

Issue: Compliance/grievance procedure/5-day rule; Ruling Date: March 1, 2007; Ruling #2007-1558; 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. 2007-1558
March 1, 2007

The Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) seeks to administratively close the grievant's November 1, 2006 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 November 1, 2006, the grievant initiated a grievance which alleges workplace harassment. The third resolution step response was provided on November 17, 2006. Since that time, the grievant has failed to return the grievance package to the agency to advance or conclude the grievance. Because the grievant never advanced or concluded her grievance within five workdays of receiving the third resolution step response, the agency sent the grievant a notice of noncompliance on February 2, 2007.¹ As more than five workdays have elapsed since the notice of noncompliance letter, and the grievant has not yet cured the noncompliance, the agency seeks a compliance ruling.

DISCUSSION

¹ While no return receipt was provided by the agency, 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). However, if the grievant were to show that she did not receive any of these notifications, for instance, because the grievant had moved, such facts will be taken into account as to whether good cause may exist for reopening the grievance should it be administratively closed. This Department considers it a good practice for agencies to send correspondence and notifications to a grievant via certified mail, return-receipt requested, especially those items that the agency may need to show the grievant has received.

The grievance procedure requires both parties to address procedural noncompliance through a specific process.² 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.³ 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.⁴

In this case, the grievant has failed to advance or conclude her grievance within five workdays of receiving the agency's third resolution step response. Moreover, the agency appears to have notified the grievant of her noncompliance, but the grievant has not advanced or concluded the grievance.

As the grievant has failed to advance or conclude the 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 workdays of the date of this ruling** by notifying her agency human resources office in writing that she wishes to either conclude the grievance or advance the grievance to the qualification for hearing stage of the grievance process. 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).

This Department's rulings on matters of compliance are final and nonappealable.⁵

Claudia T. Farr
Director

² *Grievance Procedure Manual* § 6.3.

³ *Id.*

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.

⁵ *See* Va. Code § 2.2-1001(5).