

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: February 12, 2008; Ruling #2008-1825; 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. 2008-1825
February 12, 2008

The grievant has requested a compliance ruling concerning his grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or agency). The grievant objects to the amount of time that elapsed between the time when his grievance was qualified, and when the agency requested the appointment of a hearing officer.

FACTS

On February 21, 2007, the grievant was issued a Group III Written Notice with removal for violation of Departmental Instruction 201 involving patients. On March 29, 2007, the grievant filed a grievance to challenge the disciplinary action. On May 24, 2007, the matter was qualified for hearing by the agency head. On June 12, 2007, the grievant indicated on his grievance Form A that he wished to advance his grievance to hearing. On August 13, 2007, the agency sent to this Department a request for the appointment of a hearing officer, which was received on August 15, 2007. On August 29, 2007, this Department assigned the grievance to the Hearing Officer. A hearing was held on September 25, 2007 and September 28, 2007.

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

¹ *Grievance Procedure Manual* § 6.3.

² *Id.*

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.³

The grievance procedure provides that “[i]f the agency head qualifies the grievance for hearing, the agency’s Human Resources Office must request the appointment of a hearing officer using the ‘Form B,’ within 5 workdays of the qualification decision.”⁴ In this case, the agency requested the appointment of a hearing officer approximately two months after the grievant had indicated that he desired to proceed to hearing. Thus, there is no question that the agency failed to comply with the grievance procedure. The agency has offered as explanation for the delay that: (1) the Central HR Office was awaiting receipt of the original Grievance Form A from the division office (although the division office had previously faxed a copy to the Central HR Office); and (2) the agency was waiting for a decision to be made as to who would serve as the agency representative at the hearing.

In this case, the grievant has provided no evidence that he provided the agency head with notice of non-compliance, which is generally a prerequisite before one can request a ruling from the EDR Director. Assuming that the grievant had informed the agency head of the agency’s delay in requesting the appointment of a hearing officer and the agency had not corrected the noncompliance, this Department would typically order the agency to correct its noncompliance, that is, request the appointment of a hearing officer. Because request for the appointment has been sent to this Department, the noncompliance has now been corrected and there is no need for further action by this Department in this case.

However, we are compelled to note our concern over the agency’s delay in forwarding the request for the appointment and do not condone this conduct. The reasons cited do not constitute “just cause” for the delay.⁵ First, the agency has known since March 29, 2007, the date that the grievance was initiated, that this was a matter that would, in all likelihood, advance to hearing.⁶ Accordingly, the agency had ample time to

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 *Grievance Procedure Manual* § 4.2.

⁵ Just Cause is defined as “[a] reason sufficiently compelling to excuse not taking a required action in the grievance process.” *Grievance Procedure Manual* § 9.

⁶ Formal disciplinary actions automatically qualify for hearing. *Grievance Procedure Manual* § 4.1(a).

consider who should serve as its representative and may not rely upon indecision over a representative as grounds for ignoring the grievance procedures timeframes. Likewise, delays caused by the agency's grievance routing process are not excused. In this case, the timeframe for action began once the original Form A was received by the divisional HR office, not by the Central HR Office.

We remind the agency that failure to comply with a substantial procedural requirement of the grievance procedure without just cause may result in a decision against the noncomplying party on any qualified issue.

This Department's rulings on matters of compliance are final and nonappealable.⁷

Claudia T. Farr
Director

⁷ See Va. Code § 2.2-1001(5).