

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: July 23, 2008;
Ruling #2009-2063; Agency: Virginia Department of Transportation; Outcome:
Grievant Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Transportation
Ruling No. 2009-2063
July 23, 2008

The Department of Transportation (the agency) seeks to administratively close the grievant's May 2, 2008 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 initiated his grievance, dated May 2, 2008, to challenge a Written Notice. The third step-respondent provided a written response to the grievance dated June 3, 2008, which the grievant received on June 5, 2008. However, the grievant has failed to return the grievance package to the agency to advance or conclude the grievance. Because the grievant never advanced or concluded his grievance within five workdays of receiving the third step response, the agency mailed the grievant a notice of noncompliance on June 19, 2008, by certified and first class mail.¹ Because more than five workdays have elapsed since the notice of noncompliance letter, and the grievant has not yet cured the noncompliance, 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 workdays for the opposing party to correct any

¹ The mailing of correspondence, properly addressed and stamped, raises a presumption of receipt of the correspondence by the addressee. *E.g.*, *Washington v. Anderson*, 236 Va. 316, 322, 373 S.E.2d 712, 715 (1988). Although it appears in this case that the zip code used for the grievant's address was incorrect by one digit, initially sending the certified mail package to the wrong city, documentation shows that the post office nevertheless later attempted delivery of that package at the proper address. It is reasonable to assume that whatever correction was made by the post office to attempt delivery of the certified package at the proper address was also made with the first class package as well. Accordingly, we must presume that the grievant received the agency's notification.

² *Grievance Procedure Manual* § 6.3.

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 the delay in conforming to EDR's order.⁴

In this case, the grievant has failed to advance or conclude his grievance within five workdays of receiving the third resolution step response. Moreover, the agency appears to have notified the grievant of his noncompliance, but the grievant has not advanced or concluded the 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.⁵ This Department therefore orders the grievant to correct his noncompliance **within ten workdays of the date of this ruling** by notifying his agency human resources office in writing that he wishes to either conclude the grievance or request that his grievance be qualified for a hearing by also submitting the grievance form to the agency head. If he does not, the agency may administratively close the 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.⁶

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 *Grievance Procedure Manual* § 3.3.

⁶ See Va. Code § 2.2-1001(5), 2.2-3003(G).