JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

RECONSIDERED QUALIFICATION RULING

In the matter of the George Mason University
Ruling Number 2023-5528
March 14, 2023

George Mason University (the "university" or "agency") has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management reconsider its determination in EDR Ruling Number 2023-5478 (the "prior ruling"), which concluded that the grievant's August 11, 2022 grievance was qualified for a hearing. For the reasons described below, EDR declines to reconsider the conclusions set forth in the prior ruling.

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 concluded that the grievance "sufficiently allege[d] an adverse employment action based on the effect of the IA investigation on the grievant's eligibility for promotion."[2] Specifically, the prior ruling found that the grievant had presented information about a relevant university policy that explicitly stated that if an employee received a sustained finding in an Internal Affairs (IA) investigation, they would be ineligible for promotion. EDR held that "[b]ecause this result appears to be disciplinary in nature, this adverse employment action satisfies the standards to qualify for a hearing."[3]

The university has requested reconsideration on grounds that, since the time EDR has issued its qualification ruling, the policy in question, General Order 34, has been modified and replaced by Policy 1002, *Special Duties and Promotion*. This new policy does away with General Order 34's rule of making those with sustained IA investigations on their record ineligible for promotion, and for that reason, the university appears to suggest that the grievance is now moot, as the adverse employment action that qualified the grievant for a hearing is no longer in effect. In addition, the university appears to argue that because the grievant did not apply for or inquire about a promotion

[1] *See*, *e.g.*, EDR Ruling Nos. 2010-2502, 2010-2553.
[2] EDR Ruling No. 2023-5478, at 3.
[3] *Id*.

since his IA finding, he was not excluded from a promotion on the basis of General Order 34, and for that reason, has not already suffered an adverse employment action notwithstanding the updated Policy 1002. In response, the grievant maintains that "(1) [he] was precluded from promotions by [the university's] actions; (2) the new policy still allows for the IA finding against [the grievant] to be used to preclude [the grievant] from promotion; (3) [the university's] policy changes are not permanent and could be reversed; and (4) [the grievant] is asserting that the imposed discipline was retaliatory.

Upon a careful review of the parties' submissions, we identify no grounds to reconsider the conclusions reached in the prior ruling. While it would appear that the grievant is now eligible to apply for promotion, a hearing officer could potentially find that the grievant suffered an adverse employment action in being prevented from applying for a promotion previously. The university contends that the grievant never applied for or inquired about a promotion after the IA finding. However, the grievant still experienced a period of time when General Order 34 explicitly made him ineligible for promotion. A hearing officer could find (if supported by record evidence) that the grievant chose not to apply due to his reading of that provision of General Order 34 and understanding that there would be no benefit in applying because of his ineligibility. Further, there has been a material amount of time that has passed since the IA finding when the grievant could have potentially applied for and received a promotion, but because of the Order, the grievant missed out on that potential opportunity. On that basis, the hearing officer could order an award to remedy an adverse employment action, if the record evidence supports that one occurred.[4] Further, EDR has held in the past that a change in the grievant's situation does not preclude a hearing officer from awarding relief based upon the harm already suffered by the grievant where relief is still available.[5] Therefore, the grievant continues to challenge an adverse employment action that affected his employment.[6]

In addition, the grievant argues that he has alleged retaliation in his grievance, and for that reason, the grievance should still qualify for a hearing. As was expressed in the initial qualification ruling, "to the extent the grievant asserts a claim of retaliation at hearing or other defenses, the grievant will have the burden to prove by a preponderance of evidence that the university's actions were the result of retaliation."[7] Since the change in policy has no effect on the grievant's retaliation claim, the grievant will still have the opportunity at a hearing to prove that there was retaliation, and should the hearing officer find the university's actions retaliatory, he may order rescission based upon the record.[8]

In sum, EDR has reviewed the agency's request for reconsideration and finds no grounds to disturb our prior ruling. The agency has not presented information to indicate that a mistake of fact, law, or policy led the prior ruling to an incorrect result; nor have intervening circumstances apparently mooted effective relief that could potentially be granted by a hearing officer.

---

[4] *Rules for Conducting Grievance Hearings* § VI(D).

[5] *See* EDR Ruling No. 2023-5438.

[6] Adverse employment actions include any agency actions that have an adverse effect on the terms, conditions, or benefits of one's employment. Laird v. Fairfax County, 978 F.3d 887, 893 (4th Cir. 2020) (citing Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007)).

[7] EDR Ruling No. 2023-5478, at 4.

[8] *Id*.

For these reasons, the agency's request for reconsideration is denied respectfully, and the determinations set forth in EDR Ruling Number 2022-5478 stand as originally issued.

EDR's qualification rulings are final and nonappealable.[9]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[9] *See* Va. Code § 2.2-1202.1(5).