

Issue: Compliance/5-day rule/discipline-written notice; Ruling Date: May 9, 2005; Ruling #2005-1020; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: grievant out of compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Mental Health,
Mental Retardation and Substance Abuse Services
Ruling Number 2005-1020
May 9, 2005

The Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) has requested a compliance ruling in the grievant's February 16, 2005 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

The grievant was employed as a medication assistant. On January 18, 2005, the agency issued the grievant a Group II Written Notice. The grievant initiated a grievance challenging this disciplinary action on February 16, 2005. After the first-step respondent denied the grievant's request for relief, the grievant advanced her grievance to the second resolution step on February 22, 2005. A second-step meeting was held on March 9, 2005, and the second-step respondent provided the grievant with a written response on March 17, 2005. The agency states that the grievant voluntarily resigned from the agency on March 17, 2005.

On March 30, 2005, after the grievant had failed either to advance or conclude her grievance, the agency sent the grievant a written notice of noncompliance by regular and certified mail. On April 15, 2005, the agency received a certified mail receipt showing delivery of the notice of noncompliance to the grievant. The agency alleges that despite the notice of noncompliance, to date the grievant has failed to advance or conclude her grievance.

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 this Department's (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 the EDR

¹ *Grievance Procedure Manual*, § 6.3.

² *Grievance Procedure Manual*, § 6.3.

Director, 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.

In previous rulings, EDR has held that an agency is free to close a grievance where the grievant has failed to correct noncompliance within five days of notification, provided the agency notified the grievant in writing of the administrative closing and of the grievant's right to appeal the agency's action to this Department.³ While this approach has the benefit of efficiency, we believe a more equitable policy would be to apply the *Grievance Procedure Manual's* noncompliance rules more uniformly across compliance issues and between the parties. Thus, generally, 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 its delay in conforming to EDR's order.⁴

In this case, the grievant failed to advance or conclude her February 16, 2005 grievance within five work days of receiving the second-step response. The agency notified the grievant of her noncompliance on March 30, 2005, but the grievant has not subsequently advanced or concluded her grievance.

As the grievant has failed to advance or conclude her grievance in a timely manner, she has failed to comply with the grievance procedure. This Department therefore orders the grievant to correct her noncompliance within ten work days of the issuance of this ruling by either advancing or concluding her grievance. If she does not, the agency may administratively close her grievance without any further action on its part. The grievance could be reopened only upon a timely showing by the grievant of just cause for the delay (for example, a serious illness, death in the grievant's immediate family, or other circumstances beyond the grievant's control).

Claudia T. Farr
Director

Gretchen M. White

³ See Ruling Nos. 2004-728, 2004-935, 2004-944.

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

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