

Issue: Compliance – Grievance Procedure (5 Day Rule); Ruling Date: October 4, 2017; Ruling No. 2018-4625; Agency: Virginia Department of Transportation; Outcome: Grievant Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

COMPLIANCE RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2018-4625
October 4, 2017

The Virginia Department of Transportation (the “agency”) has requested a compliance ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management in relation to the grievant’s June 29, 2017 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 or about June 29, 2017, the grievant initiated a grievance with the agency. The agency states that the second step response was issued to the grievant on or about August 25. Having received no further response from the grievant indicating whether she wished to advance or conclude the grievance, on September 5, 2017, the agency states that it mailed, by both regular and certified mail, a notice of noncompliance to the grievant.¹ As more than five workdays have elapsed since the grievant presumably received notice of her alleged noncompliance and she has not yet advanced or concluded her 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.² That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without EEDR’s involvement. Specifically, the party claiming noncompliance must notify the other party

¹ The agency has not provided a copy of the certified mail tracking information for its September 5 notice of noncompliance. However, the mailing of correspondence, properly addressed and stamped, raises a presumption of receipt of the correspondence by the addressee. *E.g.*, *Washington v. Anderson*, 236 Va. 316, 322, 373 S.E.2d 712, 715 (1988). For purposes of this ruling, therefore, EEDR will assume that the grievant received the copy of the agency’s notice of noncompliance that was sent by regular mail because there is nothing to indicate that it was improperly addressed. In addition, the agency subsequently mailed, by certified mail, a second notice of noncompliance to the grievant on September 12. A third notice of noncompliance was mailed to the grievant, by both regular and certified mail, on September 26. The certified mail receipts for those two letters indicate they have not been delivered. However, as with the September 5 letter, EEDR will assume the grievant received the September 26 notice of noncompliance that was sent by regular mail.

² *Grievance Procedure Manual* § 6.3.

in writing and allow five workdays for the opposing party to correct any noncompliance.³ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EEDR, 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 EEDR 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 EEDR's order.⁴

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.⁵ Moreover, the agency notified the grievant of her noncompliance and she 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. EEDR therefore orders the grievant to correct her noncompliance **within ten workdays of the date of this ruling** by notifying her human resources office in writing that she wishes to either conclude the grievance or proceed to the third resolution 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).

EEDR's rulings on matters of compliance are final and nonappealable.⁶



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³ See *id.*

⁴ While in cases of substantial noncompliance with procedural rules the grievance statutes grant EEDR the authority to render a decision on a qualifiable issue against a noncompliant party, EEDR favors having grievances decided on the merits rather than procedural violations. Thus, EEDR 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, EEDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

⁵ See *Grievance Procedure Manual* § 3.2.

⁶ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).