

Issue: Compliance/grievance procedure/5-day rule; Ruling Date: March 21, 2007;
Ruling #2007-1557; Agency: Department of Mental Health, Mental Retardation and
Substance Abuse Services; Outcome: grievant not in 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 No. 2007-1557
March 21, 2007

The Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) seeks to administratively close the grievant's November 7, 2006¹ 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 his grievance.

FACTS

On or about November 7, 2006, the grievant initiated an expedited grievance after receiving a Group III Written Notice with suspension. Following a face-to-face meeting, the second resolution step-respondent prepared a written response on November 14, 2006. The grievant states that this second step response was given to him at that time. He further states that he then returned the grievance package to the facility director. A third resolution step response from the facility director, dated November 16, 2006, is included in the grievance file. The agency sent the grievance package, with the third step response, to the grievant on November 20, 2006, by certified mail. That package apparently never reached the grievant because on January 23, 2007, the agency received the package back from the post office as it had gone unclaimed.

The agency sent a letter of noncompliance to the grievant on February 2, 2007, by first class mail.² The letter stated that the grievant was not in compliance because he had not indicated his intention to proceed or conclude the grievance within five workdays. On February 12, 2007, the grievant came to the human resources office, picked up the grievance packet, and was instructed by the agency about the noncompliance and that he needed to respond within five workdays. Since that time, the grievant has failed to return

¹ The actual date on the copy of the Grievance Form A provided to this Department is unclear. However, the date appears to be November 7, 2006.

² The agency's notice of noncompliance letter contains a number of errors, but foremost it incorrectly states that the grievant was to return the grievance package and indicate whether he wished to conclude the grievance or to "continue to the third-step," instead of requesting qualification for hearing.

the grievance package to the agency to request qualification for hearing or conclude the grievance. As more than five workdays have elapsed since the notice of noncompliance letter and the date when the grievant picked up the grievance package, and the grievant has not yet cured the noncompliance, the agency seeks a compliance ruling.³

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.⁴ 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.⁵ 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 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. 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.⁶

This grievance presents an unorthodox procedural history. First, when the grievant returned the grievance package to the agency following the second step meeting, the agency should have realized the grievant was attempting to request qualification for hearing, the appropriate next step in an expedited grievance.⁷ However, when the grievant gave the grievance package to the facility director, he had failed to check the appropriate box on the Grievance Form A to indicate his intent to request qualification. Moreover, a request for qualification should have been directed to the agency head, not the facility director.⁸ In addition, it appears that the first time the grievant received the inexplicable third step response⁹ was on February 12, 2007, when he picked up the

³ There is no indication in this letter that the agency provided a copy of the ruling request to the grievant as is required by the grievance procedure. *Grievance Procedure Manual* § 6.3.

⁴ *Id.*

⁵ *Id.*

⁶ 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.

⁷ See *Grievance Procedure Manual* § 2.4.

⁸ *Id.*

⁹ The grievant initiated a grievance pursuant to the expedited process, as he had received a disciplinary action with suspension. See *id.* Under the expedited process, there is no third step respondent. *Id.*

grievance package in the agency human resources office. Therefore, the noncompliance letter sent by the agency on February 2, 2007,¹⁰ was sent *before* the grievant had even received the document to which the agency was seeking his response.

Even with these procedural abnormalities, however, this Department cannot ignore the fact that the agency has attempted to provide the grievant notice in good faith of the status of his grievance and requested that he correct the apparent noncompliance. The grievant has also failed to advance or conclude his grievance within five workdays of picking up the grievance package on February 12, 2007, and the agency appears to have advised the grievant of his noncompliance. Therefore, as the grievant has failed to advance or conclude the grievance in a timely manner, he has failed to comply with the grievance procedure. This Department therefore orders the grievant to correct his noncompliance **within ten workdays of the date of this ruling** by notifying his agency human resources office in writing that he wishes to either conclude the grievance or request qualification of the grievance for hearing. If the grievant wishes to request qualification for hearing, the request should be made to the agency head.¹¹ If the grievant does not make a timely response **within ten workdays**, 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).

This Department would also like to take this opportunity to remind all parties to the grievance procedure that if they have questions about the grievance process or a particularly peculiar procedural situation, such as that presented in this case, they should feel free to contact EDR's toll-free, confidential AdviceLine at 1-888-23-ADVICE (232-3842). AdviceLine is available Monday through Friday, 8:30 a.m. to 4:30 p.m.

This Department's rulings on matters of compliance are final and nonappealable.¹²

Claudia T. Farr
Director

¹⁰ This letter did not include any discussion of any noncompliance by the grievant for failing to complete the Grievance Form A or for returning the grievance package to an incorrect individual. Consequently, it appears the agency was assuming the grievant wanted to proceed under the regular grievance process instead of the expedited process.

¹¹ See *Grievance Procedure Manual* § 2.4.

¹² See Va. Code § 2.2-1001(5).