In the

Supreme Court of the United States

THE BOARD OF REGENTS OF STATE COLLEGES, et al.,

Petitioners,

vs.

DAVID F. ROTH,

Respondent.

No. 71-162

Washington, D. C.
January 18, 1972

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HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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THE BOARD OF REGENTS OF STATE COLLEGES ET AL., Petitioners, v. DAVID F. ROTH, Respondent : No. 71-162

Washington, D. C.

Tuesday, January 18, 1972

The above-entitled matter came on for argument at 1:48 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

CHARLES A. BLECK, ESQ., Assistant Attorney General, State of Wisconsin, 114 East, State Capitol, Madison, Wisconsin 53702, for the Petitioners.

STEVEN H. STEINGLASS, ESQ., 152 West Wisconsin Avenue, Milwaukee, Wisconsin 53203, for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-162, the Board of Regents of State Colleges against Roth.

Mr. Bleck.

ORAL ARGUMENT OF CHARLES A. BLECK, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BLECK: Mr. Chief Justice, Your Honors, and may it please the Court:

The Petitioners in this case are the Board of Regents of the State Colleges. They are now known as the Board of Regents of State Universities and, actually, to be absolutely accurate, they are now known as the Board of Regents of the University of Wisconsin System.

The other Petitioner in this case is the president of the Wisconsin State University at Oshkosh, Wisconsin. The Respondent, David F. Roth, was the employee of the Board of Regents at Oshkosh State University and I believe the enrollment at that time was in the neighborhood of 11,000 or 12,000 students.

Dr. Roth was in his first full-time teaching position. He was hired by the Board as an assistant professor for the academic year 1968-1969.

Q You call him "doctor." Is he a Ph.D.?

MR. BLECK: Yes, sir, he is.

Q And where is he now?

MR. BLECK: Your Honor, I have heard, but I had much rather you would ask the other side because I wouldn't want to give you any misinformation. I think they know, and it is just hearsay on my part.

Dr. Roth was hired for the academic year 1968-1969. He was hired under a written contract, a contract that had a fixed term, expressly fixing the term for September 1, 1968 through June 30th, 1969. The contract also expressly referred to Section 37.31 of the Wisconsin Statutes, which is our state tenure statute. This statute at that time provided that if a probationary teacher is hired for four consecutive years, he will acquire tenure or permanent status.

When Dr. Roth was hired, there was a Board rule in effect, in fact, it had been passed on March 10th, 1967, which provided that in the case of a probationary teacher, no reasons will be given for non-renewal and there will be no hearings provided by the university on the question of non-renewal. This same rule also provided that in each case of non-renewal, the professor or the employee will receive notice of that fact by February 1st. So, in effect, he has from February 1st to start looking for a new position.

The procedure at Oshkosh State University in regard to renewal or non-renewal of the probationary contracts was that the tenure committee of the particular department would

first meet and vote on whether to recommend retention or non-retention. In this case, it was the tenure committee of the Department of Political Science. That recommendation then flows up to the dean, who also makes a recommendation and from there it flows up to the vice-president in charge of Academic Affairs and thence to the president for his decision.

In this particular instance, the tenure committee met and voted to recommend retention of Dr. Roth on December 17th, 1968. Subsequently, and about five weeks later, Dean Arthur Darken approached several members of the tenure committee and asked them to review this recommendation.

On January 27, 1969 the tenure committee did meet again, did review their previous recommendation and at this time voted for non-retention. This recommendation then flowed up to the dean and the vice-president and to the president, who made his decision not to renew Dr. Roth's contract for the ensuing academic year.

This notice was given on January 30th, 1969. Dr. Roth, on February 14th, 1969 filed his complaint in the district court seeking declaratory judgment and seeking reinstatement or a contract for the ensuing academic year.

On May 16th, 1969, both parties moved for summary judgment and on March 12th, 1970, the district court granted the Plaintiff or Dr. Roth's motion in part. The decision of the district court held, one, that either the State University

would have to give Dr. Roth a contract for the next academic year or, in the alternative, that the State University could give Dr. Roth a written notice of reasons for non-renewal and a hearing on those reasons. This decision was appealed to the Seventh Circuit which affirmed the district court on July 1st, 1971.

Although I have explained the facts rather extensively, it is my opinion, Your Honors, that the facts in the Roth case are absolutely irrelevant at this time. The Petitioners are not here to defend the university's action in not renewing Professor Roth's contract.

Q Was this in the western district or the eastern district?

MR. BLECK: Western district.

Q Oshkosh is in the western district?

MR. BLECK: No, sir, I don't believe it is, but the Board of Regents is in the western district.

Q And this is Judge Doyle, I take it?

MR. BLECK: Yes, sir, it was.

Whether the university acted correctly or not is still to be litigated in the district court. The present posture of this case does not involve any question of the First Amendment rights of Dr. Roth. The issue basically is whether a state university must give a statement of reasons and a hearing on those reasons in every case of the non-renewal

of a probationary teacher's contract.

Q Well, in terms of the ultimate outcome of this case, what difference does the answer to that question make?

MR. BLECK: Well, it makes a tremendous difference.

Q I know it would in other cases. What about Roth's case.

MR. BLECK: In Roth's case? It wouldn't make any difference, Your Honor.

Q What have we got it here for?

MR. BLECK: Well, Your Honor, we have facing us --

Q Well, I grant you I understand the significance in lots of other cases, but you say that Roth already has, or you concede, all that he wants. What does he want, reinstatement? Back pay?

MR. BLECK: His complaint seeks a declaratory judgment.

Q If he wins in the district court on that issue, on being fired for constitutional rights, he will have gotten all he wants.

MR. BLECK: No, sir, he will not have gotten all he wants because the fact remains that he wants reinstatement. I assume. I don't know. This is what his complaint asks for. He hasn't changed it or moved to dismiss it or anything of this sort.

Q But you say you are not here defending his

discharge?

MR. BLECK: I am not here defending his non-renewal. The propriety of the action of the university in non-renewing --

Q You don't mean you concede it was invalid?

MR. BLECK: No, sir, I do not.

Q Okay.

MR. BLECK: No, sir. That facet of the case must be litigated.

Q All right. Go ahead.

MR. BLECK: And, to repeat, I am not confessing judgment in any way, Your Honors, but because of my personal doubt as to whether the university acted correctly in not renewing Dr. Roth's contract for the ensuing academic year, it seems to me that there is a fundamental error or wrong in the decisions below because Dr. Roth made the allegations in his complaint that his contract was not renewed because of his First Amendment rights. Now the decision below requires Dr. Roth to go to this administrative agency and to have a hearing before the administrative agency which administrative agency is the alleged wrong doer to exhaust this remedy before he can proceed in the district court to determine whether his fundamental liberties have in fact been violated.

Q Well, are you saying they should have gone ahead and tried the case in the district court right away?

MR. BLECK: Yes, sir.

Q Tried the question of whether he should have been hired on the merits?

MR. BLECK: The issue, it seems to me, Your Honor, was whether the contract was not renewed for impermissable reasons or for engaging in protected constitutional activities. If that is not established, then the non-renewal would stand.

Q Mr. Bleck?

MR. BLECK: Yes.

Q If this Court were to follow the Tenth Circuit decision that Mr. Godesman commented on in his argument, I take it even that subject wouldn't be open to litigation in the district court, would it? Because, as I understand it, the Respondent here didn't have tenure.

MR. BLECK: He did not have tenure. He was a one-year probationary teacher on his first year of teaching anywhere. In answer to your question, I would say no. I feel that if -- under the Civil Rights Act, Professor Roth would always be able to come into the district court and frame a complaint alleging that his contract had not been renewed because of his protected activities.

Q Well, what you are stating is, if he states a good plan of action under the Civil Rights Act, he is entitled to a hearing.

MR. BLECK: Yes, sir.

Q Are you saying that because you have a right to go to court, you don't have to have administrative hearing?

MR. BLECK: No, sir, I am not saying that. The basis of my argument is that an administrative hearing before an agency that is the alleged wrongdoer, such as the university, for this university to conduct on its own motives and on motives that might possibly involve fundamental liberties just doesn't seem to make sense to me, Your Honors. I think the proper form --

Q What happens with a professor with tenure? You give him a hearing, don't you?

MR. BLECK: Oh, yes, we are required to give him a hearing by law.

Q Couldn't you give the other one the same kind of hearing? Wouldn't it be just as fair?

MR. BLECK: No, sir, it wouldn't, because it seems to me that if you gave the probationary teacher a hearing, then you are destroying the very purpose of tenure. You are vitiating any distinction between the probationary teacher and the tenured teacher.

Q I thought you said that he was entitled to a hearing?

MR. BLECK: In court, Your Honor.

Q In court, yes.

MR. BLECK: In court.

Q Your only quarrel with the court of appeals is that they gave the hearing before the university administrative group rather than before the court?

MR. BLECK: That's it. That's our only complaint, Your Honor, yes, sir. The hearing should have been in the district court. These facts should have been litigated there and it is not a proper subject for an administrative hearing before a school or university.

Q Well, I come back to Justice White's inquiry. What difference does it make to you in this or any other case, once you have conceded this much?

MR. BLECK: Conceded what, Your Honor?

Q Well, it seems to me that you have conceded a good bit of your case away when you say your only posture here is that he is entitled to a hearing in the district court and not at all in the university administrative structure.

MR. BLECK: He is entitled to a hearing in the district court as to whether his fundamental liberties or First Amendment rights have been violated. I do not concede, Your Honor, that he is entitled to a hearing in the district court on any other grounds, such as scholarship, or competency, or rapport with the student body. These items are not for the district court. The only issue for the district court, it seems to me, is the one of the constitutional rights.

Q Well, I gather you say that because action

under 1983 is predicated on a denial of constitutional rights.

MR. BLECK: Yes, sir.

Q And I gather you are also saying that their predicate on this claim is a denial of First Amendment.

MR. BLECK: Yes, sir.

Q He might lose on that in the district court and there still would be open the question, mooted both here and in the other case, that he is entitled to a hearing as a matter of procedural due process which has nothing whatever to do with First Amendment facts.

MR. BLECK: That's right. It has nothing to do with --

Q It has nothing whatsoever to do with teachers as a class, does it? Wouldn't it be just as true for a taxi-cab driver, a bellhop, or a bootblack?

MR. BLECK: Well, it would be true for any governmental employee. It wouldn't necessarily --

Q A state action, I'm talking about.

MR. BLECK: Yes, sir.

Q Let's make it, more sharply, a driver for some state official, a truck driver. If he frames a complaint under the Civil Rights Act, under 1983, as Justice Brennan suggested, under the federal rules of civil procedure, among other things, he must have a hearing to determine whether or not he can make his proof. Are you saying any more than that when you call this a concession?

MR. BLECK: Not a thing, Your Honor, not a thing. I just wanted to make it clear to the Court that the issue here is due process of law and does not involve First Amendment rights of Dr. Roth at this time. The only thing is due process of law.

Q Well, could not 1983 action be predicated on a denial of due process?

MR. BLECK: Yes, sir.

Q Was this one?

MR. BLECK: Yes, sir.

Q Both on denial of First Amendment rights and denial of due process?

MR. BLECK: Yes, sir.

Q And the one that is here, the only one that is here, is the denial of due process?

MR. BLECK: Yes, sir.

Q Well, why is that here at this stage, if that is still to be litigated in the district court?

MR. BLECK: The due process question is not to be litigated in the district court, Your Honor. The district court ordered that in every case --

Q They've already decided it?

MR. BLECK: They've ordered us to give him a hearing.

Q That's right, and then that has been affirmed by the Seventh Circuit and now you bring it here?

MR. BLECK: Yes, sir.

Q You want to channel him into just a strictly Section 1983 action, nothing more?

MR. BLECK: Yes, sir.

It seems to me that the issue really is whether the Constitution recognizes a state system of statutory tenure or the maintenance of a meaningful system of tenure under state law. By creation of Section 37.31 of the statutes, the Wisconsin Legislature has recognized the importance of having a probationary period leading up to the acquisition of permanent employee status or tenure.

The probationary employee as well as the university has a tremendous interest in maintaining tenure. The district court's decision recognized this and felt that tenure could be maintained by application in a case by case basis of minimal grounds for non-retention. The circuit court decision also recognizes the danger to the tenure system. In fact, every brief in this case, it seems to me, recognizes the possibility of loss of tenure.

The purposes of tenure are, ofcourse, academic excellence or the obtaining of the best possible faculty for the student body. Tenure also affords protection for the faculty and is absolutely essential to the maintenance of academic freedom. The Roth decision does threaten tenure because it vitiates any distinction between the probationary

employee and the tenured employee. This danger would result from the fact that the universities and colleges just will not get involved in administrative hearings of this sort or in protracted litigation. They will do everything they can to avoid such hearings, including the keeping of an incompetent or unscholarly professor. I think this is borne out very clearly by the fact that we have so few discharge proceedings as against the tenured faculty and so few discharge proceedings as against the Civil Service. These things are just not done in government.

Q Could I ask you again, let's assume you had not appealed the part of the district court's order which granted him hearing rights, or you hadn't brought the court of appeals decision here and then you had won what was left to be litigated in the district court, namely the First Amendment claim, there would still be left the district court's due process decision, wouldn't there?

MR. BLECK: Yes.

Q And what does that mean in terms of the relationships between the university and Roth? Does it mean that he may not be discharged and he must be reinstated until and unless he is given a university hearing?

MR. BLECK: It was an alternative order, Your Honor, one --

Q All right, so they either reinstate him or give him a hearing.

MR. BLECK: Give him a contract or give him a hearing.

Q So the district court wouldn't be purporting to itself to try out the issues involved in his discharge on non-renewal. They would on the First Amendment side, but they wouldn't be purporting to try out whether he was fired for incompetence or whether he was incompetent?

MR. BLECK: I don't know, Your Honor. The district court decisions said that, in recognizing the danger of losing a recognizable system of tenure, the district court said that the "court will recognize minimal grounds for non-reappointment.

Now, what he meant by that, I don't know.

Q Well, anyway, the district court didn't contemplate any further proceedings until and unless the university gave him a hearing.

MR. BLECK: That's right.

Q And meanwhile, he had to be reinstated.

MR. BLECK: No, sir.

Q I see.

MR. BLECK: What happened, it was an alternative order. One, give him a contract, and I assume if we don't give him a contract we might possibly be liable for damages --

Q Or give him a hearing.

MR. BLECK: Or give him a hearing. And we immediately asked for a stay of that decision or order and immediately

appealed to the circuit court.

Q And the court didn't indicate whether or not after a hearing and a decision against Roth -- whether or not the district court would and to what extent give judicial review to that decision?

MR. BLECK: He did not indicate other than to say that he would respect minimal grounds for non-renewal.

Q Did the district court indicate what the district court would do if the university chose not to give him a hearing?

MR. BLECK: Well, then we would have to give him a contract and if we didn't give him a contract we would be in contempt of court.

Q Are you here only because you say that, on non-renewal of a non-tenured teacher, you don't have to give any hearing at all?

MR. BLECK: Yes, sir.

Q Or reasons?

MR. BLECK: Or reasons. Dr. Roth was hired with this clear understanding. This did not come as a shock to him. This was part of his agreement. He was given a nine-month contract and no more.

Q You say it is simply a matter of contract law and that the district court and court of appeal were in error in thinking that the Constitution required the courts to add

something to the contract that the parties had made. Is that it?

MR. BLECK: No, sir, I don't --

Q You don't say that?

MR. BLECK: -- I don't maintain that. I think it is a great deal more than mere contract law.

Q How much more?

MR. BLECK: I think the court has to balance the interests here.

Q Well, does the court do that in an ordinary contract case? Does it say, "Look, you really should have provided, but since you didn't provide for a hearing on this, let's say, tenantcy, year to year tenantcy, we are now going to require one?" The court doesn't do that.

MR. BLECK: I never heard of one.

Q Well, then, why is there something that is required here?

MR. BLECK: Well, I don't know, Your Honor, except that --

Q What is your -- I don't really understand your position, I guess that's my problem, although you have stated it often enough.

MR. BLECK: My position is basically this, that due process of law under the Fourteenth Amendment does not require the procedural protections of a statement of reasons or a

hearing. Due process of law just does not require it.

Q Well, then, didn't I state it correctly that you say that there is nothing in the Constitution that requires a court to add anything to the contract that the parties made in this case?

MR. BLECK: Yes, sir, I guess that's correct.

I think, in weighing the interests --

Q The hearing before the district court that you think should be held is one purely on whether First Amendment rights have been violated?

MR. BLECK: Yes, sir, that's all. I can't conceive of any other appropriate issue for the district court. Now, the district court in its --

Q I take it, even if the university conceded that they did not renew because of his exercise of First Amendment rights, that the only remedy he has is the 1983 action and the only hearing he gets is the hearing on the 1983 complaint in court, that evenin that circumstance he is not entitled to any hearing before any university group?

MR. BLECK: Yes, sir, for very, very practical reasons, because he is a probationary employee. Another thing, these situations are very, very rare, Your Honor, in my opinion and if some of these constitutional rights are infringed, I think in most cases it would be by inadvertence or ignorance of the Constitution. These are not simple

questions. And another point, I don't see how this sort of procedure that is suggested in Roth would really be of any benefit to the professor or would be of any benefit to the courts.

Q So what you say is he has no recourse?

MR. BLECK: No, sir. He --

Q Well, yes --

MR. BLECK: If he feels that his --

Q I understood you to say that he can't have it in the institution and whatever he gets in the courts is not going to do him any good.

MR. BLECK: No, I never intended to imply that, Your Honor.

Q Well, you assumed that at the district court he could find out why he was fired?

MR. BLECK: Absolutely.

Q Why? Because you said under the contract you are not supposed to give those reasons. You are not required to.

MR. BLECK: But once you are in litigation, you have all the procedural remedies of a trial. You have discovery.

Q Well, let me ask you this. Would it be cheaper for the university to give him a hearing in the university than to defend against, dollars and cents-wise?

MR. BLECK: No, sir, it would not, because we are talking about hundreds of cases of non-renewal. We are not talking about just one specific Dr. Roth.

Q Well, does anybody say that you have to give a hearing in every one?

MR. BLECK: That's what the district court ordered, that in every --

Q Not in every case. It is where requested.

MR. BLECK: Yes, in every case where requested.

Q Right. And how many of that would be "many"?

MR. BLECK: Well, there is no way of knowing, Your Honor, but there are --

Q Well, why is it that you -- it's the first time I ever heard of somebody that wants to litigate something. Usually everybody tries to get away from litigation.

MR. BLECK: It would be an unnecessary and time-consuming and wasteful procedure to put not only the school through, Your Honor, but it would be wasteful for the professor himself.

Q Not if his salary goes on if he requests a hearing and not if his salary goes on until the hearing is over.

Q Well, Mr. Bleck, if he proves that something was inadvertent, the case is over with. You haven't yet told me why an administrative hearing is fruitless, other than to

say it is the alleged wrongdoer itself, but maybe this is the purpose of these hearings.

MR. BLECK: Well, first of all, the statement of reasons. I don't know what type of case we're talking about, whether we're talking about a case that involves First Amendment claims or whether we're talking about such things as scholarship, rapport with the student body and so forth, and it is that type of a situation, where these things are very difficult to articulate and these decisions are made up by many, many people. This isn't the decision of one man, but this is the decision of maybe 12 or 15 people, and to have a hearing on whether this particular professor is -- has achieved a certain level of scholarship, I can't see where this hearing would afford anybody any benefit. It would merely polarize the parties. It would involve the entire student body in the case because the professor would call his students and say, "Well, now, I am a good professor, aren't I?" And the administration would call students and so forth, and you would have just one heck of a mess. These things just don't work that simply. Also --

Q I take it you are still standing on your basic position that a non-tenured teacher whose contract is not renewed is not entitled to a hearing in the university context under any circumstance?

MR. BLECK: That is it precisely, Your Honor.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Steinglass.

ORAL ARGUMENT OF STEVEN H. STEINGLASS, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. STEINGLASS: Mr. Chief Justice, and may it please the Court:

The issue before this Court today is whether non-tenured state university professors are entitled to minimal due process, a statement of the reasons why their contract is not being renewed and a minimal opportunity to come forward with reasons why that decision should not be made.

Q A paper hearing, is it?

MR. STEINGLASS: No, I don't think so. I would hope not, certainly. First of all, the statement of reasons is essential. The hearing itself would serve several functions. First of all, where there are examples of inadvertence, ignorance, the teacher would be able to bring forward those reasons which would simply clarify the situation.

Q How about cross-examining the witnesses against him?

MR. STEINGLASS: Well, I think the answer to that question has to be to look back at the order of the district court. The district court said the burden would be on the professor, so the professor would have the initial burden of stating that either the reasons offered were wholly inappro-

priate or wholly without a basis in fact.

Q Could he do that through witnesses?

MR. STEINGLASS: Yes.

Q Could he have the assistance of Counsel?

MR. STEINGLASS: I would think that he would be able to have representation there. I would think, though --

Q Subpoena power?

MR. STEINGLASS: No, no. I would think subpoena power would have --

Q Discovery?

MR. STEINGLASS: Discovery? I would --

Q Are you talking about a full due process here?

MR. STEINGLASS: No, no, I'm not talking about the full panoply. What I'm talking about is an opportunity to bring forward that testimony--

Q Is he entitled to as many of the elements of due process as we held in Goldberg that the welfare recipient is entitled to before welfare benefits may be terminated?

I think we said there that the welfare recipient is entitled to -- not only reasons, but as well the right to produce testimony to contest the reasons and to cross-examine anyone that was offered and to have the assistance of Counsel. It doesn't have to be appointed, but he was entitled to bring one if he wanted to.

MR. STEINGLASS: I would think so. I would think

the major exception would be that, because the district court recognized that we were dealing with academic questions, many of which would -- many of the decisions would rely on very subtle reasons that, firstly, he had -- the court had to afford to the university a very, very wide discretion so in a welfare case, for example, it would seem to me that there was -- in order to deny a person the welfare assistance, you would not simply have to show that your decision was wholly unsupported in fact. The burden would simply, for a welfare director to terminate a grant of assistance, he would have to show that the facts did show that the person was not eligible, whereas in the thing that we are talking about, we are talking about a much smaller burden and that the smaller burden is necessary because the district court did recognize that the university did have an interest in maintaining a probationary system in maintaining a system under which they could decide not to retain a professor for something less than for cause as for cause has come to be known in tenured systems. So I think that would probably be the major, the most fundamental difference between a Goldberg type hearing, as far as each of the individual elements that the Court required in Goldberg. I would think --

Q How about an impartial decision-maker as you said should be in Goldberg?

MR. STEINGLASS: Yes, I would think that would be

essential, but that would still leave the university a great deal of discretion in determining who that decision-maker would be. That doesn't necessarily mean that it has to be an independent examiner taken from outside of the university system, although it could be. In the context of the present case, Defendant Guiles, who only became the Defendant after Professor Roth was denied minimal due process, Professor Guiles' own affidavit says that it is his practice to simply receive recommendations. He received a memorandum outlining reasons which were, in fact, articulated and were not very subtle at all. They said that David Roth violated a whole series of university rules.

Q How about a written statement of reasons supporting the decision, from the decision-makers?

MR. STEINGLASS: Well, I would think that would be essential, Your Honor, that the decision-makers would want --

Q Well, this doesn't sound that much different to me from a Goldberg type hearing.

MR. STEINGLASS: I thought the Court in Goldberg did recognise that it was only offering a minimal pre-termination evidentiary hearing and that the Court --

Q No, but my questions were addressed to whether or not the type of hearing you think due process requires in this situation is the same time of hearing we set in Goldberg and your answer seemed to me to suggest yes.

MR. STEINGLASS: Well, I think the essential

difference is that -- and I indicated this before -- is that the burdens would be completely different and in Goldberg and Walker type situations, there is the equivalent of a for cause requirement. If you violate X rule you will lost X benefits. Similarly with a tenure situation, there is that almost a for cause requirement and this situation, in this context, there is no such heavy burden on the university. In fact, the burden lies on the professor.

Q Would you think this minimal due process that you are talking about, Mr. Steinglass, would be limited to the faculty members, or would it include the elevator operator who takes the faculty members up to the upper floors of the building?

MR. STEINGLASS: Well, I would think that --

Q Assuming that they aren't covered by a union contract and have no other tenure?

MR. STEINGLASS: I would think that in each instance someone would have to undergo the balancing test that this Court has undergone in the past and I could well see what might come down on a different side of the equation with respect to an elevator operator than it might with a professor. I think there are certain differences when one applies a Fourteenth Amendment balancing test. The Court has recognized when an interest in pursuing a profession is at stake that that minimal due process is required. That would clearly form one side of

the line. A situation where a person is capable of finding new employment, when non-retention will not have any adverse employment consequences, a situation in which a person does not have to put in a great deal of time and effort and training to acquiring their present position, all those might weigh -- would have to be weighed and might bring one down on a different side of the line. I mean, it's hard. There are a lot of hypotheticals that we could deal with. I would think that a decision that would require a university to provide a minimal due process hearing to a university professor for his non-retention would not necessarily require every governmental employer to provide that same type of hearing for every employee before they decide not to retain him.

Q But that is on the assumption that it is all right to tell the elevator operator to look for a job as a mechanic and not to tell a teacher to look for a job as a mechanic?

MR. STEINGLASS: Well, I think the Court has looked at the interests of the individual involved and I think that would probably be the answer.

Q While we have you interrupted, where is Dr. Roth now?

MR. STEINGLASS: I thought you would ask, Your Honor. The first year he was unable to find employment and he had a

post-doctoral research -- post-doctoral position at one of the Big Ten universities. After that, he was able to find a job and he is presently teaching at a state university in Indiana.

You see, one of the problems in cases like this is that it is not clear, when the initial act complained of occurs, what the damage is. The damage may be strung out over a long period of time. When Dr. Roth commenced this action in the federal court in 1969, he did allege that he believed there would be a damage to his professional reputation. At that time it was not possible for him to know what the situation would be one, two, three, four years hence. I think there are a good number of federal courts in the country who have, in individual cases, found damage to professional reputation being a significant injury and being one that flows from a non-retention decision.

Q No back-pay consequences would flow from the carrying out of Judge Doyle's decision below, would they? The university could grant him a hearing upon remand, and if it granted the hearing and followed whatever procedures Judge Doyle had described and then decided he was dismissed, there would be no back-pay claim?

MR. STEINGLASS: At this point, Judge Doyle has not -- I would think by implication, by delaying, by not rendering a decision within one or two months after the suit

was commenced and -- the suit was commenced in 1969, in February 1969. At that point Roth was asking for reinstatement for the following academic year. The motions for summary judgment were not granted until March of 1970. The order -- which is appealed from in this case -- said provide him a hearing or grant him a contract for the following academic year, so the answer to the question is that at this point no one has ordered back-pay. We, of course, would feel free to go back to the district court and ask that the court consider the other issues which it left in abeyance during the pendancy of this and we would think that those substantive First Amendment issues may well give rise to a claim for back-pay.

Q What have you sought on the First Amendment claims, reinstatement or damages?

MR. STEINGLASS: At the time it was filed, reinstatement. At this point, if we had -- when we go back, because the only issue before the court is the procedural due process issue, we will have to reexamine what we would be seeking.

Q As I take it, if you sustained your First Amendment claim, damages wouldn't be limited, would they, to back-pay?

MR. STEINGLASS: Not -- I -- no -- damages against -- the Defendant Guiles was sued in his individual capacity as well as in his official capacity, so as far as his individual

capacity, we could pursue -- we could pursue that.

The question of why we're here today is one that I've thought about sometimes. Sometimes also, I would have hoped that the order of the district court would simply have stated effect and that we could have had administrative hearing at Wisconsin State University, Oshkosh. I think such hearing would have had advantages, not the least of which would have given persons with academic expertise and background the first opportunity to review a case dealing with issues arising out of an academic context. We think that in itself would be a valuable -- would be valuable in terms of the resolution of controversies like this within the university itself. It would make the issues much more simple for district courts when and if they do reach those forums.

Q What do you understand are the procedures a tenured teacher receives, a man or a woman who has six years or more, isn't it now, under the state statute?

MR. STEINGLASS: Yes, sir.

Q They've got six years and they have tenure and they receive a notice that their position is terminated. Now, what kind of a procedure does the university give that person?

MR. STEINGLASS: Yes, they would receive a statement of reasons why they were being discharged in that case and they would have a hearing on that.

Q Essentially like the hearing that Judge Doyle has ordered here? In general outline?

MR. STEINGLASS: I've never seen one of those hearings. I do not think that it would in that Judge Doyle has not ruled on any of the elements of the hearing. His ruling was rather narrow, that it be a minimal hearing. I think the major difference, again, would be the standard that was to be applied. A teacher with tenure could only be dismissed for cause and that for cause has a great deal of substance, even though it is two rather simple words and that substantative difference in the standard --

Q Well, you are going into the basis of the decision, but the mechanism, the machinery of reaching that decision, is it the same for the tenured teacher as for Mr. Roth?

MR. STEINGLASS: Well, I would like it to be the same for the -- for Dr. Roth as it would for the tenured teacher. I don't think this Court necessarily has to conclude that if they chose to affirm the decision of the district court. The district court was very careful in pointing out that it was a minimal type hearing. I don't want to --

Q You didn't define what minimal was.

MR. STEINGLASS: I think for good reason. I think for good reason, Your Honor. These cases will be coming up in the future in districts, both in Wisconsin and in other

places in this country and I think the determination of what a minimal hearing would consist ought to rate a case by case determination by the courts. I think there is good advantage not to create a constitutional straitjacket in which every university must fit. I think there is a great deal of variation within the phrase "minimal due process." I tried to point out one or two of them when I discussed the identity of the examiner. He could be within the university, he could be outside of the university, he could be -- it could have been Defendant Guiles if, when he had received the statement of reasons why David Roth was being not retained, he had decided to call David Roth and ask him, did you devote one-half to three-quarters of your time in class talking about extraneous matters? Did you miss this day in class? Did you make these public statements? All of which were in a memorandum which Counsel was able to discover in pre-trial discovery, but unfortunately was unable to obtain prior to the initiation of such action.

The constitutional basis for the position we are advancing is alternatively the First or the Fourteenth Amendment. It is our legal position that when a nontenured teacher is facing retention for reasons which may -- well, is facing retention, those reasons on which the retention is based may implicate First Amendment values, thus entitling him to a statement of reasons and to a minimal hearing. The

present case is quite good as far as illustrating what the hearing would have accomplished. The reasons in the present case did on their face implicate First Amendment speech. The university relied on three quotes that David Roth was alleged to have made, in fact, did make. They alleged that these quotations evidenced an unscholarly approach to the truth, thereby making him unfit to remain for another academic year, although he was certainly fit to remain for the rest of the present academic year because he was non-retained rather than discharged. And at a hearing, he would have been able to bring forward evidence showing that -- that, number one, he did substantiate the claims which the university alleged had been unsubstantiated; number two, he would have been able to bring forward evidence showing that each of the individual infractions which he was alleged to have committed did not take place. As it was, he was finally able to bring forward that evidence in the form of affidavits in the district court on the motions for summary judgment, but not before then.

Q Are you suggesting an inconsistency, Mr. Steinglass, in the position of non-renewal and keeping him for the balance of the year?

MR. STEINGLASS: Well, I'm suggesting -- I'm -- I'm suggesting that, through the expedient of keeping a teacher to the end of the year and simply saying, "Now we have

decided not to retain you, and so, since Wisconsin statutes do not provide any procedures and, in fact, don't limit us in the reasons we might choose, we'll do it this way," rather than saying "We'd better get rid of you right now." I would --

Q Having made a commitment for the whole year, for nine months, the school year, are you suggesting the university should not keep it if they can possibly do it, consistent with the welfare of the university?

MR. STEINGLASS: Well, I -- I wouldn't want the university to violate these contractual rights, but if he was unfit or not a proper teacher, the university could simply offer to pay out his salary if it became that serious.

Q Isn't it reasonable that he might have been in the situation that he wasn't bad enough to fire but not good enough to keep?

MR. STEINGLASS: Yes.

Q And so they would let him run out the full year so that he has a chance between February 1st, I think, your friend said, when he receives the notice until the following September or October to find another job.

MR. STEINGLASS: Well, that's certainly a distinction between the two.

In undertaking the balancing approach that this Court's decisions have required in determining whether or not minimal procedural safeguards will be extended to persons

whose interests are adversely affected, the district court did take into consideration the value of the tenure system and very carefully attempted not to dilute the tenure system in any way. We have the suggestion, however, that the decision somehow vitiates the distinction between tenure and elastic tenure. The opinions below, both district court and circuit court, make clear that there was no intention to vitiate the legal distinction between those two, between status of tenure and --

Q Would you say that -- let's assume that a non-tenured teacher gets notice that his contract will not be renewed and it is stated in the letter, "We have no reason other than the fact that we think we can find someone better sometime than you are." That is the only reason they have.

MR. STEINGLASS: And the teacher --

Q We don't claim you have done anything wrong at all.

MR. STEINGLASS: And the teacher doesn't believe that that is pretext or sham?

Q Yes.

MR. STEINGLASS: He believes that that is an honest reason.

MR. STEINGLASS: Um -- as far as the substantive reason, I think that that would be a valid reason for a non-tenured teacher to be terminated. It would not be a valid

reason to let a tenured teacher go.

Q I understand that.

MR. STEINGLASS: But nevertheless, the non-tenured teacher might well believe that not to be the real reason and so I think he would have a right to request a hearing.

Q Well, what if the letter says, "We are not terminating your contract or refusing to review because you exercised any First Amendment rights at all. We don't think you've even made a speech anywhere," But, otherwise, "We have no reason." That's all it says, "We just have no reason."

MR. STEINGLASS: Only they concede -- oh, I see, in other words, they concede they have no reason. It's not that they are not going to give you one, they don't have one.

That -- that -- if I understand your question -- that might become so arbitrary as to violate some of the substantive requirements of the Fourteenth Amendment.

Q Would the burden shift to him?

MR. STEINGLASS: The burden would definitely be on the professor. The professor would have to show --

Q That's all right. That's what I mean. He has a substantive right not to be fired without a reason?

MR. STEINGLASS: Yes.

Q Under the Fourteenth Amendment. That's your basic --

Q Even a non-tenured teacher?

MR. STEINGLASS: Without any -- in other words, we are not just -- we're just saying that, well, one day the president gets up and says, "Today we're going to fire somebody and you're the most likely candidate." I would think that might well be arbitrary and capricious, in light of the Fourteenth Amendment.

Q Well, does he have a right not to be fired without a good reason?

MR. STEINGLASS: Well, good reason, good reason --

Q All right, without any reason?

MR. STEINGLASS: Any reason whatsoever. I would -- it's an extremely abstract question, but I think the answer would have to be yes, that you have to have a reason, even if --

Q Well, any reason will do. I find that you are wearing a mustache and I don't like people who wear mustaches. Well?

MR. STEINGLASS: I think that reason might be improper. The point is not --

Q I hope that he's got a good reason.

MR. STEINGLASS: It's a question of whether or not there are any substantive protections in the Fourteenth Amendment. It's one question, the question of whether those substantive protections --

Q What you are talking about is that there may

be an assessment of reasons, in constitutional terms. Where do you differ this situation from the tenured teacher?

MR. STEINGLASS: Very simple. A tenured teacher could not be terminated for the reason one could say, "We found somebody better."

Q That's because of the contract.

MR. STEINGLASS: That's right.

Q That's not the Constitution --

Q A tenured teacher can't be terminated without cause.

MR. STEINGLASS: That's right, and I would think -- right. Cause has been interpreted --

Q And cause has to be shown.

Q Would the length of his hair be cause?

MR. STEINGLASS: For a tenured teacher? I would hope not, but again, trying to draw the substantive, the lines on the substantive reasons, is just extremely difficult. The point we're before the Court on is that there must be some reasons which are so absolutely devoid of reason, that are so wholly unreasoned, that are so wholly without basis in fact that reliance on them would constitute a violation of the Fourteenth Amendment.

Q What happens at a hearing of the non-tenured professor? He says, "Why was I fired?" The appointee authority or discharging authority says, "I don't have to

give you any reason."

MR. STEINGLASS: That is essentially what happened here.

Q Well, that's just what I am talking about.

Q Well, aren't we getting off into the trouble?

Q Who makes a move? Who makes a move then?

MR. STEINGLASS: Well, if this Court was to accept the position advanced by David Roth, the teacher would be able to request of the university that they provide him with the reasons and their failure to do so, it would seem to me, would violate --

Q In other words, at that stage, the university, "You just use your language, somebody's language today, you just don't get it from us."

MR. STEINGLASS: Well, I would think the professor at that point would be able to request a hearing at which time he would have the --

Q What I'm talking about, this is at the hearing.

MR. STEINGLASS: Well, he would then -- he would then have the burden on him to bring in testimony and show that that reason was wholly -- that he did cut the mustard. However, I would think that a reason like that --

Q I would hate to see somebody have to prove that he is an efficient professor.

MR. STEINGLASS: No, I'm not -- perhaps I -- I

don't want to overestimate the beneficence of universities, but I don't think universities are going to come up with reasons like that. I think the university administrators will be honest and will provide the reasons and I would think they ought to be required to provide the reasons in sufficient detail so that a response is capable of being framed. I think that one might be a little vague, but, again, at the hearing, the burden lies on the professor to show that the reasons chosen are not wholly inappropriate. "The reason was that you are not being renewed because you drive a yellow rather than a green car." I could well, I might conclude that that reason might be so insubstantial so that it would violate some of the substantive rights.

Q Where do you get those?

MR. STEINGLASS: Substantive rights?

Q Substantive rights.

Q In the Fourteenth Amendment.

MR. STEINGLASS: In the Fourteenth Amendment.

Q What provision?

MR. STEINGLASS: Due process.

Q Substantive due process.

MR. STEINGLASS: Yes. Yes, Your Honor. I think in the Schware case, this Court, dealing with an admission to a Bar, you relied on substantive -- on that particular provision. I don't think -- I always have difficulty in

trying to put content into that particular clause or, I say, that there are some reasons that are so arbitrary, so without foundation, that it would be a violation. But let me make one very important point. We are not resting our case on an attempt to ressurect the Fourteenth Amendment. What we are saying is that the First Amendment, the First Amendment requires that a teacher be provided with a statement of reasons and this due process hearing -- minimal due process hearing.

We would say that there is also an argument to be made that the Fourteenth Amendment requires it, not because it's a right, a substantive due process right, but because a decision terminating or not renewing a teacher adversely affects very fundamental interests of that teacher.

Q Now, would you make the same claim for a person who had not been hired, that is, who had applied and was not hired, as you make for a person who was not rehired?

MR. STEINGLASS: I --

Q First, I might say parenthetically that the last two or three questions and answers have all talked about firing somebody. You don't claim the man was fired, do you?

MR. STEINGLASS: A lot of those in this area, Your Honor, have an administrative slip in their terminology and perhaps --

Q Well, that includes us, too.

MR. STEINGLASS: -- perhaps that's indicative of the fact that even the lawyers and the administrators in the area do not see that substantial a difference between the two. I mean non-renewed, non-retained.

As far as the specific question, I see a completely different balancing being made, in point of fact, with respect to the hearing rights of a person who is denied an initial application. It seems that his hearing rights would be -- his interests would be quite small and probably would not entitle him to a hearing. Again, that decision doesn't have to be reached, but certainly, no stigma would flow from the failure to get a job. It is certainly not the same stigma that would flow from being not retained, on the relocation problem -- would not flow from that proceeding. The loss of income would not. The income was never coming in. It would certainly not be a damage.

Q There's just one thing. You just said something a minute or so ago. Let's see if I understood it correctly. You said that the right to hearing stems from, not so much or necessarily, from the due process clause as from the fact that the teaching profession qua teaching profession serves certain First Amendment values, that the requirement of a hearing before non-renewal can be rested on the service to those First Amendment values and not necessarily depend upon the due process clause. Did I correctly

understand it?

MR. STEINGLASS: Yes, yes. And we would say further --

Q There is nothing to do with the specific claim of violation of the First Amendment rights alleged in the 1983 --

MR. STEINGLASS: That's correct, although --

Q It's utterly -- it's just teacher qua teacher has -- serves certain First Amendment values. Is that right?

MR. STEINGLASS: That's a part of it, but then, in addition, in this case the reasons that were discovered didn't in fact implicate the First Amendment.

Q Yes, but as I gathered, you distinguished then the teacher from the college administrator, the college janitor, the college any other kind, the college football coach, for example?

MR. STEINGLASS: I said we don't have to reach that question and the different balancing would be undertaken in each case.

Q How about the college student?

MR. STEINGLASS: Well, this Court in Goldberg did cite approvingly the Dixon case from the Fifth Circuit. I would think a college student probably would -- although this question is not ruled on -- would probably be entitled to some minimal due process before being asked to leave. In point of

fact, Roth was -- one of Roth's public statements dealt with the fact that students had been terminated without due process, an ironic twist that he's here today asking such rights for h imself.

Q Mr. Steinglass, one last question. During World War II, student bodies dried up because people were at war. Suppose that same kind of thing happened at Oshkosh and the administration terminated 90 percent of the non-tenured people, retaining 10 percent. Would anyone of the 90 percent have the right to a hearing on your theory?

MR. STEINGLASS: I think they would have the right. I think that reason you stated would be a totally legitimate reason. I can't see any logic behind a professor asserting his right to a hearing in that situation, because --

Q In other words, he'd have a right to know why he, rather than X, was let go?

MR. STEINGLASS: Yes.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Steinglass.

Thank you, Mr. Block.

The case is submitted.

(Whereupon, at 2:52 o'clock, p.m., the case was submitted.)