

Issue: Compliance/time limits for appealing to the circuit court; Ruling Date: June 16, 2005;  
Ruling #2005-1051; Agency: Virginia Department of Transportation; Outcome: grievant non-compliance



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation  
Ruling Number 2005-1051  
June 16, 2005

The Department of Transportation (VDOT or the agency) has requested a compliance ruling in the grievant's February 6, 2004 grievance. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for appealing to the circuit court or concluding her grievance.

FACTS

The grievant is employed by the agency as a Permits Inspector Sr. On February 6, 2004, she initiated a grievance challenging the agency's decision not to promote her to the Construction Project Manager position. After the parties failed to resolve the grievance during the agency resolution steps, the grievant asked the agency to qualify her grievance for hearing. Her request was denied, the grievant appealed to this Department. On May 2, 2005, this Department issued a ruling denying the grievant's request for qualification of her grievance. That ruling advised the grievant that she had five days to appeal this Department's determination to the circuit court.

On May 9, 2005, the agency sent the grievant a written notice of noncompliance by regular and certified mail. The postal service twice attempted delivery of the certified copy of the noncompliance notice, but was unsuccessful. The agency asserts that it is reasonable to assume that the copy of the noncompliance notice sent by regular mail was delivered no later than the postal service's first attempt to deliver the certified copy, which occurred on May 10, 2005. The agency states that despite the notice of noncompliance, to date the grievant has failed to advance or conclude her grievance, and it asks this Department to allow the grievance to be administratively closed.

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

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

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 party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for its delay in conforming to EDR's order.<sup>3</sup>

In this case, the grievant failed to appeal to the circuit court or conclude her February 6, 2004 grievance within five work days of receiving this Department's qualification ruling. The agency notified the grievant of her noncompliance on May 9, 2005 but the grievant has not subsequently appealed this Department's ruling to the circuit court or concluded her grievance.<sup>4</sup>

As the grievant has failed to advance or conclude her grievance in a timely manner, she has failed to comply with the grievance procedure.<sup>5</sup> This Department therefore orders the grievant to correct her noncompliance within ten work days of the date of this ruling by either concluding her grievance or appealing this Department's determination to the circuit court. If she does not, the agency may administratively close her 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, death in the grievant's immediate family, or other circumstances beyond the grievant's control).

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Director

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<sup>2</sup> *Grievance Procedure Manual*, § 6.3.

<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> Although the postal service has apparently been unable to deliver the copy of the notice of noncompliance sent to the grievant by certified mail, it is reasonable to assume that the grievant has received the copy of the notice sent by first-class regular mail.

<sup>5</sup> We note that the grievant's time to appeal ran through May 9, 2005, and thus the agency's letter of noncompliance was premature. As the grievant has failed to appeal or to conclude her grievance as of the date of this ruling, however, the agency's early letter does not effect this Department's determination that the grievant is out of compliance with the grievance procedure.