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COMPLIANCE RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2021-5185
December 4, 2020

The Department of Behavioral Health and Developmental Services (the “agency”) has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management in relation to the grievant's August 28, 2020 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 August 28, 2020, the grievant initiated a grievance with the agency. The second-step respondent issued a response dated October 16, which the grievant appears to have picked up in person on October 22. Having received no further response from the grievant indicating whether she wished to advance or conclude the grievance, the agency sent a notice of noncompliance to her by both certified mail and regular mail on November 4. In its notice of noncompliance, the agency requested a response from the grievant within five workdays of her receipt of the notice. The tracking information provided by the agency indicates that the notice of noncompliance sent by certified mail was delivered to the grievant’s address on November 10.¹ Because more than five workdays have elapsed since the grievant received notice of her alleged noncompliance and she has not yet advanced or concluded her grievance, 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.² That process assures that the parties first communicate with each other about the noncompliance, and resolve any problems voluntarily, without EDR's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow

¹ For purposes of this ruling, EDR will also assume the grievant received the notice of noncompliance sent by regular mail because there is nothing to indicate that it was improperly addressed. *Cf., e.g.,* Washington v. Anderson, 236 Va. 316, 322, 373 S.E.2d 712, 715 (1988) (holding that the mailing of correspondence, properly addressed and stamped, raises a presumption of receipt of the correspondence by the addressee).

² *Grievance Procedure Manual* § 6.3.

five workdays for the opposing party to correct any noncompliance.³ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EDR, 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 EDR finds that either party to a grievance is in noncompliance, its 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 EDR's order.⁴

In this case, the grievant appears to have failed to advance or conclude her grievance within five workdays of receiving the agency's second resolution step response, as required by the grievance procedure.⁵ Moreover, the agency notified the grievant of her noncompliance and she has not advanced or concluded her grievance.

As the grievant has apparently failed to advance or conclude her grievance in a timely manner, she has failed to comply with the grievance procedure. EDR therefore orders the grievant to correct her noncompliance **within ten workdays of the date of this ruling** by notifying her human resources office in writing that she wishes either to conclude the grievance or advance to the third step. 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).

EDR's ruling on matters of compliance are final and nonappealable.⁶

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³ See *id.*

⁴ Although the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party in cases of substantial noncompliance with procedural rules, EDR favors having grievances decided on the merits rather than procedural violations. Thus, EDR 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, EDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

⁵ See *Grievance Procedure Manual* § 3.2.

⁶ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).