

Issue: Compliance/5-day rule; Ruling Date: March 29, 2004; Ruling #2004-680;  
Agency: Department of Mental Health, Mental Retardation and Substance Abuse  
Services; Outcome: EDR declines to rule in favor of the grievant



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**COMPLIANCE RULING OF DIRECTOR**

In the matter of the Department of Mental Health, Mental Retardation, and  
Substance Abuse Services  
Ruling Number 2004-680  
March 29, 2004

The grievant has requested a compliance ruling from this Department (EDR) regarding the grievance she initiated with the Department of Mental Health, Mental Retardation, and Substance Abuse Services (the agency) on October 31, 2003. The grievant claims that the agency has not complied with grievance procedure rules on several occasions. Based upon the agency's alleged noncompliance and section 6.3(5) of the *Grievance Procedure Manual*, which allows the EDR Director to render a decision against a non-compliant party, the grievant requests that the EDR Director rule in her favor on her October 31<sup>st</sup> grievance. For the reasons set forth below, this Department declines to rule in favor of the grievant.

**FACTS**

The grievant asserts that the agency has failed to comply with the grievance procedure's mandatory 5-day timeframes on several occasions and has also committed other procedural violations including failing to properly sign and date the *Grievance Form A*. The grievance, however, has moved through the management resolution steps and is currently scheduled for a hearing at week's end.

**DISCUSSION**

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>1</sup> That process assures that the parties first communicate with each other about the purported noncompliance, and resolve any compliance problems voluntarily without this Department'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. If the agency fails to correct the alleged noncompliance, the grievant may request a ruling from this Department. Should this Department find that the agency violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this

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<sup>1</sup> See *Grievance Procedure Manual* § 6, pages 16-18.

Department may resolve the grievance in the grievant's favor unless the agency can establish just cause for its noncompliance.

In addition, the grievance procedure requires that all claims of noncompliance be raised immediately.<sup>2</sup> Thus, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance at a later time.<sup>3</sup> Further, this Department has long held that it is incumbent upon each employee to know her responsibilities under the grievance procedure. Neither a lack of knowledge about the grievance procedure or its requirements, nor reliance upon general statements made by agency management or human resources will relieve the grievant of the obligation to raise a noncompliance issue immediately, as provided in the grievance procedure, upon becoming aware of a possible procedural violation.

Generally speaking, if a party has corrected any purported non-compliance prior to this Department's (EDR) receipt of a ruling request, we typically consider the non-compliance to be cured and, thus, there is no reason for EDR to take further action. An exception might be a case in which the non-compliant party has violated a substantial procedural requirement of the grievance procedure. In such cases, this Department has the authority to render a decision against the non-complying party on any qualifiable issue.<sup>4</sup> EDR would generally consider such an action only where the non-compliant party engaged in bad faith or significantly prejudiced the other party. This is not such a case. Here, although the grievant now claims that the agency has been tardy in responding to her grievance and deficient in signing and dating grievance responses, there is no evidence that the grievant ever contacted the agency head to report the alleged noncompliance, as required under the grievance procedure. Furthermore, because the grievance has now advanced through management resolution steps, the issues to which the grievant now objects have essentially been both waived and cured (corrected). Most importantly, the grievant has not cited to any prejudice suffered as a result of the alleged agency noncompliance. Thus, for the reasons set forth above, this Department declines to rule in favor of the grievant.

The parties are advised that all requirements of the grievance procedure are to be followed, and that repeated disregard of procedural rules *could* serve as evidence of bad faith. This Department's rulings on matters of compliance are final and not subject to further review.<sup>5</sup>

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Claudia Farr  
Director

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<sup>2</sup> *Grievance Procedure Manual* § 6.3, page 17.

<sup>3</sup> *Id.*

<sup>4</sup> *Grievance Procedure Manual* § 6.3(5), page 17.

<sup>5</sup> Va. Code 2.2-1001(5).

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