

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: December 3, 2008; Ruling #2009-2180; 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. 2009-2180
December 3, 2008

The Department of Transportation (the agency) seeks to administratively close the grievant's August 3, 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 her grievance.

FACTS

In her August 3rd grievance, the grievant has alleged misapplication of policy, discrimination, workplace violence, retaliation, and an arbitrary performance evaluation. The grievance advanced through the management resolution steps, and a third step response, dated October 4, 2008, was apparently provided to the grievant.¹ After the grievant failed to advance her grievance, the agency sent the grievant a letter by certified and first class mail, dated October 31, 2008, indicating that she was out of compliance with the grievance procedure.² Because the grievant has not advanced or concluded her grievance, the agency now seeks this compliance ruling.

DISCUSSION

¹ The agency asserts that it provided the third step response to the grievant and has provided this Department a copy of an October 4, 2008 response to issues raised in the August 3rd grievance. However, the copy of the Grievance Form A provided to this Department in conjunction with the agency's ruling request does not reflect on the Form A that a third step response was provided. At minimum, the Form A should indicate that a response was attached and the Form A should be signed and dated by each step respondent.

² 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). As such, it is presumed that the first class mailing reached the grievant's address. However, if the grievant were to show that she did not receive this notification, for instance, because the grievant had moved, such facts will be taken into account as to whether good cause may exist for reopening the grievance should it be administratively closed. (The certified mail correspondence was returned to the agency because it was unclaimed by the grievant.)

The grievance procedure requires both parties to address procedural noncompliance through a specific process.³ 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.⁴ 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.⁵

As the grievant has apparently failed to advance or conclude her grievance in a timely manner, she appears out of compliance with the grievance procedure. Accordingly, this Department orders the grievant to correct this apparent noncompliance, if she has not already done so, **within ten work days of the date of this ruling** by notifying the agency's human resources office in writing that she wishes to either conclude the grievance or request qualification from the agency head. If she 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 *Grievance Procedure Manual* § 6.3.

⁴ *Id.*

⁵ 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.

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