

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: August 29, 2011; Ruling No.2012-3066; 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. 2012-3066  
August 29, 2011

The Department of Behavioral Health and Developmental Services (“agency”) has requested a compliance ruling related to the grievant’s July 7, 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 his grievance.

FACTS

On July 7, 2011, the grievant initiated an expedited grievance with the agency. On or about July 13, 2011, the agency mailed the second resolution step response to the grievant. On August 3, 2011, the agency mailed a certified letter of noncompliance to the grievant, indicating the agency had not received a response from the grievant. Postal records indicate the notice of noncompliance was received two days later. Since more than five workdays have elapsed since the agency’s notification to the grievant of his alleged noncompliance, and the grievant has not yet advanced or concluded his grievance, the agency seeks a compliance ruling allowing it to administratively close the grievance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>1</sup> 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.<sup>2</sup> 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

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<sup>1</sup> *Grievance Procedure Manual* § 6.3.

<sup>2</sup> *See Id.*

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.<sup>3</sup>

In this case, the grievant appears to have failed to advance or conclude his grievance within five workdays of receiving the agency's second resolution step response, as required by the grievance procedure.<sup>4</sup> Moreover, the agency notified the grievant of his noncompliance, but the grievant has not advanced or concluded his grievance.

As the grievant has apparently failed to advance or conclude his grievance in a timely manner, he has failed to comply with the grievance procedure. This Department therefore orders the grievant to correct his noncompliance **within ten work days of the date of this ruling** by notifying his human resources office in writing that he wishes either to conclude or advance the grievance to the agency head for a qualification determination. If he 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.<sup>5</sup>

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Claudia T. Farr  
Director

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<sup>3</sup> 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.

<sup>4</sup> See *Grievance Procedure Manual* § 2.4.

<sup>5</sup> See Va. Code §§ 2.2-1001(5); 2.2-3003(G).