

Issues: Discrimination (race), Hostile Work Environment, Misapplication of Policy, and Retaliation (other protected right); Hearing Date: 05/12/15; Decision Issued: 07/02/15; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No.10575, 10576; Outcome: No Relief – Agency Upheld.



# **COMMONWEALTH of VIRGINIA**

*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10575 / 10576**

Hearing Date: May 12, 2015

Decision Issued: July 2, 2015

### **PROCEDURAL HISTORY**

On September 19, 2014, Grievant filed a grievance alleging discrimination, workplace harassment/hostile work environment, and the unfair or misapplication of policy. On November 14, 2014, Grievant filed a grievance alleging discrimination and retaliation by the Agency.

The outcome of the Third Resolution Step on each grievance was not satisfactory to the Grievant and she requested a hearing. On March 30, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 12, 2015, a hearing was held at the Agency's office.

### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Counsel  
Witnesses

### **ISSUES**

1. Whether the Agency discriminated against Grievant?

2. Whether the Agency engaged in workplace harassment or created a hostile work environment for Grievant?
3. Whether the Agency retaliated against Grievant?

### **BURDEN OF PROOF**

The burden of proof is on Grievant to show by a preponderance of the evidence that the relief she seeks should be granted. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Social Services employs Grievant as an Exceptions Processing Manager.<sup>1</sup> The purpose of her position is:

Manages the day-to-day operations of the [Unit] through professional, para-professional, and support staff. Ensures that payment exceptions are handled timely and accurately. Payment exceptions include return checks, incorrect addresses, identification of undistributed collections, check cancellations, unidentified payments, and overpayments. Serves as Treasury liaison in mailing checks with correct information. Manages the due diligence, stop payments, and other [issues] that require adjustments to the normal distribution of funds to clients.<sup>2</sup>

She began working for the Agency in 2000.

Grievant reported to the Supervisor, an African-American. Ms. W worked for the Supervisor as an administrative assistant.

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<sup>1</sup> The Agency argued that facts arising prior to 30 days of filing the grievances could not be used to support Grievant's claims because of Section 2.2 of the Grievance Procedure Manual. This section provides, “a written grievance must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the management action or inaction that formed the basis of the complaint.” The Agency did not raise its objection to the grievances when Grievant sought a hearing. The grievances were “qualified in full” by the Agency Head without limitation. Accordingly, Grievant's relevant evidence is not limited to 30 days prior to filing of a grievance.

<sup>2</sup> Agency Exhibit 5.

Grievant supervised several employees. Mr. C, an African-American, reported to Grievant. His office cube was next to Grievant's office cube. Ms. S worked for Grievant until July 10, 2013 when she transferred to another unit within the division. Ms. S is white.

Ms. G, an African-American, reported to Grievant. She stopped working on December 2, 2013 and began receiving short term disability benefits. Her short term disability ended May 30, 2014. She returned to work in June 2014. She asked to work reduced hours and presented Grievant with a doctor's note limiting her to work no more than 20 hours per week. Grievant did not agree with that request. The Agency's human resource staff attempted to follow the Agency's return to work policy which would permit Ms. G to return on a part time basis. Ms. G missed days from work and Grievant wanted to issue Ms. G two written notices. The Agency's human resource staff disagreed with Grievant's request. Grievant issued Ms. G a Group I Written Notice on August 11, 2014 and a Group II Written Notice on September 5, 2014 for poor attendance. Ms. G filed a grievance challenging Grievant's action. The Agency's human resource staff did not inform Grievant of the status of that grievance as Grievant expected. Ms. G's employment with the Agency ended in August 2014 when Ms. G transitioned to long term disability.

On July 12, 2013, Grievant asked Mr. C to fax a court order to another person. Mr. C refused to do so because he perceived the task as being the responsibility of a coworker. Grievant discussed Mr. C's behavior with the Supervisor who suggested "a more formal counseling memorandum (not an email) to address the most recent issue ..."<sup>3</sup> Grievant sent Mr. C a memorandum dated July 17, 2013 regarding the subject of "Insubordination". The memorandum stated, in part:

On July 12, 2013, I asked you to fax a copy of a court order to a staff person in Central Registry. You refused stating your co-worker could fax her own court order. I made the request several times to ensure you understood that the request was valid and not a conversation that involve humor. You refused each time I made the request, and use references of slavery in your response. \*\*\* [Insubordinate] actions are a very serious matter within itself, however when it is done openly and with such disregard to your manager's direction, and undermines the type of productive work environment we encourage.<sup>4</sup>

The language regarding "insubordinate actions" was added to the memorandum by the Supervisor.

On March 20, 2014, Grievant met with the Supervisor and the EFT Unit Manager, an African-American, to discuss an "unpinned report." When the Supervisor and the

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<sup>3</sup> Agency Exhibit 7.

<sup>4</sup> Agency Exhibit 7.

EFT Unit Manager tried to explain how they wished to handle the process, Grievant disagreed and became upset. She expressed her opinions in a loud voice and interrupted the two other employees. She left the meeting before it was to be concluded and slammed the Supervisor's door as she exited his office.

On March 24, 2014, the Supervisor presented Grievant with a "Counseling Memorandum – Insubordinate Behavior." The memorandum stated, in part:

Per our conversation today, I am issuing you this counseling memorandum with regard to our meeting on Thursday, March 20, 2014 involving you, myself, and the EFT Unit Manager. This meeting was to discuss the Unpinned Payment Report project.

I have had conversations with you in the past about conducting meetings in a manner that is productive and considerate of all parties. In this meeting I believe your behavior and actions were not in keeping with my directives. During the meeting, I requested multiple times that you control your tone and volume with regard to our discussion.

You repeatedly spoke at an excessively loud volume, did not allow myself or the other participant a reasonable opportunity to respond or express our point of views, insisted upon leaving the meeting despite my instruction that the meeting was not concluded and slammed the door to my office upon exiting the meeting. \*\*\*<sup>5</sup>

Grievant and her staff worked in abutting office cubes with "half walls". When an employee sat at his or her desk, the employee could see other employees sitting or standing in nearby office cubes. Another unit consisting of seven or eight employees had office cubes near Grievant and her employees. In July 2013, Grievant observed that the employees in her unit and the employees of the other unit sometimes had long non-work related conversations that distracted employees attempting to complete their work. Grievant spoke with Ms. A, the supervisor in the other unit about her concerns. Ms. A instructed her subordinates not to engage in conversations outside of work related issues with employees reporting to Grievant. Grievant gave her subordinates a similar instruction.

On September 5, 2014, Grievant was seated at her desk working. Mr. C walked to Ms. M's desk and they began a conversation. Ms. M was not one of Grievant's employees. Ms. M said "Ha!" loud enough for Grievant to hear her. Grievant assumed they were having a non-business related conversation and believed Mr. C was acting contrary to her instructions to refrain from unnecessary conversations with employees in other units. Mr. C was standing approximately ten feet from Grievant. She loudly said "[Mr. C's first name], you need to come back to your desk." Mr. C replied that he was working meaning that is conversation with Ms. M was about a work-related issue.

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<sup>5</sup> Agency Exhibit 9.

Grievant asked sarcastically, "Is that funny work?" Grievant continued to demand that Mr. C return to his desk. Mr. C lamented loudly that he could not even laugh anymore. He said he was not putting up with this crap any more. He began walking to his office. Grievant told him to remember he still was under a counseling memo for insubordination. Mr. C returned to his desk and leaned over the office cube wall and told Grievant to "chill" and "calm down" and added that he was not going to put up with this crap. Mr. C said to Grievant, "you are bringing back slavery making me do stuff like this." Ms. G observed the confrontation from her desk. She laughed loudly in response.

On October 2, 2014, Grievant sent the Supervisor an email asking, "[w]ith [Ms. G's] departure, I could really use the assistance of [Ms. W] in working Account 70."<sup>6</sup> Ms. W was the Supervisor's administrative assistant.

On October 7, 2014, the Supervisor sent Grievant an email stating:

I'm inclined [to] go ahead and allow [Ms. W] to begin assisting the Exception Processing Unit on Tuesday's for 2 to 4 hours as requested, while you fill your vacancy.<sup>7</sup> \*\*\*

Grievant began utilizing Ms. W's services for several hours more than just two to four hours on Tuesdays. In November 2014, the Supervisor noticed that Ms. W was not completing all of her duties for him. The Supervisor spoke with Ms. W and reminded her not to work more than two to four hours for Grievant on Tuesdays. Ms. W spoke with Grievant about the work she could provide to Grievant. Grievant understood Ms. W to say that the Supervisor prohibited Ms. W from performing any duties for Grievant. The Supervisor did not tell Ms. W to stop working for Grievant. He only told her to return to the original agreement he had with Grievant. On November 12, 2014, Grievant sent the Supervisor an email stating, "[Ms. W] informed me this morning that you gave her direction that she can no longer assist my unit daily in working the Unidentified Payment Report." The Supervisor replied:

[Y]our account of my conversation with [Ms. W] is not accurate and could have been clarified with a simple call or stop by my office. I think if you read your statement below, it's clear that the work you have assigned to [Ms. W] far exceeds our agreement for assistance in the EPU. I simply reminded [Ms. W] this morning that her primary duties are to come first.<sup>8</sup>

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<sup>6</sup> Agency Exhibit 19.

<sup>7</sup> Agency Exhibit 19.

<sup>8</sup> Agency Exhibit 2.

## CONCLUSIONS OF POLICY

Department of Human Resource Management Policy 2.30 governs Workplace Harassment. This Policy states:

It is the policy of the Commonwealth to provide its employees with a workplace free from harassment and/or retaliation against employees who either complain of harassment or aid in the investigation of such a complaint.

### A. Prohibited Conduct 1. Harassment

The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer on the basis of an individual's race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability.

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### C. Policy Violations

1. Engaging In Harassment: Any employee who engages in conduct determined to be harassment or encourages such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

2. Allowing Harassment to Continue: Managers and/or supervisors who allow workplace harassment to continue or fail to take appropriate corrective action upon becoming aware of the harassment may be considered parties to the offense, even though they may not have engaged in the harassment behavior.

3. Failure to Respond: Managers and/or supervisors who allow workplace harassment to continue or who fail to take appropriate action should be subject to disciplinary action, including demotion or termination, under Policy 1.60, Standards of Conduct.

D. Agency Responsibilities Agencies must communicate this policy to employees and third parties.

Communication must include:

- educating employees about the types of behavior that can be considered workplace harassment, and
- explaining procedures established for filing workplace harassment complaints.

Agency managers and supervisors are required to:

- stop any workplace harassment of which they are aware, whether or not a complaint has been made;
- express strong disapproval of all forms of workplace harassment;
- intervene when they observe any acts that may be considered workplace harassment;
- take immediate action to prevent retaliation towards the complaining party or any participant in an investigation; and
- take immediate action to eliminate any hostile work environment where there has been a complaint of workplace harassment.

DHRM Policy 2.30 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, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability, 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.

Although portions of DHRM Policy 2.30 are patterned after and use terminology from Federal civil rights legislation, it is not necessary for a party to show Title VII was violated in order to show that DHRM Policy 2.30 was violated. In other words, an employee's behavior may be contrary to DHRM Policy 2.30 but not contrary to Title VII (even though an employee who behaved contrary to Title VII would be acting contrary to DHRM Policy 2.30.) In the context of disciplinary action, one of the purposes of DHRM Policy 2.30 is to identify behavior for which an agency may discipline an employee in order to avoid placing the agency in the position of being liable under Title VII. In the context of cases not involving disciplinary action, it is not necessary for an employee to show an adverse employment action such as termination in order to establish workplace harassment by managers or other employees and have that harassment rectified.

Grievant argued that the Agency tolerated a culture of discrimination against her because of her race. She claimed that the Supervisor and several co-workers including Mr. C and Ms. S looked after one another and treated her differently because of her race.

Grievant argued that the Supervisor discriminated against her because he would support Mr. C and he issued her a counseling memorandum.

No credible evidence was presented to show that Ms. S engaged in any behavior that would demonstrate racial animus towards Grievant. Ms. S transferred to another



section to avoid being supervised by Grievant. Several employees testified that Grievant stared at Ms. S without reason and for inappropriately long periods of time. Ms. S's demeanor while testifying showed an individual who felt abused by Grievant when she reported to Grievant. During her testimony, Ms. S positioned her body in a manner to turn away from Grievant. Her demeanor was consistent with someone who sought to avoid Grievant because of mistreatment and not with someone who sought to discriminate against Grievant because of her race.

Mr. C made several comments that could be construed as racially offensive. There is a difference between an employee saying "they are working us like slaves" while meaning that his or her workload is heavy and an African American employee saying to a white employee "your treatment of me is like a slave owner mistreating a slave." The first example is not racially offensive because the employee is expressing a general complaint not specific to any individual or event. The second example is racially offensive and prohibited under DHRM Policy. Slavery was the most extensive human rights violation in United States history. Suggesting that a white employee would tolerate, condone, or engage in behavior similar to that of a slave owner is racially offensive based on an objective standard.

On a scale of racially offensive behavior, Mr. C's statements to Grievant about slavery were closer to the second example than to the first example. Grievant was offended when Mr. C referred to slavery in July 2013. She was offended when he repeated that behavior in September 2014. Grievant's reaction to Mr. C's comments was reasonable under an objective standard. If left un-redressed, Mr. C's comments would be sufficient to create a racially offensive and hostile work environment for Grievant under DHRM Policy 2.30. DHRM Policy 2.30 requires Agency managers to eliminate employee behavior that would create a racially hostile work environment.

Mr. C's comments were not left un-redressed by the Agency and were not sufficient to establish Grievant's assertion of discrimination by the Agency or the existence of a racially hostile work environment. When Mr. C "used references of slavery" in July 2013, Grievant received the Supervisor's approval to issue Mr. C a written counseling. The Supervisor assisted in drafting the written counseling. Following Mr. C's behavior on September 5, 2014, Grievant expressed her desire to issue Mr. C a Written Notice. The Supervisor agreed with Grievant's desire to take disciplinary action against Mr. C and Mr. C was issued a Written Notice even though the Associate Human Resource Director disagreed. Mr. C filed a grievance to challenge the disciplinary action. During the Step Process, the Supervisor reduced the disciplinary action to a counseling. His decision to reduce the disciplinary action was not based on any desire to discriminate against Grievant but because he believed the discipline should be reduced after hearing Mr. C's account of the incident. The Supervisor acted within his discretion to reduce the disciplinary action against Mr. C.

Grievant alleged the Agency discriminated against her based on the Supervisor's decision to issue her a written counseling memorandum on March 24, 2014. The evidence showed that on March 20, 2014, Grievant was rude and abrasive during her

meeting with the Supervisor and the ETF Unit Supervisor. Grievant abruptly left the meeting and slammed the door as she left. The Supervisor's action did not arise out of an intent to discriminate against Grievant because of her race but rather because of her inappropriate behavior during a meeting on March 20, 2014.

Grievant alleged the Agency discriminated against her regarding Ms. G. The evidence is insufficient for the Hearing Officer to determine that the Supervisor took any action based on race. Ms. G left work while on short term disability.<sup>9</sup> She returned to work and then left employment based on long term disability. It does not appear that the Agency took any action regarding Ms. G, Grievant, or the Supervisor based on race. On September 5, 2014, Ms. G laughed when she observed the confrontation between Grievant and Mr. C. It is not clear that laughing in response to the confrontation would give rise to disciplinary action. To the extent the Agency may have misapplied its return to work or DHRM policy, that question is moot. Ms. G is no longer with the Agency. If the Hearing Officer were to conclude the Agency misapplied policies regarding Ms. G's return to work, there would be no basis for the Hearing Officer to order the Agency to comply with policies for an employee no longer working at the Agency.

The Hearing Officer does not believe that the Agency tolerates racially offensive behavior by its employees upon learning of that behavior.<sup>10</sup> In particular, the Supervisor testified that he did not discriminate against Grievant because of her race. His denial was credible and consistent with the evidence presented in this case.

Hearing Officers have authority to address many aspects of the relationship between employees and State agencies. A supervisor's style of supervising employees is not usually one of those aspects. In this case, much of the conflict between Grievant and her subordinates resulted solely from how she managed her subordinates and whether her subordinates believed her style of management was appropriate. The Hearing Officer is not authorized to decide how to resolve those conflicts.

On November 14, 2014, Grievant filed a grievance alleging retaliation for initiating a previous grievance regarding discrimination and workplace harassment. Grievant alleged:

Attached are the emails that transpired November 13, 2014 between [Supervisor] and me. My unit was without a staff member working in the vital function of identifying payments from December 1, 2013 through May 30, 2014. This staff member returned briefly and then was permanently discharged on 09/30/2014. [Ms. W] (administrative assistant) has been working part-time each day the past 6 weeks to help complete the research needed to disperse funds to clients. On November 12, 2014, I

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<sup>9</sup> Ms. G claimed that Grievant played a part in her leaving the Agency because of the stress Grievant created for her.

<sup>10</sup> Grievant alleged other employees may have participated in the discrimination against her. No credible evidence was presented to support this assertion.

sent an email to the HR director to address my issues with receiving communication about the status of previous grievances I initiated in general issues with communication since filing my grievance. On November 13, 2014, [Supervisor] notified [Ms. W] that she could no longer work with me part-time each day. This decision was not discuss with me. The emails received from [Supervisor] after my copying my concerns to management were flip, disrespectful, humiliating, and encouraged me to seek other opportunities. [Ms. W] was pulled from helping me disburse funds to clean up the file room.

By restricting the use of time [Ms. W] can assist the EPU unit requires that I now have to work 2 full-time jobs and delays the distribution of funds to our clients. These retaliation acts of reducing assistance and flippant communication was harmful to our clients in delaying disbursement of child support finds it to me in the email exchanges that left me feeling reprimanded and incompetent for copying management staff on my emails. The statement to find better opportunities outside the SDU was bitter, hurtful, and continues to leave [me] stunned in a hostile environment of discrimination.<sup>11</sup>

The evidence showed that Grievant utilized Ms. W in excess of the amount of time the Supervisor authorized. When he learned of this, he eliminated the additional burden Grievant placed on Ms. W and resumed having Ms. W work only two to four hours on Tuesdays for Grievant. The Supervisor's action was not retaliatory but rather designed to restore Ms. W's assistance to Grievant to the number of hours to which he and Grievant originally agreed. The Supervisor had the discretion to determine how many hours Ms. W would assist Grievant. His failure to require Ms. W to provide assistance in excess of two to four hours on Tuesdays was within his discretion. He did not use that discretion to discriminate against Grievant. Grievant's concern that she had to "work 2 full-time jobs" is understandable, but the Agency retains the right to manage its operations including assigning employees. The Agency did not violate any State policies merely by failing to provide the additional assistance Grievant requested.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>12</sup> (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse

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<sup>11</sup> Agency Exhibit 2.

<sup>12</sup> See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.<sup>13</sup>

Grievant engaged in numerous protected activities through her complaints to Agency managers and by filing grievances. It is unclear whether she suffered an adverse employment action. Nevertheless, Grievant has not established a connection between her protected activities and the Agency's actions. Although Grievant presented evidence of a significant conflict between her and other employees, that conflict arose from differences of opinion and not to "get even" with Grievant or retaliate against her because of her protected activities. The Hearing Officer does not believe the Agency retaliated against Grievant.<sup>14</sup>

### **DECISION**

For the reasons stated herein, Grievant's request for relief is **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 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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

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<sup>13</sup> This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

<sup>14</sup> Grievant argued that when she stopped working at the Agency's offices after going onto short term disability, the Agency refused to give her access to the office as a form of retaliation. The evidence showed that once Grievant brought her concerns to Agency manager's she was given access to the office. This incident occurred after Grievant filed her grievances and the Agency ultimately permitted Grievant to have access to the building. Even if the Hearing Officer were to conclude that some employees desired to retaliate against Grievant, the Agency did not do so.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. 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>15</sup>

[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/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>15</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.