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SHORT FORM ORDER

INDEX No. 03-23580

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

***PRESENT:***

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 8-25-10
ADJ. DATE 11-17-10
Mot. Seq. # 004 - MotD

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MAUREEN DiVILIO,

Plaintiff,

- against -

THE BOARD OF EDUCATION OF THE HAUPPAUGE UNION FREE SCHOOL DISTRICT, individually and in their official capacity, THE HAUPPAUGE UNION FREE SCHOOL DISTRICT, JOHN McDONALD, PRESIDENT of the BOARD OF EDUCATION for the HAUPPAUGE, UNION FREE DISTRICT, GINGER TODARO, Vice President of the BOARD for the HAUPPAUGE UNION FREE SCHOOL DISTRICT, DANIEL DELUCA, Member of the BOARD of the HAUPPAUGE UNION FREE SCHOOL DISTRICT, PAT LESSER, Member of the BOARD of the HAUPPAUGE UNION FREE SCHOOL DISTRICT, MARK MELNICK, Former member of the BOARD of the HAUPPAUGE UNION FREE SCHOOL DISTRICT, FRANK PROCACCINI, Member of the BOARD of the HAUPPAUGE UNION FREE SCHOOL DISTRICT, ROBERT SCHNEBEL, Member of the BOARD of the HAUPPAUGE UNION FREE SCHOOL DISTRICT, ANN MACALUSO, Member of the BOARD of the UNION FREE SCHOOL DISTRICT, PETER C. SCORDO, SUPERINTENDANT of the HAUPPAUGE UNION FREE SCHOOL DISTRICT, individually and in his official capacity, ANTHONY ANNUNZIATO, THE ASSISTANT SUPERINTENDANT for OPERATIONS for the HAUPPAUGE UNION FREE SCHOOL DISTRICT, individually and in his official capacity and KENNETH GRAHAM, THE ASSISTANT SUPERINTENDANT for ADMINISTRATION and PERSONNEL for the HAUPPAUGE UNION FREE SCHOOL DISTRICT, individually and in his official capacity.

Defendants.

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Upon the following papers numbered 1 to 31 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 18 - 31 ; Replying Affidavits and supporting papers __; Other plaintiff's and defendant's memoranda of law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion by the defendants for summary judgment dismissing the plaintiff's complaint is decided as follows:

The plaintiff, Maureen DiVilio, commenced this action against her former employer, the Board of Education of the Hauppauge Union Free School District (hereinafter School District), as well as the individual Board of Education members, the Superintendent, and the Assistant Superintendents of schools, alleging violation of the Civil Service Law and breach of the terms of a collective bargaining agreement between the School District and the plaintiff's Union, nonparty Hauppauge Schools Office Staff Association. A review of the pleadings shows the plaintiff was permanently appointed to the position of Photocopy Machine Operator II in 1998, and that she requested a desk audit of her duties in 2002. Following its review, the nonparty Suffolk County Department of Civil Service determined that the plaintiff was performing the duties of an Assistant Print Shop Supervisor, a position not included in the School District's organizational structure. It further ruled that the plaintiff's position would not be reclassified, but that she would be "earmarked" to the position and placed on a list of employees eligible for the position should it be subsequently added to the School District's payroll. The plaintiff and her Union subsequently submitted grievances to the School District requesting reclassification and a salary increase, which were denied. The instant action was commenced in October 3, 2003, and the plaintiff retired from her employment with the School District in April 2004.

The plaintiff's complaint includes causes of action for breach of the terms of the collective bargaining agreement and violations of Civil Service Law § 61 (2), 100, 101 and 102. The complaint also asserts a cause of action seeking to hold the individual defendants personally liable for damages allegedly incurred as a result of the reduced salary the plaintiff earned while performing out-of-title work. In an order, dated January 13, 2005, the Court granted a motion by the defendants seeking dismissal of the complaint pursuant to CPLR §3211(a)(5), (7), (8) and (10), only to the extent that the plaintiff's third cause of action against the individual defendants under Civil Service Law §100, 101 and 102 was dismissed. Inasmuch as the plaintiff retired from her employment with the School District, the Court also dismissed as moot the portion of her complaint seeking an injunction prohibiting the School District from assigning her out-of-title duties unless she was promoted or an emergency was declared. The plaintiff's remaining causes of action alleging the violation of the terms of collective bargaining agreement and violation of Civil Service Law § 61 (2) were continued as against the School District.

The School District now moves for summary judgment dismissing the complaint arguing the plaintiff has no standing to personally commence an action for damages based upon an alleged breach of the collective bargaining agreement between her Union and the School District. The School District further asserts that it did not violate Civil Service Law § 61 (2), as the alleged out-of-title work performed by the plaintiff was infrequent and of a short duration, and was a logical extension of the duties performed under her existing job title. In opposition, the plaintiff argues that the motion should be denied as triable issues exist as to whether she performed out-of-title work for a substantial period of time; whether the School District's denial of her grievances were arbitrary

and capricious; and whether the School District wrongfully failed to appoint her to the Assistant Print Shop Supervisor position once it was created.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]). The proponent has the initial burden of proving entitlement to summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. Once a prima facie showing is made, the burden shifts to the opponent of the motion who, in order to defeat summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact or demonstrate an acceptable excuse for her failure to do so (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2d Dept 1989]). The opponent must assemble, lay bare and reveal her proof in order to establish that the matters set forth in her pleading are real and capable of being established at a trial (*see* ***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Summary judgment shall be granted when the cause of action or defense is established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party (CPLR §3212 [b]).

It is settled law that "when an employer and a union enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to the agreement may not sue the employer directly for breach of that agreement but must proceed, through the union, in accordance with the contract. Unless the contract provides otherwise, only when the union fails in its duty of fair representation can the employee go beyond the agreed procedure and litigate a contract issue directly against the employer" (***Matter of Board of Educ., Commack Union Free School Dist. v Ambach***, 70 NY2d 501, 508, 522 NYS2d 831 [1987]; *see also* ***Hickey v Hempstead Union Free School Dist.***, 36 AD3d 760, 829 NYS2d 163 [2d Dept 2007]; ***Michael F Wolfson, M.D., M.P.H. v Preventative Medicine Clinical Servs.***, 26 AD3d 751; 809 NYS2d 322 [4th Dept 2006]). "In order to establish a breach of fair representation, it is necessary to show that the union's conduct was arbitrary, discriminatory, or in bad faith" (***Lundgren v Kaufman Astoria Studios***, 261 AD2d 513, 514, 690 NYS2d 609 [2d Dept 1999]).

Here the School District established its prima facie entitlement to summary judgment dismissing the plaintiff's cause of action for damages based upon the alleged breach of the collective bargaining agreement (*see* ***Matter of Board of Educ., Commack Union Free School Dist. v Ambach***, *supra*; ***Hickey v Hempstead Union Free School Dist.***, *supra*). Significantly, the subject collective bargaining agreement lists the School District and the Union as the only parties to the contract and does not provide an alternate method, other than the grievance process for its members to resolve work-related disputes. The plaintiff's complaint also is devoid of any allegations of bad faith by the Union during the grievance process. Thus, the plaintiff lacks standing to maintain a cause of action based upon the alleged breach of the collective bargaining agreement (*see* ***Matter of Board of Educ., Commack Union Free School Dist. v Ambach***, *supra*; ***New York City Tr. Auth. v Gorrick***, 72 AD3d 518, 899 NYS2d 192 [2d Dept 2010]; ***Spano v Kings Park Cent. School Dist.***, 61 AD3d 666, 877 NYS2d 163 [2d Dept 2009]; ***Lundgren v Kaufman Astoria Studios***, *supra*).

Therefore, the burden shifted to the plaintiff who has failed to raise any triable issues either as to her standing to bring an action under the terms of the collective bargaining agreement or the Union's conduct during the grievance of the School District's determination (*see* ***Lundgren v Kaufman Astoria Studios***, *supra*; *cf* ***Spano v Kings Park Cent. School Dist.***,*supra*). Additionally, the plaintiff's reliance on ***Nassau Ch. of Civ. Serv. Empls. Assn. v County of Nassau***, 84 AD2d 784, 443 NYS2d 884 (2d Dept 1981) for the proposition that she has standing to bring an action under the contract is misguided, as that action involved a dispute solely between a union and a municipal employer. The cases entitled ***Matter of Beame v DeLeon***, 87 NY2d 298, 639 NYS2d 272 (1995) and ***Matter of Gomez v Hernandez***, 50 AD3d 404, 858 NYS2d 8 (1st Dept 2008) are equally unavailing, as the former includes retroactive relief based upon employment discrimination, and the latter upheld a determination by the Department of Juvenile Justice to deny an application for promotion by an employee who had a good service record and was on a list of eligible candidates for the position sought. Accordingly, that portion of the School District's motion for summary judgment dismissing the plaintiff's cause of action for damages based upon the alleged breach of the collective bargaining agreement is granted.

As for the plaintiff's cause of action alleging violation of Civil Service Law § 61 (2), the statute provides that in cases other than a temporary emergency, "no person shall be assigned to perform the duties of any position unless he has been duly appointed, promoted, transferred or reinstated to such position in accordance with the provisions of this chapter and the rules prescribed thereunder" (***Caruso v Mayor of Vil. of S. Glens Falls***, 278 AD2d 608, 608-609, 719 NYS2d 141 [3d Dept 2000]). An out-of-title work assignment exists when an employee has been assigned or compelled to perform the duties of a higher grade, without a concomitant increase in pay, frequently, recurrently and for long periods of time, unrelated to any temporary emergency requirement (***O'Reilly v Grumet***, 308 NY 351, 355, 126 NE2d 275 [1955]). Insofar as a violation of Civil Service Law § 61(2) is concerned, there is no controlling distinction between an actual assignment to out-of-title work and a de facto assignment (*see* ***Caruso v Mayor of Vil. of S. Glens Falls***, *supra*). Moreover, in determining an out-of-title work grievance, there must be a comparison of the employee's assigned and customary duties, as well as the time period he or she performed the additional duties (*see e.g.* ***Sprague v Governor's Off. of Empl. Relations***, 13 AD3d 849, 850-851,786 NYS2d 634 [3d Dept 2004]; *see also* ***Matter of Cushing v Governor's Off. of Empl. Relations***, 58 AD3d 1095, 872 NYS2d 593 [3d Dept 2009]).

Here the School District has failed to meet its prima facie burden on the motion (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). It is noteworthy that the School District does not dispute that the plaintiff performed some out-of-title work, as its own desk audit revealed that she was performing the work of an Assistant Print Shop Supervisor. Rather, as indicated previously, the School District argues that the alleged out-of-title work performed by the plaintiff was infrequent and for a short duration, and was a logical extension of the duties performed under the Photocopy Operator II title (*see* ***Matter of Brynien v Governor's Off. of Empl. Relations***, 79 AD3d 1435, 912 NYS2d 794 [3d Dept 2010]; ***Matter of Cushing v Governor's Off. of Empl. Relations***, 58 AD3d 1095, 872 NYS2d 593 [3d Dept 2009]; ***Woodward v Governor's Off. of Empl. Relations***, 279 AD2d 725, 718 NYS2d 265 [3d Dept 2001]). However, the School District has failed to include with its moving papers an adequate description of the duties and responsibilities of an Assistant Print Shop Supervisor. The partial description of the position as an "employee who assists in supervising the operations of a large print shop or supervises the operations of a smaller print shop" contained in a letter sent to the plaintiff by the Suffolk County

Department of Civil Service is insufficient to make a comparison of the plaintiff's assigned and customary duties. Also conspicuously absent from the School District's submissions is any evidence tending to establish the length of time and the frequency of the additional work performed by the plaintiff. The Court, therefore, is unable to ascertain whether the plaintiff was compelled to perform out-of-title work in violation of the Civil Service Law (*see* ***Sprague v Governor's Off. of Empl. Relations***, *supra*; ***Matter of Cushing v Governor's Off. of Empl. Relations***, *supra*). Accordingly, the portion of the School District's motion for summary judgment dismissing the plaintiff's cause of action alleging breach of Civil Service Law § 61 (2) is denied.

Dated: OCT 19 2011

J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION