

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: March 17, 2009; Ruling #2009-2250; Agency: Department of Corrections; Outcome: Grievant Not In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2009-2250
March 17, 2009

The Department of Corrections (the agency) seeks to administratively close the grievant's August 26, 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 August 26, 2008, to challenge a Written Notice. The third step-respondent provided a written response to the grievance on September 26, 2008.¹ The grievant had also requested compliance rulings from this Department regarding the agency's alleged noncompliance in providing timely responses to his grievance and document requests.² In EDR Ruling Nos. 2009-2150, 2009-2178, this Department ordered the agency to produce certain information to the grievant.³ The agency responded to that Ruling with limited generic information in an e-mail to the grievant dated January 5, 2009. However, since that time, the grievant has failed to return the grievance package to the agency to advance or conclude the grievance. Because the grievant has not advanced or concluded his grievance within five workdays of receiving the January 5, 2009 information, the agency sent the grievant a notice of noncompliance on February 3, 2009. Because more than five workdays have elapsed since the notice of noncompliance letter, and the grievant has not yet cured the alleged noncompliance, the agency seeks a compliance ruling.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.⁴ That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance

¹ EDR Ruling Nos. 2009-2150, 2009-2178.

² *Id.*

³ *Id.*

⁴ *Grievance Procedure Manual* § 6.3.

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.⁵ 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.⁶

In this case, the grievant had requested compliance rulings, which stayed the grievance process.⁷ Once EDR Ruling Nos. 2009-2150, 2009-2178 was issued on December 23, 2008, the grievance process resumed.⁸ After the agency responded to the order for production, the grievant was under a duty to submit the grievance paperwork to the agency head if he wanted to proceed with the grievance by seeking qualification for hearing.⁹ As such, the grievant appears to have failed to advance or conclude his grievance within five workdays of receiving the information from the agency. Moreover, the agency appears to have notified the grievant of the noncompliance, but the grievant has not advanced or concluded the grievance.

As the grievant has apparently failed to advance or conclude his grievance in a timely manner, he has failed to comply with the grievance procedure.¹⁰ This Department therefore orders the grievant to correct this noncompliance **within ten workdays of the date of this ruling** by notifying the agency human resources office in writing that he wishes to either conclude the grievance or requesting that the agency head qualify his grievance for hearing. 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).

⁵ *Id.*

⁶ 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.

⁷ *Grievance Procedure Manual* § 6.1.

⁸ *See Grievance Procedure Manual* §§ 6.1, 8.2.

⁹ *Grievance Procedure Manual* § 3.3. The grievant could have also raised compliance matters, if he believed there were any.

¹⁰ *See id.*

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This Department's rulings on matters of compliance are final and nonappealable.¹¹

Claudia T. Farr
Director

¹¹ See Va. Code § 2.2-1001(5), 2.2-3003(G).