Issues: Group III Written Notice with suspension (permitting gambling on state property and permitting workplace harassment) and retaliation; Hearing Date: 02/21/06; Decision Issued: 02/24/06; Agency: DMV; AHO: David J. Latham, Esq.; Case No. 8177; Outcome: Agency upheld in full

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8177

Hearing Date: February 21, 2006
Decision Issued: February 24, 2006

PROCEDURAL ISSUES

Grievants C & M requested that their grievances be consolidated for a single hearing. The Director of the Department of Employment Dispute (EDR) Resolution consolidated the two grievances for hearing.[1] The merits of each grievance have been independently assessed and separate decisions are being issued for each case.

Grievant requested as part of her relief that she receive an apology. A hearing officer does not have authority to require the issuance of an apology.[2] Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

[1] EDR *Compliance Ruling of Director* Numbers 2006-1129 & 2006-1131, October 5, 2005.
[2] § 5.9(b)6 & 7. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

APPEARANCES

Grievant C
Grievant M
Attorney for Grievant
One witness for Grievant
Human Resource Manager
Attorney for Agency
Nine witnesses for Agency

ISSUES

Did grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Did the agency retaliate against grievant?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group III Written notice for permitting gambling on state property and for permitting workplace harassment to occur.[3] As part of the disciplinary action, grievant was suspended from work without pay for ten work days. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.[4] The Department of Motor Vehicles (Hereinafter referred to as "agency") has employed grievant for 29 years; she is a Program Administration Manager II, and manages a small customer service center office.[5]

An employee in grievant's office had been playing an Internet-based game known as Pro Football Pick'em (PFP).[6] The Yahoo! sponsored game does not

[3] Agency Exhibit 1. Group III Written Notice, issued April 12, 2005. [NOTE: In this agency exhibit, the attachment to the Written Notice cites "Policy #1.80, Workplace Harassment." This is erroneous because Workplace Harassment is addressed in Policy 2.30 (See Agency Exhibit 21). However, the Written Notice and attachment grievant received correctly cites the applicable policy number. See Grievant Exhibit 7.]
[4] Agency Exhibit 1. *Grievance Form A*, filed May 6, 2005.
[5] Agency Exhibit 31. Employee Work Profile.
[6] Description from Yahoo! Web site. Pro Football Pick'em is available through Yahoo! Sports and is described as "a weekly game that lets you show your smarts by picking the winner of the year's regular season games." Participants enter selections weekly and receive points for each correct pick. Yahoo! gathers results and computes point totals and standings.

involve payment of money, does not award prizes, is for entertainment purposes only, and may not be used in connection with any form of gambling or wagering.[7] The PFP web site also allows participants to establish a Private Group of up to 50 friends and office mates. Yahoo! performs the same functions of gathering scores and computing results for both Public and Private Groups.

In 2002, a male employee (hereinafter referred to as "Commissioner" because he was so designated by the PFP game rules) recruited agency employees to join his private group. He gave participants an option to play in the Private Group for free, or to pay a season fee of $15 each. The fee was used to pay weekly monetary prizes to the person making the most correct picks each week, and to pay a prize to the person who made the most correct picks for the entire season. Grievant knew that employees in the office were playing the PFP game and using agency computers for that purpose.

During the 2003 football season, the "Commissioner" and a male coworker who was participating in the PFP Private Group had a heated discussion at the office's front counter in the presence of other employees. The discussion involved a dispute about the payment of money as a result of the coworker's wife's participation in the PFP game. Although the office was closed to the public at the time, two other employees became sufficiently concerned about the heated nature of the discussion that they went to a back room and told the assistant manager what was happening and that she should do something. She did not take any action, even though she was the only management person in the office that day. The discussion between the two males ended after two minutes without any further repercussions. Grievant learned about the incident the following day. She did not take any corrective action with regard to either the two male participants or the assistant manager.

In March 2004, grievant told the District Manager that the "Commissioner" had been bidding on eBay and was playing the PFP game on state computers. The District Manager told grievant on two occasions to determine whether the "Commissioner" was involved in such activities during working hours (as opposed to lunch or before/after working hours). If grievant determined that the employee was involved in these activities during working hours, the District Manager told grievant to formally counsel him and to document the counseling. Grievant did not counsel the employee. Grievant had known since at least 2003 or earlier that employees were gambling on state computers.[8] During mid-March 2004, all employees in the office were given and signed receipt for the Commonwealth's Internet and Electronic Communications Systems Policy.[9] This policy provides

[7] *Ibid*. Yahoo! disclaimer.
[8] Grievant Exhibit 1. Fax to Office of Attorney General, third paragraph of memorandum dated March 9, 2004. [NOTE: Grievant included in her exhibits only 27 of the 45 pages she sent to the OAG.]
[9] Agency Exhibit 28. DHRM Policy 1.75, Use of Internet and Electronic Communication Systems, August 1, 2001.

that employees may make incidental and occasional personal use of the Internet and computers but specifically prohibits accessing sexually explicit content. The policy also prohibits violating any federal or state law such as illegal gambling.[10]

In March 2004, the "Commissioner" filed a grievance against grievant because he had not been selected for a promotion that he had applied for. In April 2004, grievant filed a complaint against the "Commissioner" asserting that he had been accessing pornographic material on a state-owned computer terminal. Human resources was consulted and advised that it would be inappropriate to take any action on grievant's complaint until the "Commissioner's" grievance had been resolved because to do otherwise would appear retaliatory. Accordingly, a management decision was made to temporarily pend grievant's complaint until the "Commissioner's" grievance could be satisfactorily resolved. Grievant was unaware that her complaint had been placed on temporary hold and became dismayed at what she perceived to be inaction on her complaint. At a citizen listening tour in August 2004, grievant spoke with the Attorney General of Virginia who suggested she fax her concerns to his office.

In May 2004, the District Manager gave grievant an interim evaluation noting several performance areas considered to be substandard and identified for improvement.[11] She advised grievant, *inter alia*, that she should document and resolve performance issues as they occur. She also directed grievant to ensure that employees follow the written guidelines for computer usage.

In September 2004, grievant faxed 45 pages of material to the Office of Attorney General (OAG) complaining that her employee – the "Commissioner" had been viewing pornographic material, bidding on eBay, and gambling – all on a state-owned computer terminal in the office.[12] She also complained that the employee had been telling off color jokes that offended female coworkers. Grievant did not take any action either to halt these activities or to discipline the employee. She did not report any of the other employees for gambling even though they were participating in the PFP game. The OAG concluded that grievant's allegations were primarily a personnel matter best resolved within the agency and referred the information to the agency head.[13]

The agency head asked the Deputy Commissioner to look into the matter and to call grievant. The Deputy Commissioner spoke with grievant and directed her to:

1) Review the applicable policies, including the Internet policy, and if grievant felt there was a violation to address it directly with corrective action;

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[10] See Va. Code § 18.2-325 for definition of illegal gambling.
[11] Grievant Exhibit 3. Interim Evaluation Form, May 25, 2004.
[12] *Ibid.*
[13] Agency Exhibit 39A. Memorandum from OAG to agency head, September 23, 2004.

2) Address any performance or behavior issues in a *timely* (prompt) manner when she became aware of them;
3) Advise those who didn't like off-color jokes to advise the joke teller that they didn't like the jokes and to desist in the future, and then to tell grievant if the offensive behavior continued; and
4) Feel free to contact anyone in the management chain for further guidance if she had any additional questions.

The Deputy Commissioner stated that her conversation with grievant was intended to be coaching because she was aware that grievant had only been a manager for a relatively short time. Grievant said she appreciated the advice.

In October 2004, grievant faxed to a delegate of the General Assembly the same information she had earlier sent to the OAG. The delegate wrote to the Governor who referred the matter to the agency. The agency head spoke with the delegate to inform him of the status of the situation.

The agency resolved the "Commissioner's" grievance in December 2004 and launched an investigation into grievant's complaint in January 2005. The agency head tasked his Deputy Commissioner to put together an investigative team which was sent to grievant's office to interview all employees. The team included the agency's Director of Field Operations, the law enforcement services deputy director, a Department of Human Resources policy analyst supervisor, and the District Manager. The team was charged with investigating alleged violations of agency Internet policy, inappropriate equipment usage, abuse of state time, management deficiencies and any other policy violations.[14] During the team's visit, interviews were conducted and extensive notes taken.[15] The team found that the local office had various problems including nepotism (grievant's husband had been working for her; the assistant manager's brother was her direct subordinate), office management failing to take action to correct performance deficiencies, and low morale.

After this visit, an action plan for the office was formulated.[16] The matter was reviewed with agency top management and it was determined that the team should make a second visit to the office to further investigate concerns raised during the first visit regarding alleged workplace harassment and pornographic material. During the second visit in March 2005, the team learned that the playing of the PFP game had involved gambling for money and that money may have changed hands in the office. The team also learned about lewd jokes being told in the office; grievant was present on some occasions but she did not object or take any corrective action. One employee wore sexually suggestive costumes in the office; grievant did not counsel or discipline the employee. One employee complained to grievant about being shown pornography by a coworker; grievant

[14] Agency Exhibit 11. Memorandum from agency head to Deputy Commissioner, January 19, 2005.
[15] Agency Exhibit 40. Entire investigation including report, interviews and notes.
[16] Agency Exhibit 16. Action Plan, February 16, 2005.

did not take any corrective action. Soon thereafter, the agency head, the Deputy Commissioner, and the District Manager met with grievant to solicit her input as to what action should be taken. Grievant repeatedly asserted words to the effect of "I don't know where I was when all of this was going on."

The Customer Service Operations Director counseled grievant in writing in March 2005 that she should cease any gambling activities on state property.[17] In the same letter, he advised her that she might be subject to disciplinary action and gave her five days to submit any mitigating facts regarding her involvement in the gambling activities. Grievant responded in writing admitting that she had been aware of the gambling since at least September 2003 but had failed to take any corrective action.[18] She contended that the entire investigation should have focused only on the employee operating the PFP game. The agency concluded its investigation in April 2005. Several top management meetings, including on two occasions the agency head, were held to assess the evidence and to determine what corrective action should be taken. The team concluded that grievant's office was out of control and poorly managed. The agency head directed the management team to apply disciplinary action in a fair, consistent, and appropriate manner. The team recommended varying levels of discipline for all employees in the office, including grievant, and for the district manager. The agency head approved the recommendations.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the

[17] Agency Exhibit 1. Letter from CMSA Director to grievant, March 25, 2005. [NOTE: Although the letter is dated 2004, it was stipulated that this was a typographical error and that the letter was actually written in 2005.]

[18] Agency Exhibit 21. Letter from grievant to CSMA Director, March 30, 2005.

> grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as allegations of retaliation, the grievant must present her evidence first and prove her claim by a preponderance of the evidence.[19]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of the Commonwealth of Virginia's DHRM *Standards of Conduct* Policy provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.[20] Gambling on state property or during work hours is a Group III offense. Violation of Policy 2.05, Workplace Harassment can be a Group III offense depending upon the nature of the offense.

Workplace harassment includes, *inter alia*, unwelcome innuendo or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.[21] The policy on workplace harassment provides that managers who allow workplace harassment to continue or fail to take appropriate corrective action upon becoming aware of the harassment may be considered a party to the offense, even though they may not have engaged in such behavior. It further provides that managers who allow workplace harassment to continue or who fail to take appropriate corrective action should be subject to disciplinary action under Policy 1.60, Standards of Conduct, including demotion or discharge.[22]

The agency has demonstrated, by a preponderance of evidence, that grievant was aware that her employees were gambling on state computers

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[19] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.
[20] Agency Exhibit 26. Section V.B.3, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.
[21] Agency Exhibit 27. DHRM Policy 2.30, *Workplace Harassment*, effective May 1, 2002.
[22] *Ibid*.

during work hours. Despite this knowledge, grievant failed to curtail the activity and, failed to take any corrective action with regard to the participants. Even after being counseled by her immediate supervisor (district manager) and later by the deputy commissioner to investigate and take appropriate action, grievant failed to act. As manager of the office, grievant was responsible to oversee, monitor, and deal with such issues. Her failure to take definitive corrective action when she became aware of these activities effectively amounted to an abdication of her responsibilities. Similarly, grievant did not take corrective action against employees who viewed pornographic sites on the computer, wore sexually suggestive costumes in the office, and told offensive jokes. Grievant's failure to either counsel or discipline the offenders allowed an offensive environment to continue in the office. Grievant knew that these activities were contrary to policy because she eventually reported the activity to others. However, grievant's decision to report the primary offender coincided with the offender's filing of a grievance against grievant. Thus, it appears that grievant's reporting was intended to retaliate against the offender rather than take definitive action to curtail the activity and counsel or discipline the offenders.

Grievant claimed that her district manager prevented her from taking corrective action with regard to the "Commissioner." However, the district manager testified credibly that she had directed grievant to counsel this employee and document the counseling if grievant could substantiate the allegations of misconduct him. Grievant acknowledged this in her memorandum of March 9, 2004.[23]

Grievant's involvement in this situation is unique when compared to other employees. Grievant is the manager of the office and is therefore held to a higher standard because she is expected to set an example for subordinates and to take appropriate action when offenses are being committed. Grievant knew about the gambling at least as early as 2003,[24] had heard off-color jokes being told, observed the inappropriate Halloween costumes, and had received complaints about pornography, but she did not take any corrective action. Grievant also knew that an argument had occurred in the office between two employees over the payment of money for the PFP game. By failing to take appropriate action to curtail gambling, grievant effectively promoted the continuance of such activity. Similarly, by failing to take prompt corrective action with regard to the other activities, she acquiesced in, and thereby allowed, the continuance of these activities.

Retaliation

In her written grievance, grievant alleged that the disciplinary action was retaliatory because she had complained about one employee viewing pornography. Retaliation is defined as actions taken by management or

[23] Agency Exhibit 5.
[24] Agency Exhibit 35. E-mail from grievant to Field Operations Director, April 5, 2005.

condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.[25] To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Generally, protected activities include use of or participation in the grievance procedure, complying with or reporting a violation of law to authorities, seeking to change a law before the General Assembly or Congress, reporting a violation of fraud, waste or abuse to the state hotline, or exercising any other right protected by law.

Grievant reported an employee who, by viewing pornography on a state computer, violated the law. Accordingly, it may be concluded that grievant did participate in a protected activity and thereby satisfies the first prong of the test. An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment, such as a cut in pay.[26] Grievant was disciplined and sustained a concomitant suspension and loss of 10 days' pay. This constitutes an adverse employment action and satisfies the second prong of the test.

However, grievant has failed to demonstrate a nexus between these two events. All agency witnesses including the agency head, his Deputy Commissioner, the Field Operations Director, and the District Manager testified credibly that grievant's discipline was based only on the evidence uncovered in the investigation. These same witnesses unhesitatingly affirmed that they did not consider the fact that grievant had filed complaints with the OAG and General Assembly delegates as a basis for the corrective action taken. Moreover, the agency did not issue discipline until many months after grievant sent her fax to the OAG, and until after a very thorough investigation and extensive deliberation by the highest members of agency management. Grievant failed to present any evidence - other than speculation - that retaliation was a factor in the decision to take corrective action.

All six full-time employees in the office as well as the district manager were disciplined; the levels of discipline were carefully considered and based on the extent of each person's involvement and responsibilities.[27] The discipline meted out to each employee, including grievant, was measured and commensurate with each individual's offense(s). One Assistant Manager and the employee who was the "Commissioner" received Group III Written Notices and were removed from state employment; the other assistant manager and two

[25] EDR *Grievance Procedure Manual*, p.24.

[26] *Von Gunten v. Maryland Department of Employment*, 2001 U.S. App. LEXIS 4149 (4th Cir. 2001) (citing *Munday v. Waste Mgmt. of North America, Inc*., 126 F.3d 239, 243 (4th Cir. 1997).

[27] The district manager grieved the disciplinary action. Her discipline was subsequently rescinded during the management resolution process because one employee recanted his earlier statement that he had seen the district manager observe another employee gambling on the state computer.

generalists received Group II Written Notices.[28] Therefore, grievant has not borne the burden of proving her allegation of retaliation.

Grievant also offered as part of her closing argument a brief asserting that the agency violated grievant's statutory right to freedom of speech. She cites three Supreme Court cases in support of her argument. First, these cases hold that statements by public officials on matters of public concern must be accorded First Amendment protection. In the instant case, grievant's complaints meet this criterion. The *Pickering* case cited by grievant holds that, absent proof of false statements knowingly or recklessly made, the exercise of the right to speak on issues of public importance may not furnish the basis for dismissal from public employment.[29] Unlike *Pickering*, however, the evidence in the instant case supports a conclusion that grievant's complaint was not the basis for the disciplinary action. Second, grievant also asserts that the cited cases stand for the proposition that free speech is protected so long as it does not materially interfere with the efficient operation of agency functions. Since the agency did not argue any such interference, this issue is moot.

Third, grievant suggests that the cited cases hold that free speech is restricted if it can be demonstrated that the adverse employment action was motivated in part in response to the exercise of free speech rights. Grievant asserts that the timing of the disciplinary action is indicative of such a retaliatory motive. In fact, grievant first complained in March 2004; discipline was not issued until April 2005. More than a year elapsed between grievant's first complaint and the adverse employment action. Grievant's additional complaints to the OAG and delegates occurred in the late summer and early fall of 2004 – approximately half a year prior to issuance of discipline. Accordingly, the discipline occurred so far after grievant's initial complaints that the timing provides little, if any, support for grievant's argument. Most significantly, before issuing discipline, the agency conducted an extensive investigation and had multiple top management meetings to evaluate the evidence uncovered in the investigation. The agency did not rush to discipline anyone; rather, it undertook a careful, deliberative process to assure that its actions were appropriate and measured.

Grievant further asserts that the agency was "upset" with grievant for taking her complaints outside the agency. However, grievant offered no documentation or testimony to support this assertion. Multiple agency witnesses who were involved with both the investigation and the decision to discipline, up to and including the agency head, offered unrebutted and credible testimony that grievant's complaints were not a factor in their decision-making process.

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[28] Agency Exhibit 24. Report on Issues at grievant's office. See also Agency Exhibit 30. *Decision of Hearing Officer*, Case # 8122, issued July 12, 2005, upholding the "Commissioner's" removal from employment.

[29] *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968).

It is also worth noting that grievant filed a complaint against the employee who had filed a grievance against her. Not only did grievant file her complaint within a month after the grievance, but she named *only* the employee who filed the grievance rather than naming all of the employees who were participating in the inappropriate activities. These two factors strongly suggest that grievant retaliated against the one employee who had filed a grievance against her. The totality of evidence leads to the conclusion that grievant was the retaliator – not the agency.

Mitigation

The normal disciplinary action for a Group III offense is removal from employment. The policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has both long service and an otherwise satisfactory performance record. The agency considered these factors to be sufficiently mitigating that it decided to impose only a 10-day suspension rather than remove grievant from state employment. Based on the totality of the evidence, it is concluded that the agency properly applied the mitigation provision.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and ten-day suspension are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

Grievant has not borne the burden of proof to demonstrate retaliation.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[30] You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[31]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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David J. Latham, Esq.
Hearing Officer

[30] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[31] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.