JOYCE ELLIOTT

v. Docket No. 96-CORR-026

WEST VIRGINIA DIVISION OF CORRECTIONS/WEST VIRGINIA DIVISION OF PERSONNEL

DECISION

The grievant, Joyce Elliott, is employed by the West Virginia Division of Corrections (CORR) as an Office Assistant II (OAII) assigned to the Mt. Olive Correctional Center (MOCC). She filed a grievance at Level I, on June 28, 1995, alleging that CORR had breached an agreement that she would be hired as an Office Assistant III (OAIII). Her claims were rejected at the lower levels, and appeal to Level IV was made. At a hearing held August 11, 1997, the undersigned granted a motion by the Respondents that the grievance be dismissed or denied on the grounds that it was not timely filed.

Background

There is no dispute over the facts of the case. The grievant was first hired by CORR on November 1, 1994. When she started to work, she believed she had been hired as an OAIII. During orientation, an MOCC administrator advised employees that there were other jobs open at MOCC, and anyone who met the minimum requirements for the posts established by the West Virginia Division of Personnel (Personnel), (See footnote 1) could make application. On November 4, 1994, the grievant reported to MOCC Human Resources Director Rita Albury that she was interested in a Secretary I position. During their conversation, Ms. Albury informed the grievant that she had been hired as an OAII. The grievant explained that she been offered an OAIII position by Linda Pond, an employee in MOCC's Human Resources Department. The record is not clear on the substance of the remainder of their conversation, but it is apparent that Ms. Albury declined to change the grievant's status to OAIII.

On November 7, 1994, the grievant approached Ms. Albury again, and was told to discuss the matter with MOCC Warden George Trent. She informed Warden Trent's secretary of the nature of her problem, and was advised that he would contact her. On November 10, 1994, the secretary advised the grievant that Warden Trent would not become involved in the matter; the grievant was

directed to contact MOCC's Human Resources Department.

In a November 10, 1994 memorandum to Ms. Albury, the grievant confirmed that Ms. Pond had made the offer on September 1, 1994, and that she had accepted on that date. There was no request in the memo that Ms. Albury take any particular action on the matter.

The grievant talked to Ms. Albury again on December 15, 1994. Apparently, the grievant'saccount of her pre-employment discussions with Ms. Pond did not persuade Ms. Albury that the grievant had been offered an OAIII position. She again declined to change the grievant's classification.

On December 28, 1994, the grievant took her complaint to MOCC Associate Warden Teresa Waid. Ms. Waid directed her to send a detailed written account of events to MOCC Deputy Warden Painter. In the memorandum, dated December 29, 1994, the grievant recounted her discussions with Ms. Pond and asked to be placed in an OAIII position. The grievant met with Mr. Painter on or about January 20, 1995. The record does not reflect whether Mr. Painter took any action on her complaint. The grievant met with Ms. Waid again in May 1995. The evidence does not reveal what response Ms. Waid made at that time. As noted, the grievance was filed on June 28, 1995.

Argument

It is the grievant's position that she entered into a binding oral agreement with Ms. Pond on September 1, 1994, that she would be hired as an OAIII, and that the agreement was breached on or about November 1, 1994, when she began employment at MOCC as an OAII. She concedes that the grievance was not filed within ten days of the grievable event as required by W.Va. Code §29-6A-4(a), (See footnote 2) but asserts that her unfamiliarity with the grievance process and her good faith efforts to reach an informal resolution should excuse the delay. CORR and Personnel essentially respond that thegrievant has advanced no valid defense to their claim that the grievance was not timely filed.

Findings and Conclusions

Naylor v. W.Va. Human Rights Commission, 378 S.E.2d 843 (W.Va. 1989), holds that an employer may be estopped from raising a timeliness objection to an employee's complaint when the employer has purposely made statements or taken actions which were designed to cause the employee to delay filing, or which the employer should have understood would cause a delay. Prior

Level IV decisions have consistently followed this approach. See, Watkins v. Logan County Bd. of Educ., Docket No. 93-23-052 (Sept. 20, 1993).

During her Level IV testimony, the grievant could not clearly recollect the dates and substance of all of her various conversations with MOCC officials. She readily admitted, however, that while certain administrators made remarks to the effect that her concerns would be addressed, no one ever lead her to believe that she would be promoted to OAIII. The grievant also conceded that no official ever attempted to dissuade her from filing a grievance, and she had no reason to believe that any of the responses she received were purposely delayed.

The record as a whole supports that MOCC officials were never inclined to grant the grievant OAIII status, and she delayed filing only because she believed an informal approach was preferable. There is no evidence that any administrator enforced this belief or otherwise caused her to delay a formal action. Reluctance to exercise one's legal rights is no defense to a timeliness claim, and the grievant has advanced no other reason for not filing within ten days of the alleged breach of contract. Accordingly, the grievance is **DENIED**

Any party may appeal this decision to the Circuit Court of Fayette County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code 18-29-7. Neither with West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

.

_____

JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated:

October 28, 1997

CERTIFICATE OF SERVICE

I, Jerry A. Wright, Administrative Law Judge, do hereby certify that I have this 28th day of October, 1997 served a true copy of the foregoing **DECISION** upon the following to their addresses as follows:

Leslie Kiser, Esq.

Nicholas Hun, Commissioner

Division of Corrections

Division of Corrections

112 California Avenue

112 California Avenue

Building 4, Room 300

Building 4, Room 300

Charleston, WV 25305 Charleston, WV 25305

Elaine A. Harris

Joyce Elliott

Communications Workers of America

P.O. Box 104

Huntington Square, Suite 804

Dixie, WV 25059

900 Lee Street

Charleston, WV 25301

_____

JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Footnote: 1 *Personnel was joined as an indispensable party in the case because it appeared from the Level IV appeal that the grievant might assert that she was performing the duties of an OAIII. It became clear at the outset of the Level IV hearing, however, that her claim to an OAIII classification was predicated on a breach of contract theory.*

Footnote: 2 *"Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant."*