

Filed
Feb 6, 2015

BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of

CHARLES D. OLIVER and AMERICAN
EQUITY ADVISORY GROUP, LLC,

Respondents.

Docket No. 14-0229

INSURANCE COMMISSIONER'S
MOTION TO DISMISS

I. INTRODUCTION

Mr. Oliver comes before this Tribunal asking it to ignore commonly held principals of transparency and open governance by seeking the removal of accurate information relating to the Commissioner's enforcement activities. It is a long held principal in Washington State that the citizens have the right to access information relating to the actions of state agencies to allow for effective public oversight. This transparency allows the citizens to know what actions their state agencies are taking and how taxpayer dollars are being spent. It further allows citizens to know whether their elected officials are fulfilling the duties of their positions. The Commissioner is tasked with enforcement of Title 48 RCW, which includes a duty to disseminate information concerning insurance laws and provide assistance to members of the public in obtaining information and resolving complaints. In order to effectuate this duty, the Commissioner communicates with the public through multiple channels, including through an internet blog.

The blog post at issue here is accurate and simply relays the enforcement action and activities of a publicly elected officer. The post furthers the paramount policy of open governance and transparency in Washington State. In seeking to force removal of the post, Mr. Oliver is attempting to interfere with the Commissioner in his duty to inform the public about his agency's actions and to disseminate information related to the insurance industry.

1 For these reasons, the Commissioner, by and through his attorneys of record,
2 Robert W. Ferguson, Attorney General, and Isaac Williamson, Assistant Attorney General,
3 request that Mr. Oliver's hearing be dismissed.

4 II. FACTS

5 On April 4, 2013, the OIC issued a cease and desist order to Mr. Oliver, ordering him
6 to stop selling insurance in the state of Washington without a license and to stop engaging in
7 other alleged violations of Washington State law. Order to Cease and Desist, at 1. That same
8 day, the OIC created a blog post notifying the public of the cease and desist order and
9 summarizing some of the allegations contained in the order. This blog is available at
10 wainsurance.blogspot.com and is used by the commissioner to provide "[c]onsumer help and
11 news from Washington's insurance regulator." Among other things, this blog provides
12 information related to specific enforcement actions taken by the Commissioner. This
13 information is beneficial to the public in that it allows the Commissioner to speak candidly and
14 openly about the actions of his agency and fulfill his duty to disseminate information
15 concerning insurance laws.

16 The specific blog post at issue here is available at [http://wainsurance.blogspot.com/
17 2013/04/cease-and-desist-order-issued-to.html](http://wainsurance.blogspot.com/2013/04/cease-and-desist-order-issued-to.html). It informed the public that Mr. Oliver, and
18 other respondents, had been ordered to cease selling insurance without a Washington license.
19 The post explained that a cease and desist order was immediately effective and summarized
20 some of the allegations that gave rise to the order. The post explained that Mr. Oliver had the
21 right to request a hearing to challenge the order. The post did *not* assert that the allegations
22 had been judicially determined.

23 The parties ultimately resolved the underlying violations via a consent order, which
24 was filed on March 25, 2014, prior to any adjudicative proceedings. Mr. Oliver agreed to pay
25 a \$5,000 fine, with \$2,500 suspended pending satisfaction of other conditions imposed by the
26 order. The Commissioner agreed to supersede the cease and desist order with the consent

1 order. The matter was then dismissed with prejudice on June 3, 2014. On December 3, 2014,
2 Mr. Oliver requested this administrative hearing seeking to have this tribunal order removal of
3 the blog post. Mr. Oliver asserts that the post “is causing out-of-state individuals to cease doing
4 business with or refrain from doing business with Oliver,” and that it “has been picked up by
5 out-of-state individuals who are now incorrectly relying on it to falsely disparage Oliver, which
6 is causing business harm to Oliver.” Demand for Administrative Hearing, at 2.

7 III. ISSUE PRESENTED

8 Should Mr. Oliver’s petition for hearing be dismissed for lack of standing and for
9 failing to specify proper grounds and a redressable basis for relief?

10 IV. LEGAL ARGUMENT

11 A person challenging an agency action has the burden of demonstrating the invalidity
12 of that action. RCW 34.05.570(a). Mr. Oliver cannot carry this burden. His claim that he has
13 been harmed by the post is sweeping and conclusory and cannot satisfy the standing
14 requirement that he have a redressable, specific, and particularized harm that is not speculative.
15 His claim that the blog post is false is demonstrably incorrect, solely by review of the blog post
16 and cease and desist order, which were included with the hearing request. His claim that the
17 Commissioner lacks authority to announce the enforcement actions taken by his own office is
18 baseless. Finally, his claim that he should have been allowed to challenge the post before it
19 was published is not supported by any legal authority. Because there is no legal basis for the
20 relief Mr. Oliver is seeking against the Commissioner, and because Mr. Oliver’s request is
21 contrary to the important principle of transparency, Mr. Oliver’s petition for review should be
22 dismissed.

23 A. Mr. Oliver Has Failed To Demonstrate That He Is “Aggrieved” Or That The Post 24 Contains False Statements.

25 Under the Insurance Code, Title 48 RCW, a person is entitled to a hearing if he or she
26 is “aggrieved by any act, threatened act, or failure of the commissioner to act. . . .”

1 RCW 48.04.010(1)(b). In demanding a hearing, one must "specify in what respects such
2 person is so aggrieved and the grounds to be relied upon as basis for the relief to be demanded
3 at the hearing." RCW 48.04.010(2). While "aggrieved" is not defined in Title 48, the
4 Administrative Procedures Act provides that a person is "aggrieved or adversely affected" if
5 they can demonstrate:

- 6 (1) The agency action has prejudiced or is likely to prejudice that person;
- 7 (2) That person's asserted interests are among those that the agency was
8 required to consider when it engaged in the agency action challenged; and
- 9 (3) A judgment in favor of that person would substantially eliminate or redress
10 the prejudice to that person caused or likely to be caused by the agency action.

11 RCW 34.04.530. The first and third prongs are generally called "injury-in-fact" requirements,
12 while the second prong is called the "zone of interest" prong. *St. Joseph Hosp. v. Department*
13 *of Health*, 125 Wn.2d 733, 739, 889 P.2d 891 (1995). The injury-in-fact and zone of interest
14 tests have been widely used in Washington law.

15 The injury-in-fact test requires more than an alleged injury to a cognizable interest.
16 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563, 112 S.Ct. 2130, 2136, 119 L. Ed. 2d 351
17 (1992). A petitioner must demonstrate that the injury is concrete and particularized and not
18 imaginary or speculative. *Id.* at 560. The injury must be specific and personal. Mr. Oliver
19 cannot demonstrate anything but a speculative injury. His sweeping conclusory assertion that
20 third parties are not doing business with him and are falsely disparaging him, without any
21 factual support, is meaningless and insufficient to establish standing. Further, even if his
22 assertion is true, it is pure speculation that a judgment in his favor would eliminate or redress
23 his claimed harm. There is nothing to support the fact that if the post is removed third parties
24 would change their conduct.

25 The zone of interest test addresses the concern that injury-in-fact alone is not
26 necessarily enough to confer standing, because so many persons are potentially "aggrieved" by
agency action. *St. Joseph Hosp.*, 125 Wn.2d at 739-40. The zone of interest prong focuses

1 "on whether the Legislature intended the agency to protect the party's interests when taking the
2 action at issue." *Seattle Bldg. and Constr. Trades Council v. The Apprenticeship and Training*
3 *Council* 129 Wn.2d, 797, 920 P.2d 581 (1996) (internal quotations omitted). Mr. Oliver's
4 interest appears to be in his personal business reputation. However, Title 48 RCW is
5 concerned with the public interest in the business of insurance and in "requiring that all
6 persons be actuated by good faith, abstain from deception, and practice honesty and equity in
7 all insurance matters." RCW 48.01.030. It is with this public interest that the legislature
8 imposed a duty on the Commissioner to disseminate information to the public. RCW
9 48.02.160. Mr. Oliver's person business reputation is not an interest sought to be protected by
10 Title 48. Mr. Oliver's hearing should be dismissed because he cannot satisfy the APA's
11 standing requirements.

12 Next, Mr. Oliver has failed to "specify" his claims, as required by RCW 48.04.010(2).
13 His assertion that the blog "contains false statements" is conclusory and does not allege any
14 facts that would support the assertion. The post is accurate under any reading of the facts. The
15 post accurately described that a cease and desist order was issued. It accurately quoted
16 verbatim portions of that order. It accurately explained that the order "alleges" violations of
17 Washington law. And it accurately described Mr. Oliver's right to a hearing. The post
18 explained that the Commissioner had "received a complaint" and quoted portions of the order
19 that set forth the complainant's allegations. The post did not assert that the facts had been
20 judicially established or that they were anything more than allegations received by the
21 Commissioner. Mr. Oliver cannot demonstrate that the post contains false statements because
22 the post does nothing more than announce the Commissioner's actions. That the
23 Commissioner issued a cease and desist order to Mr. Oliver cannot be contested as the order is
24 part of the pleadings. That the order contained alleged violations of Washington law based off
25 of complaints received by the Commissioner is also beyond dispute. That the post accurately
26 reflected the order is incontestable.

1 Further, Mr. Oliver's alleged harm is purely speculative and cannot be redressed by the
2 Tribunal. At best, Mr. Oliver's claim that third parties are disparaging him would give him a
3 claim against those third parties. Mr. Oliver's interest in his personal business reputation is not
4 an interest that the Commissioner was required to consider in making the post. For the
5 foregoing reasons, Mr. Oliver cannot demonstrate that he has been aggrieved by the post. He
6 therefore lacks standing and this matter should be dismissed.

7 **B. Posting A Blog That Accurately Reflects A State Agency's Own Enforcement**
8 **Action Is Important To Transparency And Open Governance And Is Not *Ultra***
9 ***Vires.***

10 Because the Commissioner has a statutory duty to disseminate information to the
11 public, Mr. Oliver cannot demonstrate that the Commissioner exceeded his authority. The
12 Commissioner has statutory authority to issue cease and desist orders and to announce the
13 same to the public. He has all authority "expressly conferred" or "reasonably implied" by the
14 provisions of Title 48. RCW 48.02.060(1). Title 48 provides that the Commissioner may issue
15 a cease and desist order if he "has cause to believe that any person is violating or is about to
16 violate any provision of this code or any regulation or order of the commissioner. . . ."
17 RCW 48.02.080(3). Further, the Commissioner has a duty to "[d]isseminate information
18 concerning the insurance laws of this state" and "[p]rovide assistance to members of the public
19 in obtaining information about insurance products and in resolving complaints involving
20 insurers and other licensees." RCW 48.02.160. In order to effectuate these statutes, the
21 Commissioner must be able to announce enforcement actions to the public. Even if the
22 Commissioner did not have statutes authorizing him to communicate with the public regarding
23 insurance laws and complaints, the *ultra vires* doctrine does not require such a statute.

24 The *ultra vires* doctrine does not require explicit statutory authority before an agency
25 may act. Rather, *ultra vires* renders moot actions taken that are "wholly beyond the scope" of
26 the entities powers. *Wendel v. Spokane County*, 27 Wash. 121, 123, 67 P. 576 (1902). The
doctrine does not restrict an agency to only those actions expressly set forth by statute. Rather,

1 it restricts an agency to operating within its subject-matter area. Thus, the Supreme Court has
2 held that an agency action is *ultra vires* if it is “performed without any authority to act on the
3 subject.” *Haslund v. City of Seattle*, 86 Wn.2d 607, 622, 547 P.2d 1221 (1976).

4 Similarly, the Court has held that an agency does not need statutory authority expressly
5 authorizing it to communicate with the public. *Gold Seal Chinchillas, Inc. v. State*, 69 Wn.2d
6 828, 833, 420 P.2d 698, (1966). There, the Court explained that public knowledge of
7 enforcement actions is “of paramount importance” to make the public aware that laws are
8 being enforced and that an elected officer “is adequately performing the duties of his office and
9 is meeting his responsibilities to the electorate.” *Id.* The Court expressly rejected the argument
10 that the Attorney General had no specific statutory authority to inform the public of consumer
11 protection litigation. *Id.* It explained that “[n]o statutory delineation of such responsibility is
12 necessary, however, inasmuch as the Attorney General, as an elected officer of cabinet rank in
13 state government, has an implicit duty by virtue of his position to inform the people of the state
14 of Washington of actions taken in his official capacity.” *Id.*

15 The Commissioner, as a similarly elected officer, has authority to inform the people of
16 the state of actions taken in his official capacity. Thus, the Commissioner need not have
17 explicit statutory authority to issue press releases or otherwise announce his enforcement
18 actions regulating his subject-matter area. Such communication is a requirement of effective
19 open government and an absolute necessity for an agency such as the Office of the Insurance
20 Commissioner to function in its role of protecting the citizens of the state of Washington. If
21 the Commissioner is not allowed to notify the public of its orders and enforcement actions,
22 then the public cannot be effectively protected or made aware of the Commissioner’s actions.

23 ///

24 ///

25 ///

26 ///

1 C. Strong Public Policy In Favor of Transparency And Open Government Supports
2 The Commissioner's Duty To Disseminate Information Regarding His
3 Enforcement Actions.

4 State Agencies have an obligation to disseminate information about government
5 activities, including enforcement activities. There is no authority holding an agency
6 responsible for actions taken by third parties in response to enforcement information published
7 by the agency. In fact, the Commissioner and his agents and employees are immune from civil
8 liability for "publication of any report or bulletin" absent a showing of actual malice, fraud, or
9 bad faith. RCW 48.01.190(2). This immunity is in addition to any other common law or
10 statutory privilege or immunity. RCW 48.01.190(4). Immunity in this context is based on
11 sound policy—encouraging state officers to speak with transparency and candor about their
12 official duties—and includes protecting the Commissioner's ability to disseminate information
13 on his agency's actions.

14 In a defamation suit with facts very similar to those here, the Supreme Court explained
15 that total immunity is appropriate to avoid liability in defamation suits for press releases
16 relating to enforcement action. *Gold Seal Chinchillas, Inc. v. State*, 69 Wn.2d 828, 832-33, 420
17 P.2d 698, 701 (1966). In *Gold Seal*, the plaintiff was a corporate entity that had been sued by
18 the Washington State Attorney General for various Consumer Protection Act violations. *Id.* at
19 829. On the same day the Attorney General filed its complaint, it also issued a press release¹
20 that included information about "the initiation of the suit, the nature of the alleged violations,"
21 and the defendants' identities. *Id.* The underlying consumer protection action was settled by a
22 stipulated consent judgment. *Id.* The Court ultimately dismissed the plaintiffs' libel suit
23 holding that the Attorney General and his staff had absolute immunity. *Id.* at 833.

24 The Court in *Gold Seal* explained that in granting immunity the Court is balancing two
25 interests: first, the interest of the public in protection from "attacks upon [] reputations in
26

¹ The *Gold Seal* press release is available in full in the opinion and is substantially similar to the press
release at issue here in both function and form. *See Gold Seal*, 69 Wn. 2d at 831.

1 relation to [] business activities”; and second, the interest of the public in “the free and
2 uninhibited dissemination of information about government activities.” *Id.* The Court struck
3 the balance in favor of “encouraging public officials to speak with complete candor-and
4 without fear of legal recourse-with respect to their official duties,” noting that “the
5 overwhelming majority of cases” from other jurisdictions had also done so. *Id.* (citations
6 omitted). This Tribunal should strike the same balance and support Washington’s policy of
7 encouraging transparency and open government and apply those principals to the case here.

8 The blog post at issue here is similar to the blog post at issue in *Gold Seal* in all
9 pertinent ways: ~~both posts are designed to inform the public about enforcement actions by~~
10 ~~publicly elected officers; both posts describe alleged violations of state law; both posts identify~~
11 ~~the defendants; and both posts include verbatim quotes from the underlying order or complaint.~~
12 Neither post purports to present the facts as judicially established. There is no question that the
13 post at issue here is consistent with Washington State’s long held policy of encouraging
14 transparent and open communications by publicly elected officers and state agencies. This
15 Tribunal should dismiss this hearing and avoid putting Mr. Oliver’s interest in his personal
16 business reputation before the public interest in free and uninhibited dissemination of
17 information.

18 **D. There is no right to respond or rebut a blog post prior to its being published by**
19 **the Commissioner.**

20 There is no requirement that a hearing be conducted prior to the Commissioner issuing
21 an order to cease and desist, nor prior to the commissioner issuing a public statement, blog
22 post, press release, or other communication to the public. A person aggrieved by an order to
23 cease and desist must request a hearing within ninety days after the Commissioner has mailed
24 the order to the licensee. RCW 48.04.010(3). Failure to do so “conclusively” waves any right
25 to a hearing. *Id.* Mr. Oliver availed himself of this hearing right. However, there is no
26 authority—and no policy supporting—a hearing right when a publicly elected officer

1 communicates with the public or makes an announcement. Further, there is no authority that
2 an individual has a right to challenge the Commissioner's dissemination of information
3 regarding agency actions to the public.

4 As discussed by *Gold Seal*, the public policy weighs in favor of the candid
5 dissemination of information by a state agency about its actions. It is contrary to this policy to
6 require a hearing prior to an agency publishing information about its actions. Such a
7 requirement would have a chilling affect on an agency's ability to disseminate information
8 about its actions and keep the public informed. Here, the Commissioner would be impaired in
9 his ability to keep the public informed regarding the insurance market, directly contrary to his
10 statutory duty as set forth in Section 48.02.160 RCW.

11 **V. CONCLUSION**

12 Based on the foregoing, the Commissioner respectfully requests this Tribunal dismiss
13 Mr. Oliver's hearing request.

14 ///

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

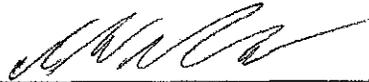
26 ///

1 The Commissioner's blog is not the source of the harm alleged by Petitioner. The
2 Commissioner's transparency should not be sacrificed because of alleged misconduct by third
3 parties. Therefore, dismissal of Mr. Oliver's hearing request is appropriate.
4

5 Isaac Williamson
6 Assistant Attorney General
7 Office of the Attorney General
8 Government Compliance & Enforcement Division
9 1125 Washington Street SE
10 P.O. Box 40100
11 Olympia, WA 98504-0100
12 Telephone: (360) 664-0542
13 isaacw@atg.wa.gov

14 DATED this 6th day of February, 2015.

15 ROBERT W. FERGUSON
16 Attorney General



17 ISAAC WILLIAMSON, WSBA No. 43921
18 Assistant Attorney General
19 Attorneys for the Insurance Commissioner
20
21
22
23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

US Mail Postage Prepaid via Consolidated Mail Service

Email: www.dwt.com

Gulliver A. Swenson
Ryan, Swanson & Cleveland, PLLC
Seattle, WA 98101-3034

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6th day of February, 2015, at Olympia, WA.


Rowena Santos
Legal Assistant