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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS PART 58
Justice

In the Matter of the Application of
VERONICA MONTGOMERY-COSTA

Petitioner,

-v-

The Board of Education, et al.,

Respondents.

INDEX NO. 102210/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

The following papers, numbered 1 to ____ were read on this motion ____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1
Answering Affidavits– Exhibits	2+4
Replying Affidavits	3+5

CROSS-MOTION: ____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

Dated: 9/7/11

J.S.C.

Check one: ✓ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 58

In the Matter of the Application of

VERONICA MONTGOMERY-COSTA as President of Local 372 of District Counsel 37, American Federation of State, County and Municipal Employees, AFL-CIO,
Petitioner,

For an Order and Judgment Pursuant to Article 75 of the Civil Practice Law and Rules,

-against-

The Board of Education, as the Public Employer, CATHLEEN P. BLACK, as Chancellor of the City School District of the City of New York d.b.a. Department of Education of the City of New York,
Respondents.

INDEX NUMBER 102210/2011
Mot. Seq. 001
ORDER & JUDGMENT

DONNA MILLS, J.:

Petitioner Veronica Montgomery-Costa petitions to compel arbitration of her grievance against Respondents. Respondents oppose and assert that they are cross-petitioning to stay arbitration. However, there is no evidence that they filed the cross petition with the Clerk of the court and paid the requisite fee. CPLR 8020 (a). Therefore, there is no distinct request for relief by respondents before this court at this time.

Background

Petitioner is president of union Local 372 (the Union), representing about 25,000 non-teaching employees of the New York City Department of Education (DOE). The Union and DOE are signatories of a collective bargaining agreement (CBA) governing employment terms and conditions. Ex. A attached to Petition. Article XX of the CBA contains complaint and

grievance procedures, normally a four-step process. The fourth and final step is arbitration by the Grievance Panel, consisting of one DOE representative, one union representative and one other person selected by mutual agreement to serve as chair. The CBA permits the Union to initiate grievances of alleged violations of any of the CBA's terms. A grievance must be initiated within 75 days of the action complained of. Appeal to the Grievance Panel must be made within 20 days of receipt of the Step III decision.

At issue is the provision, at page 31 of the CBA, "that complaints of employees in title against out-of-title assignments made to other employees are subject to the grievance procedure." This contrasts with an employee's own complaint as to out-of-title work which is to be referred to the executive director of DOE's human resources division, unless the alleged out-of-title work assignment lasted continuously for three months or more.

On or about October 14, 2009, the Union filed an Article 78 petition challenging the layoffs of about 500 school aides, as of October 16, 2009. Ex. 1 attached to Cross Petition. That action was discontinued with prejudice on June 14, 2010. Ex. 2 attached to Cross Petition. On December 8, 2009, the Union filed a Step III grievance, by first-class mail addressed to David Brodsky (Brodsky), DOE's director of labor relations, claiming that 137 teacher aides citywide, not members of the Union, were assigned to duties contained under the school aide job description in the CBA, positions which were not offered to the Union's school aides (the Citywide Grievance). Ex. B attached to Petition. On December 11, 2009, the Union amended the Citywide Grievance, in another mailing to Brodsky, to include duties pertaining to the health aide job description, also held by its members. *Id.* No Step III grievance hearing was held, and the Union moved the Citywide Grievance to Step IV, filing a demand for arbitration on March 3, 2010. Ex. C attached to Petition.

On December 15, 2009, the Union filed a related Step II grievance concerning Queens P.S. 7 (P.S. 7 Grievance). Ex. D attached to Petition. After a hearing, the grievance was denied on February 18, 2010. Ex. E attached to Petition. The Union demanded arbitration of the P.S. 7 Grievance on May 5, 2010 and May 14, 2010. Ex. F attached to Petition. No arbitration has been scheduled for either grievance and petitioner filed the instant petition to compel arbitration on February 23, 2011.

Discussion

DOE states that it was never served with the Citywide Grievance. It maintains that it "checked i[t]s online case tracking system to determine if any such grievance had ever been received" and found it "devoid of any indication that the December 11th Grievance was ever received by DOE." Respondent's Memorandum of Law at 5. It claims that it became aware of the Citywide Grievance only on March 4, 2010, when it received Local 372's demand for arbitration.[1] *Id.* By then, the 75-day limit for filing a grievance had lapsed, and DOE asked the Union for confirmation of the purported earlier submission. Ex. 4 attached to Cross Petition. The Union responded nine months later, on December 13, 2010, that the "proof of mailing would only be an affidavit from the person who put the request in an envelope," and the Citywide Grievance "was never returned to us as undeliverable." Ex. 5 attached to Cross Petition.

In fact, Mark M. Garcia (Garcia) testified for the Union, on December 16, 2010, about the mailing of the Citywide Grievance, in a related proceeding before the New York State Public Employment Relations Board. Ex. 8 attached to Cross Petition. Garcia said that he prepared the grievance on December 11, 2009, and customarily placed it in the outbox in his office from where it was taken to the facility's mailroom. Transcript at 493-494. He did not personally

[1]Actually, the copy of the demand attached has a DOE time stamp of March 3, 2010.

deliver the grievance to the U.S. Postal Service, and had no direct knowledge of its handling beyond his outbox. *Id.* at 494. Under these circumstances, the Citywide Grievance may not be deemed served upon the DOE on or about December 11, 2009. *Peter-MacIntyre v Lynch Intl., Inc.*, 52 AD3d 424, 425 (1st Dept 2008) ("the January 11, 2007 'Affirmation of Service' . . . is defective because it does not specifically state that the affiant, who is plaintiff's attorney, himself mailed the motion"); *Metzger v Esseks*, 168 AD2d 287, 287 (1st Dept 1990) ("the affidavit of service by defendants' attorney's employee . . . , dated November 3, 1989, [is] insufficient in that it does not specifically state that the affiant herself mailed the letter enclosing the motion papers").

Petitioner maintains that the "demands for arbitration were timely," without paying heed to Garcia's testimony. Memorandum of Law in Support at 6. However, the date of service of the Citywide Grievance is March 3, 2010, 82 days after December 11, 2009, as shown by the DOE time stamp. Having not timely served the Citywide Grievance upon the DOE, the Union may not insist that the Citywide Grievance be heard by the Grievance Panel – Step IV – because of inactivity at lower steps. *Matter of Local 832 Term. Empl. of the City of New York v Dept. of Educ. of the City of New York*, 60 AD3d 567, 568 (1st Dept 2009). The Union has failed to comply with the CBA's terms, and the Union's motion to compel arbitration of the Citywide Grievance is, therefore, denied. *Matter of Smith Barney, Harris Upham & Co. v Luckie*, 85 NY2d 193, 201-202 ("[A] court may address three threshold questions on a motion to compel or to stay arbitration: [1] whether the parties made a valid agreement to arbitrate; [2] if so, whether the agreement has been complied with; and [3] whether the claim sought to be arbitrated would be time-barred if it were asserted in State court"), *cert denied* 516 US 811 (1995).

There is no dispute about the timeliness of the P.S. 7 Grievance, which proceeded to a

hearing and subsequent denial. Now, DOE argues that the P.S. 7 Grievance is not subject to arbitration, because it fails the first prong of the two-prong test clearly enunciated in *Matter of City of Johnstown [Johnstown Police Benevolent Assn.]* (99 NY2d 273, 278 [2002]):

> "We first ask whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance. This is the 'may-they-arbitrate' prong. If there is no prohibition against arbitrating, we then examine the CBA to determine if the parties have agreed to arbitrate the dispute at issue. This is the 'did-they-agree-to-arbitrate' prong" (internal citations omitted).

The P.S. 7 Grievance dealt with the assignment of four paraprofessionals, members of the United Federation of Teachers (UFT), to supervise activity in the school's cafeteria, gymnasium and auditorium, duties that Local 372 claimed were reserved for school aides, its members. DOE's opposition to the petition claims that the status of the children addressed, as special education students, warranted special treatment by statute. Specifically, the federal Individuals with Disabilities Education Act (IDEA) requires that each special education student must have an Individuated Education Program (IEP). *See* 20 USCS §§ 1401 (9), 1414 (d) (2) and 34 CFR § 300.323. The paraprofessionals, according to DOE, were assigned on a one-to-one basis to special education students pursuant to their IEPs. They were not providing supervision to students generally in the school's cafeteria, gymnasium and auditorium, a role exercised by school aides and other administrative personnel. DOE maintains that arbitrating the possible assignment of school aides instead of paraprofessionals in these circumstances would be "beyond the power or jurisdiction of a labor arbitrator to determine" because it would result in a "[f]ailure to implement an IEP [which is] a violation of the IDEA and can subject the local educational authority to suit in a federal court." Respondents' Memorandum of Law at 18-19. "Moreover, to interfere with the IEP would violate the sovereignty of the [federal] government." *Id.* at 19.

DOE exaggerates the threat posed by arbitration of the P.S. 7 Grievance. The Union does

not insist that its schools aides replace the UFT paraprofessionals, but is concerned with preserving the supervisory duties in the school's cafeteria, gymnasium and auditorium. Reply Memorandum of Law at 17. In any case, the dispute concerns at most which school employees will conduct IEPs, not whether IEPs will be conducted, as DOE warns. The Grievance Panel must certainly be made aware of the federal requirements for dealing with the special education students, and its ultimate determination must give those requirements primacy while respecting the CBA as much as possible. The petition to compel arbitration of the P.S. 7 Grievance is, therefore, granted.

Accordingly, it is

ADJUDGED that the portion of the petition to compel arbitration of the Citywide Grievance is denied and that portion of the petition is dismissed; and it is further

ADJUDGED that the portion of the petition to compel arbitration of the P.S. 7 Grievance is granted; and it is further

ADJUDGED that the parties shall proceed to arbitration before the Grievance Panel forthwith on the subject of the P.S. 7 Grievance, and petitioner's counsel shall serve a copy of this judgment upon the arbitral panel; and it is further

ADJUDGED that there shall be no award of costs and disbursements in connection with this judgment.

DATED: September 7, 2011

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.