

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: June 11, 2009; Ruling #2009-2326; 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 Department of Corrections
Ruling No. 2009-2326
June 11, 2009

The Department of Corrections (DOC or the agency) seeks to administratively close the grievant's January 12, 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 12, 2009, the grievant initiated a grievance challenging a Group III Written Notice with termination he received for unauthorized use of the internet. The third resolution step response was received by the grievant on or about April 9, 2009. Because the grievant never advanced or concluded his grievance within 5 workdays of receiving the third resolution step response, the agency sent the grievant a notice of noncompliance via certified mail on April 21, 2009.¹ Because more than five workdays have elapsed since the agency's attempt to notify the grievant of the noncompliance, and the grievant has not yet cured the non-compliance, the agency seeks a compliance ruling.

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

¹ The certified mailing was later returned to the agency as unclaimed; however, it appears that the agency has in good faith attempted to notify the grievant of the noncompliance. Accordingly, this Department will assume that the agency has notified the grievant of his noncompliance and will rule on the issue of whether the grievant is out of compliance with the grievance process.

² *Grievance Procedure Manual* § 6.3.

³ *Id.*

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 presumably receiving the agency's third resolution step response. Moreover, the agency appears to have in good faith attempted to notify 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

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 § 3.3.

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