

State of Rhode Island
And
Providence Plantations

Commissioner of
Education

Melissa Gershon

v.

North Providence School Committee

DECISION

Held: The Appellant’s employment as a Certified speech/language pathologist during school years 2002-2005 was required to be on the basis of an annual contract under R.I.G.L. 16-13-2. Ms. Gershon’s employment during these years as an “independent contractor” violates the Teachers’ Tenure Act (R.I.G.L. 16-13-1 et seq.) and infringes on the collective bargaining rights of certified teachers in the public schools (R.I.G.L. 28-9.3-1 et seq.). The parties should confer on an appropriate remedy for these statutory violations.

DATE: October 23, 2006

Travel of the Case

On June 23, 2005 Ms. Melissa Gershon appealed to Commissioner Peter McWalters seeking redress for her employment situation with the North Providence School Department. She had requested that the School Committee appoint her to a regular position as a speech/language pathologist¹, place her on the appropriate step of the salary schedule and restore her to the .8 level of employment she had been working at the beginning of the 2004-2005 school year. The North Providence School Committee had not replied to her May 4, 2005 request and, subsequent to her appeal to the Commissioner but prior to the time the matter was heard by a hearing officer, Ms. Gershon had also been notified by the Superintendent of schools that her services would not be needed for the 2005-2006 school year. (Gershon Ex.K)

Jurisdiction to hear this appeal arises under R.I.G.L. 16-39-2. Hearings were conducted on September 20, October 14, November 7, and November 14, 2005. Post-hearing memoranda were submitted by the parties and the record closed on March 21, 2006.

Issues

Was Melissa Gershon's employment pursuant to an individual contract outside of the collective bargaining agreement in effect for certified teachers in the North Providence school system in violation of R.I.G.L. 28-9.3-2?

Was Ms. Gershon a "regularly-employed" teacher as that term is used in R.I.G.L. 16-16-1 (a) (12) and R.I.G.L. 16-7-29 during the period she worked in the North Providence school system?

Was the reduction in Melissa Gershon's employment from the level of a .8 Speech/Language Pathologist to a .5 Speech Pathologist on January 3, 2005 in violation of the terms of her contract with the School Department or in violation of the provisions of R.I.G.L. 16-13-2?

Was the decision to reduce Ms. Gershon's employment from a .8 to a .5 level in December of 2004 in retaliation for her assertion that she was entitled to be employed under the terms and conditions of the collective bargaining agreement?

¹ Rather than employing her as a "consultant" or "independent contractor".

Findings of Relevant Facts

- On September 23, 2002 Melissa Gershon, a certified speech/language pathologist, was retained by the North Providence School Department under a purchase of services agreement. The agreement, documented by a letter from the Superintendent of Schools at the time, Paul E. Vorro, indicated that Ms. Gershon would work one day per week and that she would be compensated at a per diem rate of \$207.67². The agreement specified that Ms. Gershon would not receive benefits or seniority rights. Gershon Ex. A.
- During school year 2002-2003 Ms. Gershon worked every Friday at the Stephen Olney School where she had a caseload of students and performed the full complement of duties of a speech/language therapist. She developed lesson plans, conducted therapy, coordinated and attended IEP meetings, developed goals, assessed student progress, and prepared quarterly report cards for each student on her caseload. Tr. Vol. I, pp. 20-23; Vol.II, p19.
- During the 2002-2003 school year at the Stephen Olney School, Melissa Gershon was not filling in for a regular school employee, and she was the exclusive provider of speech and language services for the students on her caseload. Tr. Vol.I, p.23.
- Consistent with her agreement with the district, Ms. Gershon did not receive any health or dental benefits or the like, nor did she question her entitlement to do so during the 2002-2003 school year³. Tr. Vol. I pp. 26-27, 30.
- During school year 2003-2004 Ms. Gershon continued to provide speech/language pathology services to the North Providence school district, except that in August of 2003 then-Director of Special Education, Cheryl Ursillo, offered her two additional days of employment, so that she worked a total of three days per week that year. Tr. Vol.I, pp. 32-33. Gershon Ex. C.
- During school year 2003-2004 Ms. Gershon's time was divided between the Greystone and Marieville schools—Monday and Wednesday at Marieville, Fridays at Greystone. Gershon Ex.D. Her duties were the same as they had been the previous year and she again exclusively serviced a caseload of students. Tr. Vol. I, pp. 34, 39-42; Vol.II, pp.20-22.
- In October of 2003 Ms. Gershon inquired as to whether or not she could obtain prorated medical and dental benefits⁴. The North Providence School Department denied her request, but raised her per diem rate from \$217.17 to \$330.00⁵. Tr.Vol.I, pp. 47,130; Vol.II, pp. 20-21.
- In August of 2004 Ms. Gershon was again offered employment with the North Providence School Department. In a letter dated October 5, 2004 Superintendent Donna M. Ottaviano

² This daily rate was equivalent to the rate of a teacher on Step 2 of the salary schedule, with a Master's degree. Tr. Vol. I, p.18

³ Ms. Gershon testified that during this year she was a part time employee of the Cumberland school district, and in that capacity she received pro-rated health and other benefits. Tr. Vol. I. p.28.

⁴ She was no longer employed and receiving pro-rated benefits from the Cumberland School Department. Tr. Vol. I, pp. 49, 123

⁵ This new per diem rate was not equivalent to a step on the salary schedule, but in 2004-2005 was higher than the salary of a teacher on Step 7 of the salary schedule. Tr. Vol.II, p. 147. Ms. Gershon testified that \$330 per day (or \$55 per hour) was determined to be the "going rate" for speech/language pathologists at that time.

verified that Ms. Gershon would provide speech/language pathology services on a four day per week basis “for the 2004/2005 school year”⁶.

- The letter confirmed that Ms. Gershon’s compensation would be at a daily rate of \$330.00 and that there would be no benefits or seniority rights associated with the position. Gershon Ex. E.
- At the outset of the 2004-2005 school year, Ms. Gershon’s time was divided between the Marieville School (2.5days) and the Whelan School (1.5days). Her duties that year were the same as those performed in the prior years, i.e. she was the exclusive provider of the full spectrum of speech/language services to the students on her caseload. Tr. Vol. I, pp. 52-59.
- As she had during the other two years in which she was employed by the North Providence School Department, Ms. Gershon submitted her schedule to the Office of Special Education. The schedule indicated the names of the schools, the days and hours and the initials of the students she serviced. Tr. Vol.I, pp.23-24, 34-36, 75-76, and 125. Gershon Ex. F
- With respect to her assignment at the Whelan School, Ms. Gershon found that the time allocated for her servicing of students there was not adequate, and thirteen (13) students were not able to be placed into her schedule. She notified then-interim Director of Special Education, Lynne Hickey, of this situation at the very beginning of the school year. Approximately one week later, Ms. Gershon again raised her concern that these thirteen (13) students were not receiving speech/language services. Tr. Vol.I, p.64-66. ⁷
- When she attended a professional development meeting in her district just prior to the start of the 2004-2005 school year, Ms. Gershon learned that the other four part-time speech therapists employed by the North Providence School Department received benefits as part of their compensation.
- In September of 2004 Ms. Gershon contacted John Maguire, president of the North Providence Federation of Teachers about her employment situation. After meeting with Ms. Gershon, Mr. Maguire submitted a written request to Superintendent Donna Ottaviano to provide Ms. Gershon with the benefits given to regularly employed personnel under the collective bargaining agreement. Tr. Vol.I, pp. 67-68; Vol. II, pp.55-57; Gershon Ex.G.
- Thereafter, all speech/language pathologists in the system were asked to submit a report of the number of students they serviced at each school to the special education office. Ms. Hickey then circulated a summary of this information to all speech pathologists on

⁶ Previous written verifications Ms. Gershon had received from the district had not included a specification of the duration of the agreement. See Gershon Ex. A and C.

⁷ Lynne Hickey denied that Melissa Gershon contacted her about the problem servicing these students. Ms. Hickey testified that she did not learn of the situation until being notified by the principal of the Whelan School in early November of 2004. Tr. Vol.IV, pp. 15-16; S.C.Ex.9. Ms. Gershon’s testimony on this point was persuasive. The evidence in this case is that services to these students at the Whelan School were not provided until the beginning of January, 2005, even though the principal of the school sent Ms. Hickey a written memo on November 5, 2004 listing fifteen students who had not received, and were not scheduled to receive, speech/language therapy as required under their IEP’s. (S.C.Ex.9).

November 29, 2004, asking each of them to verify the information. Tr. Vol.I, pp. 69-73; Gershon Ex.H.⁸

- At a December 6, 2004 meeting of all speech/language pathologists called by Ms. Hickey, the attendees were informed that Ms. Gershon's four(4) day per week employment would be cut back to two and one-half (2 ½) days and that she would service students at the Whelan School only⁹. The twenty-nine students Ms. Gershon was servicing at the Marieville School during the first semester would be divided up among five other speech therapists who, Ms. Hickey testified, could fit these students into their schedules. Tr.Vol.I, p.74; Vol.IV, pp.23-24, 72-73.
- When Ms. Gershon offered to remain at the Marieville School so that the students she had serviced there in 2003-2004 and for the first half of the 2004-2005 school year could have the benefit of continuity, Ms. Hickey declined this proposal, indicating that Ms. Gershon was needed to fill the position for the teacher on a one year's leave of absence at the Whelan School. Tr.Vol.I, pp.79-81.¹⁰
- Of the five speech pathologists who incorporated students at the Marieville School into their schedules effective January 3, 2005, one was a part-time employee whose schedule was increased from a two to three days per week, effective January 3, 2005. Vol.IV, pp.66-72.
- The North Providence School Department retained two additional speech/language pathologists subsequent to announcing the reduction in Ms. Gershon's schedule. One of them began work on December 17, 2004 and averaged two days per week until June 17, 2005. She worked at Ricci Middle School and the Greystone School until June 2, 2005, when she provided services at the Whelan School for the remainder of the school year. Tr. Vol.III, pp.146-149; Gershon Ex.U. The second speech/language pathologist retained by the district began work on February 28, 2005, and worked from six to twelve hours per week at the Marieville School. Tr. Vol.II, p.93; Gershon Ex.U and X.¹¹
- On December 13, 2004 Union President John Maguire wrote to Superintendent Ottaviano, requesting that the school department respond to his November 9, 2004 letter and that it provide the reason why her schedule would be reduced from four days per week to two and

⁸ Ms. Gershon wrote in a correction to the information listed in the summary with respect to the Whelan School. The memorandum from Ms. Hickey lacked the information with respect to the fourteen (14) students who were not being provided services even though Ms. Hickey testified she had received this information from the principal at the beginning of November, both verbally and in writing. Tr. Vol. I, p.73; Vol. IV, pp 17-18; S.C.Ex.9.

⁹ Ms. Hickey explained that Ms. Gershon's assignment to service all students at the Whelan School was what it "should have been in the first place" since the therapist previously servicing the Whelan School was on a one-year leave of absence. Ms. Hickey thought Ms. Gershon's primary assignment should have been Whelan that year, rather than the Marieville School, where she thought Ms. Gershon was just "filling in". Tr.Vol.I, p.75; Vol.IV, pp.18,23.

¹⁰ Testimony of the Superintendent was that Ms. Gershon's employment in 2004-2005 was so that she could fill in for the speech therapist on a one year leave of absence at the Whelan School, a two and one half (2 ½) day position, and service the "overflow" students at the Marieville School for one and one half (1 ½) days a week. Tr. Vol.III, pp.72-75.

¹¹ Although the record does not reflect the date on which this second speech therapist ended her employment, the implication in the record is that she also was retained for the balance of the 2004-2005 school year. Tr. Vol.II, p.90.

one half days per week. Gershon Ex.O. Mr. Maguire testified that the Union was not informed of the reason. Tr. Vol.I, pp.74-75;Vol.II, p.60; Vol.III, pp. 149-153;216.

- Effective January 3, 2005 Ms. Gershon worked a reduced schedule at the Whelan School. Tr. Vol.I, p.89; Gershon Ex. J.
- In February or March of 2005 Superintendent Ottaviano called Ms. Gershon to offer to restore her to a four (4) day per week schedule, but at that point Ms. Gershon had found additional employment for one day per week in the Pawtucket school system. Tr. Vol.I, p. 94-95; Vol. III, pp.152-154.
- In May of 2005, Ms. Gershon experienced health issues related to pregnancy which caused her to end her employment in the North Providence school district. Tr. Vol. I, p. 96.
- The North Providence Federation of Teachers continued to press Ms. Gershon's claim with respect to her employment status throughout the remainder of the 2004-2005 school year. Tr. Vol. II, pp. 67-72; Gershon Ex. P, Q, and R. A representative of the teachers' union filed an appeal on her behalf with Commissioner Peter McWalters on June 23, 2005¹². Gershon Ex. S.
- On July 5, 2005 Superintendent Ottaviano notified Ms. Gershon that the services she had provided on a consultant basis would not be needed for the 2005-2006 school year. Gershon Ex. K. A copy of the letter sent to Ms. Gershon was sent to John Maguire of the teachers' union with a cover letter indicating that one of the other part-time speech therapists would be working an increased schedule effective September 2005, increasing from three days per week to five days per week. Gershon Ex. V.
- Throughout the three years of her employment in the North Providence school system, Ms. Gershon did not pay union dues and received none of the benefits provided to members of the collective bargaining unit. Tr. Vol. I, pp. 98, 110, and 121.
- Ms. Gershon was not evaluated pursuant to the process for evaluating teachers set forth in the collective bargaining agreement¹³. Tr. Vol. II, pp.150- 151; Vol.III, p.89.
- Ms. Gershon was not appointed by the North Providence School Committee when she accepted employment under the purchase of service contracts. Tr. Vol. I, pp. 20, 105.
- At the time she was retained to provide speech/language pathology services to students in North Providence, Ms. Gershon had no prior public school experience in the State of Rhode Island. Tr. Vol. I, pp. 105-106.
- Ms. Gershon worked for the North Providence School Department a total of 35 days in school year 2002-2003, 101 days in 2003-2004, and up to May of 2004-2005 when she left because of pregnancy-related illness, a total of 93.5days. N.P. Ex.7.
- During the 2002-2003 school year Ms. Gershon was appointed to a .4 position as a speech/language pathologist in the Cumberland School Department. During that school

¹² The record does not indicate that the North Providence School Committee responded in writing or made a formal decision with respect to the union's May 4, 2005 request on Ms. Gershon's behalf that she be "restored to entitlements not paid to her during the period of her employment with the North Providence School Department".

¹³ Her supervisor for the first two years of her employment in the district described Ms. Gershon as very competent and reliable- able to handle the most difficult of cases. Tr. Vol. II, pp. 33-34.

year she received benefits under the collective bargaining agreement covering Cumberland teachers. Tr. Vol.I, p. 28; Vol. III, pp. 19-24. N.P.Ex. 4; She declined employment in Cumberland in 2003-2004 when North Providence offered her a three (3) day per week work schedule. Tr. Vol. I, pp. 48-49.

- During the period of time in which the North Providence School Department employed Ms. Gershon under a purchase of services contract, it also employed four part-time, “regularly employed” speech/language pathologists¹⁴ who were appointed to part-time positions by the North Providence School Committee. These other part-time speech pathologists were paid at the appropriate step of the salary schedule in effect for certified school staff and received pro-rated benefits. Tr. Vol.II, pp.23-26, 79-80; Gershon Ex. W and X.

Positions of the Parties

Melissa Gershon

In Ms. Gershon’s memorandum, her representative argues that Ms. Gershon should have been employed as a part-time, regularly-employed teacher pursuant to R.I.G.L. 16-13-2. (Gershon memo p.21) Instead, she was illegally employed pursuant to a separate written agreement the terms of which violated her rights to be paid pursuant to the salary schedule in effect for certified personnel. Because of this illegal employment arrangement, Ms. Gershon received none of the medical, dental and other benefits to which she was entitled under the collective bargaining agreement. Again, because she was not treated as a member of the regularly-employed teaching staff, her contract was abruptly terminated in January of 2005 when she was reduced from a .8 to a .5 employee.

In response to the district’s assertion that she was employed as a consultant, she argues that her service in North Providence was actually that of a regularly-employed part-time teacher. Citing the precedent of D’Ambra v. North Providence School Committee, 601 A. 2d 1370 (1992) Ms. Gershon submits that she has proven that she had a regular schedule for providing speech therapy services to students in the North Providence school system. She notes that she was the exclusive provider of speech therapy services to the students on her caseload. She at first serviced students at a single school one day a week (Stephen Olney), the next year worked three days per week at two schools (Greystone and Marieville) and in her last year of employment she worked four days per week at Whelan and Marieville. There was no distinction between Ms. Gershon’s work and that of the other speech therapists, four of whom were also part-time. They were “regularly employed” as was Ms. Gershon. They received the benefit of annual employment contracts which were automatically renewed absent statutory notice, contractual benefits, and earned seniority. Their years of service were credited not only for purposes of advancement on the salary schedule, but also for achieving tenure within the North Providence system¹⁵.

¹⁴ As well as two full time pathologists.

¹⁵ Throughout the case, Ms. Gershon’s advocate contrasted her “inequitable treatment” to that received by another speech therapist who received an appointment by the School Committee to a .2 position in January of 2002. The other speech therapist was argued to have increased and decreased her work schedule many times throughout the same period Ms. Gershon’s employment remained stable and consistent; yet the other therapist was considered

As we understand Ms. Gershon's legal argument, her request for an appropriate remedy is to make her "whole" for the benefits and entitlements she failed to garner in her three years as an independent contractor. Because she was in fact a regularly employed teacher, albeit on a part-time basis, R.I.G.L. 16-7-29 required that she be compensated pursuant to the salary schedule in effect for all regularly-employed certified personnel in North Providence. Other terms and conditions of her employment should have been aligned to those of other certified personnel in the school system. She should have had a continuing "annual" contract and been entitled to notice prior to March 1st of any non-renewal of her contract for the 2005-2006 school year.

The violation of Ms. Gershon's rights was so egregious, she argues, that her service should fulfill the three-year probationary period for achieving tenure, in the same manner as that of her part-time counterpart in the North Providence system. The union submits that, but for its advocacy on Ms. Gershon's behalf, her schedule would not have been reduced effective January 3, 2005. Even though the terms of her employment agreement with North Providence may have been inconsistent with the requirements of the Teacher Tenure Act (R.I.G.L. 16-13-1, et seq.) she nonetheless was employed on the basis of three successive written annual contracts. (See Gershon memo at page 21). While it is true that she was not formally evaluated during this time, the testimony of her immediate supervisor was that her performance was excellent. Granting her tenured status in the North Providence school system would be an appropriate remedy, it is argued.

As a final claim, Ms. Gershon alleges that her mid-year reduction to a .5 position from a .8 position was in retaliation for her assertion of her rights and her enlistment of the aid of the teachers' union. The district sought to protect itself from her emerging claim that she was a regularly employed teacher by reducing her hours and repositioning her in the system as the "replacement" filling in for the therapist on leave. The educationally sound approach to addressing the problem of 14 unserved students at the Whelan School would have been to assign other therapists (whose caseloads permitted them to take on additional students) to service these Whelan students and retain Melissa Gershon for the two and one half days she was working at Marieville, servicing many of the same students she had worked with in the prior school year. Ms. Gershon's reassignment, as well as the reduction in her schedule, had nothing to do with the educational interests of North Providence students, the union asserts.

Any argument that reduction in Ms. Gershon's employment mid year was due to the district's reduced need for speech therapists is disputed. At the same time Ms. Gershon's work schedule was reduced from .8 to .5 (effective January 3, 2005) another part-time therapist's schedule was simultaneously increased from .4 to .6. On December 17, 2004 another outside therapist was brought in to work a two day per week schedule and, in late February, yet another speech/language therapist was added to the staff. Even if there had been a legitimate reason for cutting back the level of services she provided under contract to the district, Ms. Gershon was

regularly employed, while Ms. Gershon was not. Ms. Gershon points out that this other part-time therapist received a letter from the Superintendent granting her tenure on March 31, 2004, after just two years and three months of part-time service in North Providence. See Gershon memorandum at page 20. Her claim of inequitable treatment is really irrelevant to Ms. Gershon's statutory claims.

entitled to notice, a written reason, and deferral of the effective date to the end of the school year.

If, as the district submits, manipulation of therapists' schedules and small caseloads had created the situation (of some students not being provided the required services), Ms. Gershon argues that the special education director should have verified that correct assignments and schedules were put in place. This was not done. The interim director of special education testified that she left it completely up to the therapists as to how their schedules would be adjusted to address the problem as it existed in December, 2004. She did not review or approve of revised schedules. The only adjustment and reassignment she effectuated was that of Ms. Gershon.

In response to the School Committee's arguments that Ms. Gershon waived her rights by accepting the terms of a contract which paid her much more than she would have earned as a regularly-employed teacher, her representative argues that the statutory requirements of the Teacher Tenure Act cannot be waived. The doctrine of waiver is inapplicable because Ms. Gershon was unaware that she was being treated any differently than any other part-time speech therapists employed by the North Providence school department until August of 2004. She followed up on this knowledge, as did her union representative, as soon as she realized that several of her counterparts, part-time speech therapists whose duties were identical to hers, were regularly-employed members of the bargaining unit. Her experience in Cumberland as a part-time teacher in that system in 2002-2003, where she was paid pursuant to the salary schedule and received the benefits of the Cumberland teachers collective bargaining agreement, did not make her question her different status in North Providence. As soon as she became aware of her rights, she took appropriate steps.

North Providence School Committee

Counsel for the School Committee argues that Melissa Gershon provided speech and language therapy services for North Providence students as an outside consultant. She did not fill a vacancy¹⁶, but rather serviced students at schools where there was an "overflow" of students, i.e. the therapist at the school could not fit all of the students needing speech services into her schedule. At no point in the time she serviced North Providence students was Melissa Gershon appointed to a position by the North Providence School Committee. She was paid at an agreed-upon daily rate and submitted weekly time records, facts which distinguished her from other part-time speech/language pathologists in the district. At the time she was retained by the school department, she clearly understood and agreed to the terms and conditions of her employment. She accepted a contract which gave her no benefits or seniority rights. In exchange, her compensation clearly exceeded what she would have made as a regular teacher.

In 2003-2004, her situation was very similar, except that her consulting services were increased from one day per week to three days per week, again because of "overages" of

¹⁶ The district defines a vacancy as an open position created when a person leaves a position. (Tr. Vol. III, pp. 39-40).

students at the Greystone and Marieville schools.¹⁷ As had been the case the previous year, Ms. Gershon did not pay union dues, nor was she evaluated or otherwise treated as a teacher serving a probationary period of employment. It was the flexibility of her employment as an outside consultant that enabled Ms. Gershon to negotiate an increase in her daily rate, to \$330.00 per day, in the fall of 2003. The district notes this adjustment to her rate was well in excess of what a Step 7 teacher would earn that year and would not have occurred if Ms. Gershon were regularly employed or a member of the bargaining unit.

In the fall of 2004-2005 Ms. Gershon was notified of the continuing need for her consulting services by a letter dated October 5, 2004.¹⁸ Ms. Gershon was assigned to provide services to students at the Whelan School because the therapist there was on a one year leave of absence. She was also assigned to cover the ongoing “overflow” of students needing speech/language therapy at the Marieville School, where she had worked the previous year. The district argues that, again in this school year, Ms. Gershon was clearly advised that she was not filling a permanent vacancy and that she was an outside consultant. She knew full well the distinction that existed between a speech therapist employed as a consultant and one appointed to a vacancy as a regular teacher because she had served as a part-time employee and regularly-appointed member of the staff in the Cumberland school department during the 2002-2003 school year. The terms of her contract as an outside consultant had the benefits she negotiated (a higher rate of pay) in exchange for the benefits she clearly knew she would not be entitled to.

In response to Ms. Gershon’s claim that she is entitled to be “made whole” for the entitlements and benefits she would have had if she were appointed to a regular teaching position in the North Providence school department, counsel argues that the Commissioner’s jurisdiction over such issues is lacking. A claim for benefits (such as sick leave and medical insurance) under the collective bargaining agreement in effect with North Providence teachers is a dispute arising under that contract and as such, is not a matter which “arises under a law relating to schools or education”. It is only the latter disputes over which the Commissioner exercises jurisdiction.

Counsel for the district argues that Ms. Gershon was hired as, and performed the services of, an independent contractor. While recognizing that the Commissioner’s decision in Gorman v. Jamestown School Committee¹⁹ may impact on the validity of his arguments in this case, counsel notes his respectful disagreement with the Commissioner’s decision.²⁰ He points out that the decision in *Gorman* is on appeal to the Board of Regents and suggests that the

¹⁷ The overages at Marieville were due to the fact that a self-contained class had moved from the Centerdale School over to Marieville, increasing the numbers of students to receive speech services there; the overage at Greystone was because the therapist there needed to take a class for certification purposes.

¹⁸ Ms. Gershon had already begun providing services to students at the Whelan School and, as she had the year before, at the Marieville School.

¹⁹ decision of the Commissioner dated May 31, 2005.

²⁰ The Commissioner ruled in Gorman v. Jamestown School Committee that the statutory scheme governing the employment of teachers required that school psychologists providing routine testing services to students throughout the school year be employed under annual contract pursuant to R.I.G.L. 16-13-2. The Commissioner also found that during the years she was employed as a consultant, Anne Gorman was a regularly employed teacher, albeit on a part-time basis, as the term “regularly employed” is used in R.I.G.L. 16-7-29.

arguments made by the Jamestown School Committee in that matter should be persuasive at the Regents' level. The district also argues that the *Gorman* case is distinguishable on its facts. North Providence takes the position that Melissa Gershon was, at all times an independent contractor who negotiated the terms and conditions of her employment with district officials. In fact after the 2003-2004 had already begun, she renegotiated her rate of compensation—something regularly-employed certified personnel would have been unable to do. When the benefits of the independent contractor relationship no longer suited her, it was only at that point that Ms. Gershon sought the benefits of becoming a member of the teachers' union.

To the extent Ms. Gershon's claim is premised on R.I.G.L. 16-7-29, i.e. that she was entitled to placement on the salary schedule in effect for certified personnel and advancement on that salary schedule, counsel for the district argues that the limited nature of Ms. Gershon's employment disqualifies her. In the first year, she worked a total of thirty-five (35) days. In the second year she worked one hundred and one (101) days. Up to the point she left the district in May of 2005, she had worked a total of only ninety-three and one-half (93.5) days. In none of these years, counsel argues, did she work the 135 days required to meet the definition of a "teacher", much less a "regularly employed" teacher. In 2002 the General Assembly made an amendment to R.I.G.L. 16-16-1(a)(12) which defines the word "teacher". The statute now must be interpreted, the district argues, to require a minimum of one hundred and thirty-five (135) days for a person to be considered a "teacher"- not just for retirement purposes, but for salary schedule purposes as well. It is this amended definition of "teacher" found in the Teachers' Retirement law that is incorporated by reference into the R.I.G.L. 16-7-29 and its definition section, 16-7-16²¹.

Another argument advanced on behalf of the district is that the Appellant is attempting to renegotiate the terms of her agreement with North Providence. The doctrine of equitable estoppel is invoked to preclude Ms. Gershon's attempt to renegotiate a contract she freely entered into, took advantage of, and on which the district relied in employing her. Counsel argues that all of the elements of equitable estoppel are present in this case, i.e. an affirmative representation or equivalent conduct on the part of the person against whom the estoppel is claimed, directed to another for the purpose of inducing reliance, to the detriment of the district. Even more disadvantageous to the district is the fact that these claims extend back as far as school year 2002-2003. The North Providence school district had the right to rely upon the agreements entered into with Ms. Gershon over this three-year period. If district officials had known that Ms. Gershon would claim tenure rights and additional rights under the collective bargaining agreement, they would not have hired her.

As to allegations that the district violated the teacher tenure law²² by failing to hire Ms. Gershon under a continuing annual contract, counsel for the district asserts that the union's position is based on a misinterpretation of the language of the statute. The district submits that although the definition of "teacher" contained in Section 16-13-1 does in fact apply to Ms. Gershon, the subsequent section (16-13-2) requires only that those actually providing "teaching service" be employed on the basis of an annual contract. As a certified speech/language

²¹ R.I.G.L. 16-7-16 (12) indicates that "Regularly employed" and "service" as applied to certified personnel have the same meaning as defined in Chapter 16 of Title 16.

²² R.I.G.L. 16-13-1 et seq.

pathologist Ms. Gershon did not perform “teaching services”. The district argues that it is inconceivable that the General Assembly sought to protect “other service providers” in the public schools by including them in the group of certified school professionals who could achieve tenured status²³.

With respect to the argument that R.I.G.L. 16-13-2 protected Ms. Gershon from a mid-year reduction in her schedule, and entitled her to procedural protections in the event of such change in her status, the School Committee argues that the statute protects against nonrenewal and dismissal, not a reduction in schedule. Since the language of Section 16-13-2 does not address a “reduction”, the Commissioner lacks jurisdiction over this claim.

The union appears to be arguing that Ms. Gershon was entitled to a March 1st notice of any nonrenewal of her contract and, absent notice, she was entitled to continued employment in the 2005-2006 school year. The district counters that there is insufficient evidence in support of this claim. There is no testimony from Ms. Gershon as to whether she did or did not receive statutory notice for the 2005-2006 school year. Testimony of the Superintendent and the current Director of Special Education establishes that North Providence did not need Ms. Gershon’s services in 2005-2006. Counsel notes that a claim to employment for 2005-2006 was not even advanced on Ms. Gershon’s behalf until references were made to it during the course of extended hearings before the Commissioner. It has been waived, the district submits.

Similarly, with respect to Ms. Gershon’s claim to tenured status on the basis of her three years of service to North Providence students, counsel for the district argues that there is insufficient evidence. Her contract was that of an independent contractor. As such, she was never evaluated to determine the level of her performance. Even if she had been a regular employee and evaluated, which she was not, upholding her claim for tenure would abrogate principles established in several prior decisions of the Commissioner. These cases establish that sustained performance over the probationary period is required before tenure can be achieved.²⁴ The number of days Ms. Gershon worked in each of the three years was insufficient for the district to assess her “sustained performance” and to have an adequate basis on which to make a tenure decision. A ruling by the Commissioner to give Ms. Gershon tenured status in the North Providence school system would be an inappropriate remedy and one which would usurp the School Committee’s statutory power to control and manage the district under R.I.G.L. 16-2-9 (a). Furthermore, the case consistently cited by the Appellant in support of all her claims is the Rhode Island Supreme Court decision in D’Ambra v. North Providence School Committee. A review of the D’Ambra decision would indicate that the teacher involved made no claim or arguments whatsoever with respect to tenure.

Another defense raised by the North Providence School Committee with respect to Ms. Gershon’s claims is the doctrine of laches, based on Ms. Gershon’s delay in bringing her claims and resulting prejudice to the district. The district argues that Ms. Gershon was aware of the benefits of union membership as early as September of 2002, when she became a member of

²³ Counsel also argues that including all those holding certificates of qualification from the Department of Education within the scope of Section 16-13-2 would require full time employment of such individuals.

²⁴The district cites Brunetti v. Woonsocket School Committee, decision of the Commissioner dated April 24, 2002 and Asadoorian v. Warwick School Committee, 691 A.2d 573, 577 (R.I. 1997)

the Cumberland teachers' union. Yet, she did not assert her claim to union membership in North Providence at that time and, inexplicably, delayed raising her claim to appointment to a regular position until the fall of 2004. Her claim before the Commissioner was almost three years after her retention under a consultant's contract. She clearly knew or should have known the nature of her claim to a different status in the North Providence system as early as the 2002-2003 school year. Her failure to raise this claim in a timely way has prejudiced the North Providence School Committee.

Finally, the district denies that the reduction made to Ms. Gershon's schedule in December of 2004, was retaliatory in nature. Her reduced schedule was the result of her reassignment to cover the leave of absence of the Whelan School speech pathologist and an increase in the caseloads of other speech pathologists who were asked to divide up Ms. Gershon's students at the Marieville School. Ms. Gershon's reduction was necessary, the district argues, because of the inappropriate and unprofessional actions of the speech/language pathologists in North Providence who had unilaterally modified their own caseloads and work assignments to lessen their workloads. Once this situation was "corrected" the additional one and one half days (1 ½) days Ms. Gershon had worked in the first semester of the year were no longer needed. There was no retaliation because of the union president's November 9, 2004 request that Ms. Gershon be given the status of a "regularly employed" member of the teaching staff.

DECISION

Melissa Gershon's claim is essentially that she should have been employed as a member of the regular teaching staff, rather than a consultant. Her consultant contract provided her, according to the testimony in the case, with a salary that substantially exceeded the amount she would have earned under the North Providence teachers' contract. Ms. Gershon seeks to be treated as a regularly employed teacher and, at the same time, be "made whole", a somewhat inconsistent proposition under the facts in this case. If successful in her claim, then, this is the first case, to our knowledge, in which the remedy would involve a *reduction* in a teacher's compensation.²⁵ The value of other contractual benefits sought by the Appellant may well explain her pursuit of a reduced salary. In any event, issues with respect to any remedy to which she may be entitled have been deferred until the merits of this case have been decided,²⁶

The first issue is the laches defense. While it is true that Ms. Gershon sought to challenge the legality of her employment after some two years as a consultant, we cannot

²⁵ Other cases brought to the Commissioner by those who contested their status as "substitutes" "per diem teachers" "tutors" or "consultants" have sought an award of the higher salary of a regularly employed teacher, as well as other remedial measures. See Newsome v. Newport School Committee, December 21, 1992 (a substitute); Andreozzi et al. v. Warwick School Committee, August 23, 1993 (substitutes); Morris v. School Committee of the Town of Hopkinton, decision of the Commissioner dated November 4, 1975; clarification of Decision dated April 8, 1976; affirmed by the Board of Regents on July 8, 1976 (per-diem teacher); D'Ordine v. North Providence School Committee, November 30, 1988 (home tutor); D'Ambra v. North Providence School Committee, January 3, 1990 (ESL tutor); Gorman v. Jamestown School Committee, May 31, 2005 ("consultant").

²⁶ A motion to bifurcate the issue of any damages which might be due Ms. Gershon was granted on the second day of hearing. Vol.II, pp. 6-12.

conclude that the doctrine of laches operates as a bar to her claim. The district asserts that Ms. Gershon's dissatisfaction with the terms of her employment in North Providence developed only after she weighed the benefits of receiving the "market rate" for speech pathologist services against the benefits of being regularly-employed, i.e. medical and dental insurance coverage, paid leave, rights to ongoing employment and, potentially, tenure. Ms. Gershon's contention is that she did not delay in bringing her claim. She asserts that she was unaware of any requirement that her employment be pursuant to the terms of the teachers' collective bargaining agreement. She submits that her agreement to work as a consultant was without knowledge of her right to claim a different status. As soon as she learned that all other part time speech therapists in North Providence were regularly employed teachers and that she had a claim to similar status, she immediately acted on this knowledge.

The district advances the defense of laches, as well as that of equitable estoppel. It is true that Ms. Gershon did not challenge the legality of her employment until two years as a "consultant"; however, we find that any delay did not prejudice the school department; there is no indication that if Ms. Gershon prevails, and the School Committee is required to make expenditures to her, that these expenditures would have been lessened had she sought relief more promptly. See Berthiaume v. School Committee of the City of Woonsocket, 121 R.I. 243; 397 A.2d 889 (R.I. 1979). The Berthiaume case is dispositive as to the defense of equitable estoppel. The Rhode Island Supreme Court specifically ruled in Berthiaume that a person's acceptance of a per diem rate could not effectively operate as a waiver of their right to the compensation provided for in R.I.G.L. 16-7-29. The Court observed that:

When a statute creates a private right for the public good, the donee of that private right lacks the power to waive that right or to nullify it by private contract. Berthiaume at page 250.

Thus, Ms. Gershon's voluntary acceptance of a per diem rate as a "consultant" cannot, for public policy reasons, constitute a waiver of her claim. Stated another way, her agreement with the North Providence school department, and her acceptance of a per diem rate, cannot bar her enforcement of statutes which are designed for the public benefit. Even if equitable estoppel were a defense that could be raised in this context, we do not find the elements of estoppel present here. There is no proof that Ms. Gershon made a representation or engaged in conduct that induced North Providence school officials to employ her as a consultant.

Her employment as a "consultant" under the terms of an individually-negotiated agreement with various school officials over the years was clearly in violation of statutory requirements. R.I.G.L. 16-13-1 et seq., the Teachers' Tenure Act, requires that she, as a certified speech language pathologist providing routine services in the public schools of North Providence, be employed under an annual contract. Compliance with such requirement did not require her "full time" employment as the district has argued. In fact, North Providence employed several, regularly employed, part-time speech therapists at the time it retained Ms. Gershon. The district employed such certified personnel on a part-time basis, both prior and subsequent to retaining Ms. Gershon. Thus, the district was aware that it could effectively utilize part-time speech therapists each year to meet its need for speech therapy services.

The School Committee attempts to characterize Ms. Gershon's employment as something in the nature of a long-term substitute, arguing that she was brought in to address an "overflow of services that needed to be provided". The facts of this case do not support the contention that Ms. Gershon was a substitute or that her role was limited to meeting some type of extraordinary need of the district, such as compensatory services. It is true that she did not fill a vacant position created when a person left the district's employ, but she filled a position that resulted from increased/unmet needs for speech/language therapy services which existed in each of the years of her employment.

It is true that in 2004-2005 her caseload included a number of students at the Whelan School where the speech pathologist was on a one-year leave of absence. While there is evidence of some discussion between Ms. Gershon and an office secretary with respect to her "taking over" for the person on leave at the Whelan School, the role she assumed that school year cannot be characterized as that of a "substitute". The four-day per week schedule she undertook in September of 2004 was the same in nature as that she had in the prior two years, i.e. servicing her own caseload of students for an entire year- not filling in for an absent teacher whose return was anticipated.²⁷ Even with respect to her role at the Whelan School²⁸, a "one-year only" appointment would have been in compliance with R.I.G.L. 16-13-2, since the absent teacher was on leave for the entire school year.

The district seeks to distinguish Ms. Gershon, as a speech/language pathologist, from other certified professionals who actually engage in classroom teaching. Although the district admits that Ms. Gershon meets the broad definition of "teacher" set forth in R.I.G.L. 16-13-1, it submits that she did not perform "teaching services" in North Providence because she was a related service provider, not providing classroom instruction per se. The limitation the district would impose on the meaning of "teaching service" is inconsistent with the broadly stated definition of teacher in the preceding section of the statute, Section 16-13-1. Such a limited construction of "teaching service" in the subsequent section would inexplicably restrict the class of certified professionals in our schools for whom tenure is attainable.

An interpretation which limits the protections of annual contracts and tenure to those engaged in classroom instruction would be inconsistent with substantial precedent.²⁹ Even more persuasive on this point is the district's own practice of employing such certified service providers under annual contract and according them tenure after the probationary period. The evidence in this case demonstrates that North Providence has regularly employed a broad range of certified school professionals, not only speech pathologists, but also school social workers, and school psychologists. See Gershon Ex. X. Some of these "teachers", like Ms. Gershon,

²⁷ A fact which was explicitly recognized in her consultant contract that year. See Gershon Ex.E which verifies that Ms. Gershon "will provide services as a Speech/Language Pathologist on a four-day per week basis...for the 2004/2005 school year".

²⁸ Which the District maintained was her only "correct" assignment for 2004-2005.

²⁹ Two recent cases affirming this proposition are National Education Association v. Middletown School Committee, decision of the Commissioner dated October 17, 2000 (school social workers) and Anne Gorman v. Jamestown School Committee, decision of the Commissioner dated May 31, 2005 (school psychologists). The Gorman case is presently on remand to the Commissioner from the Board of Regents to determine the applicability of the defense of laches and to address the case of Bryant v. Cunniff, 111 R.I. 211; 301 A.2d 84 (1973), which excluded managerial staff from the Teacher Tenure Act.

provide service on a part time basis. The district's position that such individuals are not providing "teaching service" and are not entitled to work under annual contract is belied by its own employment practices.

R.I.G.L. 16-13-1 and 16-13-2 must be read together with the R.I.G.L. 29-9.3-2. The latter statute gives all non-administrative certified teaching personnel collective bargaining rights. The language of Title 28-9.3-1 is broad. The General Assembly has clearly expressed as public policy the notion that high quality education is achieved by a system in which certified personnel have the right "to negotiate professionally and to bargain collectively with their respective school committees". Collective bargaining rights, as well as legislative intent, would be undermined if the School Committee was permitted to negotiate with Ms. Gershon, and other school professionals like her, to create individual terms and conditions of employment. Her inclusion in the group of those represented by the teachers' union, and her employment pursuant to the provisions of the collective bargaining agreement, entitle her to the benefits accorded to other part-time personnel in the North Providence school system.

Ms. Gershon's claim that the terms of her employment violated R.I.G.L. 16-7-29 has also been proven. As we pointed out at the outset, this raises the likelihood that the compensation she received during the time she worked in North Providence would actually be reduced. Be that as it may, the argument of the School Committee that she was not regularly employed throughout this period, for all the reasons it has cited, is without merit. We find that she was regularly employed, both in the nature of her work and schedule of the services provided to North Providence students.³⁰ This is true during each of the school years in which she worked for the district. The most persuasive information on this point is evidence of the "regularly employed" status North Providence accords its part-time certified professionals, including speech/language pathologists. Many of its regularly employed certified school employees work less than the minimum number of days (135) the district submits has been required for such status since the 2002 amendment to R.I.G.L. 16-16-1 (a) (12). It is evident that, its arguments aside, the district's practice has been to employ such part-time professionals pursuant to the salary schedule and "if an employee is appointed to a percentage of full-time (i.e. .2, .4, .6, or .8) he/she received benefits on a pro rated basis" See Gershon Ex. X. (Gershon Ex. X, contains certain employment records and rosters of employees from school years 2002-2003 through 2005-2006). Our conclusion is that the district's practice with respect to these other part-time certified school professionals is consistent with the law, whereas its position with respect to Ms. Gershon is not. Despite the confusion created by the General Assembly's 2002 amendment³¹ it is our conclusion that North Providence's post-2002 application of this law to its other part-time school professionals is correct³², i.e. one need not work in excess of 135 days to be considered a "teacher" or regularly employed.

Ms. Gershon's claim under R.I.G.L. 16-7-29 is a claim over which the Commissioner has jurisdiction since it is statutory in nature, contrary to the district's contention that it is a

³⁰ See *D'Ambra v. North Providence School Committee*, 601 A2d 1370 (R.I. 1992)

³¹ And the deletion of the word "substitute" in this section

³² The record in this case does contain evidence of employment of two additional speech/language pathologist characterized as "consultants". This case obviously does not present the issue of the legality of the employment of these two other individuals.

dispute which arises under the collective bargaining agreement. The district raised this same jurisdictional defense, without success, in the earlier case of D'Ordine v. North Providence School Committee, decision of the Commissioner dated November 30, 1988. The Commissioner determined in D'Ordine that he did not function as a "super-arbitrator" in deciding whether a "home tutor" was in fact a "regularly employed" teacher pursuant to the statute. While it is true that the focus of Ms. Gershon's claim of entitlement is to the benefits other regularly-employed teachers receive pursuant to the collective bargaining agreement, it is the determination of her status under R.I.G.L. 16-7-29, and not the interpretation of the teachers' contract, which is the task at hand.

The final issue in this case is Ms. Gershon's claim that her mid-year reduction was retaliatory, in response to her claim of regular employment status and her enlistment of the president of the North Providence Federation of Teachers to advocate on her behalf. The district's position is that there were legitimate reasons for the cut-back in Ms. Gershon's schedule and for her withdrawal from the Marieville School. These reasons have not been substantiated. Even assuming that there had been an error in the nature of her initial assignment, this was not her error. The work schedule she submitted clearly reflected where and when she was servicing students in 2004-2005. Ms. Gershon had alerted school officials early in the semester of her inability to fit several students at Whelan into her schedule. The confusion of the interim special education director as to the respective assignments of the speech therapists in the district was clearly at the root of any need to "correct" the situation. The district's correction of a problem of its own making clearly had a punitive effect on Melissa Gershon and substantially reduced her pay.

When the decision was made to reduce Ms. Gershon's employment and put her in her "correct" assignment at Whelan, the continuity of Ms. Gershon's work with her Marieville students for a one and one-half (1-1/2) year period was lost. The factor alleged to offset the loss of continuity Ms. Gershon provided to students at the Marieville School was that a single speech therapist would service Whelan students, rather than dividing up the school. The measures implemented by the district, however, resulted in dividing up the entire caseload at the Marieville School among several therapists.³³ The district could have utilized Ms. Gershon at Marieville for the balance of her .8 schedule to continue servicing some of the students there, but chose to reduce her schedule instead. This was purportedly because of the ability of certain regularly employed therapists to fit these students into their schedule. This increase in the caseloads of the other therapists set in motion a chain of events which necessitated an increase in the speech therapy staff.

Contemporaneous with the reduction in Ms. Gershon's schedule was the increase in the schedule of one of the regularly-employed speech therapists³⁴, and the employment of another part-time speech therapist. At the time of the district's decision to cut back her hours on December 6, 2004, the plan for how the other speech therapists would "cover" the Marieville students needed to be worked out. There is no evidence of the specifics of the plan that the

³³ Ms. Gershon's caseload was divided up among at least four therapists. The interim director did not personally review the information as to how the other speech therapists had rearranged their schedules to "cover" the Marieville students and could not testify with certainty on this point.

³⁴ Who, the testimony showed, covered at least some of the Marieville students Ms. Gershon previously serviced.

speech therapists devised. Whatever the revised schedules of the other therapists enabled them to do at Marieville, it was a plan which was not described “on paper”. Whatever changes the plan called for in the schedules of the other speech therapists, it necessitated a simultaneous increase in the district’s staff of speech therapists. The reduction in Ms. Gershon’s hours was not accompanied by a reduction in the district’s overall need for speech/language services in December of 2004, or even as projected for the balance of the year.

In the absence of any legitimate reason for the mid-year reduction in the level of her services, and given the pending claim she asserted at that time, the only explanation for her reduction is that it was in retaliation for her claim to regularly employed status in the North Providence school system. In light of this finding, as well as on the basis of the merit to the other claims raised by Ms. Gershon in this appeal, her appeal is sustained. It would be appropriate for the parties to confer with respect to the issue of damages. Although there is some precedent with respect to the nature of the remedy for violations of R.I.G.L. 16-13-2³⁵ and 16-7-29³⁶, there is no precedent with respect to the remedy for retaliation. The parties are directed to confer to attempt to reach an agreed upon remedy and if they are unsuccessful, further hearing in this case will be scheduled upon notice to the Commissioner.

For the Commissioner,

Kathleen S. Murray, Hearing Officer

APPROVED:

Peter McWalters, Commissioner

October 23, 2006
DATE

³⁵ Newsome v. Newport School Committee, Decision on Remedy, March 24, 1995; Andreozzi et al. v. Warwick School Committee, August 23, 1993.

³⁶ D’Ordine v. North Providence School Committee, February 26, 1990; D’Ambra v. North Providence School Committee, Decision on Remedy, July 7, 1994.