



OFFICE OF
INSURANCE COMMISSIONER

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BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of)	Docket No. 13-0134
)	
PREFERRED CHIROPRACTIC)	FINDINGS OF FACT,
DOCTOR, INC.,)	CONCLUSIONS OF LAW,
)	AND FINAL ORDER
Respondent.)	
_____)	

TO: Stephen L. Below, D.C., CEO/President
Preferred Chiropractic Doctor, Inc.
507 2nd Avenue South
Clanton, AL 35045

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COPY TO: Mike Kreidler, Insurance Commissioner
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Pursuant to RCW 34.05.434, 34.05.461, 48.04.010 and WAC 10-08-210, and after notice to all interested parties and persons the above-entitled matter came on regularly for hearing before the Washington State Insurance Commissioner commencing at 10:00 a.m. on September 19, 2013. All persons to be affected by the above-entitled matter were given the right to be present at such



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hearing during the giving of testimony, and had reasonable opportunity to inspect all documentary evidence. The Insurance Commissioner appeared pro se, by and through Marcia Stickler, Esq., Staff Attorney in his Legal Affairs Division. Preferred Chiropractic Doctor, Inc. was represented by Edward L. Clabaugh, Esq. On request of the Respondent, and with the agreement of the Insurance Commissioner, and based on the fact that counsel for Respondent was out of the country, entry of the Final Order herein was delayed until after January 1, 2014.

NATURE OF PROCEEDING

The purpose of the hearing was to take testimony and evidence and hear arguments as to whether a fine of \$152,400 should be imposed on Preferred Chiropractic Doctor, Inc. (PCD) as requested in the Insurance Commissioner's Notice of Request for Hearing for Imposition of Fines issued May 17, 2013. According to the Notice, the Commissioner proposes to impose this fine based upon the Commissioner's allegation that PCD acted as the agent/dealer for, represented, marketed and/or sold some 1,524 health care discount plan cards to Washington residents without being licensed by the Commissioner to operate as a discount plan organization in the State of Washington, in violation of RCW 48.155.020(1).

FINDINGS OF FACT

Having considered the evidence and arguments presented at the hearing, and the documents on file herein, the undersigned presiding officer designated to hear and determine this matter finds as follows:

1. The hearing was duly and properly convened and all substantive and procedural requirements under the laws of the state of Washington have been satisfied. This Order is entered pursuant to Title 48 RCW and specifically RCW 48.04; Title 34 RCW; and regulations pursuant thereto.

2. Preferred Chiropractic Doctor, Inc. ("PCD") is a healthcare discount plan organization which was organized under the laws of the state of Alabama in 1993 and has operated in all 50 states, including Washington, since that time. PCD, which was founded and is owned and operated by chiropractor Dr. Stephen Below, provides a mechanism for patients to receive discounted fees for chiropractic treatment through its nationwide network of chiropractors including 38-40 chiropractors in Washington. [Testimony of Dr. Stephen Below, President/Chief Executive Officer of PCD; Exhibit 1.] Specifically, PCD contracts with chiropractors, who agree to provide PCD card holders with specific discounts off of their regular fees. PCD, either directly or through its network chiropractors, sells discount cards to patients for \$37/year and charges no fees to its network chiropractors. In turn, these patients recoup the cost of membership on their first or second appointment; this is because an initial visit with a network chiropractor is typically \$300 including x-rays and an examination, however at the time

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of the initial visit the network chiropractor can sell a PCD discount card to the patient and the network chiropractor then provides a 40% discount beginning that day. Therefore, for the patient's \$37 payment for the PCD discount card for one year, the customer saves \$120 on his initial visit and will continue to receive discounts throughout the year of at least 25% of the discount chiropractors' charges. [Testimony of Below.] The benefit to the chiropractor is payment at the time of service, with no additional cost and delay from having to process third party insurance claim forms. In or about 1994, PCD employed a national law firm to confirm that PCD was operating legally in all the states in which it was conducting operations; additionally, PCD contacted all state chiropractic associations, state chiropractic regulatory boards and many state insurance departments to ensure they were acting lawfully. [Testimony of Below; Declaration of Below.] PCD does not market its plan directly to consumers in any state. It markets only to licensed chiropractors through direct mail advertisements, referrals and by recommendations from industry leaders at trade association meetings.

3. In 1994, PCD began operating in Washington. PCD contacted the Washington State Department of Health in 1995 and the OIC in 1997 concerning whether it needed to register in some manner with the state. The OIC staff member who was contacted by PCD, Dennis Julnes, stated that PCD should review Chapter 48.44 RCW, Health Care Services, and based on PCD's review of those statutes and conversations with the OIC at that time PCD determined that it was neither an "insurance producer" nor a "health care service contractor" and therefore did not need a license from the OIC. PCD therefore continued its operations in Washington.

4. Fifteen years later, in 2009, the Washington State Legislature enacted the Health Care Discount Plan Organization Act, RCW 48.155. This Act represents the first time this state has required healthcare discount plans operating in Washington to be licensed. While this Act became effective July 26, 2009, the OIC allowed plans then operating in Washington a grace period of until January 26, 2010 to become licensed. WAC 284-155-015.

5. In 2011, PCD became aware of a software company in Iowa claiming that Iowa had enacted a law requiring discount plan organizations to be licensed. Dr. Below conducted some research to see about any licensing requirements for Iowa and found there were none. However, Dr. Below did learn that several states had adopted some type of licensing requirement. Because PCD was at that time operating in all 50 states, and is a small company which does not have the human or financial resources to conduct an investigation into the requirements of each state or apply for necessary licenses if more than a few states required licensing by this time, Dr. Below searched for a company that had become licensed in all necessary states. Through this research he learned that AccessOne Consumer Health, Inc. was a discount plan organization that offered a variety of discount plan services in most states and that it was licensed in most states that required licensing. Dr. Below thereupon began discussions with AccessOne and after six months worked out the details of an affiliation which involved execution of two Network Access Agreements with that company on May 8, 2012. [Declaration of Below, Ex. 1, two agreements between PCD and AccessOne dated May 8, 2012.] Under the first agreement, the Network Access Agreement, AccessOne agreed, among other matters, to maintain at all times a valid and

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current license or registration as a healthcare discount plan organization in the jurisdictions that required such license or registration and to comply with all pertinent rules, regulations and statutes. [Declaration of Below, Ex. 1, Network Access Agreement, Sec. 1.01.] PCD, for its part, agreed to provide a network of participating, duly licensed chiropractors who each had malpractice and liability insurance in an amount that exceeded \$250,000 per occurrence who had agreed to discount their "routinely rendered services" and PCD also agreed that its providers would reduce their prevailing professional fee by a minimum of 25%. [Id., at Secs. 2.01, 2.05, 2.06 and 2.08.] Under the second agreement with AccessOne, the Reseller Agreement, PCD agreed to affiliate with AccessOne for the purpose of offering individuals the opportunity to obtain uninsured discounted medical services. Under the terms of the Reseller Agreement, PCD, among other matters, has to obtain the approval of AccessOne for all printed and verbal marketing and solicitation material. PCD also is required to report any provider or consumer complaints to AccessOne immediately.

6. PCD received no information from any of its 28 Washington chiropractors or any other entities that Washington had enacted a discount plan licensing requirement until July 2012, when it received a call from a Washington chiropractor asking if a license was required for PCD's operations in Washington. In researching its response, PCD learned that AccessOne had not registered in Washington, even though pursuant to their Network Access Agreement, at Sec. 1.01, AccessOne had undertaken the responsibility to ascertain the requirements of each state regarding healthcare discount plan organizations and to obtain and maintain those state healthcare discount plan organization licenses in those states where they were required. When PCD discovered that Washington had enacted a licensing requirement, and that Washington was one of the few states in which AccessOne did not hold a license, PCD began the process of applying for a license in Washington, determining that it most likely met the \$150,000 net worth requirement and taking other necessary steps. Specifically, in July 2012 PCD obtained a Certificate of Authority as a Foreign Profit corporation and a registered agent in Washington on July 18, 2012, compiled By-Laws and created an Organizational Chart for the application, began working on the notarized biographical affidavits for all company officers, obtained a DPO Bond on August 7, 2012 with an effective date of August 10, 2012, hired a company to do the NAIC Third Party Verification for all biographical affidavits, obtained a Certificate of Existence from Washington, a current Certificate of Existence from Alabama, its state of domicile, and a current Certificate of Good Standing for Alabama and began working on the actual application and supporting documentation required by the OIC in the summer of 2012. [Declaration of Below.] PCD realized it was in a position in Washington where 1) it could close operations in Washington, thereby breaching the contracts with its patient-members to whom it had sold discount cards for periods of one to three years; or 2) it could continue to operate in Washington while working to obtain the required license, thereby honoring the contracts to its patient-members but violating RCW 48.155.020. [Testimony of Below.] Finding himself in this predicament, in September 2012 PCD retained Washington attorney Edward L. Clabaugh to help it with its legal concerns with respect to applying for a Washington healthcare discount plan organization license.

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7. After being retained in September 2012 and reviewing the applicable statutes and rules for licensing PCD as a discount plan organization in Washington, on October 12, 2012 Mr. Clabaugh began a series of contacts with pertinent staff members of the OIC. He first talked to Ms. Susan Baker, a Company Licensing Specialist in the OIC's Company Supervision Division who handled licensing of discount plan organizations. While not disclosing that the company for which he was inquiring was PCD, Mr. Clabaugh told Ms. Baker that he represented a company that had been doing business as a discount plan organization in Washington for a number of years but had not been aware of Washington's requirement, which became effective in 2010, until just recently. Mr. Clabaugh told Ms. Baker that the company had not registered as a discount plan organization and asked her advice as to how best to proceed. Ms. Baker said she, Ms. Baker, would be the person who would review the company's application for a discount plan organization license. It was the conclusion of PCD, its attorney and the OIC that PCD should continue the application process, which it did. [Declaration of Below.] Mr. Clabaugh states, and the OIC does not dispute, that Ms. Baker did not inform him that PCD should stop operating in Washington until it became licensed. [Testimony of Clabaugh.]

8. On October 12 Mr. Clabaugh also talked to Ms. Carol Sureau, Deputy Commissioner, OIC Legal Affairs Division, providing Ms. Sureau with the same information he had provided to Ms. Baker on that day. Ms. Sureau advised Mr. Clabaugh to have the company file an application for a license. Ms. Sureau also told Mr. Clabaugh that the company would face an enforcement procedure, but stated that - as factors which would be considered in the OIC's determination whether the OIC would take disciplinary action against the company, and if so the amount of penalty which might be imposed on the company (i.e. mitigating factors) - the OIC would consider whether a company in this position has attempted to comply with the law. She offered to, and did, send Mr. Clabaugh the OIC's Compliance Group Enforcement Policies and Procedures. [Declaration of Clabaugh, Ex. 1, memo re discussions w/OIC; Testimony of Clabaugh; Testimony of Baker.] Ms. Sureau did not advise Mr. Clabaugh that the company should stop operating in Washington until it became licensed, but rather that the company could expect to be the subject of disciplinary action and mitigating factors would be taken into account in that disciplinary action. [Testimony of Clabaugh.]

9. Following PCD's discussions with the OIC in October 2012, during that same month and through the fall of 2012 PCD continued to pursue its application for a Washington license. The Washington Act, which as above became effective in 2010, requires that health care discount providers have and maintain \$150,000 net worth. While PCD thought it would meet this requirement, there were detailed communications between PCD and the OIC about whether a compiled statement would be sufficient to show net worth or whether an audit would be required. While it is unclear where this requirement is in the statute in this situation, the OIC maintained that an audit, on an accrual basis, would be required for either one or two years. [Testimony of Baker.] One of the primary challenges arising in PCD's efforts to become licensed, which was the subject of many of the discussions through the fall of 2012, was that the OIC required an accrual basis audit, and PCD had always used cash basis accounting. [Testimony of Below; Ex. 3, Declaration of McKinney, tax preparer of PCD.] To use accrual basis accounting would be

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more difficult, because some customers choose to buy discount cards for two or three year periods of coverage and pay, up front, \$74 for two years or \$111 for three years; for this reason it was more expedient for PCD to use cash basis accounting. [Declaration of McKinney.] The OIC then advised PCD that it might consider waiting until 2013 to file its license application because then (for some reason) an audit for only 2013 might be sufficient (and therefore presumably only have to change its accounting method for 2013 instead of for two years). [Testimony of Below.] Again, Mr. Clabaugh states, and the OIC does not dispute, that the OIC did not inform Mr. Clabaugh that the company should stop operating in Washington until it was licensed.

10. On November 2, 2012, Mr. Clabaugh contacted Ms. Gayle Pasero, the Company Licensing Manager in the OIC's Company Supervision Division, regarding these audit questions. Ms. Pasero researched the question, and contacted Mr. Clabaugh back to advise that an audited statement was required. Mr. Clabaugh talked to Ms. Baker of the OIC again on November 5, discussed with her PCD's problem with obtaining an initial audit, asked about the methodology that the OIC would employ in its review, and the OIC asked Mr. Clabaugh to find out how the company was collecting and charging for its membership fees, advising that the fee needed to be spread over the entire period covered by the membership instead of reported when received. She also stated that since the calendar year end was soon it might be better to wait until after year end to file. She stated that would provide the auditor time to do the extensive field work required by an initial audit and that if the company was marginal on the \$150,000 net worth requirement then the OIC would ask for a pro forma to show how the company plans to maintain its minimum net worth requirement. [Declaration of Below; Declaration of Clabaugh; Declaration of Clabaugh, Ex. 2, Memorandum dated November 6, 2012 from Clabaugh to Below detailing his lengthy discussion with Ms. Baker on November 5, 2012.] They also discussed the fact that companies often have compliance problems with their contracts and that PCD needed to have a compliant website. Ms. Baker also advised Mr. Clabaugh that the Application is "huge and complex." Mr. Clabaugh testifies, the OIC does not dispute, there is no evidence to the contrary, and therefore it is hereby found that the OIC never advised Mr. Clabaugh, during any of Mr. Clabaugh's communications with Ms. Baker, Ms. Sureau or Ms. Pasero, that the company should stop operating in Washington until it had obtained a license in this state. In fact, the OIC knew that PCD was operating, had been operating and was continuing to operate at that time because, as above, PCD had told them so. Further indication of Ms. Baker's knowledge that PCD either had been or was operating without a license at that time is as indicated in the Memorandum from Clabaugh to Below dated November 6, 2012 which summarized Clabaugh's discussion with Ms. Baker on November 5, 2012: *She [Ms. Baker] emphasized that the very best application is one that initially provides all the required information in the form requested. If some information is missing, the company will be provided a reasonable opportunity to provide it. She said that the company should be, in her words, "viable for licensing" – meaning that the application is complete and in condition to be approved – before the information is forwarded for the Enforcement procedure.* [Declaration of Clabaugh, Ex. 2, Memorandum dated November 6, 2012 from Clabaugh to Below.] Therefore, as with his October 12, 2012 conversation with Ms. Sureau above, in this November 5, 2012 discussion with Ms. Baker Mr. Clabaugh believed the

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OIC was not requiring that PCD stop operating in Washington until it became licensed but instead that PCD could expect disciplinary action at some time in the future for not being licensed timely. [Testimony of Clabaugh.]

11. On November 30, 2012, following conversations with his client, its accountants and Ms. Pasero, Mr. Clabaugh had another conversation with Ms. Baker concerning what years the audit was in fact required for. Ms. Baker responded that since the company had been operating without registration that technically the OIC could require that it meet the net worth requirements for the entire time it had been operating in Washington but that PCD could either file an audited statement for the current fiscal year and for the previous year or, alternatively, file an audited statement for the current fiscal year and provide a detailed pro forma for the next several years that demonstrates how the company will maintain the minimum \$150,000 net worth requirement, and PCD determined to use the second option. Accordingly, in early December 2012 PCD hired a new CPA firm, Hull & Russell, P.C., and that firm began working on the audit that the OIC required. Even though it was clear that the healthcare discount plan organization had been and currently was operating in Washington without the required license, Mr. Clabaugh testifies, the OIC does not dispute, there is no evidence to the contrary, and therefore it is hereby found that the OIC never advised Mr. Clabaugh, during any of its communications with him, that the company should cease its operations in Washington until it had obtained a license in this state. In addition, none of the OIC staff members with whom Clabaugh spoke recommended that PCD halt its operations until it received its Washington license. [Declaration of Clabaugh.]

12. On December 4, 2012, Mr. Clabaugh confirmed with the OIC in writing to Ms. Baker, Ms. Sureau and Ms. Pasero that he had spoken with each of them over the past several months about the fact that his client *has been doing business in Washington as a Discount Health Plan* and gave no indication to the OIC that PCD had stopped doing business in Washington. Mr. Clabaugh confirmed that when his client learned it was in violation of Washington law because it was unlicensed it had contacted him for legal help, disclosed that his client had asked that he disclose its name to you and it was Preferred Chiropractic Doctor, Inc., that it was a small company and had not previously had audited financials and so was now in the process of obtaining audited statements so that it could file the necessary information to apply for a Washington license. [Declaration of Clabaugh, Ex. 2, December 4, 2012 email from Clabaugh to Ms. Baker, Ms. Sureau and Ms. Pasero with copy to Dr. Below; Testimony of Clabaugh.] There is no evidence that any representative of the OIC responded to this December 4 letter. As above, even though it was clear that the healthcare discount plan organization - which was now specifically identified in writing to the OIC as Preferred Chiropractic Doctor, Inc. - had been and currently was operating in Washington without the required license, Mr. Clabaugh testifies, the OIC does not dispute, there is no evidence to the contrary, and therefore it is hereby found that the OIC never advised Mr. Clabaugh, during any of its communications with him, that the company should cease its operations in Washington until it had obtained a license in this state although as above in his November 12, 2012 conversation with Ms. Sureau and November 5, 2012 discussion with Ms. Baker they indicated that PCD might be subject to an enforcement action at a future time.

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13. On December 6, Dr. Below, in his position as president and CEO of PCD, wrote to the Commissioner *We have fewer than 1000 consumer members in the state of Washington, along with approximately 30 "active" provider members,* Dr. Below informed the Commissioner that he had become aware in the past several months that a license was required in Washington to legally conduct business; that he had been simply unaware of Washington's requirements although he acknowledged he understood that ignorance of the law is not a good defense, but that as soon as he became aware of Washington's requirement he began steps to comply; he explained PCD's fees and method of marketing and sales in Washington and PCD's interest in long term relationships with its members; he explained that PCD was in the process of completing the Washington licensing application and concluded by stating that PCD looked forward to working with the OIC as it continued the licensing process. There is no evidence that PCD received a response to this letter. [Declaration of Below, Ex. 3, Letter to Commissioner dated December 6, 2012.] Once again, even though it was clear that PCD had been and currently was operating in Washington as a healthcare discount plan organization without the required license, and that the specific company at issue was Preferred Chiropractic Doctor, Inc., Mr. Clabaugh testifies, the OIC does not dispute, there is no evidence to the contrary, and therefore it is hereby found that during any of PCD's communications with the OIC the OIC never advised PCD - or its attorney Clabaugh or President Below who were the only individuals who communicated with the OIC throughout these many months - that PCD should cease its operations in Washington until it had obtained a license in this state although, as above, in his October 12, 2012 conversation with Ms. Sureau and November 5, 2012 conversation with Ms. Baker they indicated that PCD might be subject to an enforcement action at a future time for operating in Washington without a license for this period of time.

14. In December 2012, Below received from AccessOne a copy of a letter it had received in its offices in South Carolina from Mr. John Peick, Attorney at Law in Bellevue, Washington (Peick) addressed to PCD and AccessOne. [Declaration of Below; OIC's Hearing Brief, Ex. 1 and Declaration of Below, Ex. 4.] Mr. Peick's letter, dated November 28, advised that he *ha[d] become aware that you are operating in the State of Washington as a Healthcare Discount Plan. We have been unable to locate your registration with the OIC* and advised that if PCD was not "registered" with the OIC then *you are operating illegally in the State of Washington. Please clarify your registration status at the earliest opportunity.* It is unclear what Peick's interest in this matter was or who he might be representing, and the letter did not contain any indication of a consumer complaint or problem. However PCD responded to Peick, acknowledging that it was not then licensed and advising that it was in the process of completing the Washington application for licensure. On December 28 Peick by letter reported to the OIC that PCD was operating in Washington without a license, attaching a copy of his November 28 letter to PCD.

15. In response to Peick's December 28, 2012 report to the OIC, on January 14, 2013 the OIC sent a letter to PCD and AccessOne to AccessOne's offices in South Carolina. The OIC's letter enclosed a copy of Peick's December 28, 2012 report to the OIC about PCD and requested that PCD respond by February 14, 2013. [Declaration of Below, Ex. 5, OIC's first inquiry letter to PCD dated January 14, 2013.] On January 28, 2013 Mr. Clabaugh responded to the OIC,

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confirming the facts found above including the fact that PCD had been operating in Washington without a license, acknowledged that PCD realized it was not currently in compliance, advised the OIC that PCD had been taking steps with the OIC to become licensed in Washington, advised the OIC that PCD was currently undergoing its first audit, and advised that PCD planned to have its completed application filed by no later than February 28, 2013. [Declaration of Clabaugh, Ex. 3, PCD's January 28, 2013 response to OIC's first inquiry letter.]

16. Even though PCD had already responded to the OIC's first inquiry letter on January 28, well before the OIC's February 14 deadline, on February 5 the OIC mailed a second inquiry letter to PCD inquiring into this same situation. [Declaration of Below, Ex. 8, OIC's second inquiry letter to PCD dated February 5, 2013.] In response to the OIC's second inquiry letter, which requested a response by February 25, 2013, on February 22, 2013 Dr. Below responded in great detail, again reiterating PCD's confirmation of the facts found above including the fact that PCD had been operating in Washington without a license; acknowledging that PCD realized it was not currently in compliance; advising that PCD had been taking steps with the OIC to become licensed in Washington; advising that PCD had been undergoing its first audit which was completed; and this time advising that on February 13 PCD had filed its completed Application with the OIC. [Declaration of Below, Ex. 9, PCD's February 22 response to OIC's second inquiry.] Subsequently, the OIC requested detailed information listing PCD's Washington members and fees received, which PCD provided to the OIC on March 11, 2013. [Declaration of Below; Declaration of Ginger Connell, Ex. 3, PCD's lists of Washington members and fees received.]

17. On February 12, 2013, PCD sent a letter to all of its members and network chiropractors, determining it would be best to notify them about its status in Washington and its current efforts to obtain a Washington license. [Declaration of Clabaugh, Exs. 6 and 7.]

18. On February 13, 2013, PCD submitted its Application for Licensure as a Discount Plan Organization to the OIC, before the February 28 date it had advised the OIC. [OIC's Hearing Memorandum, Ex. 5.]

19. On March 19, 2013, Ms. Baker of the OIC responded to PCD's Application for Licensure. [Declaration of Below, Ex. 10, OIC letter dated March 19.] As indicated, Ms. Baker advised that the OIC was unable to qualify PCD for a license for the reasons stated therein, among them, that because the audited financial statements for PCD were not under full GAAP standards, PCD could not demonstrate that it met the minimum net worth requirement under RCW 48.155.030. In addition (even though as found above Ms. Baker had been informed in writing on December 4, 2012 along with other OIC staff that the Preferred Chiropractic Doctor, Inc. was the discount plan organization, which was currently operating in Washington without a license, with whom they had been working for many months) Ms. Baker's March 19, 2013 letter stated *Given the application disclosure that PCD has been conducting unlicensed healthcare discount plan activities in WA prior to application, please confirm the date that all such activities ceased. Per RCW 48.155.020 – PCD including any of its agents, representatives, marketers, and providers*

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is prohibited from conducting any health care discount plan activities and operations to which this Chapter applies until it is licensed. [Emphasis in original.] This was the first time the OIC had advised PCD that it was prohibited from conducting its operations in Washington until it held a license, even though PCD had made the OIC aware, through many communications and in great detail, 1) that (through PCD's attorney) since September 2012 that an unnamed discount plan organization had been operating in Washington, was currently operating and was currently working with these OIC staff members to become licensed; and 2) since December 4, 2012 that Preferred Chiropractic Doctor, Inc. was the discount plan organization which had been operating in Washington for some time, was currently operating and was working with these OIC staff members to become licensed. Up until this time, through his discussion with Ms. Sureau on October 12, 2012 and Ms. Baker, detailed above, the OIC knew that PCD was continuing to operate in Washington without a license and that the action to be taken was that PCD may be subject to disciplinary action for these activities in the future.

20. In response to the OIC's March 19, 2013 letter, on March 22 PCD reminded its network chiropractors that it had earlier communicated to them that it was attempting to become licensed in Washington. PCD further advised them that it was continuing its efforts to become licensed in Washington, and that *Washington State has one of the most difficult laws to comply with in the country as it relates to registering a DPO. That is precisely why there are no currently registered, exclusively chiropractic DPO companies registered in Washington, nor, as far as we know, any other such organizations currently making application for licensure in Washington.* [Declaration of Below, Ex. 11, PCD March 22, 2013 letter to network chiropractors.] PCD further advised its network chiropractors that *the Washington OIC has required that we temporarily cease activities in the state of Washington until we are licensed. As such, please do not issue any new PCD patient memberships until we have secured licensure in your state.* [Id.]

21. Subsequently, PCD further reviewed the OIC's concerns included in Ms. Baker's March 19, 2013 letter, investigated whether it could comply with the financial requirements in the manner required by the OIC, communicated in detail with its auditor, talked to its attorney, and on April 2 talked again with Ms. Baker concerning whether the OIC would accept an audit with reserves for cancellations based on historical data. On April 2 Ms. Baker sent Mr. Clabaugh another email concerning PCD's accounting requirements. At that point, PCD determined it could not show it met Washington's minimum net worth requirements in the form the OIC advised was required, and therefore PCD withdrew its Application on April 8.

22. On April 8, 2013, in its letter withdrawing its Application, PCD also informed the OIC that *Upon discovering that it might have inadvertently violated applicable legal requirements in Washington, PCD took immediate steps to seek licensure. As we have previously advised you, PCD ceased activities that had been identified as potential violations of the statute on March 22, 2013. PCD will not resume such activities unless and until it has reapplied for licensure and been licensed. In addition, PCD is contacting all of its members in Washington and offering refunds of current membership fees paid.* Without being asked or required to do so, by letter dated April 23, 2013, PCD informed all of its consumer members of its activities, violations and

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efforts and inability to come into compliance in Washington, and advised them that it discontinued all business activity in Washington effective March 22, 2013 and would not resume any business activity in Washington unless and until it had obtained licensure there. Finally, PCD's notice offered each of its Washington consumer members a refund of their membership purchase price. As a result of this offer, PCD ultimately provided 93 consumer members a refund. [Testimony of Below; Declaration of Below; Declaration of Below, Ex. 15, April 23, 2013 notice to consumer members.]

23. On May 17, 2013, the OIC entered the Notice of Request for Hearing for Imposition of Fines which is at issue herein, proposing to fine PCD \$152,400 for selling 1,524 discount cards in Washington between January 1, 2009 and January 1, 2012 without a healthcare discount plan organization license. However, at hearing the OIC instead proposed to impose \$102,400 on PCD for selling 1,024 discount cards between January 26, 2010 and March 22, 2013 in order to properly reflect the fact that when RCW 48.155 was enacted in 2009, the OIC by regulation gave discount plan organizations then operating in Washington a grace period until 2010 to become licensed under the new law. PCD received approximately \$38,000 in membership fees during the time period at issue herein (January 26, 2010 to March 22, 2013, 1,024 PCD discount plan cards sold at \$37/year). Therefore, the \$102,400 fine which the OIC proposes to impose upon PCD for its activities during this period is nearly three times what it received in income.

24. The OIC admits, and it is here found, that there have been no complaints against PCD in Washington. [Declaration of Clabaugh, Ex. 11, OIC letter to PCD dated August 16, 2013.] In addition, no evidence was presented that PCD has had legal problems or complaints in any other state involving the insurance regulatory authorities or others.

25. Importantly, as PCD notes in its hearing brief, in the OIC's Notice and Hearing Brief the OIC does not allege that PCD willfully operated as a discount plan organization in violation of RCW 48.155.020(1). In addition, PCD has presented detailed evidence, discussed above, and argument that PCD did not willfully operate as a discount plan organization in violation of RCW 48.155.020(1). As the OIC argues, under normal circumstances entities certainly should realize when they are violating provisions of the Insurance Code and take immediate steps to come into compliance with the Code. However, in this situation, as found above, PCD had continuing communications with the OIC, and PCD disclosed to the OIC that it was continuing its operations in Washington during the time it was working with the OIC to become licensed; there is no evidence that the OIC ever wrongly assumed that PCD had stopped operations (but instead evidence that the OIC knew PCD was continuing to operate in Washington and simply advised PCD that it might expect a disciplinary action in the future for these violations). In this unusual situation, and based upon the evidence and arguments presented, including the facts found above, it is hereby found that PCD did not willfully violate RCW 48.155.020(1).

26. Susan Baker, Functional Program Analyst for the Company Supervision Division of the OIC, appeared as a witness on behalf of the OIC. Ms. Baker presented her testimony in a detailed and credible manner and presented no apparent biases.

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27. Chiropractor Dr. Stephen Below, President and Chief Executive Officer of Preferred Chiropractic Doctor, Inc., appeared as a witness on behalf of PCD. Dr. Below presented his testimony in a detailed and credible manner and presented no apparent biases.

28. Edward L. Clabaugh, Esq., attorney for PCD, appeared as a witness on behalf of PCD. Mr. Clabaugh presented his testimony in a detailed and credible manner and presented no apparent biases.

29. The OIC proposes imposition of this fine under a statute which permits, but does not require, the OIC to impose a fine for these activities. The OIC correctly argues that, if it chooses to impose a fine on PCD for its activities herein, the minimum fine it can impose upon PCD under this statute (based on the 1,024 violations the OIC asserts) is \$102,400, which PCD urges is a draconian measure given the circumstances. Whether or not PCD's assertion is accurate that imposition of this \$102,400 fine will financially ruin PCD (which indeed, could not show it had the \$150,000 net worth Washington requires and is no longer operating in Washington), it is accurate that PCD received approximately \$38,000 in membership fees during the time period at issue herein with no other revenue received as a result of sales of these 1,024 membership cards. Therefore, as PCD asserts, the \$102,400 fine the OIC proposes is nearly three times what PCD received in income during that same period. The amount of this \$102,400 fine is unduly harsh and disproportionate to the activities involved considering the above findings of facts to the effect that PCD made every effort to remedy the situation when it became aware of Washington's requirements, and other facts and circumstances found above.

CONCLUSIONS OF LAW

Based upon the above Findings of Facts, it is hereby concluded:

1. The adjudicative proceeding herein was duly and properly convened and all substantive and procedural requirements under the laws of the state of Washington have been satisfied. This Order is entered pursuant to Title 48 RCW and specifically RCW 48.04; Title 34 RCW; and regulations pursuant thereto.

2. RCW 48.155.020 provides:

(1) Before conducting discount plan business to which this chapter applies, a person must obtain a license from the commissioner to operate as a discount plan organization.

3. As indicated in its Notice, OIC's Hearing Brief and in its arguments at hearing, the OIC seeks to impose a fine against PCD specifically under the authority of RCW 48.155.130(1)(b), which provides:

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(1) ... whenever the commissioner has cause to believe that any person is violating or is about to violate any provision of this chapter ..., the commissioner may:

...
(b) After hearing ... and in addition to or in lieu of the suspension, revocation, or refusal to renew any license, impose a monetary penalty of not less than one hundred dollars for each violation and not more than ten thousand dollars for each violation. [Emphasis added.]

The OIC asserts that in calculating a fine to be imposed, under the wording of RCW 48.155.130(1)(b), each time a PCD discount plan card was sold in Washington after January 26, 2010 constituted a separate violation of RCW 48.155.020. Therefore, the OIC asserts, because 1,024 discount plan cards were sold during this period, the OIC is authorized to fine PCD a minimum of \$102,400. (\$100 x 1,024 cards) and a maximum of \$10,240,000. (\$10,000 x 1,024 cards). Therefore, the OIC argues, it is proposing to fine PCD the minimum amount allowed under RCW 48.155.130(1)(b) for these 1,024 separate violations.

4. As the OIC correctly argues, RCW 48.155.130(1)(b) does not require a finding that PCD has willfully operated as a discount plan organization in violation of RCW 48.155.020(1) in order to impose a fine under that statute. However, RCW 48.155.130(1)(b) permits, but does not require, the OIC to impose a fine of between \$100 and \$10,000 per violation. Therefore, the OIC can choose to impose no fine. As the OIC correctly argues, if the OIC chooses to impose a fine under this statute the minimum fine he can impose is \$100 per violation (i.e., \$102,400.00) up to a maximum fine of \$10,000 per violation (i.e., \$10,240,000.00). Authoritative treatises, Washington case law and other courts recognize that even when a statute is not ambiguous (and even though a statute may require imposition of a fine within a range provided, which RCW 48.155.020(1) does not) imposition of a penalty under that statute which would result in an unduly harsh, unjust and disproportionate punishment which is inconsistent with the purposes and policies of the statute cannot be sustained.¹

¹ E.g., *Sutherland Statutory Construction; State of Washington v. McDougal*, 120 Wn.2d 334, 841 P.2d 1232. In *Luther G. Power, Jr. v. The United States*, 209 Ct. Cl. 126; 531 F.2d 505 (1976), an executive agency dismissed an employee based on alleged misconduct which fell within the range of specified activities for which the statute authorized dismissal. On appeal, the Civil Service Commission hearing examiner found that the employee did commit some of the offenses, that these offenses were within the statutory range of activities for which an employee can be dismissed, and upheld the dismissal. After the hearing examiner's decision was affirmed by both the CSC Regional Office and the Board of Appeals and Review, the U.S. Court of Claims reversed and found for the employee. The court held that even though the penalty of dismissal was within the range of penalties permitted by the statute for the employee's misconduct, considering the facts and circumstances the penalty of dismissal was so harsh and disproportionate to the employee's misconduct that the agency's imposition of the penalty constituted an abuse of discretion. The court therefore denied the agency's motion for summary judgment, granted the employee's cross-motion for summary judgment and remanded the case to the trial division to determine the amount of the employee's recovery. In *Hale v. Morgan*, 22 Cal.3d 388, 584 P.2d 512 (1978), state statute required a \$100 per day penalty against a landlord who willfully deprives his tenant of utility services. While the trial court correctly calculated the \$17,300 penalty required by statute based on the number of days the tenant was deprived of utility services, the Supreme Court of California reversed, holding that while the statute was mandatory, it was potentially limitless in its effect regardless of circumstance and thus, under particular circumstances might produce constitutionally excessive penalties. The court further held that while all applications of the statute's mandatory penalty formula would not be unconstitutional, the application of the statute to the present case resulted in a penalty which was *clearly, positively, and unmistakably unconstitutional*, pointing out that the monthly rental for plaintiff tenant's trailer space was \$65, while the cumulation of penalties under the statute would have been \$36,500 for one year and this amount of penalty was wholly disproportionate to any discernible and legitimate legislative goal, and was so clearly unfair that it could not be sustained.

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5. Therefore, by authorizing a wide range of fine amounts, or no fine at all, RCW 48.155.130(1)(b) recognizes the vast number of different types of violations which may occur and the limitless number of particular situations in which they arise, it allows for consideration of any mitigating circumstances which might be involved in a specific situation (e.g., possibly willfulness, responsiveness to take prompt remedial measures, risk or actual harm to consumers, patterns of practice, etc.) and in this way the imposition of disproportionate or otherwise unreasonable fines can be avoided. However, in this particular situation the minimum fine is disproportionately high. Given these considerations along with the specific facts found above, it must be concluded that the minimum fine of \$104,200 which is allowed in the range provided in 48.155.130(1)(b) is unduly harsh and disproportionately excessive given the violations and circumstances found above. For this reason it is hereby concluded that no fine should be imposed on PCD for the activities at issue herein, as is also permitted under RCW 48.155.130(1)(b).

6. It is noted that, although in both its Notice and OIC's Hearing Brief, the OIC simply cites RCW 48.15.020(1) and 48.15.023(5)(a)(ii) but does not argue that they authorize imposition of a fine in this case. Although these two statutes permit the OIC to impose a range of fine amounts with no minimum amount per violation, at the same time they also require that PCD must have willfully operated a discount plan organization in violation of RCW 48.155.020(1) in order to be subject to those fines:

RCW 48.155.130(2) provides that A person that willfully operates as or aids ... another operating as a discount plan organization in violation of RCW 48.155.020(1) commits insurance fraud and is subject to RCW 48.15.020 and 48.15.023, as if the unlicensed discount plan organization were an unauthorized insurer,

Further, as discussed in Findings of Facts above, in neither its Notice or OIC's Hearing Brief does the OIC allege that PCD willfully operated as a discount plan organization in violation of RCW 48.155.020(1). In addition, PCD has presented detailed evidence, discussed above, and argument that PCD did not willfully operate as a discount plan organization in violation of RCW 48.155.020(1) and based upon the evidence and arguments presented, it was found in Findings of Facts above that PCD did not willfully violate RCW 48.155.020(1). Therefore, because RCW 48.155.130(2) provides that a person that willfully operates as a discount plan organization in violation of RCW 48.155.020(1) is subject to RCW 48.15.020(1) and 48.15.023(5)(a)(ii), PCD is not subject to RCW 48.15.020(1) or 48.15.023(5)(a)(ii).

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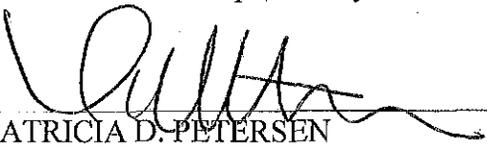
7. Based upon the above Findings of Facts found above including the particular circumstances of this situation, and based upon the above Conclusions of Law to the effect, if the OIC chooses to impose a fine under RCW 48.155.130(1)(b) then the minimum fine it can impose is \$104,200 which is unduly harsh and disproportionate to the violations found herein, it is hereby concluded that no penalty should be imposed upon PCD for the activities found above.

ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that no fine shall be imposed on PCD for the violations found above.

ENTERED AT TUMWATER, WASHINGTON, this 2nd day of April, 2014, pursuant to Title 48 RCW and specifically RCW 48.04 and Title 34 RCW and regulations applicable thereto.



PATRICIA D. PETERSEN
Chief Presiding Officer

Pursuant to RCW 34.05.461(3), the parties are advised that they may seek reconsideration of this order by filing a request for reconsideration under RCW 34.05.470 with the undersigned within 10 days of the date of service (date of mailing) of this order. Further, the parties are advised that, pursuant to RCW 34.05.514 and 34.05.542, this order may be appealed to Superior Court by, within 30 days after date of service (date of mailing) of this order, 1) filing a petition in the Superior Court, at the petitioner's option, for (a) Thurston County or (b) the county of the petitioner's residence or principal place of business; and 2) delivery of a copy of the petition to the Office of the Insurance Commissioner; and 3) depositing copies of the petition upon all other parties of record and the Office of the Attorney General.

Declaration of Mailing

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery through normal office mailing custom, a true copy of this document to the following people at their addresses listed above: Dr. Stephen L. Below, Edward L. Clabaugh, Esq., Mike Kreidler, James T. Odiome, William R. Michels, AnnaLisa Gellermann, Esq., and Marcia Stickler, Esq.

DATED this 3rd day of April, 2014.



KELLY A. CAIRNS