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LAW REVIEW:

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.

BRIEF OF THE CITY OF NEW YORK, *AMICUS CURIAE*

Interest of the *Amicus Curiae*

(1)

The Board of Higher Education of the City of New York is the governing body which operates the City University of New York, a complex of colleges, community colleges, a graduate division and a school of medicine (Mt. Sinai). The Board employs approximately 5,000 teachers who are eligible to obtain tenure, of whom about 1,771 are in the probationary period.

The Board of Education of the City of New York employs about 66,000 teachers, of whom approximately 22,000 are in the probationary period. The City of New York and its agencies employ about 198,000 in the Civil

Service, of whom approximately 6,200* are in the probationary period.

The tenure system for the instructional staff of the Board of Higher Education is similar to that for almost all of the employees of the City of New York and of the New York City Board of Education. The Board of Higher Education can grant tenure to those members of the instructional staff who have served "at an annual salary for five years continuously". Education Law § 6206 (3) (b). Once tenure is granted, a member of the teaching staff can only be discharged for cause after being served with reasons for the discharge and being accorded a hearing on those reasons. *Id.* at § 6206 (10).

(2)

An overwhelming majority of New York City's several hundred thousand employees have tenure. Once they achieve tenure they cannot be removed except on written charges which must be proved at a hearing. Dismissal after such a hearing is subject to court review under New York Civil Practice Law and Rules (NYCPLR), Article 78. The same procedure is required to impose any disciplinary punishment on a tenured employee. The courts, in the course of their review, may modify the punishment, including dismissal. NYCPLR § 7803, subd. 3; *Matter of Nagin* v. *Zurmuhlen,* 6 A D 2d 677, 173 N.Y.S. 2d 899 (1958).

It is general knowledge that there are public employees who are incompetent or inefficient. Yet a disciplinary proceeding to remove a tenured employee for incompetence alone is extremely rare. Among those in the Appeals Division of the New York City Corporation Counsel's Office, which handles all court reviews of disciplinary pro-

* The number of persons on probation in 1970 is unusually low. Because of its fiscal difficulties the City imposed a "freeze" on new appointments and, as a result, new appointments have been made only when it was urgently necessary to fill the position.

ceedings, there is no recollection of any such case in the past 25 years. In a case which did not arise in New York City, a demotion for incompetence was modified by the courts to a demotion for the period that elapsed between the time the employee had been suspended and the time of the court's decision. *Matter of Carville* v. *Board of Education of Utica City School District,* 11 A D 2d 903, 202 N.Y.Supp. 2d 578 (1960), mod. 11 A D 2d 1092, 206 N.Y.S. 2d 868 (1960).

The failure to bring proceedings to remove incompetent tenured employees is understandable. Normally, the inability to perform work adequately is not displayed by a dramatic incident. Incompetence may consist of doing work more slowly than the norm; of using poor judgment more often than others; or of other lapses which are difficult to document. A supervisor of a number of employees is usually aware of who among them are the least competent—those to whom he will never assign a task when it is important that it be well done or performed with reasonable promptness. Where employees are protected by tenure rights, such supervisors are often aware that some of the employees are so lacking in competence that he assigns to them the least important tasks.

Why, then, does not such a supervisor take steps to have such employees removed? First, in order to do so he must establish evidence of the incompetence. Even in the case of a clerk this may be difficult to do. A mere general knowledge of the clerk's lack of competence will not suffice. It must be proved. He must prepare a dossier, usually by devoting much time to reviewing the daily work of the clerk. Often, this would require the neglect of more important duties of the supervisor.

Second, even if the evidence is assembled, it does not necessarily follow that the employee will be dismissed or that, if dismissed, the dismissal will be sustained by the courts. What is regarded by those in charge of a department as a dereliction serious enough to warrant dismissal is, at

times, regarded by the courts of this state as less serious and, therefore, as warranting lesser punishment. See, e.g., *Matter of Mitthauer* v. *Patterson*, 8 N Y 2d 37, 167 N.E. 2d 731 (1960); *Matter of Bovino* v. *Scott*, 22 N Y 2d 214, 239 N.E. 2d 345 (1968); *Matter of Picconi* v. *Lowery*, 28 N Y 2d 962, 272 N.E. 2d 77 (1971).

It is apparent that one of the reasons why charges of incompetence are not brought is the fear that, after all the effort involved, the employee will not be dismissed. Moreover, supervisors hesitate to bring charges because they believe that, if they do, they will be regarded by their subordinates and others as excessively harsh.

The provision for a probationary period in which, or at the end of which, an employee may be dropped without specific charges has eliminated many incompetents before they gained tenure. If the probationary instructor in the present case is successful, it would probably be on a ground which would prevent the discharge of any probationary employee without charges.

It should also be observed that establishing the incompetence of a college instructor is generally far more difficult than showing the incompetence of a clerk. What constitutes competence in an instructor is often intangible. It depends on many factors, many of which cannot be standardized or measured with precision. For example, ability to arouse students to interest in the subject that he is teaching and his ability to command their respect. Even the fact that a college teacher is not maintaining an awareness of current developments in his own teaching subject may be difficult, if not impossible, to establish.

(3)

The use of a probationary trial period for civil servants is not novel. In New York it goes back to 1883. *People ex rel. Sweet* v. *Lyman*, 157 N.Y. 368, 378, 52 N.E. 132, 135 (1898). Apparently the federal government had such a

practice as early as 1871 and Great Britain has used it since 1855 (*Ibid.*). It has been said (*id.,* at p. 380):

> "It is manifest that actual trial of an appointee in the place which he seeks would furnish better means to accurately determine his fitness and merit than would any mere examination that could be had."

In most instances in New York the appointee who must serve a probationary period has previously taken an examination in competition with others and has been appointed from the top of the resulting civil service list. In the case of instructional personnel of the Board of Higher Education there is no such prior examination. Appointments are made originally on the basis of a resumé, recommendations and oral interviews. Obviously no one normally can predict on such a basis that the person employed will be a competent teacher, measuring up to the standards of the college in which he will teach. It is only during the probationary period that there is an opportunity to find out whether the original appraisal was sound. Sometimes inadequacies are found which are obvious and can be proved. Often, as we have previously pointed out, the inadequacies are of such a nature that they cannot be documented or otherwise clearly proved.

The New York Courts have consistently held that a nontenured teached can be refused reappointment without the giving of reasons therefor, or a hearing. *Matter of Pinto* v. *Wynstra,* 22 A D 2d 914, 255 N.Y.S. 2d 536 (1964); *Matter of McMaster* v. *Owens,* 275 App. Div. 506, 90 N.Y.S. 2d 491 (1949); *Matter of Grace* v. *Board of Education,* 19 A D 2d 637, 241 N.Y.S. 2d 429 (1963); *Matter of High* v. *Board of Education,* 169 Misc. 98, 6 N.Y.S. 2d 928 (1938), affd. 256 App. Div. 1074, 11 N.Y.S. 2d 669 (1939), affd. 281 N.Y. 815, 24 N.E. 2d 486 (1939).

The same principle has been held to be applicable to probationary civil servants generally. *Matter of Gordon* v. *State University of New York at Buffalo,* 35 A D 2d 868, 315

N.Y.S. 2d 366 (1970), affd. 29 N Y 684 (1971); *Matter of Smith* v. *Chambers,* 32 A D 2d 949, 303 N.Y.S. 2d 722 (1969), affd. 26 N Y 2d 876, 258 N.E. 2d 102 (1970); *Matter of Rosenberg* v. *Wickham,* 36 A D 2d 881, 320 N.Y.S. 2d 567 (1971). Cf. *Albury* v. *New York City Civil Service Commission,* 32 A D 2d 895, 302 N.Y.S. 2d 3 (1969), affd. 27 N Y 2d 694, 262 N.E. 2d 219 (1970).

However, when it can be shown that the discontinuance of the employment was based on grounds that make such action arbitrary and capricious, it will be set aside. *Matter of Maynard* v. *Monaghan,* 284 App. Div. 280, 131 N.Y.S. 2d 556 (1954). See *Matter of Going* v. *Kennedy,* 5 A D 2d 173, 176, 170 N.Y.S. 2d 234, 237 (1958), affd. 5 N Y 2d 900, 156 N.E. 2d 711 (1959); *Matter of Delicati* v. *Schecter,* 3 A D 2d 19, 21-24, 157 N.Y.S. 2d 715, 718-721 (1956).

If the employee, by petition or proof raises a substantial issue of fact as to whether the determination was made in good faith, he is entitled to a trial on this issue. *Matter of Pangburn* v. *Plummer,* 36 A D 2d 883, 320 N.Y.S. 2d 578 (1971). In New York, a trial has been ordered where the petitioner has shown that his discharge was due to a personality conflict. *Matter of Ramos* v. *Department of Mental Hygiene of the State of N.Y.,* 34 A D 2d 925, 311 N.Y.S. 2d 538 (1970); *Edell* v. *Municipal Broadcasting System of the City of New York,* 9 Misc 2d 220, 169 N.Y.S. 2d 993 (1958).

ARGUMENT

The due process clause of the Fourteenth Amendment does not require that a probationary employee in a tenure system be given written reasons and a hearing on those reasons before such employment is terminated.

On this appeal we are not dealing with the question of the rights of a probationary employee whose dismissal resulted from the exercise of a constitutional right. It is

the petitioner's contention that in any case of a dismissal of a probationary employee a failure to give reasons for the non-renewal of his contract as well as a hearing at which the reasons can be challenged is itself a violation of the due process clause.

The requirements of due process are flexible and differ in response to the nature of the proceeding and the character of the rights involved. *Hannah* v. *Larche,* 363 U.S. 420, 440 (1960). With respect to public employment, this court has held that due process does not require a probationary employee to be given reasons and a hearing prior to discharge. In *Vitarelli* v. *Seaton,* 359 U.S. 535, 539 (1959), the court acknowledged the power of the Secretary of the Interior to discharge summarily an employee without the giving of any reason.

In *Cafeteria Workers* v. *McElroy,* 367 U.S. 886 (1961), this court stated (p. 896):

> "The Court has consistently recognized that * * * the interest of a governmental employee in retaining his job can be summarily denied. It had become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer."

In *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), this Court, in holding that a hearing must be given a welfare recipient prior to the termination of benefits, distinguished such a situation from the right of the Government to terminate employment without a hearing, citing *Cafeteria Workers* (397 U.S. at p. 263, fn. 10). See also, *Freeman* v. *Gould,* 405 F. 2d 1153 (8th Cir., 1969), cert. den. 396 U.S. 843 (1969).

(1)

It is submitted that strong policy considerations support a determination by this Court permitting a college or uni-

versity operated by a state or city to continue to summarily discontinue the employment of a probationary instructor at the end of the school year. In a tenure system once an instructor has achieved tenure, he cannot be dismissed except "for cause" and after he has been given a hearing. In New York City a tenured instructor may be removed "for cause", *i.e.*, "incompetent or inefficient service", "neglect of duty" and "conduct unbecoming a member of the staff" (New York Education Law, § 6206, subd. 10). Thus, once a member of the teaching staff is granted tenure, the Board is not able to remove him even if it believes that another applicant for the position would make a greater contribution to the university. The Board might feel that a tenured employee is not performing very well but, faced with the difficulty of proving incompetency in a teacher or instructor, the Board might decide that it would be futile to initiate removal proceedings.

Since the tenure system gives an employee so vested an interest in his employment, it is necessary that the Board be allowed initially to exercise a large degree of discretion in the appointment and selection procedure with respect to an instructor during the probationary period before he acquires tenure. To determine whether the instructor's employment should be continued, the Board should be able to consider many factors which might be difficult to document and prove at a hearing—the ability of teacher to relate to students, to retain their interest and to gain their respect; the relationship of teacher to other members of faculty; and the ability of teacher to grow intellectually. The Board may feel that another applicant is better qualified than a probationary instructor. To achieve academic excellence, it is necessary for a university to keep its courses current. Where some new instructors indicate a tendency not to keep current in their field, the Board's discretion in retention of probationary instructors is critical. The Board may not wish to reappoint an instructor and grant him tenure, "so as not to foreclose for a substan-

tial period of time the possibility of employing a person of much greater value to the college or of changing the nature of the college's offering". KAHN & SOLOMON, *Untenured Professors' Rights to Reappointment,* 20 Cleve. State L. Rev. 522, 530 (1971).

To require that the appointing board give a new instructor reasons and a hearing before discontinuing his employment would destroy the broad discretion of the board in selecting the personnel necessary to allow the board to strive for academic excellence. Educators and administrators would spend a significant amount of their time defending their positions at non-appointment hearings. The requirement that reasons be given and a hearing held would create an adversary atmosphere in which those supervising and reviewing the work of new instructors would be placed on the defensive, having to document each decision not to reappoint. Rather than give written reasons, hold a hearing and subject the matter to judicial review, the board would tend to continue the employment of the probationary instructor despite reservations about the probationer's abilities. This would have a deleterious effect on the quality of the teaching staff. It would be particularly true in a large institution like the City University of New York where the number of non-tenured instructors refused reappointment is in the hundreds.

It must be emphasized that the Board is comprised of and employs administrators who, because of their expertise, are well qualified to select, without review, members of the teaching staff. The members of the Board are public officials who are presumed to act in good faith and in accordance with the law. See, *Utah Power and Light Co.* v. *Pfost,* 286 U.S. 165, 190 (1932); *Horne* v. *United States,* 419 F 2d 416, 419 (Ct. Cl., 1969). It would be unwise to require the Board to undertake a burdensome procedure to prevent a possible occasional injustice to a probationary employee. The procedure of the Board of Higher Educa-

tion of the City of New York for the appointment of permanent employees or the reappointment of probationary employees is designed to ensure that every employee is given fair treatment. Appointments to tenure made by the Board of Higher Education are upon the recommendation of the President of the College (By-Laws of the Board of Higher Education of the City of New York § 6.6). The President, in making his recommendations, is required to consult with the appropriate departmental and faculty committees (*id.* at § 8.11 subd. b; 9.1, 9.2). The departmental committees may contain up to five members, and the faculty members may exceed five [*id.* at 8.11(a), 9.1(d)].

Where the decision not to reappoint rests on the views of many different people, it is difficult, if not impossible, to compile a statement of reasons which reflect the basis of the decision. Each individual participating in the selection process may have a reason for denying reappointment different from another member of the appointing staff.

It should be borne in mind that the absence of a hearing and reasons does not prevent an employee from showing by petition to the proper court that his dismissal was the result of his exercise of a constitutional right or a right guaranteed by a statute. See *Pred* v. *Board of Public Instruction of Dade County, Florida,* 415 F. 2d 851 (5th Cir., 1969); *Albaum* v. *Carey,* 283 F. Supp 3 (E.D.N.Y., 1968). *Matter of Tischler* v. *Board of Education, of Monroe,* 37 A D 2d 261, 323 N.Y.S. 2d 508 (1971). Additionally, in New York the probationer has a judicial remedy if he can show that the determination not to reappoint him was arbitrary and capricious (*ante,* p. 6).

It is submitted that the present scope of judicial review available to a dismissed probationer is adequate. The university administrators should not have the additional burden of issuing a statement of reasons and holding a hearing prior to non-retention.

CONCLUSION

The judgment appealed from should be reversed and the cause remanded to the District Court for the Western District of Wisconsin for further proceedings.

December 14, 1971.

Respectfully submitted,

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of the City of New York,
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