IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,
Petitioners,

v.

DAVID F. ROTH, for himself and for all others similarly situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 3, 1971
CERTIORARI GRANTED OCTOBER 26, 1971

INDEX

Page

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Entry

(District Court Proceedings)

Entry

(Seventh Circuit Court Proceedings)

July 1, 1971—Decision of Seventh Circuit Court entered affirming District Court's order.

July 8, 1971—Notice and Motion for Stay of Seventh Circuit Court mandate mailed.

July 14, 1971—Stay granted by Seventh Circuit Court of Appeals.

Entry

(Supreme Court of the United States Proceedings)

August 3, 1971—Petition for writ of certiorari by defendants docketed.

October 26, 1971—Certiorari granted by United States Supreme Court to the United States Court of Appeals for The Seventh Circuit.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WISCONSIN

DAVID F. ROTH, for himself
and for all others similarly
situated,

Plaintiff,

v.

COMPLAINT
File NO. 69-C-24

THE BOARD OF REGENTS OF STATE
COLLEGES and ROGER E. GUILES,

Defendants.

(Filed Feb. 14, 1969)

NOW COMES the Plaintiff, through his attorneys, Charles D. Hoornstra and Steven Steinglass, and as and for a cause of action, on behalf of himself and on behalf of all who are similarly situated, and against the Defendants, alleges the following:

1. That the Plaintiff, David F. Roth, is a citizen of the United States and a resident of the City of Oshkosh, Winnebago County, State of Wisconsin.

2. That the Defendant, Board of Regents of State Colleges, is a body corporate organized under Chapter 37, Wis. Stats., and pursuant thereto regulates, governs and manages the branch of higher education in the State of Wisconsin known as the State University System which includes Wisconsin State University-Oshkosh, and the offices of the Defendant Board are located in Madison, Wisconsin.

3. That the Defendant, Roger E. Guiles, is President of Wisconsin State University-Oshkosh, which University is located in Oshkosh, Wisconsin, and that the said Roger E. Guiles, by and through authority delegated to him by the Defendant, Board of Regents, directs, governs and manages the said University.

4. That the Plaintiff was retained by the Defendants as an assistant professor to teach in the departments of political science and international studies at Wisconsin State University-Oshkosh for the school year 1968-1969, and the Plaintiff performed and continues to perform those duties pursuant to such retention.

5. That the campus at Wisconsin State University-Oshkosh has been involved in disturbances and personal clashes concerning the University administration and these Defendents, and the Plaintiff has been vocal in his expressions of opinion with respect to such disturbances and clashes, and such expressions have been critical of the University administrators and these Defendants.

6. That the Plaintiff was advised on January 30, 1969 by the Defendant, Roger E. Guiles, purporting to act under due authority, that the Plaintiff would not be retained as a member of the Wisconsin State University-Oshkosh faculty for the school year 1969-1970.

7. That the Defendants, or their agents, refused to give any reasons for their decision to not retain the Plaintiff as a member of the Wisconsin State University-Oshkosh faculty for the school year 1969-1970, and also that the Defendants did not offer the Plaintiff an impartial hearing into the merits of such decision.

8. That the reason for such decision by the Defendants, or their agents, was to retaliate against the Plaintiff for the Plaintiff's expressions of opinion.

9. That the decision of the Defendants is a denial, violation, restraint, and deprivation of the Plaintiff's rights to free speech under the United States Constitution.

10. That the decision of the Defendants was not made under ascertainable and definite standards governing the Defendants in making this decision.

11. That the Defendants, through their agents, caused the following by-law to be enacted and made applicable to the Plaintiff:

> During a Department Member's first or second year of service, a recommendation for or against his reappointment shall be made by December 15th and the member notified immediately. Such a vote is not to be made without secret ballot participation by the tenured departmental members as well as the Chaiman. . . .
>
> All votes required by this section of the bylaws will be conducted as follows. The Tenured Department Members will meet, in the absence of those whose cases are being considered at the call of the Chairman, who will chair the meeting. Decisions will be made by a majority vote of those eligible to vote, i.e. the tenured department Members plus the Chairman if he is not on tenure. Department Members on leave, or absent for other reasons, may vote by absentee ballot.
>
> *Any person not reappointed or granted tenure will be* given an explanation in writing of the reasons for the decision not to retain him.

12. That pursuant to said by-law the Tenured Department Members unanimously voted on December 15, 1968 to recommend that the Plaintiff be retained on the Wisconsin State University-Oshkosh faculty for the year 1969-1970.

13. That notwithstanding such unanimous vote, the Defendants, or their agents, decided, and so advised the Plaintiff, that the Plaintiff would not be so retained.

14. That such decision of the Defendants has caused and, unless such decision is restrained from enforcement, will cause the Plaintiff damages to his professional reputation and standing for which there is no adequate remedy at law.

15. That the Defendants, or their agents, have intimidated and harassed the Plaintiff and other Wisconsin State University-Oshkosh faculty members similarly situated because the Plaintiff and those so situated have exercised their right of free speech in a way critical of the Defendants.

16. That the conduct of the Defendants as described in paragraphs 6, 7, 8, 9, 10, 13 and 15 of this Complaint has made the Plaintiff and those Wisconsin State University-Oshkosh faculty members similarly situated reluctant and fearful to express their opinions.

17. That the Plaintiff brings this action on behalf of himself, on behalf of many of Wisconsin State University-Oshkosh faculty members, too numerous to join herein, who have been intimidated and harassed by the Defendants, or their agents, for expressing their opinions, and on behalf of many Wisconsin State University-Oshkosh faculty members, too numerous to join herein, who have become fearful and reluctant to express their opinions because of the conduct of the Defendants as described herein.

WHEREFORE, the Plaintiff demands the following relief:

1. A judgment that the decision of the Defendants that the Plaintiff not be retained as a member of the Wisconsin State University-Oshkosh faculty for the school year of 1969-1970 is in violation of the Plaintiff's rights, and in violation of the rights of those similarly situated, under the First and Fourteenth Amendments to the United States Constitution.

2. A judgment that the failure of the Defendants to provide the Plaintiff with an impartial hearing as to the merits of such decision was arbitrary, capricious, and contrary to the Plaintiff's rights, and the rights of those similarly situated, under the First, Fifth and Fourteenth Amendments to the United States Constitution.

3. A judgment that the refusal of the Defendants to give reasons for their decision was arbitrary, capricious and in violation of the rights of the Plaintiff, and those similarly situated, under the First, Fifth and Fourteenth Amendments to the United States Constitution.

4. A judgment that the failure of the Defendants to make such decision under ascertainable and definite standards was arbitrary, capricious and in violation of the rights of the Plaintiff and those similarly situated under the First, Fifth and Fourteenth Amendments, to the United States Constitution.

5. An order of the Court directing the Defendants to retain the Plaintiff in his position as a member of the Wisconsin State University-Oshkosh faculty for the school year 1969-1970 at the same level of responsibility and function as per the retention for the school year 1968-1969, and

6. For such other and further relief as may be equitable.

Dated this *14*th day of February, 1969.

(Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

ANSWER

(Filed Mar. 7, 1969)

The defendants, The Board of Regents of State Universities and Roger E. Guiles, by Robert W. Warren, Attorney General, and Charles A. Bleck, Assistant Attorney General of the State of Wisconsin, their attorneys, and E. L. Wingert of counsel, answer the complaint herein as follows:

1. Admit the allegations of paragraph 1.

2. Admit the allegations of paragraph 2, but allege that the name of the board of regents is The Board of Regents of State Universities.

3. Admit the allegations of paragraph 3.

4. Answering paragraph 4, admit that Plaintiff was appointed to the faculty as alleged, but deny that Plaintiff performed fully or faithfully his duties under such appointment.

5-6. Admit the allegations of paragraphs 5 and 6.

7. Answering paragraph 7, deny that the Defendants refused to give reasons for the decision not to retain Plaintiff, and admit that Defendants did not offer Plaintiff a hearing on the merits of the decision. Defendants deny that the decision was that of The Board of Regents of State Universities; and are without knowledge of information sufficient to form a belief as to whether any of their agents or subordinates refuse to give reasons for the decision.

8. Answering paragraph 8, Defendants deny that the reason for the decision not to employ Plaintiff for another year was to retaliate against Plaintiff for his expressions of opinion, and allege that the sole reason for the decision was that Plaintiff was guilty of substantial neglect of duty, violation of duty, violation of University rules, and insubordination in the course of his employment, to the detriment of the students in his classes and of the University which he was employed to serve.

9. Answering paragraph 9, Defendants deny that the decision not to employ Plaintiff for another year denies, violates, restrains or deprives Plaintiff of any right under the Constitution or laws of the United States, or any other right.

10. Answering paragraph 10, allege that by virtue of the laws of the State of Wisconsin and particularly sec. 37.11 (3) of the Statutes of 1967, Defendants may at their pleasure and without conforming to any particular standard, decline to employ for another year a teacher who has not attained tenure pursuant to sec. 37.31 (1) Wis. Stats. by virtue of four years of continuous service in the State University System as a teacher; and that Plaintiff had never been employed in the Wisconsin State University System prior to the academic year 1968-1969, and therefore had less than one year of such service in the System. Further allege that in making the decision not to employ Plaintiff for another year, President Guiles was guided by the standard of what is best for the University and its educational objectives, and for its students.

11. Answering paragraph 11, deny that the provision quoted therein is a by-law of The Board of Regents or of the University at Oshkosh, deny that Defendants caused the provision to be enacted or made applicable to Plaintiff, and allege that said quoted provision is merely a statement of intra-departmental policy adopted by the Department of Political Science at Oshkosh, which is not binding upon the President, the University administration generally, or The Board of Regents.

12. Admit the allegations of paragraph 12, but allege that on January 27, 1969 the Tenure Committee of the Department of Political Science met, reconsidered the recommendation alleged in the complaint, voted to recommend that Plaintiff not be retained, and did so recommend.

13. Admit the allegations of paragraph 13 with respect to Defendant Guiles, but deny that The Board of Regents took the alleged action.

14. Answering paragraph 14, Defendants are without knowledge or information sufficient to form a belief as to whether the decision not to employ Plaintiff for another year has caused or will cause him damage, but allege that any such damage is the result of Plaintiff's own misconduct, and that Defendants are not liable for any such damage.

15. Answering paragraph 15, deny that Defendants or their agents have intimidated or harassed the Plaintiff or other faculty members.

16. Answering paragraph 16, Defendants are without knowledge or information sufficient to form a belief as to whether any conduct on their part has made Plaintiff or any other faculty member reluctant or fearful to express his opinions; but allege that they have not engaged in any conduct which has given any faculty member reasonable cause for any such reluctance or fear.

17. Answering paragraph 17, Defendants deny that they or their agents have intimidated or harassed any members of the faculty at Oshkosh or elsewhere or that their conduct has given Plaintiff or any such faculty member any reason to become fearful or reluctant to express his opinions. Defendants are without knowledge or information sufficient to form a belief as to whether any faculty members at Oshkosh have become fearful or reluctant to express their opinions.

18. Further answering, Defendants deny that this is a proper class action, and deny that the questions of law and fact in this case are common to anyone other than Plaintiff; and allege that the decision not to employ Plaintiff for another year was based solely on facts peculiar to Plaintiff.

19. Further answering, Defendants allege that the complaint fails to state grounds upon which the Court's jurisdiction depends.

20. Further answering, Defendants allege that the complaint fails to state a claim upon which relief can be granted.

WHEREFORE, Defendants pray that Plaintiff's complaint be dismissed on the merits.

Dated: March 6, 1969.

(Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

PRETRIAL CONFERENCE MEMORANDUM

(Entered Apr. 30, 1969)

A pretrial conference was held by telephone April 29, 1969. The plaintiff appeared by Charles D. Hoornstra and Steven Steinglass, participating from Madison; the defendants appeared by Assistant Attorney General Charles Bleck and E. L. Wingert, participating from Madison; the court participated from La Crosse.

On or before May 16, 1969, either party may serve and file a motion for summary judgment or a motion for partial summary judgment, together with a supporting brief; within 10

days from service of said motion and supporting brief; the opposing party may serve and file affidavits and a brief in opposition; within seven days from service of said opposing affidavits and brief, the movant may serve and file a reply brief. Said motion or motions will be set for hearing in early June (not June 3 or 4), 1969.

Entered this 30th day of April, 1969.

(Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING ACTION

(Filed May 16, 1969)

The defendants move the Court, on the affidavits of Roger E. Guiles and Eugene R. McPhee served and filed herewith and on the deposition of plaintiff and the pleadings and other papers on file herein, for summary judgment dismissing the action on the merits, because the complaint fails to state a claim against defendants upon which relief can be granted, and because facts which cannot be disputed show that no constitutional, federal or other right of the plaintiff has been violated by the action complained of; and for the further reason that plaintiff has failed to exhaust his administrative remedies.

Dated May 16, 1969.

(Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT IN SUPPORT OF MOTION

(Filed May 16, 1969)

* * *

Eugene R. McPhee, being first duly sworn, on oath says:

1. I am the Executive Secretary of the Wisconsin State Universities System and the Secretary of the Board of Regents of State Universities, and in those capacities have custody of the official files of the Board of Regents and of the Wisconsin State Universities System; and I make this affidavit in support of the motion of the defendants for summary judgment in the above entitled action.

2. Attached hereto as Exhibit A is a true copy of "Faculty Appointment to Wisconsin State University" constituting the appointment of the plaintiff, David F. Roth, to the faculty of Wisconsin State University--Oshkosh, for the academic year beginning September 1, 1968 and ending June 30, 1969; the original of which is in the files in my custody.

3. The appointment specified in Exhibit A is the only appointment which David F. Roth has or has ever had to the faculty of any university in the Wisconsin State Universities System and the only teaching employment he has ever had with any such university. There exists no other contract or agreement between David F. Roth and any Wisconsin State University.

4. Neither the Board of Regents of State Universities nor affiant has taken any action with respect to the appointment or non-appointment of David F. Roth for another year at Wisconsin State University--Oshkosh, and neither has directed, advised or participated in the decision of President Roger E. Guiles not to offer re-appointment to Dr. Roth.

5. No appeal or request has been received by the Board of Regents of State Universities or by affiant from or on behalf of plaintiff David F. Roth for a review of the decision of President Guiles not to re-appoint him.

Dated May 15, 1969.

(Jurat and Execution Omitted)

Exhibit A

State of Wisconsin Board of Regents
of State Universities

FACULTY APPOINTMENT
TO
WISCONSIN STATE UNIVERSITY

Name: First, Middle, Last David F. Roth is hereby appointed to the faculty of the Wisconsin State University Position number - 0262

Location: Oshkosh as (Rank:) Assistant Professor of (Department:) Political Science this (Date:) first day of (Month:) September (Year:) 1968

Accepted: (Date) June 1, 1968

David F. Roth
(Signature, Faculty Member)

Recommended: (Date:) 6/11/68

R. E. Guiles
(Signature, University President)

Approved: (Date:) 6/12/68

Eugene R. McPhee
(Signature, Secretary of the Board)

Appointment Basis:

☒ Academic Year ☐ New Position
☐ Full Year ☒ Replacement L. Larry Leonard
(Name)

☐ Other _____

Exhibit A (continued)

Rate of Pay: $9,800 Date of Birth: Mar. 22, 1939

Years of Teaching Experience: None.
College: Secondary: Elementary:

Educational Preparation:

Degree:	Date:	Institution:
B.A.	1960	Claremont Men's College
M.A.	1965	San Francisco State College
(expected) Ph.D.	1968	Claremont Graduate School

Notice of Employment - Unclassified (Form No. SC.-P-3)

BOARD OF REGENTS OF STATE UNIVERSITIES
142 E. Gilman Street, P.O. Box 912
Madison, Wisconsin 53701
WISCONSIN STATE UNIVERSITY- Oshkosh

Name: (First, Middle, Last) David F. Roth
Maiden Name:
Date of Birth: (Month, Day, Year) March 22, 1939
Social Security Number: 569 50 5719
Accounting Code: 101 03 3171 40000
Rank and/or Title: Assistant Professor
Teaching Assignment: Political Science
Salary: 9,800 Per Month: 980.00
Tax Exemp. 2 Teacher Ret.: T Soc. Sec. T
Marital Status: Single ☐ Married ☒
Other Deduction: Name Effective Date:
Will advise us later
Amount of one ded. No. of Ded.

Regulations governing tenure are in accord with Chapter 37.31, Wisconsin Statutes. The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made.

Date began university service: (Date) September, 1968
Prior month adjustment - No. of days

STATE SERVICE

Any previous state service? ☐ Yes ☒ No If Yes
From: (Dates) (mo. day year) To: (mo. day year)
Name of State Department: Year to date earnings

TEACHERS RETIREMENT SYSTEM

Has this employee ever contributed to the Wisconsin Teachers Retirement System? ☐ Yes ☒ No If Yes
Name of School District Year to date earnings

EDUCATION

College or University Name	From	To	Major	Degree
Claremont Men's College		1960		B.A.
San Francisco State College		1965		M.A.
Claremont Graduate School		1968	Expected	Ph.D.

EMPLOYMENT
Name of Employer: Good Neighbors Abraod, Inc.

From: 1960 To: 4-67 Title of Position: Seminar Director

Rank and/or title: Assistant Professor
Teaching Assignment: Political Science
New Position: ☐ Yes ☒ No Replacing: (Name) L. Leonard
Position Number: 11161
Citizenship
Is this employee A U.S. citizen ☐ Yes ☐ No If no

When did he enter this country during his current stay?
Date When will he leave? Date:
Of what country is he a citizen?
What type of visa does he have?

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted in Printing)

AFFIDAVIT IN SUPPORT OF MOTION

(Filed May 16, 1969)

* * *

Roger E. Guiles, being first duly sworn, on oath says:

1. I am one of the defendants in the above entitled action, and make this affidavit in support of defendants' motion for summary judgment.

2. I am and have been for the last 9 years the President of Wisconsin State University--Oshkosh. Prior to assuming that position I was Director of Teachers' Education and Dean of Administration at Platteville State College for 17 years.

3. Wisconsin State University--Oshkosh, herein referred to for convenience as the University, has an enrollment of over 11,000 students, and its faculty numbers about 634, of whom about 442 are teachers on one-year appointments who have not yet attained tenure.

4. In June, 1968, plaintiff David F. Roth was appointed to the position of Assistant Professor of Political Science at the University for the academic year commencing September 1, 1968 and ending June 30, 1969. Attached hereto as Exhibit A is a true copy of his appointment, entitled "Faculty Appointment to Wisconsin State University".

5. Plaintiff had never taught nor been appointed to teach at the University prior to September 1, 1968, and had never been employed by the University prior to that date. The only contract or agreement, written or oral, which the University has ever had with plaintiff is that embodied in Exhibit A.

6. On January 29th or 30th, 1969, I determined not to offer plaintiff a re-appointment to the faculty at the University, and accordingly I notified him of my decision by a letter dated January 30, 1969, a copy of which is attached hereto as Exhibit B.

7. I made the decision not to re-appoint plaintiff without consultation with or direction or suggestion from the Board of Regents of State Universities or any member or officer thereof or the Executive Director of State Universities, and neither the Board nor any of those persons participated in the decision to any extent whatever.

8. Neither plaintiff nor anyone on his behalf has ever asked me for an explanation or statement of reasons for my decision not to re-appoint him for another year, and neither he nor anyone on his behalf has asked me for a hearing with respect to my decision.

9. The decision whether or not to offer plaintiff an appointment for another year was made in accordance with the usual and customary procedures in such cases, as set forth in the following paragraphs.

10. At the University, as at all of the State Universities which are subject to section 37.31 (1) of the Wisconsin Statutes, all teachers are initially employed on probation, and employment does not become permanent during efficiency and good behavior until after four years of continuous service in the State University System as a teacher. Teachers who have not thus acquired permanent tenure are normally appointed for only one academic year at a time, which academic year begins September 1 and expires the following June 30. In the case of

each teacher thus employed for a single academic year, the decision whether or not to offer him re-appointment for another academic year is normally made in January, and if the decision is not to re-appoint, the teacher is given notice to that effect on or prior to February 1 of his current appointment, pursuant to the following rules adopted by the Board of Regents of State Colleges, now Universities, on March 10, 1967:

RULE I - February first is established throughout the State University system as the deadline for written notification of non-tenured faculty concerning retention or non-retention for the ensuing year. The President of each University shall give such notice each year on or before this date.

RULE II - During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case.

11. At the University the decision whether or not to re-appoint a probationary teacher for another year is made by the president and is made without offering or conducting a hearing, and in case of non-retention, without issuing a statement of reasons for the decision.

12. The normal and customary procedure at the University for determining whether or not to re-appoint a probationary faculty member for another academic year is as follows: As the first step, the tenure committee of the department in which the teacher is employed, which in the department of political science consists of the chairman of the department and the faculty members of that department who have acquired statutory tenure, makes a recommendation of retention or non-retention to the dean having jurisdiction over that department. The dean

then transmits the departmental recommendation, with his own recommendation and any explanatory statement deemed appropriate, to the vice president for academic affairs, who in turn transmits them with his own recommendation thereon, to the president. The president then makes the decision whether or not to re-appoint the teacher, on the basis of the recommendations and explanatory matter thus transmitted to him and normally without independent investigation of the facts. The president's decision, if against re-appointment, is treated as final and is not transmitted to the Board of Regents for approval or for record.

13. In the case of the plaintiff, David F. Roth, the normal and customary procedure thus summarized was followed in all respects. The tenure committee of the department of political science, in which plaintiff was employed, recommended by a vote of 2 to 1, (2 members abstaining), that plaintiff should not be re-appointed (thus reversing an earlier action in which re-appointment was recommended). Dean Arthur H. Darken of the School of Letters and Science transmitted the departmental recommendation, with his own recommendation that plaintiff be not re-appointed, to Dr. Raymond Ramsden, the Vice-President for Academic Affairs, with a written report setting forth at length his reasons for his recommendation, and an account of the proceedings and action on the matter by the departmental committee; a true copy of which report is attached to this affidavit as Exhibit C. Vice-President Ramsden endorsed his concurrence in the Dean's recommendation on the report and transmitted it to me.

14. My decision not to re-appoint the plaintiff was based entirely on the recommendations of Vice-President Ramsden,

Dean Darken, and the departmental tenure committee and on the matters set forth in Dean Darken's report (Exhibit C), and particularly on the factual matters set forth in section 1 and sub-sections a, b, c and d of section 1 of Exhibit C, which had more weight in my opinion than the matters discussed in section 2 of Exhibit C with respect to plaintiff's public statements.

15. When recommendations with respect to re-appointment or non-reappointment of probationary faculty members are made to me by the vice-president of academic affairs, dean of the appropriate school and the tenure committee of the teacher's department, which are unanimous, it is and always has been my usual practice as president to accept such recommendations and make my decision accordingly, without making a personal investigation of the facts, and without substituting my judgment for that of the vice-president for academic affairs and the dean. In the case of plaintiff, David F. Roth, I followed that customary practice, accepted the statements of fact and recommendations made by the Dean and approved by the Vice-President for Academic Affairs, and decided not to offer re-appointment to the plaintiff. I concurred fully in the opinion of those officers that plaintiff's behavior as set forth in section 1 of the Dean's report, Exhibit A, made it advisable and for the best interests of the University and its students, that plaintiff should not be re-appointed.

16. I deny categorically that my decision not to recommend re-appointment of the plaintiff for another year was motivated to any extent whatever by a purpose or desire to retaliate against the plaintiff for his criticism and expressions of opinion, or to intimidate or harass the plaintiff or any other person. My action was taken solely because in my opinion the facts set forth in the report of Dean Darken supported the judgment of the dean and vice-president for academic affairs, and of the voting majority of the departmental committee on

tenure, that the best interests of the University and its students would be served best by not re-appointing plaintiff for another year.

17. Of the 442 teachers on one-year appointments who have not yet attained tenure, 4 persons were given notice of non-retention. In each of these cases, the normal procedures concerning retention and non-retention were followed.

Dated May 13, 1969.

(Jurat and Execution Omitted)

Exhibit A

(Not Reproduced, See Exhibit A, A. 116-118)

Exhibit B*

January 30, 1969

Dr. David F. Roth
869 Vine Street
Oshkosh, Wisconsin 54901

Dear Dr. Roth:

This is to officially advise you that you will not be invited to serve as a member of the faculty of Wisconsin State University-Oshkosh during the 1969-70 academic year.

I believe you have already been advised of this fact by others and this letter is only intended to make it a matter of record.

Very sincerely,

R. E. Guiles
President

REG:GMS

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* Registered mail receipt not reproduced

Exhibit C

28 January 1969

To: President Roger E. Guiles

Through: Vice President Raymond Ramsden

From: Dean Arthur Darken

Subject: Non-retention of *Dr. David Roth,* Assistant Professor of Political Science

1. In my judgment, Dr. Roth has been flagrently guilty of disregarding official responsibilities and duly constituted university authorities.

a. In International Politics, a freshman course, Dr. Roth failed to give a final examination although this is required and although Dr. Roth even announced to the class earlier in the semester that there would be a final examination. It is not a faculty member's prerogative to decide on his own that he will not give a final examination in his sections of one of the department's major freshman courses. The final examination, especially in lower level and freshman courses serves an important purpose and it is not tolerable for a first year faculty member in one of his first teaching assignments to cavalierly decide he won't give a final examination to students and breach a major all-university policy that is in the interest of the students.

b. In International Politics he used from 1/2 to 3/4ths of the class periods during 2 weeks after classes resumed following the riot to discuss the student riot and what the University was or was not doing on the matter, telling students what sorts of protests would follow, etc. He did not, however, urge students to protest or to engage in any improper activities. This summary is based on detailed oral reports by four students enrolled in one of the sections of this class.

This behavior is a clear violation of Article VIII (2) (b) of the Faculty Constitution, which reads, "The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject." Whether one shares or does not share Dr. Roth's view of what should be University policy regarding the black students it is still not acceptable for a faculty member to misuse class time in this way. The students were not receiving instruction in international politics, the presumed subject of the course. If this can be done in the service of a liberal cause it can be done also for a reactionary cause. If permitted for one it must, in fairness, be permitted for all. The University wouldn't have a recognizable academic program in this eventuality.

The University recognized the importance of the Black Student riot and the need for student discussion of it by designating the first day of classes after the riot for class teach-ins. Having done this, it is not inappropriate to insist that the remainder of the semester be used for the usual and official purposes of the various courses.

c. Dr. Roth did not meet any of his three classes on Friday, 20 December, the day of the Regents meeting on campus. This was observed personally by Vice President Raymond Ramsden. Dr. Roth, however, attended the Regents session that day. Again, if this is to be overlooked or simply "winked at" because Dr. Roth was casting himself in the role of a "liberal spokesman" the door is opened to all professors to cut their classes whenever they believe one of their personal or social objectives would be served in this way. Faculty are engaged to teach and it is simply not acceptable that they fail to meet classes for such reasons as prevailed here.

There is a regular procedure, the use of the Staff Request for Absence Form, by which faculty can apply for approval of a

proposed absence. Dr. Roth did not bother to use the regular procedure. I couldn't have approved this absence.

By itself, any one of these items (a, b, and c) might not be sufficient to cause me to conclude that Dr. Roth should not be retained, but together it is clear that Dr. Roth's performance has not been acceptable.

d. Dr. Roth was sent a note by Vice President Raymond Ramsden on or about 5 December asking him to meet with the Vice President at his early convenience. The purpose of this meeting was to discuss Dr. Roth's presence at the meeting of students and faculty in C-101 on Thursday, 4 December, at which time the class schedule was disrupted. Dr. Roth did not respond to the Vice President's note, and in fact was quoted indirectly in the *Milwaukee Journal* of 12 December 1968 to the effect that he was disregarding the Vice President's note and request for a meeting. Dr. Roth has not yet responded to Dr. Ramsden's request. Regardless of the fact that Vice President Ramsden was not following the usual chain of command in this instance, it is simply not appropriate for a junior faculty member to be able to disregard a request from the Vice President. It is a breach of authority as well as etiquette.

This series of breaches of official responsibility on the part of Dr. Roth, a first year probationary faculty member, raise serious questions as to his appropriateness as a faculty member. Most departments would not tolerate such behavior.

2. Dr. Roth has made public statements on a number of occasions that indicate a very unscholarly approach to the truth and the search for knowledge that make it doubtful he has the qualities of scholarship desirable in a faculty member. For instance, the 23 December issue of the Paper quoted Dr. Roth as saying, "Many of us feel that the authoritarian and autocratic structure of this university is no longer tolerable."

Yet Dr. Roth did not bother to indicate any areas or instances in which this situation actually existed. Nor has he done so in any of his own recently publicized statements. The statement itself is remarkable for one who has been on the faculty for only 4 months.

In the 6 January issue of the *Paper,* Dr. Roth said the following: "The state universities will not be able to keep good professors if they are told they can't teach this or that in their classes." Yet no where in this interview article running to 18 column inches did he actually indicate any appropriate or inappropriate instances in which faculty had been told what to teach or not to teach. The clear implication of the statement and the context was that WSU-O faculty are often subject to prescriptions regarding their freedom to teach their courses and explore varying viewpoints on relevant controversial issues. A scholar has the responsibility to substantiate public statements. And the 9 January 1969 issue of the *Paper* reported that Dr. Roth had instructed students involved in a sit-in outside the President's office that they should not attend a scheduled open meeting of the Advisory Committee for the Culturally Distinct to discuss progress made on the demands of the black students. Instead, Dr. Roth "told students at the Wednesday sit-in to hold another demonstration Friday in the executive offices..." 'We won't talk to any Mickey Mouse committee,' Roth said." In this case Dr. Roth rather clearly seemed to be telling students that it wasn't important to learn what progress the University had made in meeting the black student demands. Instead, the students should proceed with a larger protest sit-in. Such an approach is inconsistent with the responsibilities of a faculty member to encourage students to learn the truth, to examine ideas on their merits, and to mature. If a college professor cannot be expected to encourage a rational approach to a problem of our day, who can be expected to do it?

Such an approach is particularly distressing in view of the fact that the special open meeting of the Advisory Committee had been called and authorized in response to a request from the Concerned Students and Faculty of which Dr. Roth was a leading publicly identified spokesman.

What is involved here is not the freedom of the faculty member to explore competing views in search for the truth in his class or research but the use of unsubstantiated allegations of a grave nature in a tense and possibly inflamatory campus situation. This behavior is not consistent with what the University has a right to expect from a faculty member in the way of scholarship. It is also not consistent with the Faculty Constitution's provisions concerning academic freedom (quoted from the AAUP Statement of Principles on Academic Freedom and Tenure) (Article VIII, (2) (c) "The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman."

In view of this series of actions by Dr. Roth I cannot in good conscience, as Dean of the School, recommend that he be retained for next year. Dr. Roth has a probationary appointment; he has not demonstrated to my satisfaction that his performance merits his retention; surely we can hire a replacement for Dr. Roth who will follow university policies in regard

to meeting classes, administering final examinations, teaching materials relevant to the course, and demonstrating a greater respect for the truth.

Having considered this series of items carefully, I concluded that I could not concur in the December recommendation of the Political Science Department that Dr. Roth be retained for next year. I also wondered whether the tenured members of the Department had considered or were aware of the items recounted above. I decided, therefore, to discuss the matter informally with the tenured members in order that they could reconsider their recommendation to retain Dr. Roth, if they thought it was appropriate to do so. (The Chairman of the Department, Dr. Willis, was not a tenured faculty member. There were also serious questions regarding granting tenure to Dr. Willis that made it inappropriate to invite him to the informal discussion of Dr. Roth's retention and his own tenure.)

I invited the four tenured members of the Department, Drs. Chang, Goff, Gruberg, and Radell individually to meet with me Friday afternoon, 24 January, to discuss the matter. After presenting the detailed statement in this memorandum to the four tenured individuals in the Department, we discussed the items included and other items brought up by the four tenured members. They concluded that they would like to meet subsequently with the chairman of the department, convene the Tenure Committee, and ballot once again on retaining Dr. Roth. At least three of the tenured members mentioned in our conversation that, quite independently of what I had presented, they had come to have grave reservations about retaining Dr. Roth since the first departmental vote more than a month ago. I stated that if they were going to vote again on Dr. Roth it would have to be done in the next few days because of the State requirement for a 1 February notification of non-retention.

At about 4:00 p.m. on Monday, 27 January, three of the members of the Tenure Committee came to my office to report the results of the vote. They reported that at first the Chairman, Dr. Willis, had refused to convene the committee but, finally, had called it that afternoon. All five members cast their secret ballots in sealed envelopes and gave them to Dr. Goff for opening. The result of the vote was as follows:

2-Not to retain Dr. Roth
1-Retain Dr. Roth
2-Abstain

Consequently, only one member voted in a manner consistent with the original committee vote in mid-December. I am happy, therefore, to be able to make a recommendation that supports the 2-1 vote for non-retention submitted by the Political Science Department's Tenure Committee.

ANNUAL EVALUATION OF NON-TENURED FACULTY MEMBER

This form is not to be used when recommending a non-tenured faculty member for either promotion in rank or tenure.

Name: Roth (Last) David (First) F. (Middle)

Rank: Assistant Professor

Date joined WSU-O faculty: Sept. 1968

Degrees	Schools	Dates conferred
Ph.D.	Claremont Graduate School	June 1968
M.A.	San Francisco State	June 1966
B.A.	Claremont Men's College	June 1960

Years of full time teaching experience: 1

Years of other relevant professional experience: 5 (taught primary; led university students summer seminars)

TEACHING ABILITY:

Factors such as the following shall be taken into consideration when evaluations are made of teaching ability:

1. Adequacy of daily preparation
2. Effectiveness of communication with students
3. Stimulation and sustaining of student interest
4. Gaining and retaining of student respect
5. Maintaining high but reasonable grading standards
6. Enthusiasm for teaching
7. Requiring the writing of papers when appropriate
8. Enrichment and updating of course content
9. Effectiveness of examination techniques and procedures
10. Effectiveness in guiding and inspiring students on an individual basis
11. Success in encouraging qualified students to pursue advanced work
12. Giving instruction which has genuine, relevant, intellectual depth

Dates of class visitations and persons making visits:

December 16, 1968	William Smith, Associate Professor

Evaluation of teaching ability in relation to other members of department. Check one of the following:

☐ Superior ☒ Excellent ☐ Good ☐ Fair ☐ Poor

Statement pertaining to teaching ability:

Two new course preparations were undertaken by Dr. Roth this semester. Dr. Smith comments as follows: "Dr. Roth has a pleasnt, relaxed lecturing style. He makes use of up-to-date methodology and is very effective in his use

of illustrations of theories from current events. He manages discussion well and his students seem highly motivated and involved."

_____

_____

_____

EVIDENCE OF PROFESSIONAL AND SCHOLARLY GROWTH:

Factors such as the following shall be taken into consideration when evaluations are made of professional and scholarly growth:

1. Progress toward completion of terminal degree requirements
2. Publications: books, articles, reviews
3. Reading papers at professional meetings
4. Winning of awards and grants
5. Creative and artistic accomplishments
6. Research
7. Evidence of advanced study
8. Attendance at professional meetings

Evaluation of professional and scholarly growth in relation to other members of department. Check one of the following:

☒ Superior ☐ Excellent ☐ Good ☐ Fair ☐ Poor

Statement pertaining to professional and scholarly growth:

"Towards a Theory of Philippine Presidential Electoral System," *PJPA* January 1969

"Philippine Presidency and Modernization." Manuscript completed December 17, 1968 to be included as a chapter in book accepted for Publication.

"Who were the Wallace Voters in Oshkosh?" Article preparation. *The Philippine Presidency and Modernization* Manuscript in preparation for Princeton University Press.

Manuscript in preparation for Princeton University Press.
The Arab-Israeli Conflict: Dimensions of Bargaining (in Preparation)
The Making of the Philippine Presidency 1969; (Book in preparation jointly with Ted Becker) Oxford University Press.

. . . . . .

EVIDENCE OF SERVICES RENDERED:

Factors such as the following shall be taken into consideration when evaluations are made of services rendered:

1. Service to professional organizations--offices, committees
2. Service to department--committees and special assignments
3. Service to University--Faculty Senate, committees, special assignments
4. Extra-institutional service--speeches, community projects

Evaluation of services rendered in relation to other members of department. Check one of the following:

☐ Superior ☒ Excellent ☐ Good ☐ Fair ☐ Poor

Statement pertaining to services rendered:

By-Laws Committee in Department
Talk to Women's Club of Madison (French Political Change) Nov. 21, 1968
Talk to Candlelight Club, Oshkosh
Comments of Chairman: Willingly and ably cooperates in departmental meetings and activities.

OTHER COMMENTS (May be left blank):

Is this faculty member recommended for retention for the coming academic year?

YES x NO_____

Has the recommendation pertaining to retention (or non-retention) been made in accordance with departmental bylaws? Chairman and tenured members met Dec. 17 and unanimously the group highly recommends reappointment of Roth.

(Dr. Gruberg voted by phone) YES x NO_____

SIGNATURES: *DATES*

Faculty member being evaluated
after having reviewed this form: David Roth 21 December 1968

Chairman of Department Gerry Miller 20 Dec. 68

For non-retention- Darken 8-9 Jan 22 1969
Dean /s/ Arthur W. Darken

I recommend that Dr. Roth not be retained. A.H. Darken, Dean.

See attached comments in support of my recommendations for non-retention.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Not Printed)

PLAINTIFFS MOTION FOR PARTIAL SUMMARY JUDGMENT AND AFFIDAVIT*

(Filed May 16, 1969)

NOW COMES the Plaintiff, by and through his attorneys, Charles D. Hoornstra and Steven Steinglass, and on the basis of the Affidavit annexed hereto, and the other pleadings herein, moves the Court for a Summary Judgment in any of one or more of the following respects:

1. A judgment that the affiant, as a member of the Wisconsin State University-Oshkosh faculty, is entitled to an impartial hearing on the merits of the decision to not retain him for the school year 1969-1970, notwithstanding that the affiant had been retained originally on a one year contract basis and was non-tenured, and an order requiring the Defendants to provide such a hearing or to offer the affiant a contract as a faculty member for the school year 1969-1970.

2. A judgment that the rights of the affiant as a member of the faculty of the Wisconsin State University-Oshkosh, were violated under the United States Constitution by the failure of the Defendants to decide that he not be retained as a faculty member for the school year 1969-1970 where such decision was not made under ascertainable and definite standards, and an order that the Defendants offer the affiant a contract as a faculty member for the school year 1969-1970.

---

*The affidavit of David Roth had attached thereto the memorandum of Arthur Darken to President Guiles (see paragraph 14 of affidavit).

This same document was incorporated as Exhibit C in Appeal Document No. 17 and is not, therefore, reproduced.

3. A judgment for such other and further relief as the Court may deem equitable.

DATED this *16th* day of May, 1969.

(Execution Omitted)

(AFFIDAVIT)

* * *

DAVID F. ROTH, being first duly sworn on oath, deposes and represents the following:

1. That he is the Plaintiff in this action.

2. That he was retained by the Defendants as an assistant professor to teach in the departments of political science and international studies at Wisconsin State University-Oshkosh for the school year 1968-1969, and the Plaintiff performed and continues to perform those duties pursuant to such retention.

3. That the campus at Wisconsin State University-Oshkosh was involved in disturbances and personal clashes concerning the University administration and these Defendants, especially due to violence and turmoil on the campus on November 21, 1968, and the affiant has been vocal in his expressions of opinion with respect to such disturbances and clashes, and such expressions have been critical of the University administrators and these Defendants.

4. That such vocal and critical opinions were frequently reported by the news media in the area of Oshkosh, Wisconsin, and the affiant's primary criticism was that the entire body of black students who were the alleged disrupters of November 21, 1968, should not be expelled or suspended without a determination of individual guilt.

5. That on December 2, 1968, the affiant did not dismiss any class, although he did remove the class from its regularly

scheduled room to a different room, and he did so on the belief that this was part of the instructional program then appropriate for that course.

6. That on December 3, 1968, the Vice President of Academic Affairs, Raymond J. Ramsden, an agent of these Defendants, asked to meet with this affiant; that affiant did so meet on said day; that the discussion at said meeting concerned the correct completion of a form showing student classroom attendance and location of the classroom, and the affiant's presence in the different room on December 2, 1968, described in paragraph 5 herein.

7. That on December 5, 1968 in meeting with about 250 students, the said Raymond J. Ramsden, on behalf of Wisconsin State University-Oshkosh administration, stated that the relationship between the college administration and the students was that of family, the administration being the father and the students being the children, and also that their relationship was that of the military, the administration being the commanders and the students being the troops; and that thereupon the affiant arose in said meeting, announced his identity, and publicly challenged the said Raymond J. Ramsden as to the justice, wisdom, and accuracy of such a relationship view; that the said Raymond J. Ramsden refused to respond to said challenge, but gave the affiant a visible facial "look" which the affiant can only describe as great anger at the affiant.

8. That on December 7, 1968, the said Raymond J. Ramsden again asked the affiant to meet with him, but the affiant declined to so meet on the basis of a directive from the affiant's chairman in the department of political science to not so meet, the chairman expressing the opinion that the requested meeting was merely to harass the affiant for his previously outspoken criticism.

9. That his absence in class on December 20, 1968 was due to sickness, and he gave notice of the same to the chairman of the department of political science.

10. That he did give a final examination in the freshman course in international politics.

11. That he did not devote one-half to three-fourths of his class time in any course to discuss issues not germane to the course of instruction.

12. That his conduct with respect to absence from the classroom, the giving of examinations, and the content of his lectures was based on his good-faith belief that he was acting in compliance with what was customarily expected of faculty members at the Wisconsin State University-Oshkosh.

13. That the affiant has performed his faculty duties reasonably and in substantial compliance with the rules of Wisconsin State University-Oshkosh.

14 That a reason for the decision of the Defendants to not retain the affiant as a member of the Wisconsin State University-Oshkosh faculty for the school year 1969-1970 was affiant's outspoken criticism of the administration of said university, and this reason was admitted to during the course of discovery proceedings in this action on April 28, 1969, by the Defendant, Roger E. Guiles, and by Arthur Darken, an agent of the Defendants, said admissions being made in the presence of this affiant; and said admissions having been incorporated by the said Arthur Darken into a memorandum which was made an exhibit in said discovery proceedings, a copy of said memorandum is annexed to this Affidavit.

15. That the said Arthur Darken admitted in the affiant's presence at said discovery proceedings on April 28, 1969, that his allegations in said memorandum with respect to this affiant's scholarly approach to the truth were based on newspaper reports of what this affiant had allegedly said, and that by "unsubstantiated allegations" he (Arthur Darken) meant to say that the said newspaper reports did not disclose this affiant's basis for criticism, and that he (Arthur Darken) undertook no investigation to determine whether the newspaper failed, negligently or otherwise, to disclose said basis.

16. That on January 28, 1969, Arthur Darken, Dean of the College of Letters and Science, and purporting to speak for the Wisconsin State University-Oshkosh administration, called the affiant to advise him that the affiant would not be retained on the faculty for the school year 1969-1970; that affiant thereupon requested an explanation and reasons for such a decision, and that the said Arthur Darken replied that the affiant was not entitled to an explanation or reasons.

17. That the decision to not retain the affiant was not made under any ascertainable and/or definite standards known to the affiant, nor did the Defendants or their agents provide an impartial hearing as to the merits of the decision to not retain the affiant for the school year 1969-1970.

18. That this Affidavit is made to support the annexed Motion for Partial Summary Judgment.

(Jurat and Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted)

AFFIDAVITS IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed May 27, 1969)

NOW COMES the Plaintiff by and through his attorneys, Steven Steinglass and Charles D. Hoornstra, and submits the Affidavits annexed hereto to oppose the Defendants' Motion for Summary Judgment.

DATED May 26, 1969.

(Execution Omitted)

* * *

DAVID F. ROTH, being first duly sworn, on oath deposes and says:

1. That he is the plaintiff in this action.

2. That he was correctly quoted in the 23 December issue of the *Paper* as saying, "Many of us feel that the authoritarian and autocratic structure of this university is no longer tolerable", and that he substantiated such opinion as to said structure as follows:

a. By noting that the Vice-President of Academic Affairs considered the relationship between the university administration and the students to be analogous to the military, as further described in this affiant's affidavit herein of May 15, 1969, paragraph 7; and

b. By noting that 94 black students had been suspended without a determination of individual guilt according to due process;
and that this affiant also communicated these substantiations to the reporter for the *Paper*.

3. That he was correctly quoted in the 6 January issue of the *Paper* as saying, "The state universities will not be able to keep good professors if they are told they can't teach this or that in their classes," and that he did substantiate this statement of opinion by noting that two professors had been required to sign statements about their use of classroom time, and by noting that the Vice-President of Academic Affairs had summoned this affiant with respect to this affiant's use offclass time on December 2, 1968, as more fully described in this affiant's affidavit herein of May 15, 1969, paragraphs 5 and 6.

4. That this affiant at no time instructed students involved in a sit-in outside the President's office that they should not attend a scheduled open meeting of the Advisory Committee for the Culturally Distinct to discuss progress made on the demands of the black students, but rather that this affiant expressed his opinion that such meeting was an attempt by the administration to divert the interested students and faculty from discussing what concerned them most, to-wit: that the 94 black students who had been summarily suspended be immediately reinstated or given a hearing to determine which of them were deserving of punishment, and that this affiant did then recommend that the concerned students and faculty lawfully demonstrate in support of their objective of having the administration discuss the question of such immediate reinstatement in lieu of hearings to determine individual guilt.

5. That this affiant did describe the Committee described in paragraph 4 herein as a "Mickey Mouse" Committee, and did so express his opinion about such committee because of the fact that the defendant Roger E. Guiles withheld from such committee the authority to discuss the question of reinstatement in lieu of hearings.

6. That affiant verily believes that his public utterances which have been critical of the defendants and the administration of Wisconsin State University-Oshkosh have been opinions and statements which are capable of substantiation.

(Jurat and Execution Omitted)

* * *

GEORGE WILLIS, being first duly sworn on oath, deposes and represents as follows:

1. That he is Chairman of the Department of Political Science at Wisconsin State University-Oshkosh, Oshkosh, Wisconsin, and that he has been Chairman since September of 1968, and that he has been on the faculty of Wisconsin State University-Oshkosh since September 1966.

2. That to the best of his knowledge there is no rule that specifically states that a professor shall not give a take-home final examination in lieu of a two hour classroom written examination.

3. That he consented to David F. Roth giving a take-home final examination at the end of the first semester of the school year 1968-69, and that he so consented under the belief that it was within his jurisdictional powers as Chairman of the Department to grant such permission.

4. That the practice in the Department of Political Science in the case of a professor who cannot attend classes because of illness is that the professor so advise the Chairman or department secretary and that David F. Roth, a member of the Department of Political Science for the school year 1968-1969, did so advise this affiant of an illness that prevented him from properly conducting his classes on December 20, 1968, and that in his opinion the said David F. Roth did appear to be ill on December 20, 1968.

(Jurat and Execution Omitted)

* * *

MANFRED WENNER, being first duly sworn on oath, deposes and represents as follows:

1. That he is the Chairman of the Department of International Studies at Wisconsin State University-Oshkosh, Oshkosh, Wisconsin, and has been Chairman of such Department for two (2) years, and has been a member of the Wisconsin State University-Oshkosh faculty for three (3) years.

2. That he has no knowledge if there is a rule against take-home final examinations as opposed to two hour written final examinations in the classroom.

3. That to his own knowledge there have been other faculty members who have given take-home final examinations as opposed to two hour written examinations in the classroom.

4. That the practice in his Department of International Studies in the case of a professor who is ill and unable to teach is to notify the secretary of the department who in turn is to notify the students in the particular class.

5. That he, himself, has been ill; that he, himself, has followed this practice of reporting to the secretary that he is ill and unable to attend class, and has never told the Vice-President of Academic Affairs of the same, nor has he ever known that he had a duty to so advise the Vice President of Academic Affairs.

6. That David F. Roth is a member of the Department of International Studies, of which this affiant is Chairman.

(Jurat and Execution Omitted)

* * *

LEON SWARTZBERG, JR., being first duly sworn on oath, deposes and represents as follows:

1. That he is a member of the faculty of Wisconsin State University-Oshkosh, Oshkosh, Wisconsin, and has been on such faculty for two (2) years.

2. That he learned that the University rules prohibit take-home final examinations, as opposed to two hour written examinations in a classroom, only after he had been on such faculty for a year and a half (1 1/2); and the source of his knowledge was a casual conversation with another faculty member rather than through any documents or directives issued by the administration of Wisconsin State University-Oshkosh.

(Jurat and Execution Omitted)

* * *

WILLIAM PEDRIANA, being first duly sworn on oath, deposes and represents as follows:

1. That he is a student at Wisconsin State University-Oshkosh, Oshkosh, Wisconsin, and was a student in the course of International Relations taught by Dr. Roth in the fall semester of the school year 1968-1969.

2. That during said course there was classroom discussion of the events on the campus arising out of this disruption of November 21, 1968, but that the amount of classroom time spent on such subject did not amount from one-half to three-fourths of the classroom time but was in fact substantially less, and furthermore that all discussion of the events of November 21, 1968, and the consequences of those events, were tied into the subject matter of the course by Dr. Roth.

3. That Dr. Roth did give a final examination in this course and that the final examination was comprehensive covering the entire syllabus of the course, although the final examination was not a two hour written examination in a classroom but was a take-home final examination.

(Jurat and Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted)

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed May 29, 1969)

* * *

David Chang, being first duly sworn, on oath says:

That he is on the faculty of the Wisconsin State University-Oshkosh, Department of Political Science and has been so employed for nine years; that he has in the past served as chairman of this department.

That a by-law of the department provides that a member of the faculty who is not being retained is entitled to a written statement setting forth the reasons for non-retention from the Committee of Tenured Members.

That the chairman upon such a request has the obligation under the by-laws to call a meeting of the tenured members, which includes the chairman as the presiding officer of such committee, to prepare such a statement.

That to his knowledge Dr. Roth has never made such a request of the chairman, Dr. George Willis, for no meeting of the tenured members has been called by Chairman Willis to prepare such a statement.

That on friday; January 24, 1969, he attended a meeting in Dean Darken's office with the tenured members of the Political Science Department and was informed at that time of the Dean's reasons for not recommending retention of Dr. Roth.

That subsequently, on January 27th, 1969, he attended an Ad Hoc meeting of the entire faculty of the Department with the exception of two tenured members; that Dr. Roth and chairman Willis were present at this meeting.

That the purpose of this meeting was to inform the Political Science Department faculty as to what information had been given to the tenured members by the Dean at the prior meeting of the tenured members.

That many of the Dean's reasons for not recommending the renewal of Dr. Roth's contract were brought out at this meeting in the presence of Dr. Roth; That Dr. Roth had every opportunity at this time to be informed as to the reasons supporting The Deans recommendation.

That Dr. Roth has subsequently asked some of the tenured members of the department for a written statement on the reasons for non-retention, such a statement has not been given to Dr. Roth for under the by-laws only the chairman of the department may call the necessary meeting of the tenured members and such a meeting has not been called for by the Chairman.

(Jurat and Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted)

AFFIDAVIT IN OPPOSITION TO
PLAINTIFF'S MOTION

(Filed May 29, 1969)

* * *

Richard White, being first duly sworn, on oath says:

1. That this affiant was a student in Dr. Roth's class in International Politics for the school year 1968-69 meeting at 1:30 on Mondays, Wednesdays, and Fridays.

2. That on December 2, 1968, Dr. Roth advised his 1:30 class in International Politics that he was going to attend the meeting between President Guiles and the parents of the black students and that anyone who wanted to could go along.

3. That this affiant was asked by Dr. Roth on a Monday in early December, 1968, to announce to Dr. Roth's 1:30 Wednesday class in International Politics that he would not meet his Wednesday class and that he would be attending a meeting in Madison.

4. That subsequent to the events of November 21, 1968, Dr. Roth spent at least 50% of this class time on discussing the Black issue and that most of these discussions were initiated by Dr. Roth.

5. That this affiant was told by Dr. Roth on two or three occasions that there would not be a final exam and that the only "final exam" consisted of a project assignment which assignment had been made early in the school year; that this affiant was graded on: homework assignments, mid-term take home exam, class discussion, project assignment which was in the nature of a group term paper.

(Jurat and Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted)

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION

(Filed May 29, 1969)

Kristine Dorow, being first duly sworn, on oath says:

1. That affiant was a student in Dr. Roth's class in International Politics for the school year 1968-69 meeting at 1:30 on Mondays, Wednesdays, and Fridays.

2. That Dr. Roth announced to his 1:30 class in International Politics on December 2, 1968, that the class could either stay in the classroom or go to the meeting between President Guiles and the parents of the suspended black students; that the majority of the class wanted to attend this meeting; that the meeting between President Guiles and the parents was held in Wisconsin Room in the student Union and that many of the students from Dr. Roth's class left and did not attend the meeting in the student Union.

3. That on December 20, 1968, affiant attended the 1:30 class of Dr. Roth's in International Politics and that Dr. Roth never appeared nor did anyone else appear on his behalf to advise the class that Dr. Roth would not be present; that on three or four prior occasions Dr. Roth missed his class without notice to the class and that on such occasions the class waited ten minutes and then left.

4. That subsequent to November 21, 1968, Dr. Roth spent at least three quarters of the class time in International Politics on the discussion of the Black problem and that he initiated such discussions and encouraged the class to initiate such discussion.

5. That the only "final exam" consisted of a group term paper project that had initially been assigned approximately late September, 1968.

Dated May 27, 1969

(Jurat and Execution Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Title Omitted)

AFFIDAVIT IN OPPOSITION TO
PLAINTIFF'S MOTION

(Filed May 29, 1969)

* * *

RAYMOND J. RAMSDEN, being first duly sworn on oath deposes and says:

That attached hereto is a true and accurate copy of the 1968-1969 Faculty Handbook which sets forth the practices of the Wisconsin State University-Oshkosh pertaining to Testing and Dismissal of Classes which have been in effect during the 1968-1969 academic year.(*)

Affiant is employed at the Wisconsin State University-Oshkosh and has held the position of Vice President-Academic Affairs or predecessor position since about 1959, and that in making his recommendation that Dr. Roth not be retained, he at no time based such recommendation or was in any way motivated in making such recommendation by Dr. David F. Roth's criticism of the school administration.

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* Not printed

Attached to this affidavit is a notice to the faculty that a teach-in was authorized by the University administration for December 2 on the subject of the Black problem. The intent of the notice is plainly to make provision for discussion of this subject in the classroom. In my opinion Dr. Roth violated the clear intent of the notice and exercised poor judgment in taking his class to the Union to attend what could have been a volatile meeting between the parents of Black students and the University President.

Dated May 27, 1969.

(Jurat and Execution Omitted)

(Attachment to affidavit)

Approved by the Executive Council, consisting of the President, the Vice Presidents, and all the Deans on 27 November 1968

November 27, 1968

To: Executive Council

From: Dave Frank, Student Body President

Re: Student Senate Resolution on Teach-in

The Student Senate, in action taken on November 26, 1968, has called for Monday, December 2, to be set aside by the students and the teaching faculty as a day for teach-in on the present University crisis regarding the actions of black students on November 21 and the full implications of these actions.

THE PLAN

1) All classes meet Monday as scheduled.

2) In classes where both the instructor and the students agree, regular course material would not be discussed. Instead, a general discussion might take place on anything relative to the purposes of the teach-in. Possible discussion topics are:

a) What are the important aspects of the situation? legalistic, humanistic, etc.

b) What actions should be taken by the University, as a community in itself, to promote the best interests of the University, the students arrested, and society in general?

c) What should we at Oshkosh do to bring the black and white cultures together in such a way as to promote mutual understanding?

3) The class teach-ins could be followed by a large teach-in Monday night held in Albee Hall or the Little Theater and conducted by selected faculty. (This is still under discussion.)

Teach-In
Page 2

REASONS FOR AND POSSIBLE RESULTS OF THE TEACH-INS

Reasons for and possible results of the teach-ins are:

1) The development of a sense of unity and direction within the University relative to race relations;

2) The development of a base for continuing discussion and consideration of the problems;

3) The development of a foundation of understanding which may offset, to a good degree, the probability of serious immediate and future violence on our campus;

4) The founding of a base for developing understanding in the community of Oshkosh and improving the now seriously wounded University-community relations; and

5) The use of teach-in as an auxilliary approach for meeting the University's commitments to provide solutions for social problems.

COMMENTS

Discussion is also under way on a proposal for a teach-in for the public community. Such a teach-in might take place in one or two weeks and could be held in the Grand Theater and conducted by selected faculty and/or students.

Anything which can be done next week, and particularly Monday, to promote a casual and relaxed atmosphere is worth a try; we feel that in-class teach-ins are one such effort and should be attempted now with all deliberate speed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DAVID F. ROTH, for himself and
for all others similarly situated,
Plaintiff,

v. 69-C-24

THE BOARD OF REGENTS OF STATE
COLLEGES AND ROGER E. GUILES,
Defendants.

MEMORANDUM AND ORDER

(Entered Mar. 12, 1970)

From the pleadings, depositions, and affidavits on file, I find that there is no genuine issue as to the following material facts:

Plaintiff was retained by the defendants as an assistant professor at Wisconsin State University-Oshkosh on a one-year contract for the school year 1968-1969. He had not attained tenured status under Wisconsin statutes. During the 1968-1969 school year at the university, there were disturbances and controversies concerning the university administration and the defendants. The plaintiff was vocal in his expressions of opinion with respect to such disturbances and controversies. Such expressions were critical of the university administrators and the defendant board of regents. The plaintiff was advised on January 30, 1969, by the defendant Guiles, the president of the university, purporting to act under due authority, that the plaintiff would not be offered an employment contract as a member of the university faculty for the school year 1969-1970; no reasons for the decision were given. The defendants did not offer the plaintiff a hearing of any kind on the merits of the decision. No hearing was requested by him; none was held. Of 442 non-tenured teachers at the university, four were given notice that contracts would not be offered them for 1969-1970.

The complaint alleges, among other things, that the reason for the decision not to offer plaintiff a contract for 1969-1970 was to retaliate against him for his expressions of opinion in the exercise of his freedom guaranteed by the First and Fourteenth Amendments; that the decision was not made under "ascertainable and definite standards governing the Defendants in making this decision"; and that the decision has caused and will cause damage to plaintiff's professional reputation and

standing. The complaint seeks judgment that plaintiff's rights, and the rights of those similarly situated, under the First, Fifth and Fourteenth Amendments to the United States Constitution have been violated: by the very decision not to re-employ him; by failure of the defendants to provide a hearing as to the merits of said decision; by the refusal of the defendants to give reasons for their decision; and by defendants' failure to make such decision under ascertainable and definite standards. Further, the plaintiff's complaint seeks an order directing the defendants to employ him in his position as a member of the Wisconsin State University-Oshkosh faculty for the school year 1969-1970.

Among other things, the answer denies that the reason for the decision was to retaliate against plaintiff for his expressions of opinion, alleges that the reasons for the decision were that the plaintiff was guilty of substantial neglect and violation of duty, violation of university rules, and insubordination, denies that this court enjoys jurisdiction of the action, and alleges that the complaint fails to state a claim upon which relief can be granted.

Plaintiff has moved for partial summary judgment: declaring that he is entitled to a hearing on the merits of the decision not to retain him, and requiring the defendants either to provide such a hearing or to offer him a contract for the 1969-1970 school year; and also, apparently in the alternative, declaring that his constitutional rights have been violated because the decision of non-retention was not made under ascertainable and definite standards, and requiring the defendants to offer him a contract for the 1969-1970 school year.

Defendants have moved for summary judgment dismissing the action on its merits because the complaint fails to state a

claim upon which relief can be granted, because the undisputed facts show that no federal constitutional right of plaintiff has been violated by defendants, and because plaintiff has failed to exhaust his administrative remedies.

This opinion and order is confined to the competing motions for summary judgment.

Jurisdiction is present. 28 U.S.C. § 1343(3), (4); 42 U.S.C. § 1983.

Defendants' Motion for Summary Judgment

Defendants raise, directly or indirectly, three threshhold questions: whether defendants are "persons" within the meaning of 42 U.S.C. § 1983; whether defendants enjoy the protection of sovereign immunity; and whether defendants enjoy common law immunity.

Neither defendant is a municipal corporation. See *Monroe v. Pape,* 365 U.S. 167 (1961). This is an action for declaratory and injunctive relief, not damages. See *United States ex rel. Lee v. State of Illinois,* 343 F. 2d 120 (7th cir. 1965); *Schnell v. City of Chicago,* 407 F.2d 1084, 1086 (7th cir. 1969); *Adams v. City of Park Ridge,* 293 F.2d 585, 587 (7th cir. 1961). For the purposes of this action, defendants are "persons" under 42 U.S.C. § 1983.

Neither the Eleventh Amendment nor the doctrine of *Hans v. Louisiana*, 134; U.S. 1 (1890) affords these defendants the shield of sovereign immunity in this action for declaratory and injunctive relief in which it is alleged that, acting under color of state law, they have deprived plaintiff of rights secured to him by the Constitution of the United States. *Ex parte Young,* 209 U.S. 123 (1908); *Whitner v. Davis*, 410 F.2d 24 (9th cir. 1969); *Baker v. Louisiana State Board of Education,* 339 F.2d 911 (5th cir. 1964); *Board of Supervisors of Louisiana State*

University v. Fleming, 265 F.2d 736 (5th cir. 1959); *Orleans Parish School Board v. Bush,* 242 F.2d 156 (5th cir. 1957), cert. den., 356 U.S. 969; *School Board of City of Charlottesville v. Allen,* 240 F.2d 59 (4th cir. 1956), cert. den. *School Bd. of Arlington County v. Thompson,* 353 U.S. 910; *Dorsey v. State Athletic Commission,* 168 F. Supp. 149 (E.D. La. 1958), aff'd 359 U.S. 533.

The purpose of common law immunity enjoyed by the judiciary and legislature, here sought to be extended in a qualified form to the defendant Board and university president, is to preserve the integrity and independence of those bodies, and to insure that judges and legislators will act on their free, unbiased convictions, uninfluenced by apprehensions of consequences. *Tenny v. Brandhove,* 341 U.S. 367 (1951); *Bauers v. Heisel,* 361 F.2d 581 (3rd cir. 1966), cert. den., 386 U.S. 1021; *Kenney v. Fox,* 232 F. 2d 288 (6th cir. 1956), cert. den., 352 U.S. 855. Such considerations do not support extending, nor have courts extended, the doctrine to shield officials from the type of equitable relief here requested.

We reach the major grounds of defendants' motion for summary judgment of dismissal.

The defendants' principal contention is to this effect: Plaintiff was hired for a one year period. There was no breach or threatened breach of that contract by the defendants. As a non-tenured teacher, plaintiff can be removed "at pleasure" under Sec. 37.11(3), Wis. Stats. Such complete discretion in defendants is essential to keep the faculty at the "highest level of competency, responsibility, and devotion to duty". The administrative decision not to rehire can be reached for "no reason or any reason". It follows that no statement of reasons need be given, nor hearing offered.

If a decision not to renew the employment contract of a non-tenured university professor may be based consciously and deliberately on the fact that he has written a scholarly letter to the newspaper in support of the President's policy on Viet Nam, or on the fact that he is white, or on the fact that he is a Protestant, or on the fact that he is a Republican, and if the decision may be based on the university president's belief that the professor physically struck a student at a certain time and place, whereas in fact the professor was not present at that time and place and the incident never occurred, and if there need be no reasoned basis whatever for the decision, then it may be concluded that the Constitution of the United States affords him no substantive protection. If he enjoys no substantive protection under the Constitution - that is, if the decision not to renew may be based upon any reason or may be based upon no reason - then it also follows that he need be afforded no procedural protection by the Constitution; to require the university administration to state the reason for the decision, or to state that there is no reason for the decision, or to provide an opportunity to the professor to be heard, would serve no purpose.

On the other hand, if the Constitution of the United States forbids a decision consciously and deliberately based on the professor's otherwise protected speech activity, or his race, or his religion, or his political affiliation, then this substantive right may require procedural protection. (For the purposes of this opinion, for convenience and brevity, I will refer to an alleged right of this kind as a "First Amendment" right, although this does not accurately reach the matter of racial discrimination, for example.)

Also, if the Constitution forbids a decision based upon a wholly false assumption (for example, that the professor struck

the student), or if it forbids a decision which is wholly unreasoned, then this substantive right may also require procedural protection. (For convenience, I will refer to an alleged right of this kind as a right to be protected against an "arbitrary" decision.)

With respect to substantive protection of a professor's "First Amendment" rights, the rule is crystal clear. The employment of a teacher in a public school cannot be terminated because he has exercised that freedom secured to him by the Constitution of the United States. *Pickering v. Board of Education,* 391 U.S. 563 (1968); *Keyishian v. Board of Regents,* 385 U.S. 589, 605, 606 (1967); *Slochower v. Board of Higher Education,* 350 U.S. 551 (1956); *Wieman v. Updegraff,* 344 U.S. 183 (1952); *Pred v. Board of Public Instruction,* 415 F.2d 851 (5th cir. 1969); *McLaughlin v. Tilendis,* 398 F.2d 287 (7th cir. 1968), *Bomar v. Keyes,* 162 F.2d 136 (2d cir. 1947), cert. den. 332 U.S. 825. This substantive constitutional protection is unaffected by the presence or absence of tenure under state law. *Johnson v. Branch,* 364 F.2d 177 (4th cir. 1966), cert. den. 385 U.S. 1003; see *McLaughlin v. Tilendis, supra; Bomar v. Keyes, supra; Lucia v. Duggan,* 303 F. Supp. 118 (D. Mass. 1969). Nor is it material whether employment is terminated during a given contract period, or not renewed for a subsequent period. *McLaughlin v. Tilendis, supra.*[1/]

With respect to substantive protection against arbitrary non-retention, there is some uncertainty in the present state of the law. To test the point, we must assume a situation in which there is in fact no "First Amendment" problem; that is, the basis for non-retention is definitely not that the professor has exercised that freedom secured to him by the Constitution. The

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[1/] Because this distinction is not material in this Circuit for this constitutional purpose, I will use the term "non-retention" hereinafter to cover both situations.

question, then, is whether the Fourteenth Amendment permits non-retention on a basis wholly without factual support, or wholly unreasoned.

The most recent guidance from the Supreme Court appears to be *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1960). Rachel Brawner was employed as a cook by a private firm which operated a food concession on the premises of the Naval Gun Factory. Access to the Factory grounds depended upon an identification badge. Mrs. Brawner was required by the government's security officer to turn in her pass. The stated reason was that she had failed to meet the security requirements of the installation; no more specific reason was stated. There was no hearing provided. The effect of surrendering the badge was to lose access to the site of Mrs. Brawner's job as a cook.

The Court stated that it was required first to determine "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." 367 U.S., at 895. The private interest affected "most assuredly was not the right to follow a chosen trade or profession.... Rachel Brawner remained entirely free to obtain employment as a short-order cook or to get any other job, either with [her then private employer] or with any other employer. All that was denied her was the opportunity to work at one isolated and specific military installation." 367 U.S., at 895-896. On the other hand, the governmental function involved was "as proprietor, to manage the internal operation of an important federal military establishment. . . . In that proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control." 367 U.S. at 896.

There follows a puzzling passage (896-899) in which the Court appears initially to affirm "a settled principle that government employment, in the absence of legislation, can be

revoked at the will of the appointing officer" (896); then to acknowledge that *United Public Workers v. Mitchell,* 330 U.S. 75 (1947), and *Wieman v. Updegraff,* 344 U.S. 183 (1952) demonstrate "that the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer" (897-898); then to say that not all state and federal employees "have a constitutional right to notice and a hearing before they can be removed" (898); then to "assume" that Mrs. Brawner "could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory - that she could not have been kept out because she was a Democrat or a Methodist" (898); and then to say that it does not follow "that she was entitled to notice and a hearing when the reason advanced for her exclusion was, as here, entirely rational and in accord with the contract" between the government and her private employer (which contract provided that the private firm should not continue to employ on that site persons who failed to meet the government's security requirements) (898). Finally, the Court concluded that a determination that Mrs. Brawner "failed to meet the particular security requirements of that specific military installation" was not to "bestow a badge of disloyalty or infamy" upon her, and was not to impair her opportunities for employment elsewhere either by a public or private employer. (898-899).

Four members of the Court, in dissent, observed that the Court had recognized that Mrs. Brawner's job as a short-order cook at a Gun Factory was constitutionally protected against termination "on grounds of her race, religion, or political opinion", but had seemed to say that "mere assertion by government that exclusion is for a valid reason forecloses further inquiry." 367 U.S., at 900. The dissenters expressed the view

that Mrs. Brawner was entitled to some minimal procedures to apprise her in some detail of the reason for removing her badge, and to give her some opportunity to defend. Finally, the dissenters disagreed with the Court's estimate of the future consequences to Mrs. Brawner flowing from being characterized as a "security risk." 900-902.

In the present case I consider myself bound by *Cafeteria Workers v. McElroy* to undertake the balancing process described there: that is, to determine "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." 367 U.S., at 895.

Turning first to "the precise nature of . . . the private interest . . . affected," I start with the Court's observation that Mrs. Brawner's interest was "the opportunity to work [as a short-order cook] at one isolated and specific military installation." 367 U.S., at 896. The significance of the terms "isolated" and "specific" in this context is not easily grasped. Apparently the Court meant to contrast the termination of Mrs. Brawner's employment at the Gun Factory, with an order excluding her from employment as a short-order cook on the sites of all military installations, or to contrast it with an order revoking the license of a lawyer or a medical doctor or a real estate broker. The underlying significance appears to be that the effect of the termination was not seriously to limit Mrs. Brawner's future economic opportunities. The interest of the plaintiff here might also be viewed as "the opportunity to work [as a professor] at one isolated and specific university." The termination of this opportunity might also be contrasted with an order excluding him from employment at all universities and colleges, or with the revocation of the license of a lawyer or medical doctor or real estate broker. But the parallel with Mrs. Brawner's case falters here because the relationship between one cook and all

prospective employers of short-order cooks differs, as I now judicially notice, from the relationship between one university professor and all prospective employers of university professors. Without disrespect, I think it fair to say that the discharge from one job is a lesser impediment in the search for another in the case of short-order cooks than in the case of university professors.

Turning to "the precise nature of the government function involved," I start again with the Court's observation in *Cafeteria Workers v. McElroy*. It found the government function there to be:

> "[A]s proprietor, to manage the internal operation of an important federal military establishment. . . . In that proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control." 367 U.S., at 896.

The emphasis here seems to be that the government function involved was proprietary rather than regulatory; that it was one of internal operation of an establishment; that the establishment was important; that it was military; and that there is a tradition of unfettered control by the federal government over its proprietary military installations. The interest of the state government in the present case is also proprietary rather than regulatory; it involves the internal operation of an establishment; and the establishment is important. The establishment is educational in nature, rather than military. Whether in its proprietary educational capacity the state government "has traditionally exercised unfettered control" is a question not instantly answerable. It seems fair to say, however, that historically the governance of public institutions of higher learning by the state has been less authoritarian than the governance of miliary installations by the federal government.

But to give effect to the balancing test of *Cafeteria Workers v. McElroy* obviously requires more than literal application of its language to the present situation, and more than labored comparisons between short-order cooks and professors, and between federal gun factories and state universities. We are dealing here with institutions of higher learning in this country, and perhaps abroad, and we are dealing with professors in those institutions.

I am called upon to consider the interest of the university in assembling and preserving a community of teachers and scholars. I am to consider how vital it is to this interest that during a relatively short initial interval, the university be free arbitrarily to decide not to retain a professor, so long as its decision is not based upon his exercise of freedoms secured to him by the Constitution. The concept of tenure obviously enjoys a rational basis, as well as a traditional basis. It is reasonable that there be a time in which to observe a new teacher and scholar and that the university retain during that time a considerable latitude in deciding whether he should remain. It is reasonable that after a period of time, or after the newcomer has won a certain measure of acceptance reflected in his academic rank, he should acquire rather strong protection against non-retention; such an arrangement is conducive to productive and perhaps controversial effort. Thus it is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer or one who has not yet won sufficient respect from his colleagues. And it is reasonable that thereafter this available spectrum of reasons be sharply narrowed and confined to those amenable to articulation or demonstration.

The core issue here, however, is more difficult. No interest of the university is directly served by a regime in which a

decision not to retain a newcomer may be made upon a basis wholly without support in fact or by a decision upon a wholly unreasoned basis. If the university is forbidden, constitutionally, to rest its decision on such an arbitrary basis, the question arises: in practice will the university become so inhibited that the available spectrums of reasons for non-retention in the two situations will merge, the distinction between tenure and absence of tenure will shrink and disappear, and the university will be unable to rid itself of newcomers whose inadequacies are promptly sensed and grave but not easily defined? It will not do to ignore this danger to the institution and to its central mission of teaching and research.

As against this danger, however, there is to be set the interest of the individual new professor. To expose him to non-retention because the deciding authority is utterly mistaken about a specific point of fact, such as whether a particular event occurred, is unjust. To expose him to non-retention on a basis wholly without reason, whether subtle or otherwise, is unjust. There can be no question that, in terms of money and standing and opportunity to contribute to the educational process, the consequences to him probably will be serious and prolonged and possibly will be severe and permanent. "Badge of infamy" is too strong a term, but it is realistic to conclude that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career.

The balancing test of *Cafeteria Workers v. McElroy* compels the conclusion that under the due process clause of the Fourteenth Amendment the decision not to retain a professor employed by a state university may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason. This standard is intended to be considerably less severe than the standard of "cause" as the latter has been applied to professors

with tenure. Unless this substantial distinction between the two standards is recognized in case-by-case application of the constitutional doctrine here enunciated, the rationale for the underlying doctrine will be gravely impaired. To be more direct, in applying the constitutional doctrine, the court will be bound to respect bases for non-retention enjoying minimal factual support and bases for non-retention supported by subtle reasons.

In deciding to afford to professors in a state university substantive protection against arbitrary non-retention, I am strengthened by an awareness that this is consistent with the development of the law with respect to public employment generally. The time is past in which public employment is to be regarded as a "privilege" which may be extended upon any conditions which public officials may choose to impose. See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968); Davis, the Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193, 234 (1956). In *Birnbaum v. Trussel,* 371 F.2d 672, 678 (2d cir. 1966), after a review of the decisions of the Supreme Court and other courts, it was said that the "principle to be extracted from these cases is that, whenever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he can be removed neither on arbitrary grounds nor without a procedure calculated to determine whether legitimate grounds do exist."

The latter comment brings me to a conclusion which follows inexorably from what I have said. Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non-retention is useless without procedural safeguards. I hold that minimal procedural due process includes a statement of

the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place.[2]/ At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact.[3]/

I conclude that the defendants' motion for summary judgment dismissing this action must be denied for the reason that it is undisputed that no statement of reasons for non-retention was given to the plaintiff, and no notice was given him that he would be heard at a stated time and place in response to the stated reasons.

Defendants' motion must be denied for another reason. They contend that the record in this court - by affidavits, depositions, and pleadings - makes it clear that the decision not to retain this particular plaintiff enjoyed a basis which was

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[2]/ I do not intend to foreclose more considerate procedures, which permit the professor to waive procedural rights, voluntarily and knowingly. For example, the initial notice that non-retention is being considered may say that if the professor makes a written request, within a stated interval, a written statement of reasons will be supplied him, and that he will be provided with hearing at which he may respond; otherwise, he will simply be furnished with a letter announcing the decision without a statement of reasons. Also, even at the point at which a written statement of reasons is furnished, the professor may be advised that, if he makes a request for a hearing within a stated interval, a hearing will be scheduled; otherwise, the procedure will end with the written notice of non-retention and the reasons therefor.

[3]/ It should clearly be understood that any more stringent requirements imposed by statute, custom, or otherwise, such as a showing of "cause" in the case of a tenured professor, are unaffected by this statement of minimal procedural requirements embodied in the due process clause of the Fourteenth Amendment.

reasoned, supported in fact, and not violative of plaintiff's freedom of expression.

Defendants offer *Pickering v. Board of Education,* 391 U.S. 563 (1968), in support of the contention that plaintiff's statements referred to in section 2 of Dean Darken's memorandum (upon which memorandum defendant Guiles relied in deciding not to retain plaintiff) were not entitled to First Amendment protection. In *Pickering* the unsuccessful Board contended that "the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience." *Pickering, supra,* at 568-569. Defendants make a similar argument here.

In "evaluating the conflicting claims of First Amendment protection and the need for orderly school administration", the court in *Pickering, supra,* "indicates some of the general lines along which an analysis of the controlling interest should run." *Pickering, supra,* at 569. Those guidelines coupled with certain controverted facts prevent summary judgment based upon this contention.

A teacher's freedom of speech cannot be limited unless it can be shown that his utterances harm a substantial public interest. *Pickering, supra,* at 570-571. The defendants have not exhibited beyond dispute that such injury existed. It is not uncontroverted that the plaintiff's statements diminished his effectiveness in the classroom, hampered the administration's disciplinary actions, or furthered the disturbances and disorder already occurring on the campus.

Even if it were agreed that the plaintiff's utterances were inaccurate and unsound, it is clear from *Pickering* that a factual evaluation of their consequences would become necessary:

> "What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." 391 U.S., at 572.

Defendants argue that even if the statements of the plaintiff are constitutionally protected, section 2 of [t]he Dean's report did not disapprove of them because they were critical of university administration, but only because they were unsubstantiated and evinced an unscholarly approach to the search for knowledge and truth. The plaintiff has alleged, and it is controverted, that the defendants relied on the public statements for more than the proposition that plaintiff was unscholarly. Plaintiff supports his argument with the contention that the defendants have presented no additional evidence which calls his competence into question. Further, he contends that the statements cited in the Darken memorandum are statements of opinion as to then existing conditions which cannot be subjected to the tests of scholarship. Factual error ordinarily affords no warrant for repressing speech otherwise free. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), motion for rehearing denied 376 U.S. 967. Whether error is to be accorded special significance here will require an evaluation of the setting in which it occurred, if it was indeed error.

Defendants further contend that the defendant Guiles in making his decision of non-retention relied upon ample non-constitutionally protected activity as set forth in section one of

Dean Darken's recommendation. This is put in dispute by the following allegations of the plaintiff:

> the defendant Guiles' decision of non-retention was based upon both sections one *and* two of Dean Darken's recommendation;
>
> even if the decision was based solely upon section one recommendations, the complaints there enumerated were only brought to light and used because of the plaintiff's criticism of university administration; and
>
> apart from the recommendation, defendant Guiles' decision was an attempt to retaliate against the plaintiff for his critical comments.

Both parties seem to agree that "a justifiable ground of discharge is not a defense when the" ground "is a *mere pretext* and not the moving cause of the discharge" (Defendants' Reply Brief in Support of Defendants' Motion, at p. 7; underlining in the original). The plaintiff has so alleged and should be allowed to attempt to prove it. Obviously, a non-retention decision based upon activity which is not constitutionally protected, is a valid decision. But a decision based in part on protected activity and in part upon unprotected activity is not a valid decision. In the present case it appears that a determination as to the actual bases of decision must await amplification of the facts at trial. *Beilan v. Board of Education*, 357 U.S. 399, 412 (1958) (Warren, C. J., dissenting). Summary judgment is inappropriate.

Plaintiff's Motion for Partial Summary Judgment

There is a contrast between the relief sought in the complaint herein and the relief sought in the plaintiff's motion for partial summary judgment.

The allegations of the complaint embody an attack on the non-retention decision on both substantive and procedural grounds. The substantive grounds alleged are that the decision was based upon plaintiff's earlier expressions of opinion, and that there were no ascertainable and definite standards upon which the decision could be based.[4]/ The procedural grounds alleged are that the defendants refused to give reasons for their decision, and that they did not offer the plaintiff a hearing on the merits of the decision. The relief asked is a declaratory judgment with respect both to the substantive and procedural grounds, and an injunction requiring defendants to offer the plaintiff a contract for the 1969-1970 academic year.

The motion for a partial summary judgment, however, prays, apparently in the alternative: (a) that defendants either provide plaintiff with a hearing on the merits of his non-retention or offer him a contract for 1969-1970; or (b) that defendants offer him a contract for 1969-1970 because the non-retention decision was not made on any ascertainable and definite standards. Thus the motion for summary judgment introduces a prayer for an order to compel defendants to provide procedural safeguards within the university.[5]/

Plaintiff might have elected to come here under 42 U.S.C. § 1983 and to seek only an order compelling defendants to offer him a contract for 1969-1970, alleging that the non-retention decision had actually been based on his exercise of First Amendment freedoms, and that there were no ascertainable rules and regulations of conduct governing faculty members upon which

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[4]/ Perhaps the contention concerning the absence of ascertainable and definite standards may be described as procedural rather than substantive. I understand the contention to be that there had not been made known to the plaintiff, in advance, rules and regulations sufficiently definite and specific to serve as a guide to conduct. I compare this with contentions that substantive rules of conduct are vague or overbroad.

[5]/ Since the complaint includes a prayer "for such other and further relief as may be equitable," the plaintiff is not foreclosed from seeking this specific relief in his motion for a partial summary judgment.

the non-retention decision could have been based. Had he done so, he would not have been required to exhaust whatever state administrative or judicial remedies might have been available to him. *Damico v. California*, 389 U.S. 416 (1967).

On the other hand, plaintiff might have elected to come here under 42 U.S.C. § 1983, allege that he had been given no reasons for his non-retention and had been afforded no hearing on the merits of the decision, and to seek only an order compelling the defendants to provide him with these procedural safeguards within the university.

In this situation, I will consider first that alternative motion by the plaintiff for partial summary judgment in which he seeks an order compelling defendants to offer him a contract for 1969-1970 on the ground that the non-retention decision was not made on any ascertainable and definite standards. The motion must be denied. The contention appears to be that a non-tenured employee is constitutionally entitled to be told in advance that if he does not comply with certain reasonably specific standards of conduct, he will not be offered a contract for the following year. See *Soglin v. Kauffman*, 418 F.2d 164 (7th cir. 1969) (relating to students in a public university). The necessary implication is that if he does abide by these previously announced standards of conduct, he will be entitled to a contract for the following year. As I have explained above in discussing defendants' motion for summary judgment, it is important that in deciding whether to retain a non-tenured professor, the university should enjoy the widest possible latitude consistent with protection against arbitrariness and against invasion of his First Amendment rights. To accept the plaintiff's contention would be to erect a constitutional requirement even more severe than the showing of "cause" now required by Wisconsin law in the case of tenured professors. So far as the federal constitution is concerned - as distinguished

from state statutes, regulations, collective bargaining agreements, or traditions - I have held that due process affords professors (tenured or non-tenured) protection only against non-retention based on their exercise of constitutional freedoms and against non-retention based on arbitrariness. To provide this limited protection it is not necessary to require that the university enunciate in advance a code of conduct for professors, violation of which will result in non-retention and compliance with which will result in retention.

This brings me to the remaining alternative motion by the plaintiff for a partial summary judgment: that defendants be compelled either to provide him with a hearing on the merits of his non-retention or to offer him a contract for 1969-1970. For reasons stated in my discussion of defendants' motion for summary judgment, I have concluded that this alternative motion must be granted, with modifications. That is, upon the facts not in dispute, I believe that as of January, 1969, the plaintiff was constitutionally entitled to be provided with a statement of the reasons why he was not to be retained for the year 1969-1970, to be given notice of a specific time and place for a hearing at which he could respond to the stated reasons, and to be given the hearing itself if he appeared at the stated time and place; in the absence of being provided these procedural safeguards, he was entitled to be retained in 1969-1970. Because of the passage of time while this action has been pending in this court, the relief must be modified somewhat, and the specific order of the court is as stated below.

Because the plaintiff is being furnished the procedural relief which he has sought in his motion for partial summary judgment, I stay further proceedings in this court on what appear to be the only remaining issues: whether in fact non-retention was based upon plaintiff's earlier expressions of opinion or was arbitrary. If the plaintiff is now furnished with

a statement of the reasons for his non-retention, notice of an administrative hearing, and a hearing, I believe that the remaining issues in this case will have been clarified and that they will become more amenable to resolution.

Order

It is ordered that defendants' motion for summary judgment is hereby denied.

It is ordered that plaintiff's motion for a partial summary judgment that his rights were violated by defendants' decision not to retain him for the school year 1969-1970 because said decision was not made under ascertainable and definite standards, and for partial summary judgment that defendants be ordered to offer him a contract as a faculty member for the school year 1969-1970 (or any subsequent time), is hereby denied.

It is hereby ordered and adjudged that on or before March 20, 1970, the defendants herein are to cause to be delivered to counsel for the plaintiff herein a written statement of the reasons upon which the defendants relied in deciding not to offer plaintiff a contract for the 1969-1970 academic year; that on or before March 20, 1970, plaintiff's attorneys are to inform defendants' attorneys in writing of all dates after April 1, 1970, and prior to June 30, 1970, upon which plaintiff would be able to appear for a hearing in Oshkosh, Wisconsin; that on or before March 27, 1970, defendants are to cause to be delivered to counsel for the plaintiff herein a notice of a hearing at an appropriate place in Oshkosh, Wisconsin, on a date which is among those designated by the plaintiff and which is not less than ten days subsequent to the date on which notice is delivered to plaintiff's counsel; that said notice is to advise the plaintiff that at the specified place and time, he will be given

an opportunity to respond to the reasons stated for his non-retention; that at the said time and place, if plaintiff appears, he will be given an opportunity to respond to the reasons stated for his non-retention; that within 15 days after the date of said hearing, the defendants will notify plaintiff's counsel herein either that he will not be offered a further contract with the university or that he is being offered a contract as a member of the faculty of the university for the academic year 1970-1971, on terms and conditions no less favorable to him than those contained in his contract for the academic year 1968-1969. It is hereby further ordered and adjudged that should the defendants elect not to comply with the immediately preceding order by providing the plaintiff with a statement of reasons for his non-retention, notice of hearing, and hearing, then the defendants shall be required, on or before June 1, 1970, to offer the plaintiff a contract as a member of the faculty of the university for the academic year 1970-1971, on terms and conditions no less favorable to him than those contained in his contract for the academic year 1968-1969.

Entered this *12th* day of March, 1970.

(Execution Omitted)

IN THE

United States Court of Appeals

For the Seventh Circuit

September Term, 1970 September Session, 1970

No. 18490

DAVID E. ROTH, for himself and for all others similarly situated,
Plaintiff-Appellee,
v.
THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Wisconsin.

JULY 1, 1971

Before DUFFY, *Senior Circuit Judge,* FAIRCHILD and KERNER, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* In this case (involving an official decision at a state university not to reemploy a non-tenured professor) the parties each made motions for summary judgment. The district court decision is reported at 310 F Supp. 972. Defendants' motion was denied, and plaintiff's motion was granted in part. The order appears on pages 983 and 984. Defendants have appealed from the judgment accordingly entered. Although such judgment did not finally dispose of all issues, and no direction was made under Rule 54(b) F.R.C.P., it amounted to an injunction, and was appealable as such under 28 U.S.C. §1292(a) (1).

The facts, the disposition of the motions, and the reasoning employed are well stated in the opinion of the district court, and we shall avoid unnecessary repetition. It suffices, now, to say that during the school year '68-'69, plaintiff was a non-tenured professor at a state university who claimed (1) that the reason for defendants' decision not to retain him for the school year '69-'70 was to retaliate for plaintiff's constitutionally protected expression of opinion and (2) that even as a non-tenured member of the faculty he was constitutionally entitled either to be retained or to be given a hearing on the merits of the decision not to retain him.

With respect to issue (1), which may be termed substantive, the district court decided there were issues of fact. Such issues have not been determined and the respective claims concerning them are before us only as background. With respect to issue (2), which may be called procedural, the district court decided that plaintiff had been entitled at the administrative level to be offered a statement of the reasons why he was not to be retained and a hearing at which he could respond. Accordingly, the court ordered defendants to deliver the statement and provide for the hearing, or, in the alternative, to offer a contract for the ensuing school year. By the time of the decision the upcoming school year was '70-'71. The district court stayed its order pending appeal, and the upcoming school year is now '71-'72.

The district court made it clear that the prescribed procedure was designed to safeguard a due process right that "the decision not to retain a professor employed by a state university may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason," and that the "standard is intended to be considerably less severe than the standard of 'cause' as the latter has been applied to professors with tenure." (p. 979.)

Defendants do not question the proposition, documented by the district court at page 976, that the "employment of a teacher in a public school cannot be terminated because he has exercised that freedom secured to him by the Constitution of the United States." They would say that the proposition (which they deny) that reemployment was denied plaintiff because of his exercise of protected rights is for him to prove, if he is able, in the branch of this case which is not now before us.

The contest on this appeal is whether the state university, in deciding not to retain a non-tenured professor, must initially shoulder the burden of exposing to the limited test ordered by the district court the reasons on which its decision is predicated, and to that extent demonstrate that its reasons are not impermissible, or whether the first recourse of the professor is to attempt to establish in the judicial forum that the reasons are impermissible.

Defendants rely on the traditional principle "that government employment, in the absence of legislation, can be revoked at the will of the appointing officer."[1]/

Cafeteria Workers,[2]/ involved denial by government of an individual's access to a government facility, resulting in inability to continue private employment at that facility.

1/ *Cafeteria Workers v. McElroy* (1961), 367 U.S. 886, 896, 6 LEd 2d 1230, citing *Vitarelli v. Seaton* (1959), 359 U.S. 535, 539, 3 LEd 2d 1012. Those decisions did not involve teachers, but the principle was assumed in *Shelton v. Tucker* (1960), 364 U.S. 479, 486, 5 LEd 2d 231, involving state university as well as public school teachers, and has been followed in other decisions involving non-tenured teachers: *Jones v. Hopper* (10th Cir., 1969), 410 F 2d 1323, 1329, cert. den. 397 U.S. 991; *Freeman v. Gould Special Sch. Dist. of Lincoln County, Ark.* (8th Cir. 1969), 405 F 2d 1153, 1159, cert. den. 396 U.S. 843; *Williams v. School District of Springfield R-12* (Mo., 1969), 447 SW 2d 256, 270; *Henry v. Coahoma County Board of Education* (N.D.Miss., 1963), 246 FSupp. 517, 521, aff'd 5th Cir. 353 F 2d 648, cert. den. 384 U.S. 962; *Hopkins v. Wasson* (E.D.Tenn., 1962), 227 FSupp. 278, aff'd, 6th Cir., 329 F 2d 67, cert. den. 379 U.S. 854.

2/ Supra, fn. 1.

Although the Supreme Court suggested that the individual's interest in access to her job was closely analogous to the interest of a government employee in retaining his job, and in that connection stated the principle relied on by defendants, the Court also held that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." This was the balancing formula which the district court applied in the instant case, reaching a result different from the result in *Cafeteria Workers.*[2a]/

The opinion in *Cafeteria Workers* itself suggests that if the government action jeopardized a right to follow a chosen trade or profession, that fact would weigh upon the side of the individual. In *Goldberg v. Kelly*[3]/ the Supreme Court referred generally to relevant constitutional restraints applying to discharge from public employment, among other types of government action, and after stating that "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," quoted the balancing language from *Cafeteria Workers.* The Supreme Court has held that one who applies for a license to practice a profession is entitled to procedural safeguards not required in *Cafeteria Workers* "where only 'the opportunity to work at one isolated and specific military installation' was involved."[4]/ Several courts have found a due process right

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[2a]/ See *Kiiskila v. Nichols* (7th Cir., 1970), 433 F 2d 745.
[3]/ (1970), 397 U.S. 254, 262.
[4]/ *Willner v. Committee on Character & Fitness* (1963), 373 U.S. 96, 103, footnote 2, 10 LEd 2d 224.

where dismissal or non-retention of a public employee jeopardized an interest in practicing a profession, or in preserving a professional reputation.[5]/ We think the district court properly considered the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor and concluded, after balancing it against the governmental interest in unembarrassed exercise of discretion in pruning a faculty, that affording the professor a glimpse at the reasons and a minimal opportunity to test them is an appropriate protection.

We note that the Supreme Court has denied certiorari in several cases where a court of appeals has declined to recognize similar due process rights of an elementary or secondary public school teacher who has been dismissed or not re-employed.[6]/ On the other hand, the Supreme Court has emphasized the importance of vigilant protection of constitutional freedoms in the academic community.[7]/ "Moreover, in the case of teachers, the government's interest goes beyond the promotion of fairness to the encouragement of an academic atmosphere free from the threat of arbitrary treatment."[8]/

5/ *Birnbaum v. Trussell* (2d Cir., 1966), 371 F 2d 672, physician employed at municipal hospital; *Meredith v. Allen County War Memorial Hospital Com'n* (6th Cir., 1968), 397 F 2d 33, physician on staff of county hospital; *Lucia v. Duggan* (D.Mass., 1969), 303 FSupp. 112, public school teacher; *Orr v. Trinter* (S.D.Ohio, August 3, 1970), public school teacher. See also, the dissenting opinion of Judge Lay in *Freeman*, supra n. 1, pages 1161, 1164.

6/ *Jones*, *Freeman*, *Henry*, and *Hopkins*, supra, fn. 1. The Court has, however, recently granted certiorari in a case in this field: *Sindermann v. Perry* (5th Cir., 1970), 430 F 2d 939, cert. granted June 14, 1971, 39 L.W. 3548.

7/ *Shelton v. Tucker* (1960), 364 U.S. 479, 487, quoting from *Weiman v. Updegraff* (1952), 344 U.S. 183, 195, and *Sweezy v. New Hampshire* (1957), 354 U.S. 234, 250.

8/ Developments-Academic Freedom (1968), 81 Harvard Law Rev. 1045, 1082.

The instant case arose after serious disturbance on that particular campus, and public expressions by plaintiff of his opinions, critical of the administrators. It appeared, after discovery in this action, that these expressions were considered by defendants, albeit in a context of supposed relevancy to his performance of his duties. Although the principle announced by the district court applies by its terms to all non-retention decisions, an additional reason for sustaining application in the instant case, and others with a background of controversy and unwelcome expressions of opinion, is that it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights.[9/]

The judgment appealed from is affirmed.[10/] Necessarily our affirmance does not deprive the district court of power to modify the judgment so as make adjustments for the passage of time or circumstances which have arisen since its entry.

[9/] See Van Alstyne, Right-Privilege Distinction (1968), 81 Harvard Law Rev. 1439, 1453.

[10/] Since this opinion adopts a position concerning which a conflict appears to exist between the circuits, the majority and dissenting opinions have been circulated, before filing, to all the judges of this court in regular active service. The proposition that the appeal be reheard en banc failed to receive the support of a majority, four voting in favor and four opposed.

DUFFY, *Senior Circuit Judge,* dissenting.

I respectfully dissent. I agree with the statement in one of the amicus curiae briefs submitted in this case that "Affirmance of the judgment below . . . will constitute an unprecedented and unwise incursion of the federal courts into the domain of public higher education."[1]/ In holding that under the Wisconsin statutory provision which permits the contracts of probationary instructors to expire at the "pleasure" of the university, it must now include a statement of reasons and the opportunity for a hearing, the majority calls into question a practice that is well established and is customary at more than one thousand public schools and universities in this country, which have some three hundred thousand faculty members and over six million students. (Amicus brief, at 2-3). I do not believe that the procedural protections now called for by the majority opinion are required by the Constitution or will they prove to be effective protections in fact.

Plaintiff, David Roth, never had been employed in the state university system before he signed a contract to teach at Wisconsin State University, Oshkosh, for the 1968-69 academic year. This was his first teaching job. The contract was for one year only and it is clear that under the Wisconsin Statutes (Wis. Stats. Sec. 37.31(1)) the contract carried with it no further express or implied promise of continued employment. Moreover, the statute did not provide for a statement of reasons or a hearing in the event that the contract of a probationary instructor such as Roth was not renewed for the following year. This is to be contrasted with the situtation of

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[1]/ Brief of the Board of Governors of State Colleges and Universities of Illinois, the Board of Regents of Regency Universities of Illinois, the Board of Trustees of Southern Illinois University, the American Association of State Colleges and Universities, The American Council on Education and the Association of American Colleges, p. 3.

a tenured faculty member who could only be dismissed "for cause", which includes, by definition, certain procedural protections such as the right to a statement of reasons and a hearing.

The tenure system in effect at Wisconsin State University-Oshkosh is typical of college tenure systems throughout the United States. In Wisconsin, the tenure system for colleges and universities is adopted by statute. (Wis. Stats. Sec. 37.31(1)). A decision not to grant tenure ordinarily is embodied in a notice of contract non-renewal.

Consistent with customary procedure at the University, the decision not to rehire plaintiff Roth was made by President Guiles alone. However, the President then had before him the recommendation of the Tenure Committee of the Department of Political Science, the Dean of the School of Letters and Science and the Vice President for Academic Affairs. All of these recommended that plaintiff not be re-employed.

The Board of Regents can reverse a decision of the President of the University. However, Roth did not appeal to the Board. Instead, he filed the complaint in the District Court under 42 U.S.C. § 1983 from which this appeal is taken. His stated reason for this course of action was that the Federal Court "is the only entity to be trusted for a fair hearing."[2/]

Roth's complaint alleged first, that he was entitled to a statement of reasons and a hearing on the question of his non-renewal, and secondly, that the reason his contract was not renewed stemmed from his choosing to exercise his rights guaranteed by the Constitution.

[2/] Roth deposition, page 27.

However, as indicated in the majority opinion, this second and "substantive' ground for relief was kept separate from the procedural argument now before us. The District Judge granted partial summary judgment in favor of plaintiff solely on the ground that, as a matter of procedural due process, the defendants must give plaintiff a written statement of the reasons on which they relied in deciding not to reemploy him, and to offer him a hearing within a specified time at which he could reply to the stated reasons, or, in the alternative, that defendants offer plaintiff a contract for the up-coming academic year.

I

It is my personal opinion that the decision of the District Court is both unwise and unworkable. What troubles me especially is that the result of the decision might well be to make the Federal Courts the final arbiters of all similar cases. The majority opinion calls for a hearing before a state administrative body at which time difficult questions of constitutional law might well be presented. Administrative bodies of this sort are not qualified to pass on such questions. A person who feels he has been unjustly refused a renewal of his teaching contract certainly will not be satisfied with the result of such a hearing, if it be adverse to him. He will, quite naturally, seek relief in the federal courts and, once having reached that forum, will feel free to ignore all the proceedings that have transpired before. Indeed, that appears to have been the attitude of the plaintiff in the case before us as indicated by his statement that the Federal Court was "the only entity to be trusted for a fair hearing."

On the other hand, the state will not be so free to ignore the results of such hearings but will, instead, be required to incur a great expense to provide them in the first place. In undertaking the balancing test of the "precise nature of the government function involved as well as of the private interest that has been affected by governmental action" called for in *Cafeteria Workers v. McElroy,* 367 U.S. 886 at 895, I do not think that either the District Judge or the majority here placed sufficient weight on the burden to be borne by the State in providing these hearings. We may note that as a result of very rapid growth, the faculties of most colleges and universities contain a high percentage of young and untested teachers. Moreover, it also has been pointed out to us that the seller's market in teaching talent has changed to a buyer's market, and that we may well expect that universities will take this opportunity to upgrade their younger faculties by extensive substitutions as better qualified applicants become plentiful. The result, obviously, will be that a much greater number of non-tenured teachers will be notified that their contracts have not be[en] renewed than has been true in the past. As illustration of the fact that this trend already has begun we note, from appellant's brief, that for 1970 alone, 206 non-tenured teachers of the Wisconsin State University system were notified that they would not be retained. Clearly, it will be a significant burden for the State to hold hearings on the difficult questions involved in non-renewal decisions even if not all of those teachers demand that a hearing be held.

I further feel that the procedures ordered by the District Court and approved of by the majority here will be almost impossible to administer and certainly will not render any easier the task of federal courts in their assessment of whether or not any substantive constitutional freedoms have

been impinged. Decisions over whether or not to rehire a probationary instructor are exceedingly difficult to make; are based on various combinations of personal judgments, and are no easier to review. Under the majority's holding, administrative bodies will be compelled to review these personal judgments while possessing no expertise in the ultimate constitutional claims at issue. We shall then be called upon to conduct a second review of a, no doubt, already confusing set of facts. Our task may end up being both unmanagable and futile.[3]/

The majority opinion states that the hearing is called for in part as a "prophylactic" against infringement of constitutional freedoms, yet it is difficult to see how such proceedings will assist the process in any appreciable manner. If, in fact, certain educational bodies may sometimes act out of ill will in rendering non-renewal decisions (a proposition which I do not so readily accept), they clearly will not be deterred by any procedures approved of by this Court.

The tenure system, which has been carefully worked out throughout the years, has, at its root, the requirement that a tenured professor can only be dismissed for "cause." The assessment of whether, in fact, cause exists has traditionally included the affording of certain procedural safeguards, such as those now before us. On the other hand, non-tenured personnel has traditionally not been accorded these same protections, and they have known that this was so when they took their jobs. The majority opinion purports not to disturb that carefully worked out distinction, yet, in my view, such will be the end result.

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[3] On the difficulty in assessing rehiring decisions see: F. Machlup "On Some Misconceptions Concerning Academic Freedom" in *Academic Freedom and Tenure*, at pp. 185-6. On the problems of judicial review of school cases in general see Judge Lay's dissent in *Esteban v. Central Missouri State College*, 415 F. 2d 1077 (8 Cir., 1969).

II

Aside from my own personal views on the matter, I wish to point out that the majority opinion goes far beyond the present state of the law and, in fact, now places this Circuit in direct conflict with two other Circuits in this area of the law. Of course, I recognize that a university may not, consistent with the Constitution, take retaliatory action against one of its employees just because that employee has chosen to exercise his rights guaranteed to him by the Constitution. *Shelton v. Tucker,* 364 U.S. 479 (1960); *Keyishian v. Board of Regents,* 385 U.S. 589 (1967); *Pickering v. Board of Education,* 391 U.S. 563 (1968), and *McLaughlin v. Tilendis,* 398 F. 2d 287 (7 Cir., 1969). But that is not what is involved here. We deal instead with what procedures must be followed by a university when indicating to a probationary instructor that he will not be rehired for the following year.

Procedural due process is a totally separate area from the protection of substantive constitutional rights and, as the Supreme Court has indicated—"The Fifth Amendment does not require a trial-type hearing in every conceivable case of governmental impairment of private interest." *Cafeteria Workers v. McElroy, supra,* at 895. But even acknowledging that the flexible standard of procedural due process may sometimes require the affording of a hearing and other minimal protections when life and liberty are at stake, *Goldberg v. Kelly,* 397 U.S. 254, *Hahn v. Burke,* 430 F. 2d 100 (7 Cir., 1970), cert. den. 39 Law Week, 3473 (April 21, 1971), that does not mean that the majority's result is required. For, as I read the majority opinion, it now becomes the first opinion to require that these procedures be mandated to a probationary instructor whose contract is not renewed yet, who admittedly, has made no further substantive allegation of infringement of constitutional freedoms.

It is clear that nothing in any of the Supreme Court decisions compels the majority's result here. If anything, the Court has assumed the constitutionality of the tenure process, and its corollary, the dismissal of non-tenured faculty members without notice, hearing or statement of reasons even as the Court, at the same time, has been vigilant to protect substantive constitutional freedoms. This was exactly the case in *Shelton, supra,* where the Court struck down an Arkansas statute which impinged on teachers' freedom of association. Yet, in so doing, the Court noted by contrast that "such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made—those who any year can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain." (P. 486). While the infringement on the freedom of association was condemned, the validity of the very procedures before us now was assumed.

The validity of the procedures before us now was directly challenged in two other Circuit Court cases. Yet, in each case, the dismissal or non-renewal of a probationary instructor's contract, without a statement of reasons or without a hearing, was held to pass the scrutiny of the due process clause, and in each case, the Supreme Court denied certiorari. *Jones v. Hopper,* 410 F. 2d 1323 (10 Cir., 1969) cert. den. 397 U.S. 991 (1970); *Freeman v. Gould Special School District,* 405 F. 2d 1153 (8 Cir., 1969), cert. den. 396 U.S. 843 (Justice, then Judge Blackmun, a concurring member of the panel). In response to the same procedural due process argument as advanced here, the Freeman Court stated: "if this were so [if the argument were accepted] we would have little need of tenure or merit laws as there could only be, as argued by the

plaintiffs, a discharge for cause, with the school board carrying the burden of showing that the discharge was for a permissible reason." (at p. 1160). Yet, the majority here rejects the *Freeman* and *Jones* holdings, calls into question the validity of the tenure system, and places this Circuit squarely in conflict with the Eighth and Tenth Circuits.

I wish to emphasize that the majority opinion now requires that universities comply with the procedures established by the District Court order, even when there is absolutely no indication of any infringement of the constitutional rights of the teacher in question. In so doing, the majority opinion becomes unique unto itself. I realize that there have been those decisions which have called for a hearing or similar procedures in school cases, but these have arisen only when there has been an allegation of serious infringement of other constitutional rights. *Ferguson v. Thomas,* 430 F. 2d 852 (5 Cir., 1970); *Lucas v. Chapman,* 430 F. 2d 945 (5 Cir., 1970); *Hopkins v. Wasson,* 227 F. Supp. 278, affd. 329 F. 2d 67 (6 Cir., 1964), cf. *Meredith v. Allen County War Mem. Hosp. Comm'n.,* 397 F. 2d 33 (6 Cir., 1968). In each of those decisions, the allegation of an infringement of substantive constitutional rights was recognized as critical by the Court before a hearing would be held to be required. Indeed, the *Lucas* Court took pains to point out its holding "should not be misunderstood", that the hearing was required only when "the asserted reason for termination involved a possible collision with . . . First Amendment rights." (at p. 947). As mentioned before, I have grave doubts as to the practical workability of such a distinction, but even conceding that, it should be noted that the majority now goes beyond those cases to hold that a university must "shoulder the burden" in *all* cases, even in those situations where there is no allegation of infringement of First Amendment rights.

That such is the majority's holding is indicated at the outset of its opinion, further, in the statement on page 5 that the holding "applies by its terms to all non-retention decisions", and from an examination of the proceedings in the District Court. (310 F. Supp. at 982-3). If plaintiff Roth did have a *bona fide* claim of infringement of his First Amendment rights, he deliberately has held that claim in abeyance in another "branch" of the case in order to establish, as a matter of law, the requirement of the procedural protections before us now. I think that this Court's acceptance of that format for argument has resulted in the unnecessary decision of a constitutional question which has been doubly unfortunate in that it has resulted in this Circuit going far beyond any other case in this area. It is puzzling that the Court has been willing to do this for in one of the very cases cited as support by the majority, we indicated our preference to decide only those constitutional issues necessary to resolve the controversy. In *Kiiskila v. Nichols,* 433 F. 2d 745, en banc (1970), this Court held that a civilian employee had been improperly excluded from a military reservation because of her expression of anti-war views. In that case, the requirement that a hearing be given was urged upon this Court. Even though the Court expressed some doubt as to whether the employee could be so excluded without the opportunity for a hearing (p. 747, n. 2) we deliberately stated that we "need not decide" that question because the case could be resolved otherwise. I think that such a practice should have been followed by the District Judge in the case at bar with, perhaps, the consequence that such a wide reaching and unsettling result would not have been reached.

In my view, the State's interest in preserving a workable system of tenure which includes, almost by definition, the ability to select freely and maturely its non-tenured teaching personnel, far outweighs any expectancy which the plaintiff

David Roth might have had in continued employment at Wisconsin State University.[4/] I believe that the teaching of *Cafeteria Workers v. McElroy, supra,* supports this view especially when the great burden this Court's holding will present for states is considered. I further believe that the majority's holding is both unprecedented and represents an unwarranted intrusion of the Federal Judiciary into state educational systems. It is one thing to recognize that "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" (*Shelton,* at page 487), and that "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker v. Des Moines County School Dist.,* 393 U.S. 503 (1969) but it is quite another to hold that anxiety over hypothetical infringements of unknown constitutional freedoms demands that states accord the full panoply of procedural due process guarantees for those teachers whose services they designate as no longer required.

We should follow the decision in *Freeman v. Gould Special School District, supra,* where the Court held that "Probationary instructors whose contracts were not renewed, were not entitled to a hearing with notice."

I respectfully dissent.

(Certification Omitted)

[4/] It is interesting to note that Roth signed his one year teaching contract presumably with full knowledge of the Wisconsin Statute (Wis. Stat. Ann. Sec. 37.31) which does not provide for a hearing or statement of reasons in the event that his contract was not renewed. On the other hand, in *Birnbaum v. Trussel,* 371 F. 2d 672, relied upon heavily by the majority, it appears that there was some pre-existing state requirement that a hearing be provided for physicians who were to be discharged. While this factor by itself cannot, of course, be determinative, due to the Supremacy Clause, it is clear that Roth's "expectancy" in continued employment and in the procedures to be followed in terminating that employment differed sharply from that of Dr. Birnbaum. On other distinctions between the expectancies of teachers as opposed to physicians, see *Freeman, supra,* at 1160.