

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: June 4, 2009; Ruling #2009-2321; 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. 2009-2321
June 4, 2009

The Department of Transportation (VDOT or the agency) seeks to administratively close the grievant's April 14, 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

In his April 14, 2009 grievance, the grievant challenged a Group III Written Notice which led to the termination of his employment. The first/second step respondent replied to the grievance on or about April 22, 2009.¹ According to the agency, the grievant never advanced his grievance. Because of the grievant's purported failure to advance his grievance, the agency apparently sent the grievant, on or about May 5, 2009, a notice of noncompliance that was purportedly received on May 6, 2009.

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 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

¹ The grievant seems to have initiated his grievance with the person who issued the discipline against him, as is his right under the grievance process. *Grievance Procedure Manual* § 2.4. This individual is also apparently the person who would normally serve as the second step respondent. Accordingly, the first two steps collapsed into a single step. This individual is referred to as the second step respondent throughout the remainder of this ruling. See Frequently Asked Grievance Question #12 on EDR's website at http://www.edr.virginia.gov/faqs_a.htm#12.

² *Grievance Procedure Manual* § 6.3.

³ *Id.*

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

As the grievant has apparently failed to advance or conclude his grievance in a timely manner, he appears to have failed to comply with the grievance procedure. This Department therefore orders the grievant to correct this noncompliance **within ten work days of the date of this ruling** by notifying the agency's human resources office in writing that he wishes to either conclude the grievance or advance his grievance to the third resolution step.⁵ 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

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 In the second step response, the second step respondent indicated that while a fact-finding meeting normally occurs at the second resolution step, because of the grievant's concerns regarding the second step respondent's involvement with the issuance of the discipline challenged by this grievance, the fact-finding meeting would take place at the third step. If the grievant elects to advance his grievance, we note that if he desired to meet face-to-face with the second step respondent rather than the third step respondent, he should be afforded that opportunity. The grievance procedure provision that grants the opportunity to avoid a face-to-face fact-finding meeting with the usual second step respondent is premised on: (1) an allegation of retaliation or discrimination by the second step respondent, and (2) a decision by the grievant, not the agency, to meet with the third step respondent (or mutually agreed upon substitute). *Grievance Procedure Manual* § 3.2. To the extent that the parties mutually agree in writing to a face-to-face meeting with the third step respondent rather than the second, even in cases where retaliation or discrimination is not alleged, this Department has no objection to such an arrangement and will not intervene.

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