

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: February 14, 2008; Ruling #2008-1927; 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. 2008-1927
February 14, 2008

The Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) seeks to administratively close the grievant's October 17, 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

On October 17, 2007, the grievant initiated a grievance asserting that she was the victim of retaliation and workplace harassment. The grievance advanced through the management resolution steps but the agency head denied qualification of the grievance on December 5, 2007.¹ Because the grievant never advanced or concluded her grievance within five workdays of receipt of the qualification determination, the agency sent on December 27, 2007, via U.S. mail, a notice of noncompliance to the grievant. To ensure receipt of the notice of noncompliance, the following day, the agency also e-mailed the content of the December 27th notice to the grievant. The agency asserts that the grievant was again reminded on January 11, 2008 that she was in noncompliance. 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 party claiming noncompliance must notify the other party in writing and allow five

¹ The qualification decision was dated December 3, 2007 but was not mailed until December 5, 2007.

² *Grievance Procedure Manual* § 6.3.

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 agency head's qualification 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.⁵ 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 indicating on her Grievance Form A that she seeks qualification from this Department and returning the Form A to the agency's human resource department for forwarding to EDR. 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 See *Grievance Procedure Manual* § 4.3.

⁶ See Va. Code § 2.2-1001(5).