

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: July 16, 2008; Ruling #2008-2049; 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. 2008-2049
July 16, 2008

The Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) seeks to administratively close the grievant's April 23, 2008 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

The grievant initiated her expedited grievance, dated April 23, 2008, to challenge her fourth Written Notice which resulted in her termination. The second step-respondent provided a written response to the grievance dated May 5, 2008, which the grievant, according to the agency, received on May 7, 2008. However, the agency asserts that the grievant has failed to return the grievance package to the agency to advance or conclude her grievance. Because the grievant failed to advance or conclude her grievance within five workdays of receiving the second step response, the agency mailed the grievant a notice of noncompliance on May 22, 2008, by certified and first class mail. The certified letter was delivered to the recipient's address on June 16, 2008.

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 order the party to correct the noncompliance or, in cases of substantial noncompliance,

¹ See *Grievance Procedure Manual* § 6.3.

² *Id.*

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

In this case, the grievant has failed to advance or conclude her grievance within five workdays of receiving the second resolution step response. Moreover, the agency appears to have notified the grievant of her noncompliance.

Assuming that the grievant has still not advanced or concluded her grievance, she has failed to comply with the grievance procedure.⁴ Thus, if the grievant has not done so already, this Department orders the grievant to correct her noncompliance **within ten workdays of the date of this ruling** by notifying her agency human resources office in writing that she wishes to either conclude the grievance or continue to the qualification phase of the grievance process. 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.⁵

Claudia T. Farr
Director

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 *Grievance Procedure Manual* § 3.2.

⁵ See Va. Code § 2.2-1001(5), 2.2-3003(G).