

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: June 9, 2011;
Ruling No. 2011-3006; 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. 2011-3006
June 9, 2011

The Department of Behavioral Health and Developmental Services (“agency”) has requested a compliance ruling related to the grievant’s April 4, 2011 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 April 4, 2011, the grievant initiated an expedited grievance with the agency. On April 7, 2011, the agency conducted the second resolution step meeting with the grievant. The agency mailed the second resolution step response to the grievant on April 13, 2011 by certified mail. The postal records indicate the second resolution step response was delivered to the grievant at her residential address on April 19, 2011. On May 2, 2011, the agency confirmed with the grievant that the agency’s second resolution step response was received, and during that phone call, the grievant indicated she would return her grievance to the agency on May 3, 2011. The agency has yet to receive a response from the grievant.

On May 13, 2011, the agency mailed a certified letter of noncompliance to the grievant, indicating the agency had not received a response from the grievant. Additionally, the agency requested a response from the grievant within five workdays upon receipt of the noncompliance letter, and indicated the agency would seek administrative closure of the April 4th grievance if no response was received. The postal records indicate that the grievant signed for the noncompliance letter on May 14, 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

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, the grievant appears to have failed to advance or conclude her grievance within five workdays of receiving the agency's second resolution step response, as required by the grievance procedure.⁴ 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. 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 agency head for a qualification determination. 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

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).