

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: June 30, 2016;
Ruling No. 2016-4386; Agency: Department of Behavioral Health and Developmental
Services; Outcome: Grievant 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 2016-4386
June 30, 2016

The Department of Behavioral Health and Developmental Services (the “agency”) has requested a compliance ruling related to the grievant’s April 15, 2016 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 April 15, 2016, the grievant initiated a grievance with the agency. On or about April 22, 2016, the agency notified the grievant that the first step response was available to be picked up from the Human Resources office, as the grievant had requested rather than receiving the package by mail. After the grievant apparently did not pick up the letter, the agency sent the first step response to the grievant by certified mail. The first step response was subsequently returned to the agency as unclaimed. On June 1, 2016, the agency sent a letter of noncompliance to the grievant via regular and certified mail, indicating that the agency had not received a response from her and would ask EDR to issue a noncompliance ruling if she did not respond within five workdays.¹ Although the grievant failed to pick up the copy of the letter sent by certified mail, the copy of the letter sent by regular mail is presumed to have been delivered.² On or about June 27, 2016, still not having had a response from the grievant, the agency requested a compliance ruling from EDR regarding the April 15, 2016 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 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.⁴ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming

¹ Although the grievant failed to pick up the copy of the letter sent by certified mail, the copy of the letter sent by regular mail appears to have been delivered.

² 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).

³ *Grievance Procedure Manual* § 6.3.

⁴ *See id.*

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 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.⁵

In this case, it appears that the grievant has never actually received the first step response. However, under these facts, EDR cannot find that to be by the fault of the agency. The grievant has repeatedly failed to pick up the first step response, despite the agency's attempts to provide it to her both in person and by mail. Further, the agency has notified the grievant that if she did not respond within 5 workdays, it would seek a noncompliance ruling that would allow it to administratively close the grievance. Even though the grievant has not received the first step response, if she intended to continue with her grievance, she should have been well aware at this point that she needed to contact the agency's human resources office. However, although the agency has provided the grievant with ample time to do so, the grievant 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.⁶ The Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management therefore orders the grievant to correct her noncompliance **within ten work days of the date of this ruling** by notifying her human resources office in writing that she wishes either to conclude the April 15, 2016 grievance or advance the grievance to the second resolution 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 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 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.

⁶ See *Grievance Procedure Manual* § 3.1.

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