

Issue: Compliance – Grievance Procedure (Other Issue); Ruling Date: March 27, 2009; Ruling #2009-2255; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Grievant In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling Number 2009-2255
March 27, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8930. He also has requested that the delays in initiating his administrative reviews be excused.

FACTS

This case involves a grievant who received a Group I Written Notice.¹ The hearing decision was issued on February 23, 2009.² The hearing officer upheld the disciplinary action.³ Under the grievance procedure, and as indicated in the hearing decision, the grievant could request administrative review, but the request must be received by the reviewer within 15 calendar days of the date of the hearing decision. March 10, 2009 was 15 calendar days from the February 23 decision.

On March 10, 2009, the grievant contacted this Department on two occasions. The grievant first spoke to an administrative staff member at approximately 10:30 a.m. The grievant explained to the staff member that he had been operating under the mistaken belief that the 15-day timeframe for appealing hearing decisions began to run upon receipt of the ruling, instead of when issued. The administrative staff member suggested that he submit his appeal via e-mail. At approximately 4:50 p.m., he called again and spoke to the administrative staff member stating that he would not be able to send his e-mails "before the 5:00 deadline." The staff member suggested that he might want to submit a request for extension.

On March 11, 2009, the grievant emailed EDR requesting a two-day extension to allow him to initiate his administrative review requests with the hearing officer, EDR

¹ Decision of Hearing Officer, Case No. 8930, February 23, 2009 ("Hearing Decision"), at 1.

² *Id.* at 1.

³ *Id.* at 5.

Director, and the Director of the Department of Human Resource Management (DHRM)⁴ by March 13, 2009. That same day, the hearing officer responded to the grievant by stating that he did not have the authority to grant an extension to the appeal period. On March 13, 2009, the grievant submitted, via e-mail, a request for administrative review addressed to the hearing officer. The request was also sent to the EDR Administrator and the Director of the Department of Human Resource Management. The grievant has since explained that it was his intention that the request be reviewed by each Administrative Reviewer. On March 17, 2009, the hearing officer declined to administratively review this case because he concluded that the request was untimely.

DISCUSSION

The Grievance Procedure Manual provides that “all requests for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision.”⁵ Further, the February 23, 2009 hearing decision clearly advised the parties that any request they may file for administrative review to the hearing officer, the Department of Human Resource Management (DHRM) or EDR must be received by the reviewer within 15 calendar days of the date the decision was issued.⁶ This Department received the grievant’s request for administrative review on March 13, 2009, after the expiration of the 15 calendar days following the February 23, 2009 decision. Thus, the grievant’s request was untimely. However, as explained below, we find that under the particular facts of this case, just cause exists to excuse the grievant’s delay in filing his requests for administrative review.

On the final day of his administrative appeal period, March 10, 2009, the grievant contacted this Department for advice, first at approximately 10:30 a.m. and again at approximately 4:50 p.m. He was not referred to one of the Department’s AdviceLine Consultants, but rather was provided information by an administrative staff member, which, when viewed in total, was not entirely accurate or complete. While the staff member intended to be helpful, under this Department’s established operating procedures, the grievant should have been directed to this Department’s AdviceLine, where he would have received guidance from an EDR Consultant. The misconception that the appeal period expired at 5:00 p.m. could have been addressed by an EDR Consultant and the grievant should have been informed that he had until midnight that day (March 10th, the fifteenth day) to e-mail his appeal.⁷ Because this Department’s administrative staff member wrongly advised the grievant to file a request for extension rather than instructing him to send his appeal in prior to midnight, we will deem this appeal to be timely filed.

⁴ More precisely, the e-mail was sent to the person designated by the DHRM Director to respond to administrative review requests.

⁵ *Grievance Procedure Manual* § 7.2(a).

⁶ Hearing Decision at 5.

⁷ *See* EDR Ruling 2007-1556 (an e-mailed ruling request received after business hours is timely filed).

The hearing officer in this case properly explained in his March 11, 2009 correspondence that he had no authority to extend an appeal timeframe. In addition, on March 17, 2009, the hearing officer properly declined to respond to the March 13, 2009 Request for Administrative Review on the grounds that the request was untimely. Because this Department has now ruled, after reviewing the facts and circumstances of this case, that the grievant had just cause for his delay, the hearing officer is now directed to respond to the March 13th request as timely. This Department will issue its Administrative Review Decision once the hearing officer issues his second reconsidered decision.

Claudia T. Farr
Director