

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: March 16, 2011; Ruling No. 2011-2922; 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 the Department of Behavioral Health and Developmental Services
EDR Ruling No. 2011-2922
March 16, 2011

The Department of Behavioral Health and Developmental Services (“agency”) has requested a compliance ruling related to the grievant’s August 26, 2010 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 August 26, 2010, the grievant initiated a grievance challenging her transfer and the agency’s failure to remove prior Written Notices from the grievant’s personnel file. According to the agency, the second step respondent sent a response to the grievant on or about September 9, 2010. Because the grievant apparently did not advance or conclude her grievance within 5 workdays of presumably receiving the second step response, the agency sent the grievant a letter of noncompliance dated November 3, 2010. The agency did not hear anything from the grievant until she initiated her second grievance dated January 25, 2011.

On February 17, 2011, the grievant indicated on her January 25th grievance form that she attached the August 26, 2010 grievance form and intended to advance both grievances to hearing. However, the grievant’s August 26th grievance never advanced beyond the second step meeting. On March 8, 2011, this Department received a letter from the grievant’s attorney requesting to advance the August 26th grievance and consolidate both grievances. In addition, the grievant alleges that the agency’s November 3rd letter of noncompliance was sent to an incorrect address and claims she did not receive it.

Since more than five workdays have elapsed since the agency’s notification of noncompliance, and the grievant has 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.¹ That process assures that the parties first communicate with each

¹ *Grievance Procedure Manual* § 6.3.

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, it appears the grievant did not receive the agency's November 3rd notice of noncompliance. The agency has no evidence to the contrary. Nevertheless, the grievant failed to advance or conclude her August 26th grievance within five workdays of presumably receiving the second step response. Moreover, neither the agency's human resources office nor the agency's third step respondent have received the grievant's August 26th grievance form indicating that she wishes to continue to the third step. Although on March 8, 2011, this Department received notice that the grievant intends to advance her August 26th grievance, it would appear she has not yet advanced it to the agency.

As the grievant did not advance her August 26th grievance in a timely manner, she has failed to comply with the grievance procedure.⁴ This Department therefore orders the grievant to correct her noncompliance **within ten work days of the date of this ruling** by notifying her human resources office in writing that she wishes either to conclude or advance the grievance to the third step. If she does not, the agency may administratively close the grievance without any further action on its part. The grievant's consolidation request will be addressed in a separate ruling.

This Department's rulings on matters of compliance are final and nonappealable.⁵

Claudia T. Farr
Director

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 *Grievance Procedure Manual* § 3.2.

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