

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: March 29, 2012; Ruling No. 2012-3304; Agency: Virginia Department of Transportation; Outcome: Agency 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. 2012-3304
March 29, 2012

The Department of Transportation (the agency) seeks a compliance ruling regarding the grievant's January 3, 2012 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 3, 2012, the grievant initiated a grievance. The grievance proceeded through the management steps and was qualified for hearing by the agency head on January 26, 2012. The agency sent the January 3rd grievance to the grievant by certified mail, requesting that the grievant indicate on the original Grievance Form A his receipt of the qualification decision and his election to either conclude or advance his grievance to hearing. Thereafter, the agency requested that the grievant return the original Grievance Form A to the agency's human resources division. The agency asserts that the grievant has not returned the January 3rd grievance to the agency's human resources division.

On February 29, 2012, the agency sent a noncompliance letter to the grievant by certified and U.S., first-class mail, indicating the agency had not received a response from the grievant and he was therefore deemed out of compliance with the grievance procedure. The agency's noncompliance letter specifically stated that the grievant's "October 14, 2011" grievance had been qualified by the agency head on January 27, 2012. Additionally, the agency requested a response from the grievant within five workdays, and gave him notice that if no response was received, the agency would seek administrative closure of the grievance for noncompliance. The postal records indicate the February 29th noncompliance letter was delivered to the grievant on March 2, 2012. Now, the agency now requests a compliance ruling from this Department.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.¹ That process assures that the parties first

¹ *Grievance Procedure Manual* § 6.3.

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 agency's request for a compliance ruling appears to be premature because the agency has not shown that it first notified the grievant in writing of the alleged procedural violations with his January 3, 2012 grievance, as required by the grievance procedure. Furthermore, there is no provision of the grievance procedure requiring that an agency return the grievance package to the grievant for additional input following qualification of a grievance for hearing by the agency head. Rather, the Grievance Procedure Manual states, "If the agency head qualifies the grievance for hearing, the agency's Human Resources Office must request the appointment of a hearing officer using the 'Form B,' within 5 workdays of the qualification decision."⁴ This Department does recognize that there is an inconsistency between the grievance procedure itself and the Grievance Form A that could affect this issue. While the *Grievance Procedure Manual* is clear, confusion could be created by the inclusion of a box on the Form A for the grievant to state "I advance my grievance to hearing and am returning it to the Human Resources Office. (Only check if qualified by agency head.)" However, in such a situation, the unmistakable requirements of the *Grievance Procedure Manual* are controlling.

Therefore, in this case, because the agency has not requested the appointment of a hearing officer within five workdays of the agency head's qualification decision as required by the Grievance Procedure Manual, this Department orders the agency to, **within five workdays of the date of this ruling**, request the appointment of a hearing officer for the grievant's January 3, 2012 grievance using the Form B. The grievant must return the original grievance package to the agency within five workdays of the date of

² *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.

⁴ *Grievance Procedure Manual* § 4.2.

this ruling. The agency must submit a copy of the grievance materials with the Form B if it does not receive the original version from the grievant before requesting the appointment of a hearing officer. If the grievant wishes to conclude his grievance, he should notify the agency's human resources office in writing within five workdays of the date of this ruling.

This Department's rulings on matters of compliance are final and nonappealable.⁵

Claudia T. Farr
Director

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