

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: November 16, 2018; Ruling No. 2019-4807; Agency: Department of Behavioral Health & Developmental Services; Outcome: Grievant Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

COMPLIANCE RULING

In the matter of the Department of Behavioral Health and Developmental Services
EEDR Ruling Number 2019-4807
November 16, 2018

The Department of Behavioral Health and Developmental Services (the “agency”) has requested a compliance ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management in relation to the grievant’s July 25, 2018 grievance. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for advancing or concluding her grievance.

FACTS

On or about July 25, 2018, the grievant initiated a grievance with the agency.¹ The second step response was mailed to the grievant, by certified mail, on August 29. The certified mailing containing the second step response was returned unclaimed. However, on October 5, the agency sent, by both certified and regular mail, a notice of noncompliance to the grievant.² In its notice of noncompliance, the agency requested a response from the grievant within five workdays of her receipt of the notice. Based on the grievant’s alleged noncompliance with the grievance procedure, the agency seeks a compliance ruling allowing it to administratively close the grievance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.³ That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without EEDR’s involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.⁴ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming

¹ According to the agency, the grievant has resigned from her position since initiating the grievance.

² Based on the tracking information provided by the agency, it appears that the certified mailing containing the notice of noncompliance was also returned unclaimed. However, the mailing of correspondence, properly addressed and stamped, raises a presumption of receipt of the correspondence by the addressee. *E.g.*, *Washington v. Anderson*, 236 Va. 316, 322, 373 S.E.2d 712, 715 (1988). For purposes of this ruling, therefore, EEDR will assume the grievant received the agency’s notice of noncompliance sent by regular mail because there is nothing to indicate that it was improperly addressed.

³ *Grievance Procedure Manual* § 6.3.

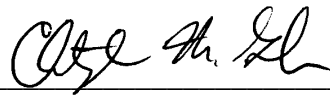
⁴ *See id.*

noncompliance may seek a compliance ruling from EEDR, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EEDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EEDR's order.⁵

In this case, the agency's request for a compliance ruling appears to be premature, as there is no indication that the grievant received the second step response. Ordinarily, this is a situation in which EEDR would direct the agency to deliver a copy of the second step response to the grievant and allow her an opportunity to advance or conclude her grievance before seeking a compliance ruling. Based on a review of the information submitted by the parties, however, it is evident that the grievant has not contacted the agency or taken any action to proceed with her grievance for an extended period of time. Indeed, over three months have passed since the second step meeting took place, and over one month has passed since the agency mailed her its notice of noncompliance.

Accordingly, and in the interest of expeditiously resolving the issues raised in the grievance, the grievant is ordered to contact her human resources office and indicate whether she wishes either to conclude the grievance or advance to the third step **within ten workdays of the date of this ruling.**⁶ If she does not, the agency may administratively close the grievance without any further action on its part. The grievance may be reopened only upon a timely showing by the grievant of just cause for the delay (for example, a serious illness, or other circumstances beyond the grievant's control).

EEDR's rulings on matters of compliance are final and nonappealable.⁷



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⁵ While in cases of substantial noncompliance with procedural rules the grievance statutes grant EEDR the authority to render a decision on a qualifiable issue against a noncompliant party, EEDR favors having grievances decided on the merits rather than procedural violations. Thus, EEDR will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, EEDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

⁶ See *Grievance Procedure Manual* § 3.2.

⁷ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).