Matter of DeGraw v Clyde-Savannah Central School District
2006 NY Slip Op 30178(U)
September 11, 2006
Supreme Court, Wayne County
Docket Number: 0059310/2006
Judge: John B. Nesbitt
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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

In the Matter of the Application of

BONNIE DEGRAW,

Petitioner,

For a Judgment Pursuant to Article 78 of the
New York State Civil Practice Law and Rules

ORIGINAL

Index No. 59310

-against-

CLYDE-SAVANNAH CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF CLYDE-SAVANNAH CENTRAL SCHOOL DISTRICT, and RICHARD DRAHMS, as Superintendent of Schools,

Respondents.

APPEARANCES: **NANCY E. HOFFMAN, ESQ.**
General Counsel, Civil Service Employees Assn, Inc.
(**MIQUEL G. ORTIZ, ESQ.**, of counsel)
Attorneys for Petitioner

HARTER, SECREST & EMERY LLP
(**DAVID W. ROBINSON, ESQ.**, of counsel)
Attorneys for Respondents

MEMORANDUM - DECISION

John B. Nesbitt, J.

I. Introduction and Summary of Disposition

The substantive issue raised by petitioner in this combined CPLR article 78 proceeding and contract/declaratory judgment action is whether the respondents violated her contractual right to post-retirement health insurance benefits by requiring her to pay a portion of the premium attributable to those benefits. The merits of petitioner's claim, however, are not now before the Court. Rather, respondents raise by cross-motion under CPLR §7804(f) procedural issues of timeliness; that is, (1) petitioner's claim as may be cognizable in a CPLR article 78 proceeding is

time-barred, because the time limitation set out in the applicable contract for presentation of the claim as a "grievance" not met, and (2) petitioner's claim as framed as a contract, declaratory judgment action is time-barred, because the time limitation applicable under the Education Law §3813 notice of claim requirement was not met. If respondents are correct, then the petitioner's proceeding/action must be dismissed without addressing the merits of her claim. If not, then respondents's motion must be denied, with leave to serve and file an answer to any other pleadings required under CPLR 7804(f) or CPLR §320, as may be applicable.

For the foregoing reasons, the Court denies respondent's cross-motion, holding that petitioner's CPLR article 78 proceeding arises from a timely filed claim under the applicable contract grievance procedure. Further, the petitioner and her union had standing to pursue the claim in that forum notwithstanding her status as a retiree and no longer a union member for bargaining purposes. As such, the Court deems it unnecessary to address the notice of claim issue with regard to petitioner's contract action. Indeed, inasmuch as the CPLR article 78 proceeding is the exclusive remedy for petitioner's claim under the circumstances of this case, the contract action must be dismissed.

II. Background Facts and Description of Controversy

Effective June 22, 2005, Petitioner Bonnie DeGraw *(hereinafter "Petitioner" or "Ms. DeGraw")* retired from the employ of the Clyde-Savannah School District *(hereinafter "School District")* after almost twenty-three years service as a Teacher Aide. As a Teacher Aide, Ms. DeGraw was a member of the bargaining unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO *(herinafter "CSEA").* This representation was pursuant to union recognition under Civil Service Law §200 et seq., commonly referred to as the "Taylor Law," reflected at the time of Ms. DeGraw's retirement in the recognition clause set forth in Article I, §3 of the 2001- 2004 collective bargaining agreement *(hereinafter the "CBA")* between the School District and CSEA.[1] As an active employee hired after July 1, 1978, Ms.

[1] This section reads:
SECTION 3. The Board of Education hereby recognizes the CSEA as the official and exclusive negotiation agent for all cafeteria, clerical, custodial, teacher

DeGraw was entitled to and received health insurance benefits prior to her retirement under CBA Article 18, §3, which in her case was coverage under one of three specified health insurance plans, with the School District paying 90% of the full premium cost for that coverage.[2]

CBA Article 18, §4[A] and [B] provides for health insurance benefits for "retired employees" as follows:

> Section 4. Health Insurance for Retired Employees.
>
> A. Those employees who began employment in the District prior to June 30, 1978, will receive full health insurance benefits upon retirement. Those employees who began working on or after September 1, 1978, must work in the District for twenty years and retire from employment in our District to be eligible for this benefit.(*emphasis added*).
>
> B. Employees who began employment in the District on or after July 1, 1978, and who retire with at least ten (10) years, but less than twenty (20) years of continuous service to the District may continue their medical coverage under the District plan provided the employee pays the full cost of the premium.

Ms. DeGraw falls in the underscored category. She argues as her substantive claim in this proceeding that "this benefit" language in the underscored sentence refers to the "full health

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aides, and other CSEA employees excluding members of the Teacher's Association negotiation unit, the Administrators, and other exempt employees. Substitute employees and retirees are also excluded from CSEA representation. Upon request of the Superintendent of Schools, the CSEA shall submit to the Board of Education by December 1, of each succeeding year, a notarized list of the paid members of the association. The Board of Education agrees not to negotiate with any other organization covering the above mentioned positions for the duration of this Agreement.

The Court assumes that the CBA was extended beyond its original expiration date of June 30, 2004 by operation of law or agreement of the parties.

[2] Exhibits B and C to the Verified Petition are letters from the School District Treasurer to the Petitioner, indicating a 90% benefit rate applicable to Petitioner at the time of her retirement. Given the Petitioner's date of hire, the Court assumes that Petitioner during her active employment was covered under CBA Article 18, §3[C], providing for a 90% benefit rate for employees not covered under subparagraphs A and B who elect a single as opposed to a family policy. Ms. DeGraw states that when she "was employed [she] had the Blue Cross HMO plan and after [she] retired [she] selected the BC/BS Blue Point plan and eventually the BC/BS Blue Million plan."

insurance benefits" language in the preceding sentence. She then argues that "full health insurance benefits" means health insurance benefits fully paid by the School District, not the percentage rate that may have been applicable during her active employment.[3]

The School District, however, did not view its obligation as did Ms. DeGraw. The different interpretations surfaced in April and May of 2005 coincident with Ms. DeGraw submitting written notice of her forthcoming retirement in June. Ms. DeGraw contacted Ms. Patricia Evarts, the School District's Payroll Clerk, who, among other things, is responsible for processing benefits for employees and explaining to employees their present and post-retirement benefits, including discussing premiums that an employee is required to pay. There were at least two conversations between Ms. DeGraw and Ms. Evarts. At least initially, Ms. DeGraw voiced the belief that the School District would be paying the entire premium for her health insurance upon her retirement. Ms. Evarts informed Ms. DeGraw otherwise; that her retirement health care benefit was no different than her current health care benefit as an active employee, and that Ms. DeGraw would be required to contribute during retirement the same percentage of the health insurance premium that she was then paying as an active employee. According to Ms. Evarts, Ms. DeGraw indicated that she understood that the District would be requiring that she pay the same percentage of her health insurance premium after her retirement that she was then paying in order to continue the coverage.[4] Ms. Evarts also informed the President of the local CSEA unit of the matter and the School District's position relative thereto.

The issue did not surface again until late October 2005, after Ms. DeGraw had retired with continuing health insurance benefits. A October 25th letter from the School District Treasurer to

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[3]Alternatively, one could argue, in terms of a single policy, "full health insurance benefits" for a pre-June 30, 1978 hire entitles the employee to a 100% District paid coverage under CPA Article 18,§3[A]. Therefore, the argument could run, reference to "this benefit" for a post-June 30, 1978 hire with more than 20 years service necessarily implies 100% District paid coverage as well. Under either approach, the post-June 30, 1978 hire with more than 20 years service will receive upon retirement a health insurance benefit greater than that received during active employment.

[4] Ms. DeGraw states that she "never accepted [Ms. Evart's] opinion as accurate, especially given" CBA Article 18, §4[A], nor does she recall "discussing health insurance costs with Ms. Evarts.

Ms. McGraw informed her that her payroll deductions had covered her required contributions through August, and requested payment for her contributions attributable for coverage from September, 2005 to June, 2006 by one time payment by November 15, 2005, or installments commencing on the same date. Upon receiving the October 25, 2005 bill, Ms. Evarts called the School Superintendent to protest the same based upon her reading of the CBA and to initiate Stage 1 of the "grievance procedure" under CBA Article 7, §4. Receiving no response to her Stage 1 verbally relayed grievance, she filed a Stage 2 written grievance on November 3, 2005, again protesting the payment the School District was requiring of her for continuation of her health insurance coverage. Handling the matter at the Stage 3 level, the Superintendent of School responded by letter dated November 8, 2005, as follows:

> I have reviewed the written grievance dated November 3, 2005, alleging that the Clyde-Savannah Central School District violated Article 18. Health Insurance, Section 4. Health Insurance for Retired Employees. The grievance procedure in Article 7, Section 1. PURPOSE mandates that a grievance "must be initiated within ten (10) working days when the employee knew or should have known of the alleged violation of the agreement." In this particular case, the grievant was informed about her health care insurance benefits in retirement on or about the end of May or beginning of June 2005. The next conversation occurred on October 28, 2005 when Mrs. DeGraw called the undersigned about the same. Clearly, therefore, this grievance is not timely.
>
> However, even if this grievance was timely, Mrs. DeGraw is receiving the health care insurance benefits for retirees pursuant to the terms of the collective bargaining agreement. Accordingly, the grievance is respectfully denied because it is untimely and lacking in merit.

Ms. DeGraw, through her CSEA representative appealed the Superintendent's decision to the School District's Board of Education pursuant to Stage 4 of the grievance procedure, which rendered its decision in writing on January 12, 2006. The decision of the Board of Education followed that of the Superintendent's regarding the alleged untimely filing of the grievance, and found a further ground to deny the grievance. Said the Board of Education:

> The recognition clause at Article 1 of the collective bargaining agreement at Sections 3 and 4 makes it clear that the [CSEA] Association has the jurisdictional authority to represent District bargaining unit employees only. Section 3 states "[s]ubstitute employees and retirees are also excluded from CSEA representation." In this case, Ms. DeGraw is not an employee and as such, the Association does not and may not represent her in this matter. Indeed, the Grievance Procedure itself is limited to employees. (See Article 7, Section 2B.)

The Board also amplified upon the School District's position as to the merits of Ms. DeGraw's claim:

> [T]he Board of Education maintains that Ms. DeGraw is getting the contractual health insurance benefit she is entitled to. Specifically, she is getting all of the insurance benefits and the District is making the same percentage contribution toward her premiums as if she were still employed. In no instance, whatsoever, did the District promise to provide Ms. DeGraw (or anyone else) greater insurance benefits or greater premium payments in retirement. The practice of the District has been to provide eligible retirees with the same benefits and the same percentage of premium payment consistent with their employment than when they were actively employed.

The decision of the Board of Education exhausted the administrative remedies available to Ms. DeGraw under the CBA grievance procedure, the concluding sentence of Article 7 providing that "[t]he decision of the Board of Education will be final and binding."

This combined CPLR article 78 proceeding/ declaratory judgment action was instituted by its filing on May 8, 2006, The jurisdictional and timeliness issues raised by the School District's cross-motion were argued before the Court on July 11, 2006.

II. Decision of the Court

As the parties note in their Memoranda of Law, some of the doctrinal terrain pertaining to this matter was covered by this Court in *Ledain v Town of Ontario* (192 Misc2d 247 [Sup Ct Wayne Co 2002], *aff'd on op below* 305 AD2d 1094 [4th Dep't 2003]). The general rule there noted provides that "when an employer and a union enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to that agreement may not sue the employer directly for breach of contract but must proceed, through the union, in accordance with the contract" (Id. at 251, quoting *Matter of Board of Educ., Commack Union Free School District v Ambach*, 70 NY2d 501, 508, *cert denied sub nom Margolin v Board of Educ.*, 485 US 1034). Exceptions apply when "the collective bargaining agreement provides otherwise or when the union breaches its duty of fair representation" (*see Ponticello v County of Suffolk*, 225 AD2d 751 [2nd Dep't 1996]), *Tomlinson v Board of Education, Lakeland Central School District,* 223 AD2d 636[1996] lv den 88 NY2d 808 [1996].

Ledain stands for the proposition that a retired employee or a union on behalf of that retiree is not categorically excluded as a matter of law from contract grievance procedures in securing redress for alleged contractual violations. Indeed, if that process is available to address a retiree grievance, then it must be followed unless the agreement provides otherwise. As the Court noted in *Ledain*, "it is not unfair for employees who reap the benefits of collective bargaining to accept the restrictions that make that process work" (*Id.* at 251).

The issue is whether the CBA at issue in this case channels disputes between retirees and the School District over post-retirement health insurance benefits through the contract grievance process. At the outset, the School District argues that it does not, because the recognition clause found in CBA Article 1, §3 specifically excludes retirees from the CSEA unit. However, as this Court noted in *Ledain*, the fact that a union may no longer bargain for retirees formerly members of the union, does not mean that it may not pursue contract grievances on their behalf (Id. at 254). In the present case, the grievance procedure allows a grievance to be filed by or on behalf of an "aggrieved party" who is an "employee who submits a grievance" (CBA Article 7, §2(C). An "employee" is defined as "any person in the Unit covered by this agreement" (CBA Article 7, §2(B). The School District argues that the language describing the grievant as an "employee" who is "in the Unit" perforce excludes retirees who are no longer employees or members of the Unit. However, in CPA Article 18, §4, discussing health insurance, the contract uses the term "employees" to describe individuals entitled to receive such benefits, enjoying either active employment or retirement status. The term "employees" is not used in contradistinction to "retirees," as in the earlier recognition clause. "Retired employees" as that term appears in the heading of Section 4 is consistently read to reference a subclass of "employees," not a separate category of non-employees. The qualifier "in the Unit" found in the definition of "employee" for purposes of defining who may submit a grievance may also be consistently read to exclude from the grievance procedure disputes initiated by those without the contract rights derived from unit membership. By this reading, a unit employee does not lose his or her right to grieve an alleged contract violation by moving from active to retired status so long as he or she is :aggrieved" by the alleged violation.

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Having found that Ms. DeGraw and the local CSEA unit were entitled, and indeed required, to present their claim by way of the contract grievance procedure, the next issue is whether it was timely or not. CPA Article 7, §1 states the grievance must be initiated "within ten (10) working days when the employee knew or should have known of the alleged violation of the agreement." Absent some contrary evidence, the question in this case may be looked at in the context of anticipatory breach or repudiation of contract doctrine.

> An "anticipatory breach" of a contract is one committed before the time when there is a present duty of performance and results from words or conduct indicating an intention to refuse performance in the future. "Anticipatory repudiation." also known as "anticipatory breach," is defined as a party's repudiation of its duty under a contract before the time for performance has arrived" (23 Williston on Contracts §63:29 [4th ed.])

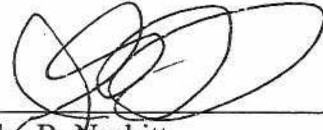
Citing *Lucente v IBM Corporation.*, 310 F.3d 243 [2d Cir. 2002]), Williston goes on to state that "[w]hen confronted with an anticipatory repudiation, the non-repudiating party has two mutually exclusive options under New York law; he may (a) elect to treat the repudiation as an anticipatory breach and seek damages for breach of contract ... or (b) he may continue to treat the contract as valid and await the designated time for performance before bringing suit" (Williston, supra, at §63:33). One may treat the statements of the Payroll Clerk in the Spring of 2005 as an anticipatory breach, which gave Ms. DeGraw the ability to elect under the grievance procedure the ability to file a grievance at that time or await the time for performance of the contract. She choose the latter. As such, her grievance was timely. There is nothing in the contract that required her to bring her grievance before the time of the"alleged violation of the agreement" even though she had clear prior notice that such was the School District's intent. Of course, finding that the grievance was timely and properly brought says nothing about its merits.

III. Conclusion

Accordingly, the cross-motion of the School District to dismiss the Article 78 proceeding is denied, with leave to respondents to file answering papers in accordance with CPLR §7804(f). The second cause of action in the petition asserting a contract/declaratory judgment claim is

dismissed, inasmuch as this Article 78 proceeding is the proper avenue for judicial review following conclusion of the contract grievance procedure *(see e.g. Matter of Civil Service Employees Ass'n, Local 1000, AFSME, AFL-CIO v South Glens Falls Central School District*, 21 AD3d 1247 [3rd Dep't 2005]).

Dated: September 11, 2006
Lyons, New York



John B. Nesbitt
Acting Supreme Court Justice