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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-162

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

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Wisconsin is reported in 310 F. Supp. 972 (1970) and is set forth in A. 153.

The opinion of the United States Court of Appeals for the Seventh Circuit appears at 446 F. 2d 806 (1971) and is set forth in A. 176.

JURISDICTION

Jurisdiction is based on 28 U.S.C. §1254 (1). The judgment of the Court of Appeals was entered on July 1, 1971, and on July 14, 1971, that Court granted a stay of mandate in accordance with Rule 41 (b) of the Federal Rules of Appellate Procedure. The Petition for Certiorari was filed on August 3, 1971, and certiorari was granted on October 26, 1971.

QUESTION PRESENTED

Whether a probationary instructor at a state university, who is employed on an academic year-to-year basis prior to the acquiring of tenure under state law, has the right under the Fourteenth Amendment due process clause to a written statement of reasons as to why he is not going to be given a contract of employment for the ensuing academic year and an administrative hearing on those reasons?

STATUTES INVOLVED

Wisconsin Statutes 1967, 37.11, 37.11 (3) and 37.31 (1)

"37.11 Powers of board as to state colleges. The said board shall have the government and control of all the state colleges, and may:

(3) Remove at pleasure any president, assistant or other officer or person from any office or employment in connection with any such college, but discharges of teachers shall be governed by s. 37.31."

"37.31 Teachers employed on probation; tenure; compulsory retirement. (1) All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher. An official leave of absence shall not constitute a break in continuous service, nor shall it count toward the 4 years required to attain tenure. No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision. The action and decision of the board in the matter shall be final. The term 'teachers' as used in this section includes all persons engaged in teaching as their principal occupation but shall not include any university president or acting president in his capacity as president of any of the state universities."/[1]

/-1The Legislature has since increased the probationary period to six years. Ch. 233, Laws of 1969, effective November 26, 1969; Sec. 37.31, Wis. Stats., 1969.

STATEMENT

This action was (apparently) commenced under the Civil Rights Act. The District Court, in partially granting the plaintiff's motion for summary judgment held that under the due process clause of the Fourteenth Amendment to the United States Constitution, a state university could not allow the employment contract of a non-tenured member of the faculty to expire by virtue of its terms; that the Constitution required the employer to state its reasons for not renewing the contract and to provide the employe with a hearing on those reasons. The defendant-employer appealed this decision and order. The Circuit Court of Appeals affirmed the decision of the District Court and the employer now seeks review of that decision.

Petitioner, Board of Regents of State Universities, is a public board established by Chapter 37 of the Wisconsin Statutes and entrusted with the government and control of the nine Wisconsin State Universities. Petitioner, Roger E. Guiles, is the president of the State University at Oshkosh,/[2] hereinafter referred to as defendants or by name.

David F. Roth, respondent, hereinafter referred to as plaintiff or by name, was employed by the Board of Regents of State Universities on June 12, 1968, as an assistant professor in the Department of Political Science at the Wisconsin State University-Oshkosh for one academic year commencing September 1, 1968 and ending June 30, 1969 (A. 114-116). He

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/[2]Formerly the Board was known as Board of Regents of State Colleges and the State Universities were known as State Colleges. The 1971 session of the Wisconsin Legislature merged The Regents of The University of Wisconsin with The Board of Regents of State Universities. The new Board is now known as The Board of Regents of The University of Wisconsin System and The State University at Oshkosh is now known as the University of Wisconsin at Oshkosh, Ch. 100, Laws of 1971.

had never before been employed in the State University system (A. 114). He was 29 years of age, had just completed his graduate study, and this was his first college teaching job (A. 117).

Plaintiff's contract of employment contained the following language:

> "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" (A. 117).

Accordingly, plaintiff's employment contract terminated on June 30, 1969.

The pertinent language of sec. 37.31, Wis. Stats., 1967, incorporated by reference in the contract provided:

> "(1) All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher. * * * No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. * * *"

On or about January 29, 1969, President Guiles made the determination not to offer the plaintiff a reappointment to the faculty of the University (A. 120).

In accordance with the normal and customary procedure at the University, the decision whether to hire plaintiff for another academic year was made by President Guiles alone (A. 121-122). It had to be made in January, because of a rule of the Board of Regents requiring the president of each university to give written notice to nontenured faculty members concerning retention or nonretention for the ensuing year by February 1 (A. 121).

Also in accordance with the established practice at the University, President Guiles had before him recommendations 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 (A. 121-122). These functionaries all recommended that plaintiff not be reappointed (A. 122). Dean Darken supplemented his recommendation with a report setting forth at length his reasons and an account of the proceedings and action on the matter by the departmental committee, on which report Vice President Ramsden endorsed his concurrence (A. 122).

Plaintiff was advised of the President's decision not to invite him to return, by letter dated January 30, 1969 (A. 120, 124). The letter stated no reasons for the decision (A. 124). Rule II adopted by the Board of Regents on March 10, 1967 and in the presence of which his contract was made, provided that "During the time a faculty member is on probation, no reason for non-retention need be given" (A. 121).

Dr. Roth was not offered a hearing on the matter of his reappointment, and he did not request a hearing or statement of reasons (A. 120).

Dr. Roth was not discharged, but was permitted to complete the academic year 1968-1969 for which he was employed, and was paid his salary for the full term of employment. There was no breach of contract by the defendants and none is charged. He was simply notified that he would not be hired for another year.

Neither the Board of Regents nor any member nor officer thereof participated in the decision not to hire Roth again (A. 115).

Although the Board of Regents has power to review any decision of President Guiles relating to the employment or nonemployment of University personnel, Dr. Roth did not appeal to the Board or ask the Board to review the decision not to reemploy him (A. 115).

On February 14, 1969, 15 days after notification that he would not be reemployed, Roth filed his complaint against the defendants, presumably under the Civil Rights Act, asserting that the decision not to employ him for another year and the failure of the defendants to give him a statement of reasons for not reemploying him and a hearing thereon, violated his rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and demanding judgment to that effect and directing defendants to retain him for the year 1969-1970 at the same level of responsibility and function. (A. 104-108) His basic contention on the merits is that he was denied reemployment because of his exercise of constitutionally protected freedom of speech.

With his complaint Roth served an order to show cause why the defendants should not be restrained from filling or otherwise disposing of his position. (Docket Entry 2) The order to show cause was heard on February 19, 1969, and the court denied the motion (Docket Entry 11).

The defendants duly answered the complaint, denying wrongdoing and violation of constitutional rights, and alleging that the complaint fails to state a claim upon which relief can be granted, and that the decision not to employ Roth again was based on breaches of duty, violation of rules and insubordination on his part. (A. 109-112)

On April 29, 1969, a pretrial conference was held by telephone during which the Court suggested that in order to present any legal issues which might dispose of the case, the

parties move for summary judgment or partial summary judgment on or before May 16, 1969. (A. 112-113) Pursuant to that suggestion, the defendants moved for summary judgment of dismissal and the plaintiff moved for "partial" summary judgment. (A. 113, 136)

On March 12, 1970, the Court entered its Memorandum Opinion and Order (A. 153-175), which order denied defendants' motion and part of Roth's motion, but granted Roth's motion in part. (A. 166) The Court ordered and adjudged that by March 20 the defendants give Roth a written statement of reasons on which they had relied in deciding not to offer him a contract for the next academic year; that they schedule a hearing before June 30, 1970, at which he might respond to the stated reasons; and then that within 15 days after the hearing they notify his counsel either that he will or will not be offered a contract for the coming academic year; or in the alternative to such notice and hearing that defendants offer Roth a contract as a member of the faculty for the academic year 1970-1971, on as favorable terms as his previous contract. (A. 174-175)

In his memorandum opinion accompanying the order and judgment, the District Judge went beyond the particular case, and held broadly and apparently with respect to all probationary university professors, as follows:

> "* * * 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. 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." (A. 166-167)

In a footnote the opinion states that these "minimal" requirements may be met by an offer to give a statement of reasons and hearing on written request. (A. 167)

The court did not decide the merits of the controversy as to whether the failure to employ Roth for another year, as distinguished from failure to give him a statement of reasons and hearing, violated his constitutional rights. That question remained at issue in the District Court and was not presented on appeal.

The defendants filed a notice of appeal on April 10, 1970 (Docket Entry 34), and moved for a stay of the Court's order of March 12 pending appeal. (Docket Entry 37) An order granting the stay was entered May 15, 1970. (Docket Entry 38)

The United States Court of Appeals for the Seventh Circuit on July 1, 1971, rendered its decision holding in part:

> "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." (A. 181)

The defendants on or about July 8, 1971, filed a motion for a stay of the Court of Appeals mandate which stay was granted on July 14, 1971.

On August 3, 1971, defendants' petition for certiorari was docketed in the Supreme Court of the United States. The petition was granted on October 26, 1971.

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* Footnote Omitted.

SUMMARY OF ARGUMENT

The decision under consideration has created instant tenure by entitling all probationary faculty to a statement of reasons and a hearing on the non-renewal of their contracts, regardless of whether the decision not to renew was based on a change of curriculum, a drop in enrollment or competency.

This decision, if allowed to stand, will vitiate tenure by destroying any real distinction between the tenured and non-tenured faculty or, in the alternative, will embroil the State and Federal Courts in the daily administration of the University.

The result was arrived at under *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961), by equating the private interest against the public interest. We respectfully submit the court erred in this comparison.

The factual private interest established in the record was the loss of employment opportunity at one State University. The court assumed, through judicial notice, that this loss of opportunity would possibly haunt and have a lasting effect on future employment opportunities. As against this assumption the court equated the risk of losing a distinguishable system of tenure. The decision foresaw, however, that tenure could be saved by judicial recognition, in a case-by-case basis, of minimal grounds for non-retention.

The court failed to acknowledge the principle that the judiciary should not be involved in the daily administrative decisions of the University. Nor did the court apparently consider the possibility of the University avoiding the administrative hearings and court review by keeping an undesirable or untalented instructor. Nor did the court consider that those who have the responsibility of making such administrative determinations will, predictably, have an absolute abhorrence of having to defend their opinions on competency in an administrative confrontation. No other imaginable situation could

possibly create greater difficulty in the sensitive area of personnel relations. Nor did the court consider the difficulty of conducting such hearing and the lack of practical benefit from such hearings.

Universities cannot be run on a case-by-case basis nor can administrative decisions be arrived at through the judicial process. Administrators will be prone to retain the incompetent, in all but the most extreme cases, in an attempt to avoid the administrative hearing.

Tenure will be emasculated and the universities of this country will have lost one of their chief administrative tools for the achievement of academic excellence.

ARGUMENT

I. The Rule Established In Roth Is Applicable To All Governmental Employment.

The principles established in *Roth* are not limited to institutions of higher education but are equally applicable to all governmental employment. There is no logical reason why the decision in *Roth* should be restricted to a particular class of governmental employment, nor has it been so restricted. *Myrsiades v. Towne* (W.D. Wis., Oct. 4, 1971, No. 70-C-52)./[3]

/[3]The District Court held in denying the Employer's motion to dismiss the Complaint:

> "I now conclude and hold that in some measure, a vocational rehabilitation counselor employed by a state government on a probationary basis is entitled to procedural protections with respect to a decision to terminate his employment.
>
> "The procedural constitutional guarantees available to one in plaintiff's position — a probationary state employee on the job for only about four months — should be minimal." (State law provides for a six-month probationary period, sec. 16.22, Wis. Stats., 1969, prior to the acquiring of permanent employee status under state civil service.)

The argument that follows is, in our opinion, applicable to all governmental employment although reference will be confined to higher educational institutions of the state.

II. Under Roth, Either The Courts Will Be Directly Involved In Selecting The Faculty Or The Schools Will Ignore Any Distinction Between The Tenured Faculty And The Probationer.

David Roth was not discharged from the University. His contract of employment ran for one academic year and he was employed for that full year (A. 105, 116). The plaintiff was hired for this one year as a probationary employee under sec. 37.31, Wis. Stats., 1967, which provided for tenure after four years of continuous employment. Under the *Roth* decision, the employer must furnish the probationary employee with a statement of reasons and a hearing on those reasons if the contract is not going to be renewed./[4] Under sec. 37.31, Wis. Stats., 1967, a tenured member of the faculty may not be discharged except upon written charges and a hearing if requested.

The difference between a tenured member of the faculty and a non-tenured or probationary member of the faculty is now, under *Roth*, a matter of degree. What that degree of difference is, is not clear and, in our opinion as well as in the dissenting opinion of the Hon. F. Ryan Duffy, subject to erosion (A. 186).

/[4]Although the decision in *Roth* held that the Constitution required such procedures, the District Court did not "* * * foreclose more considerate procedures, which permit the professor to waive procedural rights* * *." (A. 167 N. 2)

Although the pivotal issue in Roth would seem to be procedural due to process, this is, in fact, merely the opening of the door to judicial inquiry as to what constitutes an "appropriate" reason for non-renewal.

The District Court decision acknowledges that the reasons for non-renewal may include a "very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate" (A. 164) and that these reasons would necessarily differ between the newcomer and the professor who had won a "certain measure of acceptance" (A. 164).

If *Roth* is to stand, the schools will necessarily provide the hearings. However, through the vehicle of the administrative hearings the courts, Federal as well as State, will be called upon to decide these matters on the merits by determining what satisfies the requirement of an "appropriate" reason for non-renewal. The courts will be setting the criteria for the selection of the faculty and will, in fact, become the final arbiters, a concern expressed in the dissenting opinion of Judge Duffy (A. 184).

Further, the courts by being called upon to pass on the sufficiency of the reason for non-retention will be directly involved in the selection of the faculty and the administration of the schools. The courts will not only be determining the criteria for the composition of the faculty, but will actually be selecting the faculty by affirming or reversing the administrative decision.

This result is more aptly stated in the dissenting opinion of the Honorable John Paul Stevens in the later case of *Shirck v. Thomas* (C.A. 7th, Sept. 2, 1971, No. 18790):/[5]

/[5]Reversed 315 F. Supp. 1124 (S.D. Ill., 1970)

> "The analogy is apt because we have no guidelines other than the vague contours of the due process clause itself, and our own conceptions of appropriate policy, by which to judge the character of a school board's non-retention decision. In final analysis the 'due process' decision will not turn on any question of fair procedure but on a judge's evaluation of the substance of the administrative determination. I believe judges are qualified by experience and training to evaluate procedural fairness and to interpret and apply guidelines established by others; I do not believe they have any special competence to make the kind of policy judgment that this case implicitly authorizes. The assumption that they do invites the reaction that was produced by decisions such as *Lochner v. New York,* 198 U.S. 45, 56." (Slip opinion, p. 7)

The *Roth* decision creates a new form of tenure within the statutory tenure system of this State. In essence, it creates tenure for the probationary member of the faculty and it apparently differs only in degree from the statutory system. It is not realistic to assume that the University will maintain a separate code of procedure for the two systems of tenure. Practical expediency, if not judicial mandate, will cause a merger of the separate systems through the anticipated expansion of "minimal" due process./[6]

/[6]In *Roth,* the District Court placed the burden of proof on the professor to apparently convince the University administration that it was in error in its initial decision (A. 166-167). However, in a subsequent case involving the non-renewal of a University of Wisconsin faculty member, the Court, in denying two separate motions for a preliminary injunction, raised, but did not answer, the procedural questions of whether due process required review by a body separate than that which made the initial determination not to renew, whether such hearings included the right to summon witnesses, to confront accusers, to be represented by counsel and whether the professor had the right to a hearing even before a decision to renew had been made. *Culross v. Weaver* (W.D. Wis., Orders dated July 23, 1971, and October 13, 1971, No. 71-C-75). In our view, the "minimal" due process of *Roth* will be short-lived (A. 166).

The Court in the *Shirck* case refused to expand the minimal procedures indicated in *Roth* on the ground the plaintiff had failed to persuade the Court that such was necessary. The dissenting opinion however noted, "Under *Roth,* more than a mere opportunity to try to persuade a school administrator to change his mind is involved." (slip opinion, p. 6)

In our view, as well as in the view of the United States Court of Appeals for the First Circuit, school administrators will ignore differences, if any, between the tenured faculty and the probationer in order to avoid protracted and unpleasant administrative hearings and litigation./[7]

III. The Hearing Is Impractical And Will Serve Little Purpose.

Formerly non-renewal was merely the administrative (personnel) decision of the school. Such decisions have been transformed, by the *Roth* decision, into contested cases which will initially be heard by the administrative agency (school) acting in a quasi-judicial capacity.

Neither historically, nor legislatively, were our colleges and universities intended to be courts or quasi-judicial agencies. If the *Roth* decision stands, due process will eventually pit lawyer against lawyer before this lay body which body will be required to decide difficult constitutional issues./[8] In the words of the dissenting opinion of Judge Duffy:

/[7]*Drown v. Portsmouth School District* (C.A. 1st, 1970), 435 F. 2d 1182, 1185-1186.

/[8]Under *Pickering v. Board of Education*, 391 U.S. 563 (1969), and numerous similar decisions, the teacher has ready access to the Courts for vindication of constitutional rights. Providing for a university hearing in situations involving constitutional issues will only delay the administration of justice. In our opinion, the hearing or record produced at the University would be worthless. The findings of fact and conclusions of law of the faculty hearing or university president would similarly be of small, if any benefit to the Courts.

"Administrative bodies of this sort are not qualified to pass on such questions" (A. 184).

In our opinion, many non-renewal hearings will involve a determination regarding the validity of the administration's judgment as to the competency of the professor who is not being retained. We submit that it is wrong to equate non-renewal with discharge in any situation where there is a system of tenure. Philosophically, legally and in actual fact, non-renewal is not discharge. Discharge under a system of tenure connotes wrongdoing, whereas non-renewal may and does in most instances, concern an opinion as to that wide "spectrum of reasons" for non-renewal. These judgments do not fall within the framework of a contested case. No subject matter could be less suitable to judicial scrutiny. Non-renewal is an administrative decision, not a judicial decision, and it is not amenable to the judicial process./[9]

In the *Roth* case, the decision not to renew the employment contract was made by the president of the University, the usual and customary procedure. (A. 121-122) If, as suggested in the *Culross* case, the president may not review his own decision is he to abrogate his administrative authority to a lesser body or is the review to be made by a higher body, that is the Board of Regents?/[10] Being the administrative

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/[9]The Court in *Drown v. Portsmouth School District,* 435 F. 2d 1182, N. 11 at 1187 (C.A. 1st, 1970), stated:

> "In Roth v. Board of Regents, supra, cited with approval by appellant, the court stated '[I]t 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. . . .' 310 F. Supp. at 978. We find it difficult to believe that the scrutiny by either an administrative or a judicial hearing of a decision made on such nebulous but admittedly valid grounds would afford a teacher meaningful protection from arbitrary decisions.
>
> "Similarly, we think a requirement that a teacher be afforded an administrative hearing if he makes a constitutional claim or a claim of an actionable wrong, see Sindermann v. Perry, supra, offers the teacher little more protection than the status quo. Presently, the teacher can make such a claim in the courts, a forum undoubtedly more suited to evaluating them."

/[10]*Culross v. Weaver,* (W.D. Wis., orders denying a preliminary injunction dated July 23, 1971, and October 13, 1971, No. 71-C-75), see N. 6.

decision of the University's chief executive officer common sense as well as sound administrative practice indicates that the Regents would be required to conduct such hearing, if the president's decision is to be overruled. This procedure is the procedure required under sec. 37.31, Wis. Stats., for the discharge of a tenured member of the faculty.

The impact of having the Board of Regents conduct hearings on every case of non-renewal, or even if limited to those cases where requested, is staggering./[11] However, this is the only possible procedure if administrative authority is to remain in the university or college president.

Surely, no one wants the faculty to be selected through the advocacy system as suggested in *Culross*./[12] Again, in the words of Judge Duffy:

> "It is my personal opinion that the decision of the District Court is both unwise and unworkable" (A. 184).

The giving of reasons for non-renewal is impractical. Although the actual decision not to renew was made by President Guiles, his decision was based on the views of the tenure committee of the Department of Political Science and on the recommendations of the Dean and Vice President for Academic Affairs (A. 122). Every person involved in this decision-making process may have had several "subtle and difficult to articulate" reasons in support of non-renewal.

/[11]The Board of Regents of the University of Wisconsin System (Ch. 100, Laws of 1971, merged the defendant-board and its institutions with the University of Wisconsin and its several institutions) has under its jurisdiction thirteen four-year institutions of higher education and numerous two-year campuses or branches. The Board is a policy-making body generally meeting once a month and the Regents receive no compensation. (Chs. 36 & 37, Wis. Stats., 1969, and Ch. 100, Laws of 1971). The dissenting opinion noted that in 1970, the prior State University System had notified 206 non-tenured teachers of non-renewal. (A. 185)

/[12]See N. 6.

Literally, the *Roth* decision requires that the thought processes of all persons involved in arriving at the final administrative decision not to renew be reduced to a statement of reasons so that they may be demonstrated and subjected to attack in an administrative hearing and subsequently passed upon by the courts in a case-by-case review.

IV. The Court Erred In The Balancing Of Interests.

(a) Non-renewal of the Probationer's Contract Has Little Influence on Future Employment Opportunities

In *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy,* 367 U.S. 886, 895 (1961), the procedures due process may demand were found to depend on the "precise" nature of the governmental function and the private interest involved. The Cafeteria Case seems to imply that if the discharge carries with it a stigma that would foreclose future employment opportunities, due process may require notice and hearing prior to discharge.

The *Roth* decision found such a stigma in the non-renewal of a probationer's contract (A. 163). In actual fact the record shows the only established effect was the inability of Roth to be employed at one particular institution (A. 162), the same finding of this Court in the *Cafeteria & Restaurant Workers* case, 367 U.S. at 896. After this one established fact, the decision finds, through the use of judicial notice, prolonged and possibly severe and permanent consequences to the probationer (A. 163, 165). In our opinion, this conclusion is of doubtful validity. Employment opportunities are more influenced by economic and enrollment trends than by the mere fact of non-renewal. We venture that in the academic community little or no significance is attached to a non-renewal.

In our view the decision below failed to place any weight on the fact that the plaintiff was a probationer under a state statutory tenure system. It is true the distinction between discharge and non-reappointment is immaterial when the protection of First Amendment rights by the court is the issue, *Pickering v. Board of Education,* 391 U.S. 563 (1968). But it is equally true that this distinction cannot be ignored and is material in assessing the nature of the interest involved for the purpose of determining whether a hearing is required. This distinction is recognized in law and in practice, for surely discharge of a tenured member of the faculty leaves an entirely different impression not only on the academic community but on the general public.

The plaintiff was not discharged. His employment terminated under the following contractual provision:

> "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" (A. 117).

The plaintiff had a nine-month contract of employment. Under University rules the plaintiff was entitled to and did receive notice by February 1, that his present contract would not be renewed for the following academic year (A. 121, 124). In our view, the harm experienced by the probationer may more realistically be expressed as inconvenience and the cost of relocating.

In the view of the dissenting opinion, the employe in the *Cafeteria & Restaurant Workers* case was branded as a security risk, 367 U.S. at 901.

Under the circumstances of the *Roth* case, any imputation or branding that would affect the probationary teacher's employment opportunities is less than that presented by the facts in the *Cafeteria & Restaurant Workers* case, 367 U.S.

at 898, for it is generally accepted that the better one's education the more opportunities are available. Nor is it proper, in our opinion, to compare the facts in *Roth* to the facts as found by the Court in *Birnbaum v. Trussell,* 371 F. 2d 672, 679, (C.A. 2d 1966), where the discharge was "* * * well calculated to injure appellant's career as a physician both in private and public practice." Similarly it seems to us that you cannot compare *Roth* to the situation where the interest involved is "* * * the very means by which to live * * *" *Goldberg v. Kelly,* 397 U.S. 254, 264 (1970).

The Constitution cannot and does not afford protection against inconvenience or every loss. Due process of law should not be invoked to protect us from every vicissitude of life. If the nine-month probationary employe has a right to a statement of reasons and hearing in the non-renewal of his contract, then surely permanent employes have the right to notice and hearing on salary adjustments or any administrative decision that affects them.

(b) The Public Interest

As stated previously, if the administrative decision of selecting the faculty is to become a contested case, the university hearing will be subject to state and federal judicial review. Judicial interposition in the day-to-day operation of the university will necessarily result, a situation this Court has been careful to avoid. *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968). This was of major concern to the dissenting judge (A. 134), but was a public interest not considered in either the opinion of the District Court or in the majority opinion of the Circuit Court. The District Court gave consideration to the public's interest in maintaining a tenure system and noted that the distinction between tenure and absence of tenure might shrink and disappear (A. 165). However, the District Court apparently reasoned that this distinction is to be maintained or is maintainable through a case-by-case

application (A. 166). We suggest few, if any, university administrators can or will be willing to operate a university on a case-by-case basis. In *Drown v. Portsmouth*, 435 F. 2d at 1186 the First Circuit recognized this inevitable consequence stating:

> * * *
>
> "* * * but the very existence of the right of a non-tenured teacher to such a hearing would have two side effects, equally unfortunate. In the first place, administrators would be less likely to recommend that teachers not be rehired if they knew that such a decision might require them to go through the time, expense, and often the personal discomfort of a full scale hearing. In such circumstances, the school board is more likely to tolerate incompetent teachers. At the same time, administrators would, to avoid these difficulties in the future, follow a counsel of over-caution in their hiring practices. The innovative teacher would have a more difficult time finding employment if school districts fear they cannot afford to take a chance on him. And the schools would be left with a teaching force of homogenized mediocrities. * * *"

The interests of higher education in achieving academic excellence through a recognized and recognizable statutory system of tenure, in our opinion, far exceeds the inconvenience the probationer suffers through non-renewal.

V. The Decision In Roth Is In Conflict With The Decisions Of The Circuits That Have Considered The Question.

In *Drown v. Portsmouth School District* (C.A. 1, 1970), 435 F. 2d 1182, *cert. den.* 39 U.S.L.W. 3511 (May 17, 1971), the court concluded that a probationary teacher under a system of tenure was entitled to a statement of reasons for non-renewal but that the interests involved and the benefits that could possibly be derived from a hearing on the stated reasons did not surpass the public interest and did not warrant the requirement of providing such hearings.

In *Orr v. Trinter,* 444 F. 2d 128, 135 (C.A. 6th, 1971), *Petition for cert. filed* Aug. 18, 1971), the issue involved a probationary teacher. The court concluded that if the reason for non-renewal violated the plaintiff's constitutional rights, relief could be granted under 42 U.S.C. § 1983 and the court would not "* * * confer certain tenure privileges upon non-tenured teachers * * *" by requiring a statement and hearing. The court was of the view that public interest exceed the interests of the teacher. Also see *Freeman v. Gould Special School District of Lincoln Co. Arkansas,* 405 F. 2d 1153 (C.A. 8th, 1969), *cert. den.,* 396 U.S. 843 (1969); *Jones v. Hoffer,* 410 F. 2d 1323 (C.A. 10th 1969), *cert. den.,* 397 U.S. 991 (1969).

Parker v. Board of Education of Prince George's County, Maryland, 237 F. Supp. 222 (D. Md. 1965), *aff'd per Curiam,* 348 F. 2d 464 (C.A. 4th, 1965), *cert. den.,* 382 U.S. 1030 (1966), held that a probationary teacher is not entitled to a hearing on non-renewal. However, the District Court opinion did mention the fact that the teacher had been able to present his side to his superiors, 237 F. Supp. at 228.

The First, Sixth, Eighth, Tenth and apparently the Fourth Circuits have found that a probationary teacher is not entitled to a hearing, and with the exception of the First have not required a statement of reasons. These Circuits refused to create a system of tenure for the probationary teacher and in those instances where discussed, found the public interest to far exceed the interest of the teacher.

In *Ferguson v. Thomas,* 430 F. 2d 852 (C.A. 5th, 1970), the court found an "expectancy of continued employment" arising out of the college treating the non-renewal as a discharge in fact and that it was the practice for the school to base non-renewal on a showing of cause. Accordingly, the court set minimum procedural standards, 430 F. 2d at 856. Following the *Ferguson* case, the court in *Sindermann v. Perry,* 430

F. 2d 939, 944 (C.A. 5th, 1970, *cert. granted* No. 70-36), established a dual system of procedure, one for the tenured teacher or teacher with expectancy of employment and another system for those not having tenure or expectancy. Significant to us is that in instances of the non-tenure or non-expectancy situations, the court held that the college would not be required to give reasons and any such requirement would be to deny the college freedom of contract. It is difficult to appreciate what possible benefits could result from a hearing where the teacher must show a wrong in a situation where the college need not have or state any reason for non-renewal.

As we analyze the decisions of the Fifth Circuit, it appears that the teacher who has acquired some form of tenure, either under law, by practice or custom, or by long continued service, *Lucas v. Chapman,* 430 F. 2d 945 (C.A. 5th, 1970), is entitled to some sort of confrontation. The non-tenured teacher (tenure used in the broad sense as described above) or in other words, the probationer is not entitled to a hearing meeting the requirements of minimal due process as set forth in *Ferguson,* 430 F. 2d at 856. Further, the probationer is only entitled to some very minimal procedure if the claim is made that non-renewal was based on constitutionally protected activity of the probationer. Also see *Thaw v. Board of Public Instruction of Dade County, Florida,* 432 F. 2d 98 (C.A. 5th, 1970).

Our analysis of the Fifth Circuit shows a sharp conflict between that Circuit and the Seventh. The ruling in the Fifth Circuit does not provide a minimal due process hearing for the probationary teacher. The probationary teacher in the Fifth Circuit is *not* entitled to a statement of reasons for non-renewal and is only entitled to some sort of confrontation

if the claim of constitutional infringement is made. In the Fifth Circuit, non-renewal may be based on any reason or no reason, 430 F. 2d at 944. The *Roth* decision to the contrary entitles a probationer to a hearing in all cases and there must be a reason for non-renewal and that reason must be an appropriate reason in the eyes of the court.

The reason for not renewing a contract may be based on shifts in curriculum or a drop in predicted enrollment. These decisions do not reflect on the non-renewed teacher but nevertheless must, under *Roth,* be stated and subjected to a hearing. The reasons for non-renewal may include an attempt to secure better qualified personnel or it may involve the competency of the non-retained teacher which prior to *Roth* did not necessarily reflect on the teacher but under *Roth* surely will. In these instances of administrative hearings by the University, as well as in many others, and regardless of any claim by the teacher of constitutional infringement, the teacher will have the right to judicial review. Under Wisconsin law administrative hearings involving a contested case are subject to judicial review. State courts may and will be asked on appeal to review the administrative record to determine whether the reason or reasons are appropriate and whether the decision not to renew is supported by substantial evidence in view of the entire administrative hearing record./[13]

When the non-renewed teacher asserts that the stated reasons are false and that the true reason involves infringement of constitutionally protected activity, the federal courts may well be asked to determine the truth and even if a constitutional issue is not established, the court may determine the matter on pendent jurisdiction.

/[13]Ch. 227, Administrative Procedure and Review, Wis. Stats., 1969, ss. 227.01 (2) and 227.20, Wis. Stats., 1969.

The *Roth* decision has made the determination not to renew a judicial decision, a contested case. Judicial review of these administrative hearings will necessarily follow.

The *Roth* decision appears to be unique in its granting of tenure to the probationary faculty.

We have a somewhat vague feeling that perhaps the Seventh Circuit is having second thoughts on the *Roth* requirements. This feeling is only premised on the fact that the court in *Shirck v. Thomas,*/[14] refused to enlarge on the procedural rights of the probationary teacher to have more than a "glimpse at the reasons and a minimal opportunity to test them" (A. 180).

We suggest that even under such minimal rights and even if they remain minimal, the hearings will have great potential for personal involvement and conflict between the probationary employe and those who not only have the obligation to judge competency but will, under *Roth,* have the responsibility and duty to defend their opinions. The inevitable result of *Roth* will be tenure for the probationary employe.

/[14]*Shirck v. Thomas,* No. 18790, Slip opinion, P. 5.

CONCLUSION

It is respectfully submitted that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed and the cause remanded to the District Court for the Western District of Wisconsin for further proceedings.

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