

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: September 11, 2007; Ruling #2008-1757; Agency: Virginia Department of Health; Outcome: Grievant Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Mental Health,
Mental Retardation and Substance Abuse Services
Ruling No. 2008-1757
September 11, 2007

The Department of Health (VDH or the agency) seeks to administratively close the grievant's November 17, 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 his grievance.

FACTS

On November 17, 2006, the grievant initiated a grievance challenging his performance evaluation. On or about February 20, 2007, the agency delivered to the grievant the second resolution step response. On or about February 27, 2007, the grievant faxed a copy of the Grievance Form A, without attachments, to the third-step respondent. The grievant stated that he would send the original by mail. The grievant never provided the original or attachments despite the agency's request to do so. In addition, he purportedly told the third-step respondent's designee that he did not know whether he would continue with his grievance. On June 14, 2007, the agency sent the grievant a letter informing him that due to his failure to provide the original form and attachments, he was out of compliance with the grievance procedure. The grievant admits that he has not sent any documents back to the agency in response to the agency's June 14th noncompliance letter.

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

¹ *Grievance Procedure Manual*, § 6.3.

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 provide the original grievance form and attachments to the agency but, more importantly, he has not advised the agency of his desire to continue with his grievance after indicating that he might want to conclude it. Accordingly, this Department orders the grievant to, **within ten work days of the date of this ruling**, either (1) conclude his grievance, or (2) inform the agency of his intention to advance his grievance and provide the complete grievance with attachments to the third-step respondent. If he does neither, 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.⁴

Claudia T. Farr
Director

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.

⁴ *See* Va. Code § 2.2-1001(5).