

Issue: Compliance/5-day rule; Ruling Date: December 22, 2005; Ruling #2006-1212; Agency: Department of Transportation; Outcome: grievant ordered to correct noncompliance and if not done, 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 Number 2006-1212  
December 22, 2005

The Department of Transportation (VDOT or the agency) has requested a compliance ruling regarding the grievant's September 3, 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 a Traffic Controller. On January 17, 2004, the grievant received a Group I Written Notice. As a consequence of receiving the Written Notice, the grievant was excluded from consideration for an in-band adjustment. (The division has a policy of denying in-band adjustments to those who have active Written Notices in their personnel files.) However, because the agency inadvertently entered an erroneous date in the tracking system for the Written Notice (January 17, 2003), the grievant was initially informed that she would receive an in-band pay adjustment (IBA). When the agency realized its error, it informed the grievant that she was not eligible for an IBA. The agency's refusal to now grant her an IBA forms the basis of the September 3<sup>rd</sup> grievance.

The agency asserts that the grievance advanced through the three resolution steps, and on October 21, 2005, the grievant requested qualification of her grievance for hearing. On October 31, 2005, the agency head's designee denied qualification for hearing and sent the grievant copies of the decision by 1<sup>st</sup> class U.S. mail and certified mail, return receipt requested. The agency asserts that the grievant never responded to the qualification decision by indicating her preference of either closing the grievance or appealing the agency head's decision.

The agency claims that on November 22, 2005, it sent the grievant a notice of non-compliance by 1<sup>st</sup> class U.S. mail and certified mail. According to information provided by the agency, the grievant never claimed the certified letter. The agency assumes that the 1<sup>st</sup> class letter was delivered. Because the grievant has not corrected the alleged non-compliance of essentially abandoning her grievance, the agency seeks a ruling from this office granting it permission to 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 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 advance or conclude her September 3, 2005 grievance within five work days of receiving the agency head's qualification ruling. The agency notified the grievant of her noncompliance on November 22, 2005, but the grievant has apparently not subsequently 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 qualification stage. 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).

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Claudia T. Farr  
Director

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William G. Anderson, Jr.

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<sup>1</sup> *Grievance Procedure Manual*, § 6.

<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.

EDR Consultant, Sr.