

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: March 17, 2011; Ruling No. 2011-2926; 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  
Ruling No. 2011-2926  
March 17, 2011

The Department of Transportation (the “agency”) seeks a compliance ruling regarding the grievant’s August 20, 2010 grievance.<sup>1</sup> Specifically, the agency seeks permission to administratively close the grievance due to the grievant’s alleged noncompliance.

FACTS

On August 20, 2010, the grievant initiated a grievance challenging the agency’s determination not to award him an in-band adjustment. 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 his grievance for hearing. In EDR Ruling No. 2011-2855, this Department declined to qualify it and informed him that:

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

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<sup>1</sup> In the agency’s ruling request, the date of the grievance was erroneously listed as September 23, 2010.

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 his grievance, the agency sent the grievant a written correspondence on February 15, 2011 directing him to either advance or conclude it within five workdays. The letter informed the grievant that if he 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 his apparent failure to advance or conclude his grievance, the agency seeks a compliance ruling.

### DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

In this case, the grievant appears to have failed to advance or conclude his grievance within five workdays of presumably receiving this Department’s qualification decision (EDR Ruling No. 2011-2855). Moreover, the agency appears to have notified the grievant of his apparent failure to advance or conclude, but he has apparently done neither.

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<sup>2</sup> *Grievance Procedure Manual* § 6.3.

<sup>3</sup> *See Id.*

<sup>4</sup> 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 his grievance in a timely manner, he has failed to comply with the grievance procedure.<sup>5</sup> This Department therefore orders the grievant to correct his noncompliance **within ten work days of the date of this ruling** by notifying his human resources office in writing that he wishes either to conclude his grievance or advance it to the circuit court for a qualification determination. If he 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.<sup>6</sup>

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Claudia T. Farr  
Director

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<sup>5</sup> See *Grievance Procedure Manual* § 4.4; EDR Ruling Nos. 2011-2799, 2011-2715, and 2010-2609.

<sup>6</sup> See Va. Code § 2.2-1001(5); 2.2-3003(G).