

Issue: Compliance – Grievance Procedure: 5-day Rule; Ruling Date: October 2, 2007; Ruling #2008-1818; 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 the Department of Mental Health,
Mental Retardation and Substance Abuse Services
Ruling No. 2008-1818
October 2, 2007

The Department of Mental Health, Mental Retardation and Substance Abuse Services seeks to administratively close the grievant's July 31, 2007 expedited 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 July 31, 2007, the grievant initiated a grievance challenging her receipt of a Group I Written Notice with suspension for "unsatisfactory attendance or excessive tardies." On or about August 10, 2007, the grievant received the second management resolution step response. However, because the grievant never advanced or concluded her grievance, on August 24, 2007, the agency sent to the grievant a notice of noncompliance via certified and regular first-class U.S. Mail.¹ Because more than five workdays have elapsed since the grievant's alleged receipt of the notice of noncompliance letter, the agency seeks a compliance ruling.

DISCUSSION

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

¹ The agency claims that it also verbally notified the grievant of her noncompliance on August 17, 2007. During this conversation, the grievant allegedly stated that she saw no need to advance the grievance since the agency's action had been upheld by the second step-respondent.

² *Grievance Procedure Manual*, § 6.3.

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 its 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 second management resolution step response. Moreover, the agency appears to have notified the grievant of her noncompliance, but the grievant has evidently not advanced or concluded her grievance.

As the grievant has apparently 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, if she has not recently done so, to correct her noncompliance **within ten workdays of the date of this ruling** by either concluding her grievance or advancing it to the agency head for a qualification determination.⁵ 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.⁶

Claudia T. Farr
Director

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 It should be noted that because the July 31, 2007 grievance challenges formal disciplinary action, it automatically qualifies for a hearing. See Grievance Procedure Manual § 4.1(a).

⁶ See Va. Code § 2.2-1001(5).