

## COORDINATED STATE AGENCY MANAGEMENT RESPONSE TO PERFORMANCE AUDIT ON ADMINISTRATIVE APPEALS – MAY 6, 2016

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This coordinated management response to the State Auditor’s Office (SAO) performance audit report received on April 15, 2016, is provided by the Board of Industrial Insurance Appeals (BIIA), Board of Tax Appeals (BTA), Health Care Authority (HCA), Office of Administrative Hearings (OAH), Office of Financial Management (OFM), and the departments of Employment Security (ESD), Retirement Systems (DRS), Revenue (DOR), and Social and Health Services (DSHS).

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### SAO PERFORMANCE AUDIT OBJECTIVES:

The SAO objectives were designed to answer:

1. Are administrative appeals processes understandable?
  2. Do administrative appeals processes appear impartial?
  3. How can the state strengthen the appearance of impartiality?
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### SAO Findings:

1. Appeals are readily understood by many appeals participants, but agencies have opportunities to enhance user understanding and accessibility.
  2. Appeals processes we analyzed are designed to be impartial, but stakeholder and participant perceptions vary.
  3. Clarification regarding permissible communication, particularly between hearing officers and other agency staff and management, and the use of informal guidance in decisions would improve the appearance of impartiality.
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**SAO Recommendation 1:** To improve perceptions of fairness and hearing officers’ impartiality, both within the agencies and among stakeholders, we recommend the Legislature:

- Amend RCW 34.05.455 regarding ex parte communications with hearing officers by clarifying:
  - What types of communication between management and hearing officers are allowed
  - When and in what capacity managers may provide direction regarding a hearing officer’s performance
- Amend Chapter RCW 51.52 regarding ex parte communications with hearing officers by clarifying:
  - What types of communication between management and hearing officers are allowed
  - When and in what capacity managers may provide direction regarding a hearing officer’s performance
- Add a new section to either Part II or Part IV of Chapter RCW 34.05 regarding the role of informal guidance by clarifying:

- In what circumstances hearing officers may apply informal guidance in developing administrative decisions
- Whether managers may require hearing officers to apply informal guidance
- If hearing officers may apply informal guidance, clarify whether the hearing officers may apply written guidance, unwritten guidance, or both.

**STATE RESPONSE:** The SAO found that clarifying permissible communication — particularly between hearings officers and other agency staff and management — and clarifying the use of informal guidance in decisions would improve the appearance of impartiality.

We do not believe a statutory change is warranted. The Administrative Procedures Act (APA) sufficiently and clearly addresses *ex parte* communications<sup>1</sup> between management and hearings officers regarding a case. Washington closely modeled the APA after the federal APA. This is a rich and consistent source of guidance for state agencies and the courts.

The SAO’s report focuses on knowledge and understanding of current procedures that govern the array of agencies’ proceedings covered by the APA. The SAO identified the tension between greater agency control of policy development on the one hand and greater appearance of impartiality on the other.

The report also acknowledges the concepts of judicial and structural independence. While we recognize that independence and impartiality are very distinct concepts, we wished the report more closely examined how changes to structural and funding independence might influence the appearance of impartiality in our state.

Agency work and customer needs are diverse, and as the SAO’s report pointed out, “state agencies are committed to administering appeals of their decisions in an economical, expedient and impartial manner that also serves to implement agency policy.”

We believe policies tailored to the unique circumstances of each agency will better address perceptions of fairness and impartiality. Rather than propose legislative changes, the audited agencies governed by the APA or Chapter 51.52 RCW are committed to reviewing and developing or refining agency-specific policy to explain the differences in communication as a management tool for process versus having influence on decision making.

### **Action Steps and Time Frame**

- BIIA, BTA, HCA, OAH, ESD, DRS and DSHS will have a policy that explains the types and purpose of communication between management and hearings officers. *By October 31, 2016.*
  - DSHS policy in the EA-Z manual already reflects the statute’s prohibitions on *ex parte* communications to ensure a fair process for participants.

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<sup>1</sup> *Ex parte* communications are addressed in the Administrative Procedures Act (RCW 34.05.455).

**SAO Recommendation 2:** We recommend all agencies, with the exception of the Department of Revenue and the Office of the Insurance Commissioner, develop internal guidance regarding:

- a) What types of communication between management and hearing officers are allowed.
- b) When and in what capacity managers may provide direction regarding a hearing officer's performance.

Examples of internal guidance include but are not limited to a code of ethics, a memo, or an administrative policy.

**STATE RESPONSE:** We appreciate the SAO acknowledging that it would not be practical for all agencies to have similar operating processes and agree there is an opportunity to improve communications between management and hearings officers. The root issue in the SAO's report appears to be knowledge and understanding of what procedures govern the array of proceedings covered by the APA and Chapter 51.52 RCW.

**Board of Industrial Insurance Appeals (BIIA)**

The BIIA will change its policy and/or provide a written directive to supervisors, managers and board members that is consistent with the recommendations made to the BIIA in the performance audit.

**Board of Tax Appeals (BTA)**

The Board of Tax Appeals will develop a written policy addressing appropriate communications between hearings officers and persons employed by the agency.

**Health Care Authority (HCA)**

The Chief Review Judge directly supervises the Review Judges within HCA's Board of Appeals and has delegated authority as a presiding officer. The Chief Review Judge is responsible for evaluating the performance of the Review Judges on an annual basis through Performance Development Plans (PDPs) and to provide feedback throughout the year. To reduce the risk of ex parte communications, HCA is developing an administrative policy.

**Office of Administrative Hearings (OAH)**

OAH will develop new policy, clarify existing policy and/or provide written direction to administrative law judges and other employees that is consistent with the SAO's recommendations to OAH.

**Employment Security Department (ESD)**

In order to improve the appearance of impartiality between the Commissioner and the agency program divisions with regard to administrative appeals, ESD will issue a memorandum to all agency staff formalizing ESD's screening protocol on all matters subject to administrative review by the Commissioner and his delegates at the Commissioner's Review Office. The screening protocol will be similar in style and scope to the one issued by the Office of the Insurance Commissioner contained in the SAO audit in Appendix G. Additionally, the Commissioner's Review Office of ESD will develop and adopt a specific Code of Ethics for the Review Judges of that office that will establish parameters for proper management oversight.

## **Department of Social and Health Services (DSHS)**

The Department of Social and Health Services appreciates, acknowledges and supports the State Auditor's Office's (SAO) mission. We agree that it would not be practical for all agencies to have similar operating processes and agree there is an opportunity to improve communications between management and hearings officers.

To more clearly articulate when management may and may not communicate with hearings officers, DSHS will be drafting a protocols memo from the Assistant Secretary for the Economic Services Administration (ESA) that will address multiple issues such as: raising safety issues, like domestic violence concerns/restraining orders when there are multiple parties (child support hearings); administrative communication (not of a substantive nature) to facilitate hearings, such as an appellant running late or documents being faxed; and when managers and hearings officers should have the ability to provide comments or guidance on draft policy procedures related to administrative hearings.

DSHS will develop a method to provide feedback to hearings officers' superiors regarding issues in the hearing process, such as timelines; clear patterns of not following DSHS regulation; or failure to meet requirements under interagency agreements. This could even be in a dispute resolution process built into the DSHS Memorandum of Understanding. DSHS' ESA has ultimate responsibility to our clients, the federal government and the taxpayers for our programs. To not have any ability to discuss hearings officers' performance seems unjust.

### **Action Steps and Time Frame**

- **BIIA:** Change its policy and/or provide a written directive to supervisors, managers and board members that is consistent with the SAO's recommendations. *By October 31, 2016.*
- **BTA:** Develop written policy addressing appropriate communications. *By July 15, 2016.*
- **HCA:** Create administrative policy on ex parte communications. *By September 1, 2016.*
- **OAH:** Develop new policy, clarify existing policy and/or provide written direction to administrative law judges and other employees that is consistent with the SAO's recommendations. *By October 31, 2016.*
- **ESD:** (1) Develop and issue a memorandum from the Commissioner to all agency staff regarding ESD's screening protocol on all matters subject to administrative review before the Commissioner and the Commissioner's delegates at the Commissioner's Review Office. *By October 1, 2016.*  
(2) Develop and adopt a specific Code of Ethics for the Review Judges at the Commissioner's Review Office. *By October 1, 2016.*
- **DRS:** Develop internal guidance to document the types of communication allowed between agency management and the hearings officer and when and in what capacity managers may provide direction regarding the hearings officer's performance. *By October 31, 2016.*
- **DSHS:** (1) Develop a memo or administrative policy clarifying what types of communication between management and hearings officers are allowed and in what capacity managers may provide direction regarding a hearings officer's performance. *By October 31, 2016.*  
(2) Develop a feedback method for hearings officers' superiors regarding issues in the hearing process. *By October 31, 2016.*

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**SAO Recommendation 3:** We recommend the Department of Retirement Systems (DRS):

- a) Post information about the appeals process on the DRS website. An online link to the appeals brochure would facilitate access to it.
- b) Post the index of decisions on the DRS website.

**STATE RESPONSE:** The Department of Retirement Systems agrees the recommendations made by the SAO provide opportunities to enhance user understanding of the department’s administrative appeals process.

**Action Steps and Time Frame**

- Information about the appeals process will be made more readily available on the DRS website by posting a link to the appeals brochure. *By June 30, 2016.*
  - An index of decisions will be made available on the DRS website. *By December 31, 2016.*
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**SAO Recommendation 4:** We recommend the Department of Revenue (DOR):

- a) Add a link to the appeal website in notices and communications in order to facilitate access.
- b) Review communications with appellants – such as the hearing officers’ hearing script – to identify opportunities to state that the process is not intended to be independent.

**STATE RESPONSE:** After an extensive year-long process, DOR’s [Rule 100](#) (WAC 458.20.100) was updated and became effective April 1, 2016. Rule 100 is now titled “Informal administrative reviews.” The changes were intended to strengthen the important role of our Administrative Review and Hearings Division (ARHD) (formerly Appeals) in ensuring Revenue’s tax policy decisions are fair and consistently applied. The changes also clarify for our customers and stakeholders that the Rule 100 process is an internal, administrative review, and not an independent one.

Rule 100 provides a process for the ARHD staff to take a “second look” at a division’s decision after a taxpayer challenge. When gathering facts for this second look, our ARHD staff have full authority to talk to other divisions to understand what went into making the initial agency tax decision.

Rule 100 is important to the taxpayer community. It allows a faster, less costly review of a department decision outside of a challenge at the Board of Tax Appeals or Thurston County Superior Court.

**Action Steps and Time Frame**

- Add links to documents generated by the ARHD for the [rule](#), [website](#), or [administrative support](#) as applicable. *Completed April 1, 2016.*
- Update the ARHD website and forms. *Completed April 1, 2016.*

- Update processes, including the hearing script, to align with the updated Rule 100 “Informal administrative reviews.” *By June 30, 2016.*
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**SAO Recommendation 5:** We recommend the Health Care Authority (HCA):

- a) Develop a process for updating significant decisions. HCA’s Board of Appeals can improve transparency by updating its published list of significant decisions as they become available. To do so, the Board should continue to develop a process for indexing significant decisions.
- b) Further develop policy to clarify what types of communication with hearing officers are allowable.

**STATE RESPONSE:** HCA is developing a process to index decisions. Additionally, HCA is developing an administrative policy on ex parte communications.

**Action Steps and Time Frame**

- Develop index process for decisions. *By September 1, 2016.*
- Develop administrative policy on ex parte communications. *By September 1, 2016.*