

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: April 29, 2015;
Ruling No. 2015-4144; Agency: Department of Behavioral Health and Developmental
Services; Outcome: Agency Not in Compliance.



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

COMPLIANCE RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2015-4144
April 29, 2015

The grievant 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 March 2, 2015 grievance. The grievant alleges that the Department of Behavioral Health and Developmental Services (the “agency”) has failed to comply with the time limits set forth in the grievance procedure for providing the third step response.

FACTS

On or about March 2, 2015, the grievant initiated a grievance with the agency. The grievant advanced her grievance to the third step on or about March 19, 2015. The grievant apparently met with the third step-respondent on April 3, 2015. On April 6, 2015, the third step-respondent advised the grievant that she needed until April 13, 2015 to complete her response. Having not yet received the third step response, on April 16, 2015, the grievant gave the third step-respondent (the facility director) written notice of noncompliance. On April 20, 2015, the third step-respondent advised the grievant that she needed additional time to complete the third step response, but she did not provide a date by which the response would be prepared. By letter dated April 23, 2015, the grievant requested a compliance ruling from EDR.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹ That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without EDR’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.² 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 an EDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its

¹ *Grievance Procedure Manual* § 6.3.

² *See id.*

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.³

In this case, the grievant's request for a compliance ruling appears to be premature because she has not shown that she first notified the agency head in writing of the alleged procedural violation. Based on a review of the information submitted, however, it is evident that more than five workdays have elapsed since the grievant and the third step-respondent met, and that the grievant has not agreed to the third step respondent's continued delay in responding.⁴ In the interest of expeditiously resolving the issues raised in this grievance, the agency is ordered to correct its noncompliance **within ten work days of the date of this ruling** by providing the grievant with a written third step response.

It should be noted that the third step-respondent has been exceedingly polite in stating the need for a delay in her response to this grievance, which is commendable. Further, we understand that given the nature of the charges against the grievant and the demands on the time of a facility director additional time could be necessary for a full review. Perhaps if the grievant were notified of the specific reasons the third step-respondent needs additional time an agreement could be reached on a reasonable extension between the grievant and the third step-respondent. However, as stated, the charges against the grievant are serious and in fairness the grievant deserves expeditious resolution to the situation as well, one way or another.

EDR's rulings on matters of compliance are final and nonappealable.⁵



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³ While in cases of substantial noncompliance with procedural rules the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party, 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.

⁴ Although the agency head has not received the grievant's notice of noncompliance, EDR has notified the agency that the grievant has requested a compliance ruling.

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