

Issue: Compliance/5 day rule; Ruling Date: July 13, 2006; Ruling #2006-1393; Agency: Virginia Department of Transportation; Outcome: grievant out of compliance; ruling directs grievant to correct non-compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling No. 2007-1393
July 13, 2006

The Department of Transportation (VDOT or the agency) seeks to administratively close the grievant's November 11, 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 is employed with VDOT as a Bridge Tunnel Patrol Supervisor. On November 11, 2005, the grievant initiated a grievance asserting that he was subject to retaliation and discrimination as a result of his participation in the grievance process. After being denied qualification for hearing by the agency head, the grievant sought a qualification ruling from this Department. On May 5, 2006, this Department mailed the grievant a ruling denying his request for qualification.¹ Because the grievant never advanced or concluded his grievance within 5 days of receiving the qualification decision, the agency sent the grievant a notice of non-compliance via certified mail and U.S. Mail, first class on June 9, 2006. According to the United States Postal Services (USPS) tracking services, the USPS delivered the non-compliance letter to the grievant's home address on June 12, 2006. Because more than five days have elapsed since the delivery of the certified letter and the presumed delivery of the first class letter, and the grievant has not yet cured the non-compliance, the agency seeks a compliance ruling.

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 party claiming noncompliance must notify the other party in writing and allow five

¹ See EDR Ruling #2006-1282.

² *Grievance Procedure Manual*, § 6.3.

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 has failed to advance or conclude his grievance within five work days of receiving this Department's qualification decision. Moreover, the agency appears to have notified the grievant of his noncompliance, 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 notifying his agency human resources office in writing that he wishes to either conclude his grievance or appeal this Department's qualification decision to circuit court. 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.⁵

Claudia T. Farr
Director

³ *Id.*

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).