

Issue: Compliance/grievance procedure/5-day rule; discipline/termination; Ruling Date: September 23, 2005; Ruling #2006-1144; Agency: Department of Transportation; outcome: grievant not in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2006-1144
September 23, 2005

The Department of Transportation (VDOT or the agency) has requested a compliance ruling in the grievant's July 18, 2005 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

The grievant was employed by the agency as a Transportation Operator II. On July 11, 2005, the grievant was terminated after receiving a second Group II Written Notice. On July 18, 2005, the grievant initiated a grievance challenging the agency's actions. Because the grievant had been terminated, he elected to use the expedited grievance process. The agency states that a second-step meeting was scheduled for August 3, 2005, but that the meeting was canceled by the grievant. On August 9, 2005, the second-step respondent issued a written response to the grievance. This response advised the grievant that he had five days to either conclude his grievance or request qualification for a hearing. The agency states that the grievant subsequently failed to conclude or advance his grievance.

On August 30, 2005, the agency sent the grievant a written notice of noncompliance by regular and certified mail. The grievant received the letter sent by certified mail on September 3, 2005. The agency states that despite the notice of noncompliance, to date the grievant has failed to advance or conclude his 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.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 *Grievance Procedure Manual*, § 6.3.

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.³

In this case, the grievant failed to advance or conclude his July 18, 2005 grievance within five work days of receiving this Department's qualification ruling. The agency notified the grievant of his noncompliance on August 30, 2005, but the grievant has apparently not subsequently advanced or concluded his grievance.

As the grievant has 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 either concluding his grievance or advancing his grievance to the qualification stage. If he does not, the agency may administratively close his 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).

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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.