



OFFICE OF  
INSURANCE COMMISSIONER

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2014 APR 15 P 1:31

OIC DELEGATED UNIT  
PATRICIA D. PETERSEN  
CHIEF PRESIDING OFFICER

April 15, 2014

VIA U.S. MAIL AND ELECTRONIC MAIL

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RE: iCan Benefit Group, LLC and iCan Insurance, LLC, No. 13-0216

Dear Mr. Kreger and Ms. Philhower:

This letter is in response to the request of iCan Benefit Group, LLC and iCan Insurance, LLC, which was filed by their attorney, Mr. Kreger, on April 3, 2014. That document, entitled Licensees' Objection to OIC's Request for Hearing [for Imposition of Fines] as Contrary to Law; Request to Dismiss OIC's Request [for Hearing for Imposition of Fines], seeks dismissal of this matter based upon their argument that an OIC employee cannot institute this proceeding and also cannot participate on behalf of the Commissioner and/or represent the Commissioner in this proceeding. As you will recall, during prehearing conference held April 3, 2014, both parties agreed to wait for a decision on iCan's above referenced Objection and Request to Dismiss until this same issue was decided in the matter of *Edmund C. Scarborough and Walter W. Wolf*, Matter No. 13-0084 (hereinafter, *Scarborough*).

This same issue was decided in *Scarborough* on April 7, 2014, and a copy of that Order is enclosed. As indicated in that Order, Scarborough's Motion to Quash was denied for the reasons stated therein. The significant difference between *Scarborough* and this case, however, is that in the OIC's Response to Scarborough's Motion to Quash it submitted a Declaration of Assistant Attorney General Marta U. DeLeon stating: *Delegated OIC Staff have the approval of the*

iCan Benefit Group, LLC, et al.

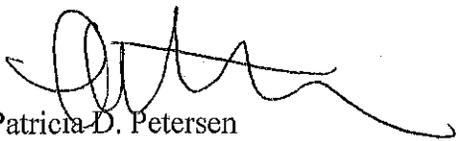
April 15, 2014

Page Two

*Attorney General's Office to handle this administrative hearing [i.e., the administrative hearing in Scarborough].*

Based upon the decision in *Scarborough* which involves this same issue, please provide any responses you may have within five business days of the date of this letter so that a prompt decision can be made on iCan's Objection to OIC's Request for Hearing [for Imposition of Fines] as Contrary to Law and Request to Dismiss OIC's Request [for Hearing for Imposition of Fines]. As agreed by both parties during the April 3, 2014 prehearing conference, after a decision is made on iCan's Objection and Request to Dismiss, if iCan still wishes that this file be sent to the Office of Administrative Hearings for an initial decision then it will be sent to OAH promptly.

Sincerely,



Patricia D. Petersen  
Chief Presiding Officer

Encls. – Order on Respondent Scarborough's Motion to Quash entered April 7, 2014  
in the matter of *Scarborough*, 13-0084

MIKE KREIDLER  
STATE INSURANCE COMMISSIONER



OFFICE OF  
INSURANCE COMMISSIONER

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BEFORE THE STATE OF WASHINGTON  
OFFICE OF INSURANCE COMMISSIONER

In the Matter of )

**Docket No. 13-0084**

**EDMUND C. SCARBOROUGH and** )  
**WALTER W. WOLF,** )

**ORDER ON RESPONDENT**  
**SCARBOROUGH'S MOTION**  
**TO QUASH**

Respondents. )

**TO:** Walter W. Wolf  
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**COPY TO:** Mike Kreidler, Insurance Commissioner  
James T. Odiorne, Chief Deputy Insurance Commissioner  
John F. Hamje, Deputy Commissioner, Consumer Protection Division  
Alan Michael Singer, Staff Attorney, Legal Affairs Division  
AnnaLisa Gellermann, Esq., Deputy Commissioner, Legal Affairs Division  
Office of the Insurance Commissioner  
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On March 8, 2013, the Washington State Office of the Insurance Commissioner (OIC) issued a Notice of Request for Hearing for Imposition of Fines to Edmund C. Scarborough and Walter W.



Wolf. Said Notice of Request for Hearing proposes that the Washington State Insurance Commissioner (Commissioner) take disciplinary action against the Respondents for alleged violations of the Insurance Code involving the sales and issuance of surety bonds to both federal and other entities.

On January 21, 2014, Respondent Scarborough (Scarborough) filed a Motion to Quash the OIC's Notice of Request for Hearing, requesting that the Notice of Request for Hearing be quashed on two bases:

- I. that the Commissioner lacks authority to participate in this proceeding through members of his legal staff rather than the Attorney General; and
- II. that the Commissioner lacked authority to initiate an administrative proceeding to impose a fine because the proceeding was required to be initiated by the Attorney General.

On March 4, 2014 the OIC filed its Opposition to Scarborough's Motion to Quash. Thereafter, on April 1 Scarborough filed his Memorandum on Judicial Notice of Governor's Memorandum and the OIC filed its OIC Response re judicial notice.

I. **Does the Commissioner lack authority to participate in this proceeding through members of his legal staff rather than the attorney general?**

Scarborough's arguments that Commissioner lacks authority to participate through members of his legal staff. Briefly, Scarborough argues that Washington Constitution Art. III Sec. 21 provides, in material part, that [t]he attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law.<sup>1</sup> This constitutional principle is implemented by statutes, e.g., Scarborough argues that RCW 43.10.067 requires that the Attorney General (AG) represent the Commissioner before this administrative tribunal:

*No officer, director, administrative agency, board, or commission of the state, other than the attorney general, shall employ, appoint or retain in employment any attorney for any administrative body, department, commission, agency, or tribunal or any other person to act as attorney in any legal or quasi legal capacity in the exercise of any of the powers or performance of any of the duties specified by law to be performed by the attorney general, ....*

Additionally, Scarborough argues that the OIC's Notice must be quashed because RCW 43.10.030 requires that the AG, not the Commissioner or his representative, must institute all actions and proceedings before this agency and also must prosecute all actions for the Commissioner:

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<sup>1</sup> Certain state agencies are exempt from this requirement, however the OIC is not among the exceptions. RCW 43.10.067.

*The attorney general shall: ... (2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer; ... [Emphasis added.]*

Finally, Scarborough argues that the Notice must be quashed because RCW 43.10.040 also requires the AG to represent the Commissioner before this administrative tribunal in this hearing:

*The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, .... [Emphasis added.]*

**OIC's arguments that the Commissioner has authority to participate through members of his legal staff.** Briefly, the OIC argues, correctly, that RCW 34.05, Washington's Administrative Procedures Act (APA), applies to and governs this proceeding. The OIC further argues: 1) that the Commissioner has the power to enter orders and participate in such proceedings as this one; and that he is authorized to delegate any of his duties to any of his employees and he has in fact properly delegated his duty to participate in this proceeding to employee Singer; 2) that employee Singer is not acting as the Commissioner's legal counsel in this proceeding, that rather he is acting either *as the Commissioner himself* or *as the Commissioner's "lay representative;"* and finally, 3) the OIC argues that the administrative proceeding herein is not a "*legal or quasi legal matter, hearing or proceeding*" and is not among the administrative proceedings falling within the definition of *all administrative tribunals or bodies of any nature*" referenced in RCW 43.10.040 such as would require that the AG (and not another representative of the Commissioner such as employee Singer) must represent the Commissioner in this administrative proceeding. These arguments are addressed below:

- 1a) The OIC argues that the Commissioner has the power and duty to issue orders, and conduct and participate in hearings as part of his duty to enforce the Insurance Code. The OIC correctly argues that the Commissioner has the power, and indeed has the duty in many situations, to issue orders, and to hold hearings as part of his core duty in enforcing the provisions of the Insurance Code: RCW 48.04.010(1) authorizes the Commissioner to *hold a hearing for any purpose within the scope of this code as he or she may deem necessary.* In addition, as the OIC argues, under RCW 48.04.010 the Commissioner has the duty to hold a hearing when one is demanded by an aggrieved party (under specified circumstances). As the OIC further asserts, the Commissioner's power to issue orders can be done in many ways. For example, as was done in the proceeding herein, RCW 48.15.023(5)(ii) authorizes the Commissioner to assess monetary penalties against unauthorized insurers *after providing notice and an opportunity for hearing under chapters 34.05 and 48.04 RCW*, e.g., by means of entering a Notice of Request for Hearing to Impose a Fine in order to assess a civil penalty for violation of RCW 48.15.020.

- 1b) The OIC argues that the Commissioner has the authority to delegate his powers and duties under the Insurance Code to his employees. The OIC also correctly argues that not only does the Commissioner have the power, and often the duty, to issue orders and hold hearings, but pursuant to RCW 48.02.100 he also has the authority under the Insurance Code to delegate any of his powers and duties to any of his employees: *Any power or duty vested in the commissioner by any provision of this code may be exercised or discharged by any deputy, assistant, examiner, or employee of the commissioner acting in his or her name and by his or her authority.* The OIC argues that in this proceeding the Commissioner has properly delegated to his employee, Mr. Singer, the Commissioner's power to *attend and participate in the matter.*<sup>2</sup>

After review, first, as indicated above, the Commissioner does have the power and the duty to enforce the provisions of the Insurance Code, and pursuant to RCW 48.04.010(1) he is authorized to *hold a hearing for any purpose within the scope of this code as he or she may deem necessary.* Hearings can certainly be commenced in different ways, e.g., by direct orders imposing fines if the governing statute(s) permit (with the right of the aggrieved party to demand a hearing within a specific number of days after entry of the order); by Notice to Show Cause under RCW 48.04.050; as was done herein, by entry of Notice of Request for Hearing for Imposition of Fines under RCW 48.15.023(5)(a)(ii) which provides that the Commissioner can assess a civil penalty after a hearing. Second, RCW 48.02.100 does give the Commissioner the authority to delegate *any power or duty vested in the commissioner by any provision of this code to any ... employee of the commissioner acting in his or her name and by his or her authority.* However, while the Insurance Code gives the Commissioner broad authority in many areas including the power, and at times the duty, to *hold hearings*, and while one can assume that the OIC's argument that his power to *hold hearings* includes the power to *attend and participate in hearings* is correct, it is not clear that the Code gives the Commissioner the authority to act as the *prosecutor* in these hearings. In addition, as Scarborough argues, those portions of the Insurance Code cited by the OIC which identify the Commissioner's powers and duties and authorize him to delegate his powers and duties to his employees are general statutes, in contrast to those specific statutes cited above by Scarborough which specifically require that the AG represent state officers and agencies, i.e. RCW 43.10.040 which specifically requires that the AG represent state officers and agencies in *all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings* and RCW 43.10.067 which prohibits any *officer or administrative agency other than the attorney general from employ[ing] any attorney for any administrative body ... agency, or tribunal or any other person to act as attorney in any legal or quasi legal capacity in the exercise of any of the powers or performance of any of the duties specified by law to be performed by the attorney general, ....* To RCW 43.10.040, the OIC argues that employee Singer is not representing the Commissioner in this proceeding but *is the*

<sup>2</sup> The OIC also cites RCW 48.02.060(2) which requires the Commissioner to enforce the provisions of the Insurance Code, and Jackstadt, which holds that "*When a power is granted to an agency, 'everything lawful and necessary to the effectual execution of the power' is also granted by implication of law*" and provides that "*[i]mplied authority is found where an agency is charged with a specific duty, but the means of accomplishing that duty are not set forth by the Legislature.*"

*Commissioner himself*; and to RCW 43.10.067, the OIC argues that employee Singer is appearing as a representative of the Commissioner but not as a legal representative of the Commissioner:

- 2) The OIC argues that employee Singer is participating in this proceeding either a) *as the Commissioner himself*; or b) as a "lay representative," of the Commissioner and not as the Commissioner's legal counsel.

a) The OIC argues that because RCW 48.02.100 authorizes the Commissioner to delegate any of his powers and duties under the Insurance Code to any of his employees; and because the Commissioner has in fact delegated to employee Singer the Commissioner's statutory power to *hold hearings* which the OIC argues includes *attending and participating* in hearings; and because RCW 34.05.428<sup>3</sup> provides that [a] *party to an adjudicative proceeding may participate personally* in this proceeding, employee Singer is not appearing as the Commissioner's representative at all but instead is *acting as if he were the Commissioner himself* and is therefore the *party to an adjudicative proceeding participating personally*. After review, while there is some historic debate as to whether RCW 34.05.010(12) includes the Commissioner in its definition of a "*party to an adjudicative proceeding*" for purposes of RCW 34.05.428,<sup>4</sup> to conclude that the Commissioner is not a "*party*" under this statute would lead to implausible results within the statutory framework of the APA and therefore he is considered herein to be a "*party*" for purposes of RCW 34.05.428. It is, however, more difficult to accept the notion that employee Singer is appearing not as a representative of the Commissioner but *as the Commissioner himself*. In addition, again, to sustain the OIC's argument one must rely on the general provisions of the Insurance Code which allow the Commissioner to delegate any of his powers and duties to any employee, and one must also rely on a dubious interpretation of a general statute, RCW 34.05.428 - that employee Singer is *the Commissioner himself* and therefore is the *party to the adjudicative proceeding* who can *participate personally* under RCW 34.05.428. This is in contrast to those specific portions of RCW 43.10.030 and 43.10.040 which

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<sup>3</sup>RCW 34.05.428 provides, in full: (1) *A party to an adjudicative proceeding may participate personally, or, if the party is a corporation or other artificial person, by a duly authorized representative. (2) Whether or not participating in person, any party may be advised and represented at the party's own expense by counsel or, if permitted by provision of law, other representative.*

<sup>4</sup> For purposes of RCW 34.05.428, RCW 34.05.010(12) provides, in full, that *the definitions set forth in this section shall apply throughout this chapter, unless the context clearly requires otherwise. ... (12) "Party to agency proceedings," or "party" in a context so indicating, means: (a) A person to whom the agency action is specifically directed; or (b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding.*

specifically require that the AG represent state officers and agencies in all administrative tribunals or bodies of any nature ....<sup>5</sup>

b) Alternatively, the OIC argues that employee Singer is appearing as an "other representative" of the Commissioner in this proceeding under RCW 34.05.428(2)<sup>6</sup>, not as the Commissioner's legal representative. RCW 34.05.428 provides, in full:

*(1) A party to an adjudicative proceeding may participate personally, or, if the party is a corporation or other artificial person, by a duly authorized representative. (2) Whether or not participating in person, any party may be advised and represented at the party's own expense by counsel or, if permitted by provision of law, other representative.*

After review (assuming as above that the Commissioner is a party to an adjudicative proceeding for purposes of RCW 34.05.428), in order for employee Singer to appear in this proceeding as an other [non-legal] representative of the Commissioner under RCW 34.05.428(2) he must be permitted by provision of law and therefore the question remains as to where in the law employee Singer is authorized to act as the Commissioner's other representative. RCW 34.05.428 does not, of itself, provide that authority but rather simply seems to recognize that there may be some other provision of law which allows another representative [other than legal counsel] to represent a "party." Again, as above and throughout the OIC's argument herein, the only other provision of law which would arguably authorize employee Singer to represent the Commissioner would be in the general RCW 48.04.010 which generally authorizes the Commissioner to hold hearings (but fails to address the fact that no statute authorizes him to act as the prosecutor in these hearings) and the general RCW 48.02.100 which generally authorizes him to delegate any of his powers to his employees. This is in contrast to those specific portions of RCW 43.10.030 and .040 which specifically require that the AG represent state officers and agencies in all administrative tribunals or bodies of any nature ....

- 3) The OIC argues that the administrative proceeding herein is not a "proceeding," "administrative proceeding" or "hearing" within the meaning of RCW 43.10.030, .040 and .067 so it is not subject to those statutory requirements. The OIC recognizes Scarborough's argument that, most specifically, RCW 43.10.040 requires that The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all

<sup>5</sup> The OIC also cites WAC 10-08-083 as authority for this argument, however that regulation only requires that, if a party is represented (under some other statutory authority) then the representative must file a Notice of Appearance.

<sup>6</sup> Presumably the OIC is not arguing that employee Singer is not appearing as a "duly authorized representative" of a corporation or other artificial person under RCW 34.05.428(1).

legal or quasi legal matters, hearings, or proceedings,... [emphasis added], but argues that the instant proceeding is somehow not an *administrative tribunal* or *administrative body of any nature* or *hearing* or *proceeding* or *legal or quasi legal matter* within the meaning of RCW 43.10.040. Rather, the OIC argues that *Under WAC 284-02-070, such "[a]djudicative proceedings include both contested case hearings and other types of adjudicative proceedings which are required by law. Contested case hearings include appeals from disciplinary actions taken by the commissioner." ... Such matters are expressly "informal" and internal, though open to the public – like rulemaking hearings, for example – where people discuss issues and the agency's staff hears what people have to say.* [Emphasis added.] As authority, the OIC cites WAC 284-02-070(2)(d) which provides *Adjudicative proceedings or contested case hearings of the insurance commissioner are informal in nature, and compliance with the formal rules of pleading and evidence is not required.*

After review, this argument has no merit. RCW 34.05.010(1), broadly defines *adjudicative proceeding* as *a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or by constitutional right before or after the entry of an order by the agency.* The proceeding herein is exactly that type of proceeding. It cannot be concluded that the adjudicative proceeding herein is not an *administrative tribunal* or a *body of any nature*, or a *hearing* or a *proceeding* under RCW 43.10. In response to the OIC's argument that the term *proceeding* has *traditionally meant matters before the courts*, this ignores the specific wording of RCW 43.10 which includes *administrative tribunals* and *administrative bodies of any nature.* This argument also ignores the OIC's own regulation, WAC 284-02-070(1)(a) which recognizes that a contested hearing is a "proceeding" under Title 34 RCW, the APA, and must be conducted strictly in compliance with Title 34 RCW. In support of its position on this issue, the OIC asserts that these adjudicative proceedings are not *administrative tribunals* or *hearings* or *proceedings* but instead are somehow something less, namely *internal, ... where people discuss issues and the agency's staff hears what people have to say.* This argument lacks any merit: rather, these hearings are the parties' due process; the presentation of evidence and argument at hearing provides the only bases for the Findings of Facts, Conclusions of Law and Final Order entered after hearing; and this Final Order is appealable not to the agency but only to the Superior Court.<sup>7</sup> The requirements of RCW 43.10, which apply to *administrative tribunals* and *administrative bodies of any nature* and *legal or quasi legal matters* and *hearings* and *proceedings* cannot be avoided by simply describing the proceedings before this agency as something different when they are not. There is no evidence upon which to conclude that the proceeding herein is any different than any other such administrative proceeding in this state or that the proceeding herein is not for some reason among those administrative proceedings contemplated by RCW 43.10.

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<sup>7</sup> Contrary to the OIC's argument, when WAC 284-02-070 provides that adjudicative proceedings of the insurance commissioner are *informal in nature*, under well established case law this refers to the fact that the formal rules of pleading and evidence, while applicable in most circumstances, can also be modified by the presiding officer in order to meet the APA's mission to conduct hearings in as efficient a manner as possible. It does not mean that these administrative proceedings are not administrative proceedings conducted strictly under the APA.

**Conclusion relative to Issue I: Does the Commissioner lack authority to participate in this proceeding through members of his legal staff rather than the attorney general?** Presumably as a resolution to the above issues involving the issue of RCW 43.10 as it applies to agency employees representing the agency head in administrative hearings such as the proceeding herein, on December 20, 2013 Nicholas Brown, General Counsel to Governor Jay Inslee, Governor of the State of Washington, distributed a Memorandum directed to Directors of State Agencies, Board, and Commissions concerning Prohibition on Employing In-house Attorneys. In this Memorandum, the Governor, through his attorney, reminds state employees: *RCW 43.10.040 states that 'The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, .... and also cites RCW 43.10.030 discussed above. The Governor advises that state law prohibits state agencies from hiring attorneys as "staff attorneys" or in any other role as a legal advisor, and agency staff use of working titles such as "staff attorney" or allowing staff to represent that they serve as "attorneys" to the agencies that employ them has created confusion among the public, judicial tribunals and the media, and must cease.*<sup>8</sup>

However, the Governor does state that *...Of course, agencies are allowed to employ people who happen to be attorneys as long as they do not perform functions assigned to the Attorney General's Office. I know some agencies employ attorneys in policy, legislative, or other non-attorney roles. I also know that with approval of the Attorney General's Office, agency staff, including attorneys, have come to handle certain administrative hearings. These sorts of pre-approved arrangements raise far fewer concerns. ... If your agency has been approved to handle certain administrative hearings internally, make sure that you are doing so within the bounds of the approval provided by the Attorney General's Office. If you are uncertain about what constitutes a legal function or whether your staff is performing approved activities, I suggest you consult with the division chief that Attorney General Ferguson has assigned to your agency. [Emphasis added.]* Therefore while the Governor has reiterated the requirements of RCW 43.10.030 and as discussed above, he – and apparently the AG – has recognized that the AG may give pre-approval for agency staff, including attorneys, to “handle” certain administrative hearings even though those individuals may write briefs, present and argue motions, present opening and closing arguments, examine and cross-examine witnesses and perform other functions otherwise reserved for legal counsel.

In its OIC's Response to Scarborough's Motion herein, the OIC has attached Declaration of Marta U. DeLeon, Assistant Attorney General, dated April 1, 2014. Ms. DeLeon attests that she has been the lead attorney assigned to advise and represent the Commissioner and the agency since February 2009, that *During the time I have been lead counsel ..., the OIC has handled*

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<sup>8</sup> The OIC's argument in its Response to this letter - - which argues that the OIC may be exempt from RCW 43.10.040 because its staff attorneys or lay representatives do not assert the attorney-client privilege between agency employee-attorneys - - addresses neither the full mandate of RCW 34.10.030 and .040, the full scope of the issues it presents or the majority of the concerns raised in the Governor's letter.

*administrative hearings before the Insurance Commissioner through delegated OIC staff, with the approval of the Attorney General's Office. Delegated OIC staff has the approval of the Attorney General's Office to handle this administrative hearing.* Based upon this document, it can be recognized that delegated OIC staff, including employee Singer, has the approval of the Attorney General's Office to *handle* this proceeding and absent any limitation in her Declaration this approval implicitly contemplates that the Commissioner's delegated employee(s) will perform all of the activities they have customarily performed in representing the Commissioner's position in these hearings. Ms. DeLeon's Declaration confirms that at least since February 2009 delegated OIC staff had implicit approval from the AG to act on the Commissioner's behalf in all administrative hearings. However, because her Declaration does not give prior approval for delegated OIC staff to handle other administrative proceedings which are ongoing or will commence in the future, in recognition of the above cited statutes and the Governor's letter, and the analysis herein, at the very least in the exercise of caution it is highly recommended that the OIC 1) obtain documentation that the Attorney General's Office has pre-approved the Commissioner's delegated employees to act on his behalf in administrative proceedings before this agency other than just this single proceeding as it has done in its April 1, 2014 letter attached to the OIC's Response to Scarborough's Motion herein; and 2) have the Attorney General's Office provide in that documentation a broad, general description of the activities that the Attorney General's Office pre-approves OIC delegated staff to perform in acting on the Commissioner's behalf in administrative proceedings.<sup>9</sup>

<sup>9</sup> It is notable that the Office of the Attorney General has neither filed, nor requested to file, an amicus brief herein and has provided no other input into this issue although it directly affects that office. In addition, both the OIC and Scarborough reference an earlier decision involving this same issue. In the Matter of Regence Blueshield, G99-109 (2000), the OIC initiated the proceeding on October 14, 1999 by filing a Notice of Hearing to Request Imposition of a Fine regarding rate filings made by Regence which the OIC disapproved. The Notice advised that the Commissioner would participate in the hearing through his employee Carol Sureau. On October 29, 1999, Assistant Attorney General Shannon Smith filed a Notice of Appearance in that case as legal counsel for the Commissioner. On January 14, 2000 AG Smith withdrew as counsel for the Commissioner, and on that date employee Sureau entered an appearance for the Commissioner advising that the Commissioner was appearing pro se by and through his employee Sureau. Regence opposed the OIC's decision to participate in this matter without legal counsel, arguing that, under the same statutes at issue in this instant matter, the Commissioner must be represented by the AG as the prosecutor in that matter and cannot proceed without counsel. While much more cursory arguments were presented at that time, in addition the AG requested and was granted the opportunity to file an *amicus curiae* brief on this issue. In the AG's *Amicus Curiae* Washington Attorney General's Office Regarding Pro Se Participation filed January 24, 2000, Attorney General Christine O. Gregoire argued that where state agencies are represented by counsel they must be represented by the AG, but that there is nothing in chapter 43.10 RCW which prohibits an agency from proceeding *pro se* in an agency adjudicative proceeding. The AG further opined that the Commissioner had chosen to appear *pro se*, and delegated employee Sureau to be in charge of the matter; the AG opined that employee Sureau was not representing the OIC as an attorney in the matter but simply as the OIC person designated to present the OIC's *pro se* position (and the fact that she is an attorney does not change the fact that she is not counsel for the OIC). The AG further opined that other agencies handle hearings the same way (ignoring the fact that those agencies she identified had enacted specific rules authorizing them to do so). Finally, the AG stated that RCW 34.05.428 allows any party to appear in a matter pro se and that the OIC is clearly a "party" under that statute. The presiding officer in Regence ruled that the OIC could appear pro se, that employee Sureau could be delegated the authority to appear on behalf of the OIC pro se and not as legal counsel. That decision in Regence was based upon the parties much more cursory arguments at the time; the new Attorney General has neither asked to file an *amicus* brief nor provided any legal advice on the matter even though it directly affects his office; and now, thirteen

II. Must the Notice for Request for Hearing for Imposition of Fine be quashed because it was signed by an employee of the Commissioner rather than by the Attorney General?

On March 8, 2013, the Commissioner filed and served both an Order to Cease and Desist and a Notice of Request for Hearing for Imposition of Fines against both Respondents. Scarborough's Motion herein relates to the proceeding relative to the Commissioner's Notice of Request for Hearing for Imposition of Fines only. In his Motion, Scarborough argues that RCW 43.10.030(2) requires that the AG institute all actions and proceedings by any state agency, and therefore because the AG has not instituted this proceeding it must be dismissed. RCW 43.10.030(2) provides:

*The attorney general shall:*

...  
(2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer;... [Emphasis added.]

After review, first, in this Notice the Commissioner has detailed the allegations against Respondents, cites the alleged statutory violations for these activities, specifies the penalties and relief to be requested at hearing, and advises that he has delegated his authority to his employee, Andrea L. Philhower, to act on his behalf and in his name as he is authorized to do under the statutes discussed above:

*The Insurance Commissioner will convene a hearing at a date, location, and time to be determined, to consider the allegations above and the sanctions to be imposed upon [Respondents] pursuant to RCW 48.15.020 and RCW 48.17.560.*

...  
*The Insurance Commissioner's staff will participate in this matter through its designated representative, Andrea L. Philhower ....* [Emphasis added.]

Second, the Commissioner *instituted* this proceeding when he entered the Notice on March 8, 2013 seeking to fine Respondents a *total amount of \$75,000 for three violations each of RCW 48.05.030(1), 48.15.020 and 48.15.070* as authorized by RCW 48.15.020. The Commissioner signed the Notice, having delegated the authority to his employee Andrea L. Philhower to sign on his behalf:

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years after Regence, the Governor has published a letter on these very statutes as they apply to this very issue, with a very different interpretation of these statutes.

MIKE KREIDLER  
Insurance Commissioner

By: Andrea L. Philhower,  
Staff Attorney – Legal Affairs

It is unclear whether Scarborough would have had an objection had the Commissioner himself signed the Notice, or whether he instead argues that the AG must sign any and all documents such as this Notice which *institute* an enforcement proceeding. However, as stated, the Commissioner has *instituted* this proceeding under the authority of RCW 48.15.020, which does not require that a hearing be held before a fine is imposed.<sup>10</sup> Therefore instead of commencing this proceeding through the Notice mechanism as he chose to do, the Commissioner could instead have issued a direct Order Imposing Fines against Respondents under RCW 48.15.020 without even communicating with them first. Then, had Respondents filed a Demand for hearing to contest that Order Imposing Fines it would have been Respondents (not the Commissioner) who would have *instituted* this proceeding so there would be no issue about whether the AG was required to have signed the Notice. In contrast, under the Notice mechanism chosen by the Commissioner, Respondents are afforded the opportunity to first have an impartial adjudicator hear and determine the amount of fines, if any, which should be imposed after hearing Respondents' arguments. Even so, Scarborough has seized this opportunity to argue that the Notice should be dismissed because it has not been signed by the AG (or, perhaps, the Commissioner himself instead of the Commissioner's designee on his behalf would have been satisfactory to Scarborough).

In this case, because as above under the same statute the Commissioner could simply have chosen to commence imposition of these fines using a different form of order, Scarborough's objection to the Notice the Commissioner chose is a mere technicality at best. Equally importantly, the AG's Office has given delegated OIC staff, including Ms. Philhower, the authority to act on behalf of the Commissioner in this proceeding in *instituting* this proceeding (although arguably this approval has not extended to the use of the identification of her position as "staff attorney"). For these reasons, Scarborough has not presented sufficient

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<sup>10</sup> While RCW 48.17.560 does require that a hearing be held prior to imposition of a fine for purposes of that chapter, which applies to insurance producers, agents and adjusters, this statute by its terms only authorizes the Commissioner to levy a fine upon a "licensee" and not Scarborough, who is not a licensee under the definition of license provided in RCW 48.17.560(7) or an insurance producer under the definition provided in RCW 48.17.010(5) or a licensed surplus lines as contemplated in RCW 48.15.020. Therefore although it is debatable whether RCW 48.17.560 has any application herein, it provides:

*After hearing or upon stipulation by the licensee ..., and in addition to or in lieu of the suspension, revocation, or refusal to renew any such license ..., the commissioner may levy a fine upon the licensee .... (1) For each offense the fine shall be an amount not more than one thousand dollars. (2) The order levying such fine shall specify that the fine shall be fully paid not less than fifteen nor more than thirty days from the date of the order. (3) Upon failure to pay any such fine when due, the commissioner shall revoke the licenses of the licensee ..., if not already revoked. The fine shall be recovered in a civil action brought on behalf of the commissioner by the attorney general. ...*

argument relative to this second issue to require either that the Notice be quashed or that the Commissioner must change the form of the Notice herein.

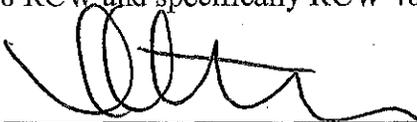
**Conclusion relative to Issue II: there are inadequate bases to support a decision to quash the Notice for Request for Hearing for Imposition of Fine simply because it was signed by an employee of the Commissioner rather than by the AG.** Based upon the arguments of the parties considered above, the fact that an employee of the Commissioner signed the Notice on behalf of the Commissioner does not support granting Scarborough's Motion to Quash.

**ORDER**

Based upon the above activity, including Washington Constitution Art. III Sec. 21, RCW 43.10.030, .040 and .067 and the Governor's letter dated December 20, 2013; consideration of Scarborough's arguments regarding the application of these rules to the proceeding herein and the OIC's response thereto; and the conclusions reached as discussed above,

**IT IS HEREBY ORDERED** that Respondent Scarborough's Motion to Quash is denied.

**ENTERED AT TUMWATER, WASHINGTON**, this 7<sup>th</sup> 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

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: Walter W. Wolf, James A. McPhee, Esq., Michael Miles, Esq., Timothy J. Parker, Esq., Jason W. Anderson, Esq., Mike Kreidler, James T. Odiorne, John F. Hamje, Esq., AnnaLisa Gellermann, Esq. and Alan Singer, Esq.

DATED this 10<sup>th</sup> day of April 2014.

  
KELLY A. CAIRNS