

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date:  
September 15, 2009; Ruling #2010-2419; Agency: Department of Behavioral  
Health and Developmental Services; Outcome: Grievant Not In Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**COMPLIANCE RULING OF DIRECTOR**

In the matter of Department of Behavioral Health and Developmental Services  
Ruling No. 2010-2419  
September 14, 2009

The Department of Behavioral Health and Developmental Services (the agency) seeks to administratively close the grievant's August 10, 2009 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 his grievance.

FACTS

On August 10, 2009, the grievant initiated a grievance challenging a Group II Written Notice he received for allegedly failing to follow instructions. According to the agency, the grievant received the first-step response to his grievance on August 15, 2009. The agency further states that on August 25, 2009, a member of the agency's human resources staff telephoned the grievant to advise him that his grievance was to have been returned on August 24, 2009. On August 27, 2009, the agency sent the grievant a written notice of noncompliance by certified mail. According to the agency, as of September 8, 2009, the grievant had not picked up this certified mail. As more than five workdays have elapsed since the agency's notification of noncompliance, 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.<sup>1</sup> 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.<sup>2</sup> 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

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<sup>1</sup> *Grievance Procedure Manual* § 6.3.

<sup>2</sup> *See Id.*

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.<sup>3</sup>

In this case, the grievant appears to have failed to advance or conclude his grievance within five workdays of apparently receiving the agency's first resolution step response. Moreover, the agency appears to have in good faith attempted to notify the grievant of his noncompliance, but the grievant has not advanced or concluded his grievance.

As the grievant has apparently failed to advance or conclude his grievance in a timely manner, he has failed to comply with the grievance procedure.<sup>4</sup> This Department therefore orders the grievant to correct his noncompliance **within ten work days of the date of this ruling** by notifying his human resources office in writing that he wishes either to conclude his grievance or advance the grievance to the second resolution step. If he 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).

This Department's rulings on matters of compliance are final and nonappealable.<sup>5</sup>

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Claudia T. Farr  
Director

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<sup>3</sup> 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.

<sup>4</sup> See Grievance Procedure Manual § 3.1.

<sup>5</sup> See Va. Code § 2.2-1001(5); 2.2-3003(G).