

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: October 15, 2010; Ruling #2011-2799; 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 the Department of Transportation
EDR Ruling No. 2011-2799
October 15, 2010

The agency has requested a compliance ruling related to the grievant's November 23, 2009 grievance filed with the Department of Transportation ("agency"). The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for advancing or concluding her grievance.

FACTS

On November 23, 2009, the grievant initiated a grievance challenging the agency's application of the layoff policy. The grievance advanced through the management resolution steps but was not qualified for hearing by the agency head. Accordingly, the grievant requested that this Department qualify her grievance for hearing. In EDR Ruling Number 2011-2730, this Department declined to qualify it and informed her that:

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

The above referenced "enclosed sheet" instructed the grievant that "[i]f you wish to pursue this course [appeal to the circuit court], you must notify your Human Resources office, in writing, that you wish to appeal this ruling to circuit court and return it to the Human Resources office of your agency within five work days of receipt of this ruling." The sheet further instructed that "[i]f you choose not to appeal this ruling, you should notify you Human Resources office, in writing, that the grievance is concluded and return

the Form A to your Human Resources office within five work days of receipt of this ruling.”

According to the agency, because it could find no evidence that the grievant either requested to advance or conclude her grievance, the agency sent the grievant a written correspondence on September 15, 2010, directing her to either advance or conclude her grievance within five workdays. The letter informed the grievant that if she did neither, the agency would seek permission from EDR to administratively close the grievance. As more than five workdays have elapsed since the agency’s notification of the alleged noncompliance, and the grievant has apparently not yet cured her apparent failure to advance or conclude her grievance, the agency seeks a compliance ruling.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹ 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.² 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.³

In this case, the grievant appears to have failed to advance or conclude her grievance within five workdays of presumably receiving this Department’s qualification decision (EDR Ruling No. 2011-2730). Moreover, the agency appears to have notified the grievant of her apparent failure to advance or conclude, but she has apparently done neither.

¹ *Grievance Procedure Manual* § 6.3.

² *See Id.*

³ 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.

As the grievant has apparently failed to advance or conclude her grievance in a timely manner, she has failed to comply with the grievance procedure.⁴ This Department therefore orders the grievant to correct her noncompliance **within ten work days of the date of this ruling** by notifying her human resources office in writing that she wishes either to conclude her grievance or advance it to the circuit court for a qualification determination. If she does neither, 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.⁵

Claudia T. Farr
Director

⁴ See *Grievance Procedure Manual* § 4.4; EDR Ruling Nos. 2011-2715; 2010-2609.

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