

Issue: Compliance: Grievance Procedure – 5 Day Rule: Ruling Date: May 8, 2007;
Ruling #2007-1668; 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 Number 2007-1668
May 8, 2007

The Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) seeks to administratively close the grievant's January 29, 2007 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 is employed as a Human Service Care Worker with the agency. On January 29, 2007, the grievant initiated an expedited grievance challenging her receipt of a Group III Written Notice with termination. On or about February 6, 2007, the second management resolution step response was sent to the grievant via regular and certified mail. The certified mail was returned to the agency as unclaimed on February 26, 2007.

On April 4, 2007, the grievant allegedly told the agency that she had not received the second step response, but that she would come by the office on April 6, 2007 to pick up a copy of the response. After failing to hear from the grievant, on April 11, 2007, the agency sent the grievant a notice of noncompliance, with a copy of the grievance and the second step response enclosed, via certified and regular U.S. Mail. According to United States Postal Service (USPS) tracking receipt, the USPS left notice of the noncompliance letter at the grievant's home address on April 12, 2007. Presumably, the first class mail version has already been received at the grievant's address.

During a telephone conference on April 18, 2007, the grievant allegedly told the agency that she "didn't remember receiving" the second step response. The agency informed the grievant that the second step respondent had denied her request and advised the grievant that it was her final day to either conclude the grievance or advance it to the next step. According to the agency, the grievant stated that she wanted to continue with her grievance. As such, the agency advised the grievant that the grievance form must be

received by the agency no later than April 23, 2007. The grievant failed to return the grievance form to the agency by April 23, 2007 and as such, the agency seeks a compliance ruling.

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 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 its delay in conforming to EDR's order.³

In this case, the grievant has failed to advance or conclude her grievance within five work days of receiving the second management resolution step response. Moreover, the agency appears to have notified the grievant of her noncompliance, but the grievant has not 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 date of this ruling** by either concluding her grievance or requesting that the agency head qualify her grievance for hearing. If she does not, the agency may administratively close her 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).

¹ *Grievance Procedure Manual*, § 6.3.

² *Id.*

³ 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.

This Department's rulings on matters of compliance are final and nonappealable.⁴

Claudia T. Farr
Director

⁴ See Va. Code § 2.2-1001(5).