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Hearings Unit, OIC
Patricia D. Peterson
Chief Hearing Officer

HEARINGS UNIT: OFFICE OF THE INSURANCE COMMISSIONER

No. 11-0220

In the Matter of:

RACHEL ANDERSON.

MOTION FOR AN ORDER
PROTECTING PERSONAL
INFORMATION FROM PUBLIC
DISCLOSURE

AND

RESPONSE TO OIC'S MOTION RE
HEARING RIGHT

I, Rachel Anderson, bring this (1) Motion for an Order Protecting Personal Information from Public Disclosure and (2) Response to the Office of the Insurance Commissioner's Motion Re Hearing Right.

I. INTRODUCTION

The Legal Affairs Division of the Office of the Insurance Commissioner (OIC) argues that the OIC's decision that there is insufficient evidence of a violation and that the OIC's decision to do nothing following an investigation that took over a year to complete should be subject to absolutely no form of review by the Hearings Unit. That position should be rejected. First, the Hearings Unit may hear any issue at its discretion. Second, the OIC's investigation was an act. The OIC also acted when it reached the conclusion that

1 there is insufficient evidence of a violation. Third, the OIC's failure to certify the facts of
2 John Peterson's violation of the Insurance Code to a public prosecutor, which is a mandatory
3 duty, qualifies as a failure to act (regardless of whether the OIC chooses not to discipline
4 John Peterson for his wrongful conduct). Finally, the Hearings Unit's description of what
5 failures to act can be appealed, in combination with the OIC's narrow reading of the
6 meaning of the word "act" that limits a right to a hearing, creates a dangerous situation
7 where the OIC might later argue that consumers had not exhausted their administrative
8 remedies and cannot bring an action in Superior Court. For all of these reasons, I have a
9 right to a hearing.

10 **II. PROTECTIVE ORDER**

11 As part of my initial request for a hearing and as part of its motion, I and the OIC,
12 respectively, have submitted enclosures, exhibits and a Certificate of Mailing that include
13 personal information that should be restricted from access by the public. Information such
14 as my Social Security Number, date of birth, health information, address, phone number,
15 email address, and other sensitive personal information have been included in the
16 enclosures, exhibits and Certificate of Mailing filed with the Hearings Units. I request that
17 these past materials and all other materials submitted by the OIC and by me, in the future, be
18 placed under seal and not be made public. *See* RCW 34.05.446; RCW 48.135.060; Ch. 284-
19 04 WAC.

20 **III. FACTS**

21 In the summer of 2008, I began looking for disability insurance. I met with John
22 Peterson on October 30, 2008, and at that meeting I signed an application form for disability
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1 insurance before it had yet been completed. I signed the application form for Mr. Peterson's
2 convenience, with the understanding that he needed additional information before it could be
3 completed. Mr. Peterson took this application and sent a copy to me with a cover letter
4 dated October 31, 2008. Mr. Peterson later, without my knowledge or consent, submitted an
5 altered copy of this application to The Standard Insurance Company ("The Standard"),
6 which the Standard received on November 25, 2008. Most of the alterations were additions
7 of inaccurate, incorrect, or false information. These alteration did not have any initials
8 showing who had made them, and I was never provided with a copy of this document for my
9 approval before its submission. In fact, on December 5, 2008, I emailed Mr. Peterson with
10 suggested changes to the application form, which documents the fact I did not know the
11 application form had been submitted.

12 Mr. Peterson had told me that there were three required parts to the insurance
13 application process: the written application, the physical exam, and the phone history
14 interview. I was not sure that I wanted to apply to The Standard and had not asked that my
15 application form been submitted to them, so I did not complete a phone history interview.
16 When I was contacted for a phone history interview, I told the caller that I had not decided
17 whether or not I wanted to apply to The Standard and I would not complete the interview at
18 that time. They gave me a number to call to complete the interview if I decided to apply to
19 The Standard. On December 30, 2008, and January 6, 2009, Mr. Peterson told me that I
20 needed to complete the phone history interview before The Standard could make a decision.
21 Since I had not decided to apply to The Standard, I never completed the phone history
22 interview.

1 To my surprise, I received a letter from The Standard dated January 30, 2009,
2 informing me that my application had been postponed. On February 21, 2009, I wrote to
3 The Standard and explained that since I had not completed the phone history interview, I
4 had not completed an application for insurance and therefore could not have an application
5 postponed or acted upon in any other way. I asked that they correct their records reflect the
6 fact that I never completed an application. In addition to having all records at The Standard
7 corrected, I asked that any information shared outside of the Standard be corrected as well.
8 Finally, I requested written confirmation from The Standard that all records had been
9 corrected. In a letter dated March 20, 2009, The Standard informed me that the phone
10 history interview was not a required part of the application process and that once the written
11 application form was submitted, the application was considered complete.

12 I did not know it at the time, but Mr. Peterson had submitted to The Standard an
13 altered version of the application form I had signed on October 30, 2008, but the altered
14 version was incorrect and I had not authorized its submission. This is what The Standard
15 received on November 25, 2008. Mr. Peterson should have known that once he submitted
16 the altered version of the application form I had signed, The Standard considered my
17 application completed and would process the application and determine if I was eligible for
18 insurance coverage with the application form. The statements Mr. Peterson made to me on
19 December 30, 2008, and January 6, 2009, about the requirement for a phone history
20 interview needing to be completed before The Standard could make a decision were not true.

21 Only in the course of my conversations with employees of The Standard did it
22 become clear to me that the application they had received contained information that was
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1 not present on the application form I had signed. In a letter dated May 28, 2009, I asked
2 them to send me a copy of the application form they had received. When I received it, I
3 noticed that it had been altered. In order to determine when and where these alterations
4 were made, I contacted Mr. Peterson's office and requested a copy of the application they
5 had submitted to The Standard. On June 25, 2009, Mr. Peterson's office emailed to me a
6 copy of the application form they had submitted to The Standard. This application
7 contained the same alterations that are present on the application form that The Standard
8 received. I wrote to The Standard informing them that the application they received was
9 forged and asking that they correct all their records to state that I never submitted an
10 application. In addition to having all records at The Standard changed, I asked that
11 information regarding my purported application and its postponement not be shared outside
12 The Standard and I asked that any information that had been shared be retracted or
13 corrected. Finally, I requested that The Standard confirm that all records had been corrected
14 or retracted. The Standard informed me that Mr. Peterson adamantly denied altering or
15 forging my application in any way and referred me to the Washington Office of the
16 Insurance Commissioner.

17 On September 30, 2009, I filed a request for investigation of the interactions among
18 The Standard, Mr. Peterson, and me regarding an application for disability insurance. I
19 asked that the OIC help to have these records corrected to reflect the fact I never submitted
20 an application and therefore never had an application postponed. The case was assigned to
21 Investigator Victor Overholt. Contrary to the facts described in the OIC's motion, I do not
22 believe Mr. Overholt ever advised me that he had determined that the information
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1 constituting the alterations was provided by me to Mr. Peterson with the understanding that
2 the information would be submitted as part of my application.¹

3 Mark Durphy wrote a letter to me dated January 12, 2011. This letter informed me
4 that the OIC had concluded its investigation and concluded that there is insufficient evidence
5 to substantiate the allegation that Mr. Peterson violated one or more provisions of
6 Washington's insurance code. On January 20, 2011, I wrote to Mr. Durphy asking for
7 clarification of how the OIC had reached this conclusion. I received a reply from Ms.
8 Sureau, which did not explain how the OIC reached this conclusion but did explain the
9 process for requesting a hearing. I submitted this request for a hearing, which was received
10 by the Hearings Unit on July 25, 2011. My right to a hearing was challenged in the OIC's
11 Motion Re Hearing Right.

12 IV. ARGUMENT

13 The OIC's decision that there is insufficient evidence of a violation and its decision
14 to do nothing after an investigation are reviewable. First, the Hearings Unit has authority to
15 hear anything it chooses. But even if the Hearings Unit had no discretion to review anything

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17 ¹ When I received the OIC's Motion Re Hearing Right on October 10, 2011, was the first time I
18 was informed that Mr. Overholt had determined that the information constituting the alterations was
19 provided by me to Mr. Peterson with the understanding that the information would be submitted as
20 part of my application. I do not know how Mr. Overholt determined this. I did send an email to Mr.
21 Peterson on December 5, 2008, outlining a number of changes I wanted made to the written
22 application. The alterations made before the application was submitted to The Standard, which was
23 received on November 25, 2008, were not made in response to the email I sent on December 5, 2008.
24 Nor did I provide information to Mr. Peterson supporting the alterations. For example, I know that I
graduated from medical school in 2005, that I earned an income in 2007, and that I would not have
provided "school" as my 2007 income. Even if the information contained in the alterations had been
provided by me, which it was not, these alterations were not made by me, they were not made with
my written consent, and they were not made in such a manner as to indicate clearly that they were
not to be ascribed to me.

1 it wanted to, the OIC did act by investigating, the OIC did act by reaching a conclusion, and
2 the OIC did fail to act when it did not certify the facts of John Peterson's violation of the
3 Insurance Code to a public prosecutor. Finally, the OIC should be estopped from arguing
4 that its actions are unreviewable because the Hearings Unit appears to disagree and the
5 OIC's position would then create a trap for unwary consumers who may not fully
6 understand the Administrative Procedure Act, chapter 34.05 RCW, and its requirement that
7 administrative remedies be exhausted before bringing an action in Superior Court. For all of
8 these reasons, the OIC cannot evade the accountability of review by the Hearings Unit and I
9 have a right to a hearing.

10 **A. The Hearings Unit Has the Right to Hear This Matter, No Matter What the**
11 **Legal Affairs Division of the OIC Would Prefer.**

12 Under the Insurance Code, "the commissioner *may hold a hearing for any purpose*
13 *within the scope of this code as he or she may deem necessary.*" RCW 48.04.010(1)²
14 (emphasis added). Given this statutory authorization, my hearing may be heard at the

15 _____
16 ² The full text relevant to this Response Brief appears below:

17 Hearings — Waiver — Administrative law judge.

18 (1) The commissioner may hold a hearing for any purpose within the scope
19 of this code as he or she may deem necessary. The commissioner shall hold a
20 hearing:

21 (a) If required by any provision of this code; or

22 (b) Except under RCW 48.13.475, upon written demand for a hearing made
23 by any person aggrieved by any act, threatened act, or failure of the commissioner to
24 act, if such failure is deemed an act under any provision of this code, or by any
report, promulgation, or order of the commissioner other than an order on a hearing
of which such person was given actual notice or at which such person appeared as a
party, or order pursuant to the order on such hearing.

RCW 48.04.010.

1 discretion of the Hearings Unit—a hearing is thus authorized if so decided by the hearings
2 officer pursuant to her authority under WAC 284-02-070 and the Insurance Code. I
3 maintain that the evidence does not support the OIC’s decision, and a hearing is appropriate
4 regardless of whether OIC believes it “acted” or “failed to act.” However, a hearing is also
5 required by the Insurance Code because the OIC did indeed “act.”

6 **B. The OIC’s Decision Must Be Reviewed Because the OIC Acted When It**
7 **Conducted an Investigation and When It Reached a Conclusion That There**
8 **Was Insufficient Evidence.**

9 The Insurance Code requires that “[t]he commissioner shall hold a hearing . . . upon
10 written demand for a hearing made by any person aggrieved by any act.”

11 RCW 48.04.010(1)(b). The Insurance Code does not define the word “act,” but as
12 commonly used in the English Language it means:

13 **1 a :** a thing done or being done : DEED, PERFORMANCE <one of the first
14 [act]s of the new commission> <if some understanding of the [act] is not
15 present, comment on the result may be irrelevant —Ronald Bottrall> <an
16 [act] of folly> **b law :** an external manifestation of the will : something done
17 by a person pursuant to his volition <the effect may be negative, in which
18 case the [act] is properly described as a “forbearance” —T.E. Holland>.

19 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 20 (2002); *see* RCW 48.17.010.

20 Here, the OIC acted and its actions must be reviewed, regardless of its conclusion
21 that there was insufficient evidence and its decision not to discipline John Peterson or do
22 anything at all about his wrongful conduct. Under the Insurance Code, the Commissioner
23 may “[c]onduct investigations to determine whether any person has violated any provision
24 of this code.” RCW 48.02.060(3)(b); *see* RCW 48.02.060(3)(c); WAC 284-02-010(a)(ii). I
filed a request for investigation of the interactions among The Standard, John Peterson and

1 me. The OIC responded to my request and conducted an investigation, as fully admitted to
2 by the OIC in its motion:

3 This complaint was assigned to Victor Overholt for *investigation*. . . .
4 Mr. Overholt's *investigation* determined that the information constituting the
5 "alterations" was provided by Ms. Anderson [S]he wrote to John
6 Hamje, myself and Mark Durphy stating that she did not believe Mr.
7 Overholt was capable of conducting an unprejudiced *investigation* of her
8 complaint and asking that the *investigation* be reassigned.

9 The *investigative* file compiled by Mr. Overholt was reassigned by
10 *Investigations* Manager Mark Durphy to Cheryl Penn On January 12,
11 2011, Mr. Durphy wrote to Ms. Anderson informing her that, *after a*
12 *thorough investigation* and review of the facts and evidence in the case, the
13 agency had *concluded* that there is *insufficient evidence* to substantiate the
14 allegation that Mr. Peterson violated the Insurance Code. . . . (emphasis
15 added)

16 OIC's Motion at 1. What the OIC readily acknowledges to be an "investigation" was an act
17 and must be reviewed—using the OIC's implicit definition of the word "act" would strain
18 the word beyond recognition. The OIC's conclusion that there was insufficient evidence is
19 also a subsidiary "act" that is reviewable.

20 Whether a failure by the OIC to investigate would be reviewable as a "failure of the
21 commissioner to act" is a situation not at issue here. RCW 48.04.010(1)(b). That issue must
22 be decided at some point in the future when a consumer complains and the OIC does not
23 even investigate. Until that time, the OIC's conclusions and decisions following an
24 investigation must be reviewed, if so requested.³

25 ³ Arguably, the OIC's choice not to investigate a complaint by a consumer would still have to be
26 reviewed. The OIC has assumed a higher duty to consumers because it "assists persons who have
27 complaints about companies, insurance producers, surplus line brokers and title insurance agents, or
28 other licensees of the OIC. *OIC investigators follow up on consumer complaints, look into*
29 *circumstances of disputes between consumers and licensees, and respond to questions.*" WAC 284-

1 This reading of the Insurance Code is consistent with the legislative intent. In
2 interpreting a statute, the primary objective is to ascertain and give effect to legislative
3 intent. *Fraternal Order of Eagles, Tenino Aerie No, 564 v. Grand Aerie of Fraternal Order*
4 *of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). To determine legislative intent, one
5 first looks to the language of the statute. If the statute is unambiguous, as here, the
6 legislative intent is determined from the plain language of the statute as written. *Tenino*
7 *Aerie*, 148 Wn.2d at 239.

8 But even if RCW 48.04.010(1)(b) were ambiguous, Washington’s Legislature set
9 forth its intent in creating the Insurance Code: “The business of insurance is one affected by
10 the public interest, requiring that *all persons* be actuated by good faith, *abstain from*
11 *deception*, and *practice honesty and equity in all insurance matters*. Upon the insurer, the
12 insured, their providers, and their representatives *rests the duty of preserving inviolate the*
13 *integrity of insurance*.” RCW 48.01.030 (emphasis added). And the Insurance Code should
14 encompass this issue because it has such a broad scope: “All insurance and insurance
15 transactions in this state, or affecting subjects located wholly or in part or to be performed
16 within this state, and all persons having to do therewith are governed by this code.” RCW
17 48.01.020. Given this legislative intent and the broad scope of the Insurance Code, the word
18 “act” includes the OIC’s investigation and the OIC’s conclusions and decisions following
19 that investigation.

20
21 02-010(1)(f) (emphasis added). In defining its role, vis-a-vis consumers, the OIC did not use any
22 precatory language that it “may” assist consumer or “may” follow up on consumer complaints—a
23 precaution it clearly knew how to use. See WAC 284-02-010(1)(a)(i)–(iv).

1 **C. The OIC’s Decision Must Be Reviewed Because the OIC Failed to Act When**
2 **It Did Not Certify the Facts of John Peterson’s Violation of the Insurance**
3 **Code to the Public Prosecutor.**

4 Beyond the investigation it chose to conduct, the OIC also had a mandatory duty to
5 act that would constitute a “failure to act” subject to review under RCW 48.04.010(1)(b).
6 Under the Insurance Code, “If the commissioner has cause to believe that any person has
7 violated any penal provision of this code or of other laws relating to insurance he or she
8 shall certify the facts of the violation to the public prosecutor of the jurisdiction in which the
9 offense was committed.” RCW 48.02.080(2).

10 In my letters to the OIC, I stated that John Peterson altered my insurance application
11 without my written consent or any other form of approval and submitted the altered
12 application to The Standard. Alteration without the applicant’s written consent is a violation
13 of RCW 48.18.070(1) and is a misdemeanor—thus, a penal provision of the Insurance Code.
14 Another penal provision of the Insurance Code states, “A person who knowingly makes a
15 *false or misleading statement or impersonation*, or who willfully fails to reveal a material
16 *fact, in or relative to an application* for insurance to an insurer, is guilty of a *gross*
17 *misdemeanor*, and the license of any such person may be revoked.” RCW 48.30.210
18 (emphasis added). Because I argue that sufficient evidence supports a finding that John
19 Peterson altered my application without authority to do so, impersonated me when he
20 submitted an application bearing my name without my consent, and made false and
21 misleading statements both to me and to the Standard, the OIC’s decision not to certify facts
22 of the violation of RCW 48.18.070(1) and RCW 48.30.210 to a public prosecutor are
23 failures to carry out a mandatory duty and are each reviewable as a “failure to act.” My
24

1 concern is that the OIC find the truth and act appropriately and equitably, even if the OIC
2 chooses not to discipline a licensee who engaged in conduct that violated the Insurance
3 Code.

4 Finally, the OIC neglected in its briefing to provide an example of a failure to act
5 that the Hearings Unit believes is reviewable:

6 Pursuant to RCW 48.04.010(1)(b), any act, threatened act or failure to
7 act, of the Insurance Commissioner may be appealed by any interested
8 party. . . . *An example of a failure of the Commissioner to act which can be*
9 *appealed is when the Commissioner is asked to enforce a specific statute*
10 *against an insurance company by a member of the public/health care*
11 *provider and he chooses not to do so. In all of these situations, the interested*
12 *party must file a Request for Hearing, which is received by an Administrative*
13 *Law Judge in the Hearings Unit*

14 http://www.insurance.wa.gov/orders/hearingsunit_overview.shtml (emphasis added). I am
15 requesting review regarding the result of the OIC's investigation of John Peterson's
16 violation of the Insurance Code and an unwinding of his wrongful conduct. Although a
17 complaint about John Peterson's conduct is a little different than a complaint about an
18 insurance company, I believe that these situations are parallel and therefore this failure of
19 the Commissioner to act is reviewable.

20 **D. The OIC Should Be Estopped from Arguing There Is No Right to a**
21 **Hearing—The Requirement for Exhaustion of Administrative Remedies**
22 **Puts Consumers in Danger of Having No Review in Any Forum.**

23 The OIC's position in this motion also creates a dangerous situation for the unwary.
24 Normally the rule is that litigants must exhaust administrative remedies before seeking
judicial intervention when an agency has initial authority to evaluate and resolve a claim. *S.*
Hollywood Hills Citizens Ass'n v. King County, 101 Wn.2d 68, 73, 677 P.2d 114 (1984).

1 Even where an administrative remedy is not precisely spelled out in the statutes, exhaustion
2 is still required. *Dioxin/Organochlorine Center v. Dept. of Ecology*, 119 Wn.2d 761, 777,
3 837 P.2d 1007 (1992) (pursuit of administrative remedies not inadequate or futile despite
4 absence of injunctive power in agency). *See also, Credit Gen. Ins. Co. v. Zewdu*, 82 Wn.
5 App. 620, 919 P.2d 93 (1996), *review denied*, 130 Wn.2d 1022, 930 P.2d 1230 (1997)
6 (failure to exhaust administrative remedies can be fatal to later lawsuit involving question of
7 validity of policy's exclusion language).

8 For this reason alone, the OIC should be estopped from making the arguments it has
9 made here. Otherwise, the OIC could turn around and argue in Superior Court that
10 consumers must seek an administrative hearing or else the consumers' administrative
11 remedies were not exhausted and a civil action cannot be maintained.

12 VI. CONCLUSION

13 Given the broad discretion of the Hearings Unit and the mandatory review of the
14 OIC's decision following its investigation, OIC's position that I have no right to a hearing
15 should be rejected and its motion should be denied.

16 I also request that all past and future materials submitted that contain my private
17 information be placed under seal subject to a protective order that will prevent inadvertent
18 public disclosure.

19 Respectfully submitted this 31st day of October, 2011.

20 By: 
21 Rachel Anderson

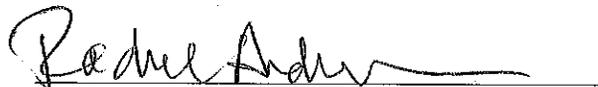
1 CERTIFICATE OF MAILING

2 The undersigned certifies under penalty of perjury under the laws of the State of
3 Washington that the following is true: During all times herein mentioned I was and now am
4 a citizen of the United States, a resident of the State of Washington, and over the age of
fifteen years. On the 31st day of October 2011, I served the foregoing document upon the
following individuals by U.S. Mail and by email:

5 Patricia D. Petersen
6 Chief Hearing Officer, Hearings Unit
7 Office of the Insurance Commissioner
8 P.O. Box 40255
9 Olympia, WA 98504-0255
10 KellyC@oic.wa.gov

11 Carol Sureau
12 Deputy Commissioner, Legal Affairs Division
13 Office of the Insurance Commissioner
14 P.O. Box 40255
15 Olympia, WA 98504-0255
16 ReneeM@oic.wa.gov

17 SIGNED this 31st day of October 2011 at Bremerton, Washington.

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Rachel Anderson