JUDICIAL REVIEW OF THE TENURE CONTRACT OF A PROFESSOR IN A PRIVATE COLLEGE

Felch v. Findlay College, No. 640, Court of Appeals of The Third Appellate Judicial District of Ohio, Hancock County, June 28, 1963.

The plaintiff, Dr. William E. Felch, was a member of the faculty of defendant Findlay College, a private non-profit corporation. In October of 1958, the college issued a memorandum containing tenure regulations. In August of 1959, Dr. Felch was informed that he had been placed on tenure under those regulations. The fifth paragraph of the memorandum contained dismissal provisions, and concluded with the following statement:

> Upon completion of the investigation and after consultation with the Dean of the College, the Division Chairman, and the Department Head concerned, and with the approval of the Administrative Council, the President may recommend dismissal to the Board of Trustees or its Executive Committee.[1]

On July 20, 1961, without following the above dismissal procedures, President Wilson announced to Dr. Felch that he had one hour in which to decide whether to accept a letter of dismissal or to resign. Dr. Felch denied the charges that had been leveled against him,[2] and accepted a letter of dismissal. He then notified the Board of Trustees that the dismissal would be contested. Nevertheless, the Board affirmed the President's action.[3]

Thereafter Dr. Felch instituted the present proceeding seeking to enjoin Findlay College from effectuating his dismissal. He requested that the college be ordered to continue his employment as a member of the faculty, and that the college be ordered to pay him the salary previously

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[1] Brief for Appellant as Amicus Curiae, p. 16, Felch v. Findlay College, No. 640, Court of Appeals of The Third Appellate Judicial District of Ohio, Hancock County, June 28, 1963. The record does not indicate the scope of the investigation which was to have been conducted.

[2] It is not apparent from the record the nature of the charges which were made against Dr. Felch.

[3] In affirming the President's dismissal the Board of Trustees declared that by not requesting a hearing Dr. Felch had waived his right to one. On the other hand, Dr. Felch contended that while the President might recommend dismissal to the board, he could not dismiss a faculty member himself. This argument was based on the words of the memorandum, "the President may recommend dismissal," and was that the omission of words in the memorandum specifically delegating dismissal authority to the President negated the existence of such authority. The court assumed without deciding that a binding contract of employment existed between Dr. Felch and Findlay College, that it contained a covenant that Dr. Felch would not be dismissed without a hearing, and that Findlay College had breached this contract.

agreed upon. The trial court entered judgment for the defendant college, and Dr. Felch appealed. The appellate court noted that the plaintiff's claim depended on general equitable principles, since there are no Ohio statutes covering teachers' tenure in private institutions. Then, in accordance with the generally accepted rule,[4] they held that a court of equity will not order specific performance of an employment contract for personal services, and affirmed the decision of the trial court.[5]

Among the reasons stated for the rule are: (1) it is impractical for a court to supervise the enforcement of a decree for specific performance of a personal service contract; (2) specific enforcement at the request of the employer would result in involuntary servitude of the employee; (3) since the employer cannot receive specific enforcement, lack of mutuality of remedy prevents the court from granting specific performance to the employee; and (4) it is futile for a court to attempt to resolve differences between an employer and an employee when the employment is personal in nature.[6] Some jurisdictions have held the general rule inapplicable where the services have a unique and peculiar value on the theory that the employee is irreplaceable.[7] The court in the instant case held that the uniqueness exception is not applicable where the action is by the employee rather than the employer, on the ground that although employees with unique talents may be found, unique employment positions do not exist.

Finally, the court considered the argument that the provision for a hearing constituted a negative covenant which could be specifically enforced by an injunction against dismissal, regardless of whether or not the court could specifically order Findlay College to reinstate Dr. Felch.[8] The court concluded that while in some instances a negative covenant can be enforced as an indirect means of specifically enforcing an accompanying affirmative promise, to do so here would lead to "unjust or harmful" results.[9] In other words, an injunction should not be issued if the affirmative promise is one that for substantial reasons ought not to be specifically enforced.[10]

There are at least three sources of tenure for teachers and professors. First, the state legislature may enact a statute granting permanency of employment to any teacher meeting specified requirements.[11] Secondly,

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[4] See Restatement, Contracts § 379 (1932); Annot., 44 A.L.R. 1443 (1950).

[5] Felch v. Findlay College, No. 640, Court of Appeals of The Third Appellate Judicial District of Ohio, Hancock County, June 28, 1963. A motion to certify the record was made to the Supreme Court of Ohio, and was approved by that court. Before the case was heard it was settled and dismissed by agreement of the parties.

[6] See generally, Corbin, Contracts § 1204 (2d ed. 1951).

[7] Shanks Village Committee Against Rent Increases v. Cary, 197 F.2d 212 (2d Cir. 1952) held that one entitled to a chattel or service of peculiar value may have specific performance and cannot be forced to seek recompense by way of damages.

[8] See, *e.g.*, Cincinnati Exhib. Co. v. Marsans, 216 Fed. 269 (E.D. Mo. 1914).

[9] See Restatement, Contracts § 380 (1932).

[10] See Corbin, Contracts § 1206 (2d ed. 1951).

[11] For a discussion of tenure statutes in the public schools see Taylor, "Tenure for Teachers—A Continuous Struggle," 23 Texas L. Rev. 265 (1945); Kuenzli,

a state administrative body, such as a board of regents, may promulgate a ruling granting tenure at the college level.[12] Finally, the administration of a private institution may formulate tenure regulations for its faculty.[13] The variety of tenure programs is almost as great as the number of institutions which grant it.[14]

Ohio's Tenure Law[15] is illustrative of the tenure regulations which have been prescribed by state legislatures. The statute provides that once an elementary or high school teacher has obtained tenure, his contract shall not be terminated except for "gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause."[16] A hearing before the board of education is afforded upon request.

If dismissal occurs after the hearing, the teacher has the right of appeal to the court of common pleas for the county in which the school is located. This right has been held not to be the right to a trial de novo, but the right to review of an appellate nature. As the Ohio Supreme Court stated in *Powell v. Young:*[17]

> It seems to us that the General Assembly intended the appeal provision . . . to be confined to a judicial review of the proceedings of the board of education and to give the court discretion to hold further hearings to be certain that the proceedings before the board were legally regular and not arbitrary, oppressive, unreasonable or fraudulent; and that it was not the intention of the General Assembly to provide a trial "de novo."[18]

"Dismissal or Removal of Public School Teachers Under Teachers' Tenure Laws," 21 Notre Dame Law. 25 (1945). In general, tenure statutes do not apply to teachers in colleges and universities. Wisconsin does have a statute, Wis. Stat. Ann. § 37.29 (1937), granting tenure to teachers on the college level.

12 Even if the board has promulgated tenure regulations, there is still a need to find that the regulations have been incorporated into the teacher's contract. For cases holding that the institution's bylaws or other rulings as to tenure may become a part of the contract when the parties bargain with them in mind, see University of Mississippi v. Deister, 115 Miss. 469, 76 So. 526 (1917); Board of Regents v. Mudge, 21 Kan. 223 (1878). The importance of the regulations' having been recognized as more than mere statements of policy is illustrated in Bradley v. New York Univ., 124 N.Y.S.2d 238 (Sup. Ct. 1953), *aff'd,* 283 App. Div. 671, 127 N.Y.S.2d 845 (1954), *mem.,* 307 N.Y. 620, 120 N.E.2d 828, 128 N.Y.S.2d 562 (1954).

13 See, *e.g.,* Cobb v. Howard Univ., 106 F.2d 860 (D.C. Cir. 1939), *cert. denied,* 308 U.S. 611 (1939); Thomas v. Catawba College, 248 N.C. 609, 104 S.E.2d 175 (1958); Rhine v. International YMCA College, 339 Mass. 610, 162 N.E.2d 56 (1959).

14 See Byse & Toughin, Tenure in American Higher Education: Plans, Practices, and the Law 9-70 (1959) for a survey of tenure practices in eighty colleges and universities in California, Illinois, and Pennsylvania.

15 Ohio Rev. Code §§ 3319.08-16 (1953).

16 Ohio Rev. Code § 3319.16 (1953).

17 148 Ohio St. 342, 74 N.E.2d 261 (1947).

18 *Id.* at 349, 74 N.E.2d at 265.

This holding is consistent with the purpose of Ohio's Tenure Law as interpreted in *State ex rel Weekley v. Young*.[19] In that case the Supreme Court held that the purpose of the act was not to afford permanence of employment, but to provide an orderly procedure for termination of employment contracts. Thus, the court's obligation is not to maintain the employment relationship, but to insure that it is not terminated for some cause other than one which is specified in the statute. Discretion is vested with the school board as to the existence of statutory grounds for discharge, subject only to the limitation that the board must act in good faith.[20]

As originally enacted Ohio's Tenure Law contained a provision for damages to a teacher wrongfully dismissed.[21] When the statute was subsequently amended, this section was omitted. This raised the question of sovereign immunity, which retains its vigor in those states which have not explicitly consented to suit in contract.[22] Without ever explicitly discussing the issue, the Ohio Supreme Court has indicated that the doctrine does not apply under these circumstances. In *Poehls v. Young*[23] a writ of mandamus had been issued commanding the board of education to enter into a continuing contract with a teacher for the school year 1941-42. She never received a contract and was not assigned a school. Subsequently she brought an action for damages for the period. The board of education was ordered to pay her the amount which she would have received had the contract been complied with. This amounted to her salary for one year, since she retired after that period.

The court's willingness to grant damages for a period longer than one year was explicitly announced in *Roller v. Patrick*.[24] There the board of education had failed to obey a writ of mandamus ordering it to execute a continuing contract. The teacher, claiming her right to salary for two years under a continuing contract with the board, and claiming that she must be permitted to accept such amount without prejudice to her right to salary for future years up to retirement age, brought an action for salary declatory judgment. The court ordered that the board pay the teacher the amount which she would have received had the continuing contract been effectuated. As to future payments the court noted:

> Where, after the continuing contract is entered into, the teacher is deprived of a teaching assignment and the salary, . . . the teacher may maintain an action . . . for subsequent installments of salary so long as the contract remains in full force and effect.[25]

Since both *Poehls* and *Roller* were decided after the re-enactment of Ohio's Tenure Law minus the damage provision, it is apparent that in Ohio the problem of sovereign immunity has been resolved in favor of recovery.

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19 141 Ohio St. 260, 47 N.E.2d 776 (1943).

20 Powell v. Young, *supra* note 17, at 348, 74 N.E.2d at 265.

21 Ohio Gen. Code § 7708 (1938).

22 See Note, 40 Minn. L. Rev. 234, 257-59 (1956).

23 144 Ohio St. 604, 60 N.E.2d 316 (1945).

24 145 Ohio St. 572, 62 N.E.2d 367 (1945).

25 *Id.* at 579, 62 N.E.2d at 370.

In most state colleges and universities tenure regulations are promulgated either by the board of regents or by the administration of the university.[26] If the legislature has specifically delegated to the board of regents the broad power to "hire and fire," any attempt by such body to limit its own powers with respect to dismissal is generally held void.[27] The rationale apparently is that just as an administrative body cannot extend its own powers as defined by the legislature, neither can it limit them. The leading case on this theory is *Gillian v. Board of Regents of Normal Schools*,[28] a non-tenure case. Gillian had a contract for services in the normal school of the city of Milwaukee, and was dismissed without cause. In denying his request for judgment for the balance of the school year the court said:

> This power of summary removal of a teacher, vested in the board by statute, is a discretionary power, and its exercise in a given case cannot be inquired into, or questioned by the courts . . . The board of regents could make no by-law or contract by which this power could be bargained away, limited, or restricted.[29]

Although this was a non-tenure case, it has nevertheless been consistently applied to those situations in which the teacher has tenure.[30] Thus in the tenure situations a provision for a hearing before dismissal, whether embodied in the constitution of the college and subsequently approved by the board, or announced as the policy of the school and likewise approved, is unenforceable if the board has been vested with plenary power by the legislature.[31]

Where the legislature has not specifically granted the board complete power as to employment, it appears that tenure regulations may be enforced.[32] A satisfactory rationale for this distinction is lacking. If the legislature has not granted the board complete authority as to dismissals, it is doubtful that the legislature has delegated authority to the board to limit an authority which it has never possessed. Nevertheless, the courts have granted relief without attempting to justify the proposition.

For example, in *State ex rel Keeney v. Ayers*,[33] the tenure regulations

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[26] Byse & Toughin, *supra* note 14.

[27] Hyslop v. Board of Regents of Univ. of Idaho, 23 Idaho 341, 129 Pac. 1073 (1913); Devol v. Board of Regents of Univ. of Arizona, 6 Ariz. 259, 56 Pac. 737 (1899). *Contra*, Board of Regents v. Mudge, 21 Kan. 223 (1878); Board of Educ. of City of Ottawa v. Cook, 3 Kan. App. 269, 45 Pac. 119 (1896).

[28] 88 Wis. 7, 58 N.W. 1042 (1894).

[29] *Id.* at 13, 58 N.W. at 1044.

[30] See, *e.g.*, Posin v. State Bd. of Higher Educ., 86 N.W.2d 31 (N.D. 1957); Worzella v. Board of Regents of Educ., 77 S.D. 447, 93 N.W.2d 411 (1958); State *ex rel.* Wattawa v. Manitowoc Public Library Bd., 255 Wis. 492, 39 N.W.2d 359 (1949).

[31] Cases cited note 30, *supra*.

[32] Abraham v. Sims, 2 Cal. 2d 698, 42 P.2d 1029 (1935); State *ex rel.* Phillips v. Ford, 116 Mont. 190, 151 P.2d 171 (1944).

[33] 108 Mont. 547, 92 P.2d 306 (1939).

of the Montana State Board of Education provided that reappointment of a professor at a state university after three years of service would be deemed a permanent appointment. They further provided that once having received such an appointment a professor was entitled to a hearing prior to dismissal. Professor Keeney was employed as a professor of library science for six consecutive years under six annual contracts. The tenure regulations were printed on the reverse side of each of the contracts. However, the provisions were crossed out in the sixth contract. At the conclusion of the school year the university notified Professor Keeney that he would not be reappointed for the succeeding year. No charges had been filed, no investigation made, and no hearing had been held. The court held that the regulations became part of his contract with the university and that having once achieved tenure status he did not waive it by signing a contract from which the tenure provisions had been deleted. The court then ordered his reinstatement.

Under similar circumstances, the court in *Richardson v. Board of Regents of University of Nevada*[34] not only found that the tenure provisions of the Board of Regents were enforceable, but also held that the charges were not sufficiently serious to warrant dismissal. Thus the requirement that dismissal of a staff member under tenure should be only for "cause" was given legal significance. It should be observed that tenure provided by administrative fiat was enforced procedurally in *Keeney* and substantively in *Richardson*. In *Keeney* the court found that the orderly procedure for dismissal as prescribed in the tenure regulations was not observed. Consequently, it ordered reinstatement. In *Richardson* the required hearing was held, and the issue before the court was the sufficiency of the cause for which the hearing board dismissed Professor Richardson. In holding that "cause" meant "legal cause" and not any cause which the hearing board might deem sufficient, the court insured that the college could not negate the tenure contract by holding a sham hearing before dismissal. It should be noted that if the teachers in these cases had requested damages instead of reinstatement, the concept of sovereign immunity, discussed previously with respect to Ohio, might well have prevented such an award.[35]

Enforcement of the tenure provisions of private institutions has been virtually non-existent. In refusing enforcement the courts have either held the act of the institution in making the tenure contract to be ultra vires,[36] or have denied relief on the ground that it is beyond the power of a court of equity to order specific performance of a contract for personal services.[37]

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[34] 70 Nev. 144, 261 P.2d 515 (1953).

[35] See Note, *supra* note 22. *Contra,* Trustees of State Normal School v. Wightman, 93 Colo. 399, 25 P.2d 193 (1933); Colorado School of Mines v. Neighbors, 119 Colo. 399, 203 P.2d 904 (1949).

[36] Cobb v. Howard Univ., *supra* note 13.

[37] Generally on injunction against the discharge of an employee see Annot., 44 A.L.R. 1443 (1926); Annot., 135 A.L.R. 279 (1941); Restatement, Contracts § 379 (1932).

Queen ex rel Wray v. Governor of The Darlington Free Grammar School[38] is the much quoted source of the ultra vires theory. There the letters patent gave the governors of the Darlington School the power to remove a teacher or schoolmaster "according to their sound discretion." The governors issued a bylaw limiting this power. It provided that teachers were to be removed only on proved charges, and were to be heard in their own defense. A teacher was removed without charges. He brought an action in mandamus against the governor of the school. Lord Denam, in refusing the writ, held that "nothing can be better established than that a bylaw by a corporation which alters the constitution of the corporation, is void; and up the same principle a bylaw which restrains and limits the powers originally given to the governors . . . we think must be bad." [39]

Even more difficult to circumvent is the reluctance of a court of equity to order specific performance of a contract for personal service.[40] Opponents of the rule argue that since the teacher, knowing full well the hostility of the school, has requested reinstatement, the court need not concern itself with the cordiality of the relationship upon reinstatement. This ignores the court's obligation to enforce its decree. The court must consider the working conditions of the teacher, for otherwise the school could effectively nullify the decree. The teacher is not just asking to be reinstated. He is asking to be reinstated on the same terms, with the same fringe benefits, and the same opportunity for advancement as if the contract had never been breached. Otherwise, tenure would be meaningless. In an academic environment where much depends on the interplay of personalities, it could be difficult for a court to determine whether the contract was being effectively performed. Furthermore, a tenure contract is of indefinite duration. The court could be forced to retain a case on the docket for years after its decision. Assuming that one of the parties is dissatisfied with the employment relationship upon reinstatement, the court might have to resolve innumerable disputes concerning whether the terms of the contract were being substantially complied with.

Even though there is no direct precedent for it, it appears that a tenured teacher in a private institution does have a chance of obtaining damages for the breach of his employment contract. In *Thomas v. Catawba College*,[41] a professor had achieved continuous employment status. The bylaws of the institution provided that tenure at the college would be governed by the principles outlined in the Statement of Tenure adopted by the American Association of University Professors,[42] and approved by

[38] 6 Q.B. 682, 115 Eng. Rep. 257.

[39] *Id.* at 701, 115 Eng. Rep. at 271.

[40] Contracts of a close personal nature have, however, been specifically enforced upon the request of a party suing to enforce an arbitration award. See In the Matter of Staklinski & Pyramid Elec. Co., 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959), discussed in Notes, 48 Calif. L. Rev. 140 (1960); 45 Cornell L.Q. 580 (1960); 55 N.Y.U.L. Rev. 615 (1960); 7 U.C.L.A.L. Rev. 507 (1960).

[41] *Supra* note 13.

[42] 1940 Statement of Principles on Academic Freedom and Tenure, in 44 Am. A. of University Professors Bull. 290, 291-92 (1958).

the Association of American Colleges. The professor was provided with a hearing as specified in the statement. The committee determined that the charges were valid, and the board of trustees terminated his contract. Simultaneously, they notified him that in accordance with their tenure policy his salary would be continued for one year from the date of notice. More than a year later the professor, asserting that the discharge was without adequate cause, brought an action asking for recovery of all unpaid salary. The court first considered what would be the proper measure of damages for a wrongful discharge of a faculty member. They stated that the measure of damages would be the actual loss sustained on account of the breach, and that the maximum amount recoverable would be the difference between the agreed compensation and the amount the professor could have earned elsewhere by exercising reasonable diligence. Nevertheless, the court refused Professor Thomas's request on the ground that in accepting salary payments after his dismissal he had elected his remedy, and was not thereafter entitled to maintain an action for wrongful discharge. On this basis the court found it unnecessary to consider whether there was adequate cause for dismissal. Though the court denied recovery, their discussion of the proper measure of damages indicated a willingness to allow recovery in some situations.

Having considered the legal status of tenure, it is advisable to ask whether tenure is desirable.[43] Certainly tenure is one method of preventing arbitrary dismissals. It enables a professor or teacher to exercise freedom of speech within a classroom and in his personal life without fear of arbitrary retaliation.[44] Arguably, tenure is the guardian of academic freedom, and academic freedom is the prerequisite to that full discussion of ideas to which our society is committed. Further, tenure insures that a teacher's classroom performance will be appraised impartially. This is important because of the variety of pedagogy, and the difficulty in evaluating the effectiveness of a particular teacher's efforts.

On the other hand, tenure may erode the intellectual atmosphere that it purports to protect. Schools may be forced to retain incompetent teachers whose conduct is close to, but not quite, just cause for dismissal. Also, tenure may attract security seekers, and it is arguable that they are less likely to be pioneers in scholarship than their more fearless brethren.

If tenure is to be more valuable than destructive, just cause for dismissal must be emphasized in drafting and enforcing tenure provisions. A satisfactory method of providing for this is obtained by Ohio's Tenure Law.[45] Cause is emphasized not only by providing that there must be a hearing before dismissal but also by affording judicial review of the determination of the hearing committee. Likewise, the *Richardson* court in

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[43] For a discussion justifying tenure see Stene, "Bases of Academic Tenure," 41 Am. A. of University Professors Bull. 584 (1955). *Contra,* Davis, "Enforcing Academic Tenure: Reflections and Suggestions," 1961 Wis. L. Rev. 200 (1961).

[44] See Emerson & Haber, "Academic Freedom of the Faculty Member As Citizen," 28 Law & Contemp. Prob. 525 (1963).

[45] Ohio Rev. Code §§ 3319.08-16 (1953).

exercising judicial review of the proceeding of the Nevada Board of Regents, recognized the importance of just cause.

The courts most often overlook just cause when considering whether or not they should enforce the tenure regulations of private institutions. Instead, their emphasis is placed on the nature of the relief requested. Thus, in the instant case the court did not consider whether there was cause for Dr. Felch's dismissal, and it is uncertain that it would have been advisable for it to do so. The contract contained a provision for a hearing before a body composed of Dr. Felch's professional associates. Presumably they would have been more qualified than a court to determine academic competence. Nevertheless, cause should mean legal cause, and not any cause which the hearing body might deem sufficient.[46] Therefore, standards of fairness would seem to require the court to exercise its power of judicial review to ascertain if there is sufficient evidence of cause for dismissal. This would, at the very least, insure against a kangaroo hearing and impose upon the school administration a duty to act in good faith.

Although not requested in the instant case, should the court have exercised its equitable powers and ordered a hearing for Dr. Felch? This would seem to be the most practical solution, and would closely parallel the procedure presently employed by appellate courts when they remand a case to the trial court for further proceedings. Such relief would not be subject to the basic criticism of a direct order of reinstatement, namely, that the college would be forced to retain an allegedly incompetent professor. If, on remand, the hearing committee found the charges to be warranted, the dismissal of Dr. Felch would be effective, subject only to the possibility of judicial review of the committee's determination, as discussed above.[47] Dr. Felch would then have received the benefit of tenure, which is continuous employment except for cause.

Assuming that the hearing body found the charges to have been unwarranted, one of two things could happen. Since the court would not have ordered specific enforcement of the contract as to employment, but only as to a hearing, the college could dismiss Dr. Felch without being in contempt of court. If Dr. Felch appealed to the court, the policy argument against ordering a college to pay damages for dismissing a man whose degree of competence neither the court nor the hearing body of the college had determined, would be inapplicable. Thus a court would seemingly be justified in awarding damages. Furthermore, with his name cleared, Dr. Felch would have less difficulty obtaining another position. This would alleviate the need for a large sum in damages.

Alternatively, the college might decide to retain Dr. Felch. The court in the instant case viewed this possibility as indirect enforcement by them of specific performance of the contract, so an injunction against a dismissal that was not in conformity with the tenure hearing provisions

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[46] See Richardson v. Board of Regents, *supra* note 34, at 144, 261 P.2d at 515.

[47] If the court found the hearing to be a sham, the college would seemingly be subject to contempt of court. In addition, the court might then choose to hear the case as to cause de novo or order another hearing, with provision for damages.

was refused. However, there is a substantial distinction between the college's choice of reinstatement after a hearing and reinstatement upon order of the court. The court having ordered a hearing and not reinstatement would have no duty to supervise the reappointment of Dr. Felch. Moreover, since the college would chose to retain him, presumptively the employment relationship would be satisfactory.

The above suggestion, if followed, would not necessarily result in one of the more important objectives of tenure, that is, permanence of employment at a given institution. However, it would insure that Dr. Felch would not have to seek another position while under the stigma of unresolved charges. In this sense it would result in permanence of employment in academic circles.