

Issue: Compliance/agency claims grievant failed to comply with second step meeting; Ruling Date: December 9, 2005; Ruling #2006-1183; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: agency's request for compliance ruling premature; both parties expected to cooperate to accomplish second-step meeting or choose to waive.



*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 No. 2006-1183  
December 9, 2005

The Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS or the agency) has asked for a compliance ruling from this Department allowing it to administratively close a grievance. The agency alleges that the grievance should be closed because the grievant failed to cooperate with its efforts to schedule a second-step meeting.

FACTS

The grievant was employed by the agency as a Rehab Tech. On July 19, 2005, the agency advised the grievant of its intent to issue him a Group I Written Notice for disruptive behavior and a Group II Written Notice for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy. The grievant received the two written notices on July 21, 2005, at which time his employment with the agency was terminated.

On July 20, 2005, the grievant initiated a grievance challenging the agency's announced intent to take disciplinary action. Using the expedited process, the grievant subsequently initiated a second grievance on August 3, 2005 challenging the issuance of the written notices and his resulting termination.

The parties met for a second-step meeting on the grievances on August 10, 2005. Two days after that meeting, the grievant, through his union representative, requested a compliance ruling from this Department on the second-step respondent's failure to allow the grievant to question witnesses. As the grievant had not previously given the agency head written notice of noncompliance, we determined that the compliance ruling request was premature.<sup>1</sup> However, the ruling advised the agency that under *no* circumstance may a grievant be denied the opportunity to question witnesses, although in some very narrow circumstances direct questioning may be limited.<sup>2</sup>

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<sup>1</sup> See EDR Ruling No. 2006-1105.

<sup>2</sup> *Id.*

After the issuance of this Department's ruling, another second-step meeting was scheduled for September 21, 2005. This meeting was apparently adjourned due to the unavailability of the grievant's witnesses. The grievant subsequently sent a letter of noncompliance to the facility head, to which the agency responded by letter dated September 30, 2005. In its September 30<sup>th</sup> letter, the agency offered to continue the second-step meeting on October 6, 2005 and advised the grievant to contact the agency to confirm the meeting date and time.<sup>3</sup> The agency asserts that this letter was sent to the grievant by first-class and certified mail, but that the certified mail was unclaimed and returned to the agency. The grievant denies having received the letter from the agency.<sup>4</sup>

On October 11, 2005, the agency sent another letter to the grievant. This letter advised the grievant that because the agency had not heard from him regarding the proposed October 6<sup>th</sup> meeting, it was "setting up a final second step meeting" for October 17, 2005 at 10:00 am. The grievant was asked to contact the agency by 5:00 pm on October 14, 2005 to confirm the October 17<sup>th</sup> meeting. The October 11<sup>th</sup> letter also advised the grievant that if he did not contact the agency "by the documented date" the agency would have "no other option but to administratively close [his] grievance." The grievant denies that he received the October 11<sup>th</sup> letter.

The agency states that on October 14, 2005, the grievant confirmed his availability for the October 17<sup>th</sup> meeting date.<sup>5</sup> The grievant subsequently advised the agency that he would be unable to attend the meeting as he had to go out of town.<sup>6</sup> The agency alleges that the grievant stated that he would call the agency by October 20, 2005 to reschedule the meeting, but that he failed to do so. The grievant denies that the burden to reschedule the meeting was solely his. Rather, he asserts that the parties agreed that each would try to contact the other, but that he was unable to contact the agency by October 20, 2005, as he was delayed out of town, and that the agency did not attempt to contact him.

By letter dated October 21, 2005, the agency advised the grievant and his representative that it intended to request a compliance ruling from this Department. The agency states that this letter was sent by both first-class and certified mail, but that the

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<sup>3</sup> In its compliance ruling request, the agency states its September 30<sup>th</sup> letter was sent "without having been notified by either [the grievant's representative or the grievant] of any non-compliance." We note, however, that contrary to this assertion, the first paragraph of that letter states that the agency "ha[s] received and reviewed [the grievant's letter] Letter of Non-compliance of the Employee Grievance Process." Similarly, the agency's October 11, 2005 letter to the grievant states, "On September 30, 2005 you were sent a letter to address your concern of non-compliance...."

<sup>4</sup> The grievant admits that on at least one occasion, he received notice of a certified letter from the postal service, but claims that he was unable to pick up the letter because the post office is closed during his non-work hours. He also states that he advised the agency not to send him material by certified mail for this reason.

<sup>5</sup> The grievant asserts that he was contacted by phone by an agency representative regarding his availability for a second-step meeting. He does not recall the specific dates of the phone call or the meeting but admits that the agency's dates may be correct.

<sup>6</sup> The grievant states that he was required to go out of town for his present job.

letters sent by certified mail were returned to the agency. The grievant denies receiving the October 21<sup>st</sup> letter, and his representative states that he was unaware of any compliance ruling request by the agency until this Department's investigation.

On October 25, 2005, the agency requested a compliance ruling from this Department, asking that it be allowed to "administratively close this grievance." The agency argues that its "repeated efforts to complete the second-step meeting have been thwarted by cancellation or failure to appear." In particular, the agency claims that it does not "seem reasonable" that the grievant would have had to go out of town immediately after having confirmed his availability on October 17, 2005.<sup>7</sup> The agency also asserts that neither the grievant nor his representative have requested an extension of time for the second-step meeting and "have not attempted to satisfy their own time frame to reschedule the meeting."

### DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>8</sup> That process assures that the parties first communicate with each other about the 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 or the opposing party to correct any noncompliance.<sup>9</sup> If the party fails to correct the alleged noncompliance, the complaining party may request a ruling from this Department.

For a letter of noncompliance to satisfy this procedural prerequisite, it must, at a minimum, provide clear notice that the party writing the letter considers the other party's conduct to constitute noncompliance, and it must advise the opposing party of the specific conduct which is alleged to be noncompliant. Although no specific wording is required, the letter must be sufficiently direct and unambiguous that it fulfills its purpose, which is to give notice to the opposing party and allow that party an opportunity to cure the noncompliance within five workdays.

In this case, the agency's October 11<sup>th</sup> letter, which the agency has identified as its "non-compliance letter," does not provide the necessary notice. In particular, the letter does not specifically advise the grievant that the agency considers his failure to appear or to confirm his attendance at the proposed October 6<sup>th</sup> second-step meeting to constitute non-compliance with the grievance procedure, which must be corrected within five

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<sup>7</sup> We note, however, that the agency has not presented any evidence to call into question the truthfulness of the grievant's assertion that he was called out of town for work.

<sup>8</sup> *Grievance Procedure Manual* § 6.1.

<sup>9</sup> *Grievance Procedure Manual* § 6.3.

workdays.<sup>10</sup> To the contrary, the letter could be fairly read to advise the grievant that if he failed to contact the agency by December 14, 2005—a condition with which the grievant arguably complied—the agency would *then* consider him to be noncompliant. Accordingly, as the agency’s October 11<sup>th</sup> letter fails to give adequate notice of noncompliance, the agency’s request for a compliance ruling is premature.

We note, however, that this is the second compliance ruling request we have received in this matter, and that the pending grievances have remained stalled at the second management resolution step since August 2005. Moreover, it appears that both parties share some responsibility for the current impasse. The grievant and the agency are therefore counseled that this Department expects cooperation by *both* parties throughout the management resolution steps, and that a failure to cooperate by either party could result in a finding of noncompliance. Further, to the extent the parties are unable to resolve their conflict regarding the scheduling of the second-step meeting, they should be aware that they may mutually agree to waive the second-step meeting.

This Department’s rulings on matters of compliance are final and nonappealable<sup>11</sup>.

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Claudia T. Farr  
Director

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<sup>10</sup> It appears the agency considers the grievant’s conduct subsequent to the October 11<sup>th</sup> letter—in particular, the grievant’s cancellation of the October 17<sup>th</sup> meeting—to constitute noncompliance as well. However, the agency did not provide the grievant with a letter of noncompliance regarding these events.

<sup>11</sup> Va. Code § 2.2-1001(5).