SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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CIVIL SERVICE EMPLOYEES ASSOCIATION A.F.S.C.M.E., Local 1000, A.F.L.-C.I.O. by its Local 865 and KELLY KENDRICK,

Plaintiffs,

-against

FARMINGDALE UNION FREE SCHOOL DISTRICT,

Defendant.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 16
Index No.: 12933/05
Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

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Defendant Farmingdale Union Free School District (District) moves pursuant to CPLR §3212 for Summary Judgment dismissing the Plaintiffs' complaint.

The Plaintiffs cross move for Summary Judgment against the Defendant Farmingdale Union Free School District.

BACKGROUND

In this action Plaintiff, previously an on-call per diem food service worker, seeks, *inter alia*, reinstatement to the position of assistant cook, with all back pay and benefits, predicated on Defendant's alleged breach of Article XII, § 5; Article XVIII and Article I of the Collective Bargaining Agreement between the Cafeteria Employees' Union and the Board of Education of the Farmingdale Union Free School District [CBA] (July 1, 2001–June 5, 2005) by terminating her probationary employment as an assistant cook without affording her the opportunity of a pre-termination hearing.

It appears from the record that Plaintiff was notified by letter that her appointment as an assistant cook was approved at a special meeting of the Board of Education on August 11, 2004. The appointment, effective September 1, 2004, included a 26-week probationary period. Given the effective date of the appointment, i.e., September 1, 2004, the probationary period was to last until on or about March 1, 2005. After various problems arose related to her job performance, Plaintiff was advised, first orally by Maureen McCorkell, Food Service Manager, and then by letter dated January 31, 2005, from the Assistant Superintendent for Business, that her employment would be terminated effective March 1, 2005.[1]

The defendant seeks dismissal of the complaint predicated on the two-pronged contention that Plaintiff failed to serve a timely notice of claim (i.e., within 90 days of the accrual of the cause of action on January 31, 2005) and that Plaintiff was removed from her appointed position as assistant cook prior to satisfactory completion of the 26-week probationary period. In response, Plaintiff has cross-moved for summary judgment contending that the notices of claim served on May 19, 2005 and June 30, 2005 were, in fact, timely and, even if Plaintiff were to be considered a probationary employee, which Plaintiff disputes, she was entitled to a hearing prior to termination of her employment pursuant to Article XII § 5 of the CBA which provides, with respect to discipline, the following:

> "[e]mployees shall be afforded the opportunity to have a hearing prior to any disciplinary action being taken by the employer with a Union Representative present."

Since such a hearing was not held, Plaintiff maintains that her termination is violative of the CBA.

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[1]According to Defendant District Plaintiff changed menus on her own initiative, ordered food outside normal procedures and assigned staff to work hours not provided for in the budget.

ANALYSIS

It is well established that a probationary civil service employee may be discharged without a hearing and without a statement of reason in the absence of any demonstration that the dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law. *Sztabnik v City of New York*, 31 AD3d 456 [2d Dept 2006]; *Rivera v Department of Educ., City of New York*, 25 AD3d 559 [2d Dept 2006]. Moreover, § 2573 of the Education Law grants a school board the authority to dismiss a probationary employee at any time. Such an employee has no property rights in his position. A probationary civil service employee " 'may be dismissed for almost any reason, or for no reason at all.' " (*Matter of Swinton v Safir*, 93 NY2d 758, 762-63 [1999] quoting *Matter of Venes v Community School Bd. of Dist. 26*, 43 NY2d 520, 525 [1978]), and has no right to challenge the termination by way of a hearing or otherwise, absent a showing that said employee was dismissed in bad faith or for an improper or impermissible reason. *Matter of York v McGuire*, 63 NY2d 760, 761 [1984]. In the event of a bad faith dismissal, the burden of raising and proving bad faith is on the employee. The mere assertion of bad faith without the presentation of evidence demonstrating same does not satisfy the employee's burden. *Witherspoon v Horn*, 19 AD3d 250, 251 [1st Dept 2005]; *Cooke v County of Suffolk*, 11 AD3d 610 [2d Dept 2004]; Rossetti-Boerner *v Hampton Bays School Dist.*, 1 AD3d 367, 368 [2d Dept 2003].

In the absence of any demonstration by competent evidence that her dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law, as a probationary employee, Plaintiff was not entitled to a hearing or a statement of reasons upon being terminated. *Walsh v New York State Thruway Authority*, 24 AD3d 755, 757 [2d Dept 2005]. The record supports the conclusion that she was properly notified, within the probationary period, of her termination based

upon unsatisfactory performance and there was no violation of the CBA regarding her termination.

With respect to her appointment to the position of assistant cook, effective September 1, 2004, Plaintiff signed a form entitled "Non-competitive or Labor Class Appointment" memorializing the effective date thereof and indicating a probationary period of 26 weeks. Plaintiff does not dispute the fact that, on or about January 31, 2005, she received a letter from the District terminating her employment. There is no legal basis, therefore, to conclude that the probationary period of Plaintiff's employment in the assistant cook position commenced prior to September 1, 2004 or continued beyond the probationary period. *Reis v New York State Housing Finance Agency*, 74 NY2d 724, 726 [1989]; *Easling v Odessa-Montour Cent. School Dist.*, 10 AD3d 839, 840 [3d Dept 2004].

Following notification of her termination, Plaintiff filed a grievance with Defendant District the end result of which was a finding by the Board of Education (April 7, 2005) that "there was no violation of due process and no violation of the Contract or Civil Service laws regarding [Plaintiff's] termination of employment." In this regard, Rule XIX(8) of the Nassau County Civil Service Commission provides that:

> "[n]othing contained in this Rule shall be construed to limit or otherwise affect the authority of an appointing officer pursuant to Section 75 of the Civil Service Law at any time during the appropriate probationary period term to remove a probationer for incompetence or misconduct."

Notwithstanding Plaintiff's assertions to the contrary, the Court does not read Article XII § 5 of the CBA so expansively as to place a limit on the Defendant District's right to terminate a probationary employee during the probationary period or to require a pre-termination hearing under the facts of this case. In the Court's view, Plaintiff has offered no authority to support such a proposition. Absent bad faith, Plaintiff's termination prior to completion of the probation period, based on unsatisfactory job

performance, does not come within the ambit of a disciplinary action anticipated by § 5.

Inasmuch as Plaintiff's breach of contract claim accrued on January 31, 2005, the notices of claim served on May 30, 2005 and June 30, 2005 respectively, were untimely. General Municipal Law § 50(e)(1)(a). Even if they were found to be timely, the action would fail as there was no breach of contract.

CONCLUSION

Accordingly, since Plaintiff was terminated during the 26-week probationary period, and was not entitled to a pre-termination hearing, there was no breach or violation of the Article XII § 5, Article XVIII or Article I of the CBA. The defendant is, therefore, entitled to summary judgment dismissing the complaint pursuant to CPLR §3212 and CPLR §3211(a)(7). Plaintiff has failed to raise a triable issue of fact requiring a trial and failed to demonstrate any basis on which she might be awarded summary judgment in her favor. Her motion, therefore, for Summary Judgment in her favor is **denied** and the Defendant's motion for Summary Judgment is **granted**.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: April 17, 2008
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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