

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: November 3, 2008; Ruling #2009-2158; 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. 2009-2158
November 3, 2008

The Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) seeks a compliance ruling regarding the grievant's August 7, 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 grievance, dated August 7, 2008, to challenge a Written Notice. The grievance advanced to the third management resolution step, and on or about September 10, 2008, the third step respondent sent the grievant his response to her grievance. According to U.S. Postal Service records, the grievant received the third step response on September 12, 2008. However, the grievant has apparently failed to return the grievance package to the agency to advance or conclude the grievance. Because the grievant never advanced or concluded her grievance within five workdays of receiving the third step response, the agency mailed the grievant a notice of noncompliance on September 30, 2008. According to U.S. Postal Service records, the grievant received the notice of noncompliance on October 1, 2008. Because more than five workdays have elapsed since the date of the notice of noncompliance letter, and the grievant has apparently not yet cured the noncompliance, 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 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

¹ *Grievance Procedure Manual* § 6.3.

² *Id.*

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 the delay in conforming to EDR's order.³

In this case, it appears that the grievant has failed to advance or conclude her grievance within five workdays of receiving the third step response. Moreover, the agency sent the grievant a notice of noncompliance, but the grievant has apparently not advanced or concluded the 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.⁴ This Department therefore orders the grievant to correct her noncompliance, if she has not already done so, **within ten workdays of the date of this ruling** by either (1) notifying her human resources office in writing that she wishes to either conclude the grievance, or (2) requesting qualification of the grievance for hearing. If she does neither, 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* § 3.3.

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