

Issue: Compliance/5 day rule; Ruling Date: January 20, 2006; Ruling #2006-1240;
Agency: Virginia Department of Health; Outcome: grievant ordered to respond within
10 days from receipt of ruling; agency may administratively close if no response



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Health
Ruling No. 2006-1240
January 20, 2006

The Department of Health (VDH or the agency) seeks to administratively close the grievant's June 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 his grievance.

FACTS

The grievant was employed with the agency as a Storekeeper Assistant. On June 3, 2005, the grievant initiated a grievance challenging his involuntary separation and/or involuntary resignation. Because his grievance challenges an alleged termination, the grievant elected to use the expedited grievance process. As such, on November 15, 2005, the second step respondent issued a written response to the grievance. The agency claims that the grievant received the second step response on November 18, 2005, but subsequently failed to conclude or advance his grievance.

Accordingly, on December 5, 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 December 7, 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 June 3rd 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

¹ *Grievance Procedure Manual*, § 6.3.

workdays for the opposing party to correct any noncompliance.² 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.³

In this case, the grievant failed to advance or conclude his June 3, 2005 grievance within five work days of receiving the second management resolution step response. The agency appears to have notified the grievant of his noncompliance on December 7, 2005, but the grievant has not 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 agency head for a qualification determination. 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). This Department's rulings on matters of compliance are final and nonappealable.⁴

Further, as the agency has correctly pointed out, the above cited rule is a departure from this agency's past practice which permitted an agency to administratively close a grievance once the grievant was notified of his alleged noncompliance and failed to respond within the mandated 5 workdays of the notice of noncompliance.⁵ However, in the interest of fairness to all parties, this Department, in its sole discretion, decided to modify its former practice regarding how and when an agency may administratively close a grievance for noncompliance with the 5 workday rules.⁶ Importantly, the current rule is

² *Id.*

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.

⁴ See Va. Code § 2.2-1001(5).

⁵ See e.g., EDR Ruling ## 2001-228, 2002-177 and 2002-101.

⁶ See e.g., EDR Ruling ## 2006-1211, 2006-1185, 2006-1144 and 2006-1212.

consistent with the published party noncompliance provisions of the grievance procedure.⁷

Claudia T. Farr
Director

Jennifer S.C. Alger
EDR Consultant

⁷ See *Grievance Procedure Manual* § 6.3.