

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: March 31, 2011; Ruling No. 2011-2930; Agency: Department of Behavioral Health and Environmental 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. 2011-2930
March 31, 2011

The Department of Behavioral Health and Developmental Services (“agency”) has requested a compliance ruling related to the grievant’s December 2, 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 December 2, 2010, the grievant initiated a grievance challenging the Notice of Improvement Needed/Substandard Performance Improvement Plan she received. According to the agency, the grievant received the second step response via certified mail on February 8, 2011. The agency asserts further that the grievant did not advance or conclude her grievance within 5 workdays of receiving the second step response, and for that reason, the agency sent the grievant a certified letter of noncompliance dated February 22, 2011. The grievant signed for this certified letter on March 2, 2011.

Since more than five workdays have elapsed since the agency’s notification to the grievant of her alleged noncompliance, and the grievant has not yet advanced or concluded her grievance, the agency seeks a compliance ruling allowing it to be administratively close the 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

¹ *Grievance Procedure Manual* § 6.3.

² *See Id.*

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 grievant appears to have failed to advance or conclude her grievance within five workdays of receiving the agency's second resolution step response. Moreover, the agency notified the grievant of her noncompliance, but the grievant has not advanced or concluded her grievance.

As the grievant has apparently failed to advance or conclude her 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 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.⁵

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 *Grievance Procedure Manual* § 3.2.

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