

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER
EDUCATION

.....
Anne Gorman

v.

Jamestown School Committee
.....

DECISION ON REMAND

Held: Anne Gorman’s delay in formally presenting her claim against the School Committee was not “unexplained and unreasonable”. The Jamestown School Committee did not demonstrate “prejudice” from her delay. The accumulation of interest on any monetary damages that might be owed to Ms. Gorman or on payments required to be made to the Employees Retirement System on her behalf does not constitute prejudice.

DATE: April 16, 2007

Travel of the Case

The Commissioner issued an initial decision in this dispute on May 31, 2005. The matter was taken up to the Board of Regents on appeal filed on behalf of the Jamestown School Committee on June 29, 2005. After hearing by the Board, the matter was remanded to the Commissioner pursuant to the Board's decision of May 11, 2006. Following remand, the Commissioner's designated hearing officer held hearings in accordance with the directive of the remand on June 26 and September 20, 2006. Thereafter, the parties submitted written arguments addressing the issues. The record on remand closed on November 21, 2006, following the submission of memoranda by both parties.¹

ISSUES

- Did the Jamestown School Committee waive the defense of laches because it was not raised as an affirmative defense at the hearing before the Commissioner?
- Was Ms. Gorman's delay in claiming entitlement to status as a regularly-employed teacher unexplained and inexcusable and did it result in prejudice to the Jamestown School Committee?
- Does the case of Bryant v. Cunniff et al.² affect the legal conclusion of the Commissioner that the Jamestown School Department was required to employ Ms. Gorman as a teacher under annual contract pursuant to R.I.G.L. 16-13-2 from 1990-2001³

Findings of Relevant Facts:

- Ms. Gorman did not formally assert a claim that her services as a school psychologist for the period 1990-2001 should have been under an annual employment contract as a regularly-employed teacher pursuant to R.I.G.L. 16-13-2 until October 8, 2003. Joint Ex.1.

¹ The parties on remand were the same as those in the initial hearing on the merits, i.e. Ms. Gorman and the School Committee. A group called the Rhode Island Association of School Superintendents (RIASC) submitted an amicus curiae brief in support of the Jamestown School Committee and participated in the hearing before the Board of Regents. An argument contained in the RIASC amicus brief (that Ms. Gorman's claim was barred under the doctrine of laches and/or equitable estoppel) prompted the Regents to remand the matter to the Commissioner for further hearing on the facts surrounding delay in presentation of Ms. Gorman's claim.

² 111 R.I. 211; 301 A 2d 84 (R.I. 1973)

³ In March of 2001 Ms. Gorman was appointed to the Jamestown faculty as a full-time, regular teacher. Joint Ex.4.

- On March 29, 2001 the Jamestown School Committee appointed Ms. Gorman to a full-time position on the Jamestown faculty. At that time her letter of appointment informed her that:
 Though you have worked in our school for a number of years you have always been considered an independent, part-time contractor. After studying and coming to understand the Labor Laws of the State of Rhode Island, the committee is happy to rectify the situation. Joint Ex.4.⁴
- At the time of her appointment as a full-time school psychologist on the Jamestown faculty, Ms. Gorman became a contributing member of the Employees Retirement System of the state of Rhode Island. Joint Ex. 28b and Ex.28c.
- During the following summer, i.e. 2001, Ms. Gorman sought to “purchase credit” in the Employees Retirement System for her prior years of work as a part-time school psychologist in Jamestown. Tr.Vol.I, pp.17-20; On October 1, 2001 the business manager for the Jamestown School Department filled out paperwork for the Employees Retirement System at Ms. Gorman’s request. This documentation verified her past part-time service from 1990 to March 5, 2001, when she was appointed to a full time position. Joint Ex. 28A and 28B; Tr. Vol.I, pp. 20, 35; Vol.II, pp. 61-62.
- By the summer of 2002 the issue of whether Ms. Gorman had been an employee or an independent contractor during the period 1990-2001 was under consideration by the Employees Retirement System. After an initial review of the information available, Ms. Gorman’s request to “purchase service time” as a school psychologist for the Jamestown School Department was denied. Joint Ex. 28D,E,F and 32; Vol.I, p.31.
- Ms. Gorman appealed this decision, and on June 24, 2003 a hearing officer at the Employee’s Retirement System found that Ms. Gorman was not an independent contractor, but that she was a regularly-employed teacher during this period. Joint Ex. 32. The hearing officer also determined that some of her years of service as a regularly-employed teacher were eligible for retirement credit, while others were not. Joint Ex. 32⁵
- The parties to the proceedings before the Employees Retirement System were Ms. Gorman and the Employees Retirement System of Rhode Island. Joint Ex. 32.
- Anne Gorman became a tenured teacher in the Jamestown School Department at some point after she made her October 8, 2003 claim to the Jamestown School Committee and after completing three years of full-time service under a continuing annual contract as a regularly-employed teacher. Tr. Vol.I. pp. 91-96.

⁴ Letter to Mrs. Anne Gorman from Sirje Carl, Chairperson of the Jamestown School Committee dated March 30, 2001.

⁵ The hearing officer’s decision gave Ms. Gorman pro-rata credit for school years 1994-2001 when she became full time. Since there had been no contributions made by either Ms. Gorman or the Jamestown School Department throughout this period, the decision that she was eligible for partial credit was “conditioned” upon the required contributions being made by both parties. We assume that this decision by the Employees Retirement System resulted in Ms. Gorman’s October 8, 2003 claim to the Jamestown School Committee, although her claim clearly did not confine itself to retirement contributions on her behalf.

- If Ms. Gorman’s appeal is upheld, the Jamestown School Committee will owe her (as yet uncalculated) monetary damages,⁶ together with statutory interest, and be required to make retirement contributions to the Employees Retirement System on her behalf for the years the Employees Retirement System has already determined she was eligible to participate in the system, i.e. 1994-2001. Tr.Vol. I. pp. 107-110.

Positions of the Parties

Jamestown School Committee

Counsel for the School Committee argues that the record on remand supports dismissal of Ms. Gorman’s appeal under the doctrine of laches. The School Committee asserted this defense immediately upon remand of Ms. Gorman’s appeal on June 26, 2006.⁷ The School Committee submits that for up to thirteen (13) years Anne Gorman delayed in presenting to the Committee her contention that instead of being categorized as an independent contractor she should have been an employee. The School Committee contends that the explanation offered by Ms. Gorman for not pursuing her claim to be an employee of the district and to receive benefits was not convincing or even credible. In fact, her testimony as to the reason for her delay was refuted by witnesses testifying on behalf of the School Committee, i.e. the former Director of Pupil Services and the school department’s Business Manager.

Furthermore, Ms. Gorman’s contention that the School Committee was actually put on notice of her claim earlier than 2003 – in fact during the fall of 2001- and that she had asserted entitlement to the status of an employee of the school department at various times from 1990-2001, is not supported by the evidence. Ms. Gorman also testified that she considered her formal request to the Retirement Board in 2001 to purchase credit in the retirement system for her past service in Jamestown to constitute notice to the School Committee of her claim. Counsel submits that this testimony is “inherently incredible”. The only fact substantiated by Ms. Gorman’s testimony on this point is that the business manager of the School Department assisted Ms. Gorman by filling out forms she was submitting to the Retirement Board. The business manager merely documented the facts related to Ms. Gorman’s service as a school psychologist over the years 1990-2001. According to the business manager’s testimony, she did not construe Ms. Gorman’s request for assistance with such documentation as a “claim” against the School Committee. Counsel further notes that the Committee was not a party to, or involved in, the subsequent proceedings before the Retirement Board during which Ms. Gorman formally asserted that she was an employee of the School Department and a regularly employed teacher for purposes of the teachers’ retirement act. Therefore, the School Committee stands by its position that the first notice it had of Ms. Gorman’s claim against Jamestown was October 8, 2003.

⁶ There may be other elements to the remedy she seeks. There has not as yet been a hearing with respect to remedy or damages, as these issues were previously referred to the parties for an attempt at informal resolution. See page 9 of the Commissioner’s May 31, 2005 decision.

⁷ See pages 3-4 of Volume I of the record, June 26, 2006.

As to the second element of the laches defense – prejudice – the School Committee argues that it has demonstrated that it has incurred prejudice as a result of Ms. Gorman’s delay in raising her claim. The testimony of Superintendent Katherine Sipala establishes that, if upheld, Ms. Gorman’s claim will result in “significant financial prejudice” in that the School Department will have to pay interest⁸ on certain monetary damages, pension contributions and tax payments that will be required. If Anne Gorman had asserted a more timely claim, these substantial interest obligations could have been avoided. Furthermore, the School Department has not budgeted monies for any payments which it might be required to make to Ms. Gorman or on her behalf. Neither the current budget, nor any past budget for any of the years in question, include any allocations for the compensation and other monetary damages claimed by Ms. Gorman.

Another element of prejudice is described as the School Committee’s “loss of rights”, that is, the School Committee could have elected to terminate Ms. Gorman before she became tenured if it knew of her claim. See page 3 of the School Committee’s post-hearing brief. The inference is that if Ms. Gorman had presented her claim that she was an employee at some point prior to 2003, the School Committee would have elected to terminate her before she became a tenured teacher in the Jamestown system. Since she did, in fact, become a tenured teacher, the increase in her salary, as well as any increase in contributions to the retirement system and other such payments, became ongoing obligations. Absent “just cause” for a reduction or elimination of her position or her dismissal for good and just cause, the School Committee is not free to terminate Ms. Gorman. If the School Committee had been aware of her claim prior to her attainment of tenure in Jamestown, the Committee could have assessed the prospect of increased financial obligations at a time when it could have exercised a right to nonrenew her contract as a nontenured teacher, unrestricted by the need to demonstrate “good and just cause”.

Finally, with respect to that part of the Regents’ decision on remand which requests that the Commissioner address the case of Bryant v. Cunniff, the School Committee submits that this case is controlling on the issue of whether Ms. Gorman’s employment was governed by the Teacher Tenure Act. In Bryant v. Cunniff, the Supreme Court rejected the argument of a principal that his dismissal was invalid absent “just cause” because it found that the tenure law covered only those “actually engaged in teaching or in continuing service as a teacher”. The Court ruled that despite the broad definition of “teacher” contained in R.I.G.L. 16-13-1, the substantive provisions of the teacher tenure law apply to a more limited group, to the exclusion of those engaged in purely administrative duties. In this case, Ms. Gorman does not engage in classroom instruction and she similarly is not engaged in teaching or continuing service as a teacher. Thus, under the precedent in Bryant v. Cunniff, her employment is not governed by the Teacher Tenure Act and Jamestown was free to engage her as a “consultant” or independent contractor.

⁸ The brief of the School Committee mentions “penalties” as well (at page 3) but we believe that this refers to the interest payments described by Superintendent Sipala in her testimony.

To the extent that the more recent Commissioner's decision in the case of National Education Association v. Middletown School Committee (October 17, 2000) appears to deviate from the holding in Bryant v. Cunniff, counsel notes that the Bryant decision does not appear to have been raised or argued in the NEA – Middletown case. Therefore, counsel submits, it may well have been overlooked by both parties. Secondly, there is at least a suggestion in the decision that the school social worker in the Middletown case *may* have been engaged in teaching - teaching parenting skills- and thus the case would be distinguishable on its facts. In Ms. Gorman's situation it is undisputed that she had no classroom teaching responsibilities whatsoever. The Middletown case should not stand for the proposition that the Teacher Tenure Act prohibits the employment of certified professionals as independent contractors in public schools. Consistent with the Bryant v. Cunniff case, only those certified staff who engage in classroom teaching should be eligible for tenure. The ability to employ non-teaching certified personnel as independent contractors would increase the flexibility of school districts in negotiating terms and conditions of employment and enable superintendents to meet student needs more easily.

An important factor in the Commissioner's May 31, 2005 decision was that the Teacher Tenure Act *required* that Ms. Gorman be employed as a "teacher" under annual contract as an employee. If one accepts the proposition that school psychologists and other certified school personnel not engaged in teaching are not covered by the teacher tenure law, and reexamine the terms and conditions of Ms. Gorman's employment in this light, she functioned more like an independent contractor than an employee. The indicia of independent contractor status, as outlined in the recent Rhode Island Supreme Court case of Absi v. State of Rhode Island, 785 A 2d 554 (R.I. 2001) were clearly present during 1990-2001 when Ms. Gorman provided school psychologist services on a part-time basis. Thus, assuming Bryant v. Cunniff is controlling, Ms. Gorman was not engaged in "teaching service" and was not required to be engaged under annual contract as a teacher under the Teacher Tenure Act. She was properly employed during all of the years in dispute, and did in fact function during each of those years, as an independent contractor for the Jamestown School Department.

For all of the foregoing reasons, the School Committee requests that the Commissioner find that Ms. Gorman's claim is barred under the doctrine of laches, and if it is considered on the merits, that it be denied because she was properly employed as an independent contractor from 1990-2001.

Anne Gorman

On remand, Ms. Gorman argues that any consideration of the laches defense is precluded because the Jamestown School Committee waived this defense by not raising it either in the initial proceedings before the Commissioner or before the Board of Regents. Counsel for Ms. Gorman argues that the affirmative defense of laches was raised for the first time on appeal to the Regents – and not by Jamestown, but rather in an amicus brief submitted by an organization which was not a party to the appeal. It is unfair to permit

the Jamestown School Committee to assert this defense under such circumstances. These arguments were offered in support of an objection to the Motion to Dismiss submitted by the School Committee.

From a substantive standpoint, Ms. Gorman takes the position that the School Committee has failed to prove facts sufficient to support the laches defense. Although the record may support a finding that Ms. Gorman delayed in formally asserting her claim against the Jamestown School Committee, her delay was both explainable and excusable. Moreover, the burden of proof is that of the School Committee to prove that the delay was inexplicable and unexcused- a burden of proof that was not met in this case. Counsel for Ms. Gorman points out that testimony in the record establishes a conversation she had with her supervisor, Helen O'Hara, who served as Director of Pupil Services in Jamestown beginning in 1993. Ms. Gorman's account of this conversation was that when she questioned her status as a consultant and indicated to Ms. O'Hara her feeling that at that point she was being treated as an employee, Ms. O'Hara responded, "that's the way it is". Ms. Gorman further testified that because of this conversation, she came away with an understanding that if she pursued the matter, she would be let go and someone else would be hired to provide the services of school psychologist to the Jamestown school department.⁹

In addition, there has been no demonstration of prejudice to the School Committee by reason of any delay in Ms. Gorman's assertion of her claim. In fact, counsel argues, the School Committee was "curiously indifferent" to its burden of proof. See pages 3-4 of the brief of Anne Gorman. Even the assertion by the School Committee that its financial obligations were vastly increased because Ms. Gorman waited until 2003 to present her claim remains unsupported by any specific facts. Not only has the Committee apparently made no calculations of damages, it has no estimate of the "substantial amount of interest" it contends has accrued over the years. Superintendent Sipala could not testify as to dollar amounts, the extent of salary adjustments or benefit reimbursement that would be required by a decision in Ms. Gorman's favor. Thus, there has been no demonstration by the school department of prejudice and therefore no basis to invoke equitable estoppel or laches as a bar to Ms. Gorman's claim.

As to the applicability of Bryant v. Cunniff, Ms. Gorman's counsel argues that it is as inapplicable now as it was when this matter was heard initially. It was not cited by either the Committee or Ms. Gorman in written legal arguments submitted by the parties following the initial hearings, but rather was raised for the first time in the Committee's brief to the Regents. Counsel argues that Bryant v. Cunniff was simply the second in a trilogy of cases¹⁰ decided by the Rhode Island Supreme Court¹¹ in which school administrators, who were engaged exclusively in administrative duties and did not teach, were determined to be outside the scope of the Teacher Tenure Act. Ms. Gorman is not

⁹ Ms. Gorman does not allege that Ms. O'Hara used these exact words, but words to that effect.

¹⁰ The first being Irish v. Collins, 107 A2d 455 (R.I. 1954) and the third being Slattery v. School Committee for the City of Cranston, 354 A 2d 741 (R.I. 1976)

¹¹ As well as a Superior Court decision in Stiefer v. School Committee for the Town of New Shoreham, cited in Ms. Gorman's brief as C.A. 78-843 (R.I. 1980)

an administrator, and a school psychologist is more like a teacher than an administrator. A school psychologist does not exercise supervisory or management functions. Ms. Gorman's primary functions are pupil-based, in that she evaluates and tests students, provides counseling to students, and works as part of a team of specialists to help develop appropriate Individualized Education Programs for students with disabilities.

A school psychologist is one of several certified school professionals functioning in schools to provide an array of services to students. As the nature and extent of these services has expanded over the years, so, too, has the construction of the term "teaching service" in the Teacher Tenure Act expanded. The work of non-administrative certified school professionals such as school psychologists and school social workers has been recognized as the legal equivalent of "teaching service".¹² Counsel argues that the Jamestown School Department's position that only classroom teachers are "teachers" under the Teacher Tenure Act is inconsistent even with its own practice of employing these very same certified service providers under annual (teaching) contracts. In fact, it has so employed the Appellant Anne Gorman from March of 2001 (when she became full-time) to the present.

For the foregoing reasons, Ms. Gorman requests that the Commissioner deny the Motion to dismiss on the basis of laches and clarify that the precedent in Bryant has limited applicability to distinguish administrators from teachers for purposes of tenure eligibility. Anne Gorman was – and still is – a "teacher" just like so many of her counterparts in other public schools throughout the state of Rhode Island.

DECISION

If, as the Appellant has argued, the Board of Regents committed reversible error in permitting a representative of the Rhode Island Association of School Superintendents to participate in proceedings before the Board and to raise an affirmative defense (laches) which had not previously been raised by the Jamestown School Committee, this is not an error which is appropriately raised on remand to the Commissioner. The Board of Regents reviews, and has appellate authority, over the decisions issued by the Commissioner, not vice versa. Thus, any arguments with respect to this issue must be presented in the appropriate forum.

Pursuant to the Board of Regents May 11, 2006 remand, additional hearing on the issue of laches was undertaken and consideration has been given to the case of Bryant v. Cunniff, 111 R.I. 211, 301 A. 2d 84 (1973). Our initial task is to determine if Ms. Gorman's claim is barred under the doctrine of laches because of unreasonable and inexcusable delay, resulting in prejudice to the School Committee. Numerous cases decided by the Rhode Island Supreme Court, as well as several administrative decisions of the Commissioner have discussed the parameters of the laches defense. It is well-

¹² R.I.G.L. 16-13-1 "Teacher" defined- The term "teacher" as used in this chapter means every person for whose position a certificate issued by the department of elementary and secondary education is required by law.

established that mere delay is not enough. The delay must be accompanied by prejudice to the party against whom the claim is asserted. In such cases, delay in asserting a right becomes inequitable and operates as an estoppel against the assertion of the right. Adam v. Adam, 624 A 2d 1093, 1096 (R.I. 1993). The prejudice or disadvantage may consist of loss of evidence,¹³ a change of position in reliance on the status quo¹⁴ or other factors.

The first fact relevant to laches is the extent of Ms. Gorman's delay. In his initial decision the Commissioner determined that Anne Gorman was a regularly-employed part time teacher in the Jamestown school system from September of 1990 to March of 2001. The decision directed the parties to confer to resolve issues of appropriate remedy¹⁵. As a result, proceedings before the Commissioner have not addressed the issue of remedy and the nature and extent of the relief Ms. Gorman seeks have not been the subject of evidence or argument. Thus, whether she seeks back salary and other benefits going back as far as 1990 or whether the focus of the remedy she seeks is on contributions on her behalf to the Employees Retirement System during part of this period¹⁶ has not been specified. Depending on the nature of the remedy she seeks and the years she seeks to encompass, her delay would be measured from as early as September of 1990¹⁷ or from the date of the paycheck she received just prior to filing her claim. Therefore her delay could be as lengthy as thirteen years (a claim for additional salary for 1990) or as short as one week (a claim for the salary she would have received in October of 2003, if her years as a consultant were taken into account for purposes of her placement on the salary schedule.) The measure of delay will, therefore, vary with the nature of the relief and years for which Ms. Gorman's seeks compensation.

Despite Ms. Gorman's contention that she asserted her claim against the district as early as 2001 when she enlisted the aid of the business manager to fill out forms for the Employees Retirement System, this is not the conclusion we draw from the evidence. The evidence demonstrates that Ms. Gorman presented her claim on October 8, 2003 when her attorney wrote to the Jamestown School Committee on her behalf. It was not raised earlier when Ms. Gorman sought to purchase credit in the retirement system and a dispute arose *with the Employees Retirement System* on her eligibility for retirement credit. The School Committee was not a party to that dispute and there is no evidence that it participated in the appeal that resulted.¹⁸

¹³ As was the case in a three-year delay accompanied by the loss of memory of a critical witness for the School Committee in McDougal v. Coventry School Committee, decision of the Commissioner dated June 6, 2006.

¹⁴ As was the case in the five-month delay during which a replacement was hired for the appellant in Saddow v. DCYF, decision of the Commissioner dated June 6, 2006.

¹⁵ With the option of scheduling additional hearing on remedy if informal resolution did not occur.

¹⁶ As indicated in our findings of fact, the Retirement Board has determined that Ms. Gorman is eligible for retirement credit from 1994 forward.

¹⁷ When she was first retained as a "consultant"

¹⁸ Ms. Gorman testified that "in her mind" her claim against the Jamestown School Committee was asserted in August of 2001 when she requested that the business manager fill out certain forms for the retirement system verifying her employment in the Jamestown school department during the period September, 1990-March 2001. Ms. Gorman's request, and the school department's providing of the requested documentation of her employment did not constitute the making of a claim against the Jamestown School

Although there is a substantial period of delay in asserting a claim for compensation for the earlier years at issue, there is no evidence that Ms. Gorman's delay was either unreasonable or inexplicable. When asked why she had not pressed a claim for regular employment status earlier than she did, Ms. Gorman described an assumption she made in the mid-1990's going forward that if she pursued the status (and additional benefits) of regular employment, she would be let go and someone else would be utilized to provide the district with school psychologist services. Ms. Gorman harbored the expectation that she would be "out of a job" if she raised the issue. See transcript of June 26, 2006 at pages 47-50. Although she attributed her assumption to a specific conversation she had in the mid-1990's with the Director of Pupil Services, there was a conflict in the testimony as to whether the conversation occurred. It is not necessary to resolve this conflict as to whether the specific conversation occurred, because independent of any conversation, Ms. Gorman's "assumption" that she would lose her job if she raised a claim for status as an employee was a reasonable assumption. It is supported both by the testimony of the Superintendent and by the argument contained in the School Committee's brief.

Testimony of the Superintendent described a process of meeting the district's staffing needs for specialized services to students by evaluating those needs annually and hiring independent contractors for positions that are less than full time. She described budgetary constraints and cost savings as major factors in the decision to retain independent contractors instead of hiring employees in such cases. Tr. Vol.I, pp 60-78. Assuming the Jamestown school department followed the process described in this testimony, it surely would have replaced Ms. Gorman with another independent contractor at any point that she claimed "employee" status from 1990-2001. Additional objective support for Ms. Gorman's assumption that she would have been terminated if she claimed the status and compensation of a regular employee earlier than she did is found in the argument of the School Committee. Jamestown argues that it was prejudiced by her 2003 notice because at that point she was tenured and the Committee had lost its right to terminate her. (Brief at page 3) If the School Committee takes the position it would have terminated Ms. Gorman because of her assertion of this claim when she was a regularly-employed, nontenured teacher, Ms. Gorman's assumption that it would have terminated her when she was merely an independent consultant was a valid and reasonable assumption. It has objective support in this record.

Finally, the record on remand does not substantiate the claim that the School Committee has suffered substantial prejudice from delay. First, as to its "loss of rights". The Committee argues that in October of 2003 (when Ms. Gorman's attorney wrote to it on her behalf) the district could no longer elect to terminate Ms. Gorman because she had attained tenured status. There is, however, no evidence in this record that on October 8, 2003 Anne Gorman was a tenured teacher, or even that she attained such status prior to the conclusion of the 2003-2004 school year. She was hired under an annual contract as a teacher, according to the facts in evidence, on March 29, 2001 (Joint Ex.4) In order for

Committee. In fact the Committee was not even a party to the hearing when the status of her employment and entitlement to "purchase credit" in the system was adjudicated by the Employees Retirement System.

the three-year probationary period to be completed, she would have attained tenure upon completion of the 2003-2004 school year (assuming she did not receive a non-renewal letter on or before March 1st). Assuming for the sake of this argument that a teacher's assertion of a claim, and the prospect of additional monetary obligations (some ongoing) is a legitimate reason for the non-renewal of a nontenured teacher, Jamestown could have notified Ms. Gorman of this, or any other legitimate reason for nonrenewal on or before March 1st of 2004. Thus, there is insufficient proof of a loss of rights because of delay.

Although it is true that statutory interest has been accruing on any sums that may be owed by the district to Ms. Gorman, or that it might be required to pay on her behalf,¹⁹ the accrual of interest required under statute, in this case R.I.G.L. 9-21-10, is not "significant financial prejudice" as argued by the School Committee. Interest is an element of any remedy to which Ms. Gorman may be entitled and it is an element of remedy that has been affirmed by both the General Assembly and the Rhode Island Supreme Court²⁰. While such payments may be viewed as a "penalty" by the School Committee, they are intended to ensure that the appellant, or any claimant in a civil case, receives a full remedy and that the passage of time will not work any unfairness. Thus, we do not agree that the accrual of interest constitutes prejudice. Also, the fact that the district may not have a budget, past or current, in which allocations have been made for any monies which might be owed to Ms. Gorman is not a basis on which to find that it has been "prejudiced". Budgeting for potential liabilities is a matter within the district's discretion. The failure to budget sums which may be required to pay a disputed claim is not a reason to bar it. To do so would permit a school district, or any other public entity, to evade responsibility for statutory violations simply by failing to appropriate and/or allocate funds sufficient to pay them when the matter is finally adjudicated.

In the case of Bryant v. Cunniff, 111 R.I. 211; 301 A2d 84 (1973) the Rhode Island Supreme Court applied the language of the teacher tenure law to school professionals who, although certified, work exclusively in an administrative capacity. A distinction between administrators and other certified school professionals was tied to the single fact that they did not teach or engage in continuing service as a teacher. The focus of the decision was on the managerial role of these school employees. The educational philosophy forming the basis of the ruling was that supervisors and managers in districts should not have tenure because School Committees should have more flexibility in determining the terms and conditions of their employment. The ruling in the Bryant case should be confined to the facts of that case and not applied, as has been argued here, to exclude non-administrative certified school professionals who work with students every day from the coverage of the teacher tenure law.

Since the time of the Bryant case, a host of certified school professionals who do not necessarily engage in classroom teaching, but who service the educational needs of students in the public schools, have become regular employees.²¹ In many cases they

¹⁹ e.g. contributions on her behalf to the Employees Retirement System

²⁰ See Paola v. Commercial Union Assurance Cos., 461 A. 2d 935 (1983)

²¹ See the recent case of Gershon v. North Providence School Committee, decision of the Commissioner dated October 23, 2006. Ms. Gershon, a part-time speech/language pathologist, was employed as a

have attained tenured status in their respective school systems. They meet the broad definition of teacher found in R.I.G.L. 16-13-1 in that they must hold certificates issued by the department of elementary and secondary education. They are “teachers” as defined by the Teachers’ Retirement Act (R.I.G.L. 16-16-1 et seq.) and the Certified School Teachers’ Arbitration Act (R.I.G.L. 28-9.3-1 et seq.). These non-teaching certified staff work with students, although not always in a classroom setting. We construe the tenure law to apply to these non-administrative certified school professionals. The Jamestown School Committee itself did so when it recognized that Anne Gorman was a teacher on March 29, 2001 and appointed her to a position on its faculty.

For the foregoing reasons, the Commissioner would affirm the May 31, 2005 decision in this matter and ask that the parties attempt to resolve all issues with respect to damages. If not successful, they may notify the Commissioner that a reconvening of the hearing on these issues is necessary.

For the Commissioner

Kathleen S. Murray, Hearing Officer

APPROVED:

Peter McWalters, Commissioner

April 16, 2007
Date

“consultant” while other part-time speech pathologists were employed under annual contract and attained tenure in the North Providence system. The district in the Gershon case similarly argued that non-teaching certified personnel were not covered by the Teacher Tenure law, an argument inconsistent with its own employment practices.