



JANET L. LAWSON  
DIRECTOR

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

James Monroe Building  
101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, Virginia 23219

Tel: (804) 225-2131  
(TTY) 711

**RECONSIDERED QUALIFICATION RULING**

In the matter of the Virginia Community College System  
Ruling Number 2024-5604  
August 17, 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 2023-5578 (the “prior ruling”), which concluded that the grievant’s January 9, 2023 grievance with a community college in the Virginia Community College System (the “college” or “agency”) was not 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>

The first issue the grievant identifies in her request for reconsideration concerns the materials the college submitted with the ruling request to EDR. The grievant uses this issue to express her position that she did not appeal the basis of the “Below Contributor” rating in her performance evaluation, but rather the college’s alleged misapplication(s) of policy in the process of issuing the performance evaluation. The prior ruling addressed both the grievant’s arguments about misapplication of policy and her overall rating of “Below Contributor.”<sup>2</sup> While the grievant suggests that the college’s (and EDR’s) focus on the overall rating is a “red herring,” that is not the case. If we were to analyze the issues challenged in this grievance without reference to the overall “Below Contributor” rating, the grievance would have no possibility to qualify for a hearing. The grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”<sup>3</sup> Thus, typically the threshold question is whether the grievant has suffered an adverse employment action.<sup>4</sup> Alleged misapplications of policy in the

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

<sup>2</sup> EDR Ruling No. 2023-5578.

<sup>3</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>4</sup> An adverse employment action is defined as a “tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities,

process of issuing a performance evaluation in this case do not represent an adverse employment action in and of themselves because they do not have an adverse effect *on the terms, conditions, or benefits* of one's employment without reference to the rating of "Below Contributor." EDR's focus on the overall rating was the only way for this grievance to have potentially qualified for a hearing.<sup>5</sup> Therefore, this first issue does not present a basis for EDR to reconsider the prior ruling.

The second issue raised by the grievant in her request for reconsideration concerns her argument that she did not receive a Notice of Improvement Needed (NOIN) during the performance cycle. While this matter was addressed in the prior ruling,<sup>6</sup> the grievant again reiterates that the NOIN she received was not signed by the reviewer and, therefore, could not be considered an effective NOIN for purposes of supporting an overall "Below Contributor" rating. The grievant states that she did not receive the version of the NOIN that reflected review by the central office human resources staff in place of the reviewer until May 1, 2023, outside the performance period. Nevertheless, this does not change EDR's analysis. The policy does not mandate that the employee receive a copy with the reviewer's signature, just that the NOIN be reviewed and approved (and signed) by a reviewer.<sup>7</sup> In this case, we found that the college had substantially complied with the policy language. There is no dispute that the grievant received the NOIN that identified substandard performance and provided a performance improvement plan.<sup>8</sup> These are the critical aspects of the NOIN and the purpose of its pre-requisite to the "Below Contributor" rating. While the grievant maintains that she "did not receive a NOIN for the 2021-2022 performance evaluation cycle," it is simply not the case. Rather, the grievant is arguing that the NOIN she did receive omitted a signature. The lack of a reviewer's signature on the form is a technicality that does not invalidate the NOIN or its substance in this case. The available evidence does not support a finding that the NOIN was not reviewed and approved. Accordingly, EDR again finds that the college had substantially complied with policy in the issuance of the NOIN. This second issue does not present a basis for EDR to reconsider the prior ruling.

Lastly, the grievant, while again confirming that she is not contesting the contents of her performance evaluation, states that she did complete all training modules required of her. The grievant's request for reconsideration does not provide additional facts on this point to explain the grievant's position or documentation to support what she had completed. The available evidence reviewed by EDR indicates that the grievant had not created the training modules she was tasked with creating, as indicated in her performance evaluation.<sup>9</sup> Therefore, EDR has reviewed no basis on this final point that supports reconsideration of the prior ruling.

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or a decision causing a significant change in benefits." *Ray v. Int'l Paper Co.*, 909 F.3d 661, 667 (4th Cir. 2018) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). 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)) (an adverse employment action requires more than a change that the employee finds "less appealing").

<sup>5</sup> Further, as discussed in the prior ruling, it is not clear that the grievant actually suffered an adverse employment action even with consideration of the "Below Contributor" rating as a result of the lack of a re-evaluation. EDR Ruling No. 2023-5578 at 2.

<sup>6</sup> EDR Ruling No. 2023-5578 at 2-3.

<sup>7</sup> DHRM Policy 1.40, *Performance Planning and Evaluation* ("Identifying Substandard Performance").

<sup>8</sup> The grievant states she received the NOIN on August 12, 2022, during the relevant performance period.

<sup>9</sup> EDR Ruling No. 2023-5578 at 4-5.

CONCLUSION

Based on the foregoing, the grievant has not presented a basis that supports reconsideration of EDR's determinations in the prior ruling. As previously held, the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.<sup>10</sup> EDR's qualification rulings are final and nonappealable.<sup>11</sup>

*Christopher M. Grab*  
Director  
Office of Employment Dispute Resolution

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<sup>10</sup> See *Grievance Procedure Manual* § 4.1.

<sup>11</sup> Va. Code § 2.2-1202.1(5).