

Issues: 1) Harassment and discrimination, 2) retaliation, and 3) harassment and retaliation; Hearing Date: 09/12/06; Decision Issued: 09/14/06; Agency: DSS; AHO: David J. Latham, Esq.; Case No. 8409, 8410, 8411; Outcome: Agency upheld in full in all three grievances; **Judicial Review: Appealed to the Circuit Court in Henrico County on 10/13/06; Court Ruling No. CL06-2632 issued 01/04/07; Outcome: HO's decision affirmed.**



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case Nos: 8409, 8410 & 8411

Hearing Date: September 12, 2006  
Decision Issued: September 14, 2006

**PROCEDURAL ISSUES**

Grievant filed three grievances during the first half of 2005. In grievance # 8409, she requested as relief that three other employees be removed from state employment. In grievance # 8410, she requested removal of one of the three employees named in the first grievance. In grievance # 8411, she requested removal of one of the three employees named in the first grievance and transfer of a fourth employee. A hearing officer does not have authority to transfer or remove employees from employment.<sup>1</sup> In a case such as this, the authority of the hearing officer is limited to issuing an order that the agency comply with applicable law or policy, if it is determined that the agency retaliated, harassed, or discriminated against grievant.<sup>2</sup>

Although grievant does not include religious discrimination in her written grievance of March 10, 2005, she subsequently told a human relations generalist that she believed an isolated incident in 2004 constituted religious discrimination. While this subject is briefly mentioned in the generalist's memorandum,<sup>3</sup> this

<sup>1</sup> § 5.9(b)6. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004.

<sup>2</sup> § 5.9(a)5. *Id.*

<sup>3</sup> Grievant Exhibit 7. Memorandum from human resource generalist, unsigned and undated.

issue is not a subject for adjudication in this case for two reasons. First, the incident occurred more than 30 days prior to filing of the grievance<sup>4</sup> and, second, the issue was not included in the written grievance.<sup>5</sup> In any case, grievant complained about this matter in 2004, spoke with the manager and assistant director after it occurred, resolved it, and there have been no recurrences.

Subsequent to the filing of her grievances, the grievant resigned from her position on July 19, 2005. Because the grievances were filed prior to resignation, grievant is entitled to pursue her grievances and to have a hearing.

### APPEARANCES

Grievant  
Attorney for Grievant  
Two witnesses for Grievant  
District Manager  
Advocate for Agency

### ISSUES

Was grievant the subject of harassment, discrimination, or retaliation?

### FINDINGS OF FACT

The grievant filed a timely grievance alleging harassment and discrimination.<sup>6</sup> She filed a second grievance claiming retaliation by her supervisor.<sup>7</sup> Grievant filed a third grievance alleging harassment and retaliation.<sup>8</sup> When the parties were unable to resolve the grievances at the third resolution step, the agency head declined to qualify the grievances for hearing. Grievant appealed to the Department of Employment Dispute Resolution (EDR) which ruled that the grievances qualify for hearing and, that they should be consolidated for a single hearing.<sup>9</sup>

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<sup>4</sup> § 2.2, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004, provides that the written grievance must be initiated within 30 calendar days of the date the employee knew, or should have known, of the event that formed the basis of the dispute.

<sup>5</sup> § 2.4, *Id.*, provides that once the grievance is initiated, additional claims may not be added.

<sup>6</sup> Grievant Exhibit 6. Grievance Form A, filed March 10, 2005.

<sup>7</sup> Grievant Exhibit 19. Grievance Form A, filed April 25, 2005.

<sup>8</sup> Grievant Exhibit 31. Grievance Form A, filed June 3, 2005.

<sup>9</sup> Grievant Exhibit 46. EDR *Qualification and Consolidation Ruling of Director Numbers 2005-1064, 2006-1169, and 2006-1283*, July 19, 2006. [NOTE: EDR also issued two other rulings related to Case # 8411 but those rulings address only agency compliance issues relating to the processing of the grievance during the resolution step process. See Grievant Exhibits 39 & 43.]

Grievant was employed by the Department of Social Services (DSS) (Hereinafter referred to as the agency) for less than three years. She was initially employed as a fiscal technician and became a senior technician in December 2003. The purpose of her position is to supervise, approve, analyze and process the reconciliation of fiscal accounts to ensure accuracy and conformity with established policies and procedures.<sup>10</sup> Her work description requires, *inter alia*, that she ensure there is a clear and accurate audit trail by maintaining accurate documentation.

#### Grievance of March 10, 2005 (# 8409)

On March 8, 2005, the District Manager directed the Acting Accountant Senior to have grievant make an accounting adjustment on a client's case. The case is a long standing, high-profile case which had previously resulted in a customer complaint to the manager. When the Accountant instructed grievant to make the adjustment she refused and asked for documentation to support the adjustment. The accountant advised the manager of grievant's response; the manager told the accountant to again direct grievant to make the adjustment. When the accountant did so, grievant went to the manager's office, stood in his doorway and told him she would not make the change without documentation. The manager stood up and told grievant in a raised voice that if she could not complete her job, she needed to let him know and she would be dealt with accordingly. Both grievant and the manager were agitated during this verbal interchange.

The manager then called the assistant director who suggested that grievant, the manager, and the accountant come to his office and discuss the matter. Before coming to the assistant director's office, grievant called the human resource (HR) department; an HR representative told her to follow her supervisor's instructions but that she could ask for documentation. After listening to what had occurred, the assistant director advised grievant that HR does not run DSS and that grievant is expected to comply with the manager's verbal instructions. He further stated that he was disappointed with grievant and, then told all three to return to their offices and do their jobs. Grievant considered this meeting to be inappropriate behavior toward a woman. Two days later, the assistant director documented the meeting in writing and advised grievant to consider it a verbal counseling.<sup>11</sup> He also advised her that her behavior was considered insubordinate and that a repetition of such behavior could result in disciplinary action.

On the same day, grievant filed a grievance alleging harassment, bullying and sexual discrimination. Also on the same day, grievant was walking by a room in which her supervisor was giving a farewell speech for a female employee who had resigned. She overheard a bit of his comments in which he purportedly said he would miss looking at the departing employee's tattoos, legs, and short

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<sup>10</sup> Agency Exhibit 4. Employee Work Profile Work Description, December 25, 2003.

<sup>11</sup> Grievant Exhibit 9. Memorandum from assistant director to grievant, March 10, 2005.

skirts.<sup>12</sup> During the management resolution steps, the agency granted to grievant relief that was not requested in the written grievance. First, it agreed to remove the counseling memorandum of March 10, 2005 from grievant's personnel file and instead place it in the supervisor's file. Second, it advised grievant that the management staff would be required to take appropriate training.<sup>13</sup>

The adjustment requested by the manager resulted from a Circuit Court order reducing the amount of a non-custodial parent's support obligation retroactive to February 1, 2005.<sup>14</sup> The information necessary to make the adjustment was contained in the court order which is part of the case record; grievant had access to the case record. One of grievant's previous supervisors was called as a witness by grievant and testified that, although documentation was received with the majority of requests for accounting adjustments, there were occasions when adjustments were made based solely on the manager's verbal request. Documentation would usually be received at a later time in such cases.

The agency's employee relations manager conducted an internal investigation of the grievance and concluded that grievant had been insubordinate in refusing to comply with a legitimate instruction and, that there was no evidence of harassment or discrimination.<sup>15</sup> The report also concluded that both the manager's and the assistant director's handling of the incident was unsatisfactory and, that the supervisor was appropriately counseled and required to take sexual harassment training.

#### Grievance of April 25, 2005 (# 8410)

On April 25, 2005, pursuant to agency policy,<sup>16</sup> grievant's supervisor gave her an interim performance form which identified areas that fully met job criteria as well as areas that needed improvement.<sup>17</sup> The interim evaluation notes that grievant struggled with Excel spreadsheets on occasion, needed to better understand the financial team's role, and needs to foster a team atmosphere and more supportive relationship with senior management. Grievant took exception to the areas identified for improvement contending that some of the comments were veiled references to the March 8<sup>th</sup> insubordination incident. She asserted that her supervisor retaliated against her because of the March 10<sup>th</sup> grievance and because he had been counseled as a result of that grievance.

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<sup>12</sup> Grievant Exhibit 8. Memorandum from grievant to employee relations manager, March 11, 2005.

<sup>13</sup> Grievant Exhibit 11. Counseling memorandum from manager to supervisor, March 16, 2005. The supervisor was required to take sexual harassment training. The supervisor acknowledged that he should not have made the comments even though grievant was the only person to complain about them.

<sup>14</sup> Grievant Exhibit 11. Memorandum from assistant director to employee relations manager, March 29, 2005.

<sup>15</sup> Grievant Exhibit 13. Report of Investigation by employee relations manager, April 20, 2005.

<sup>16</sup> Agency policy requires that interim performance evaluations be given to all employees at six months and nine months into the annual performance cycle.

<sup>17</sup> Grievant Exhibit 20. Interim Evaluation Form, April 28, 2005.

### Grievance of June 3, 2005 (# 8411)

In early May 2005, grievant's supervisor was transferred to another office; a supervisor from another office was assigned as grievant's supervisor. On June 2, 2005, the new supervisor gave grievant a Notice of Improvement Needed based on grievant's handling of an accounting situation that had occurred during mid-May.<sup>18</sup> She also scheduled grievant to take financial management training. On June 3, 2005, grievant filed the third grievance alleging that her supervisor and the manager were harassing and retaliating against her.

The Notice of Improvement was issued because a fiscal technician had initially made an incorrect adjustment to the automated system resulting in complaint calls to the Customer Service Unit and the manager. Grievant then made a second adjustment intended to correct the first error but failed to prorate the monthly charges correctly. This necessitated a third adjustment to completely correct the problems from the first two adjustments. Grievant's supervisor felt that both grievant and the technicians whom grievant supervised should have been able to make these adjustments without errors. The supervisor has issued two other Notices of Improvement to other employees for unrelated deficiencies in their work performance.

### 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 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.

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<sup>18</sup> Grievant Exhibit 30. Notice of Improvement Needed/Substandard Performance, June 2, 2005.

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 claims of retaliation, harassment, discrimination, the employee must present her evidence first and must prove her claims by a preponderance of the evidence.<sup>19</sup>

### **Grievance of March 10, 2006 ( Case # 8409)**

#### **Workplace Harassment**

Grievant alleges workplace harassment<sup>20</sup> and “job bullying.” For purposes of this analysis, “job bullying” will be considered a form of workplace harassment. To establish a claim for harassment, grievant must prove that: (i) the conduct was unwelcome; (ii) the harassment was based on a protected classification; (iii) the harassment was sufficiently severe or pervasive to create an abusive work environment; and (iv) there is some basis for imposing liability on the employer. Grievant has satisfied the first prong of this test by asserting that she found the March 8<sup>th</sup> meeting in the assistant director’s meeting to be intimidating and unwelcome. However, grievant has not shown that the unwelcome conduct was directed at her *based on any protected classification*. In fact, grievant has not even alleged that the unwelcome conduct was based on her gender or any other protected classification. While grievant obviously did not agree with what the assistant director and manager said during the meeting, the discussion was not so severe as to constitute an abusive work environment. Accordingly, grievant has not proven the second and third prongs of the test, and therefore, there is no need to address the fourth prong.

Nevertheless, the agency’s Deputy Commissioner concluded in the second step response to this grievance that the meeting was “problematic.”<sup>21</sup> He provided relief by assuring that appropriate steps would be taken to assure that future counseling would be handled differently, and that training would be given to management staff. Thus, while the March 8<sup>th</sup> meeting did not constitute workplace harassment, the counseling of grievant could have been conducted in a less stressful manner.

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<sup>19</sup> § 5.8, Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, Effective August 30, 2004.

<sup>20</sup> Department of Human Resource Management (DHRM) Policy 2.30, *Workplace Harassment*, effective May 1, 2002 defines workplace harassment as: “Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status or pregnancy that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee’s work performance; or (3) affects an employee’s employment opportunities or compensation.” [NOTE: This definition was slightly revised on May 16, 2006. However, the definition quoted herein was in effect at the time of the grievances.]

<sup>21</sup> Grievant Exhibit 14. Memorandum from deputy commissioner to grievant, April 22, 2005.

## Gender discrimination

Grievant also alleged in this first grievance that she was subjected to “sexual discrimination.” Based on the testimony and evidence, it is concluded that grievant meant to allege gender discrimination. To sustain a claim of gender discrimination, grievant must show that: (i) she is a member of a protected group (female); (ii) she suffered an adverse job action; (iii) she was performing at a level that met his employer’s legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee’s gender.<sup>22</sup> Grievant has satisfied the first and third prongs of this test because she is female and, she was performing at a satisfactory level.

An adverse employment action is defined as a “tangible employment act constituting a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”<sup>23</sup> In this case, the counseling memorandum did not constitute an adverse employment action. A counseling memorandum, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.<sup>24</sup> As grievant has not demonstrated the existence of an adverse employment action, she has not met the third prong of the test for gender discrimination.

## **Grievance of April 25, 2006 (Case # 8410)**

### Retaliation

Grievant asserts that her supervisor retaliated against her in the April 2005 interim performance evaluation because she had filed a grievance that resulted in counseling of the supervisor. Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.<sup>25</sup> 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. Grievant satisfies the first prong of the test because she had filed a grievance about six weeks prior to the interim performance evaluation. However, using the definition of adverse employment action cited in the preceding paragraph, an interim performance evaluation is not an adverse employment action. First, agency policy requires that interim evaluations be prepared on all employees. Second, in and of itself, such an interim evaluation does not detrimentally affect the terms, conditions, or benefits of employment.

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<sup>22</sup> *Cramer v. Intelidata Technologies Corp.*, 1998 U.S. App Lexis 32676, p6 (4<sup>th</sup> Cir.1998) (unpub.).

<sup>23</sup> *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

<sup>24</sup> See EDR Ruling 2003-425. See also *Boone v. Goldin*, 178 F.3d 253 (4<sup>th</sup> Cir. 1999).

<sup>25</sup> § 9, EDR *Grievance Procedure Manual*. [NOTE: DHRM Policy 2.30 defines retaliation as, “Overt or covert acts of reprisal, interference, restraint, penalty, discrimination, intimidation, or harassment against an individual or group exercising rights under this policy.”]



If grievant had subsequently received an overall “Below Contributor” annual evaluation, and if it could be demonstrated that the interim evaluation was a significant contributing factor in the rating, and if it could be shown that the interim evaluation was materially and deliberately false, a reasonable argument could be made that the interim evaluation was part of an adverse employment action. However, none of these conditions exist. Moreover, grievant has not shown that the areas identified for improvement were incorrect. Grievant acknowledged that she needed additional training in the Excel program.<sup>26</sup> It was also evident that grievant’s working relationships with her supervisors and with the district manager could have been significantly improved. Of course, as noted *infra*, management shared responsibility for the less than ideal communications with employees. In effect, the areas identified as needing improvement on the interim evaluation were equivalent to a form of counseling. Just as the deputy commissioner had counseled the management staff for the March 8<sup>th</sup> meeting, the interim evaluation essentially amounted to counseling of grievant for her conduct on that date. Accordingly, the interim evaluation was not retaliatory.

### **Grievance of June 3, 2005 (Case # 8411)**

#### **Harassment**

In this case, grievant contends that a Notice of Improvement Needed amounted to harassment. Using the workplace harassment analysis cited *supra*, one must conclude that a performance Notice such as this is not harassment. Grievant has not shown that the Notice was issued to her on the basis of any protected classification, or that it was so severe as to create an abusive work environment. First, the supervisor who issued the Notice had only been working in the office for one month. Grievant has not shown that this new supervisor (who appeared as a witness for grievant) had any motive or reason to harass grievant. Second, based on her testimony, it is apparent that the new supervisor is knowledgeable, experienced, and has high expectations from those she supervises. When it became apparent to her that neither grievant nor grievant’s subordinates were aware of a particular accounting procedure, she identified this issue as one on which grievant and her subordinates needed training. She notified grievant of this and enrolled grievant in a financial management training course.

#### **Other observations and conclusions**

It is apparent that the relationship between the district manager and the employees in the office was significantly affected by a statement he made to the group shortly after he was transferred to the office in May 2004. He stated, without further explanation, that “He would have his favorites and picks” among the employees.<sup>27</sup> From that point on staff speculated that those who were

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<sup>26</sup> Grievant Exhibit 22. E-mail from grievant to supervisor, April 12, 2005.

<sup>27</sup> See Grievant Exhibit 51. *Employee Relations Investigation*, March 30, 2006.

promoted were among his favorites and that the others were non-favorites. Grievant considered herself to be a non-favorite and that resulted in an invisible barrier that clearly was not conducive to the team spirit that the manager professed to be seeking.

Grievant has personalized events that were not directed at her personally thereby making it appear that management was harassing her when, in fact, the events were not specifically directed at grievant. For example, she contends that the assistant director threatened her livelihood in September 2002 when he spoke to the entire office staff advising them that they could be removed if they did not perform their jobs.<sup>28</sup> Similarly, she contends that her supervisor's inappropriate remarks to another employee during a group farewell party in March 2005 were indicative of sexual discrimination against grievant, even though grievant was not present in the room and there was no showing that the supervisor knew that grievant was outside the room.<sup>29</sup> Grievant's reaction to events not to her liking is confrontational. As an example, on the second day after the new supervisor's arrival in May 2005, grievant filed a grievance against her because the supervisor had come to her workstation and put her hand on grievant's shoulder or back and arm.<sup>30</sup>

The testimony and evidence make it apparent that both parties share responsibility for the brouhaha on March 8<sup>th</sup>. On one hand, the manager and supervisor could have exercised more patience by: explaining the reason for the required adjustment, pointing out that information necessary to make the adjustment was contained in the court order in the case record, and giving grievant a signed, brief written instruction that would serve as documentation. On the other hand, grievant could have been more polite in fully explaining what she needed and why she needed it rather than simply refusing to make the adjustment. Moreover, she could easily have provided her own documentation by sending an e-mail to the supervisor and manager stating that she was making the adjustment based on their verbal instructions.<sup>31</sup> It appears that the situation escalated almost immediately into a classic standoff between grievant and the manager with grievant obstinately refusing to comply and the manager saying, in effect, "Do it or else." As Strother Martin said in the movie classic *Cool Hand Luke*, "What we've got here is failure to communicate."

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<sup>28</sup> Grievant Exhibit 16. Memorandum from grievant to Commissioner, April 26, 2005.

<sup>29</sup> Grievant Exhibit 8. Memorandum from grievant to employee relations manager, March 11, 2005.

<sup>30</sup> Grievant later withdrew the grievance after meeting with the supervisor and discussing the incident.

<sup>31</sup> In fact, grievant testified that several days later she made the adjustment and noted in the case record that she was doing so based on the manager's verbal instruction.

## Summary

Grievant has not shown, by a preponderance of evidence, that the agency harassed, discriminated or retaliated against her. However, the evidence does reflect that communication between grievant and office management was strained, resulting in the confrontation on March 8, 2005. As noted above, both grievant and the office manager have some responsibility for the less than ideal working relationship that existed in the office. Agency senior management has already recognized the need for improvement among office management and has taken appropriate corrective action.

## DECISION

Grievant has not borne the burden of proof to show that the agency harassed, discriminated, or retaliated against grievant.

Grievant's requests for relief are DENIED.

## 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 14<sup>th</sup> St, 12<sup>th</sup> 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.<sup>32</sup> 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.<sup>33</sup> You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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]

*S/David J. Latham*

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David J. Latham, Esq.  
Hearing Officer

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<sup>32</sup> 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).

<sup>33</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.