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Notes on Recent Cases

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Notes on Recent Cases

The Refusal to Renew the Contracts of Non-Tenured Teachers

The United States Supreme Court, in several decisions announced at the end of its last term, substantially diminished the due process rights of non-tenured teachers whose contracts are not renewed. These opinions constitute a sequel to several articles appearing in the July 1972 issue of the *Journal of Law and Education* which discussed a number of lower court opinions which had held that non-tenured teachers are entitled to certain procedural safeguards.*

BOARD OF REGENTS v. ROTH, 408 U.S. 564, 92 S. Ct. 2701 33 L. Ed. 2d 548 (1972)

Plaintiff, a non-tenured professor at Wisconsin State University-Oshkosh, was notified prior to the end of his first year of teaching that he would not be rehired for the next academic year. No reasons were given and no opportunity to challenge this decision at a hearing was offered. Plaintiff brought an action on the grounds that the decision not to rehire him without giving him notice of reasons and an opportunity for a hearing violated his right to procedural due process of law under the Fourteenth Amendment and that the true reason for the university's decision was to punish him for making statements critical of the university administration in violation of his First Amendment right to free speech. The district court granted a partial summary judgment for the professor on the procedural issue and ordered university officials to give him reasons and an opportunity for a hearing. This decision was affirmed by the Seventh Circuit Court of Appeals. The Supreme Court reversed on the ground that the plaintiff was not entitled to summary judgment on the procedural issue because no deprivation of liberty or property had been proven.

The district court in *Roth* held that the refusal to rehire a non-tenured teacher without giving reasons for such decision and an opportunity to test these reasons at a hearing deprived a teacher of liberty without due process because it assumed that a university's decision not to rehire a professor creates difficulties for his subsequent academic career. To the district court there was sufficient likelihood of such harm that proof of actual career difficulties was not required, *i.e.*, it constituted a deprivation of liberty as a matter of law.

In reversing this decision of the lower court the Supreme Court did not hold that a university is never required to give reasons and a hearing when it refuses to rehire a non-tenured teacher. Rather, the Court held that, absent proof, it could not assume that a teacher's career would be substantially harmed by such

* Jacobson, et al, *The Dismissal and Non-Reemployment of Teachers*, 1 J.L.E. 435 (1972), and Palmer, *Due Process Termination of Untenured Teachers*, 1 J.L.E. 469 (1972).

action. The Court indicated that a teacher in this position would have to prove a "foreclosure of opportunities amounting to a deprivation of 'liberty.'" (33 L. Ed. 2d at 559, n. 13) While the Court did not undertake to specify what proof would be required to establish this, it did say that proof of more than just being made "somewhat less attractive to some other employers" was required.

The Court then considered whether the plaintiff had any property interest in his employment which would require that reasons and an opportunity for a hearing be given. The Court held that to have a property interest in a benefit, such as being rehired in a job, one must have a "legitimate claim of entitlement to it." Such entitlements are created and defined by sources independent of the Constitution, such as state law. In this case, the Court found that plaintiff had no protected property interest because, under the terms of his appointment, his employment terminated on a certain date and no provision was made for renewal. Thus the Constitution did not require the use of procedures consistent with due process prior to the university's failure to renew his contract.

The district court had not had to consider plaintiff's First Amendment claim since it directed a partial summary judgment for plaintiff on the due process issue. However, the court of appeals had found that because the decision not to rehire plaintiff was made "with a background of controversy and unwelcome expressions of opinion," plaintiff's interest in liberty of expression was implicated. Thus, it determined that an opportunity for a hearing and statement of reasons were required "as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights." 446 F.2d 806, 810. The Supreme Court, however, rejected the view that procedural protections are required when a teacher alleges that a school or university's decision was based on the exercise of the First Amendment rights (33 L. Ed. 2d at 559, n. 14). Justice Douglas, in dissent, argued in agreement with the court of appeals that decisions with respect to teachers are potentially loaded with dangers to academic freedom, an aspect of the First Amendment, and special care must be taken to insure that the real reason for the refusal to rehire is not to punish for expression.

Justices Brennan and Marshall also dissented.

PERRY v. SINDERMAN, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)

This case, which was decided by the Supreme Court on the same day as *Roth*, considered whether a non-tenured professor who had taught for a number of years in a state college system could acquire "*de facto* tenure," obligating the university to provide notice of reasons and an opportunity for a hearing upon its refusal to renew his contract. Plaintiff had taught for a total of ten years at three different colleges within the Texas state college system. He had been active in the Junior College Teacher's Association, and had become involved in public disputes with the college's board of regents. Subsequently, the board voted not to offer him a contract for the next academic year and issued a press release alleging his insubordination. However, no official statement of the

reasons for the non-renewal was given and no opportunity for a hearing was offered.

As in *Roth* the plaintiff brought suit in federal court alleging that he had been denied procedural due process and that the primary reason he had not been rehired was his criticism of the college administration's policies which infringed his right to freedom of speech.

On the basis of affidavits filed by the parties, the district court granted summary judgment for the board of regents on the ground that the professor had no cause of action because his contract had expired and the college had no tenure system. The court of appeals had reversed and ordered a full hearing on the grounds that (a) tenure was irrelevant to a claim that a contract was not renewed because of protected speech activity and (b) if plaintiff had an "expectancy" of re-employment he had a due process right to an opportunity for a hearing despite his lack of tenure.

With respect to the First Amendment issue, the Supreme Court held, consistent with its previous decisions, that "the non-renewal of a non-tenured public school teachers' one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights." The Court found that plaintiff's allegations concerning the impermissible basis for non-renewal presented a genuine dispute requiring a hearing in the district court; therefore that court's grant of summary judgment for the defendants had been improper.

With respect to the procedural due process issue, the court elaborated on the concept of "property interest" it had applied in *Roth*. The plaintiff in *Perry* alleged that although there was no formal contractual tenure provision, there was a binding understanding fostered by the college administration which amounted to a *de facto* tenure program. He alleged that this understanding resulted from statements in the college's faculty guide concerning tenure and from guidelines issued by a coordinating board of the state college system. The Supreme Court agreed that the concept of "property" protected by the due process clause includes mutual understandings which, though not formalized in writing, may be embodied in the policies and practices of an institution so as to form an unwritten "common law" in a particular university "that certain employees shall have the equivalent of tenure." The Court held that whether such an understanding existed was a matter for proof, making improper the district court's grant of summary judgment for the board on the due process issue.

The Chief Justice filed a separate concurring opinion which sought to underscore that state law governed the creation of a "property interest" requiring due process protections. Consequently, he believed that, if the relevant state contract law is unclear, federal courts should abstain from deciding whether a prior hearing is constitutionally required.

Justices Brennan, Douglas and Marshall dissented in part on the grounds that summary judgment should have been entered for plaintiff on the due process issue since, it was their view that he was entitled, *as a matter of law*, to a statement of reasons why his contract was not renewed and a hearing on disputed issues of fact.

Comment

The Supreme Court, by rejecting the stricter but more simple due process requirement which had been adopted by the district court in *Roth*, added complexity and uncertainty to the determination of when notice of reasons and an opportunity for a hearing must be given to a non-tenured teacher when his contract is not renewed. Essentially, the district court in *Roth* sought to require these procedural safeguards in every case of non-renewal on the ground that it must assume that the unexplained refusal to rehire a teacher leaves a blot on his career amounting to a deprivation of liberty. This is an easily understood standard which eliminates much of the uncertainty concerning the application of due process safeguards. However the constitutional standard announced by the Supreme Court in *Roth* and *Perry* is not so easily understood or administered.

The Supreme Court's requirement that a teacher prove that his termination actually resulted in the substantial foreclosure of other professional opportunities means that neither teachers nor schools may know whether reasons for non-renewal should have been given or an opportunity for a hearing should have been afforded until a substantial time after the non-renewal decision is made. The Supreme Court appears to be saying that insofar as a deprivation of liberty is alleged the existence of a right to due process procedures must be determined on the basis of the actual consequences to the particular teacher that flow from the non-renewal. The injury to the teacher, however, may not be known until long after the non-renewal. In other words, the right to reasons and a hearing may not ripen until after the time when such procedures would be useful to protect the teacher's interests.

The same problem is inherent in the application of the Court's property interest test, *i.e.*, understandings creating the equivalent of tenure. It does not appear possible, on the basis of the Court's opinion, to articulate any general rule about what understandings or representations will create a property interest requiring due process procedures prior to non-renewal. Indeed, if the Chief Justice's concurring view of the exclusive applicability of state law to this issue is wholeheartedly adopted by the Court, there could be a different rule in each of the fifty states. In many cases it will not be possible to know if notice and a hearing should have been given until a court determines that the facts of a particular case give rise to a property interest. These decisions provide little guidance to school boards as to the particular circumstances in which notice and an opportunity for a hearing are required.

The Court's requirement that teachers prove either a foreclosure of opportunities amounting to a deprivation of liberty or a property interest amounting to equivalence to tenure may discourage actions from being filed because of the difficulty and cost of proving these elements in many cases. Those actions that are brought may be expensive and time-consuming for teachers and school boards alike since heavy reliance on pre-trial discovery is likely to be required.

The question raised by the Chief Justice concerning whether a teacher has the equivalent of tenure because state law with respect to the creation of a

property interest is unclear is likely to arise frequently in subsequent cases. It is uncertain, however, what the view of a majority of the Court is on the question of the application of state law and abstention. The fact that the emphasis on abstention came in Chief Justice Burger's concurring opinion would indicate that all the justices on the majority opinion do not agree with the Chief Justice. There may be a fear that granting the states exclusive control over what interests are protected by the Fourteenth Amendment is inconsistent with the purposes of that amendment to protect citizens against arbitrary state conduct.

Consequently, *Roth* and *Perry* raise as many questions as they answer, making it unlikely that these decisions are the Supreme Court's last words on the due process rights of non-tenured teachers.

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