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INSURANCE COMMISSIONER

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April 22, 2014

Marcia G. Stickler, Staff Attorney
Legal Affairs Division
Office of Insurance Commissioner
5000 Capitol Boulevard
Tumwater, WA 98501

RE: Preferred Chiropractic Doctor, Inc. No. 13-0134
Motion of Insurance Commissioner Mike Kreidler for Reconsideration of
Findings of Fact, Conclusions of Law, and Final Order

Dear Ms. Stickler:

On April 11, 2014, the Hearings Unit received and filed your Motion for Reconsideration of the Final Order in the above referenced matter.

As you know, Motions for Reconsideration are governed by RCW 34.05.470. This section provides, in pertinent part:

- (1) *Within ten days of the service of a final order, any party may file a petition for reconsideration,*
- ...
- (3) *... The agency is deemed to have denied the petition for reconsideration if, within twenty days from the date the petition is filed, the agency does not either: (a) Dispose of the petition; or (b) serve the parties with a written notice specifying the date by which it will act on the petition.*
- (4) *... The disposition shall be in the form of a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further hearing.*

Pursuant to RCW 34.05.470 cited above, this letter is to notify you that, pursuant to your request in your Motion for Reconsideration, I am reconsidering the Final Order in this matter.

As is customary, by copy of this letter to Preferred Chiropractic Doctor, Inc. (PCD) I am advising PCD that it is given 15 days after the date of this letter to file written arguments and authorities responding to your Motion. If you then wish to submit a reply memorandum, it will be due within five business days of PCD's response. After all written arguments have been submitted, if it appears that oral argument on this Motion by telephone or in person would be helpful (or if a party requests oral argument) then a time for presentation of oral argument can be scheduled.

While the information below may or may not be helpful, it is offered to assist in focusing on the issue the OIC has raised in its Motion. However neither of you are required to address this information further, nor are you restricted from raising other issues relevant to a fair reconsideration of the Final Order:

OIC's Motion for Reconsideration.

- RCW 48.155.130(1)(b) provides for fines of "\$100 to \$10,000 per violation" for violations that need not be willful. I.e., this statute sets forth a minimum fine, so the smallest fine which can be imposed under this statute is \$100 per violation.
- In contrast, RCW 48.155.130(2) [which incorporates RCW 48.155.130(2) and 48.15.023(5)(a)(ii)] provides for fines of "up to \$25,000 per violation" for willful violations. I.e., this statute does not set forth a minimum fine so any fine less than \$25,000 per violation can be imposed.

The basis of the OIC's Motion for Reconsideration reflected, correctly, 1) that in the Final Order it is apparent that the undersigned considered the sole issue at hearing to be the OIC's application of only RCW 48.155.130(1)(b) against PCD; 2) that while this statute is permissive in that no fine is required to be imposed against PCD for these activities under RCW 48.155.130(1)(b), \$102,400¹ was the least amount of fine which could be imposed if the OIC determined to impose a fine; 3) that this \$104,200 fine imposed under RCW 48.155.130(1)(b) for these activities was too harsh given the circumstances; and 4) that therefore no fine could be imposed. In its Motion, the OIC argues that in this proceeding it was proposing to fine PCD under either or both RCW 48.155.130(1)(b) and 48.155.130(2) and therefore when the undersigned determined that imposition of \$102,400 under RCW 48.155.130(1)(b) was too harsh then she should have considered imposing a lesser fine against PCD under RCW 48.155.130(2) [which includes RCW 48.155.130(1)(b) and 48.155.130(2) which provide for fines "up to \$25,000 per violation"].

As above, the Final Order was entered with the understanding that the only issue at hearing was whether the OIC's imposition of the minimum fine of \$102,400 allowed under RCW 48.155.130(1)(b) should be upheld. This understanding was based on 1) the wording of the OIC's Notice; 2) the OIC's Hearing Brief; and 3) PCD's Motion for Summary Judgment and the OIC's Response thereto; and 4) the OIC's oral argument at hearing, as follows:

¹At hearing, the OIC changed the amount of fine it proposed to impose on PCD to \$102,400. This was due to the parties' recalculation and stipulation to the number of discount cards PCD sold during the pertinent period. Hereinafter, therefore, unless the text is quoting a statement that still referred to the amount of fine as \$152,400 the OIC originally sought in this proceeding, the fine the OIC sought will be stated as \$102,400 to reflect the parties' stipulated number of discount cards sold during the pertinent period x \$100 per violation (pursuant to the OIC's application of RCW 48.155.130(1)(b)).

1) The OIC's Notice seems to notify PCD that the OIC sought to impose the minimum fine allowed under RCW 48.155.130(1)(b) (and in the Notice the OIC also calculated the fine sought by 1,524 cards sold x \$100/violation which is the formula set forth only in RCW 48.155.130(1)(b)). The OIC's Notice reads:

A. Basis

...

2. *Between January 1, 2009 and January 1, 2012, Respondent acted as the agent/dealer for, ... and/or sold at least 1,524 health care discount plan cards to Washington residents. ...*
3. *By conducting discount plan business without obtaining a license ... Respondent violated RCW 48.155.020(1).*

B. Penalties and Relief Requested

1. *Pursuant to RCW 48.155.130, the OIC seeks to impose a fine against Respondent in the total amount of \$152,400 for violation of RCW 48.155.020.*
2. *RCW 48.155.130(1)(b) provides that in lieu of or in addition to suspending ... under RCW 48.155.020(8), 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, ... impose a monetary penalty of not less than one hundred dollars for each violation and not more than ten thousand dollars for each violation.*

[Emphases added.]

The OIC's Notice does continue (in paragraphs 3 and 5) by simply citing RCW 48.155.130(2) and 48.15.023(5)(a)(ii) which might have authorized the OIC to impose a fine, but the OIC's Notice does not seem to advise PCD that the OIC was proposing to impose a fine under these other statutes either directly or as an alternative to imposing the fine under RCW 48.155.130(1)(b) and the only amount of fine proposed to be imposed is the one based upon the formula which is only provided under RCW 48.155.130(1)(b).

2) In the OIC's Hearing Brief filed September 9, 2013, the OIC stated, under Penalties and Relief Requested:

OIC seeks to impose a fine against Respondent in the total amount of \$152,400 for 1,524 violations of RCW 48.155.020.

RCW 48.155.130(1)(b) provides that in lieu of or in addition to ... whenever the Commissioner has cause to believe that any person is violating ... any provision of this chapter ..., the commissioner may: (b) After hearing ..., impose a monetary penalty of not less than one hundred dollars for each violation and not more than ten thousand dollars for each violation.

Consistent with the OIC's Notice, the \$152,400 fine was calculated using the formula which is only provided for under RCW 48.155.130(1)(b) and not under any other statute(s). In the OIC's Hearing Brief, under Argument, it further stated:

The statute regarding unlicensed activity by a discount plan organization authorizes a maximum fine of \$10,000 per violation, but no less than \$100 per violation [i.e., RCW 48.155.130(1)(b)]. That is the fine requested in the OIC's Notice of Hearing, \$100 for each of 1,524 violations. Given that PCD did not immediately cease all unlicensed activity in the fall of 2012, this is the most lenient fine possible and should be upheld. [As above, RCW 48.155.130(2) provides for lesser fines for these activities but this statute was not asserted in the OIC's Hearing Brief.]

As above, RCW 48.155.130(2) provides for lesser fines i.e. "up to \$25,000 per violation" for these activities but this statute was not asserted in the OIC's Hearing Brief; rather, the \$152,400 fine imposed in the OIC's notice, and identified as being the "most lenient fine possible" was calculated under only RCW 48.155.130(1)(b).

3) Thereafter, in PCD's Motion for Summary Judgment filed September 12, 2013, PCD seemed to reflect that the OIC was only applying RCW 48.155.130(1)(b) in this enforcement action. On pages 1 and 2 of its Motion, PCD states:

This motion is based on the lack of authority of the [OIC] to levy a fine on an unlicensed [DPO] that is not willfully operating as a DPO. The [OIC] has not claimed that PCD has willfully operated as a DPO under the provisions of RCW 48.155.130(2), which contains the only provisions that authorize the [OIC] to levy fines and penalties against His Notice of Request for Hearing for Imposition of Fines claims that PCD violated RCW 48.155.130(1)(b) because PCD operated as a DPO without a license. The [OIC] seeks a fine of \$100 under those provisions for each of 1,524 health care plan discount cards that PCD sold [thereby applying RCW 48.155.130(1)(b)].... The internal file of the [OIC] in this matter provided to counsel for PCD contains no information that shows that PCD willfully operated in violation of the requirement that it obtain a license that would subject it to the penalties imposed by RCW 48.155.130(2).... There is no evidence that would support a claim that PCD willfully operated without a license

On page 23 of its Motion, PCD further states: *The commissioner has not charged PCD with willfully operating as a DPO because there are no facts that support such a charge. The commissioner has not sought a fine based on any violation of RCW 48.155.130(2). However, in his Notice of Request for a Hearing for Imposition of Fines, the commissioner cites that section and the two sections referred to in that section. Therefore, out of an abundance of caution, PCD has chosen to address the issue in case the commissioner should change his mind.*

In the OIC's Response to PCD Motion for Summary Judgment filed on the same date that PCD's Motion for Summary Judgment was filed (September 12, 2013), the OIC does not directly address PCD's above assumption (in its Motion for Summary Judgment) that *The [OIC] has not*

claimed that PCD has willfully operated as a DPO under the provisions of RCW 48.155.130(2), [The OIC's] Notice of Request for Hearing for Imposition of Fines claims that PCD violated RCW 48.155.130(1)(b) Instead, in its Response the OIC simply recites what it believes the issues in this proceeding were: [Issue No. 1]: Did PCD "willfully" sell discount plan memberships without a license in violation of RCW 48.155.020(1)? [Issue No. 2]: Does the Commissioner have the authority to fine PCD for selling discount plan memberships without a license? Under RCW 48.155.130(2), as cited in both the OIC's Notice of Request for Hearing ... and its Hearing Brief, any person who willfully operates a discount plan organization in violation of RCW 48.155.020(2) is subject to RCW 48.15.020 and RCW 48.15.023, as if they were unauthorized insurers. RCW 48.15.023 can subject a violator to a fine of up to \$25,000 for each violation of transacting insurance, ... without authorization. [Issue No. 3]: Is each sale a violation of the act, or is failure to obtain a license just one violation? Both RCW 48.155.130(1)(b) and RCW 48.15.023 permit the Commissioner to impose a fine "for each violation." Both apply to PCD. Thus, given RCW 48.15.020 and RCW 48.15.023, any time a PCD discount plan membership was solicited, ... an unauthorized in insurance transaction took place. Pursuant to the foregoing, the Chief Hearings Examiner should deny PCD's motion in its entirety.

4) In oral argument during hearing much of the argument concerned how many cards were sold during the pertinent time period, in order to apply the minimum \$100 fine per violation provided for under RCW 48.155.130(1)(b) and at least it does not appear that the OIC asserted that statutes other than RCW 48.155.130(1)(b) apply. Finally, during closing argument at hearing, the OIC stated:

Just want to say that the willful thing [i.e. RCW 48.155.130(2)] isn't really germane to the specific penalty I'm requesting. I still think it would apply, but the basic 48.155.130 says instead of doing something about a license if there is one, the Commissioner can hold a hearing and impose a monetary penalty – the word willful doesn't show up in that part of 48.155.130(1)(b). In addition the penalty also refers back to the 48.15 and the \$25,000 per violation and that's where the word willfully comes out but for purposes for the fine that we are asking for today the willfulness isn't really part of that and obviously "in lieu of" means "rather than" or "instead of" so in the case where there is no license but still a violation of the chapter, sub (1)(b) clearly permits for \$100 to ten thousand dollars for each violation – just to put that to rest once and for all.

Other than that I don't have anything, other than generally – by the way it is the U.S. Supreme Court that I was alluding to in my motion ... where willfully and knowingly is distinguished....

Intent is not generally required in administrative regulatory violations and willful always generally means, especially in administrative regulatory law, that the action was willful, not the mens rea of knowing there was violation of the law, and clearly Dr. Below testified there's no, this 20 year history in the state, etc. that clearly it was willful but that is not even necessary to get to unless I was asking for \$25,000 per violation. I think the Commissioner has been very reasonable in having the fines on the extremely low end to begin with. Believe

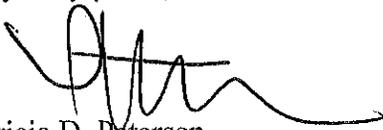
me, if the Commissioner had believed this was knowing and intentional – as I mentioned before and we had a cease and desist order prepared, but because the wheels turn slowly sometimes trying to get the paperwork where it needs to go, I did not even get the file until PCD had pretty much ceased, and Commissioner doesn't want to rub salt in the wound by issuing a cease and desist order...

[Emphasis added.]

If the OIC did, in fact, provide both timely and adequate notice to PCD that in this proceeding it was seeking to impose a fine under either the minimum \$102,400 which could be imposed under RCW 48.55.130(1)(b) or 48.55.130(2) [which incorporates RCW 48.155.130(1)(b) and 48.155.130(2) which as above could both certainly provide for a fine less than the \$102,400 that was determined to be too harsh], then it would be appropriate to consider imposition of a reasonable fine under one of those other statutes. However, based upon the above wording of the OIC's Notice, pleadings and oral arguments of the parties, the undersigned - and also possibly PCD - only understood that the OIC was applying RCW 48.55.130(1)(b) in this matter. Because of this understanding at least on the part of the undersigned, the issue of whether PCD's violations were "willful" for purposes of a fine under RCW 48.55.130(2) [which incorporates RCW 48.155.130(1)(b) and 48.155.130(2)] was not considered by the undersigned and would need to be considered prior to imposition of a reasonable fine under RCW 48.155.130(1)(b) and 48.155.130(2).

Once again, the above is offered to reflect the OIC's basis for its Motion herein and to identify the concerns I believe might be important, but you are not required to address them nor are you restricted from raising other issues relevant to a fair reconsideration of the Final Order.

Very truly yours,



Patricia D. Petersen
Chief Presiding Officer

cc: Edward L. Clabaugh, Counsel for Preferred Chiropractic Doctor, Inc.
Stephen L. Below, D.C., CEO and President, Preferred Chiropractic Doctor, Inc.