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**RECONSIDERED QUALIFICATION RULING**

In the matter of the Department of State Police  
Ruling Number 2023-5438  
August 9, 2022

The Department of State Police (the “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 2022-5407 (the “prior ruling”), which concluded that the grievant’s March 3, 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.<sup>1</sup>

In the prior ruling, EDR concluded that the grievance raised a sufficient question as to whether the agency misapplied or unfairly applied policy when it determined that the grievant was not exempt from its weight control policy, with the result that the grievant was ineligible for promotion. Specifically, the prior ruling found that the grievant had presented information about a medical condition that he alleged prevented him from complying with the agency’s weight control policy. Because the agency’s basis for denying the grievant’s request for exemption was not apparent from the record, we determined that the grievance presented “a qualifiable issue as to whether the agency misapplied or unfairly applied policy to effectively deprive the grievant of a standard promotion and/or reasonable accommodations to which he was entitled.”<sup>2</sup>

The agency has requested reconsideration on grounds that, while the previous ruling was pending, the grievant came into compliance with the agency’s weight requirements and, accordingly, he is expected to be promoted on August 10, 2022, to the rank he initially sought in his grievance. The agency appears to suggest that the grievance is now moot, as the adverse employment action it challenged is no longer in effect. In addition, the agency appears to argue

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<sup>1</sup> See, e.g., EDR Ruling Nos. 2010-2502, 2010-2553.

<sup>2</sup> EDR Ruling No. 2022-5407, at 4.

that the grievant's demonstrated ability to comply with the agency's weight requirements indicates that he is not prevented from doing so and, thus, the agency did not misapply policy by requiring the grievant's compliance as a condition for promotion.

In response, the grievant maintains that he should have been promoted in February 2022, as he argued in his grievance, and should therefore be entitled to backpay in an amount corresponding to the salary increase he would have received with a February promotion. Moreover, the grievant seeks a continuing exemption from the agency's weight requirements.

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 agency plans to grant the grievant a portion of his requested relief (*i.e.* promotion effective August 10), a hearing officer could potentially find that the agency misapplied policy by not promoting the grievant several months ago. On that basis, the hearing officer could order an award to remedy a misapplication of policy, if the record evidence supports that such a misapplication occurred.<sup>3</sup> Therefore, the grievant continues to challenge an adverse employment action that affected his pay.<sup>4</sup>

In addition, the grievant's recent compliance with the agency's weight requirements is not necessarily inconsistent with his continuing claim to exemption from those requirements. First, as explained above, the grievance relates to the agency's determination that the grievant was not eligible for promotion in February 2022. Without more, we cannot say that the grievant's circumstances in July are probative as to that issue.<sup>5</sup> Second, in light of the record as a whole, a sufficient question remains as to whether the grievant has a medical condition that requires a continuing accommodation as to the agency's weight control policy. By its terms, the policy makes weight compliance an explicit "performance element" for all sworn employees to be noted during annual performance evaluations; compliance is also a condition for career progression and competitive transfer. In light of those provisions, we cannot say that the issue of exemption and/or accommodation has become moot.

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.

For these reasons, the agency's request for reconsideration is denied respectfully, and the determinations set forth in EDR Ruling Number 2022-5407 stand as originally issued.

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<sup>3</sup> *Rules for Conducting Grievance Hearings* § VI(D).

<sup>4</sup> 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)).

<sup>5</sup> Nothing in this ruling prevents the agency from offering this evidence at the eventual hearing, or prevents the hearing officer from determining such evidence is relevant to the questions at issue.

EDR's qualification rulings are final and nonappealable.<sup>6</sup>

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<sup>6</sup> See Va. Code § 2.2-1202.1(5).