STATE OF VERMONT
RUTLAND COUNTY, SS

Dee Russell Plaintiff v. Rutland City Public Schools Defendant	SUPERIOR COURT Docket No. 1332-11-08 Rdsc

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter came on for hearing on May 26, 2009. The Plaintiff was present, pro se. The Defendant was represented by Erin Gallivan, Esq. Based upon the evidence adduced at hearing, the Court makes the following findings of fact, conclusions of law and order:

Findings of Fact

Plaintiff, Dee Russell, is a technology teacher at Rutland High School. She was hired in 1999. She was hired upon recommendation to the Rutland School Board by the Superintendent at that time, David Wolk.

Teachers in the Rutland City School system are paid according to a pay grid, which is negotiated between the Rutland City School Board and the Rutland teachers' union, the Rutland Education Association (REA). This contract applies to all teachers whether REA members or not. Pay is determined by consideration of two factors, education and experience. A teacher is placed in a pay column based upon their education and at a pay step within that column based upon experience. At the time of hire, a teacher may be placed at a higher step within a column based upon prior teaching or other experience germane to the position in question.

The contract between the REA and the Defendant (Def. Ex. A) allows the Superintendent to determine the appropriate step upon which to place the new employee. The contract provides that the Superintendent may consider experience, background and education in determining the appropriate step. The contract also provides that the Superintendent may not place a newly hired teacher on a higher step than a current employee with the same general experience, background and education.

Plaintiff's claim involves her salary. She does not dispute the education column in which she was placed in 1999 (bachelor's degree plus 30 credits). Plaintiff disputes her step placement.

Plaintiff alleges that she was either not given appropriate credit for her experience when she was hired or that another teacher, Deb Jiloty, who was hired in 2005, was wrongfully placed ahead of her on the pay grid. Ms. Russell claims she has similar background, experience and education to Ms. Jiloty and should have been placed at the same step as Ms. Jiloty. Ms. Jiloty was placed two steps ahead of Ms.Russell when she was hired in 2005. In other words, Ms. Russell claims either that Ms. Jiloty was placed at too high a step or that Plaintiff was placed at one which was too low.

Plaintiff was upset about the salary paid to Ms. Jiloty in 2005. Plaintiff was also upset about "step freezes" which were agreed upon between the REA and the School Board, but the step freeze issue is not before the Court at this time.

Ms. Russell is not a member of the REA. Despite this, she is entitled to their assistance concerning grievances. The final stage of the grievance process, arbitration, can only be requested by the REA, even if the grievance involves non-union members such as Ms. Russell.

In the fall of 2005, Ms. Russell filed a grievance concerning her salary issues (Def. Ex. O). Although she now claims she sought REA assistance concerning the grievance, this is disputed by Ellen Green, the president of the REA since 2002, who says that she was not aware of the grievance at the time it was filed. Ms. Russell claims the union would not help her in 2005 and that she was forced to proceed on her own. None of the contemporaneous documents concerning the 2005 grievance indicate they were copied to the REA. There is nothing in writing from Russell requesting union assistance. The Court finds Ms. Green's testimony on this point more credible. Ms. Green was aware from discussions with Ms. Russell in 2005 that she was upset with her step placement (and the step freezes), but neither Ms. Green nor the REA was aware that any grievance had been filed. The union was not involved in the grievance process in 2005 and did not refuse to help Ms. Russell with it.

Ms. Russell pursued her grievance through the various stages of the grievance process in 2005 save for the final step, arbitration. These steps included meeting with the principal, making a formal written grievance with the principal, grieving to the Superintendent, and grieving to the School Board. At each stage the grievance was denied. The final stage of the grievance process is arbitration. Only the union can request an arbitration hearing for a grievance. The REA was not asked by Russell in 2005 to pursue arbitration. As a result, the grievance process was not exhausted in 2005.

The Rutland Public Schools-REA contract provides that any request for arbitration must be made to the Superintendent by the union within 15 days of receipt of the School Board's decision. The School Board denied Ms. Russell's grievance on October 13, 2005. Any request for arbitration would have been required within 15 days of receipt of that letter. No request was made because Ms. Russell did not ask the union to do so at that time and the union did not consider the merits of her claim in that time frame.

On July 29, 2008, Ms. Russell sent a letter to the School Board (Def. Ex. P), again complaining of the pay discrepancy between Ms. Jiloty and herself. This was the same issue she had grieved in 2005. This time, however The Board stood on its denial from 2005, informing Ms. Russell by letter on August 27, 2008 (Def. Ex. Q). As school was starting in August 2008, Ms. Russell again mentioned to Ms. Green that she was upset with the pay issue. Ms. Russell did not file a new grievance at that time.

Following a meeting with Ms. Green and the union grievance officer, James Woodward, on September 22, 2008, Ms. Russell met with the executive board of the REA on October 9, 2008. The purpose of this meeting was to enable Ms. Russell to determine if the REA would agree to demand arbitration in the event Ms. Russell elected to file a new grievance. After hearing Ms. Russell's presentation the REA told Ms. Russell it would not demand arbitration on her behalf due to lack of merit to Ms. Russell's concerns and the passage of more than 15 days from the Board's decision in 2005. The Board told Ms. Russell they would work with her if she decided to file a new grievance but would not take the grievance through the arbitration stage if it was denied through the rest of the grievance route.

Ms. Russell alleges that she did not receive fair treatment from the union and that they treated her differently than union members. In support of her claim, Ms. Russell called Robert Field, a teacher at Rutland High School. Mr. Field has had several issues which he felt were not properly addressed by the union. However, those issues all arose while Field was a union member. His testimony shows that not everyone is satisfied with the REA response to issues. It does not show disparate treatment by the union between members and non-members.

The union considered Ms. Russell's arguments concerning her pay. They concluded that her position did not have merit. This was the same conclusion that others in the grievance process had come to in 2005. While Ms. Russell feels the union should have done more to investigate her concerns, the Court believes the union's consideration of her complaint was fair and adequate.

Ms. Russell did not file a new grievance. Instead she filed this action, seeking $5000 plus costs, representing, in part, her claimed underpayment in salary based upon improper step placement.

Ms. Russell claims she has at least equivalent relevant experience as Ms. Jiloty. Ms. Russell provided a mentoring letter for Ms. Jiloty in Jiloty's effort to obtain teacher certification or licensure (P. Ex. 9). Ms. Russell feels this shows she has at least as much experience as Ms. Jiloty. That Plaintiff provided a mentoring letter for Ms. Jiloty does not mean the Superintendent erred in assessing their past experience for step placement.

In 2002, Ms. Jiloty applied for an IT position at the school. At that time, the Superintendent, Mary Moran, offered her a teaching position and assessed Ms. Jiloty with no prior relevant past experience for step placement credit. Three years later in 2005, Ms. Jiloty was again offered a position. This time, Ms. Moran assessed Ms. Jiloty with

seven years of creditable experience. Ms. Russell questions how seven years of experience could have been obtained in three years. It was not.

In addition to the three years of additional experience which Ms. Jiloty had obtained during 2002-2005, she also provided additional information to Ms. Moran concerning her past experience which she had not done when she applied in 2002. This additional information, along with the additional experience, accounted for Ms. Moran's decision to credit Ms. Jiloty with seven years experience in 2005 when she was unwilling to allow any credit in 2002. Ms. Moran's testimony was uncontroverted and is convincing.

Ms. Russell made no complaint about her step placement in 1999. Had she felt the Superintendent abused his discretion with respect to his treatment of her in 1999, she should have complained about it at that time.

Further, a comparison of Ms. Russell's resume (Def. Ex M) with Ms. Jiloty's (Def. Ex N.) shows that Jiloty has extensive experience as a computer instructor and trainer as well as experience as a systems programmer and analyst. Ms. Russell's resume reflects no such experience. Given Ms. Jiloty's resume, it was well within the Superintendent's discretion to place Ms. Jiloty at step seven of the step grid at the time she was hired in 2005. The Superintendent did not violate the contract by placing a new hire (Ms. Jiloty) ahead of a current employee with the same general experience. The two women did not have the same general experience.

The Superintendent did not abuse his/her discretion either in 1999 when Ms. Russell was hired or in 2005 when Ms. Jiloty was hired. The REA did not act unfairly to a non-member in declining to request arbitration on behalf of Ms. Russell in 2008 when it was eventually asked to do so. No such request was made in 2005 at the time it was required to be made.

Conclusions of Law

The universally accepted rule holds that an employee subject to a collective bargaining agreement, who has a grievance within the scope of that agreement's grievance and arbitration procedure, must exhaust the remedies available under that agreement before she may maintain a suit against her employer. *Burkhart v. Mobil Oil Corp.*, 143 Vt. 123, 126 (citing *Clayton v. Automobile Workers,* 451 U.S. 679, 681-82 (1981); *Morton v. Essex Town School District,* 140 Vt. 345, 349 (1981)).

The Vermont Supreme Court has applied this rule specifically to suits brought by teachers, holding that the use of grievance procedures by teachers and their school boards, as a means of resolving disputes which arise between them in regard to the rules which govern their employment relationship, is expressly authorized by the Vermont legislature. *Morton*, 140 Vt. at 348 (citing 16 V.S.A. § 2004). Grievance and arbitration agreements are entered into for the precise purpose of providing an alternative to judicial

remedies and they provide a reasonably amicable method of resolving disputes in the least expensive and most expeditious manner possible. *Id.* (citations omitted).

The requirement that an employee exhaust her remedies does not apply, however, if the employee has been prevented from exhausting her contractual remedy by the union's wrongful refusal to process the grievance. *Ploof v. Village of Enosburg Falls*, 147 Vt. 196, 200 (1986). The employee must prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance. *Id.* at 201. This breach occurs "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.*

The Rutland Public Schools-REA contract provides that any request for arbitration must be made to the Superintendent by the union within 15 days of receipt of the School Board's decision. The School Board denied Ms. Russell's grievance on October 13, 2005. Any request for arbitration would have been required within 15 days of receipt of that letter pursuant to the contract. Although Ms. Russell is not a member of the REA, she is entitled to their assistance concerning grievances. The final stage of the grievance process, arbitration, can only be requested by the REA, even if the grievance involves non-union members such as Ms. Russell. No arbitration request was made because Ms. Russell did not ask the union to do so at that time and the union did not consider the merits of her claim in that time frame.

In 2008, Ms. Russell again complained of the pay discrepancy between Ms. Jiloty and herself. Ms. Russell met with the executive board of the REA to determine if the REA would agree to demand arbitration in the event Ms. Russell elected to file a new grievance. After hearing Ms. Russell's presentation the REA told Ms. Russell it would not demand arbitration on her behalf due to lack of merit to Ms. Russell's concerns and the passage of more than 15 days from the Board's decision in 2005

The Court does not find that the union's conduct towards Ms. Russell was arbitrary, discriminatory, or in bad faith. See *Ploof*, 147 Vt. at 201. To the contrary, the union treated Ms. Russell fair and adequately in consideration of her complaint in 2008.

The Court finds that Ms. Russell never utilized the grievance procedure available to her under the contract. That being the case, Ms. Russell has not exhausted her remedies and may not maintain an action for breach of contract against her employer. See *Morton*, 140 Vt. at 349.

Furthermore, if Ms. Russell felt the Superintendent abused his discretion with respect to her step placement in 1999, that was the proper time to complain, not in 2005.

Finally, even if Ms. Russell were able to maintain an action against her employer for breach of contract, the Court finds no such breach. The Superintendent did not abuse his discretion with respect to Ms. Russell's step placement, nor did the Superintendent violate the contract by placing a new hire ahead of a current employee.

ORDER

The Plaintiff's claim, filed November 18, 2008, is DENIED. Judgment is entered for the Defendant.

Dated at Rutland, Vermont this 8 day of June, 2009.

Hon. Harold Eaton, Jr.
Superior Court Judge