

**Matter of Civil Serv. Empls. Assoc., Inc. v Village of  
Freeport**

2009 NY Slip Op 33194(U)

December 23, 2009

Supreme Court, Nassau County

Docket Number: 15597/09

Judge: F. Dana Winslow

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 6  
NASSAU COUNTY**

**In the Matter of the Application of  
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,  
A.F.S.C.M.E., LOCAL 1000, A.F.L.-C.I.O.,  
by its LOCAL 882 and RONALD SHANNON,**

**Plaintiffs,**

**-against-**

**VILLAGE OF FREEPORT,**

**Defendants.**

**MOTION SEQ. NO.: 001, 002  
MOTION DATE: 11/5/09**

**INDEX NO.: 15597/09**

**The following papers having read on the motion (numbered 1-3):**

<b>Notice of Petition.....</b>	<b>1</b>
<b>Notice of Cross Motion.....</b>	<b>2</b>
<b>Affirmation in Opposition.....</b>	<b>3</b>
<b>Reply Affirmation.....</b>	<b>4</b>

Petitioners, Civil Service Employees Association, Inc., A.F.S.C.M.E., Local 1000, A.F.L.-C.I.O., by its Local 882 (hereinafter referred to as "CSEA") and Ronald Shannon ("Shannon"), by Order to Show Cause, bring this Article 78 proceeding against Respondent, Village of Freeport ("Village"), alleging breach of contract and violations of New York State Civil Service Law §§ 61(2), 100, 101 and 102, in connection with their claim that from on or about November 1, 2007 through on or about February 1, 2009, Ronald Shannon had been working out-of-title. Petitioners seek relief in the form of, *inter alia*, compensation to Shannon for out-of-title pay, pursuant to Section 28 of the Collective Bargaining Agreement ("CBA") between the Village of Freeport and CSEA, and that Shannon be immediately promoted from his position as Complaint Investigator to Housing

Inspector.

Respondent, Village of Freeport, cross moves, by Notice of Motion, pursuant to CPLR §§ 3211(a)(7), 3211[c] and 7804(f), for an Order of this Court, dismissing the petition on objections in point of law and upon the grounds that the petitioners have failed to state a cause of action upon which relief can be granted.

The proceeding and motion are determined as herein set forth below.

This Article 78 proceeding is in the nature of a mandamus to compel. This Court notes at the outset that respondent, Village of Freeport's argument to convert the within Article 78 proceeding into an action to recover damages for the breach of the CBA is unavailing. While it is true that where damages allegedly have been sustained due to a breach of contract by a public official or governmental body, the claim "must be resolved through the application of traditional rules of contract law" (*Abiele Contr. v New York City School Constr. Auth.*, 91 NY2d 1, 8 [1997]; see also *Matter of Goodstein Constr. Corp. v. Gliedman*, 117 AD2d 170, 176 [1<sup>st</sup> Dept. 1986], *affd.* 69 NY2d 930 [1987]), in this case, where the remedy sought by the CSEA and Ronald Shannon relates to more than simply enforcement of the CBA (to wit: promotion of Shannon from his position as a Complaint Investigator to Housing Inspector), a plenary action sounding in contract does not lie (*cf. Abiele Contr. v. New York City School Constr. Auth.*, *supra*; see also, *Matter of Barrier Motor Fuels v. Boardman*, 256 AD2d 405 [2<sup>nd</sup> Dept. 1998]). Therefore, respondent, Village of Freeport's argument that this proceeding was brought in an improper form and that therefore this Court should exercise its authority pursuant to CPLR 103[c] to convert the proceeding into an action to recover damages for breach of contract, is **denied** (*cf.*, *Matter of Cromwell Towers Redevelopment Co. v. City of Yonkers*, 41 NY2d 1, 5 [1976]; *Matter of Yaeger v. Educational Testing Serv.*, 158 AD2d 602 [2<sup>nd</sup> Dept. 1990]).

For the purposes of respondent's motion, "... the facts alleged in the petition are deemed to be true and are considered in the light most favorable to petitioner (*Matter of Nistal v. Hausauer*, 308 NY 146 [1954]; *Matter of Board of Educ. v. Allen*, 32 AD2d 985 [3<sup>rd</sup> Dept. 1969]).

Petitioner Ronald Shannon is an employee of the respondent Village of Freeport. Shannon is employed in the position of "Complaint Investigator." Shannon alleges that from November 1, 2007 through February 1, 2009, the Village assigned him duties which were not contained in the Nassau County Department of Civil Service promulgated job specifications for Complaint Investigator; rather he claims that he was performing duties outlined for a "Housing Inspector." As a result, he claims that on August 13, 2008, he approached CSEA with respect to this out of title issue. The next day, on August 14, 2008, Shannon apparently met with the Labor Relations Specialist, Stephanie Teff. On August 20, 2008, Shannon again met with Teff and this time with the Unit President, Peter Reinke, as well. Petitioner claims that Peter Reinke, on August 25, 2008, arranged a meeting with Shannon, Joe Madigan, the then Building Department Supervisor, Keith Nicholson, the Assistant Building Department Superintendent, and Ted Forker, the Unit Vice President. Petitioner argues that this meeting satisfied Stages One and Two of the Grievance Process pursuant to the CBA. At the August 25, 2008 meeting, Shannon claims that a letter from the Nassau Civil Service Commission (hereinafter referred to as the "CSC") Executive Director Karl Kampe was presented to all parties present thereat which letter supported that Shannon had been working out of title. Shannon claims in his petition that upon information and belief, from August 25, 2008 through on or about April 15, 2009, the issue regarding his out of title work was raised by the CSEA at monthly labor management meetings, and that on April 30, 2009, CSEA wrote a letter to the new Village Mayor, Andrew Hardwick, advising him of the

issue and stating that if Shannon's request for out of title pay was not granted by May 18, 2009, CSEA would deem this to be a final decision denying the request for out of title pay. On May 7, 2009, counsel for the respondent, Village of Freeport, Kenneth Gray, issued a response denying the request for out of title pay.

These allegations form the basis for petitioners' two causes of action for breach of the Collective Bargaining Agreement and violation of the Civil Service Law.

It is undisputed herein that there is an existing Collective Bargaining Agreement between the Village of Freeport and CSEA covering the period from March 1, 2004 to February 28, 2010. It is also undisputed that Shannon is a member of the bargaining unit represented by CSEA.

Section 28 of the CBA, entitled "Working Out of Title," states, in pertinent part, as follows:

Out of Title Work shall be determined by the Nassau County Civil Service Commission. An employee must work Out of Title as defined above for a minimum of thirty (30) days (cumulative) to be eligible for additional compensation.

Section 29 of the CBA is entitled "Grievance Procedure," and together with Appendix C of the CBA, outlines an elaborate four step procedure for the processing of grievances when an employee is aggrieved by virtue of the violations of the CBA. Essentially, pursuant to Section 28 of the CBA, conditions precedent to the receipt of out of title pay are as follows: (1) out of title work shall be determined by the CSC; and (2) an employee must work out of title as defined by CSC for a minimum of 30 days (cumulative) to be eligible for compensation. According to Section 29 and Appendix C of the CBA, should an issue arise regarding out-of-title pay, the employee's recourse is to file a grievance

with a supervisor within five days of the occurrence. If not satisfied, the employee must present the grievance in writing to the Department Head within ten (10) days thereafter. If still not satisfied, the employee may file a written appeal to the Grievance Board.

In this case however, based upon the papers submitted for this Court's consideration, this Court finds that the petitioners have failed to exhaust their administrative remedies and that therefore the petition is **dismissed**. Generally, an employee covered by a CBA which provides for a grievance procedure must exhaust administrative remedies prior to seeking judicial remedies (*Matter of Plummer v. Klepak*, 48 NY2d 486, 489-490 [1979]). In this case, the CBA set forth a four-step grievance procedure, and the plaintiff did not complete the steps of that procedure. Where a petitioner fails to exhaust administrative remedies called for in a CBA prior to bringing an Article 78 proceeding, the proceeding must be dismissed even where the situation is the fault of the union (*Id*; *Miller v. County of Nassau*, 297 AD2d 344 [2<sup>nd</sup> Dept., 2002]; *Kropp v. Incorporated Village of Freeport*, 277 AD2d 289 [2<sup>nd</sup> Dept. 2000]).

Here, plaintiffs have failed to submit any proof that the CSC, in accordance with Section 28 of the CBA, made a determination that Shannon performed out of title work for a minimum of thirty days. Moreover, there is no proof that either Shannon or CSEA even sought such a determination from the CSC. Accordingly, this Court finds that petitioners have failed to exhaust their administrative remedies and in light of Section 28 of the parties' CBA, the petitioners' claims should have been addressed first at the administrative level (*Kropp v. Incorporated Village of Freeport*, *supra*).

Insofar as the petitioners argue that the letter from Karl Kampe, the Executive Director of the CSC, dated May 28, 2008, to Shannon, satisfies the CBA's requirement that the CSC determined whether an employee had been

assigned and performed out of title work, and that to the extent that petitioners argue that said letter evidences that Shannon had been assigned and performed work in the higher paying Housing Inspector classification, that argument is entirely specious. The text of the letter states in full, as follows:

This is in response to your appeal to your rejection for the Housing Inspector exam #68-926.

Unfortunately, the duties you describe that qualify you for this exam are not duties within the scope of your Nassau County Civil Service Title of Complaint Investigator.

Section 61.2 of the New York State Civil Service Law specifically prohibits out-of-title work. Since out-of-title work is a violation of the law, such experience can not be credited towards meeting open-competitive minimum qualifications. The back of our announcement, under General Information #2, we clarify that no credit will be given for work experience which is determined by the Commission to have been gained in violation of the provisions of Civil Service Law.

A plain and simple reading of the letter however makes it abundantly clear that the letter was in response to Shannon's appeal to this rejection for the Housing Inspector exam. The letter further states that Shannon's rejection from taking the Housing Inspector exam was based upon the duties that Shannon himself described as his qualification for taking the exam. The CSC found that the duties, as described by Shannon, were in violation of the New York State Civil Service Law §61(2). Hence, contrary to plaintiffs' assertions, the CSC has not determined that Shannon was assigned and performed out-of-title work. Rather, in

order for the CSC to determine whether Shannon was assigned and performed out of title work, the CSC must first conduct a thorough investigation. Furthermore, there is no evidence that the petitioners failed to file a written grievance on the issue of whether Shannon was entitled to out-of-title pay as required by the CBA. Accordingly, any claim for out of title pay for Shannon is barred by the CBA.

By failing to get a determination from the CSC and having chosen to bypass the grievance procedure and instead move straight to the Article 78 proceeding herein, plaintiffs have clearly failed to exhaust their administrative remedy, which is readily available to them under the CBA. In fact, the petitioners themselves state in their petition that they did not complete the grievance procedures outlined in the CBA; rather, they state that Shannon has only satisfied Stages One and Two of the grievance process.

Under these circumstances, respondent's motion to dismiss the petitioners' Article 78 petition is **granted** and the petition is herewith **dismissed** (CPLR 7804[f]).

This constitutes the Order of the Court.

Dated: December 23, 2009

ENTER:



J.S.C.

**ENTERED**  
JAN 14 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE