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OIC HEARINGS UNIT
PATRICIA D. PETERSEN
CHIEF PRESIDING OFFICER

STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In re the Matter of

EDMUND C. SCARBOROUGH and
WALTER W. WOLF,

Respondents.

No. 13-0084

RESPONDENT EDMUND C.
SCARBOROUGH'S REPLY IN
SUPPORT OF MOTION TO QUASH

I. INTRODUCTION

The legislature has mandated that the attorney general institute and prosecute "all actions and proceedings" by any state agency. Nothing in the statute limits its application to court proceedings, and a court will not add words to an unambiguous statute. The legislature has also mandated that state agencies be represented by the attorney general in all proceedings and hearings including before all administrative tribunals. While the Administrative Procedure Act allows parties to participate "personally" in adjudicative proceedings, that provision applies only to members of the public, to promote access to justice. Moreover, even if that general provision could be interpreted in isolation as applying to agencies, it would be superseded by the specific statute requiring attorney-general representation. The remedy for failure to comply with the statutory mandates is to quash the OIC's notice of request for hearing for imposition of fines.

RESPONDENT EDMUND C. SCARBOROUGH'S
REPLY IN SUPPORT OF MOTION TO QUASH

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II. AUTHORITY AND ARGUMENT

A. This Is a "Proceeding" that Must Be Instituted and Prosecuted by the Attorney General.

The attorney general must "institute and prosecute *all* actions and proceedings...which may be necessary in the execution of the duties of any state officer." RCW 43.10.030(2) (emphasis added). Because this proceeding fails to comply with the statute in that it is not initiated or prosecuted by the attorney general's office, it must be dismissed. *State v. Gattavara*, 182 Wash. 325, 47 P.2d 18 (1935).

Gattavara is not distinguishable on the basis that it involved a court proceeding. The meaning of an unambiguous statute is determined from its language alone. *Wash. State Coalition for the Homeless v. Dep't of Social & Health Svcs.*, 133 Wn.2d 894, 904, 949 P.2d 1291 (1997). The statute unambiguously applies to "*all* actions and proceedings." RCW 43.10.030(2) (emphasis added). Nothing limits its application to court proceedings. A court will not add words to an unambiguous a statute, nor will it strain to find ambiguity where the statute's language is clear. *Wash. State Coalition*, 133 Wn.2d 904, 907.

The OIC asserts that the term "proceedings" has "traditionally meant matters before the courts."¹ In the absence of a specific statutory definition, words used in a statute are given their ordinary meaning according to a dictionary. *Wash. State Coalition*, 133 Wn.2d at 905. "Proceeding" is defined broadly as "[a]ny procedural means for seeking redress from a tribunal or agency." BLACK'S LAW DICTIONARY 1241 (8th ed. 2004). In addition, the OIC's own regulation recognizes that a contested hearing is a "proceeding" under the Administrative Procedure Act (APA), chapter 34.05 RCW. WAC 284-02-070(1)(a). Indeed, the APA broadly defines "adjudicative proceeding" as "a proceeding before an agency in which an opportunity for

¹ *Opposition* at 11.

1 hearing before that agency is required by statute or by constitutional right before or after the
2 entry of an order by the agency.” RCW 34.05.010(1). This is such a proceeding.²

3 Only if a statute is ambiguous will a court resort to statutory construction aids such as
4 legislative history and relevant case law. *State Dep’t of Ecology v. Campbell & Gwinn, LLC*,
5 146 Wn.2d 1, 11-12, 43 P.3d 4 (2001). Even assuming that the term “proceeding” in RCW
6 43.10.030 were ambiguous, which the OIC does not establish, the OIC offers no authority
7 suggesting that an APA adjudicative proceeding is not a “proceeding” under RCW 43.10.030.
8 None of the decisions cited by the OIC addressed the scope of the term “proceeding” or RCW
9 43.10.030, let alone presumed to reach any holding about whether a contested adjudicative
10 proceeding is a “proceeding” under that statute.³

11 The plain language of RCW 43.10.030, as confirmed by the broad legal and statutory
12 definitions of “proceeding,” establishes a broad scope that is not limited to court proceedings but
13 includes adjudicative proceedings. Dismissal of this proceeding is required under RCW
14 43.10.030 and *Gattavara* because it is not instituted or prosecuted by the attorney general.

15 **B. This Is a “Proceeding” and “Hearing” in Which the Agency Must Be Represented**
16 **by the Attorney General.**

17 Not only must an adjudicative proceeding be initiated and prosecuted by the attorney
18 general, the attorney general must “*represent* the state and all officials, departments, boards,
19 commissions and agencies of the state in the courts, and before *all* administrative tribunals or
20 bodies of *any* nature, in *all* legal or quasi legal matters, hearings, or proceedings[.]” RCW
21 43.10.040 (emphasis added). This statute prohibits the OIC from being represented by anyone
22 other than the attorney general’s office, including an OIC “staff attorney.”

23
24 ² An opportunity for a hearing is required in this matter both under the penalty provision relied upon
25 by the OIC, RCW 48.15.023(5)(a)(ii), and under the due process clauses of the state and federal
26 constitutions.

³ See cases cited in *Opposition* at 11, n.17.

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1 The OIC relies upon the APA provision that a “party” to an adjudicative proceeding may
2 participate “personally” as opposed to through an attorney. RCW 34.05.428(1). The OIC
3 asserts that it is a “party” to this matter and, as such, is allowed under the APA to participate
4 “personally.”⁴ By participating “personally,” the OIC argues, the commissioner does not appear
5 “before” any administrative tribunal when he could personally sit as the presiding officer.⁵ And
6 while admitting that it appears in this proceeding through a representative and not “personally,”
7 the OIC asserts that anything the commissioner may do “personally,” he may do through his
8 “staff attorney” by subdelegation of authority.⁶ Finally, the OIC asserts that its “staff attorney”
9 represents the agency only as a *lay* representative and not as its attorney.⁷

10 The OIC’s assertions are contradictory, unsupported, and contrary to law. First, even
11 though it may be managed by a natural person as “agency head,” a state agency is an artificial
12 entity. See RCW 34.05.010(2) (defining “agency” to include an “officer”). Subject to limited
13 exceptions, an entity may not appear “pro se” but must be represented by an attorney who is
14 licensed to practice law. *Cottringer v. State Dep’t of Empl. Sec.*, 162 Wn. App. 782, 787, 257
15 P.3d 667 (2011); RCW 2.48.170; APR 1(b). Second, while the APA contains an exception that
16 allows a “party” to participate personally in an adjudicative proceeding, the agency conducting
17 the adjudicative proceeding is not included in the APA’s definition of “party.” RCW
18 34.05.010(12). Where the legislature has specifically designated the things upon which it
19 operates, omissions are presumed to be intentional. *Wash. Nat. Gas Co. v. Pub. Utility Dist. No.*
20 *1 of Snohomish County*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969). Third, the suggestion that the
21 commissioner could personally sit as the presiding officer, and thus does not appear “before”
22 any tribunal, ignores the mandatory separation of powers within any state agency: the agency

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24 ⁴ *Opposition* at 6-7.

25 ⁵ *Id.* at 13.

26 ⁶ *Id.* at 3-5.

⁷ *Id.* at 6-8.

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1 head is prohibited from acting in a dual role of prosecutor or advocate and presiding officer.
2 RCW 34.05.458(1). Fourth, contrary to the OIC's characterization of its "staff attorneys" as "lay
3 representatives," the OIC admits that these attorneys engage in the practice of law under GR 24
4 when participating in adjudicative proceedings.⁸

5 The suggestion that the OIC could employ *non-lawyers* to practice law under RCW
6 34.05.428 and the corresponding exception in GR 24(b)(3) ignores the overall purpose of the
7 APA and of these exceptions, which is to promote access to justice for members of the *public*.
8 See RCW 34.05.001 ("The legislature intends...to provide greater public...access to
9 administrative decision making."). The unfairness that would result from allowing unregulated
10 non-lawyers to practice law on behalf of the *agency* would serve to deny, rather than promote,
11 public access to justice. The Supreme Court in its comment to GR 24 denotes the pitfalls of
12 allowing non-lawyers to practice law:

13 Defining "the practice of law" lies at the heart of any effort to protect the public from
14 untrained and unregulated persons who hold themselves out as able to offer advice and
15 counsel in matters customarily performed by lawyers that affect individuals' legal rights,
16 property, and life. When licensed and regulated lawyers perform these functions, they
17 are required to meet extensive educational requirements to become lawyers, required to
18 maintain continuing legal education to stay current in the law, required to follow
19 standards of ethical behavior with respect to their clients and others, and are subject to
20 discipline up to and including suspension and disbarment. ***Nonlawyers are not required
21 to meet any of these standards. The public has no recourse for poor, illegal, or
22 negligent performance of these functions by nonlawyer.***

23 2 WASH. PRAC., RULES PRAC. GR 24 (drafter's comment). To be sure, non-lawyers participate
24 in adjudicative proceedings on behalf of certain other agencies, but not in the role of legal
25 counsel. Such representatives generally explain the agency's action. If they undertook to make
26 legal argument, cross examine parties and witnesses, file motions and legal briefs and otherwise
perform the functions of a lawyer they would run afoul of the state constitution. Only in limited

⁸ *Opposition at 7.*

1 circumstances that do not involve the practice of law, and only under legal authority specific to
2 the agency, is such representation allowed.⁹ Finally, no such authorization exists here.

3 The OIC notes that the presiding officer ruled in a different proceeding over 14 years ago
4 that the OIC may participate in adjudicative proceedings “in a pro se capacity,” a ruling made in
5 reliance upon the OIC’s and attorney general’s representation that the OIC’s “staff attorneys”
6 were acting as lay representatives without entering into an attorney-client relationship with the
7 agency. Although the OIC still claims (albeit with a different elected commissioner) that “there
8 is no attorney-client relationship between the Commissioner and any of his staff,”¹⁰ the OIC has
9 not acted consistent with that representation since the presiding officer’s 2000 ruling. Instead,
10 the OIC has asserted the attorney-client privilege as a basis to withhold intra-agency
11 communications from public disclosure, which is an assertion that an attorney-client relationship
12 exists.¹¹ See *Dietz v. Doe*, 131 Wn.2d 835, 843, 935 P.2d 611 (1997) (existence of an attorney-
13 client relationship is a prerequisite to application of the privilege). That the attorney general’s
14 office submitted an “amicus brief” supporting the OIC in the 2000 proceeding only highlights
15 that the attorney general is silent in this proceeding, perhaps recognizing that the OIC is now
16 trying to have it both ways.

17 But more importantly, even accepting the OIC’s position that the APA read in isolation
18 would authorize agency representation by staff attorneys, the APA cannot be read in isolation,
19 and the specific mandate of RCW 43.10.040 supersedes the APA. “The specific statute
20 supersedes a general statute when both apply.” *Gen. Tel. Co. of the N.W., Inc. v. Wash. Utils. &*
21 *Transp. Comm’n*, 104 Wn.2d 460, 464, 706 P.2d 625 (1985). In contrast to the APA, which
22 does not specifically address agency representation in administrative proceedings, RCW

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24 ⁹ See, e.g., WAC 182-526-0010 (Health Care Authority); WAC 388-02-0170(1) (Department of Social
& Health Services).

25 ¹⁰ *Opposition* at 6, n.9. See also *id.* at 9.

26 ¹¹ See Declaration of Brian F. Kreger, Exhibit A.

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1 43.10.040 specifically provides the attorney general must represent *all* officials and agencies in
2 *all* hearings or proceedings, including before *all* administrative tribunals. In addition, RCW
3 43.10.067 forbids an agency from employing attorneys to act "in any legal or quasi legal
4 capacity" where the law mandates that such duties be performed by the attorney general.
5 Because the OIC is not represented by the attorney general in this proceeding as required by
6 RCW 43.10.040, dismissal is required.

7 **III. CONCLUSION**

8 The OIC's notice of request for hearing for imposition of fines should be quashed for
9 failure to comply with RCW 43.10.030, .040, and .067.

10 DATED this 11th day of March, 2014.

11 CARNEY BADLEY SPELLMAN P.S.

12
13 By: 

14 Timothy J. Parker, WSBA No. 8797

15 Jason W. Anderson, WSBA No. 30512

16 Attorneys for Respondent Edmund C. Scarborough
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DECLARATION OF SERVICE

I, Christine Williams, under oath hereby declare as follows: I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. On March 11, 2014, I caused to be delivered in the manner indicated a copy of the foregoing document on the following parties at the last known address as stated:

Judge Patricia Petersen – ORIGINAL Chief Hearing Officer Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 kellyc@oic.wa.gov via e-mail and legal messenger	Attorney for OIC Mr. Alan M. Singer Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 alans@oic.wa.gov via e-mail and legal messenger
Attorney for Walter W. Wolf James A. McPhee Workland & Witherspoon, PLLC 601 W Main Avenue, Suite 714 Spokane, WA 99201 jmcphee@workwith.com via e-mail and U.S. mail	

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 11th day of March, 2014.

Christine Williams, Legal Assistant

RESPONDENT EDMUND C. SCARBOROUGH'S
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STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In re the Matter of

No. 13-0084

EDMUND C. SCARBOROUGH and
WALTER W. WOLF,

DECLARATION OF BRIAN F.
KREGER

Respondents.

BRIAN F. KREGER declares:

1. I am a principal of Kreger Beeghly, PLLC. I am over the age of eighteen and competent to testify.

2. In June 2012, I made a public disclosure request to the Washington Office of Insurance Commissioner (OIC) under chapter 42.56 RCW. Included with the OIC's response to the request was a "Privilege Log," a true and correct copy of which is attached as Exhibit A.

3. Andrea Philhower, mentioned in the privilege log, is one of the staff attorneys with the OIC's Legal Affairs Division. Staff attorneys with the Legal Affairs Division regularly appear on behalf of the OIC in its adjudicative proceedings.

DECLARATION OF BRIAN F. KREGER -- 1

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

DATED this 11th day of March, 2014, at Seattle, Washington.


Brian F. Kreger

DECLARATION OF BRIAN F. KREGER -2

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WASHINGTON STATE OFFICE OF THE INSURANCE COMMISSIONER

PRIVILEGE LOG

REQUEST NO. 4538 KREGER

The following documents have been withheld or produced in a redacted form. They are subject to privilege under the identified statutes below. This list is provided in accordance with RCW 42.56.210(3).

Bates #	Date	Type of Document	Recipient	Author	Statute	Comments
23	8/31/10	Licensee Profile		OIC	RCW 42.56.230(2)	This document contains a Social Security number and date of birth which has been redacted to protect the individual's identity.
376-378	5/23/12	Letter RE limited benefit plan	Sharon Mattingly	Andrea Philhower	RCW 42.56.280 RCW 5.60.060(2)	This document has been withheld for Attorney/Client Privilege. It includes legal strategy and recommendations for agency action in a pending matter. This information is considered exempted under the identified RCWs.
379-382		Consent Order Levying A Fine	United States Fire Insurance Company	OIC	RCW 42.56.280 RCW 5.60.060(2)	This document has been withheld for Attorney/Client Privilege. It includes legal strategy and recommendations for agency action in a pending matter. This information is considered exempted under the identified RCWs.
383-384	5/16/12	Compliance Group Review Summary		OIC Legal Affairs Division	RCW 42.56.280 RCW 5.60.060(2)	This document has been withheld for Attorney/Client Privilege. It includes legal strategy and recommendations for agency action in a pending matter. This information is considered exempted under the identified RCWs.
385-386	3/28/12	Compliance Group Review Summary		OIC Legal Affairs Division	RCW 42.56.280 RCW 5.60.060(2)	This document has been withheld for Attorney/Client Privilege. It includes legal strategy and recommendations for agency action in a pending matter. This information is considered exempted under the identified RCWs.
387-389	2/8/12	Attachment to 2/9/2012 Email: Compliance Group Review Summary		OIC Legal Affairs Division	RCW 42.56.280 RCW 5.60.060(2)	This document has been withheld for Attorney/Client Privilege. It includes legal strategy and recommendations for agency action in a pending matter. This information is considered exempted under the identified RCWs.

WASHINGTON STATE OFFICE OF THE INSURANCE COMMISSIONER

PRIVILEGE LOG

REQUEST NO. 4538 KREGER

UPDATE 07/23/2012

The following documents have been withheld or produced in a redacted form. They are subject to privilege under the identified statutes below. This list is provided in accordance with RCW 42.56.210(3).

Bates #	Date	Type of Document	Recipient	Author	Statute	Comments
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379-382		Consent Order Levying A Fine	United States Fire Insurance Company	OIC	RCW 42.56.240(1)	This document contains information essential to an open investigation. This information is considered exempt under the identified RCW.
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385-386	3/28/12	Compliance Group Review Summary		OIC Legal Affairs Division	RCW 42.56.240(1)	This document contains information essential to an open investigation. This information is considered exempt under the identified RCW.
394-395	2/8/12	Attachment to 2/16/2012 Email: Compliance Group Review Summary		OIC Legal Affairs Division	RCW 42.56.240(1)	This document contains information essential to an open investigation. This information is considered exempt under the identified RCW.
396-398	3/28/12	Attachment to 05/09/2012 Email: Compliance Group Review Summary		OIC Legal Affairs Division	RCW 42.56.240(1)	This document contains information essential to an open investigation. This information is considered exempt under the identified RCW.

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DECLARATION OF SERVICE

I, Christine Williams, under oath hereby declare as follows: I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. On March 11, 2014, I caused to be delivered in the manner indicated a copy of the foregoing document on the following parties at the last known address as stated:

Judge Patricia Petersen – ORIGINAL Chief Hearing Officer Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 kellyc@oic.wa.gov via e-mail and legal messenger	Attorney for OIC Mr. Alan M. Singer Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 alans@oic.wa.gov via e-mail and legal messenger
Attorney for Walter W. Wolf James A. McPhee Workland & Witherspoon, PLLC 601 W Main Avenue, Suite 714 Spokane, WA 99201 jmcphee@workwith.com via e-mail and U.S. mail	

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 11th day of March, 2014.



Christine Williams, Legal Assistant

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