

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: November 12, 2008; Ruling #2009-2163; 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. 2009-2163
November 12, 2008

This Department recently received correspondence from the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) concerning its administrative closure of an expedited grievance. To clarify the proper file closing procedure, this Department issues the following ruling.

FACTS

Based on the letter from the agency, it appears that the grievant initiated an expedited grievance on or about July 10, 2008. The second step-respondent issued a response on or about August 1, 2008. However, the grievant apparently never returned the grievance paperwork to the agency to advance or conclude the grievance. The agency, therefore, contacted the grievant, who reportedly stated that she no longer wished to pursue her grievance. The grievant was asked to return the grievance paperwork to the agency and indicate on the Form A that she intended to conclude the grievance. Because the grievant had not done so, the agency sent its October 10, 2008 letter stating that it had accepted the grievant's verbal notification to conclude the grievance and closed the file.

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

¹ *Grievance Procedure Manual* § 6.3.

² *Id.*

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 failed to advance or conclude her grievance within five workdays of receiving the initial resolution step response in this expedited grievance. As such, she has failed to comply with the grievance procedure.⁴ This Department therefore orders the grievant to correct this 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 requesting that the agency head determine whether the grievance qualifies for hearing. 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).⁵

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

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* § 2.4.

⁵ It must be noted that this ruling arises on a unique posture. Generally speaking, when the agency did not receive the paperwork from the grievant indicating her intent to conclude the grievance, it should have sent her a notice of noncompliance and, if no response was received, later request a ruling from this Department, rather than closing the file immediately. However, in the interest of expediency, this ruling has been issued to clarify the appropriate compliance procedure and settle any procedural gaps for the resolution of this grievance.

⁶ See Va. Code § 2.2-1001(5), 2.2-3003(G).