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 REPLY BRIEF

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INTRODUCTION

According to McGill, no reasonable person could deny he is entitled to tenure at the University of California. Indeed, in McGill's view, anyone who thinks otherwise is either a personal enemy or a "rubber stamp" for someone who is. (RB 22, 27, 38, 39.[1/]) McGill's enemies and rubber-stampers include a majority of

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1/ This really is McGill's position. "All of the negative remarks in the file are the result of non-expert opinion, bias, or the reliance on biased and unfounded (continued...)

McGill's colleagues in the Department of Mathematics, the Chair of the Department of Mathematics, the Dean of the School of Physical Sciences, the majority of the Appeals Evaluations Committee, the Chair of the Department of Mathematics at another University campus, the Executive Vice Chancellor of the University, and the Chancellor of the University.

In fact, all of these people carefully reviewed McGill's mediocre record of achievement and concluded, on the evidence, that he does not meet the University's standard of excellence and does not merit a lifelong appointment to its Mathematics faculty. In fact, the University bent over backwards, twice, to ensure a fair and independent evaluation of McGill for tenure. In fact, the Chancellor's decision and findings were based on his own review of the entire record and were made in light of, and in spite of, McGill's charges of bias within the department. The Superior Court had no basis for concluding otherwise.

The superior court also had no basis for second-guessing the Chancellor's decision on its merits. It was not the court's prerogative to instruct the Chancellor on how to weigh the criteria for tenure or to chose the "most sensible" recommendation from among the differing recommendations presented to the Chancellor. If the court had the authority to remand the entire matter to the Chancellor at all (it did not), the remand could only have been to reconsider, not to compel the Chancellor to rehire McGill for two years at higher pay.

1/(...continued)
findings and conclusions." (RB 27.) "UCI terminated Professor McGill to satisfy the vengeful animosity of Professor Carmona." (RB 38.) "Everybody (who isn't biased) agrees that Professor McGill is full professor material . . . ." (RB 39.)

None of this is to say that McGill is incompetent or should be ineligible for tenure elsewhere. It is to say that, at this time, at this University, and for good reason, McGill is not the University's choice for one of very few tenured positions available in a Department of Mathematics which has been striving to attain not just competency but excellence. The University is entitled to make such a choice. McGill is obliged to make way for other potential candidates for tenure. The superior court should not have interfered, and the court's judgment should be reversed.

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.

As the University has demonstrated, the superior court should never have ventured an inquiry into the merits of the University's decision to deny tenure to McGill. (AOB 24-28.) The academic function of a university may and can be exercised only by the university, not the courts. At the core of this function is the grant or denial of tenure, "a defining act of singular importance to an academic

institution." (Scharf v. Regents of University of California (1991) 234 Cal.App.3d 1393, 1405, footnote omitted.)

McGill does not address this issue, other than to assert that since Code of Civil Procedure section 1094.5 provides a mechanism for judicial review of administrative decisions, therefore this administrative decision is subject to judicial review. (RB 35.) The existence of a mechanism for review, however, does not mean that review is always proper. The United States Supreme Court made this clear in Chicago & Southern Air Lines v. Waterman S.S. Corp. (1948) 333 U.S. 103, 106, 68 S.Ct. 431, 433-434, 92 L.Ed. 568:

> "This Court long has held that statutes which employ broad terms to confer power of judicial review are not always to be read literally. Where Congress has authorized review of 'any order' or used other equally inclusive terms, courts have declined the opportunity to magnify their jurisdiction, by self-denying constructions which do not subject to judicial control orders which, from their nature, from the context of the Act, or from the relation of judicial power to the subject-matter, are inappropriate for review."[2/]

2/ Judicial review of administrative decisions has been denied in many circumstances: where the administrative agency is granted broad discretion by law (Schilling v. Rogers (1960) 363 U.S. 666, 674-675, 80 S.Ct. 1288, 1294-1295, 4 L.Ed.2d 1478), where the administrative decision depends upon matters on which even experts may disagree (Panama Canal Co. v. Grace Line, Inc. (1958) 356 U.S. 309, 317, 78 S.Ct. 752, 757, 2 L.Ed.2d 788) where the issues are beyond the ordinary competence of the courts (Kletsha v. Driver (2nd Cir. 1969) 411 F.2d 436), where there is an evident need to avoid "the haggling and delays of litigation" (Brotherhood of Ry. & Steamship Clerks v. Ass'n for Ben. of Non-Con. Emp. (1965) 380 U.S. 650, 671, 85 S.Ct. 1192, 1203, 14 L.Ed.2d 133), and where judicial review may unnecessarily interfere with the conduct of the affairs of another branch of government (United States v. Pink (1942) 315 U.S. 203, 229, 62 S.Ct. 552, 565, 86 L.Ed. 796), to name just a few.

Judicial review of the University of California's tenure decisions would present insurmountable difficulties. First, there is no external framework within which the courts could operate. The University's discretion in granting tenure is limited only by its own standards. Those standards may change from time to time and may even vary from department to department. Other than constitutional proscriptions against discrimination (not an issue here), there are no externally-mandated standards at all.

Second, even for those standards that are fixed by the University, the tenure process is not the result of an easily-applied formula. It is necessarily subjective, an art rather than a science. As in this case, experts can and often do disagree on how to balance the many applicable considerations.

Third, the courts would seldom if ever have expertise in the pertinent subject matter.[3/] Few judges would likely be able to give intelligent consideration to the impact of McGill's work (e.g., on intrinsic local time as a semimartingale in the excursion filtration) on the study of probability. (CT 595.)

Fourth, if judicial intervention were the norm, then neither tenure candidates nor the University could ever proceed with certainty. Tenure decisions must be made on an annual basis, yet litigation can take years. The uncertainty would affect not only the aggrieved candidate, but all other potential candidates for the same position.

3/ In Kletscha v. Driver, supra, 411 F.2d 436, the court refused to review a decision of the Veterans Administration whether or not to award a research grant to a particular researcher: "We do not believe it would be practical for the district court to review such a decision, resting on complex and subtle evaluations of the technical merit of plaintiff's project and the professional competence of plaintiff himself." (Id. at p. 443.)

Fifth, outside review of a tenure decision would be made even more difficult by the necessity of maintaining the confidentiality of the inside evaluators. A court could not accurately weigh competing evaluations without knowing who made the evaluations. To preserve the integrity of the peer review process, however, the names and qualifications of evaluators ordinarily cannot be revealed.

Finally, under Article IX, section 9 of the California Constitution, the University of California is a constitutional entity, a branch of government equal to the courts. Decisions about the internal functioning of the University should be entitled to special respect. (See AOB 24-25.)

For all these reasons and more, "the courts have refused to impose their judgment as to whether the aggrieved academician should have been awarded the desired appointment or promotion." (Smith v. University of North Carolina at Chapel Hill (4th Cir. 1980) 632 F.2d 316, 345, footnote omitted.) The decision whether to award tenure "by its very nature cannot be made by a court but must be made by the faculty, the administration and trustees of the university." (Johnson v. University of Pittsburgh (W.D. Pa. 1977) 435 F.Supp. 1328, 1353; Faro v. New York University (2d Cir. 1974) 502 F.2d 1229, 1231-1232; Laborde v. Regents of University of California (C.D. Cal. 1980) 495 F.Supp. 1067, 1070; Zahorik v. Cornell University (2d Cir. 1984) 729 F.2d 85, 93.)

Thus, absent a claim of denial of some constitutional or explicit statutory right (no such claim has been made by McGill, much less sustained), the superior court should not have ventured a review of the merits of the University's decision to deny tenure to McGill. For this reason alone, the judgment should be reversed.

II.

SUBSTANTIAL EVIDENCE SUPPORTS THE CHANCELLOR'S DECISION TO DENY TENURE AND NOT RE-APPOINT McGILL.

Assuming the superior court could properly inquire into the merits of the University's decision to deny tenure and not to reappoint McGill (the court could not), nonetheless the court's inquiry should have ended with a finding that there was substantial evidence to support the University's decision.

A. The Substantial Evidence Test Applies.

It is unclear what standard of review McGill would have the courts apply.[4/] At one point or another, his brief espouses virtually every known standard, and some unknown. McGill first argues that the superior court "correctly applied the substantial evidence standard of review . . . finding substantial evidence of an arbitrary and capricious decision." (RB 1.) Next, he says, "This Court must give

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4/ It is not even clear what statute, if any, authorizes the type of judicial review McGill seeks in this case. McGill relies on, and the superior court purported to grant relief under, the administrative mandamus statute, Code of Civil Procedure section 1094.5. By its own terms, however, section 1094.5 authorizes judicial review only after an administrative action "made as a result of a proceeding in which by law a hearing is required to be given." (C.V.C. v. Superior Court (1973) 29 Cal.App.3d 909, 918.) No law required a hearing for McGill's tenure decisions, nor was there a hearing in any formal sense. As an untenured professor, McGill had no constitutional right to a hearing. (Board of Regents v. Roth (1972) 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548; King v. Regents of University of California (1982) 138 Cal.App.3d 812, 815-818; Chang v. Regents of University of California (1982) 135 Cal.App.3d 812, 815.)

great deference to the trial court's role as weigher of substantial evidence." (RB 33, original emphasis.) Later on the same page, McGill urges that the evidence should be considered in the light most favorable to himself, giving him the benefit of every reasonable inference and resolving all conflicts in his favor. (RB 33.) Finally, he asserts that the court has "considerable latitude in reviewing a discretionary act" and "will afford a petitioner a de novo review upon pleading and proof that the administrative agency has acted arbitrarily, capriciously, or fraudulently." (RB 38.) In fact, if there is to be judicial review at all (there should not be), that review must be limited to a review for substantial evidence. That is, the Chancellor's findings and decision for non-reappointment should be upheld if there is any substantial evidence to support them. The Chancellor is the trier of fact in this case. (Laural Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 407.)

B. Any Substantial Evidence Should Be Sufficient To Support The Chancellor's Decision.

Contrary to McGill's argument, the University would not have this Court apply an "any evidence" standard of review. (RB 32-33.) The standard of review is "any substantial evidence." As the court states in Surfside Colony, Ltd. v. California Coastal Com. (1991) 226 Cal.App.3d 1260, 1263, fn. 3:

> "[U]nder the substantial evidence test, the court must resolve reasonable doubts in favor of the administrative decision and uphold

the decision if there is 'any' substantial evidence to support the findings."

See also, National Identification Systems, Inc. v. State Bd. of Control (1992) 11 Cal.App.4th 1446, 1460, 1461:

"This factual issue is subject to the substantial evidence test both in the superior court and here. [Citation.] 'In applying this test, the court may not consider evidence outside the administrative record [citation], must consider the entire record [citation], and must deny the writ if there is any substantial evidence in the record to support the findings. [Citation.]'" (Original emphasis.)

C. Substantial Evidence Supports The Chancellor's Decision That McGill Does Not Meet The University's Standard Of Excellence For Tenure.

The University's criteria for tenure (teaching, research, professional activities, and University and public service) are not objectively quantifiable. There is no set formula for balancing each criterion. There is no one level of achievement at which all candidates must necessarily be granted tenure.[5/] Furthermore, a decision regarding tenure cannot be made in isolation. The University must also

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5/ "The criteria . . . are intended to serve as guides for minimum standards in judging the candidate, not to set boundaries to exclude other elements of performance that may be considered." (Academic Personnel Manual, § 210-1d; CT 781.)

compare how a particular candidate compares with other potential candidates for the same position. (Academic Personnel Manual, § 210-1c(3); CT 779, 803.)

Among many others, Professor Thomas Liggett, Chair of the Department of Mathematics at UCLA, has concluded that McGill's work "did not merit promotion to tenure in the UCI Mathematics Department." (CT 802-803.) Professor Liggett's opinion alone constitutes substantial evidence to support the Chancellor's decision to deny tenure. "The evidence of one credible witness may constitute substantial evidence." (Kearl v. Board of Medical Quality Assurance (1986) 189 Cal.App.3d 1040, 1052.) Professor Liggett's opinion is not rendered any less substantial by the fact that some other evaluators think McGill is entitled to tenure. It was for the Chancellor to decide what weight to give to the conflicting opinions. (Trustees of Cal. State University v. Public Employment Relations Bd. (1992) 6 Cal.App.4th 1107, 1123.)

McGill belittles Professor Liggett's conclusion and contends the professor "disqualified" himself when he first evaluated McGill's qualifications for tenure in 1989. (RB 38.) There is no evidence in the record that Professor Liggett is the same evaluator whom McGill thinks "disqualified" himself. But even if that evaluator were Professor Liggett, he did not "disqualify" himself. When first asked to evaluate McGill's work, that evaluator did so, with the comment that another professor might share McGill's specific interests in probability theory. That evaluator did not hesitate to give his informed opinion that McGill, while competent, was not outstanding and not deserving of tenure at the University. (CT 395.) A year later, that evaluator reviewed even more of McGill's work and again

concluded that it simply lacked the impact that it should have had to justify tenure at the University of California. (CT 442.)

In any event, unlike most of the anonymous reviewers relied on by McGill, we know that Professor Liggett is well qualified to evaluate McGill for tenure in mathematics at the University of California. Professor Liggett started as an Assistant Professor of Mathematics at UCLA in 1969 and was promoted to full professor in 1976. At the time of trial in 1993, he had just completed his second year as Chair of the Mathematics Department at UCLA. Professor Liggett is a fellow of the Institute of Mathematical Statistics and spent three years on the Institute's membership committee. (CT 800-801.) From 1985 through 1987, Professor Liggett was the editor-in-chief of the Annals of Probability, the leading journal in the field of probability in the world. (CT 801.) He made the final decisions regarding approximately 750 papers submitted for publication. He had to be familiar with all the areas of probability research. (CT 801.)

Furthermore, Professor Liggett knows McGill's research and academic career. (CT 802.) He also knows the Mathematics Department at UCI and that its reputation has improved dramatically in the last few years. That reputation has been enhanced by several recent appointments to tenure. (CT 802.) Based on his familiarity with the standards and criteria for advancement to tenure at the University of California, Professor Liggett knows that a lifelong appointment 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.) Moreover, a

candidate for tenure must be considered in relation to others in the field who might be considered alternative candidates. There are a number of probabilists whose research is far more significant than McGill's. (CT 803-804.) In Professor Liggett's opinion, McGill's work does not merit promotion to tenure. (CT 803.)

In addition to Professor Liggett's opinion, there are the opinions of a majority of McGill's colleagues in the Department of Mathematics, the Chair of the Department the Dean of the School of Physical Sciences, and the Executive Vice Chancellor of the University, all of whom agree McGill does not merit tenure. The only way McGill can deal with all this substantial evidence against him is by trying to define it out of existence. According to McGill, the opinion of anyone who favors tenure is worthy "evidence," but the opinion of anyone who opposes tenure is an unsupported "finding." (RB 26-27.) The opinions against McGill, however, are just as much evidence as the opinions for him.

Substantial evidence therefore supports the decision of the Chancellor of the University for non-reappointment in this case.

III.

THERE IS NO EVIDENCE THE CHANCELLOR WAS BIASED AGAINST McGILL OR THAT HE WAS ONLY A "RUBBER STAMP" FOR A PROFESSOR WHO SUPPOSEDLY DID NOT LIKE McGILL.

As the University has demonstrated (AOB 33), if personal bias were a legitimate basis for a court to interfere with a tenure decision, it would have to be a bias of the decision-maker, not of some other participant in the process. (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 442, 431.)

The decision-maker and fact-finder in this case is the Chancellor.[6/] There is no evidence whatsoever that the Chancellor was biased against McGill. There is no

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6/ McGill contends the only real findings against him are the findings of the majority report of the Mathematics Department. (RB 27.) This simply is not true. The department only made recommendations. The Chancellor was the only person entitled to make findings (CT 947), and he did so after considering the recommendations, both positive and negative, of numerous evaluators both within and without the University.

McGill also contends he was denied due process of law because the Chancellor did not make findings on his allegations of bias. (Bekiaris v. Board of Education (1972) 6 Cal.3d 575, 592.) McGill did not make this contention below, and he cannot make it now. (Shor v. Department of Social Services (1990) 223 Cal.App.3d 70, 75.) In any event, Bekiaris involved a public employee who claimed he lost his job for exercising his constitutional rights; findings by a statutory employment review board were required by the court to ensure that the employee's constitutional rights were protected. There is no similar issue here. Constitutional rights are not at stake. McGill was therefore not entitled to findings by the Chancellor, much less to findings on every matter he raised in support of his position. (Board of Regents v. Roth, supra, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548.)

evidence whatsoever that the Chancellor did not independently review McGill's file, as he said he did. (CT 142.) There is no evidence whatsoever that the Chancellor's decision was based on anything other than his explicit findings: McGill's research since appointment was deficient for tenure; McGill's teaching was only adequate; and McGill's mentoring of graduate students and his record of University service was minimal. (CT 142.) Finally, there is no evidence whatsoever that the Chancellor was a "rubber stamp" for anyone, much less for some professor in the Mathematics Department who supposedly did not like McGill. The Chancellor made his decision in light of, and in spite of, McGill's allegations of departmental bias.

In short, the Superior Court's conclusion that the Chancellor's decision and findings were tainted by personal bias is utter speculation and cannot stand.

IV.

THE REMEDY FOR McGILL, IF ANY, WOULD BE A REMAND FOR RECONSIDERATION BY THE CHANCELLOR, NOT AUTOMATIC REINSTATEMENT FOR TWO YEARS WITH AN INCREASE IN PAY.

As the University has demonstrated (AOB 36-37), under section 1094.5 the courts may not compel an administrative agency to exercise its discretion in any particular way. Therefore, if McGill is entitled to any remedy at all (he is not), the remedy is reconsideration by the Chancellor, not a directive that the Chancellor

reinstate McGill for two more years at higher pay. (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.)

McGill concedes the superior court could not tell the Chancellor upon which of many different recommendations to base his decision. (RB 40.)[7/] McGill nevertheless argues that the court could compel the Chancellor to rehire him at a higher pay because he has a "right to continued employment within the Mathematics Department at UCI while working to purge the bias and prejudice." (RB 41.) McGill has no such right. The cases he cites, Ross General Hospital, Inc. v. Lackner (1978) 83 Cal.App.3d 346, and Tripp v. Swoap (1976) 17 Cal.3d 671 (overruled on other grounds by Frink v. Prod (1982) 31 Cal.3d 166, 180), do not give him that right. They stand for the proposition that "[w]here the record of the administrative proceedings requires as a matter of law that a particular determination be made, the court may order that the agency carry out its legal obligation." (Ross, 83 Cal.App.3d at p. 354; Tripp, 17 Cal.3d at p. 677.) The record in this case does not require that a particular determination be made, much less that McGill be rehired for two more years at higher pay.

7/ Yet that is exactly what the superior court did. The court ruled: "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." (RB 30; emphasis added.)

By compelling the Chancellor to rehire McGill, the court gave McGill affirmative relief to which he was not entitled. If the Chancellor is required to reconsider at all (he should not be), he still may conclude his original decision was correct, that McGill should not be reappointed and that he could therefore continue on the faculty for only one more academic year, not three.

CONCLUSION

The superior court's judgment is an impermissible intrusion into the academic affairs of the University of California. The court decided for itself what criteria the University should apply, substituted the court's own analysis of those criteria for the analysis made by the Chancellor of the University, decided on the "most sensible" recommendation, and compelled the University to continue to employ a professor whom the University had decided should no longer be employed. The court's judgment is unsupported and insupportable, and should be reversed.

Respectfully submitted,

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