

Issue: Compliance – Grievance Procedure (5 Day Rule); Ruling Date: May 4, 2009; Ruling #2009-2287; 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 Department of Transportation
Ruling No. 2009-2287
May 4, 2009

The Department of Transportation (VDOT or the agency) seeks to administratively close the grievant's January 27, 2009 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

On January 27, 2009, the grievant initiated an expedited grievance challenging his receipt of a Group II Written Notice with termination for "violating safety rules." The grievant received the second resolution step response on March 20, 2009. Because the grievant never advanced or concluded his grievance within 5 workdays of receiving the second resolution step response, the agency sent the grievant a notice of noncompliance via U.S. Mail First Class and certified mail on April 3, 2009. The U.S. Post Office attempted to deliver the certified mail package on April 4, 2009 and a notice was left for the grievant regarding the letter. As of April 16, 2009, the grievant had failed to claim the certified mailing containing the notice of noncompliance. The agency asserts that despite the grievant's failure to claim the certified letter, he presumably received, on or about April 4, 2009, the notice of noncompliance that was sent via regular U.S. Mail but to date has failed to advance or conclude his grievance.¹ Accordingly, the agency asks this Department to allow the grievance to be administratively closed.

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 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).

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

In this case, the grievant appears to have failed to advance or conclude his grievance within five workdays of receiving the agency's second resolution step response. Moreover, the agency appears to have notified the grievant of his noncompliance, but the grievant has not advanced or concluded his 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.⁵ This Department therefore orders the grievant to correct his noncompliance **within ten work days of the date of this ruling** by notifying his agency human resources office in writing that he wishes to either conclude his grievance or request qualification of the grievance for a 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).

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 § 2.4.

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