

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date:
February 18, 2009; Ruling #2009-2220, 2009-2226; Agency: Department of
Corrections; Outcome: Grievant In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2009-2220, 2009-2226
February 18, 2009

The Department of Corrections (the agency) seeks a compliance ruling regarding the grievant's September 15, 2008 (Grievance #1) and October 3, 2008¹ (Grievance #2) grievances. The agency seeks to close the grievances due to the grievant's alleged noncompliance. For the reasons set forth below, the agency's request is denied.

FACTS

The grievances at issue here had proceeded through different stages of the management steps and were returned to the grievant in mid-October 2008. However, it appears that the grievant failed to return the grievance packages back to the agency to either conclude or proceed with the grievances. As such, on November 17 and 18, 2008, the agency sent the grievant two letters describing the grievant's alleged noncompliance. According to notations on the agency's versions of these letters, the grievant did not receive one of the letters. The notations also appear to state that the grievant indicated to the agency verbally that she wished to close her grievances and said that she would send in the paperwork. The agency apparently marked the grievances as closed around that time (mid-December 2008). However, when the grievant returned the grievance packages to the agency, on or around December 30, 2008, the grievant sought advancement of both grievances, not closure. In a letter dated January 7, 2009, the agency told the grievant that the grievances were closed and no action would be taken. Upon being advised of the proper method for requesting closure of grievances, the agency has now sought a compliance ruling from this Department.

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

¹ These dates appear on the respective Grievance Form A's. The actual dates of initiation are not pertinent to this ruling.

² *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.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

An agency may not close an allegedly noncompliant grievance without first seeking a ruling from the EDR Director. Before seeking such a ruling, 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.⁵ In this case, the agency appears to have attempted to close the grievances without first requesting a compliance ruling from this Department. Accordingly, the grievances were prematurely and improperly closed.

Although the grievant was out of compliance for failing to return the grievance packages to the agency in a timely fashion, the agency never sought to close the grievances through this Department until after the grievant had cured the noncompliance by seeking to advance the grievances. Consequently, because EDR's ruling on such noncompliance would be to order the grievant to correct the issue, which the grievant has already apparently done, the agency's current request to close the grievances is denied as the alleged issue of noncompliance is now moot.

The agency is ordered to advance both grievances as requested by the grievant. **Within five workdays of receipt of this ruling**, the agency shall forward the grievance package in Grievance #1 to this Department for a qualification ruling.⁶ Further, **within**

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 *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. *Grievance Procedure Manual* § 6.2; *Frequently Asked Grievance Questions*, FAQ # 29, at <http://www.edr.virginia.gov/faqs.htm>.

⁶ See *Grievance Procedure Manual* § 4.3.

five workdays of receipt of this ruling, the agency head is ordered to respond to the grievant's apparent request for qualification in Grievance #2.⁷

This Department's rulings on matters of compliance are final and nonappealable.⁸

Claudia T. Farr
Director

⁷ See *Grievance Procedure Manual* §§ 2.4, 4.2.

⁸ See Va. Code § 2.2-1001(5), 2.2-3003(G).