

GAIL MIRDA,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
BOARD OF EDUCATION OF THE	:	
UNION COUNTY EDUCATIONAL	:	
SERVICES COMMISSION,	:	
UNION COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner asserted that she achieved tenure through her many years of employment as a bedside instructor with the respondent, Board of Education of the Union County Educational Services Commission (Commission) and is therefore entitled to a full-time position within the district, as well as back pay and emoluments. The Commission contended that petitioner’s work assignment as an hourly Bedside Tutor was exempt from tenure accrual. The parties filed cross motions for summary decision and submitted a joint stipulation of facts. Oral argument took place in August 2018, and the record closed.

The ALJ found, *inter alia*, that: there are no material facts in dispute here, and the matter is ripe for summary decision; respondent provides a variety of services to twenty-one school districts in Union County, including one-to-one bedside instruction at Trinitas Regional Medical Center and Children’s Specialized Hospital, for students enrolled in Union County schools; petitioner was employed by respondent as an hourly Bedside Tutor, under the Teacher of the Handicapped endorsement, from October 13, 1999 to November 2013; as a Bedside Tutor, petitioner worked with five to seven students per day, and her work schedule varied widely since she was employed on an as-needed, hourly basis; the Commission asserted that bedside instructors have never been afforded tenure by New Jersey courts, and the law on this subject is well settled; the services provided in the bedside instructor position fall squarely within the “substitute” or “temporary employee” exception to the Tenure Act, *N.J.S.A.* 18A:16-1.1; since November 4, 2013, petitioner has been employed by the Commission in salaried, tenure track positions, and is currently assigned to a four-fifths position as an Auxiliary Services Teacher in the Commission’s Non-public Services Department; petitioner attained tenure with the Commission in or around November 2017 as a result of her combined employment as a Title 1 and Auxiliary Services Teacher, subsequent to her time as a Bedside Tutor; at issue here is whether her employment as a Bedside Tutor carried with it eligibility to attain tenure status. The ALJ concluded that the substitute teacher exception, *N.J.S.A.* 18A:16-1.1 of the Tenure Act, applies to petitioner’s employment as a Bedside Tutor, and such employment is not eligible for tenure accrual. Respondent’s motion for summary decision was granted, petitioner’s cross motion was denied, and the petition was dismissed.

Upon review, the Commissioner concurred with the ALJ’s findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed with prejudice.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 18412-16
AGENCY DKT. NO. 286-11/16

GAIL MIRDA, :
 :
 PETITIONER, : COMMISSIONER OF EDUCATION
 :
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 :
 RESPONDENT. :
 :

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner adopts the Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, respondent's motion for summary decision is granted and petitioner's motion for summary decision is denied. The matter is hereby dismissed with prejudice.

IT IS SO ORDERED.¹

COMMISSIONER OF EDUCATION

Date of Decision: November 9, 2018

Date of Mailing: November 9, 2018

¹ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 18412-16

AGENCY DKT. NO. 286-11/16

GAIL MIRDA,

Petitioner,

v.

BOARD OF EDUCATION OF THE UNION

COUNTY EDUCATIONAL SERVICES

COMMISSION, UNION COUNTY,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, attorneys)

Eric Harrison, Esq., and **Brett Pohlman**, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: August 27, 2018

Decided: October 11, 2018

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

Petitioner Gail Mirda asserts that she achieved tenure through her employment as a bedside instructor with the respondent, Board of Education of the Union County

Educational Services Commission (Commission or respondent), and is entitled to a full-time position with the district, as well as back pay and other emoluments commensurate with that position.

PROCEDURAL HISTORY

On November 1, 2016, Gail Mirda (petitioner or Mirda) filed a complaint with the New Jersey Department of Education (DOE) alleging that respondent Commission failed to grant petitioner tenure through her position as a bedside instructor. She seeks an order finding that she achieved tenure in that position; finding that respondent violated her tenure and seniority rights; and directing that respondent appoint petitioner to a full-time position in the district, and pay back pay and other emoluments commensurate with her position as a full-time tenured teacher. Respondent filed an Answer to the Petition on December 7, 2016, denying petitioner's claims. The Department of Education, Bureau of Controversies and Disputes, transmitted petitioner's claim to the Office of Administrative Law (OAL), where it was filed on December 7, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The matter was initially assigned to the Honorable Joan Bedrin Murray, ALJ, but was reassigned to the undersigned in December 2017.

On March 12, 2018, respondent filed a Motion for Summary Decision. Petitioner filed a Cross-Motion for Summary Decision on May 29, 2018, following two extensions. Respondent filed a response to petitioner's Cross-Motion on or around June 4, 2018, and oral argument took place on August 27, 2018, at which time the record closed.

FACTUAL DISCUSSION

The parties submitted a Joint Stipulation of Facts and agree that there is no dispute as to any genuine issue of material fact in this matter. Based on the submissions presented and oral argument on the motions, I rely on the following **FINDINGS of FACT:**

Respondent is a public school district that provides services to the twenty-one school districts in Union County. The Commission provides child study team and transportation services to these districts; operates several schools in the County that serve students with disabilities; and provides basic skills and supplemental instruction to nonpublic school students in the County. The Commission also provides one-to-one bedside instruction at Trinitas Regional Medical Center and Children's Specialized Hospital to students enrolled in the Union County school districts, nonpublic schools in Union County, and the Commission's schools.

Bedside instruction is provided by Commission employees who serve under the title of Inpatient Teacher (Teacher) or Bedside Tutor (Tutor). All bedside instruction is provided on a one-to-one basis. While Teachers are full-time, salaried ten-month employees, Tutors are paid at an hourly rate. Teachers accrue pension through the Teachers' Pension and Annuity Fund (TPAF), while Tutors accrue pension through the Public Employees' Retirement System (PERS). Unlike Teachers, Tutors do not receive benefits or paid holidays, nor are they guaranteed a certain number of work hours/days or yearly salary. Teachers are tenure-track employees, and respondent maintains that the position of Tutor is not, and has never been, tenure eligible.

Teachers and Tutors shared teaching/educational responsibilities. Once a student is assigned to a bedside instructor, it is the instructor's responsibility to contact the Home District to obtain the student's work. The instructor completes a short initial assessment of the student's skills in reading and math; however, they do not formally develop lesson plans. Instead, they utilize work provided by the Home District or, in the event that no work is provided, they utilize previously created packets to work on specific skill deficits.

Teachers, however, have additional responsibilities not shared by Tutors, including scheduling, reporting, organizational, and liaison responsibilities. Teachers also review and submit for processing Tutors' attendance logs and hours, and they submit students' discharge and progress reports, monthly reports, and Tutors' spreadsheets of instructional sessions to the business administrator. Teachers also identify new students for services and contact the Home Districts to obtain billing

approval, and they notify Tutors of initial start and discharge dates of instructional services. Finally, Teachers, not Tutors, serve as the primary liaison among Trinitas Hospital, the Commission, and Home Districts.

During the relevant time period, the Commission employed as few as fifteen and as many as thirty-four Tutors per year. The number of students receiving bedside instruction varied from year to year, month to month, and week to week, and this affected the number of Tutors retained and the number of hours Tutors worked.

Mirda was employed by respondent as an hourly Bedside Tutor, under the Teacher of the Handicapped endorsement, from October 13, 1998, to November 2013. For those fifteen years, petitioner worked at Trinitas Hospital, where she was assigned to approximately five to seven students per day. While Mirda's work hours varied, respondent does not dispute that she may have worked six to eight hours per day from 2006 to 2013. Respondent maintains that the number of hours she worked is of no import. Mirda was never guaranteed those hours, which were a product of the districts' need for bedside-instruction services, and she worked for the Commission on an as-needed basis.

On November 4, 2013, petitioner was assigned to work at the Union County Juvenile Detention Center as a full-time teacher, where she served as a salaried, tenure-track Title I Teacher. At the conclusion of the 2015–2016 school year, the Commission terminated its contractual relationship with the Detention Center. Effective September 1, 2016, petitioner was assigned to a four-fifths position as an Auxiliary Services Teacher in the Commission's Non-public Services Department, and she continued to serve in this capacity as of at least January 2018 (when the parties submitted the Joint Stipulation of Facts). Petitioner attained tenure with the Commission in or around November 2017, as a result of her combined employment as a Title I and Auxiliary Services Teacher, and is still employed by respondent.

Respondent's Motion for Summary Decision

Respondent asserts that home/bedside instructors have never been afforded tenure by New Jersey courts, and the law on this subject is well settled and has been the precedent for at least the past thirty-five years. Respondent maintains that such services fall squarely within the exception² to the Tenure Act, codified in N.J.S.A. 18A:16-1.1. N.J.S.A. 18A:16-1.1 provides:

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 officers or employees subject to the provision of N.J.S.A. 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.

While teachers who provide remedial and supplemental instruction to educationally disabled students may acquire tenure if they meet the qualifications set forth in the Tenure Act, N.J.S.A. 18A:28-5, teaching staff members who function akin to substitutes or temporary replacements are acting in place of a regular classroom teacher and are not entitled to tenure. Here, petitioner was acting in place of the students' regular classroom teachers, who were disqualified from providing bedside instruction at Trinitas during the students' medical absence from school. As such, petitioner's assignments, which she carried out on an as-needed basis, were exempt from tenure accrual.

Respondent primarily relies on two decisions, which it maintains are dispositive of the issue here: Hyman v. Teaneck Bd. of Educ., 1983 S.L.D. 699, modified on other grounds, 1983 S.L.D. 722 (Comm'r), rev'd on other grounds, 1985 S.L.D. 1940 (State Bd.), aff'd in part, remanded in part, No. A-3508-84T7 (App. Div. 1986), and Donvito v.

² This exception is referenced herein as the "substitute exception" or the "temporary employee exception."

N. Valley Reg'l High Sch., EDU 5877-02, Initial Decision (July 22, 2003), rejected, Comm'r (Dec. 4, 2003), rev'd, State Bd. (June 1, 2005), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, 387 N.J. Super. 216 (App. Div. 2006).

In Hyman, 1983 S.L.D. 699, the petitioner claimed that the periods she served as a home instructor should have been credited towards tenure. "Home instruction" was described by the petitioner as being "given at home or in a hospital when a child is unable to attend school," as requiring appropriate certification, as occurring when "the student's regular classroom teacher assigned his or her work," and when "some students needed only a week, others as much as six weeks of home instruction." Hyman testified that her work hours varied depending on the needs of the students, and the administrative law judge (ALJ) determined that the time Hyman served as a home instructor was not tenure eligible. The ALJ explained that "a home instructor is a substitute for a regular classroom teacher where substitution is necessitated by the inability of a student to attend class at school." The Commissioner of Education adopted the findings and conclusions of the ALJ.

In Donvito, the petitioner served as a "home instructor" between the 1995–1996 and 2001–2002 school years. In this position, Donvito was "instructing students who were absent from school due to illness or other reason." For the 2001–2002 school year, Donvito was appointed by contract to the position of a part-time special education teacher. Her contract was not renewed for the following school year, and Donvito filed a Petition with the Commissioner of Education contending, in part, that she was entitled to a full-time position of a non-tenured or less senior employee teaching in her area of certification and endorsement. The matter was transmitted to the OAL, and the ALJ, relying on Hyman, issued an initial decision granting the Board of Education's motion for summary decision. The Commissioner of Education reversed the ALJ's decision, finding that N.J.S.A. 18A:16-1.1 did not apply to home instructors, and because Donvito was not filling in for an absent, disabled, or disqualified teacher. The State Board of Education, however, reversed the Commissioner's decision and reinstated summary decision in respondent's favor. The State Board held that service as a home instructor did not accrue towards the acquisition of tenure. While home instructors may hold appropriate certifications to serve in that capacity, they "are acting in the place of

classroom teachers, [and therefore] they fall within the exception set forth in N.J.S.A. 18A:16-1.1, and cannot acquire tenure on the basis of such employment” Donvito, EDU 5877-02, State Board (June 1, 2005), <http://njlaw.rutgers.edu/collections/oal>.

Respondent maintains that this matter is analogous to Donvito, where the State Board and the Appellate Division held that the petitioner’s employment as a home instructor was akin to a substitute teacher, and fell within the exception to the tenure statute as outlined in N.J.S.A. 18A:16-1.1. In both instances, the petitioners were acting in the place of the students’ regular classroom teacher during the students’ absence. As in Donvito, Mirda’s services would not have been needed but for the regular classroom teachers’ inability to provide the students with instruction during the students’ absence. Also, bedside tutors, like home instructors in Donvito, did not formally develop their own lesson plans. The fact that Mirda provided instruction in a hospital setting, rather than in a home (as in Donvito), does not alter the analysis. Home instruction and inpatient hospital instruction are treated the same in the regulations, as both are contemplated for students who cannot attend class due to a need for treatment that precludes participation in the usual classroom setting. N.J.A.C. 6A:16-10.1.

Also, as in Donvito, a bedside instructor’s assignments are intermittent, temporary, and scheduled with minimal advance notice. The number of students receiving bedside instruction fluctuates every year and within the school year itself, as instruction is necessitated by a health condition, or a need for treatment, that precluded a student’s participation in their regular classroom setting. The number of students assigned to each instructor during the year, and in turn the number of hours worked per year, varies among instructors. Finally, the length of each student’s inpatient stay, and in turn the duration of each bedside-instruction assignment, varies on a student-by-student basis.

Respondent also asserts that affording tenure to bedside tutors would undermine the Commission’s ability to control its costs, and would interfere with the flexibility and cost-effectiveness of the Commission’s delivery of bedside instruction. Moreover, as home instructors, Tutors are not formally evaluated, and conferring tenure on the basis

of such service would deprive the Commission of the ability to evaluate these employees to ensure the educational quality of the instructional services provided.

Finally, in further support of its position that Tutors are exempt from tenure eligibility, respondent points to regulations that expressly exclude “compensation paid for serving as a bedside instructor” from earnings that are eligible for pension credit in the TPAF. N.J.A.C. 17:3-4.1(a)(1)(xviii). Tutors, including Mirda, accrue pension through PERS.

Petitioner’s Cross-Motion for Summary Decision

Petitioner contends that she earned tenure as a Tutor pursuant to the express terms of N.J.S.A. 18A:28-5, because she worked the requisite period of time to acquire tenure (i.e., more than three years), and she served continuously in a position for which she holds the appropriate educational certification. The fact that she was paid an hourly rate and did not receive benefits or paid holidays is irrelevant, according to petitioner, because tenure is not determined by contract, but by the Tenure Act, N.J.S.A. 18A:28-1 to -18, which should be liberally construed.

Petitioner asserts that the “substitute exception” to the tenure statute, codified in N.J.S.A. 19:16-1.1, does not apply here because, as a Tutor, Mirda was not serving as a “replacement” for an absent Commission employee. Petitioner interprets N.J.S.A. 19:16-1.1 to apply only to situations in which a district appoints a substitute for an absent employee of that district. Since the Commission did not appoint Mirda as a substitute for another Commission employee, Mirda asserts that she is not a replacement/substitute and should accrue tenure.

Petitioner argues that Donvito is distinguishable from her case because Donvito was a bedside tutor working within the Northern Valley school district who was filling in for the classroom teacher employed by the same district. Mirda, on the other hand, was not replacing any Union County Educational Services staff member when she served as a Tutor, and was therefore not a substitute. Petitioner also asserts that Hyman is outdated, not binding, and distinguishable from this matter because Mirda, unlike the

petitioner in Hyman, is not replacing another employee within her same school district, and Mirda worked a regular full-time schedule, whereas Hyman's work as a home instructor was variable.

Petitioner references Sayreville Education Association v. Board of Education of Sayreville, 193 N.J. Super. 424 (1984), and Weigand v. Marlboro Township BOE, 84 S.L.D. 534, adopted, 84 S.L.D. 549, both of which address the substitute-teacher exception to the tenure statute and maintain that the exception is limited to employees who take the place of a temporarily absent teacher. Mirda argues that she was not acting in place of another Commission employee; she worked a "regular schedule with ostensibly full-time hours, every school day"; and she was, therefore, not a substitute.

Petitioner also relies on Platia v. Hamilton Board of Education, 434 N.J. Super. 382 (App. Div. 2014), where the petitioner worked as a Long-Term Substitute for one year. While the district claimed that Platia could not accrue tenure because she was a substitute, the court held that, despite her job title of "Long-Term Substitute," Platia was not actually replacing anyone and, therefore, could not be denied tenure. Mirda argues that she too was not actually replacing an absent employee, and, despite her title, could not be denied tenure.

Respondents' Opposition to Cross-Motion for Summary Decision

In its reply to petitioner's cross-motion for summary decision, respondent argues that two cases cited by petitioner, Spiwak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982), and Sayreville Educ. Ass'n, 193 N.J. Super. 424, do not apply here, as they fail to address the question of whether instruction provided by a bedside/home instructor falls within the exception to the tenure statute, as codified in N.J.S.A. 18A:16-1.1. Platia, 434 N.J. Super. 382 does not "instruct" the within matter as petitioner contends because Platia was not a home/bedside instructor but a long-term substitute functioning as a classroom teacher, and Platia, therefore, did not address whether the substitute exception applies to bedside instruction provided due to a medical condition that precludes class attendance.

Respondent also maintains that, despite petitioner's contention, the fact that Mirda was not replacing an absent Commission employee is of no moment. Mirda, like the petitioner in Donvito, was "acting in the place of the students' regular classroom teacher" during the students' absence, as contemplated by N.J.S.A. 18A:16-1.1. As in Donvito, Mirda's services as a Tutor would not have been necessary but for the regular classroom teacher's inability to provide the student with instruction during the student's absence. It is of no import that the District's classroom teacher was not absent or disabled. Also, petitioner's argument that the substitute exception only applies to District employees acting in the place of a classroom teacher from the same school district is not supported by any case law, and this construction is not supported by the holding in Donvito, where the State Board of Education held that the exception applies to any individual acting in the place of the student's regular classroom teacher.

While the legal responsibility to provide bedside instruction is left to the school district, the services performed by Mirda were financed by the districts paying the classroom teacher. While Mirda was not technically employed by the district, she was providing those services (at the district's expense) that a district employee would provide if such services had not been contracted out to the Commission. Therefore, it is of no moment that petitioner worked for the Commission, and for purposes of N.J.S.A. 18A:16-1.1, she was acting in the place of a Home District employee much the same way she was acting in the place of a classroom teacher.

Finally, the number of hours petitioner actually worked between 2006 and 2013 is irrelevant, as it is undisputed that those hours were not guaranteed from month to month or year to year, and were a product of the districts' need for bedside-instruction services, which is the very essence of "as-needed" employment. The number of students assigned to each instructor during the year, and the number of hours worked per year, varies among instructors, and the length of each student's inpatient stay, and in turn the duration of each bedside instruction assignment, also varies.

Oral Argument

At oral argument, respondent argued that petitioner is attempting to improperly expand tenure rights beyond the tenure statute. Respondent stressed that this case is comparable to Donvito, with the only difference being that instruction here was provided in a hospital setting rather than a home setting for a child who could not attend a regular classroom. Respondent asserts that summary decision is appropriate here because, given the facts, petitioner was acting in place of other teachers on an as-needed basis, and her position was, therefore, not tenure eligible, as it fell within the substitute-teacher exception to the tenure statute. Petitioner worked on an as-needed basis since she did not have a regular and set schedule; she was never guaranteed a certain number of work hours or annual income, and her hours fluctuated based on the number of students requiring services. The Commission maintains that Mirda did not serve as a “regular teacher,” but was acting in place of the children’s regular classroom teachers, and for purposes of applying the “substitute exception,” the fact that she was employed by the Commission rather than the children’s Home District is irrelevant.

Petitioner argued that she is eligible for tenure as a bedside instructor because she (1) worked in a position that required teacher certification; (2) she held a Teacher of the Handicapped certification; and (3) she held that position for over three years and a day. She argues that the “substitute exception” to the tenure statute does not apply here because Mirda was not a “substitute”—she was not replacing anyone employed by the Commission, nor is she replacing any teacher from the Home District. Also, the exception to the tenure statute should be read narrowly, and N.J.S.A. 18A:16-1.1 does not expressly state that the exception applies specifically to “bedside tutors.”

ANALYSIS

Summary decision may 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). To survive a summary decision, the opposing party must show that “there is a genuine issue which can only be determined in an evidentiary

proceeding.” Ibid. Failure to do so entitles the moving party to summary judgment/decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995).

Here, based on the Joint Stipulation of Facts, briefs, and affidavits submitted, as well as oral argument on the motion and cross-motion for summary decision, I **CONCLUDE** that there is no genuine issue of material fact and the matter is ripe for summary decision.

The purpose of teaching-staff tenure laws is “to aid in the establishment of a competent and efficient school system by affording teaching staff members ‘a measure of security in the ranks they hold after years of service.’” Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528–29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)). In order to acquire tenure, a teaching staff member “must comply with the precise conditions articulated in the [tenure] statute.” Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962). Thus, 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. Under N.J.S.A. 18A:28-5(a), “teaching staff members,”³ including teachers, principals, and vice principals, who hold appropriate certificates acquire tenure after employment for:

- (1) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

³ A “teaching staff member” is defined as:

a member of the professional staff of any district or regional Board of education, or any Board of education of a county vocational school, 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 and includes a school nurse and a school athletic trainer.

[N.J.S.A. 18A:1-1.]

These timeframes apply to “[t]he services of all teaching staff members employed prior to the effective date of P.L.2012, c.26 (C.18A:6-117 et al.),” which was August 6, 2012. N.J.S.A. 18A:28-5(a).

(2) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

(3) The equivalent of more than three academic years within a period of any four consecutive academic years.

The only applicable exception to the Tenure Act is codified in N.J.S.A. 18A:16-1.1, which states:

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.

The issue here is whether the petitioner's employment as a Bedside Tutor is one which carried with it eligibility to attain tenure status. While no case law specifically addresses the tenure status of "Bedside Tutors," Donvito and Hyman are instructive. In Donvito and Hyman, the petitioners were home instructors who were determined not to be tenure-eligible because their positions and responsibilities fell within the substitute exception to the Tenure Act. "Home instruction" is defined in the regulations as "the provision of one-to-one, small-group, or online instruction in the student's place of residence or other appropriate setting due to a health condition, need for treatment, court order, or exclusion from general education for conduct or safety reasons." N.J.A.C. 6A:16-1.3. The regulations, therefore, equate home instruction with bedside instruction, in that home instruction is defined to include one-to-one instruction in an "appropriate setting," which reasonably includes hospitals, due to the student's medical condition or need for treatment. The Home District is responsible for providing, and paying for, instructional services to the student when he/she is confined to the home "or another out-of-school setting [such as a hospital] due to a temporary or chronic health condition or a need for treatment that precludes participation in their usual education

setting.” N.J.A.C. 6A:16-10.1(a). The district may provide these services through contract with an educational services commission, as was done here. N.J.A.C. 6A:16-10.1(b).

In Hyman, which is referenced in Donvito and useful to this analysis, the ALJ equated home instructors not with regular teaching staff members, but with substitutes for a regular classroom teacher where the substitution was necessitated by the student’s inability to attend class at school. In Donvito, the ALJ determined that, as a home instructor, petitioner Donvito fell within the exception to the Tenure Act. In that case, the State Board of Education held: “a Home Instructor is acting in the place of a student’s regular classroom teacher when he or she provides instruction in a student’s home as a result of the student’s absence from school. Since Home Instructors are acting in the place of classroom teachers, they fall within the exception set forth in N.J.S.A. 18A:16-1.1 and cannot acquire tenure on the basis of such employment” See Donvito, EDU 5877-02, State Bd. (June 1, 2005), <http://njlaw.rutgers.edu/collections/oal/>. As a Tutor, Mirda too was acting in the place of the classroom teachers as a result of the students’ absence from the classroom. Tutors, like home instructors, are only needed because the regular classroom teachers are unable to provide the student with instruction during his or her absence. The fact that Mirda provided her services/instruction in a hospital setting rather than in the students’ homes is of no moment.

In examining the nature of her work, Mirda’s employment as a Tutor is practically identical to that of a home instructor, as described in both Hyman and Donvito. Like home instructors, Tutors must be certified, and they do not carry all of the responsibilities typically held by teachers—i.e., Tutors do not, for example, develop their own lesson plans and they are not subject to the same evaluations as teachers. Tutors, like home instructors (and unlike regular teachers), provide instruction on a one-to-one basis for variable periods of time; their assignments are temporary, intermittent, and entirely dependent on a varying need for bedside instruction. It is irrelevant that Mirda may have worked between six and eight hours a day for several years because, ultimately, she worked on an “as-needed” basis in that she was never guaranteed those hours of employment, nor a certain yearly salary. Instead, she was compensated at an

hourly rate (like home instructors), was not paid for sick days or vacation days, and did not receive those benefits typically afforded to full-time, tenure-track, teaching staff. The idea that Tutors are not part of the regular teaching staff for purposes of the N.J.A.C. 18A:28-5 is further supported by the fact that the regulations specifically exclude “compensation paid for serving as a bedside instructor” from earnings that are eligible for pension credit in TPAF. See N.J.A.C. 17:3-4.1(a)(1)(xviii).

Petitioner argues that she cannot be denied tenure because, despite her title, she was not replacing an absent Commission employee and, therefore, the substitute-teacher exception to the Tenure Act does not apply. Petitioner interprets N.J.S.A. 18A:16-1.1 to be limited to employees hired to substitute, or take the place of, absent teachers from that district only, and Mirda was not replacing an employee of the Commission. Petitioner’s interpretation of N.J.S.A. 18A:16-1.1 is unsupported by case law and is inconsistent with the statute’s plain meaning. N.J.S.A. 18A:16-1.1 clearly states that a 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.” (Emphasis added.) It does not indicate that this exception applies only to employees who substitute for “any officer or employee” of *the same* school district. Petitioner’s interpretation of the statute’s unambiguous language is unduly restrictive and unsupported by any case law. I **CONCLUDE**, therefore, that the substitute-teacher exception, N.J.S.A. 18A:16-1.1, of the Tenure Act applies to Mirda’s employment as a Tutor because she was acting in the place of classroom teachers as a result of the students’ absence from the classroom.

Finally, the cases relied on by petitioner involve long-term substitutes (which Mirda is not) and provide no guidance in determining whether instruction provided by bedside instructors, or to students who cannot attend their classroom due to medical reasons, falls within the exception codified in N.J.S.A. 18A:16-1.1.

While Mirda held the appropriate teaching certification while working as a Tutor for approximately fifteen years, based on my review of the record, including the caselaw cited and a plain reading of the statutory exception to the Tenure Act, I **CONCLUDE** that petitioner’s former position as a Bedside Tutor is not eligible for tenure accrual.

CONCLUSIONS

Petitioner did not acquire tenure in the Bedside Tutor position because that position is one that falls within the exception to the Tenure Act, as codified in N.J.S.A. 18A:16-1 to -18.

Accordingly, I **CONCLUDE** that the petitioner has not met her burden of proof and demonstrated that she is entitled to judgment as a matter of law. Petitioner's cross-motion for summary decision, therefore, shall be denied, and her petition shall be dismissed.

I further **CONCLUDE** that respondent has met its burden of proof that it is entitled to judgment as a matter of law, and therefore, its motion for summary decision shall be **GRANTED**.

ORDER

It is, therefore, **ORDERED** that the cross-motion for summary decision filed by the petitioner, Gail Mirda, is **DENIED** for the reasons stated herein.

It is, therefore, **ORDERED** that the motion for summary decision filed by the Union County Educational Services Commission is **GRANTED** for the reasons stated herein.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the 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 **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 11, 2018
DATE


SUSANA E. GUERRERO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb