

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date:
November 5, 2009; Ruling #2010-2457; Agency: Department of Behavioral
Health and Developmental Services; Outcome: Agency 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. 2010-2457
November 5, 2009

The Department of Behavioral Health and Developmental Services (the agency) seeks a compliance ruling regarding the grievant's June 23, 2009 grievance. The agency appears to allege 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 June 23, 2009, the grievant initiated a grievance challenging a Group I Written Notice he received for allegedly using obscene/abusive language. According to the agency, a second step fact-finding meeting had been scheduled for August 17, 2009 but the meeting had to be postponed because the grievant's representative suffered a death in the family. The agency asserts that because of the failure of the grievant to timely reschedule the meeting, the second step respondent provided his response without holding the second step meeting. The agency appears to assert that the grievant failed to timely advance or conclude his 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 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,

¹ *Grievance Procedure Manual* § 6.3.

² *See Id.*

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, the agency provided the grievant with a second step response without first conducting the second step meeting. Assuming the truth of the agency's assertion that the grievant did not timely reschedule the meeting, the agency is not permitted to unilaterally omit the fact-finding meeting. Instead, the agency should have notified the grievant of his non-compliance and given him five days to reschedule the meeting, an action not reflected in the materials submitted by the agency for this ruling. Accordingly, in an effort to move this grievance forward, this Department instructs the grievant to contact the agency human resources office **within ten work days of the date of this ruling** to set up a mutually agreeable date for the second-step meeting.

This Department's rulings on matters of compliance are final and nonappealable.⁴

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 Va. Code § 2.2-1001(5); 2.2-3003(G).