

Issue: Compliance/5-day rule; Ruling Date: December 28, 2005; Ruling #2006-1211;
Agency: Department of Transportation; Outcome: grievant ordered to correct noncompliance; if not, agency may administratively close grievance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling No. 2006-1211
December 28, 2005

The Department of Transportation (VDOT or the agency) seeks to administratively close the grievant's October 20, 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 her grievance.

FACTS

The grievant was employed by the agency as an Administration and Program Specialist III. On September 23, 2005, the grievant received a Group II Written Notice and was terminated from her employment with VDOT. The grievant subsequently challenged the agency's action by initiating a grievance on October 20, 2005. On October 24, 2005, the first step-respondent issued a written response to the grievance on the Form A. The agency claims that the grievant received the first step response on October 26, 2005, but subsequently failed to conclude or advance her grievance.

Accordingly, on November 9, 2005, the agency sent the grievant a written notice of noncompliance by certified mail. The letter appears to have been delivered to the grievant on November 12, 2005.¹ 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.² 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

¹ While the agency has not conclusively demonstrated that the November 9, 2005 notice of noncompliance was delivered to the grievant on November 12, 2005, it has produced a Track & Confirm record from the United States Postal Service showing that an item was delivered on November 12, 2005 in the city where the grievant lives. As such, we will assume that the item that was confirmed to be delivered on November 12th in the city where grievant lives was the November 9th notice of noncompliance.

² *Grievance Procedure Manual*, § 6.3.

party claiming noncompliance must notify the other party 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 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.⁴

In this case, the grievant failed to advance or conclude her October 20, 2005 grievance within five work days of receiving the first management resolution step response. The agency appears to have notified the grievant of her noncompliance on November 12, 2005, but the grievant has not advanced or concluded her grievance.

As the grievant has 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 either concluding her grievance or advancing her grievance to the second management resolution step. 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, 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

Jennifer S.C. Alger

³ *Grievance Procedure Manual*, § 6.3.

⁴ 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.

⁵ *See* Va. Code § 2.2-1001(5).

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