

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: September 22, 2008; Ruling #2009-2112; Agency: Department for the Blind and Vision Impaired; Outcome: Agency Not in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department for the Blind and Vision Impaired
Ruling No. 2009-2112
September 22, 2008

The grievant seeks a compliance ruling regarding her May 8, 2008 grievance with the Department for the Blind and Vision Impaired (the agency). The grievant raises a compliance matter with the procedural history and closure of the grievance.

FACTS

The grievant initiated her grievance on May 8, 2008 to raise issues with a supervisor's conduct in the workplace. The grievance proceeded through the management steps and was submitted to the agency head for a qualification determination on June 3, 2008. The agency head made his decision not to qualify the grievance for hearing on or about June 9, 2008. This information was conveyed to the grievant by e-mail of the same date. However, this e-mail also indicated that the official decision and grievance package would be mailed to the grievant. The agency states that this package was mailed to the grievant by certified mail on June 10, 2008. However, the grievant never received the package. The package was eventually returned to the agency as "unclaimed." In the interim, because the agency assumed the grievant had received the package, the agency notified her of alleged noncompliance in failing to return the grievance Form A and "documents" to the agency to advance or conclude the grievance on July 9 and 10, 2008. The grievant then sent the agency copies of what she had originally provided on June 3, 2008 in her request for qualification. Having received that correspondence, the agency closed the grievance for noncompliance on July 17, 2008. The grievant now seeks a compliance ruling.

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

¹ *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.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 the delay in conforming to EDR's order.³

In this case, it appears the grievant never received the grievance package back from the agency following the agency head's qualification determination. Therefore, she was under no duty to advance or conclude the grievance and was not noncompliant with the grievance procedure. It is understandable why the agency would think the grievant was in noncompliance, as it appears the agency was not aware the package had gone unclaimed until after the grievance was closed. However, the agency erred by prematurely closing the grievance.

An agency may not close an allegedly noncompliant grievance without first seeking a ruling from the EDR Director. Before seeking such a ruling, and as discussed above, the agency must inform the grievant, in writing, of the noncompliance and allow the grievant five workdays after receipt of the written notice to correct the noncompliance. If EDR finds that the grievant is out of compliance, EDR will order the grievant to correct the noncompliance. If it is not corrected within the designated timeframe, the agency may close the grievance.⁴ In this case, the agency closed the grievance without first requesting a compliance ruling from this Department. Accordingly, the grievance was prematurely and improperly closed.

Based on the foregoing, the May 8, 2008 grievance is hereby reopened. **Within five workdays of receipt of this ruling**, the agency is ordered to provide the grievance package and agency head's qualification decision to the grievant so that she can decide whether to advance or conclude the grievance. Once the grievant receives that package,

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 *Grievance Procedure Manual* § 6.3; *Frequently Asked Grievance Questions*, FAQ # 29, at <http://www.edr.virginia.gov/faqs.htm>. Agencies may still close grievances without requesting such a ruling if initiation noncompliance is raised. See *Grievance Procedure Manual* § 6.2; *Frequently Asked Grievance Questions*, FAQ # 29, at <http://www.edr.virginia.gov/faqs.htm>.

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the grievant will have **five workdays** to notify the agency in writing, on the Form A, whether she wishes to conclude her grievance or appeal to EDR for a ruling on whether her grievance qualifies for a hearing.⁵ If the grievant does not do so in a timely manner, the agency may seek administrative closure of the grievance pursuant to the provisions of section 6.3 of the *Grievance Procedure Manual*.

This Department's rulings on matters of compliance are final and nonappealable.⁶

Claudia T. Farr
Director

⁵ *Grievance Procedure Manual* § 4.3

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