

Issue: Compliance – Grievance Procedure (5 Day Rule); Ruling Date: April 14, 2009;
Ruling #2009-2271; Agency: Department of Mental Health, Mental Retardation and
Substance Abuse Services; Outcome: Agency 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. 2009-2271
April 14, 2009

The Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) seeks a compliance ruling regarding the grievant's July 11, 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

On July 11, 2008, the grievant initiated a grievance challenging her removal from her position for her alleged inability to perform her assigned duties. The grievance proceeded through the management steps and was qualified for hearing by the agency head on November 24, 2008. The agency thereafter sent the grievance to the grievant by certified mail, which, according to the agency, was received on November 28, 2008. Because the grievant did not return the grievance Form A to the agency within 5 workdays, on February 20, 2009, the agency sent the grievant a notice of noncompliance. According to the agency, the grievant was verbally informed on two separate occasions following her receipt of the February 20th letter regarding how to advance her grievance to hearing. On March 16, 2009, the grievant returned her grievance to the facility human resource office and verbally stated that she wanted to advance her grievance to hearing. However, according to the agency, the grievant did not sign, date or check the box on the Form A indicating her desire to proceed to a hearing. As a result of the grievant's failure to indicate her intentions on the Form A, the agency seeks to administratively close the July 11, 2008 grievance.

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

¹ *Grievance Procedure Manual* § 6.3.

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 the delay in conforming to EDR's order.³

The agency asserts that the grievant has failed to check the box on the Form A indicating her desire to advance the grievance to hearing following qualification of the grievance for hearing by the agency head. However, there is no provision of the grievance procedure requiring that an agency return the grievance package to the grievant for additional input following qualification of a grievance for hearing by the agency head. Rather, the Grievance Procedure Manual states, "If the agency head qualifies the grievance for hearing, the agency's Human Resources Office must request the appointment of a hearing officer using the 'Form B,' within 5 workdays of the qualification decision."⁴ Therefore, in this case, because the agency has not requested the appointment of a hearing officer within five workdays of the agency head's qualification decision, the agency is directed to do so **within five workdays of the date of this ruling** using the Form B.⁵ .

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

Claudia T. Farr
Director

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 *Grievance Procedure Manual* § 4.2.

⁵ This Department recognizes that there is an inconsistency between the grievance procedure and the Grievance Form A that could affect this issue. While the *Grievance Procedure Manual* is clear, confusion might be created by the inclusion of a box on the Form A for the grievant to state "I advance my grievance to hearing and am returning it to the Human Resources Office. (Only check if qualified by agency head)" However, in such a situation, the unmistakable requirements of the *Grievance Procedure Manual* are controlling.

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