

4th Civil No. G014837
Orange County Superior Court No. 701228

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

PAUL MCGILL,

Plaintiff and Respondent,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant and Appellant.

Appeal from the Superior Court of Orange County
Honorable William F. McDonald, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
STATEMENT OF FACTS	4
A. McGill's Background And Employment By The University In 1987 As An Untenured Assistant Professor.	4
B. The University's 1990-1991 Academic Year Review Of McGill For Tenure.	5
1. The Departmental Evaluation.	6
2. The Recommendation Of A Majority Of The Department of Mathematics Against Tenure.	7
3. The Recommendation Of The Chair Of The Department of Mathematics Against Tenure And For Non- Reappointment.	8
4. The Recommendation Of The Dean Of The School Of Physical Sciences Against Tenure.	9
5. The Recommendation Of An Ad Hoc Committee Appointed By The Committee on Academic Personnel For Continued Employment Of McGill But Not For Tenure.	10
6. The Department's And the Dean's Replies To The Ad Hoc Committee Recommendations.	12
7. The Executive Vice Chancellor's Recommendation Against Tenure.	13
8. The Chancellor's Decision Against Tenure.	13
9. McGill's Appeal To The Committee On Academic Personnel.	14
C. The University's Re-Evaluation Of McGill For Tenure.	15
1. The Second Recommendation of The Department Of Mathematics Against Tenure.	15
2. The Second Recommendation Of The Dean Against Tenure.	16

	<u>Page</u>
3. The Recommendation Of The Appeals Evaluation Committee Against Tenure.	17
4. The Second Recommendation Of The Executive Vice Chancellor Against Tenure.	18
5. The Final Decision Of The Chancellor Against Tenure.	18
STATEMENT OF THE CASE	19
A. The Petition For Writ Of Administrative Mandate.	19
B. The Administrative Record.	19
C. The Additional Evidence Considered By The Superior Court.	20
D. The Superior Court's Judgment Granting A Writ Of Mandate To Compel The Chancellor To Set Aside His Decision, Continue To Employ McGill At A Higher Salary For Two Years, And To Reconsider Him For Tenure At The End Of That Time.	22
E. The Court's Explanation: Substantial Evidence Supported Granting Tenure, And The Tenure Process Was Tainted By Personal Bias Against McGill And Consideration Of McGill's Lack Of "Congeniality."	22
LEGAL DISCUSSION	24
I. THE DECISION WHETHER OR NOT TO GRANT LIFETIME TENURE TO A PROFESSOR OF MATHEMATICS AT THE UNIVERSITY OF CALIFORNIA IS NOT SUBJECT TO JUDICIAL REVIEW FOR CORRECTNESS.	24
II. IN ANY EVENT, THE CHANCELLOR'S DECISION WAS CORRECT; SUBSTANTIAL EVIDENCE SUPPORTS THE DENIAL OF TENURE AND NON-REAPPOINTMENT BECAUSE MCGILL'S RESEARCH DID NOT MEET THE UNIVERSITY'S STANDARD OF EXCELLENCE, HIS TEACHING WAS ONLY ADEQUATE, AND HIS SERVICE TO THE UNIVERSITY WAS MINIMAL.	29
A. If Judicial Review Is Appropriate At All, The Review Must Be For Substantial Evidence To Support The Chancellor's Decision.	29

	<u>Page</u>
B. Substantial Evidence Supports The Chancellor's Decision Against Tenure: The Majority of Evaluators Agree That McGill Does Not Meet The University's Standards Of Excellence.	30
III. THERE IS NO EVIDENCE THE CHANCELLOR WAS BIASED AGAINST MCGILL OR THAT HE DENIED TENURE BASED ON MCGILL'S LACK OF "CONGENIALITY."	32
A. The Chancellor, Not The Mathematics Department Or The Committee On Academic Personnel, Made The Decision To Deny Tenure And Not Re-Appoint McGill.	33
B. The Chancellor Made His Decision Based On His Review Of The Whole Record And On Recognized Tenure Criteria.	33
C. The Chancellor Was Not Biased, And He Made The Tenure Decision With Full Knowledge Of McGill's Allegations Of Bias Against Some Members Of The Mathematics Department.	35
IV. EVEN IF THE SUPERIOR COURT WERE CORRECT IN FINDING THAT CHANCELLOR'S DECISION WAS TAINTED (IT WAS NOT), THE APPROPRIATE REMEDY WOULD BE TO REMAND THE CASE FOR RECONSIDERATION, NOT TO COMPEL THE UNIVERSITY TO EMPLOY MCGILL FOR TWO MORE YEARS WITH A RAISE IN PAY.	36
CONCLUSION	38

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
Amluxen v. Regents of University of California (1975) 53 Cal.App.3d 27	29
Apte v. Regents of University of California (1988) 198 Cal.App.3d 1084	26
Board of Regents of State Colleges v. Roth (1972) 408 U.S. 564 [33 L.Ed.2d 548, 92 S.Ct. 2701]	26
Board of Trustees v. Superior Court (1981) 119 Cal.App.3d 516	6
California State Auto. Inter-Ins. Bureau v. Garamendi (1992) 6 Cal.App.4th 1409	36
Chang v. Regents of University of California (1982) 135 Cal.App.3d 88	25
Citizens Capital Group v. Cathcart (1982) 136 Cal.App.3d 793	33
Cole v. Los Angeles Community College Dist. (1977) 68 Cal.App.3d 785	33
Faro v. New York University (2nd Cir. 1974) 502 F.2d 1229	27
Gilbert v. State of California (1990) 218 Cal.App.3d 234	36
Goldberg v. Regents of the University of California (1967) 248 Cal.App.2d 867	25
Hosford v. State Personnel Bd. (1977) 74 Cal.App.3d 302	31
Ishimatsu v. Regents of University of California (1968) 266 Cal.App.2d 854	29
Johnson v. University of Pittsburgh (W.D. Pa. 1977) 435 F.Supp. 1328	27, 30
Johnston v. Trustees of Cal. State University & Colleges (1984) 151 Cal.App.3d 1003	32, 37

	<u>Page</u>
Kahn v. Superior Court (1987) 188 Cal.App.3d 752	6
King v. Regents of University of California (1982) 138 Cal.App.3d 812	25, 26
Kumar v. National Medical Enterprises (1990) 218 Cal.App.3d 1050	37
Laborde v. Regents of University of California (C.D. Cal. 1980) 495 F.Supp. 1067	6, 27
Lieberman v. Gant (2nd Cir. 1980) 630 F.2d 60	38
Lynn v. The Regents of the University of California (9th Cir. 1981) 656 F.2d 1337	30
Pennington v. Bonelli (1936) 15 Cal.App.2d 316	24
Regents of University of California v. City of Santa Monica (1978) 77 Cal.App.3d 130	25
Regents of University of California v. Superior Court (1970) 3 Cal.3d 529	25
San Francisco Labor Council v. Regents of University of California (1980) 26 Cal.3d 785	25
Scharf v. Regents of University of California (1991) 234 Cal.App.3d 1393	25
Searle v. Regents of University of California (1972) 23 Cal.App.3d 448	24
Smith v. County of Los Angeles (1989) 211 Cal.App.3d 188	31
Smith v. Regents of University of California (1976) 58 Cal.App.3d 397	29
Smith v. University of North Carolina at Chapel Hill (4th Cir. 1980) 632 F.2d 316	26
Sodikoff v. State Bar (1975) 14 Cal.3d 422	33

	<u>Page</u>
Strumsky v San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28	29
Sweezy v. State of New Hampshire (1957) 354 U.S. 234 [1 L.Ed.2d 1311, 77 S.Ct. 1203]	1
Vega v. City of West Hollywood (1990) 223 Cal.App.3d 1342	36
Wall v. Board of Regents, U.C. (1940) 38 Cal.App.2d 698	25
Zahorik v. Cornell University (2nd Cir. 1984) 729 F.2d 85	27, 34

Constitutions

California Constitution, article IX, section 9	24
--	----

Statutes

Civil Procedure Code section 904.1, subd. (a)	24
Civil Procedure Code section 1094.5, subd. (c)	31
Code of Civil Procedure section 1085	19
Code of Civil Procedure section 1094.5	19

Other Authorities

Academic Personnel Manual Section 210-1 c(3)	34
Academic Personnel Manual Section 210-1 d	34

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APPELLANT'S OPENING BRIEF

INTRODUCTION

This appeal involves an extraordinary judicial intrusion into the "essential freedom" of a university to determine for itself who may serve on its faculty. (See, Sweezy v. State of New Hampshire (1957) 354 U.S. 234, 263 [1 L.Ed.2d 1311, 77 S.Ct. 1203, 1218], Frankfurter, J., concurring.) The superior court has directed The Regents of the University of California ("the University") (1) to set aside the decision of the Chancellor of the University of California at Irvine not to promote Paul McGill

to a tenured position in the Department of Mathematics, (2) to continue to employ McGill for two academic years as an assistant professor at higher salary, and (3) to consider McGill for life-long tenure at the end of that time.

The superior court granted the writ because it perceived some personal bias against McGill by individuals within the Department of Mathematics and because the Chancellor's decision to deny tenure was supposedly based on McGill's lack of "congeniality" rather than on other factors which the court believed were more pertinent and persuasive.^{1/}

The University appeals, and will demonstrate several compelling reasons why the writ should be set aside. The University of California is a constitutional entity, a coordinate and equal branch of state government. Its decisions as to who should receive lifetime appointments to its faculty are not open to the sort of ordinary judicial oversight undertaken by the superior court in this case. In particular, a court may not, as the court did here, decide for itself which factors the University must and must not consider in making faculty appointments and what weight to give to those factors.

If there is to be judicial review of a tenure decision at all, it certainly must be a review for substantial evidence to support, not overturn, the Chancellor's decision. Here, the superior court erroneously searched the record for substantial evidence to support a decision granting tenure. The court compelled the University to ignore all other evidence. The court directed the University to follow what the court decided

^{1/} The court said it "[s]ounds like the Miss America contest here." (RT 3.) However, there is no reference to "congeniality" anywhere in the record of the University's review of McGill for tenure.

was, out of many different recommendations, the most "sensible recommendation," to allow McGill to continue to serve on the faculty.

The record amply supports the Chancellor's decision to deny tenure to McGill. Although there were some dissenting voices, after two complete rounds of intense evaluation, the following individuals and committees all agreed that McGill's work, while perhaps adequate, did not meet the standard of excellence justifying a life-long appointment to the faculty of the University of California: (1) a majority of the tenured members of the Department of Mathematics, (2) the Chair of the Department of Mathematics, (3) the Dean of the School of Physical Sciences, (4) the majority of the Appeals Evaluations Committee, (5) respected evaluators from other university campuses, (6) the Executive Vice Chancellor of the University, and (7) the Chancellor of the University.

Having been denied tenure, McGill had no right to continued employment with the University. He was an at-will employee. By University rules, he was required to make room for other, more-qualified candidates for tenure.

Finally, even if there were a few individual members of the Department of Mathematics who were hostile to McGill, there is no evidence that their hostility was shared by the Chancellor of the University, by any of the other evaluators outside the Department, or even by the majority of members of the Department. The final decision to deny tenure to McGill was made by the Chancellor after he independently reviewed the file and the many recommendations it contained. The Chancellor's decision was based on McGill's failure to meet the University's standards of

excellence. Neither personal bias against McGill nor McGill's lack of "congeniality" played a part in the Chancellor's decision.

In short, there is no legal or factual basis for the court to compel the University to continue to employ McGill as an assistant professor, much less to compel it to employ him at a higher salary and reconsider him for tenure. The superior court's judgment granting a peremptory writ of mandate should be reversed.

STATEMENT OF FACTS

A. McGill's Background And Employment By The University In 1987 As An Untenured Assistant Professor.

Paul McGill was born in Ireland in 1948. He received a Ph.D. in mathematics from Queen's University, Belfast, in 1973. He served in various academic posts in Ireland and France (CT 224-229) and was eventually hired by the University of California at Irvine for the 1987-1988 academic year as an assistant professor, step IV. This is an untenured position. (CT 1059.)^{2/}

There were high hopes for McGill in his subspecialty of probability. (CT 529.) He was advanced to assistant professor, step V, for the 1989-1990 academic

^{2/} McGill has alleged that the University induced him to take this untenured position by fraudulent representations. (CT 13-14.) He asserts that the professors who recruited him for the Department of Mathematics misinformed him that the University could not grant tenure immediately and that he would receive tenure on his first review. (CT 221-223.) The trial court did not grant the writ based on any alleged fraud. Because of the severance of the writ proceedings, that issue has been reserved for subsequent proceedings. (RT 2-3, 33.)

year. (CT 1059.) The recommendation for promotion, however, cautioned that McGill should be "aware that further advancement will depend upon improving his teaching and continuing to achieve the promise shown in his research" as a probabilist. (CT 530.)

A review for possible tenure for McGill was begun during the 1989-1990 academic year, but then suspended. (CT 1059.)

B. The University's 1990-1991 Academic Year Review Of McGill For Tenure.

McGill could not stay on indefinitely as an untenured professor. At the University of California, an untenured professor is appointed for two-year terms and may serve at most, for only eight years. (CT 767, 796-798.) If tenure is denied (as in McGill's case), the candidate is given a one-year terminal appointment (referred to as "non-reappointment" in McGill's case) and must then make room for other candidates. (CT 234.)^{3/}

The University reviewed McGill for tenure during the 1990-1991 academic year. (CT 1059.) An elaborate evaluation process was undertaken, beginning with

^{3/} McGill has contended he achieved "de facto" tenure because his total service, including years at other universities, exceeded eight years. (CT 28-32, 130-132.) University rules, however, do not give credit for service at other universities and do not permit "de facto" tenure. (CT 768.) For purposes of the writ proceeding, the trial court rejected McGill's "de facto" tenure contention. (RT 22, 33-34; CT 1117.)

recommendations at the Department level and culminating in the final decision on whether or not to grant tenure by the Chancellor of the University.^{4/}

1. The Departmental Evaluation.

As the first step in the University's painstaking faculty tenure review process, the Department of Mathematics assembled a file on McGill's credentials. (CT 428-478.) Evaluations were obtained from interested and knowledgeable scholars outside the University. (CT 429-442.^{5/}) McGill submitted biographical materials for his file. (CT 457-478.)

Several outside evaluations of McGill's research were positive. McGill apparently would be welcome on the faculty at some other universities. (CT 429-441.) However, among others, one outside evaluator concluded that McGill's "work simply has not had the impact that it should have had in order to justify receiving a tenured position at the University of California." (CT 442.)

Student evaluations of McGill as a teacher were, at best, lukewarm. He was consistently ranked below most other mathematics instructors. (CT 444-456.)

^{4/} A chart of the University's general tenure-review process, appended to Laborde v. Regents of University of California (C.D. Cal. 1980) 495 F.Supp. 1067, is reproduced at CT 947. A particular University campus may follow its own minor variations in the process or in names of committees.

^{5/} All references to particular evaluators have been redacted from McGill's personnel file documents. Confidentiality is an essential prerequisite to the effectiveness of a peer evaluation system of faculty selection. (Board of Trustees v. Superior Court (1981) 119 Cal.App.3d 516, 529; Kahn v. Superior Court (1987) 188 Cal.App.3d 752, 770.) Nevertheless, it is possible to identify the source of certain documents from their content and context as well as from information in the record about participants in the tenure-review process.

2. The Recommendation Of A Majority Of The Department
of Mathematics Against Tenure.

A three-member ad hoc committee of the faculty of the Department of Mathematics was unable to reach a consensus regarding a recommendation for future employment for McGill. Those recommending against tenure cited several grounds:

"[G]iven the amount of time since the doctorate [17 years], it is not clear that his work has had the impact that it should for a tenured professor in the University of California system. There are now many more good candidates in probability theory among the applicants to the department than there were at the time McGill was hired. In order for the department to succeed in its goal of continuing to grow into a first rate department, it must be sure that every appointment is solid and has no weaknesses. There are weaknesses in Professor McGill's case."

(CT 423.)

"The interaction with the students in the graduate program has also been less satisfactory than we expected." (CT 424.)

"[H]is teaching effectiveness must be considered only adequate at best."

(CT 424.)

"[Other recent candidates for tenure] in probability compare favorably with McGill especially when one considers their whole careers, and more importantly, their impact on the future growth of the department of mathematics." (CT 424.)

The one ad hoc department committee member favoring tenure cited McGill's good reputation with certain probabilists at other universities. (CT 424-426.)

On January 7, 1991, 23 of the 25 tenured members of the Department of Mathematics met and considered McGill's qualifications. (CT 422.) Only one member vocally supported a promotion. (CT 426.) The discussion focused on the perceived impact of McGill's work and the potential for further research progress. (CT 415.) The members voted by secret ballot. (CT 552.) Their recommendation was against tenure and for non-reappointment to the faculty. (CT 426.)

3. The Recommendation Of The Chair Of The Department of Mathematics Against Tenure And For Non-Reappointment.

Ronald Stern, Chair of the Department of Mathematics, submitted his own recommendation strongly favoring non-reappointment (i.e., against promotion to tenure). According to Stern, while McGill's work is respected, it does not compare to and does not have the impact of the work of others of equal experience, has not attracted external funding, and is not at the level appropriate for the University of California system. (CT 414.)

Stern also noted that McGill had not interacted with the probability group within the faculty. McGill's teaching, while improving, had not been successful as indicated by student evaluations. McGill's service to the University had been limited.

During recruitment of new candidates, McGill had been negative and denigrating about some of the Department's valued faculty. (CT 415.)

Stern concluded that McGill's work "falls short of the quality of research of recent candidates that we have considered for appointment or for whom we have an offer pending." (CT 415.)

4. The Recommendation Of The Dean Of The School Of Physical Sciences Against Tenure.

On January 28, 1991, the Dean of the School of Physical Sciences also recommended against tenure for McGill:

"Of all the departments in the School of Physical Sciences, the Department of Mathematics must be the most careful in promotions requiring tenure. They can only afford to promote colleagues who will significantly enhance their internal and external standing. A number of very marginal appointments were made in the past and that has placed the department in an unenviable position.

"I do not see the promotion of Paul McGill helping the positive evolution of the Mathematics Department. Although decisions of this nature are very difficult and they are only rarely obvious, I favor the recommendation for non-reappointment." (CT 413.)

5. The Recommendation Of An Ad Hoc Committee
Appointed By The Committee on Academic Personnel
For Continued Employment Of McGill But Not For
Tenure.

McGill's file was sent on for further review by an ad hoc committee appointed by the Committee on Academic Personnel ("CAP"). (CT 552.) McGill submitted additional materials regarding recent academic accomplishments. (CT 404, 457.)

McGill wanted to disqualify the entire faculty of the Department of Mathematics on the basis of his belief that the Department's decision was motivated by a strong personal animosity by two or three members of the Department. (CT 412.) Although the University was not obligated to do so (CT 964), it permitted McGill to exclude 23 of the 28 members of the Department as potential members of his ad hoc review committee. (CT 408, 411.)

On March 12, 1991, McGill wrote to the Assistant Vice Chancellor for Academic Personnel, Mary Carol Perrott, that he felt the Chair of the Department was hostile to him. (CT 400.)

On March 29, 1991, McGill wrote to the Dean of the School of Physical Sciences expressing concern that evidence gathered by the department was being concealed from CAP. (CT 397.) McGill was referring to some evaluation letters which were collected in the course of his earlier suspended tenure review in 1989-1990. Again, although not obligated to do so (CT 953-954), the Dean agreed to

include copies of all the old letters from his 1989-1990 review in McGill's current tenure review file. (CT 380.)

On May 28, 1991, the ad hoc committee recommended that McGill be advanced to the untenured position of Assistant Professor, Step VI, and that he be reconsidered for tenure in two years. (CT 375.) The committee found the file "puzzling" (CT 377) and asked the Department of Mathematics and McGill to strive for cooperation. According to the committee, McGill "bears the onus to make clear efforts to improve in this regard and to reach out in an attempt to mend real or perceived failures in cooperativeness in regards to collegial interactions." (CT 378.)^{6/}

^{6/} The committee asked that two paragraphs be included in McGill's file:

"We would hope that when the next personnel action for McGill is forwarded, CAP and a potential ad hoc committee are not faced with a similar problematical file. Whatever the recommendation may be, we would counsel a full and candid presentation of all elements of the case and also suggest that every effort be made to interact completely and openly with McGill to avoid any misunderstanding on his part concerning the recommendation and the reasons for it.

"If, as we suspect, personal tensions are in some way related to the present recommendation for termination, we strongly urge both McGill and other concerned members of the Department to try to reach an accommodation and resolve any such matters. We are well aware that such tensions and/or misunderstandings can arise and are often transient. We are also aware that responsibility rarely resides solely with one or the other party. It is our view that McGill adds strength to the UCI Math Department based on the quality of his work and his international reputation. However, it is also clear that his cooperation and to some extent his service to the department and school are the least satisfactory elements in his record. He bears the onus to make clear efforts to improve in this regard and to reach out in an attempt to mend real or perceived failures in cooperativeness in regards to collegial interactions." (CT 378.)

On May 30, 1991, CAP agreed to support the recommendation of the ad hoc committee which it had appointed. (CT 373.)^{7/}

6. The Department's And the Dean's Replies To The Ad Hoc Committee Recommendations.

On June 18, 1991, the Department submitted a rebuttal to the ad committee report and its cautionary paragraphs. (CT 363.) The Department noted that:

"Collegiality" was not mentioned in the Department's recommendation and was only a passing reference in the recommendation of the Department Chair. (CT 363.)

Outside praise for McGill's work focuses on work he did prior to joining the Department. (CT 363-364.)

McGill would never receive federal research funding money. (CT 374.)

McGill is at least a level below all other professors receiving tenure in the department in the last ten years. (CT 364.)

"Any non-reappointment is certainly problematical. In order for a University to excel at research, teaching, and service, tough and timely decisions need to be made." (CT 364.)

^{7/} CAP opined to the Department of Mathematics that "collegiality (apart from service to the University)" should not be a condition of tenure. (CT 373.) CAP was wrong in this regard. Collegiality is an acknowledged factor in a university's tenure review process. (CT 766-767.)

On June 20, 1991, the Dean also questioned the ad hoc committee's recommendation of a merit increase:

"I do not view this file as being strong enough to justify a promotion to tenure and to delay the decision will only prolong the inevitable." (CT 361.)

7. The Executive Vice Chancellor's Recommendation Against Tenure.

On July 15, 1991, the Executive Vice Chancellor of the University recommended denial of tenure:

"Overall, when the case is not clouded by the issues of 'collegiality' and a 'problematical file,' the information presented in the dossier does not support the criteria required for a prospective promotion to a tenured position at the University of California." (CT 358.)

8. The Chancellor's Decision Against Tenure.

On August 5, 1991, then Chancellor Jack W. Peltason (now President of the University of California) gave McGill formal notice of non-reappointment. McGill was offered a one-year terminal appointment as Assistant Professor, Step V, through

August, 1992. (CT 356.) The Chancellor explained his decision in a letter to McGill on August 19, 1991:

"As you know, your dossier was reviewed by an ad hoc review committee and the Committee on Academic Personnel. The conclusion reached from the review of your case is that the research record since appointment was judged deficient for tenure. While the teaching performance in the classroom was assessed to be adequate, mentoring of graduate students and the record of University service is minimal. The overall record was found not to meet UC standards for tenure.

"I have examined your dossier thoroughly and the recommendations made during the course of review. My decision for non-reappointment in this case was made in light of those recommendations, and in consideration of the criteria of the University of California for promotion in the professorial series, and view of the time limit established by the University of California for such decisions." (CT 354.)

9. McGill's Appeal To The Committee On Academic Personnel.

On September 4, 1991, McGill appealed the Chancellor's decision, citing alleged errors in the file regarding dates of publication of certain articles. McGill felt

that some of his recent work had been mischaracterized as being from an earlier review period. (CT 511, 513.)

Apparently based on McGill's allegations of procedural irregularities, CAP granted McGill's appeal. (CT 510.) This meant that yet another round of evaluations would be conducted.

C. The University's Re-Evaluation Of McGill For Tenure.

1. The Second Recommendation of The Department Of Mathematics Against Tenure.

On October 30, 1991, McGill submitted extensive additional materials, including additional teaching evaluations, articles and accomplishments, and his allegations of errors in the list of publications in his file. (CT 558-763a.)

On November 25, 1991, the Department of Mathematics reconsidered its earlier recommendation. Department Chair Stern announced that McGill's classification of his publications was the correct one. The discussion centered on evaluating the information McGill had submitted and whether or not McGill should be re-appointed at some rank. (CT 483.) The Department again voted to recommend against tenure and for non-reappointment. (CT 487, 493.) A departmental letter advised that "all of the voting faculty . . . have carefully reviewed Paul McGill's file and made judgements based on quality of research mathematics, teaching, and service,

and that no personal animosity was evident in any of the discussions of this case."
(CT 544.)^{8/}

On December 9, 1991, McGill asserted to Assistant Vice Chancellor Perrott his feeling that Department Chair Stern was behaving in a partial and unreasonable manner. (CT 489.) Perrott forwarded McGill's complaint to CAP (CT 485) along with a reply to McGill's complaints. (CT 482.)

2. The Second Recommendation Of The Dean Against
Tenure.

On December 26, 1991, the Dean of the School of Physical Sciences again recommended against tenure for McGill. "Overall, the record simply does not justify promotion. Furthermore, the record will likely not significantly change during the next two years." (CT 539.) With regard to McGill's complaints regarding the way publications were listed in his file, the Dean explained:

"The bottomline [sic] seems to be that McGill claims these as new contributions and the Department claims that they have already received at least some evaluation in the Merit File of 1989. In fact all of these contributions were submitted . . . in written form at the time of the Merit Review." (CT 541.)

^{8/} Although one professor said he had heard there was personal animosity against McGill from two professors (CT 550), the Department voted by secret ballot, so faculty members were free to vote their own convictions.

3. The Recommendation Of The Appeals Evaluation
Committee Against Tenure.

An ad hoc Appeals Evaluation Committee was appointed by CAP to evaluate McGill's case. This committee included mathematics professors from other campuses of the University of California, some nominated by McGill. (CT 494, 495.)

McGill's attorney filed a lengthy submission in support of the appeal. (CT 279.) He detailed McGill's allegations of personal bias against particular members of the Department of Mathematics. (CT 283.) According to McGill, he had had a falling out with another probabilist, Professor Carmona, over allegations that some of McGill's early work was not his own. (CT 283.)

On May 12, 1992, the Appeals Evaluation Committee issued its majority report recommending against tenure. (CT 533.) Among other things, the majority found:

Based on a detailed analysis of his research, teaching and service to the University and the community, McGill "does not meet the minimum standards for tenure at this time and will not in the future." (CT 536.)

While some of McGill's older work had some impact in the area of "concrete calculations for excursions," the impact of his more recent work with "Wiener-Hopf factorizations" was less certain. (CT 535.)

"It was generally agreed . . . that some people in the available 'pool' and those whose names were discussed and who have been advanced recently

to tenure in probability in the University of California are superior to Dr. McGill." (CT 536.)

A minority report recommended tenure, believing McGill's work should not be compared to that of others of equal experience or to that of other potential candidates for tenure. (CT 537.) CAP supported the minority report. (CT 527.)^{9/}

4. The Second Recommendation Of The Executive Vice Chancellor Against Tenure.

The Executive Vice Chancellor reaffirmed his recommendation that "McGill does not meet the criteria for either tenure or reappointment." (CT 526.)

5. The Final Decision Of The Chancellor Against Tenure.

On June 20, 1992, the Chancellor informed McGill that his decision against tenure (and therefore for non-reappointment) would stand:

"The case has now been reviewed by a duly-constituted Appeals Evaluations Committee and by the Committee on Academic Personnel.

^{9/} The minority report was incorrect in its conclusion that McGill should not be compared to other potential candidates. The Academic Personnel Manual specifically provides in its Instructions to Review Committees that "[t]he department and the review committee should consider how the candidate stands in relation to other people in the field outside the University who might be considered alternative candidates for the position." (CT 779.)

Those reviews were made on the basis of the complete dossier, including all materials you submitted.

"After consideration of all recommendations in this case, and after my own review of the dossier, I have concluded that there is not a sufficient reason to reverse my decision for non-reappointment." (CT 523.)

STATEMENT OF THE CASE

A. The Petition For Writ Of Administrative Mandate.

McGill filed suit in Orange County Superior Court against The Regents, the Chancellor, Department Chair Stern and Department Professors Carmona and Yeh. He sought damages for fraud, violation of due process, and age discrimination. (CT 1.) On June 23, 1993, under the same case number, McGill filed a petition for a writ of mandate under both Code of Civil Procedure section 1085 and 1094.5 to compel the University to grant him tenure. (CT 28.) The superior court severed the writ petition from the suit for damages and heard the petition as a separate matter.

B. The Administrative Record.

The administrative record consists of the "Original Non-Reappointment File" from the Department of Mathematics (CT 350-478), the "Request For Appeal" file

(CT 479-521), the "Appeal File" (CT 522-762), and a collection of additional documents not already copied from these other files. (CT 274-345a.) Many of the documents in each file are copies of documents from the other files.

C. The Additional Evidence Considered By The Superior Court.

The superior court denied the University's motion to limit judicial review to the contents of the administrative record. (CT 891, 1064, 1124-1125.)

McGill filed affidavits from various university professors as to the appropriate standards for granting tenure and as to McGill's qualifications for tenure. (CT 130-132, 136-138, 346-348.) Professor James Pittman of the Department of Statistics at the University of California at Berkeley believes that McGill should have been made a full professor when he was originally appointed to the faculty at the University of California at Irvine. (CT 136.)

The University filed opposing affidavits. (CT 764-769, 800-804, 949-954.) Professor Thomas M. Liggett, Chair of the Department of Mathematics at U.C.L.A., and former Editor in Chief of the leading probability journal in the world (CT 801), stated:

"The commitment of a life-long appointment to a tenured position in Mathematics at the University of California is reserved for those very few highly original and productive thinkers who have had a major impact in their field and who are likely to continue to do so for the rest of their careers." (CT 802.)

"My review of Paul McGill's research which has appeared in the important refereed journals and my review of the impact of his work has had on the field of probability theory leads me to the expert opinion that his work did not merit promotion to tenure in the UCI Mathematics Department." (CT 802-803.)

"Dr. McGill has not been the editor or even an associate editor of any journal that I am aware of, has apparently never received any important research grants . . . , nor has he been a key speaker at any significant meeting of mathematicians or probabilists." (CT 803.)

"[The reputation of the UCI Department of Mathematics] has improved dramatically in the last few years. That reputation has been enhanced . . . by several of the recent . . . appointments to its tenured ranks." (CT 802.) "[O]ne of the . . . Department's recent appointments, Professor Senya Shlosman from Moscow, confirms the availability of far more important and creative researchers in the field of probability than Dr. McGill." (CT 803-804.)

McGill submitted an affidavit again asserting that certain members of the Department of Mathematics were biased against him. (CT 221-223.) However, the Chair of the Department and the two other professors accused of bias submitted counter-affidavits flatly denying that personal animosity was involved in the Department's recommendation of non-reappointment. (CT 1043-1045, 1047-1049, 1051-1053.)

D. The Superior Court's Judgment Granting A Writ Of Mandate To Compel The Chancellor To Set Aside His Decision, Continue To Employ McGill At A Higher Salary For Two Years, And To Reconsider Him For Tenure At The End Of That Time.

On August 18, 1993, the superior court signed a judgment granting a peremptory writ of administrative mandate. The judgment commands the University to set aside its decision not to award tenure, to reinstate McGill to the Department of Mathematics as an Assistant Professor, step VI, for the 1993-1994 academic year, and to conduct a personnel review for tenure during the 1994-1995 academic year, and if tenure is awarded, it will be effective July 1, 1995. (CT 1133.)

E. The Court's Explanation: Substantial Evidence Supported Granting Tenure, And The Tenure Process Was Tainted By Personal Bias Against McGill And Consideration Of McGill's Lack Of "Congeniality."

The superior court declined to make written findings. (RT 31.) However, the court explained its ruling at the hearing on the writ petition:

"Congeniality is not the criteria here and that seemed to be what everyone went off on." (RT 6.)^{10/}

^{10/} As noted above, it is unclear what the court meant by "congeniality." The issue of "collegiality" was appropriately mentioned in the administrative record, but "congeniality" was never mentioned.

The court explained that it would follow the "most sensible recommendation" from among the several different recommendations which various evaluators had made:

"I think the action has been arbitrary and capricious. The Chancellor certainly does have the discretion to differ with the Committee on Academic Personnel's recommendation and advice, however from the record here it is clear that that discretion that the chancellor has was not exercised in accordance with the standard for evaluation for tenure. Counsel is absolutely correct the file here is permeated with the bias and the antagonistic feelings towards Mr. McGill within the department. . . . There is substantial evidence to support the awarding of tenure, at the very least the promotion and two year review of the tenure coming up, which was the recommendation of the Committee of Academic Personnel. It should also give Mr. McGill and the Department a period to try to resolve their personality problems which clearly exist. And I think that is the most sensible recommendation. The writ will be granted along those lines." (RT 29-30.)

The court made it clear that it was not accepting McGill's charges of procedural irregularities. Instead, the court was deciding what standards should be applied by the University in awarding tenure:

"The procedural confusion that existed the first go-around was ultimately cured, however the proper standards still were not applied."
(RT 33.)

On September 9, 1993, the University filed notice of appeal from the judgment granting the peremptory writ. (CT 1141-1142.) The judgment is appealable. (Civ. Proc. Code, § 904.1, subd. (a).)

LEGAL DISCUSSION

I.

THE DECISION WHETHER OR NOT TO GRANT LIFETIME TENURE TO A PROFESSOR OF MATHEMATICS AT THE UNIVERSITY OF CALIFORNIA IS NOT SUBJECT TO JUDICIAL REVIEW FOR CORRECTNESS.

For several good reasons, the superior court should not have ventured an inquiry into the merits of the University's decision to deny life-time tenure to McGill.

First, the California Constitution, article IX, section 9, entrusts to the Regents of the University of California "full powers of organization and government." (Searle v. Regents of University of California (1972) 23 Cal.App.3d 448, 452.) The University is "a branch of the state itself" (Pennington v. Bonelli (1936) 15 Cal.App.2d 316, 321), "a constitutional department or function of the state

government." (Goldberg v. Regents of the University of California (1967) 248 Cal.App.2d 867, 874; Regents of University of California v. City of Santa Monica (1978) 77 Cal.App.3d 130, 135.) The power of the Regents to operate, control and administer the University is therefore virtually exclusive. (San Francisco Labor Council v. Regents of University of California (1980) 26 Cal.3d 785, 788; Regents of University of California v. Superior Court (1970) 3 Cal.3d 529, 540.) "This being so, this court has no right to interfere with its government." (Wall v. Board of Regents, U.C. (1940) 38 Cal.App.2d 698, 699 [denying writ purporting to challenge employment decision of University].) In particular, "the evaluation of academic personnel is within the area of autonomy granted the University under article IX, section 9 of the California Constitution" (Scharf v. Regents of University of California (1991) 234 Cal.App.3d 1393, 1411.)

Moreover, even without its constitutional standing, as a matter of fundamental academic freedom the University must be permitted to decide for itself who shall teach at the University. "[T]he evaluation of scholarship and the grant or denial of tenure or promotion . . . is a defining act of singular importance to an academic institution." (Scharf v. Regents of University of California, *supra*, 234 Cal.App.3d 1393, 1405.)

It is also well-established that a non-tenured faculty member has no protected property interest in continued employment. (Chang v. Regents of University of California (1982) 135 Cal.App.3d 88, 91; King v. Regents of University of California (1982) 138 Cal.App.3d 812, 815 ["a nontenured professor has no cognizable property interest in the renewal of his employment"].) "The university has simply decided not

to accord appellant the special privilege of life-time employment. His ability to seek other employment in his profession has not been curtailed in any respect, nor has his professional status been removed or damaged." (Id. at pp. 817-818.)^{11/}

In addition, as a non-tenured employee, McGill had no constitutional right to any particular procedure for determining whether he would continue to be employed. (Board of Regents of State Colleges v. Roth (1972) 408 U.S. 564, 576-579 [33 L.Ed.2d 548, 92 S.Ct. 2701, 2708-2710].)

Finally, it is settled law that the academic decision whether or not to grant tenure to a professor of mathematics at a university is ordinarily beyond the expertise of the courts.^{12/} The court in Smith v. University of North Carolina at Chapel Hill (4th Cir. 1980) 632 F.2d 316, 345-346, acknowledges:

"Unsure how to evaluate the requirements for appointment, reappointment and tenure, and reluctant to interfere with the subjective and scholarly judgments which are involved, the courts have refused to impose their judgment as to whether the aggrieved academician should have been awarded the desired appointment or promotion. Rather, the

^{11/} Employment decisions by the University may be subject to judicial review for unfairness in other contexts. (See, Apte v. Regents of University of California (1988) 198 Cal.App.3d 1084 [regarding termination of long-time, non-tenure track associate professor].) The decision to grant or deny tenure to a professor, however, is unique.

^{12/} Few persons outside a university department of mathematics would even understand the nature of the topic of McGill's study. Consider, for example, the introductory paragraph of plaintiff's article "Remark On The Intrinsic Local Time": "The intrinsic local time is a semimartingale in the excursion filtration. We indicate, inter alia, a new proof of the fact that its martingale part generates an orthogonal martingale measure in the sense of Walsh. The calculations avoid explicit use of excursion theory, relying instead on stochastic calculus in the space variable." (CT 595.) The court in this case could barely pronounce the problems with which McGill works, much less decide his competency in working with them. (RT 10-11.)

courts review has been narrowly directed as to whether the appointment or promotion was denied because of a discriminatory reason.

[Citation.] '[The] law does not require, in the first instance, that employment be rational, wise, or well-considered -- only that it be nondiscriminatory.' [Citation.]"

See also, Johnson v. University of Pittsburgh (W.D. Pa. 1977) 435 F.Supp. 1328, 1353:

"[T]enure is a privilege, an honor, a distinctive honor, which is not to be accorded to all assistant professors. It is a very high recognition of merit. It is the ultimate reward for scientific and academic excellence. It is to be awarded in the course of search for fundamental merit. [Citation.] Such decision by its very nature cannot be made by a court but must be made by the faculty, the administration and trustees of the university."

Accord: Faro v. New York University (2nd Cir. 1974) 502 F.2d 1229, 1231-1232; Laborde v. Regents of University of California (C.D. Cal. 1980) 495 F.Supp. 1067, 1070 ["This Court is reluctant to substitute its judgment for the academic experts in the field, no matter how impressive her scholarly work appears to the Court"]. As aptly stated in Zahorik v. Cornell University (2nd Cir. 1984) 729 F.2d 85, 93:

"Where the tenure file contains the conflicting views of specialized scholars, triers of fact cannot hope to master the academic field sufficiently to review the merits of such views and resolve the differences of scholarly opinion. Moreover, the level of achievement required for tenure will vary between universities and between departments within universities. Determination of the required level in a particular case is not a task for which judicial tribunals seem aptly suited. Finally, statements of peer judgments as to departmental needs, collegial relationships and individual merit may not be disregarded absent evidence that they are a facade for discrimination."

The University therefore submits that, short of a finding of a denial of some constitutional or explicit statutory right (there is no such finding here), the superior court had no authority to review the decision whether to grant or deny tenure to McGill. That should be the end of this case.

As we next demonstrate, however, even if the court were authorized to review the University's academic employment decision regarding McGill, the record fully supports the University's decision not to award tenure.

II.

IN ANY EVENT, THE CHANCELLOR'S DECISION WAS CORRECT; SUBSTANTIAL EVIDENCE SUPPORTS THE DENIAL OF TENURE AND NON-REAPPOINTMENT BECAUSE MCGILL'S RESEARCH DID NOT MEET THE UNIVERSITY'S STANDARD OF EXCELLENCE, HIS TEACHING WAS ONLY ADEQUATE, AND HIS SERVICE TO THE UNIVERSITY WAS MINIMAL.

- A. If Judicial Review Is Appropriate At All, The Review Must Be For Substantial Evidence To Support The Chancellor's Decision.

McGill had no right to continued employment at the University or to judicial review of the correctness of the University's employment decision. But even if he did, in reviewing the decision of a constitutional agency, the substantial evidence test controls. (Smith v. Regents of University of California (1976) 58 Cal.App.3d 397, 400; Amluxen v. Regents of University of California (1975) 53 Cal.App.3d 27, 32-33; Ishimatsu v. Regents of University of California (1968) 266 Cal.App.2d 854, 862; See, Strumsky v San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 35-36.)

The superior court apparently employed the contrary test here. The court decided there was substantial evidence to support a decision opposite to the one which the Chancellor made. (RT 29-30 [THE COURT: "There is substantial

evidence to support the awarding of tenure, at the very least the promotion and two year review of the tenure coming up"].)

B. Substantial Evidence Supports The Chancellor's Decision
Against Tenure: The Majority of Evaluators Agree That McGill
Does Not Meet The University's Standards Of Excellence.

"Without doubt, deficient scholarship is a legitimate, nondiscriminatory reason to deny salary increases or tenure." (Lynn v. The Regents of the University of California (9th Cir. 1981) 656 F.2d 1337, 1344.) Furthermore, the relative weight to be given other elements of the tenure equation, such as teaching, service to the University, and comparative standing in the field, is a matter peculiarly within the discretion of the University. "[U]niversities exist not only for the teaching of students but also for the doing of advanced research to increase the knowledge of mankind. The amount of emphasis to be placed on such research in any given department, however, is a matter for the administration and trustees of the university to determine, not the court." (Johnson v. University of Pittsburgh, supra, 435 F.Supp. at pp. 1365-1366.)

There is abundant evidence here that McGill's research, while adequate, was not excellent; that his research did not and would not have the impact in his field of probability as had originally been hoped; that his work was not up to the par of other recent and prospective appointments to the Department of Mathematics; that his teaching was, at best, adequate; and that his service to the University and the

community was minimal. This was the informed opinion of a majority of the members of the Department of Mathematics (CT 363, 422, 487), of the Chair of the Department (CT 414), of the Dean of the School of Physical Sciences (CT 361, 413, 539), a majority of the Appeals Evaluations Committee appointed by CAP (CT 533), of the Executive Vice Chancellor (CT 358), of respected outside evaluators (CT 443, 802-804), and of the Chancellor of the University (CT 354, 356, 523).

There were, as there often are in tenure cases, contrary opinions. Some outside evaluators thought McGill's work deserved tenure. (CT 424-426, 429-441.) Some within the University thought so, too, or at least that McGill deserved still more time to prove himself. (CT 375, 424-426, 537.) But these were just different opinions. It simply cannot be said as a matter of law by a court that one opinion was necessarily better than another, or that opinions with which McGill did not agree were invalid.

McGill has argued that the superior court must make a review for substantial evidence "in light of the whole record." (CT 1108; Civ. Proc. Code, § 1094.5, subd. (c).) A review of the whole record, however, does not mean the court independently reweighs the evidence. The court still "must deny the writ if there is any substantial evidence to support the findings." (Smith v. County of Los Angeles (1989) 211 Cal.App.3d 188, 198, original emphasis.) "Substantial evidence" is "'relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" (Hosford v. State Personnel Bd. (1977) 74 Cal.App.3d 302, 307.)

Substantial, indeed ample, evidence in the form of the opinions of respected, knowledgeable and independent evaluators both within and without the University,

supports the Chancellor's decision that McGill simply did not measure up to the high standards of excellence for a tenured professorship at the University of California. (CT 354, 356, 358, 361, 363, 413, 421, 422, 443, 487, 523, 533, 539.)

III.

THERE IS NO EVIDENCE THE CHANCELLOR WAS BIASED AGAINST MCGILL OR THAT HE DENIED TENURE BASED ON MCGILL'S LACK OF "CONGENIALITY."

The University does its best to provide a fair procedure for awarding or denying tenure. (CT 267; see also CT 236-241, 778-785.) As we have shown, there is an elaborate fact-finding and appeal process for tenure decisions. But the University is not compelled to provide such a process. Its tenure decisions need not be "correct" to a judicial standard as long as they do not discriminate on constitutionally forbidden grounds. This is because a non-tenured assistant professor serves at the will of the Chancellor. As the court explains in Johnston v. Trustees of Cal. State University & Colleges (1984) 151 Cal.App.3d 1003, 1009:

"[T]he existence of the grievance procedure cannot be construed to nullify the president's power to reject a probationary employee at any time, subject only to the limitation that public employment may not be conditioned upon a waiver of constitutional rights."

However, as we now demonstrate, even if McGill were entitled to a "fair" tenure decision, it is clear that he got one.

A. The Chancellor, Not The Mathematics Department Or The Committee On Academic Personnel, Made The Decision To Deny Tenure And Not Re-Appoint McGill.

By University rules, the Department, the outside evaluators, the ad hoc committees, the heads of academic units, and the Committee on Academic Personnel only make recommendations. The Chancellor makes the decision as to academic appointments at the University. (CT 242, 252.) Therefore, it was the decision of the Chancellor which was at issue in the superior court. If bias were a legitimate basis for courts to interfere with a tenure decision, the bias would have to be of the decision-maker, not of other participants in the proceedings. (Citizens Capital Group v. Cathcart (1982) 136 Cal.App.3d 793, 798; Cole v. Los Angeles Community College Dist. (1977) 68 Cal.App.3d 785, 792; see, Sodikoff v. State Bar (1975) 14 Cal.3d 422, 431.)

B. The Chancellor Made His Decision Based On His Review Of The Whole Record And On Recognized Tenure Criteria.

The Chancellor's written findings establish that he made his tenure decision based on his own independent review of the file and taking into account all the

varying recommendations of others within and without the University. He specifically considered the four criteria which the University has established for tenure decisions.^{13/} The Chancellor did not even mention "congeniality" (or "collegiality" for that matter) as a basis for his decision.^{14/} He stated:

"The conclusion reached from the review of your case is that the research record since appointment was judged deficient for tenure.

While the teaching performance in the classroom was assessed to be adequate, mentoring of graduate students and the record of University

^{13/} The criteria are teaching, research and creative work, professional competence and activity, and university service and public service, as set forth and elaborated in the Academic Personnel Manual. (CT 781-784, 1059.)

Section 210-1 c(3) of the Academic Personnel Manual provides: "Promotions to tenure positions should be based on consideration of comparable work in the candidate's own field or in closely related fields. The department and the review committee should consider how the candidate stands in relation to other people in the field outside the University who might be considered alternative candidates for the position. The department chairperson shall supplement the opinions of colleagues within the department by letters from distinguished extramural informants." (CT 779-780.)

Section 210-1 d provides: "The review committee shall judge the candidate with respect to the proposed rank and duties, considering the record of the candidate's performance in (1) teaching, (2) research and other creative work, (3) professional activity, and (4) University and public service. . . . Superior intellectual attainment, as evidenced in both teaching and in research or other creative achievement, is an indispensable qualification for appointment or promotion to tenure positions. Insistence upon this standard for holders of the professorship is necessary for maintenance of the quality of the University as an institution dedicated to the discovery and transmission of knowledge." (Original emphasis; CT 780.)

^{14/} Although "collegiality" is not expressly mentioned in University guidelines regarding tenure, the University does not concede that collegiality can play no legitimate role in the overall determination of a candidate's qualifications for tenure. (CT 766.) The Statement on Professional Ethics of the American Association of University Professors provides that "[a]s a colleague, the professor has obligations that derive from common membership in the community of scholars." (CT 786.) And as the court explains in Zahorik v. Cornell University, *supra*, 729 F.2d 85, 93: "[S]tatements of peer judgments as to departments needs, collegial relationships and individual merit may not be disregarded absent evidence that they are a facade for discrimination."

service is minimal. The overall record was found not to meet UC standards for tenure." (CT 142.)

C. The Chancellor Was Not Biased, And He Made The Tenure Decision With Full Knowledge Of McGill's Allegations Of Bias Against Some Members Of The Mathematics Department.

There is absolutely no evidence that the Chancellor was biased against McGill or that he was a "rubber stamp" for anyone. (RT 3.) He independently reviewed McGill's entire tenure file. (CT 354, 523.) The file included all of McGill's allegations of bias against certain members of the mathematics department. (CT 283, 412, 489, 558.) McGill had even included an extensive legal brief in his appeal file. That brief reiterated all of McGill's charges of fraud in inducing him to join the faculty and his belief that certain other professors were out to get him. (CT 279.)

The Chancellor made his decision in light of and despite all these allegations. He was entitled to consider the recommendations of the department in light of those allegations and give them appropriate weight. He was not required to accept all of McGill's charges uncritically nor to disregard every opinion which McGill believed unworthy. The Chancellor could reasonably consider the fact that all alleged procedural irregularities had been corrected before the second round of recommendations. The Chancellor could reasonably consider the fact that neither "congeniality" or "collegiality" was even mentioned as a basis for the recommendations of a majority of the Department, of the Dean, of any of the outside

evaluators, of the Executive Vice Chancellor, or of any of the ad hoc committees. The Chancellor could reasonably consider the fact that evaluators outside the Department, who would not even know of the alleged animosity between McGill and some other professors inside the Department, found McGill's record deficient.

The superior court's finding that the Chancellor's decision was tainted by bias is not supported by any evidence whatsoever. If bias were the basis for issuing the peremptory writ of mandate, the writ should be reversed.

IV.

EVEN IF THE SUPERIOR COURT WERE CORRECT IN FINDING THAT CHANCELLOR'S DECISION WAS TAINTED (IT WAS NOT), THE APPROPRIATE REMEDY WOULD BE TO REMAND THE CASE FOR RECONSIDERATION, NOT TO COMPEL THE UNIVERSITY TO EMPLOY MCGILL FOR TWO MORE YEARS WITH A RAISE IN PAY.

Administrative mandamus may not be used to compel an administrative agency to exercise its discretion in any particular way. The court may not substitute its judgment, notions of expediency, reasonableness or wisdom, for those of the agency. (California State Auto. Inter-Ins. Bureau v. Garamendi (1992) 6 Cal.App.4th 1409, 1422-1423; Vega v. City of West Hollywood (1990) 223 Cal.App.3d 1342, 1352; Gilbert v. State of California (1990) 218 Cal.App.3d 234, 241.)

In particular, if an employee proves the employment hearing was unfair, the employee is entitled to a new hearing, not a judicial determination of the employment matter to be heard. (Kumar v. National Medical Enterprises (1990) 218 Cal.App.3d 1050, 1056; Johnston v. Trustees of Cal. State University & Colleges, *supra*, 151 Cal.App.3d at p. 1012.)

Even if this Court were to agree that the tenure decision in this case was somehow biased or improper, the superior court's peremptory writ would still have to be reversed. The court intruded too far into the University's academic decision-making by instructing the Chancellor exactly which set of opinions to accept and which recommendation to follow:

"There is substantial evidence to support the awarding of tenure, at the very least the promotion and two year review of the tenure coming up, which was the recommendation of the Committee of Academic Personnel. It should also give Mr. McGill and the Department a period to try to resolve their personality problems which clearly exist. And I think that is the most sensible recommendation. The writ will be granted along those lines." (RT 30; emphasis added.)

At most, McGill would be entitled to a new tenure review. He is not entitled to further employment at a higher salary for two more years.

CONCLUSION

In Lieberman v. Gant (2nd Cir. 1980) 630 F.2d 60, 70, Judge Friendly cogently states the issues facing McGill and the University:

"Denial of tenure, after six years of employment in a university department, is necessarily a traumatic experience. But it is a simple fact of university life that not every appointee to the rank of assistant professor, even one who may possess some degree of qualification, can be given tenure. [Citation.] To award tenure to marginally qualified candidates would block the road to advancement for more highly qualified prospects who may be coming down the tenure track in the future and seriously impair a university's quest for excellence as distinguished from mere competence."

In this case, the Chancellor of the University made his decision, based on all the available evidence, that McGill did not meet the University's standard of excellence and did not merit a life-time appointment to the University's faculty. The superior court had no legal basis to overturn that decision, much less to decide for itself what was the most "sensible recommendation" and to order the University to reinstate McGill at a higher salary for two years and reconsider him for tenure after that time.

The judgment granting a peremptory writ of mandate should be reversed with directions to the superior court to deny McGill's petition for a writ.

Respectfully submitted,

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