

Issue: Compliance – Grievance Procedure (5 Day Rule); Ruling Date: May 1, 2009;
Ruling #2009-2280; 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. 2009-2280
May 1, 2009

The Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) seeks a compliance ruling concerning the grievant's two December 3, 2008 grievances. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for advancing or concluding his grievances.

FACTS

This ruling concerns two grievances, both initiated on or about December 3, 2008, one challenging a Group II Notice for leaving the worksite without permission, the other contesting a Group II for failure to follow a supervisor's instruction. Following the second step meeting, the agency allegedly informed the grievant, via telephone, that the second step response was ready to be picked up.¹ When the grievant failed to retrieve the response, the agency attempted to mail it to him via certified mail. The response was apparently returned to the agency as "unclaimed, unable to forward."

Because the grievant had apparently made no effort to claim the response, the agency sent the grievant a notice of noncompliance dated February 19, 2009, via certified mail. The U.S. Postal Service left notices of attempted delivery at the grievant's home on February 20, 2009 and March 14, 2009. When the grievant failed to respond to the notices of attempted delivery, the notice of noncompliance was ultimately returned to the agency as undeliverable. The agency asserts, however, that a copy to the notice of noncompliance was also sent via first-class mail.

Because (1) the grievant has made no effort to move his grievance forward, and (2) more than five workdays have elapsed since the presumed receipt of the notice of noncompliance,² and the grievant has not yet cured the noncompliance, the agency now seeks a compliance ruling.

¹ According to the agency, the Executive Secretary of Residential Services spoke to the grievant on December 22, 2008, and left a message on voice-mail at the grievant's home telephone number on December 30, 2008.

² The mailing of correspondence, properly addressed and stamped, raises a presumption of receipt of the correspondence by the addressee. *E.g.*, *Washington v. Anderson*, 236 Va. 316, 322, 373 S.E.2d 712, 715 (1988).

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.³ 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.⁴ 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.⁵

In this case, the grievant has apparently failed to advance or conclude his grievances. Moreover, the agency appears to have notified the grievant of his noncompliance, but the grievant has not advanced or concluded his grievances. As such, the grievant has failed to advance or conclude his grievances in a timely manner, which is failure to comply with the grievance procedure.⁶ This Department therefore orders the grievant to correct his noncompliance **within ten workdays of the date of this ruling** by notifying his agency human resources office in writing that he wishes to either conclude his grievances or advance them to the next steps.⁷ If the grievant fails to notify the agency **within ten workdays of the date of this ruling** whether he wishes to conclude or advance his grievances, the agency may administratively close the grievances without any further action on its part. The grievances 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.⁸

Claudia T. Farr
Director

³ *Grievance Procedure Manual* § 6.3.

⁴ *Id.*

⁵ 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.

⁶ See *Grievance Procedure Manual* § 2.4.

⁷ Because the grievances were expedited, the next step is to request qualification for hearing.

⁸ See Va. Code § 2.2-1001(5), 2.2-3003(G).