

HEARING OFFICER, CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER,
COLORADO

Appeal No. 209-02

ORDER OF DISMISSAL

IN THE MATTER OF THE APPEAL OF:

CECILIA ARCE-APPELL, Appellant,

Agency: DEPARTMENT OF SAFETY, DENVER POLICE DEPARTMENT,
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

Hearing Officer Joanna Lee Kaye held a preliminary hearing in this matter on the issue of jurisdiction on April 24, 2003. Assistant City Attorney Linda Davison represented the Agency. Appellant was present and was represented by James Alexander, Esq. The preliminary hearing was held to address the issues of whether Appellant's filing of her second-level grievance with Technology and Support Division Chief Steve Cooper satisfied the requirements of CSR 18-12 3), which requires that the second-level grievance be filed with the "agency head or designee."

Appellant argues that she filed her second-level grievance with Division Chief Cooper on the advice of someone from the Career Service Authority ("CSA"). Appellant asserts that since she acted in reliance on this advice from an agent of the City and County of Denver, the Agency should be estopped from denying Appellant's right to appeal.

The Agency asserts that Division Chief Cooper was never a designee of the Agency head. It argues that estoppel arguments cannot be used to create jurisdiction, and that the elements of estoppel have not been satisfied because the Agency did not know of any advice given to Appellant by an agent of the CSA, which is a separate agency from the Department of Safety.

At the end of the preliminary hearing on jurisdiction, the hearing officer requested briefs on issues raised during the preliminary hearing. Those briefs were timely filed by both parties.¹

For the reasons set forth below, the hearing officer concludes that this matter must be dismissed for lack of jurisdiction.

¹ The Agency's Brief was six pages long, one page in excess of the page limit set forth by the hearing officer, and also contained Affidavits from Vivian Adkins as well as Division Chief Cooper. On May 12, 2003 Appellant filed a Motion to Quash the Agency's Brief for being in excess of the page limit, and for having the Affidavits attached. However, because the hearing officer concluded without benefit of the Agency's Brief and attachments that the elements of estoppel are not present in this case, she has taken neither the Agency's Brief nor the Affidavits into consideration here.

ISSUES

1. Did Appellant's filing of her second-level grievance with Division Chief Cooper satisfy the requirements of CSR 18-12 governing the grievance process?
2. Did Appellant reasonably believe Division Chief Cooper was the "designee" of the "agency head" for purposes of filing a second-level grievance?
3. Has Appellant demonstrated the elements of estoppel?

FINDINGS OF FACT

Based on the evidence in the record, the hearing officer now finds the following to be fact:

1. The Denver Sheriff's Department, the Denver Police Department and the Denver Fire Department are all departments within the entity called the Department of Public Safety. The Department of Public Safety is an agency of the City and County of Denver.
2. The Agency Head is Manager of Safety Tracy Howard.
3. Appellant is an employee of the Denver Police Department, Technology and Support Division.
4. Appellant filed four first-level grievances with Sergeant Shanna D. Clark on November 20, 2002. This individual denied Appellant's grievances on December 2, 2002.
5. Appellant filed her grievances at the second level with Division Chief Steve Cooper on December 11, 2002.
6. Division Chief Cooper is not the Agency Head for the Department of Safety, nor is there any evidence that he has been designated as such by Mr. Howard at any relevant time.
7. Appellant testified that she was uncertain about who the appropriate "designee" would be to whom to file her second-level grievance, and therefore consulted with an individual at the Career Service by the name of Vivian Adkins. Appellant testified that during this conversation, she asked Ms. Adkins about Mr. Howard. Appellant testified that Ms. Adkins advised her to file her second-level grievance with Division Chief Cooper.
8. Division Chief Cooper did not respond to Appellant's second-level grievances.
9. On December 27, 2002 the Agency's Human Resources Department contacted Appellant and notified her that she must file her second-level grievance with Mr. Howard. Appellant immediately re-filed her second-level grievances with Mr. Howard on that date.
10. Appellant filed her appeal on December 30, 2002.
11. Appellant has observed other employees consulting with Division Chief Cooper concerning what she believed were grievances.

12. No other employees were called to testify that they had filed second-level grievances with Division Chief Cooper, or otherwise considered him the designee of the Agency Head for purposes of filing grievances.

DISCUSSION AND CONCLUSIONS

1. The governing CSR regulation.

CSR 18-12 3) is at the heart of the dispute in this case. That rule directs employees to act as follows in relevant part:

If the response of the immediate supervisor does not resolve the grievance and the employee wishes to pursue the grievance further, the employee shall present the grievance to the *head of the agency, or designee*, in writing within ten (10) calendar days after receiving the decision of the immediate supervisor...

2. Burden of Proof

The Agency filed a Motion to Dismiss this case for lack of jurisdiction on February 4, 2003. The Agency, being the proponent of this motion, bears the initial burden of proving that Appellant did not timely file her second-level grievance.

It is undisputed that Appellant's first-level grievance was denied on December 2, 2002, meaning Appellant would have had to file her second-level grievances with the Agency Head or designee within ten calendar days thereafter. It is clear from the record that the Agency Head is Tracy Howard. The Agency proffered an affidavit from Mr. Howard, stating in essence that he has never designated Division Chief Cooper to act on his behalf respecting the review of grievances under CSR 18-12 3). Appellant filed her second-level grievances with Division Chief Cooper on December 11, 2002. Appellant did not file her second-level grievances with Mr. Howard until December 27, 2002. Thus, neither Mr. Howard, the Head of the Agency in this case, nor any designee of Mr. Howard, timely received the second-level grievance.

These facts having been established, the burden shifts to Appellant to show why her filing with Division Chief Cooper should be considered sufficient under the requirements of the CSR rules. The only remaining dispute in this case is whether Appellant filed her second-level grievance with a person whom she reasonably believed was the designee of the Agency head, and if so, what are the legal consequences of that act.

3. Appellant's estoppel argument.

a. Appellant's reliance on advice from the CSA.

Appellant argues that she filed her second-level grievance with Division Chief Cooper in reliance on the advice of Ms. Adkins from the CSA. Appellant posits that the CSA and the Department of Safety are both part and parcel of the City and County of Denver. Therefore,

Appellant asserts that the Agency should be equitably estopped from seeking a dismissal of Appellant's grievance as untimely, because she relied to her detriment on this advice.

The Agency argues that equitable estoppel cannot be used to create jurisdiction. However, the hearing officer does not reach this question because Appellant failed to satisfy the requirements of promissory estoppel.

The Colorado Supreme Court has set out the elements required to make a showing of a case of equitable estoppel:

Equitable estoppel is designed to achieve justice where four elements are present: (1) the party to be estopped by its conduct must know the facts; (2) that party must intend that the conduct be acted upon or must act so the party asserting estoppel is justified in believing the conduct was so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) that party must detrimentally rely on the other party's conduct.

Dep't of Health v. Donahue, 690 P.2d 243 (Colo. 1984). The reliance of a party seeking to invoke equitable estoppel must also be reasonable. *See*, Comm. for Better Health Care for All Colo. Citizens v. Meyer, 830 P.2d 884 (Colo. 1992).

There are several problems with Appellant's case of equitable estoppel. First, Appellant's case turns largely on the alleged advice given by Ms. Adkins. Yet Appellant failed to call this critical witness. The only evidence of this alleged advice is Appellant's hearsay claim.

Second, even if Appellant had demonstrated that Ms. Adkins gave her this advice, the CSA is not a party to this case. The party to be estopped in this case is the Department of Safety. While technically it can be argued that both are sub-entities of the City and County of Denver, it is nonetheless clear from the entire context of the CSR rules that the agencies within the City and County of Denver each engage in their own separate personnel functions.

The reason for this arrangement is illustrated by the facts of this case. As a practical matter the Department of Safety did not know about any such alleged representations of a separate agency (the CSA), nor did it know that Appellant filed a second-level grievance allegedly in reliance thereon. Since the Department of Safety was not the party who so advised Appellant, it therefore could not have intended that conduct to be acted upon. The record remains devoid of any evidence that Ms. Adkins had the authority to designate Chief Cooper to act on behalf of Mr. Howard.

Finally, Division Chief Cooper did not testify. It is unknown whether he received the grievance in person and if so when, what he did with it, or how it came to be in possession of the Agency's Human Resources Division.

When considering these points, it becomes clear that the necessary elements of estoppel (set forth above) are not present here.

b. Appellant's belief that Division Chief Cooper acted as the Agency designee in other grievance cases.

Appellant attempted to show that Agency itself took actions tending to induce Appellant's reasonable reliance thereon, for which it can be equitably estopped from pursuing dismissal of this case. Appellant testified that, to her knowledge, other employees have gone to Chief Cooper with "grievances" and "disputes."

The hearing officer finds Appellant's assertions unpersuasive and lacking in credibility for several reasons. First, once again Appellant called no witnesses to testify they actually forwarded step-two grievances to Chief Cooper. Instead, she relied on her own hearsay testimony to prove that others had approached Chief Cooper as the Agency designee.

Furthermore, Appellant testified that she considered "grievances" and "disputes" to be the same thing. Yet there is a difference between consulting on issues with one's supervisor, and formally initiating and pursuing a "grievance." Appellant had already initiated her own grievance process by this point, and clearly therefore either knew or should reasonably have known that to file a formal "grievance," employees must follow the procedures set forth in CSR 18. Any reliance by Appellant that Division Chief Cooper was the designee for purposes of a second-level grievance based on such observations is therefore not reasonable.


Finally, by her own testimony, Appellant asked about Tracy Howard in her conversation with Ms. Adkins. Appellant therefore knew of Mr. Howard. Yet Appellant has failed to explain why she did not call Mr. Howard directly in her attempts to ascertain who Tracy Howard's own designee would be.

For all the foregoing reasons, Appellant's estoppel argument must fail.

ORDER

Wherefore, the Agency's Motion to Dismiss is GRANTED. This case is DISMISSED for lack of jurisdiction.

Dated this 22nd day of May, 2003.


Joanna Lee Kaye
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **ORDER OF DISMISSAL** by depositing same in the U.S. mail, postage prepaid, this 27 day of May, 2003, addressed to:

James M. Alexander, IV
Attorney at Law
2335 Lafayette St.
Denver, CO 80205

Cecilia Arce-Appell
4374 Liverpool Ct.
Denver, CO 80249

I further certify that I have forwarded a true and correct copy of the foregoing **ORDER OF DISMISSAL** by depositing same in the interoffice mail, this 27 day of May, 2003, addressed to:

Linda M. Davison
Assistant City Attorney
Employment Law Section

Tracy Howard
Manager of Safety

Captain Jennifer Steck
Denver Police Department

Vigando