

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: August 12, 2010; Ruling #2011-2701; 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 the Department of Behavioral Health and Developmental Services
Ruling No. 2011-2701
August 12, 2010

The Department of Behavioral Health and Developmental Services (“the agency”) seeks to administratively close the grievant’s July 23, 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 her grievance.

FACTS

On July 23, 2009, the grievant initiated a grievance alleging abuse of policies and retaliation. According to the agency, the second resolution step response was received by the grievant on or about September 23, 2009. Because the grievant allegedly did not advance or conclude her grievance within five workdays of receiving the second resolution step response, the agency sent the grievant a notice of noncompliance on or about February 3, 2010. The letter was unclaimed. The agency followed up with an email on April 8, 2010. The email stated that:

I have attempted to reach you by mail about closing out the grievance you filed last year. I sent a certified letter to the address we show as being current but it was returned to me as “unable to forward.” Could you please contact me so that I can verify your address and close out this grievance.

The grievant responded on April 10, 2010 that “I have not heard from the next step after Mrs. _____ and believed that it was closed out.” The grievant also provided her address, which was unchanged from when the agency had attempted to contact her in February. The grievant asserts that she has not seen her grievance since it was purportedly delivered to the Director of Nursing. The grievant asserts that she would like to advance her grievance but does not have the Grievance Form A any longer to move forward.

Because more than five workdays have elapsed since the grievant received the April 8, 2010 email, and the grievant has not yet advanced her grievance, the agency seeks a compliance ruling.

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, 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 asserts that the grievant has failed to advance or conclude her grievance within five workdays of receiving the second resolution step response. The grievant counters that she checked the box indicating that she wished to advance her grievance and had allegedly given it back to the second-step respondent, the Director of Nursing.

This Department orders the agency to, within five workdays of receipt of this ruling, search its records for a copy of the Grievance Form A and to provide it to the third step respondent for response. Should the agency not be able to produce a copy, this Department can provide a photocopy.

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

Claudia T. Farr
Director

¹ *Grievance Procedure Manual* § 6.3.

² *See 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 *See Va. Code* § 2.2-1001(5); 2.2-3003(G).