

## Cabinet and Governor Appointed Agencies' Performance Audit Action Item(s) & Status

### Administrative Appeals

(See also [cabinet agency response](#) for full context to Washington State Auditor's Office (SAO) [report](#), May 2016)

Agencies included in the performance audit: Board of Industrial Insurance Appeals (BIIA), Board of Tax Appeals (BTA), Employment Security (ESD), Health Care Authority (HCA), Office of Administrative Hearings (OAH), Retirement Systems (DRS), Revenue (DOR) and Social and Health Services (DSHS).

#### SAO Issues Summary:

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.

#### SAO Recommendations (Rec) Summary:


1. To improve perceptions of fairness and hearing officers' impartiality, both within the agencies and among stakeholders, we recommend the **Legislature**:
  - a. Amend RCW 34.05.455 regarding ex parte communications with hearing officers by clarifying:
    - i. What types of communication between management and hearing officers are allowed
    - ii. When and in what capacity managers may provide direction regarding a hearing officer's performance
  - b. Amend Chapter RCW 51.52 regarding ex parte communications with hearing officers by clarifying:
    - i. What types of communication between management and hearing officers are allowed
    - ii. When and in what capacity managers may provide direction regarding a hearing officer's performance
  - c. Add a new section to either Part II or Part IV of Chapter RCW 34.05 regarding the role of informal guidance by clarifying:
    - i. In what circumstances hearing officers may apply informal guidance in developing administrative decisions
    - ii. Whether managers may require hearing officers to apply informal guidance
    - iii. If hearing officers may apply informal guidance, clarify whether the hearing officers may apply written guidance, unwritten guidance, or both.
2. All agencies, with the exception of DOR 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
3. The Department of Retirement Systems:
  - 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.
4. The Department of Revenue:
  - 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
5. The Health Care Authority:

- 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

The table below shows the current status of action items the agency initiated to address issues identified in the performance audit report. Please note that the while recommendation 1 is to the Legislature, agencies disagree that statutory changes are warranted. Please see the [cabinet agency response](#) for additional context and any additional steps already taken.

For an explanation of the columns below, [see the legend](#).

| Issue/ Rec | Status    | Action Steps   | Lead Agency | Due Date                  | Current Resources ? | Budget Impact? | Legislation Required? | Notes  |
|------------|-----------|--|-------------|---------------------------|---------------------|----------------|-----------------------|--|
| Rec 1      | Completed | Establish a policy that explains the types and purpose of communication between management and hearings officers | BIIA        | 10/16                     | Y                   | N              | N                     | A "Directive to Ensure Impartiality" was issued July 5, 2016. Directive placed in the performance and development plans for chief judge, executive secretary and assistant chief judges. |
| Rec 1      | Completed | Establish a policy that explains the types and purpose of communication between management and hearings officers | BTA         | 10/16                     | Y                   | N              | N                     | July 8, 2016: BTA has completed a written policy addressing appropriate communications.  |
| Rec 1      | Completed | Establish a policy that explains the types and purpose of communication between management and hearings officers | HCA         | <del>10/16</del><br>12/16 | Y                   | N              | N                     | HCA adopted an administrative policy on ex parte communications in December, 2016.   |
| Rec 1      | Completed | Establish a policy that explains the types and purpose of communication between management and hearings officers | OAH         | 10/16                     | Y                   | N              | N                     | October 2016: OAH has established a policy directing the types and purpose of communications.  |
| Rec 1      | Completed | Establish a policy that explains the types and purpose of communication between                                  | ESD         | 10/16                     | Y                   | N              | N                     | Memo for <i>protocol for communications with Commissioner’s Review Office</i> sent by Dale Peinecke, Commissioner on 10/31/2016.   |

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|------------|-----------|---|-------------|--------------------------|---------------------|----------------|-----------------------|--|
|            |           | management and hearings officers  |             |                          |                     |                |                       |  |
| Rec 1      | Completed | Establish a policy that explains the types and purpose of communication between management and hearings officers  | DRS         | 10/16                    | Y                   | N              | N                     | DRS established a policy, effective 10/31/16, that guides how DRS management and other team members may communicate with the Presiding Officer.  |
| Rec 1      | Completed | Establish a policy that explains the types and purpose of communication between management and hearings officers  | DSHS        | 10/16                    | Y                   | N              | N                     | 11/2/16: Memo from Secretary was sent to Executive Cabinet and Board of Appeals Office "Clarification of what types of communication between management and BOA review judges are allowed."<br><br>Communication Between Management |
| Rec 2      | Completed | Change its policy and/or provide a written directive to supervisors, managers and board members that is consistent with the SAO's recommendations                               | BIIA        | 10/16                    | Y                   | N              | N                     | A "Directive to Ensure Impartiality" was issued July 5, 2016. Directive placed in the performance and development plans for chief judge, executive secretary and assistant chief judges.   |
| Rec 2      | Completed | Develop written policy addressing appropriate communications  | BTA         | 7/16                     | Y                   | N              | N                     | July 8, 2016: BTA has completed a written policy addressing appropriate communications.  |
| Rec 2      | Completed | Create administrative policy on ex parte communications   | HCA         | <del>9/16</del><br>12/16 | Y                   | N              | N                     | HCA adopted an administrative policy on ex parte communications in December, 2016.   |
| Rec 2      | Completed | 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 | OAH         | 10/16                    | Y                   | N              | N                     | October 2016: OAH has completed this action.   |

| Issue/ Rec | Status    | Action Steps   | Lead Agency | Due Date                 | Current Resources ? | Budget Impact? | Legislation Required? | Notes  |
|------------|-----------|--|-------------|--------------------------|---------------------|----------------|-----------------------|--|
| Rec 2      | Completed | 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 | ESD         | 10/16                    | Y                   | N              | N                     | Memo for <i>protocol for communications with Commissioner's Review Office</i> sent by Dale Peinecke, Commissioner on 10/31/2016.   |
| Rec 2      | Completed | Develop and adopt a specific Code of Ethics for the Review Judges at the Commissioner's Review Office  | ESD         | <del>10/16</del><br>7/17 | Y                   | N              | N                     | ESD is using the <i>American Bar Association (ABA) model code of judicial conduct for state administrative judges</i> for the code of ethics for administrative review judges. "Adherence to and follow the <i>ABA 2016 model code of judicial conduct for state administrative law judges</i> " is being incorporated into each review judges performance expectations during their annual review. Currently 3 out of 6 judges have completed their annual review with the last annual review expected to be completed by September 2017. |
| Rec 2      | Completed | 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                    | DRS         | 10/16                    | Y                   | N              | N                     | DRS established a policy, effective 10/31/16, that guides how DRS management and other team members may communicate with the Presiding Officer.  |
| Rec 2      | Completed | Develop a memo or administrative policy clarifying what types of communication   | DSHS        | 10/16                    | Y                   | N              | N                     | 11/2/16: Memo from Secretary was sent to Executive Cabinet and Board of Appeals Office "Clarification of what types of   |

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|------------|-----------|---|-------------|----------|---------------------|----------------|-----------------------|---|
|            |           | between management and hearings officers are allowed and in what capacity managers may provide direction regarding a hearings officer's performance       |             |          |                     |                |                       | communication between management and BOA review judges are allowed."  |
| Rec 2      | Completed | Develop a feedback method for hearings officers' superiors regarding issues in the hearing process  | DSHS        | 10/16    | Y                   | N              | N                     | 11/2/16: Memo from Secretary was sent to Executive Cabinet and Board of Appeals Office "Clarification of what types of communication between management and BOA review judges are allowed." |
| Rec 3      | Completed | Information about the appeals process will be made more readily available on the DRS website by posting a link to the appeals brochure                    | DRS         | 6/16     | Y                   | N              | N                     | Information about the DRS appeals process was more readily available on the DRS website by 6/30/16.   |
| Rec 3      | Completed | An index of decisions will be made available on the DRS website   | DRS         | 12/16    | Y                   | N              | N                     | An index of decisions was made available on the DRS website on 12/19/16.  |
| Rec 4      | Completed | Add links to documents generated by the Administrative Review and Hearings Division (ARHD) for the rule, website, or administrative support as applicable | DOR         | 4/16     | Y                   | N              | N                     | DOR completed this action on its <a href="#">website</a> April 1, 2016, prior to completion of the performance audit.   |
| Rec 4      | Completed | Update the ARHD website and forms   | DOR         | 4/16     | Y                   | N              | N                     | DOR completed this action on its <a href="#">website</a> and updated forms April 1, 2016, prior to completion of the performance audit.   |
| Rec 4      | Completed | Update processes, including the hearing script, to align with the updated Rule 100 "Informal administrative reviews"                                      | DOR         | 6/16     | Y                   | N              | N                     | DOR completed this action by 6/30/16.   |

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|---------------|-----------|--|-------------|--------------------------|---------------------|----------------|-----------------------|--|
| Rec 5         |           | Develop index process for decisions                      | HCA         | 9/16                     | Y                   | N              | N                     |  |
| Rec 5         | Completed | Develop administrative policy on ex parte communications | HCA         | <del>9/16</del><br>12/16 | Y                   | N              | N                     | HCA adopted an administrative policy on ex parte communications in December, 2016. |