142-25
OAL Dkt. No. 06144-24
Agency Dkt. No. 104-4/24

New Jersey Commissioner of Education

Final Decision

Ilona Giordano,

Petitioner,

v.

Board of Education of the Township of Harmony, Warren County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent Board of Education of the Township of Harmony (Board) pursuant to *N.J.A.C.* 1:1-18.4, and petitioner Ilona Giordano's reply thereto, have been reviewed and considered.

Petitioner worked as a full-time school counselor during the 2020-2021, 2021-2022, and 2022-2023 school years. She continued working as a full-time school counselor at the start of the 2023-2024 school year until she was summarily terminated by the Board on January 22, 2024. The legal question presented in this matter is whether petitioner's part-time employment as a school counselor during the 2019-2020 school year should be considered when determining whether she achieved tenure as a school counselor pursuant to *N.J.S.A.* 18A:28-5(b) prior to her

termination.[1] The Board takes the position that petitioner was an independent contractor during the 2019-2020 school year and therefore did not acquire tenure prior to her termination because she was not an employee for four consecutive years.

Once the matter was transmitted to the OAL, the parties cross-moved for summary decision. The ALJ granted petitioner's motion for summary decision upon concluding that she was a tenured employee when she was terminated in January 2024. The ALJ found, among other things, that petitioner's "role saw no functional change in those four years during the shift from part-time to full-time, merely an increase in days and hours worked." Initial Decision, at 2. Next, the ALJ reasoned that, under the ABC test,[2] petitioner was an employee during the 2019-2020 school year and not an independent contractor. In addition, the ALJ determined that the record lacked evidence to establish that petitioner was hired as a temporary substitute pursuant to *N.J.S.A.* 18A:16-1.1. Therefore, the ALJ held that petitioner had satisfied the requirements for tenure under *N.J.S.A.* 18A:28-5(b). Accordingly, the ALJ ordered the Board to reinstate petitioner retroactive to the date of her dismissal with all back pay, benefits, and emoluments.

In its exceptions, the Board argues that the Commissioner should reject the Initial Decision and remand the matter for additional discovery and a plenary hearing. It contends that: (1) the ALJ made unjustified assumptions of fact regarding the scope of petitioner's job duties when she worked part-time as compared to when she worked full-time; and (2) the ALJ erred by injecting an industrial labor analysis into this matter by reference to the "ABC test" used in the

[1] Petitioner's part-time employment with the Board commenced in or around 2012.

[2] The Unemployment Compensation Law "sets forth a test—commonly referred to as the 'ABC test'—to determine whether an individual serves as an employee." *East Bay Drywall, LLC v. N.J. Dep't of Labor & Workforce Dev.*, 251 *N.J.* 477, 485 (2022) (citing *N.J.S.A.* 43:21-19(i)(6)(A) to (C)).

unemployment law context to determine whether a worker is an employee or an independent contractor.

In response, petitioner argues that the Commissioner should adopt the Initial Decision. She denies that any material questions of fact exist, or that the ALJ assumed facts not contained in the record. Moreover, she points out that the Board cross-moved for summary decision without seeking further discovery and never claimed that summary decision was premature. For those reasons, she asserts that the Board cannot now claim that discovery and a plenary hearing are needed. Furthermore, she argues that additional discovery would not change the outcome of this case. Finally, she contends that the Board has not cited any legal authority to support its position that the "ABC test" should not be applied in the school law context.

Upon review, the Commissioner concurs with the ALJ and adopts the Initial Decision as the final decision in this matter, as modified. "The Tenure Act . . . specifically defines the conditions under which teachers are entitled to the security of tenure. The statute makes tenure a mandatory term and condition of employment." *Spiewak v. Bd. of Educ. of Rutherford*, 90 *N.J.* 63, 72 (1982). *N.J.S.A.* 18A:28-5(b) provides that "teaching staff members" may acquire tenure under certain conditions. "Teaching staff member" is defined by statute as "a member of the professional staff of any district . . . holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners . . . ." *N.J.S.A.* 18A:1-1.[3]

[3] "Employee" is defined as "the holder of any position or employment." *Ibid.* "Employment" includes "employment in a position." *Ibid.* "Position" includes "any office, position or employment." *N.J.S.A.* 18A:28-1.

Generally, a teaching staff member "is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time." *Spiewak,* 90 *N.J.* at 74. *N.J.S.A.* 18A:28-5(b) provides that certificated teaching staff members such as petitioner shall obtain tenure after employment with a board of education for: "(1) Four consecutive calendar years; or (2) Four consecutive academic years, together with employment at the beginning of the next succeeding academic year; or (3) The equivalent of more than four academic years within a period of any five consecutive academic years."

"Once tenure is earned, 'it provides a measure of job security to those who continue to perform their jobs properly.'" *Parsells v. Bd. of Educ. of Somerville*, 254 *N.J.* 152, 162 (2023) (quoting *Wright v. Bd. of Educ. of E. Orange*, 99 *N.J.* 112, 118 (1985)). Given its remedial purpose, the Tenure Act is liberally construed. *Spiewak*, 90 *N.J.* at 74. It is well-established that part-time employees are eligible to obtain tenure. *See, e.g., Spiewak,* 90 *N.J.* at 75; *Lichtman v. Bd. of Educ. of Ridgewood*, 93 *N.J.* 362, 363-64 (1983); *Impey v. Bd. of Educ. of Shrewsbury*, 273 *N.J. Super.* 429, 431 (App. Div. 1994), *aff'd*, 142 *N.J.* 388 (1995); *Zimmerman v. Sussex Cnty. Ed. Servs. Comm'n*, 453 *N.J. Super.* 464, 473-74 (App. Div. 2018), *aff'd as modified*, 237 *N.J.* 465, 479-80 (2019). Although *N.J.S.A.* 18A:16-1.1 creates an exception which prohibits substitute or temporary employees from obtaining tenure, the exception "is limited to employees hired to take the place of an absent teacher [or employee]." *Spiewak*, 90 *N.J.* at 77.

It is undisputed that the position of school counselor requires a certificate, and that petitioner obtained said certificate in June 2008. Petitioner certified that during the 2019-2020 school year, she provided both group and individual counseling services to students on a part-

time basis on school property. She further certified that during the COVID-19 pandemic, she provided counseling services remotely through a Google Classroom account provided by the Board. She also certified that while she assumed some additional responsibilities as a full-time employee, her school counseling duties were substantively identical in nature during 2019-2020 when she worked part-time and during the 2020-2024 school years when she worked full-time.

Although the Board claims in its exceptions that the ALJ made unjustified assumptions of fact regarding the scope of petitioner's job duties when she worked part-time as compared to when she worked full-time, the Commissioner disagrees and holds that the ALJ's findings are adequately supported by petitioner's certification. At no point did the Board contest the portion of petitioner's certification describing her job duties; it failed to provide an affidavit setting "forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." *N.J.A.C.* 1:1-12.5(b). Indeed, in its summary decision brief, the Board asserted that there was "no genuine dispute of any material fact."

Furthermore, while the Board is correct that the ALJ also found that "[t]he nuances" of petitioner's "job role were not prominent in either party's briefings, so questions of oversight and routine remain," Initial Decision, at 6, the Board argued in its summary decision brief that the nature and function of petitioner's work was "irrelevant." It cannot now claim that discovery is warranted on this very issue. "[O]bjection to a summary judgment motion on the basis that it is premature requires the resisting party to demonstrate with some specificity the discovery sought, and its materiality." *In re Ocean Cnty. Comm'r of Registration*, 379 *N.J. Super.* 461, 479 (App. Div. 2005). In sum, the Board has failed to demonstrate that discovery regarding the nature and function of petitioner's work is material to this case.

While the Board also takes exception to the ALJ's use of the ABC test in this case, the Commissioner finds that it was reasonable for the ALJ to utilize the ABC test as part of his analysis because the Board expressly argued that petitioner was an independent contractor in 2019-2020 and was therefore ineligible for tenure because she was not an employee for four consecutive years.[4] However, the Commissioner further finds that it was unnecessary to apply the ABC test despite the Board's claim that petitioner was an independent contractor because "all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure unless they come within the explicit exceptions in *N.J.S.A.* 18A:28-5 or related statutes such as *N.J.S.A.* 18A:16-1.1." *Spiewak*, 90 N.J. at 81. The record supports the conclusion that petitioner is both a "teaching staff member" and "employee" as those terms are defined within the Tenure Act.

In support of its contention that petitioner did not acquire tenure, the Board relied primarily upon *Donvito v. Bd. of Educ. of N. Valley Reg'l High School Dist.*, 387 *N.J. Super.* 216

[4] The ABC test is utilized in the unemployment law context to determine whether workers are employees or independent contractors. *East Bay Drywall*, 251 *N.J.* at 484-85. Codified at *N.J.S.A.* 43:21-19(i)(6), the ABC test states: "Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the division that: (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of services and in fact; (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business." The ALJ concluded that petitioner was an employee because the record failed to establish that she was engaged in "activity outside the usual course of the business for which such service is performed" or that the activity was "performed outside of all the places of business of the enterprise." Initial Decision, at 4. Thus, Prong B of the ABC test was not satisfied. The ALJ's conclusion is supported by the record, as petitioner certified that during the 2019-2020 school year, she provided school counseling services on school property until the COVID-19 pandemic necessitated that she provide school counseling services remotely at the direction of the Board. During the COVID-19 pandemic, the Board was conducting its business remotely via Google Classroom.

(App. Div. 2006), which involved the substitute exception codified at *N.J.S.A.* 18A:16-1.1. However, *Donvito* is distinguishable from the present matter. There, the Appellate Division held that the petitioner, a home instruction teacher, was acting in place of students' regular classroom teachers within the meaning of *N.J.S.A.* 18A:16-1.1 and was therefore statutorily prohibited from acquiring tenure. *Id.* at 220-21. In contrast, in this case, the record fails to support a finding that petitioner was ever designated by the Board "to act in place of" an employee due to that employee's "absence, disability or disqualification." *N.J.S.A.* 18A:16-1.1. Thus, the Commissioner holds that the exception codified at *N.J.S.A.* 18A:16-1.1 is not applicable to petitioner. *Spiewak*, 90 N.J. at 77.

Having established that *N.J.S.A.* 18A:16-1.1 is not applicable here, the remaining question is whether petitioner has worked for the requisite number of years to acquire tenure. *N.J.S.A.* 18A:28-5(b). The record reflects that petitioner was employed for four consecutive academic years (2019-2020, 2020-2021, 2021-2022 and 2022-2023) together with employment at the beginning of the next succeeding academic year, 2023-2024. The Tenure Act's plain language does not require a teaching staff member to work a minimum number of hours each year to obtain tenure. The Board is not at liberty to prohibit employees from acquiring tenure simply by categorizing them as independent contractors, paying them as vendors, and offering them part-time hours. *See Spiewak*, 90 *N.J.* at 77 ("Whether certain teachers are entitled to tenure never depends on the contractual agreement between the teachers and the board of education. Tenure is a 'statutory right imposed upon a teacher's contractual employment . . . .'"). Therefore, the Commissioner holds that petitioner acquired tenure pursuant to *N.J.S.A.* 18A:28-5(b) prior to her termination in January 2024.

Accordingly, the Initial Decision, as modified, is adopted as the final decision in this matter, and the petition of appeal is hereby granted. The Board is ordered to reinstate petitioner retroactive to the date of her dismissal with all back pay, benefits and emoluments. Should the Board wish to terminate petitioner's employment, it must file tenure charges in accordance with *N.J.S.A.* 18A:6-10.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: April 21, 2025
Date of Mailing: April 22, 2025

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 06144-24

AGENCY DKT. NO. 104-4/24

ILONA GIORDANO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HARMONY, WARREN COUNTY,

Respondent.

Edward Cridge Esq., for petitioner (Mellk Cridge, attorneys.)

Alexander L. D'Jamoos, Esq., for respondent (Flanagan, Barone, O'Brien, attorneys)

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Ilona Giordano, (Giordano/petitioner), a New Jersey State Certified School Counselor since 2008, alleges a violation of tenure rights by the Township of Harmony Board of Education (BOE/respondent) in its January 22, 2024, summary dismissal of her as a Teaching Counselor.

On or about April 16, 2024, Giordano filed a verified Petition with the Commissioner of Education, seeking, among other relief, her reinstatement. The Department of Education transmitted the case to the Office of Administrative Law (OAL) on May 8, 2024. In November, 2024, both petitioner and respondent filed motions seeking summary decision. Briefs in support of and in opposition to each motion were received and on January 30, 2025, oral argument on the motions was heard. For the facts reasons which follow, I find the matter ripe for summary decision and grant Giordano's motion for Summary Decision, which renders the District's motion for Summary Decision moot.

FACTUAL DISCUSSION AND ISSUE PRESENTED

From 2012-2019, petitioner had a continuous history of providing part time services to the BOE as a school counselor, her earnings generally rising each year from $2,400 a year in 2012 to $21,675 a year in 2019-2020. In 2020, she received a contract as a full-time employee as a school counselor for $65,020 per annum. It is not disputed that Giordano was a full-time school counselor for school years 2020-2021, 2021-2022, 2022-2023 and was contracted and remained employed for school year 2023-2024 until her summary dismissal on January 22, 2024. To establish proof of tenure, since it is undisputed she was a full-time employee as School counselor for the three subsequent years and contracted for four years until being dismissed in approximately the middle of the fourth year, the key factual component is the 2019-2020 year that preceded the three full time years. Petitioner worked part time, on an as-needed basis, for the 2019-2020 school year. She was then under contract for three subsequent years. However, there is no question that her role saw no functional change in those four years during the shift from part-time to full-time, merely an increase in days and hours worked. During those years, petitioner provided counseling to students on school board property. New Jersey employment and tenure status are both statutorily given.

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The core issue presented is clearly whether Giordano's part time work as a School counselor contributed sufficiently to her to the employment period for which she would be entitled to tenure by being "continuously employed" within the meaning of N.J.S.A. 18A:28-5(b).

LEGAL DISCUSSION

1. The Summary Judgement Standard

Summary Decision can be granted "…if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. " N.J.A.C. 1:1-12.5(b).

Specifically, N.J.A.C. 1:1-12.5(b) provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla,

'Fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 252.

2. Petitioner was an employee during the 2019-2020 school year because Respondent fail to satisfy prong B of the ABC Test.

As set forth more fully below, Summary Decision is appropriate here because in its application to the appropriate standard to be upheld, which I find to be the ABC test, there is no material issue in dispute that bears on respondent's inability to satisfy prong B of the ABC Test. As a result, petitioner is entitled to tenure. Here, the counselor was an employee during the 2019-2020 school year because the ABC Test to establish an individual as an independent contractor is not sufficiently met. Specifically, the B-prong falls short, as she was neither engaged in "activity outside the usual course of the business for which such service is performed" nor was it "performed outside of all the places of business of the enterprise." Because she was an employee for that year under the ABC test and an employee under contract for three subsequent years, she is entitled to tenure.

The core issue is whether petitioner was an independent contractor or an employee for the 2019-2020 school year. N.J.S.A. 43:21-19(i)(6)(A)-(C) offers a three-part test to determine whether an individual is an employee or an independent contractor. If an individual meets all three factors, they are an independent contractor. If even one factor is not met, then they are an employee. East Bay Drywall, LLC v. Dept. of Labor and Workforce Development, 251 N.J. 477, 496 (2022). The statute

says, "service performed by an individual for remuneration shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the division that:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;
>
> (B) such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business."

[N.J.S.A. 43:21-19(i)(6)(A)-(C)]

The New Jersey Supreme Court applied this test in Carpet Remnant Warehouse, Inc. v. New Jersey Dep't of Labor. There, the Supreme Court reversed the decision of the Commissioner of the New Jersey Department of Labor and held that carpet installers were independent contractors. In doing so, it provided clarification and guidance for how to interpret the factors.

For prong A, the Supreme Court found insufficient evidence to support the determination that the installers operate under the managing company's control and direction. "Specific factors indicative of control include whether the worker is required to work any set hours or jobs, whether the enterprise has the right to control the details and means by which the services are performed, and whether the services must be rendered personally." Carpet Remnant Warehouse, Inc. v. New Jersey Dep't of Labor, 125 N.J. 567, 590 (1991). In that case, installers were free to reject posted work, could work for competitors, and chose the manner and means of installation, assuring only results.

For prong B, the Supreme Court split its analysis into two alternatives. First, whether the work is part of the company's "usual course of business." Second, whether it is performed "outside of all the places of business" of the employer. Regarding the first alternative, the Court found its meaning elusive and case law disjunctive. It did not decide on that alternative, calling it "confusingly vague". Id. at 584. It focused instead on the second alternative of part B and determined that carpet installation in third party residences was "outside of all the places of business" of the employer. The court stated: "In our view, that phrase refers only to those locations where the enterprise has a physical plant or conducts an integral part of its business." Id. at 592. Under that framework, the residences of the company's customers were clearly outside the place of business of the company.

For prong C, the Supreme Court determined that testifying carpet installers were operating independently established trades. In clarifying this standard, it offered that, "… if the person providing services is dependent on the employer and on termination of that relationship would join the ranks of the unemployed, the C standard is not satisfied. Conversely, the C standard is satisfied when a person has a business, trade, occupation or profession that will clearly continue despite termination of the challenged relationship." Id. at 586. The carpenters could, and did, work for other installation companies, showing that their enterprise was not dependent on the managing company.

For the matter at hand, petitioner's employment does not meet all three criteria required to be an independent contractor for the 2019-2020 school year. Regarding prong A, Giordano was beholden to providing counseling, but the performance of that work is largely reactive and allows for significant discretion in reacting to a student's needs. The nuances of her job role were not prominent in either party's briefings, so questions of oversight and routine remain. Still, the part-time work was not restrictive of other employment opportunities, which was a significant factor in Carpet Remnant Warehouse. Regarding prong C, there is nothing to indicate that petitioner was entirely financially dependent on the sum of money she received during that school year. Her

services could be applied elsewhere, and she made roughly a third of what her salary would be in the 2020-2021 school year.

Prong B is dispositive for determining that petitioner is an employee. She was hired by the school board to perform a standard service on their property during the 2019-2020 school year. The court in Carpet Remnant Warehouse placed specific emphasis on location and opted not to decide on the confusing alternative regarding a company's "usual course of business." If we take that language at its plain meaning, it is hard to persuade that student counseling services are outside a school's standard practice. Most importantly, however, is that the work was performed on the premises of the school board. The ABC Test requires all three factors to be met for one to be deemed an independent contractor, and prong B is clearly not satisfied. As a result, petitioner was an employee during the 2019-2020 school year.

3. **Petitioner is statutorily entitled to tenure because she was an employee during the 2019-2020 school year and was not in a substitute role.**

Petitioner worked part time, on an as-needed basis, for the 2019-2020 school year. She was then under contract for three subsequent years. However, there is no question that her role saw no functional change in those four years during the shift from part-time to full-time, merely an increase in days and hours worked. During those years, petitioner provided counseling to students on school board property. There is no evidence that she was ever hired as a substitute.

The dispositive issue is what entitles a school employee to tenure. N.J.S.A. 18A:28-5(b) establishes who can acquire tenure and how. Its relevant portions state that "The services of all… in positions which require them to hold appropriate certificates issued by the board of examiners… shall be under tenure…, after employment in such district or by such board for:

1 four consecutive calendar years; or
2 four consecutive academic years, together with

> employment at the beginning of the next succeeding academic year; or
>
> 3 the equivalent of more than four academic years within a period of any five consecutive academic years."
>
> [N.J.S.A. 18A:28-5(b)] (emphasis added)

If petitioner is considered an employee for the 2019-2020 year, then she, having been contractually employed for the 2020-21, 2021-22, 2022-23, and 2023-24 academic years, would be statutorily afforded tenure.

Respondent's position relies on an exception to tenure for those in a substitute role. Respondent cites N.J.S.A. 18A:16-1.1 and Sayreville Educ. Ass'n v. Sayreville Bd. of Educ., and to support this claim. Such reliance is misguided. N.J.S.A. 18A:16-1.1 provides in full that:

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of section 18A:17-13.
>
> The act of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.
>
> [N.J.S.A. 18A:16-1.1]

The court in Sayreville explained that "The phrase, 'to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee,' clearly implies a temporary arrangement." However, this does not support the opposite, as respondent seems to claim that temporary arrangements are necessarily substitute roles. That case dealt with a teacher designated as a substitute, there is no such designation here. Petitioner was carved into her own role regardless of her part-time status or lack of a contract during the 2019-2020 school year.

Respondent also relies on Donvito v. Bd. of Educ. of Northern Valley Regional High School District. to support denying tenure. There is merit to such reliance, but it is still a distinguishable case. In that matter, a teacher worked as a home instructor at students' residences on as-needed basis. After a period of such work, she then was contracted for subsequent years. The issue was the same, whether the as-needed work would contribute to her tenure acquisition. The Court determined that that the teacher in Donvito was more akin to a substitute, because she "acting in the place of" the teacher when a student could not attend class. Donvito v. Bd. of Educ. of Northern Valley Regional High School District., 387 N.J. Super. 216, 220 (2006). The Superior Court did not apply the ABC Test, instead relying on the substitute exception. Respondent suggests that petitioner was also a substitute because she was working as-needed but has not provided any support that she was filling the same role as a faculty member who could not provide their service at an alternate location. The New Jersey Supreme Court has stated that supplemental teachers, generally those with lower hour counts than a regular teacher, may acquire tenure if they meet the requirements of N.J.S.A. 18A:28-5. Spiewak v. Bd. of Educ., 90 N.J. 63, 84. Resultingly, the ABC Test utilized by the Supreme Court is a better measure for employment status, and the substitute exception is a poor fit in the matter at hand. Having been deemed an employee under that ABC test, the petitioner should be awarded tenure.

CONCLUSION

I **CONCLUDE** that petitioner was an employee under the ABC Test for the 2019-2020 school year and was not a substitute. She then served another three consecutive years as an employee for the District in the same capacity. Thus, she had tenure when she was summarily dismissed in January 2024. As a result, she meets the requirements for statutory tenure under N.J.S.A. 18A:28-5(b).

ORDER

Having determined that petitioner has established she had attained tenure, her

summarily dismissal violated her statutory rights as a School Counselor, and the District's dismissal is **REVERSED**. The District is **ORDERED t**o reinstate her retroactive to the date of dismissal with all lawful back pay, benefits and emoluments.

I hereby **FILE** this initial decision with the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Acting Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION. Exceptions may be filed by email to ControversiesDisputesFilings@doe.nj.gov or by mail to Office of Controversies and Disputes, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**. A copy of any exceptions must be sent to the judge and to the other parties.

March 12, 2025 Ernest M. Bongiovanni

DATE **ERNEST M. BONGIOVANNI**, ALJ

Date Received at Agency: 3/12/25

Date Mailed to Parties: 3/12/25

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