

Issue: Compliance – Grievance Procedure (5-day Rule); Ruling Date: March 19, 2008; Ruling #2008-1942; 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. 2008-1942
March 19, 2008

The Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) seeks to administratively close the grievant's November 30, 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 November 28, 2007, the grievant was issued a Group III Written Notice with termination for "Fighting and/or other Acts of Physical Violence." On November 30, 2007, the grievant initiated an expedited grievance challenging the discipline. The grievance advanced through the second-step and on December 10, 2007, a second-step response was provided to the grievant. On or about December 14, 2008, the grievant responded to the second-step response by drafting a response not on her Grievance Form A, but instead on a separate letter. The response read as follows: "To whom it may concern: After consideration of my options and [the second-step respondent's] decision for termination, I [grievant] intent (sic) to exercise to the third-step of the grievances [sic]." The response was unsigned. The agency informed the grievant that she would have to sign her letter request to advance her grievance and indicate that desire on her Expedited Grievance Form A. The grievant apparently signed her letter but did not return the Form A. Because the grievant never returned her signed Form A, the agency sent on January 3, 2008, a notice of noncompliance to the grievant. 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.¹ That process assures that the parties first

¹ *Grievance Procedure Manual* § 6.3.

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 failed to return her signed grievance within five workdays of receiving the second step response. Although it is evident from her December 14th letter that the grievant wished to advance her grievance rather than conclude it, she did not make that intention evident on the Grievance Form A as required by the grievance procedure. We have long recognized that the Grievance Form A is the official grievance document used by the parties to communicate throughout the grievance process and as such, is of paramount importance during the grievance procedure.⁴ Because the grievant, agencies, and this Department rely on the Grievance Form A to ascertain the intent of the parties, it is incumbent on the parties to clearly and accurately express their intentions on that Form.⁵ Having all responses and replies on the same Form (or, at a minimum, referenced on the same Form) helps to ensure that at every step, all representations of intent are fully and accurately reflected in a single document.

Accordingly, if she has not recently done so, the grievant is ordered to return the Form A to the Agency Head (or to the Agency's Human Resource Office who will forward the Form A to the Agency Head). Based upon the December 14th letter it appears clear that the grievant intended to advance her grievance to the next step, which because she used an expedited grievance form, would be qualification for hearing. Accordingly, prior to returning the grievance to the agency, the grievant shall mark the box "I request qualification of my grievance." If the grievant has lost the original Form

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 EDR Ruling No. 2007-1631.

⁵ *Id.*

A, upon her request, the agency shall provide her with a copy that will be accepted as a replacement for the original which she can mark and return.

If the grievant takes no further action on this grievance **within ten workdays of the date of this ruling**, 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).

If either the grievant or agency management have any questions regarding the grievance procedure, they should contact EDR's toll-free AdviceLine at 1-888-232-3842 for assistance.

This Department's rulings on matters of compliance are final and nonappealable.⁶

Claudia T. Farr
Director

⁶ See Va. Code § 2.2-1001(5).