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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.

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.

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

The petitioners, The Board of Regents of State Colleges, and Roger E. Guiles respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 1, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix. The opinion of the District Court for the Western District of Wisconsin is reported in 310 F. Supp. 972 and is printed in the appendix.

JURISDICTION

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. This petition for certiorari was filed within the period of the 30 day stay of mandate. This Court's jurisdiction is involved under 28 U.S.C. § 1254 (1).

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]

/[1]The Legislature has since increased the probationary period to six years Ch. 233, Laws of 1969, effective November 26, 1969.

STATEMENT OF THE CASE

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]

David F. Roth, respondent, hereinafter referred to by name, was employed by the Board of Regents of State Universities on June 12, 1968, as an assistant professor at the Wisconsin State University-Oshkosh for one academic year commencing September 1, 1968 and ending June 30, 1969. He had never before been employed in the State University system.

Dr. Roth's contract of employment provided that "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." (In this case June 30, 1969).

Roth was employed under the provisions of sec. 37.11, Wis. Stats., which authorized the Board of Regents:

> "(3) To 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."

His employment was also governed by sec. 37.31, Stats. The pertinent part was as follows:

/[2]Until recently the Board was known as Board of Regents of State Colleges and the State Universities were known as State Colleges.

> "(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. * * *"

Pursuant to the notice requirements of the Board of Regents, Dr. Roth was advised of President Guiles' decision not to employ him for the following academic year by letter dated January 30, 1969.

The letter gave no reasons which was consistent with Rule II of the Board of Regents which provided:

> "During the time a faculty member is on probation, no reason for nonretention need be given."/[3]

On February 14, 1969, Dr. Roth commenced an action in the District Court for the Western District of Wisconsin under 42 U.S.C. § 1983, asserting that the decision not to employ him for another year and the failure 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.

Dr. Roth moved for "partial" summary judgment and on March 12, 1970, the District Court entered its Memorandum Opinion and Order, which ordered and adjudged that by March 20 the petitioners 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

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/[3]Dr. Roth was not discharged but completed the academic year 1968-1969. Nonretention refers to nonrenewal of a contract and not discharge.

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 petitioners offer Roth a contract as a member of the faculty for the academic year 1970-1971, on as favorable terms as his previous contract.

In the 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."

Petitioners filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit on April 10, 1970, and moved for a stay of the Court's order pending the appeal. An order granting the stay was entered.

The Court of Appeals affirmed the judgment on July 1, 1971,/[4] holding in part:

> "* * * Necessarily our affirmance does not deprive the district court of power to modify the judgment so as to make adjustments for the passage of time or circumstances which have arisen since its entry." (See page 206 of appendix hereto.)

/[4]Hon. F. Ryan Duffy, Senior Circuit Judge, dissenting. See pages 206-216 of appendix hereto.

Petitioners' motion to the Court of Appeals for a stay of mandate pending this application was granted on July 14, 1971. See page 239 of appendix hereto.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is In Conflict With Decisions Of This Court.

The decision below notes from *Cafeteria Workers v. McElroy* (1961), 367 U.S. 886, that the case:

> "* * * 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. * * *"

However, this Court held in *Cafeteria Workers v. McElroy,* supra, on pages 896-897:

> "* * *It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer. (citing cases) This principle was reaffirmed quite recently in *Vitarelli v. Seaton,* 359 U.S. 535, 79 S. Ct. 968, L. Ed. 2d 1012. There we pointed out that Vitarelli, an Interior Department employee who had not qualified for statutory protection under the Civil Service Act, 5 USCA § 632 et seq., 'could have been summarily discharged by the Secretary at any time without the giving of a reason * * *' 359 U.S., at 539, 79 S. Ct. at p. 972."

And the Honorable F. Ryan Duffy, Senior Circuit Judge, in his dissenting opinion below states:

> "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. 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 education systems. * * *"

II. There Is A Conflict Among The Courts Of Appeal.

Judge Duffy's dissenting opinion below states:

"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 * * *. 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."

Nor is the *Roth* decision in harmony with the Fifth Circuit where the rule has been established in *Thaw v. Board of Public Instruction of Dade Co., Fla.* (1970), 432 F.2d 98, *Pred v. Board of Public Instruction* (1969), 415 F. 2d 851 and *Sindermann v. Perry* (1970), 430 F.2d 939, cert. granted June 14, 1971, 39 L.W. 3548, that a hearing need only be given in those instances where the teacher has acquired a right of expectancy or tenure or the claim is made that nonretention is grounded upon the exercise of First Amendment

rights. Also see *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). To the contrary, the *Roth* decision requires a hearing, when requested, in all cases involving the nonretention of a probationary teacher.

The *Roth* decision is not in complete harmony with the First Circuit where the Court held in *Drown v. Portsmouth School District* (1970), 435 F. 2d 1182, that a probationary teacher is entitled to a statement of reasons for nonrenewal but expressly rejected the holding below regarding an administrative hearing and held that the teacher was not entitled to a hearing on the reasons for nonretention.

III. The Decision In Roth Raises Significant Problems And Results In Sweeping Changes In The Administration Of Public Education Without Practical Benefit.

The practice of the petitioners in not giving a written statement setting forth the reasons for nonretention and hearing thereon is the "* * * customary practice at approximately 1080 public colleges and universities in the United States, with almost 300,000 faculty members * * *"/5

The giving of reasons and a hearing in every case of the nonrenewal of a probationary teacher was rejected in *Sindermann v. Perry* (1970), 430 F.2d 939, 944 as interfering with

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/5Statement from 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 as Amici Curiae.

freedom of contract to employ probationary teachers and was found that it would result in tenure by Court edict. Similarly, the District Court in the *Roth* decision noted the danger that any distinction between tenure and absence of tenure will shrink and disappear but balanced that result as against the interest of the probationary teacher and found it to be less persuasive (P. 228 appendix hereto). However, in balancing the interests of the state as against the interests of the teacher, the District Court did so in the absence of a record and apparently relied on judicial notice to arrive at a factual conclusion that petitioners assert is erroneous.

The dissenting opinion of Judge Duffy noted:

> "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." (P. 211 appendix hereto)

Academic freedom as well as academic excellence will surely suffer by the impairment of tenure.

Requiring hearings in all cases of the nonrenewal of probationary teachers will result in, as noted in *Drown v. Portsmouth School District* (1970), 435 F.2d 1182, 1185-1186, a reluctance on the part of school administrators to recommend nonretention in an attempt to avoid time consuming, expensive and possibly embarrassing hearings. The end result

will be administrative tolerance for the incompetent. Further, school administrators will exercise over-caution in hiring new teachers resulting in "a teaching force of homogenized mediocrities."

Most significant is the fact that such hearing will be purely illusory. The decision to retain or not retain a probationary teacher is an administrative decision not judicial. It cannot be made judicial or subject to judicial process for there is:

> "* * * 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." (Decision of the District Court below, p. 227 appendix hereto)

Nor can a teacher's competence be resolved by judicial process when:

> "A professor's value depends upon his creativity, his rapport with students and colleagues and various other intangible qualities which cannot be measured by objective standards." *Lewis v. Chicago State College,* 299 F. Supp. 1357, 1359 (N.D. Ill. 1969).

Similarly, if nonretention is based on budgetary consideration, changes in curriculum or the institution's desire to foster academic excellence such administrative determinations of the school are not the proper subject for an administrative or judicial hearing.

If the hearing is to deal with constitutional issues it is likely to present difficult questions of law and fact, which are ill suited to resolution at a hearing before a university president or his delegate, or a board of regents. The issues involved in these free speech cases are more properly matters for determination in Court; and Congress has given the

teacher a forum in the Federal Court to voice any legitimate grievance. (*Drown v. Portsmouth School District,* supra, pp. 1186-1187; Dissenting Opinion below, p. 209 appendix hereto.)

The requirement that reasons and hearing be offered in all cases of nonretention will be burdensome on the universities, colleges and schools affected by it. As the result of several years of extremely rapid growth, the faculties of most colleges and universities contain a high percentage of young and untested teachers. Thus in the faculty at Oshkosh there were 442 nontenured teachers in the academic year 1968-1969 out of a total faculty of about 634 — and the proportion is somewhat the same at the other eight State Universities. The leveling-out of enrollments is sure to result in many more nonretentions in 1970 and the following years. While their number does not appear in the record here, we were informed by the State Universities system that in the academic year just ended 206 nontenured teachers were notified that they would not be retained. It is common knowledge that the seller's market in teaching talent has changed to a buyer's market, as enrollments and budgets have leveled off and Ph.Ds are in abundant supply, and the universities and colleges may be expected to take the opportunity to upgrade their younger faculties by extensive substitutions as better qualified applicants become plentiful.

Nor will the probationary teacher be necessarily benefited by a compulsory statement of reasons and hearing. Such procedure will be likely in many cases to be harmful rather than helpful to the teacher's future career; for the statement will doubtless be drawn, as well as presented, to make the best case possible for nonretention, and may spread upon the teacher's record shortcomings which he would perfer to have forgotten.

The decision below will impose a very substantial burden on the universities and others similarly situated, to draft statements of reasons and hold hearings. The clear effect of which is to have the selection of the faculty subject to judicial review. Nor is the effect of this ruling limited to academic employment. Logically, the decision would apply to all state employment as well as to all local governmental employment.

It appears to the petitioners that this decision is not only in direct conflict with two Circuits but far exceeds in scope and impact the decisions of those Circuits which have had the occasion to consider the question./[6]

This Court in granting certiorari in *Sindermann v. Perry,* supra, recognized the importance of the issues in that case. The facts of that case differ from the facts in the *Roth* case in that it appeared Mr. Sindermann could never have acquired tenure. To the contrary, in *Roth* a state statute granted tenure after a statutory probationary period. During a probationary period there clearly can be no "expectancy of reemployment," a point specifically noted and accepted by the Court in *Sindermann v. Perry,* supra, p. 944, but rejected in *Roth.* Further, it is clear under *Roth,* the school must always assign a cause for the nonrenewal of a probationary teacher's contract when requested; a view rejected by the Court in *Sindermann,* supra, p. 944. Finally, under *Roth* a hearing on nonrenewal must be given whenever requested by the probationary teacher but in *Sindermann* a hearing need only be given in those situations involving tenure, right of expectancy or where the teacher claims violation of

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/[6]We have just been advised that the Sixth Circuit on June 16, 1971, in case No. 20721 reversed the decision in *Orr v. Trinter,* 318 F.Supp. 1041 (S.D. Ohio E.D. 1970) and places the Seventh Circuit in direct conflict with the Sixth Circuit.

constitutional rights or other actionable wrong. The *Roth* decision far exceeds the issues raised in *Sindermann.* The decision of the Seventh Circuit leaves governmental employment within the Circuit subject to drastic change, if not reversed.

It is respectfully submitted that certiorari be granted.

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APPENDIX

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 FSupp. 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]/

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[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, 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 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 expertize in the ulitmate 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.

[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.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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[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.

OPINION AND ORDER OF DISTRICT COURT

MEMORANDUM (OPINION) AND ORDER

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 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.

UNITED STATES COURT of APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, JULY 14, 1971

Before

Hon. *THOMAS E. FAIRCHILD, Circuit Judge*

Hon.

Hon.

DAVID F. ROTH, etc.,
Plaintiff-Appellee,

No. 18490 vs. THE BOARD OF REGENTS OF STATE COLLEGES, et al.,
Defendants-Appellants.

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

On consideration of the motion of counsel for defendants-appellants,

IT IS ORDERED that the issuance of the mandate of this Court be stayed for thirty (30) days in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.