

STATE OF RHODE ISLAND  
AND  
PROVIDENCE PLANTATIONS

COMMISSIONER OF  
EDUCATION

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**Anne Gorman**

**v.**

**Jamestown School Committee**

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**DECISION**

Held: The Appellant was retained from 1990 through March of 2001 by the Jamestown School Department as a “consultant” through a series of one year contracts. During this period she was actually part of the district’s “certified personnel regularly employed” for purposes of R.I.G.L. 16-7-29. Also, her service during this period was service as a “teacher” as defined in R.I.G.L. 16-16-1 (a) (12).

DATE: May 31, 2005

## **Travel of the Case**

On May 3, 2004 an appeal was filed on behalf of Anne Gorman, who had proceeded before the Jamestown School Committee on a claim that her employment status with Jamestown for the period 1990-2001 was that of a regularly-employed teacher, rather than a consultant. The February 4, 2004 decision of the School Committee, transmitted by letter of its attorney, concluded that Ms. Gorman was not eligible for the benefit she seeks<sup>1</sup> because she was not a regularly-employed teacher during this period. The undersigned was designated to hear and decide this appeal on May 12, 2004. The matter was heard on a several days of hearing on dates agreed to by the parties. At the conclusion of the hearing, the parties submitted memoranda summarizing their arguments. This process was completed, and the record was closed, on January 4, 2005.

### **Issue:**

During the period September of 1990 through March of 2001 did Anne Gorman serve as a regularly-employed teacher in the Jamestown public schools?

### **Findings of Relevant Facts:**

- On March 29, 2001 Anne Gorman was appointed on a full time basis to the position of school psychologist in the Jamestown School Department. Her appointment letter indicated that she was being placed on step two of the salary schedule in effect for teachers in the Jamestown system. Joint Ex.4.
- Prior to her appointment as a full-time school psychologist in Jamestown, Ms. Gorman had worked as the district's school psychologist for over ten years under a series of "Purchase of Service" agreements. Joint Ex.5-16.
- Pursuant to the above-referenced Agreements,<sup>2</sup> Ms. Gorman agreed to provide the services of a certified school psychologist to designated students, participate in Multidisciplinary Team and IEP meetings, perform evaluations, provide consultations, counseling services and submit the appropriate reports and other documentation connected with these activities. Joint Ex.5-16.

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<sup>1</sup> The benefit referred to in the February 4, 2004 letter was participation in the employees retirement system of the state of Rhode Island, a system in which regularly-employed public school teachers enjoy membership. The Commissioner has no jurisdiction over the issue of eligibility for membership/credit in the employees retirement system and we understand that this issue has been pursued in the appropriate forum. The appellants has not precisely articulated her claims with respect to remedy, but instead has requested that the matter be referred to the parties for an attempt at informal resolution.

<sup>2</sup> with minor language changes over the years

- The district provided Ms. Gorman with the necessary office space, equipment, and testing materials required for the performance of her duties. Joint Ex. 5-16; Tr.Vol. I, p.30.
- When she was first retained, both the district and Ms. Gorman “committed to” six to seven hours per week. Later in the year counseling was specifically added to her duties and the number of hours was changed to nine per week. Joint Ex.5 and 6.
- Over the years the number of hours to be provided by Ms. Gorman gradually increased, up to fifteen hours per week at the time of her appointment as a full-time member of the school staff in March of 2001. Joint Ex. 5-16.
- The early Agreements required that any change in the specified number of hours per week be made by mutual agreement of both parties. Beginning in 1993, the contract provided that any changes in the number of hours required the approval of Jamestown’s Director of Pupil Services. Joint Ex. 5-16.
- According to each of the contracts, the Jamestown School Department agreed to provide “appropriate supervision” to Ms. Gorman. Beginning in September of 1992 she was in fact supervised in the performance of her duties by the district’s Director of Pupil Services. Tr. Vol. I p.64. Vol. II p.10 Joint Ex.5-16.
- During the period September 1990-March 2001 Ms. Gorman was paid at an hourly rate, and submitted a monthly bill to the district for the hours she had worked. Joint Ex. 5-16. Appellee’s Ex. A-G.
- At the beginning of the year from September 1992 forward, Ms. Gorman provided a schedule indicating on which days of the week she would be available in addition to the designated “team” meeting days which were fixed as Wednesday. Tr. Vol. I. pp. 36, 91-92; Vol.III pp. 10-12; Vol.IV pp.28-32. If there were a variation from the schedule, Ms. Gorman would notify the Director of Pupil Services, or her secretary. Tr. Vol. 1 pp. 152-157; Variations in Ms. Gorman’s schedule were due such things as her workload, illness, students’ scheduling needs and school holidays. Tr. Vol. 1 pp. 149-152.
- Throughout the period 1990 to March of 2001, there were no income taxes deducted from the compensation paid to Ms. Gorman and she received a 1099 at the end of each tax year which reflected status as a “independent contractor”. She received no medical, or other benefits such as would have been received by an employee of the school department during this time. Tr. Vol.1, pp. 73-74. Joint Ex.28F.
- Ms. Gorman performed her school psychologist duties in substantially the same manner after her appointment to a full time position in March of 2001 as she did during the previous decade. Tr. Vol. I, pp.42-45, 142-143. After her appointment to a full-time position, she had more time for such duties as formal and informal consultations with teachers and administrators and individual counseling of students. Tr. Vol. I. pp. 42-47; She also was designated to chair the “teacher support team”, which is part of a pre-referral process to reduce the number of referrals for special education evaluations. Tr. Vol. I. pp. 47-51.

## **Positions of the Parties**

### **Anne Gorman**

Counsel for Ms. Gorman takes the position that Ms. Gorman was not a consultant, but actually a regularly employed certified school psychologist in the Jamestown school system from 1990 until her appointment to a full-time position in March of 2001. The Appellant lists fifteen (15) factors that indicate the nature of Ms. Gorman's employment as an employee and distinguish her from an "independent contractor". She cites traditional factors such as receipt of supervision and being provided with workspace and materials for the performance of her work duties. In addition, counsel argues that Ms. Gorman was an employee who was "regularly-employed" and who provided "service" as a "teacher" as those terms appear in R.I.G.L. 16-7-16 (12), 16-7-29, and 16-16-1 (a) (12). In accordance with the ruling of the Rhode Island Supreme Court in D'Ambra v. North Providence School Committee, 601 A.2d 1370 ( R.I. 1992 ), Ms. Gorman argues that her part-time status does not prevent her from being "regularly employed", and that her schedule, similar to the ESL teacher in the D'Ambra case, was developed according to the number of students she serviced and their needs and schedules. Ms. Gorman's work schedule, counsel argues, supports her "regularly employed" status, because she submitted it at the beginning of each year, and, for the most part, she adhered to this schedule. Thus, although she has been characterized as a consultant, Ms. Gorman actually functioned as a regularly-employed member of the school staff. Her service was indistinguishable from that of regularly employed certified personnel in the Jamestown school department.

Ms. Gorman directs our attention to the October 17, 2000 decision of the Commissioner in National Education Association v. Middletown School Committee, a decision which affirmed that certified staff such as school social workers were required to be retained on the basis of an annual teaching contract. Applying the reasoning of the Middletown decision to this case, since a certificate is issued by the Rhode Island Department of Education for the position of a school psychologist, Jamestown was clearly required by law to hire Anne Gorman as a teacher under an annual contract pursuant R.I.G.L. 16-13-2. It was this situation which the Jamestown School Committee sought to "rectify" in March of 2001 when it appointed her to a full-time position as a "teacher" and placed her on second step of the teachers' salary schedule.

Finally, as demonstrated by a hearing officer's decision (Joint Exhibit 32), Ms. Gorman has been ruled to be a regularly employed teacher within the meaning of R.I.G.L. 16-16-1 (a) (12) for retirement purposes. Since the same language is at issue here, the same principles should apply and result in a determination that Ms. Gorman was a regularly employed teacher for other benefits and entitlements over which the Commissioner has jurisdiction under Title 16.

## Jamestown School Committee

At the outset, presuming that Ms. Gorman's claim is for compensation pursuant to the teachers' salary schedule during the subject years<sup>3</sup> counsel for the School Committee argues that she has failed to prove her eligibility for such compensation. It is argued that given the language of R.I.G.L. 16-7-29, 16-7-16, and the incorporation by reference of the "definitions" contained in Chapter 16, one must satisfy the criteria set forth in Section 16-16-1(a)(12) to be eligible for salary schedule compensation.<sup>4</sup> Analysis of each of these criteria demonstrates that Anne Gorman was not a regularly employed teacher as defined in 16-16-1(a)(12).

First, it is argued that Ms. Gorman is not a "teacher" nor does she hold a "teaching certificate". Counsel directs us to the language of 16-16-1(a)(12) which describes a teacher as a person who is required to hold a certificate of qualification issued by the Board of Regents and who is actually engaged in teaching as his or her principal occupation and who is regularly employed as a teacher in the public schools. Although she may be required to hold a certificate of qualification issued by the Regents, Anne Gorman's certificate is that of a school psychologist, not a teacher. She does not, nor is she authorized to do so under the certificate she holds, teach public school students. Her classroom involvement is limited to her observations of students who are undergoing special education evaluations or about whom she consults with classroom teachers.

Although the 16-16-1(a)(12) may specifically list certain non-teaching professional staff in the public schools in its definition of "teachers", reference to this "exhaustive" list does not indicate that school psychologists are among those listed. Principles of statutory interpretation would indicate that this omission is intentional, so that even if more general references to categories of school personnel might arguably include school psychologists, they should, nonetheless, be excluded from the definition.

Even assuming, arguendo, that Ms. Gorman served as a "teacher" as that word is used in Chapter 16 of Title 16, her service was not that of a "regularly employed" teacher in that her part-time service did not rise to the level required in the statute. It is argued that 16-16-1(a)(12) requires that to be a "regularly employed" teacher, one must work at least three quarters (3/4) of the number of days that the public schools are required by law to be in session, i.e. at least 135 days, during the year. Since Ms. Gorman's service was at best that of a three-fifths (3/5) teacher prior to her appointment full time in March of 2001, she did not meet the one hundred and thirty-five (135) day requirement. The School Committee argues that after the Rhode Island Supreme Court's 1992 decision in D'Ambra v. North Providence,<sup>5</sup> in which it found that a part-time ESL teacher was

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<sup>3</sup> The Appellant has requested that if she is successful in proving that she was a regularly employed teacher during all or part of the period 1990-2001 that the matter be remanded to the parties so that they might confer with respect to the "remedial aspects of this matter". The reply brief of Ms. Gorman asserts that she should have been paid on the salary schedule for each year of her employment by the Jamestown School Department. No specific claim for back wages has been asserted yet.

<sup>4</sup> And be eligible for service credit.

<sup>5</sup> 601 A.2d 1370 (R.I. 1992)

“regularly employed”, the legislature amended Section 16-16-1(a)(12). The effect of this amendment was to make all teachers, not just substitute teachers, subject to a 135-day minimum period of service to be considered “regularly employed” teachers. Ms Gorman’s part-time service from 1990-March of 2001 does not meet the 135-day requirement of the statute and she was thus not regularly employed during this period.

Even if the 135-day rule were not controlling, Ms. Gorman did not prove that she was otherwise “regularly employed” during the period in question. Citing the D’Ambra decision as setting forth criteria for “regularly employed” status, counsel submits that Ms. Gorman did not adhere to a regular schedule developed in accordance with the scheduling needs of students, nor did she work on an almost daily basis. On the contrary, it is asserted that Ms. Gorman had a set schedule only one day per week (the day of MDT/IEP meetings) and for the remainder of her contracted time, worked on an unscheduled, sporadic basis. Although Ms. Gorman testified that she submitted a written work schedule at the beginning of each year, her supervisor contradicted this testimony, indicating that Ms. Gorman’s schedule was “flexible” and that other than on team meeting days she was not required to work on any particular days. The school committee notes that documentation showing the hours and days that Ms. Gorman worked over these years establishes that her days and hours of work varied considerably, such as one would expect of an independent contractor.

The School Committee submits that to be regularly employed under the statutes on which Ms. Gorman premises her claims, one must be an employee in the first place, and not an independent contractor. Consistent with the written contracts executed by the parties from 1990 through 2001, they understood her role to be that of an independent contractor. Counsel cites Absi v. Rhode Island Department of Administration, 785 A.2d 554 (R.I. 2001) for the proposition that one’s status as an independent contractor is whether the employer has the right or power to exercise control over the method and means of performing the work. Persons who do not work set hours, arrange their own hours and are paid differently from employees may also be independent contractors, the Committee argues.

Applying these criteria, Ms. Gorman clearly functioned as an independent contractor, the School Committee submits. Her schedule, for the most part, was of her own making. Her work as a school psychologist was clearly professional in nature and not subject to the control of school administrators. Her final product, i.e. her evaluations of the children referred for special education services, was the only element of her duties for which she was held accountable. Reflecting this employment status, no income taxes were withheld from her compensation over this entire period. Considering all aspects of the arrangements she made with the Jamestown School Department, Anne Gorman was an independent contractor and cannot now claim or prove that she was an employee, much less “regularly employed”.

## DECISION

The threshold issue in this case is whether Anne Gorman was an employee of the Jamestown School Department from 1990 to March of 2001, despite the fact that both she and the school department considered her to be an independent contractor. Her employment status during this period as an educational professional providing school psychologist services to Jamestown students certainly has some of the elements of an independent contractor arrangement. It is true that she was employed under an “Agreement for the Purchase of Services” and paid at an hourly rate. Her compensation did not include benefits, and at the end of each tax year she was issued Form 1099 which documented, for tax purposes, the amount of her “nonemployee compensation”. As with most professionals, she utilized her expertise as a school psychologist and exercised a certain amount of discretion as to how to conduct evaluations of students referred to her. Her findings and recommendations to the MDT/IEP teams reflected her knowledge, expertise, and the exercise of her independent professional judgment.

On the other hand, Ms. Gorman’s performance of her professional duties since her appointment to a full time position with the school department in March of 2001 is indistinguishable from the manner in which she performed her duties while considered an independent contractor. Although she is now indisputably an employee of the Jamestown school department, her professional services, particularly with respect to the evaluations of students, still reflect her knowledge, expertise and the exercise of her independent professional judgment. With professional employees, it is sometimes not possible to point to one single factor, e.g. the presence or absence of the employee’s independent discretion in providing services or whether the employer’s right or power to exercise control over the method and means of performing the work as determinative of employment status. In Ms. Gorman’s situation, the factor of “control” over her work remained unchanged from the time when she was argued to be an independent contractor through and beyond March of 2001 when she was appointed as a regular teacher by the Jamestown School Committee.

The case cited by the school department, Absi v. The State of Rhode Island, 785 A.2d 554 (R.I. 2001) is instructive as to other factors which our Supreme Court found relevant to this issue. In the Absi case, the Court found that the statutory scheme permitted the state to “procure” medical or dental services from outside state service when certain conditions were met. After applying the test of whether the employer, the state, exercised control over the methods of dental treatment provided by the plaintiffs, who claimed employee status, the Court concluded that the plaintiffs qualified as independent contractors<sup>6</sup>. Of significance, the Court went on to state that “procurement of such services by consultants was legally authorized, noting:

Here, the statutory conditions necessary for hiring dental consultants to perform dental services under Section 37-2-72 have been met. The state has demonstrated a need for

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<sup>6</sup> The inconsistent conclusion of an IRS audit had required that income taxes be withheld from the dentist’s compensation because they were actually employees.

their services and the absence of any state personnel to perform the required work. Absi at page 557.

In the case presented to the Commissioner, the statutory scheme governing Ms. Gorman's employment does not legitimize or permit employment as an independent contractor under any circumstances. At all times during the period 1990 through March of 2001 R.I.G.L. 16-13-2 required the school department to employ Ms. Gorman as a "teacher" under an annual employment contract. She also was entitled to the protections of membership in the collective bargaining unit pursuant to R.I.G.L. 28-9.3-2. See National Education Association v. Middletown School Committee, decision of the Commissioner dated October 17, 2000. Thus, while in the Absi case the plaintiffs could "theoretically" have been considered either employees or independent contractors, Ms. Gorman's retention as an independent contractor violated specific provisions of state law. This statutory scheme with respect to the employment of certified professionals in the public schools is an important factor in our conclusion that Ms. Gorman was an employee, and not an independent contractor from 1990-2001. Other factors include our finding that in performing many of her duties, such as participating in MDT/IEP team meetings, consulting with school staff on behavioral and learning issues, and counseling students, she clearly was a member of a team of school professionals, working together in Jamestown's schools. Her contract called for, and she was provided with, "appropriate supervision" in performing all of her job duties.

We reject the argument that Ms. Gorman was not a "teacher" as that term is used in 16-16-1 (a)(12). This section of the law interpreted both in isolation, and in conjunction with Section 16-7-29 establishes a broad definition of "teacher". Entitlement to salary schedule compensation is that of all "certified personnel who are regularly employed". Section 16-7-29 requires that recognition be given to years of "service" for those "regularly employed" and its incorporation of Chapter 16's definitions results in a focus on Section 16-16-1(a)(12). This section defines "teacher" in both broad terms and by specific example. While it is true that "school psychologist" is not included in the "exhaustive" list contained in 16-16-1(a)(12), school psychologists are encompassed by the language "...or any person who has worked in the field of education or is working in the field of education that (sic) holds a teaching or administrative certificate". Those positions which are listed in this section go beyond those who "teach", or instruct students or those whose work takes place in the classroom. Even certain school professionals licensed by the department of health have been specifically included in the definition of "teacher". When the Jamestown School Committee appointed Ms. Gorman to a position on the Jamestown faculty, and notified her of placement on the second step of the salary schedule, it recognized the fact that a school psychologist is a "teacher", its arguments to the contrary notwithstanding.

While we recognize and appreciate<sup>7</sup> the School Committee's argument that statutory amendment to Section 16-16-1 (a)(12) could be interpreted to establish a 135 day minimum for a teacher to be considered "regularly employed", this amendment was not made until 2002. See Chapter 383 of the Public Laws of 2002. Thus, we are constrained to apply the pre-2002 wording of this statute such that the 135-day rule would apply only to substitute teachers. Our Supreme Court interpreted and applied this language in the D'Ambra case and held that a teacher could be "regularly employed" even if on a part time basis and that a year of part-time teaching service was creditable under Section 16-7-29. These principles apply to Ms. Gorman's part-time service for the Jamestown school department.

The School Committee focused on the factual distinctions between the part-time schedule of Ms. Gorman and that of the plaintiff in the D'Ambra case. The Committee took the position that unlike Ms. D'Ambra, Anne Gorman's part time schedule was not fixed at the beginning of a semester and strictly adhered to throughout the semester and for this reason she was not "regularly employed". The evidence in this case, argues the Committee, establishes that Ms. Gorman's work schedule varied from week to week and even month to month within a semester. The Committee also argues that unlike the ESL tutor in the D'Ambra case, Ms. Gorman did not work on an almost daily basis, and at most worked three out of five days of the school week.

Despite some factual distinctions from the D'Ambra case,<sup>8</sup> it is our conclusion that Ms. Gorman was "regularly employed" by the Jamestown School Department throughout this period. The indicators of "regular employment" are not carved in stone by the D'Ambra case. Absent a statutory definition, we must give such language its plain and ordinary meaning to determine if the conditions of a teacher's employment satisfy the conditions of Chapter 16 with respect to regular employment. Doing so in this case, we find that Anne Gorman was "regularly employed" in each year from 1990-2001. She was under written contract in each of these years to provide school psychologist services to the School Department. The School Department was required to employ a school psychologist by state's special education regulations. Although she was the only school psychologist Jamestown had, her services were not provided on an "as needed" or open-ended basis. The contract specified a certain number of hours per week. She consistently fulfilled the weekly time commitments of her contract, which is not to say that she worked exactly the same number of hours each week. If workload demands required or

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<sup>7</sup> The Commissioner's office will inevitably be presented with a dispute which is governed by this relatively new statutory language. It is arguable that it effectively establishes a 135-day minimum for "regularly employed" status for all teachers. See the discussion at pages 6-7 of the May 7, 2004 decision of the Commissioner in D'Arpino et al. v. Middletown School Committee. We would note that this would put the definitions section of the teachers' retirement law at odds with other provisions of this same law.

<sup>8</sup> We would note for the record, however, that the plaintiff in the D'Ambra case did not work on an "almost daily basis". The record did not establish the number of days, only full-day equivalents. Another teacher in a prior North Providence case, Helen D'Ordine (decision of the Commissioner dated November 30, 1988) had served in the same capacity as Ms. D'Ambra and had worked on an "almost daily, part-time basis". The record in D'Ambra did not indicate the exact number of days worked by Ms. D'Ambra during any given school year during 1979-1983. See footnote at page 2 of the Commissioner's January 3, 1990 decision in D'Ambra v. North Providence School Committee.

permitted, her hours, and even the days, of her work could change. This flexibility benefitted both Ms. Gorman and the School Department. She was employed for the entire school year, on a schedule that also reflected school breaks and holidays. It is true that her work schedule varied somewhat from week to week and even month to month, but we do not find it to be “sporadic”, as argued by the School Committee. All factors considered, it was “regular” in nature.

For the foregoing reasons we find that Anne Gorman was a regularly-employed part-time teacher in the Jamestown school system from September of 1990-March of 2001. As requested by the Appellant, the parties are directed to confer to attempt to resolve the issue of remedy. If such a resolution is not possible, the hearing will be reconvened to determine the legal remedies to which Ms. Gorman is entitled.

For the Commissioner,

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Kathleen S. Murray, Hearing Officer

APPROVED:

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Peter McWalters, Commissioner

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Date May 31, 2005