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RECONSIDERED QUALIFICATION RULING

In the matter of the Marine Resources Commission
Ruling Number 2023-5548
May 16, 2023

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management reconsider its determination in EDR Ruling Number 2023-5513 (the “prior ruling”), which concluded that the grievant’s January 17, 2023 grievance with the Marine Resources Commission (“the agency”) was not qualified for a hearing. The agency has also identified an error in the prior ruling. For the reasons described below, EDR declines to reconsider the conclusions set forth in the prior ruling, but will correct the prior ruling’s facts as discussed below.

DISCUSSION

EDR does not generally reconsider its qualification rulings and will not do so without sufficient cause. For example, EDR may reconsider a ruling containing a mistake of fact, law, or policy where the party seeking reconsideration has no opportunity for appeal. However, clear and convincing evidence of such a mistake is necessary for reconsideration to be appropriate.¹

In the prior ruling, EDR addressed the grievant’s concerns that the Commissioner of the agency was taking part in a variety of actions adversely affecting the grievant, such as delaying pay actions and Employee Work Profile (“EWP”) proposals, and engaging in inappropriate workplace behavior for retaliatory reasons.² EDR concluded that the agency “has not misapplied policy by delaying the pay action and EWP proposals.”³ The prior ruling also found that the grievant “has not identified acts or omissions that could reasonably be viewed as amounting to an adverse employment action or would not have occurred but for a retaliatory motive.”⁴

Grievant Request

The grievant has requested reconsideration on grounds that the facts found by EDR were inaccurate and has asked that it be reconsidered “based only on verifiable information.” In

¹ See, e.g., EDR Ruling Nos. 2010-2502, 2010-2553.

² EDR Ruling No. 2023-5513, at 1.

³ *Id.* at 4.

⁴ *Id.* at 5.

particular, the grievant states that (1) the September 12, 2022 meeting was not called by the Commissioner to discuss theft of oysters, but to discuss the correspondence the former Shellfish Division Chief (“former Chief”) and the grievant had with the Department of Health; (2) the agency’s Human Resources (HR) Director received memos and email chains regarding EWP revisions and salary proposals on October 27, not on November 10, 2022, as EDR found in the prior ruling; (3) contrary to the prior ruling’s facts, the grievant did not allege that a meeting between the former Chief and the Secretary regarding EWP revisions ever took place; (4) the Commissioner was appointed in June 2022, not July 2022; and (5) the witness statements and accompanying email correspondence given by the HR Director were improperly considered in the prior ruling due to being based on “unverified opinions.” The grievant also requests that “all reference to anything that ‘allegedly’ happened be stricken from [the prior ruling].” Upon a careful review of the parties’ submissions, while EDR will correct certain facts in the prior ruling, we identify no grounds to reconsider the conclusions reached therein.

First, the grievant’s claim that the September 12, 2022 meeting was about correspondence with the Department of Health, and not about theft of oysters as the prior ruling found, will be corrected in the prior ruling to more accurately state the purpose of the meeting. However, since the material issue of this meeting was the behavior of the Commissioner, the subject matter of the meeting or how it is described has no impact on the prior ruling’s conclusion.

EDR also agrees with the grievant’s claim that correspondence from the former Chief was sent to the HR Director on October 27, 2022 based on a copy of the email. A correction will be made to the prior ruling. However, based on the timeline provided by the HR Director, she stated that she received correspondence from the former Chief on November 10, 2022. The dates of the correspondence have no material impact on the prior ruling’s ultimate determination, which will not be disturbed.

As for the alleged meeting between the former Chief and the Secretary that the grievant claims never took place, EDR relied on a statement by the grievant in his response at one of the management steps that states the former Chief “requested an exit interview with the Secretary . . . and that this was not done until December of 2022.” EDR now finds that the grievant must have meant, based on this wording, that the former Chief requested the meeting in December 2022. This again has no material impact on the prior ruling’s final determination, but EDR will adjust the facts in the prior ruling accordingly.

Finally, the official announcement from the Governor’s office of the Commissioner’s appointment is dated July 14. The date of the appointment has no bearing on the prior ruling’s conclusions.

The grievant also argues that certain witness statements included in the record consisted of “unverified and untruthful information” that wrongly influenced the prior ruling. In the context of the witness statements, while such statements are not under oath, there is no basis to dismiss them as unverified or untruthful. The grievant has offered to provide but has not provided evidence that contradicts the facts presented in the witness statements. Further, the witness statements in the prior ruling had little to no impact on the final determination of qualification. The description is included in the prior ruling to place in context the initiation of the grievance. However, the facts described in the witness statements had no bearing on the actual issues grieved. While the grievant requests that any and all facts that “allegedly” happened be stricken from consideration, the only

such alleged facts are related to those described in the witness statements. They are described as alleged facts because no factual determinations regarding those events were necessary as they had no impact on the outcome of the ruling. For the foregoing reasons, EDR will not disturb the inclusion of a description of these allegations in the prior ruling.

The grievant concludes his request for reconsideration by emphasizing the basis of his grievance. He summarizes that Shellfish Division pay actions and EWP proposals were approved at all levels within the agency, but after the new Commissioner's appointment, all actions regarding pay for the Shellfish Division were halted, despite some pay increases being approved for others within other divisions in the agency. The grievant further claims that all other actions by the Commissioner, such as verbal abuse, intimidation, and not approving travel requests, were "largely confirmed as occurring." EDR finds that the facts relating to the Commissioner delaying pay actions and EWP proposals were properly and accurately assessed in the prior ruling. As the prior ruling stated, DHRM Policy 3.05, *Compensation*, allows for broad discretion in agencies' oversight of pay actions. Based on the facts provided, particularly all the staffing changes taking place at the time, EDR found that the delay was not inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.⁵

Regarding the claims of verbal abuse and intimidation by the Commissioner, there is no evidence of verbal abuse or intimidation in the record other than the facts noted in the prior ruling. The grievant cites solely to the September 12, 2022 meeting with the Commissioner, the meeting in which the Commissioner confirmed he slammed his fists. In the management-step responses between the Commissioner and the grievant, the grievant contests that the Commissioner yelled in addition to slamming his fists, but the Commissioner denies any yelling. Even if it were found that the Commissioner did in fact yell at the grievant during this meeting, the act of yelling on a single occasion would likely not rise to the level of an adverse employment action.⁶ These are the facts that the prior ruling considered regarding the grievant's retaliation claims, and based on those facts, EDR found that there were no "acts or omissions that could reasonably be viewed as amounting to an adverse employment action."⁷

Agency Request

Following issuance of the prior ruling, the agency noted that the timeline of pay increases for the grievant were not entirely accurate. The agency provided screenshots showing that the grievant's most recent salary increase was a statewide increase in July 2022. This conflicts with the prior ruling's finding that the HR Director confirmed that the grievant received a pay increase in November 2022.⁸ Accordingly, EDR will correct this information in the ruling.

⁵ EDR Ruling No. 2023-5513, at 3-4.

⁶ See *Holloway v. Maryland*, 32 F.4th 293, 301 (4th Cir. 2022) (citing *Buchhagen v. ICF Int'l, Inc.*, 545 F. App'x 217, 219 (4th Cir. 2013)) (stating that a singular instance of a supervisor yelling or "pounding the table" is not sufficiently severe or pervasive to establish an abusive environment).

⁷ EDR Ruling No. 2023-5513, at 5.

⁸ *Id.*

CONCLUSION

In sum, EDR has reviewed the grievant's request for reconsideration and finds no grounds to disturb the prior ruling. For the reasons described above, the grievant's request for reconsideration is denied respectfully, and the determinations set forth in EDR Ruling Number 2023-5513 stand as originally issued. Corrections as noted herein will be made to EDR Ruling Number 2023-5513 with the final, revised version to be provided to the parties and published on EDR's website.

EDR's qualification rulings are final and nonappealable.⁹

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⁹ See Va. Code § 2.2-1202.1(5).