Filed
3-23-15

## Cairns, Kelly (OIC)

**From:** Anderson, Jason [Anderson@carneylaw.com]
**Sent:** Monday, March 23, 2015 4:59 PM
**To:** Cairns, Kelly (OIC)
**Cc:** Stillman, Drew (OIC); Saiden, Patti
**Subject:** RE: Robert Timmer, Docket No. 14-0247
**Attachments:** Exhibit A.pdf; Exhibit B.pdf; Exhibit C.pdf

Ms. Cairns,

Thank you for your message. Mr. Timmer exercises his right under RCW 48.04.010(5) to have the hearing presided over by an ALJ assigned under chapter 34.12 RCW.

In addition, Mr. Timmer requests that the OIC delegate to the ALJ the authority to enter the final order under RCW 34.05.461. This request is made under the appearance of fairness doctrine. *See Tatham v. Rogers*, 170 Wn. App. 76, 96, 283 P.3d 583 (2012) ("A judicial proceeding satisfies the appearance of fairness doctrine only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing.").

The commissioner has delegated to the presiding officer the authority to enter the final order in agency hearings. *See* WAC 284-02-070(2)(d)(i). Where an insurance producer's license is at issue, the presiding officer has discretion to decide whether disciplinary action is warranted under the insurance code and, if so, the type of action warranted. RCW 48.17.530. The code lists the grounds upon which the commissioner "***may*** place on probation, suspend, revoke, or refuse to issue or renew" a producer's license. RCW 48.17.530(1) (emphasis added).

Less than a year ago, despite the commissioner's delegation of authority to the presiding officer, a current deputy commissioner, James Odiorne, attempted to influence the former presiding officer's decisions and limit her discretion. Mr. Odiorne addressed the substance of the presiding officer's decisions as a job performance issue and suggested that failing to withhold or revoke a producer's license, if there was any basis for doing so, would be "contrary to [the] Commissioner's policy and program goals." *See* Exhibit A. More recently, within the past month, the commissioner confirmed that he endorses the view expressed by Mr. Odiorne in the performance evaluation. The job description posted by the commissioner on February 25, 2015, to solicit applications for a new presiding officer states that the presiding officer "communicates with the Commissioner about agency policy to further the agency's goal of regulating the insurance industry in a fair and efficient manner[.]" *See* Exhibit B. This plainly shows that the commissioner believes he can influence the presiding officer. Indeed, a deputy commissioner, John Hamje, expressed concern that the practice described by this specific language would "create the appearance of an impropriety since agency policy may influence the decision yet the policy may not be known by or communicated to the parties in the case...and the appealing party may not be able to challenge it at the hearing." *See* Exhibit C.

A reasonably prudent and disinterested person would question whether an insurance producer can obtain a fair, impartial, and neutral hearing within the OIC given that the same officials remain in control at the OIC. Accordingly, Mr. Timmer respectfully requests that the ALJ be authorized to enter the final order.

Whether witnesses may testify by telephone should be taken up by the ALJ.

-Jason Anderson

CARNEY BADLEY SPELLMAN

**Jason W. Anderson**, Principal
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**From:** Cairns, Kelly (OIC) [mailto:KellyC@oic.wa.gov]
**Sent:** Monday, March 23, 2015 10:40 AM
**To:** Anderson, Jason
**Subject:** RE: Robert Timmer, Docket No. 14-0247

Good morning, Mr. Anderson,

I wanted to follow up to see if you would be filing a response to OIC's request to have a witness testify by telephone. If so, can you please email a response no later than Tuesday, 3/24?

Thank you,

*Kelly A. Cairns*
Paralegal, OIC Hearings Unit
360-725-7002
KellyC@oic.wa.gov

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**From:** Stillman, Drew (OIC)
**Sent:** Thursday, March 19, 2015 11:45 AM
**To:** Cairns, Kelly (OIC)
**Cc:** 'Anderson, Jason'
**Subject:** Robert Timmer, Docket No. 14-0247

Good Morning Ms. Cairns,

Would you please pass along the following message to Judge Finkle?

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Judge Finkle,

The OIC requests leave to have a witness, Claudio Copat, testify via telephone during the hearing set on April 1, 2015 regarding Robert Timmer (Docket No. 14-0247). Mr. Copat was Mr. Timmer's employer during the relevant time period and has personal knowledge of the issues at hand. Mr. Copat lives in Idaho and must attend to his young children among other responsibilities on the day of the hearing. It is therefore not economically feasible to have Mr. Copat testify in person. This will not prejudice Mr. Timmer's rights or his opportunity to effectively participate in the hearing, as he will be present and represented by counsel at the hearing. Mr. Timmer will have the same opportunity to hear and question Mr. Copat's testimony as everyone else present at the hearing. The relevant authorities granting discretion to the Presiding Officer in this matter are RCW 34.05.449(3) and WAC 10-08-180(1).

Yet, I understand that Mr. Timmer's counsel is not inclined to agree to the OIC's request. I have copied him on this communication and will defer to him to communicate his thoughts on the matter.

Sincerely,

**Drew Stillman**
Insurance Enforcement Specialist
Legal Affairs Division
Washington State Office of the Insurance Commissioner
360.725.7063 | drewst@oic.wa.gov | PO Box 40255 Olympia, WA 98504-0255

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EXH. A

# Performance and Development Plan (PDP) Evaluation

| | | | |
|---|---|---|---|
| Performance Period<br>From 07/01/2013 To 04/30/2014 | | | |
| Purpose of Plan and Review ☐ Annual ☐ Trial Service ☐ Probationary ☐ Transitional ☒ Other (specify) Interim | | | |
| Employee Last Name<br>Petersen | Employee First Name<br>Patricia | Employee Middle Name (Initial)<br>D | Employee ID Number<br>556847 |
| Position Class Title<br>Hearings Examiner 3 | Working Title<br>Chief Presiding Officer | Position Number (Object Abbrev.)<br>0262 | |
| Employer (Business Area)<br>Office of the Insurance Commissioner | Division (ORG Unit)<br>Executive/Hearings Unit | Evaluator's Name<br>James T. Odlorne | |

## Part 4 - Interim Reviews (Optional)

Part 4 is an optional section that may be used during the course of the performance period to adjust performance expectations if circumstances change and/or to document mid-year feedback sessions.

**Key Results Assessment**
To what degree did the employee accomplish the expected results and how well were they done?

This interim evaluation is being done at the ten month point of a 12 month evaluation cycle. The purpose is to formally document on-going discussions about areas of improvements that are needed, as well as to note areas that are currently being satisfactorily performed. The intent of this document is to ensure clear communication is being given so that you can make the necessary improvements to ensure that you can meet the critical components of your position.

- PDP Expectation for 7/1/13 to 6/30/14: Ensure hearing process for all cases is conducted in compliance with procedural and substantive standards. Assessment: Nothing has come to my attention that suggests that you have not met this expectation.

- PDP Expectation for 7/1/13 to 6/30/14: Independently draft and enter final orders and decisions that conform to statutory requirements and legal precedent applicable to the individual case. Assessment: The level of supervision required for your position requires that I provide Administrative Direction, which means that completed work is reviewed for compliance with budget, policies, laws, and program goals. (Reference job description signed by you in August 2012.) I find that your orders do not consistently evidence an understanding of Commissioner's policy and program goals. Example: In more than one producer case ( Tam and Hyson ), after finding the producer had been convicted for a felony (which is a statutory ground for denial or revocation of a license) you have allowed the felon to get or maintain a producer license, potentially exposing consumers to personal or financial danger. Exposing consumers to increased potential for harm is contrary to Commissioner's policy and program goals. Example: After finding facts that support action taken by OIC staff to disapprove contract filings, you effectively ordered the OIC staff to draft contract language for the insurer and approve contracts that did not conform to law. You effectively assumed supervisory control of the contract approval process on an on-going basis. These actions were contrary to Commissioner's policy and program goals both in ACA implementation and in on-going consumer protection. I have previously attempted to bring these issues to your attention during one-on-one meetings, most recently on April 14, 2014. These comments are in no way intended to change any order you have written. These comments are offered only to fulfill my obligation to provide supervision and provide you an opportunity to meet your job requirements.



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- PDP Expectation for 7/1/13 to 6/30/14: That communication with parties within the OIC and outside the agency is accurate, clear, and concise. Assessment: Your orders are not concise, and the language used often obscures the meaning or intent. I have discussed your orders with attorneys who were not involved with the case who were not able to discern the reason or result of the order. As an example, your order denying the Scarborough motion to quash was not clear to the parties, as evidenced by the Scarborough motion for reconsideration, and your order denying the motion for reconsideration.

- PDP Expectation for 7/1/13 to 6/30/14: That decisions are well-reasoned and able to withstand scrutiny on appeal. Assessment: Your orders are seldom appealed. However, the reasoning of the orders is not always clear. In both your original order in Coordinated Care and your original order on Scarborough's motion to quash, I was not able to follow the reasoning from finding of fact through conclusions of law to the order. Even after re-reading the orders several times the reasoning is not clear. I believe the orders are unnecessarily wordy and the word volume interferes both with reasoning and communication.

- PDP Expectation for 7/1/13 to 6/30/14: That written decisions are issued on a timely basis at the conclusion of the hearing process. To develop a method of tracking the time between key milestones in the hearing process. Assessment: When we have previously discussed, during one-on-one meetings, timeliness of decisions, you indicated that the hearing calendar contained information by which a determination of timeliness could be made. When I questioned orders that were 90 days or more from date of hearing, you indicated that sometimes you allow time for briefing after hearings conclude. Generally, those extensions for briefing do not appear in the hearings calendar, and therefore I cannot determine how long it is taking to issue orders after hearing. The expectation that there will be a method of tracking the time between key milestones in the hearing process has not been met. As an example of the untimeliness of orders, I specifically point to Preferred Chiropractic Doctors matter. That matter was heard September 19, 2013, you noted an agreement of the parties that an order would not be entered until after January 1, 2014. The order on the hearing was not entered until April 2, 2014. The total time from hearing to order was very nearly six months, which is unacceptable. Also, our one-on-one discussions have indicated that you are not tracking the timeliness of matters referred to the OAH.

In summary, you have evidenced a thorough technical knowledge of the APA. You have also committed yourself to being totally independent in all matters over which you preside.

I think you need to strive for orders that are concise and to the point. Those orders should clearly communicate your reasoning that leads from facts to conclusions to order. Those orders must as clearly and obviously support Commissioner's policy and program goals as the support the law. Since your orders are legally the acts of the Commissioner, they must be orders that he supports.

Patricia - You remain an important and vital part of our team. While recognizing that oral and written feedback is sometimes difficult to receive, I encourage you to remain open to the information in this document so that you can take proactive steps in the next two month period to show positive attention to these areas before the end of the annual performance cycle. In follow-up to this document, we will also be discussing more detailed Expectations that will be in effect for the next two month period, at which time we will enter into another agency-wide annual cycle. The discussion about your updated PDP Expectations will be scheduled for next week.

**Key Competencies Assessment**
How well (or how frequently) did the employee demonstrate the knowledge, skills, abilities and behaviors expected?

- PDP Expectation – Key Competency Expected for 7/1/13 to 6/30/14: Thorough Knowledge of insurance and related statutes and case law; the Administrative Procedure Act and Court Rules. Assessment: You have displayed a thorough technical knowledge of the Insurance Code, APA, and court rules.

- PDP Expectation – Key Competency Expected for 7/1/13 to 6/30/14: Reasoning and judgment. Assessment: Within the last year, you have written orders that found that producers have committed felonies indicative of a disregard of the rights of consumers, and if repeated, would disadvantage potential consumers. Those orders effectively put the producer back in the market with access to consumers. Such an order does not show judgment supportive of the Commissioner's policy and program goals of protecting consumers. Within the last year, you have written orders that seemed to be written as road maps for appeal of OIC actions and at times invitations to challenge OIC on broader grounds. Those road map/invitation orders evidence a lack of judgment about the more global impact of your orders on the OIC's mission. Additionally, within the last year, a number of your orders have been unprofessionally critical of OIC staff who presented cases before you. [See footnote 4, Docket No. 13-0293, Order on Insurance Commissioner's Motion to Dismiss (February 20, 2014)] [See Docket No. 13-0293, Order on Seattle Childrens' Hospital's Motion for Partial Summary Judgment (March 14, 2014), discussion on Page 8 and footnote 24 on page 9.] [See Docket No. 13-0232, Findings of Fact, Conclusions of Law and Final Order – despite finding OIC witnesses were credible, discussion on pages 7, 8, 11, and 12, taken as a whole, cast doubt on the credibility of OIC staff.] Such unprofessional conduct causes OIC and its processes to be demeaned in the eyes of those who read such orders.

- PDP Expectation – Key Competency Expected for 7/1/13 to 6/30/14: Communication skills. Assessment: While assuming positive intent to show thoroughness, as noted in the results assessments, your orders are extremely wordy and difficult to follow. Attorneys not involved in the actual proceeding have not been able to perform a cold review of your orders and understand their reasoning and outcome. I believe your orders in both Coordinated Care and Scarborough are examples of wordy, difficult to follow orders.

- PDP Expectation – Key Competency Expected for 7/1/13 to 6/30/14: Supervisory skills and ability to manage functions of her unit. Assessment: I have not had an opportunity to directly assess your supervisory skills in relationship to direct interaction or coaching/training with the paralegal 2 assigned to assist you, but have not been notified of any supervisory issues. However, as discussed already, I remain concerned that you did not fully attend the Performance Accountability: How to Measure Outcomes that was required for all supervisors in January 2015. In the future, I expect you to attend all mandatory supervisory training, which is consistently announced well in advance.

- PDP Expectation – Key Competency Expected for 7/1/13 to 6/30/14: Ability to work independently. Assessment: As discussed with you 4/15/14, you have had a failure to abide by your set work schedule of M-F; 8 to 5 pm. (with additional hours if needed to perform your duties.) You have also extended times for producing orders. Both indicate an inability to effectively work independently.

**Other Relevant Information** (Optional)

## Part 5: Performance Feedback

Provide a narrative assessment of the employee's performance in relation to the Key Results and Competencies.



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Expected that were outlined in Part 1. This assessment must be based on performance observed or verified.

## Comments and Signatures

**This report is based on my best judgment.**

| Date | Evaluator's Signature |
|---|---|
| 05/01/2014 | |

**This report has been discussed with me.**

| Comments | Date | Employee's Signature |
|---|---|---|
| I strongly object and disagree with many of the Assessments included in this Interim Performance Evaluation. My current 7/1/13 to 6/30/14 Expectations upon which these Assessments are based have in recent months been misconstrued in a way which is contrary to the requirements of my Position Description and title 34 RCW which by law governs these OIC hearings and my responsibilities as a presiding officer under those statutes. Please see Comments/Responses of Patricia D. Petersen, pgs. 1-9 attached hereto and incorporated herein. I am advised by Jim Odiorne and OIC HR Manager Melanie Watness that these Comments/Responses are permanently attached to this Interim Evaluation form. | 05/09/2014 | |

**I have reviewed this report and in my judgment, the process has been properly followed. In addition, the following comments are offered concerning the employee's performance.**

| Comments | Date | Reviewer's Signature |
|---|---|---|
| | | |

*NOTE: Typically, once the performance evaluation is completed and signed by all parties,* the supervisor provides the employee a copy and the original is forwarded to Human Resources to be placed in the employee's personnel file. Supervisors should check with their Human Resources office for organization specific instructions.

**The following ten pages represent the Response of Patricia D. Petersen, dated May 6, 2014, to PDP Interim Evaluation done by James T. Odiorne, Chief Deputy Insurance Commissioner, for the performance period from 7/1/2013 to 4/30/2014. As I have been promised on May 1, 2014 by HR Manager and Agency Ethics representative Melanie Watness would be done, they are to be attached to, and become a part of, that PDP Interim Evaluation.**

1. PDP Expectation for 7/1/13 to 6/30/14: "Ensure hearing process for all cases is conducted in compliance with procedural and substantive standards." Your Assessment states: *"Nothing has come to my attention that suggests that you have not met this expectation."* In response, I have worked for the Office of the Insurance Commissioner (OIC, or agency) for nearly 30 years, first as Deputy Insurance Commissioner of legal, enforcement and consumer protection, for the past over 25 years as a presiding officer and for the past over 20 years as the agency's Chief Presiding Officer. Over the years, for the protection of the OIC and s required by law, I have always ensured that the hearing process for all cases is conducted in compliance with procedural and substantive standards. I believe this is the reason why every year through this past evaluation period I have received very high PDP Performance Evaluations from my direct supervisors (the Chief Deputy Insurance Commissioner), and on those rare occasions in which my decisions are appealed they have never been overturned.

2. PDP Expectation for 7/1/13 to 6/30/14: Independently draft and enter final orders and decisions that conform to statutory requirements and legal precedent applicable to the individual case. Your Assessment states: *The level of supervision required for your position requires that I pro vide Administrative Direction, which means that completed work is reviewed for compliance with budget, policies, laws, and program goals. (Reference Job description signed by you in August 2012.) I find that your orders do not consistently evidence understanding of Commissioner's policy and program goals.* In response, during our May 1, 2014 meeting you stated this comment is directed at your displeasure with the outcome of only two cases, the Tam and Coordinated Care cases, which were two of the fairly rare cases which were not decided in favor of the OIC for the reasons detailed in those Final Orders. My orders conform to statutory requirements and legal precedent applicable to the individual cases as required by my PDP Expectations and title 34 RCW, the Administrative Procedures Act (APA). Second, my Position Description, PDP Expectations and title 34 RCW all require that I conduct these cases as an impartial judge, ensuring a fair hearing and due process to both parties. In order to ensure a fair hearing and impartial decision in all cases, it is not allowed – nor has it ever been done – to tie my work evaluation into the outcome of my decisions. The first time I was called to meet with you privately, on September 6, 2013, you advised that you could not furnish me with a positive work evaluation because you were displeased with the outcome of my Coordinated Care decision and tried to discuss that case with me even though it was still ongoing as it was under reconsideration at the time. This occurred in later private meetings with you as well, although



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that case was still ongoing; for this reason in December 2013 I sent you a memorandum citing important provisions of the APA including RCW 34.05.455 which provides: *1) A presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding ... with any person employed by the agency without notice and opportunity for all parties to participate, ....*

3. PDP Expectation for 7/1/13 to 6/30/14: <u>That communication with parties within the OIC and outside the agency is accurate, clear, and concise</u>. Your Assessment states: *Your orders are not concise, and the language used often obscures the meaning or intent. ... As an example, your order denying the Scarborough motion to quash was not clear to the parties, as evidenced by the Scarborough motion for reconsideration, and your order denying the motion for reconsideration.*

   In response, <u>Scarborough</u> is still an ongoing case and has not even yet come to hearing. As above, RCW 34.05.455 prohibits you from discussing this case with me and prohibits me from discussing this case with you.

4. PDP Expectation for 7/1/13 to 6/30/14: <u>That decisions are well-reasoned and able to withstand scrutiny on appeal</u>. Your Assessment states: *Your orders are seldom appealed. However, the reasoning of the orders is not always clear. In both your original order in Coordinated Care and your original order on Scarborough's motion to quash, I was not able to follow the reasoning from findings of fact through conclusions of law to the order. Even after re-reading the orders several times the reasoning is not clear* [to me]. *I believe the orders are unnecessarily wordy and the word volume interferes both with reasoning and communication.* In response, please recognize that both Coordinated Care (through the Seattle Children's Hospital case) and also Scarborough are ongoing cases and we are prohibited by RCW 34.05.455 from discussing those cases. However, I will continue to make every effort to discuss my reasoning and decisions as clearly and succinctly as possible. Although I have never had my writing be criticized, I do voluntarily take a plain writing class, and legal writing classes, to maintain my skills. My HR records show that the last DOP plain writing class I chose to take was completed on

5. PDP Expectation for 7/1/13 to 6/30/14: <u>That written decisions are issued on a timely basis at the conclusion of the hearing process</u>. Your Assessment states: *When we have previously discussed, during our one-on-one meetings, timeliness of decisions, you indicated that the hearing calendar contained information by which a determination of timeliness could be made. When I questioned orders that were 90 days or more from date of hearing, you indicated that sometimes you allow time for briefing after hearings conclude. Generally, those extensions for briefing do not appear in the hearing calendar, and therefore I cannot determine how long it is taking to issue orders after hearing. The expectation that there will be a method of tracking the time between key milestones in the hearing process has not been met. As an example of the untimeliness of orders, I specifically point to Preferred Chiropractic Doctors* [sic] *matter. That matter was heard September 19, 2013, you noted an agreement of the parties that an order*



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*would not be entered until after January 1, 2014. The order on the hearing was not entered until April 2, 2014. The total time from hearing to order was very nearly six months, which is unacceptable.* In response, while you pointed to Preferred Chiropractic Doctor and directed me to review my hearing calendar for this assessment period, in fact none of my cases have exceeded the 90 day statutory limit and this is clear in my hearing calendar. As to Preferred Chiropractic Doctor, that case is still an ongoing case as the OIC has asked for reconsideration which is pending. However, I can let you know that in that case it was the OIC attorney (and the appellant) who requested that I not consider or enter a Final Order in this case until after January 1, 2014. The Final Order in that case was entered on April 2, 2014, which is within the 90 day period beginning on January 2, 2014. I always considered the OIC attorneys to be responsible professionals who have solid, legal reasons for their requests; indeed, in this situation the OIC attorney did have good cause for his request and, given also that the appellant agreed to the request, it would not have been appropriate for me to have denied it. You cite no other cases in which any order has been entered late and, in fact, as I review my hearing calendar I see it is clear that there have been no cases which were entered late. In addition, because the APA permits a hearing record to be left open after a hearing for receipt of evidence or arguments upon request, and because the APA states that the 90 day period for entry of orders does not begin to run until the last piece of evidence or argument is filed, before this evaluation period I revised my hearing calendar to reflect those later filings so that the timeliness of orders can be specifically tracked. You see no indication in my hearing calendar where there have been extensions of briefing or for receipt of evidence during this evaluation period because there have been no such extensions during this evaluation period. If there had been any such extensions of briefing or for receipt of evidence during this evaluation period you would have seen that clearly reflected in my hearing calendar. My hearing calendar has always allowed you or anyone to clearly track the timeliness of my orders.

Second, relative to this PDP Expectation No. 5 your Assessment states: *Also, our one-on-one discussions have indicated that you are not tracking the timeliness of matters referred to the OAH.* In response, I only refer cases to OAH when it is legally required to do so, and my hearing calendar does track the timeliness of those cases. You criticize both of the two cases which are currently at OAH: in both those cases the OIC attorney has either requested, or agreed to, continuances of both of those hearings and that it the reason for the delay. Once again, I have always considered the OIC attorneys to be responsible professionals who have good cause for their actions, and in addition I am not in a position to direct either the OIC attorneys in a case I will eventually review and enter the Final Orders in (which is all of the OAH cases). In addition, I am not in a position to direct the decisions of the OAH administrative law judge for the same and other reasons. Finally, every time I send a case to OAH, and in our OAH-OIC protocol, it is specifically written that the hearings are to be held as soon as possible and it is explained that because there is normally a stay on the OIC's action it is in the interest of the public and the



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agency to have an initial decision entered promptly. I have also held continuing discussions with OAH stressing the importance of prompt handling of these cases, as have former Chief Deputy Insurance Commissioners. As I discussed with you on April 15, 2014, in the past month I have spent two one-hour sessions with Chief Deputy ALJ Robert Crabill about this issue, and he informed me, just as I informed you regarding my lack of authority over OIC attorneys or OAH judges, that he is not in a position to second guess either the requests or agreements of the OIC attorneys in those cases or the decisions of the ALJs assigned to those cases including their decisions to delay the dates of the hearings over which they preside.

6. In this Interim Evaluation, you summarize your assessment as follows: *In summary, you have evidenced a thorough technical knowledge of the APA. You have also committed yourself to being totally independent in all matters over which you preside.* In response, this is also the reason why I have had to repeatedly state, and cite, the strict provisions of the APA, including RCW 34.05.455, that prohibit the presiding officer from receiving ex parte communications in ongoing cases. I have never had to do this with any other former Chief Deputy in all of the past over 25 years in which I have served as presiding officer because at no time have I ever, until now, received comments of any kind on ongoing (or completed) cases and I have never had my work evaluation based in any way upon the outcome of my decisions.

   You then state that, however, that *I think you need to strive for orders that are concise and to the point. Those orders should clearly communicate your reasoning that leads from facts to conclusions to order. Those orders must as clearly and obviously support Commissioner's policy and program goals as the* [sic] *support the law. Since your orders are legally the acts of the Commissioner, they must be orders that he supports.* In response, we have discussed that – for the protection of both the agency and me – it is not possible for my work evaluation, including this Interim Evaluation to which I am attempting to respond, to be based on the outcomes of my decisions as this represents a form of influence over my work which jeopardizes my neutrality as a judge. In my Position Description and title 34 RCW, I am required to conduct and decide these cases in a fair and impartial manner. In addition, as I mentioned during your private meeting with me on April 15, 2014, this section of my PDP Position Description that states that I am to see that the administrative directives and policies of the Commissioner are to be followed does not mean that I am to make sure that the outcome of my decisions are in accord with the Commissioner's policies and preferences and that he agrees with my decisions. If this were the case, as I have mentioned to you before, those who filed Demands for Hearing would not receive their due process rights, the strict laws set forth in title 34 RCW, case law and rules of



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ethics would be seriously violated, my Bar license would be at risk, and there would be no purpose to holding a hearing.

**Key competencies.**

1. PDP Expectation – Key Competency Expected for 7/1/13 to 6/30/14: Thorough knowledge of Insurance and related statutes and case law: the Administrative Procedure Act and Court Rules. Your Assessment states: *You have* [definitely] *displayed a thorough technical knowledge of the Insurance Code, APA, and court rules.* I always strive to remain professional, and to comply with the requirements of the Administrative Procedure Act, Court Rules and case law. I also always strive to enter fair and impartial decisions based upon the Insurance Code and regulations as presented to me and argued by both parties at hearing as well as upon the evidence presented by both parties at hearing. I do believe this is the reason I have always had high PDP Evaluations and have never been overturned in the rare occasions where my decisions are appealed to Superior Court.

2. PDP Expectation – Key Competency Expected for 7/1/13 to 6/30/14: Reasoning and judgment. Your Assessment states [with numbers added for reference to responses]: 1. *Within the last year, you have written orders that found that producers have committed felonies indicative of a disregard of the rights of consumers, and if repeated, would disadvantage potential consumers. Those orders effectively put the producer back in the market with access to consumers. Such an order does not show judgment supportive of the Commissioner's policy and program goals of protecting consumers.* 2. *Within the last year, you have written orders that seemed to be written as road maps for appeal of OIC actions and at times invitations to challenge OIC on broader grounds. Those road map/invitation orders evidence a lack of judgment about the more global impact of your orders on the OIC's mission.* 3. *Additionally, within the last year, a number of your orders have been unprofessionally critical of OIC staff who presented cases before you. [See footnote 4, Docket No. 13-0293, Order on Insurance Commissioner's Motion to Dismiss (February 20 2014)] [See Docket No. 13-0293, Order on Seattle Childrens' Hospital's Motion for Partial Summary Judgment (March 14, 2014), Conclusions of Law and Final Order – despite finding OIC witnesses were credible, discussion on pages 7, 8, 11, and 12, taken as a whole, cast doubt on the credibility of OIC staff.]*

   In response to 1. above, during our May 1, 2014 meeting you stated that the only two cases you were basing this criticism on were Tam and Hyer. Contrary to your statement, neither of these cases put these individuals back into the market; they were both applicants who had never been licensed as producers before. Your Interim PDP Evaluation of my work strictly considers the outcome of both these cases. You imply that, because apparently the Commissioner's policy is that no one who has been convicted of a felony should be licensed as an insurance producer,



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the outcome of my decision in both these cases should have been to uphold the agency's order denying them producer's licenses even though you were not present during any part of either hearing and regardless of any of the actually extraordinary mitigating circumstances which are reflected in my decisions in both these cases. While most of the Commissioner's decisions involving licensees or applicants are upheld, these two decisions of the Commissioner denying Tam and Hyer producer's licenses could not have been upheld. Further, once again, if my instructions are simply to decide whatever the Commissioner asks for at hearing (in these cases, denial of Tam's and Hyer's applications for producer's licenses) – regardless of any evidence or argument presented by the appellant – then the appellant's due process rights are violated and there is no purpose for a hearing.

In response to 2. above, during our May 1, 2014 meeting you stated that the only case you were basing this assessment on was Scarborough. Scarborough is a case which is still ongoing. As my hearing calendar details, while decisions have been made relative to several motions, the hearing has not even been held yet. For this reason, while I disagree with your criticisms, you are prohibited by the APA and ethics rules from communicating with me ex parte like you have in private meetings you have called with me and in this Interim Evaluation of my work, and I am likewise prohibited by the APA and ethics rules from communicating ex parte with you.

In response to 3. above, your sole criticism is specifically about cited sections of two of my interim decisions in the Seattle Childrens' Hospital case. The Seattle Children's Hospital case is still ongoing. As my hearing calendar details, preliminary decisions have been made but the hearing has not even taken place yet. As above, while I disagree with your comments relative to this point, you are prohibited by the APA and ethics rules from communicating with me ex parte like you have in private meetings you have called with me and in this Interim Evaluation of my work, and I am likewise prohibited by the APA and ethics rules from communicating ex parte with you. Prohibited communications also include your delivery of a written note to me days after I entered my Order Denying OIC's Motion to Dismiss that case criticizing that Order. Finally, generally, credibility findings are required under the APA, a finding that a witness if credible is just that (credible), and a reasonable acknowledgement of the evidence and argument presented by all parties at hearing is required.

3. PDP Expectation – Key Competency Expected for 7/1/13 to 6/30/14: Communication skills. Your Assessment states: *While assuming positive intent to show thoroughness, as noted in the results assessments, your orders are extremely wordy and difficult to follow. Attorneys not involved in the actual proceeding have not been able to perform a cold review of your orders and understand their reasoning and outcome. I believe your orders in both Coordinated Care and Scarborough are examples of wordy, difficult to follows orders.* First, as above, Scarborough is clearly a case which is ongoing. Scarborough is a case which is still ongoing. As my hearing



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calendar details, while decisions have been made relative to several motions, the hearing has not even been held yet. For this reason, while I disagree with your criticisms and have never been advised that my orders are "wordy" or "difficult to follow," you are prohibited by the APA and ethics rules from communicating with me ex parte like you have in private meetings you have called with me and in this Interim Evaluation of my work, and I am likewise prohibited by the APA and ethics rules from communicating ex parte with you.

Second, relative to Coordinated Care, in the first private meeting you called with me held September 6, 2013, three days after entry of my order in Coordinated Care but while the case was still ongoing, you advised me that you could not provide me with a positive PDP Performance Evaluation for the past assessment period because you were displeased with the outcome of my decision in Coordinated Care (particularly regarding the most significant issue in that case i.e. the issue of network adequacy). On September 6 and in later meetings before I entered my Order Denying the OIC's Motion for Reconsideration and also just several days after I entered that Order, you again attempted to influence my opinion with your own (again especially regarding the network adequacy issue) and to express your displeasure with the outcome of my decision. At this time, the Coordinated Care case is no longer ongoing, however the exact, identical, issue (whether the OIC's approvals of the Coordinated Care, and also Premera's and Bridgespan's Exchange filings were in compliance with federal and state law) is the central issue in another case which is ongoing now, Seattle Children's Hospital. Therefore, although I disagree with your criticism and have never been advised that my orders are "wordy" or "difficult to follow," you are prohibited by the APA and ethics rules from communicating with me ex parte like you have in private meetings you have called with me and in this Interim Evaluation of my work, and I am likewise prohibited by the APA and ethics rules from communicating ex parte with you.

4. PDP Expectation – Key Competency Expected for 7/1/13 to 6/30/14: Supervisory skills and ability to manage functions of her unit. Your Assessment states: *I have not had an opportunity to directly assess your supervisory skills in relationship to direct interaction or coaching/training with the paralegal 2 assigned to assist you, but have not been notified of any supervisory issues. However, as discussed already, I remain concerned that you did not fully participate in the Performance Accountability: How to Measure Outcomes that was required for all supervisors in January 2015* [sic]. *In the future, I expect you to attend all mandatory supervisory training, which is consistently announced well in advance.* As noted, my supervisory skills are and have never been questioned. Regarding the class given in January 2014 which was required for all supervisors, attached please see OIC Human Resources' written confirmation of my completion of, and full credit given, the Performance Accountability: How to Measure Outcomes class that you mention. As is also noted in my Memorandum of last week to you, I have also taken many other optional agency-sponsored and DOP-sponsored classes for supervisors and agency



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employees. In addition, in the past three months I have at my own expense completed three continuing legal education classes for judges.

5. PDP Expectation – Key Competency Expected for 7/1/13 to 6/30/14: Ability to work independently. Your Assessment states [numbered for reference to responses]: *As discussed with you 4/15/14, 1. you have had a failure to abide by your set work schedule of M-F 8 to 5 pm. (with additional hours if needed to perform your duties.) 2. You have also extended times for producing orders. Both indicate an inability to effectively work independently.*

In response to 1., I have only been a full time 8:00 a.m. to 5:00 p.m. employee since December 1, 2013. Notes from the private meetings you have called with me, and my two recent memoranda to you, reflect that the agreement beginning December 1, 2013 was that my hours did need to be somewhat flexible because, e.g., motions can be filed up until 5:00 p.m. for argument the following day and therefore I am fairly often required to work in the office until 7:00 p.m. or later so that I am prepared for the next day. Therefore, in order to help minimize uncompensated hours somewhat, my hours would be somewhat flexible with the requirement that I document those days in which they varied from the 8:00 a.m. to 5:00 p.m. schedule. I have documented all of these hours and weeks, and have worked over 40 hours each week (except where I have been on official approved leave). However, as I stated to you in my memorandum to you last week, since as of our private meeting on April 15, 2014 you have indicated that I am to work a strict 8:00 a.m. to 5:00 p.m. schedule with uncompensated extra hours as needed, I have strictly adhered to that directive. In addition, as I also stated to you in my memorandum to you of last week, while I had not understood that there was a requirement to use my key card so that you can check when I arrive, since April 15, 2014 I have strictly adhered to your requirement on that point as well. While I know that this does result in more uncompensated hours that I might have incurred, I will abide by your directives.

In response to 2., during our May 1, 2014 meeting I asked if you could identify what cases you were basing this Assessment on and you directed me to review my hearing calendar to find those cases myself. After reviewing my hearing calendar [during this current evaluation period 7/1/13 to current as you directed] I see no case where I have extended times for producing orders.

Summary. Jim, in summary, I will continue to make every effort to acknowledge and respect your concerns. Please understand that incorporating compliance with the Commissioner's policy, program goals and preferences into an evaluation of my work undermines my ability to provide an impartial review of the cases brought by individuals and companies who wish to appeal acts of the Commissioner. In these Responses to Interim Evaluation I have attempted to disagree with most of your Assessments, to provide you with information I hope will be helpful to you, and to generally respond to your Assessments as far as I am legally allowed to respond. I believe that you seem to be taking this disciplinary action against me to influence the outcomes



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of my decisions in cases which seem to be of political interest, while the political reasons there seem to be far exceed my area of expertise. These are high profile cases, and the orders you raise as concerns are all those in which the Commissioner has not prevailed. Pursuant to the APA, I am required to base my decisions on the evidence and argument presented at hearing. I cannot go to the Commissioner himself privately when I receive these cases to hear from him how he wants me to decide these cases, as you suggested I should during the first private meeting you called with me on September 6, 2013 just after my decision in Coordinated Care was filed. I also cannot privately talk to OIC staff to learn the Commissioner's preferences outside the hearing and use them to guide the outcome of my decisions in these cases. If that were considered to be legal and ethical, then there would be no due process rights given to parties which appeal the Commissioner's acts and there would be no due process for a hearing. The appellant would have no idea what I had been instructed or told or influenced to do in his or her (or a company's) case and therefore would be unable to address it; the appellant would simply have no fair recourse in which to appeal an act of the Commissioner, and to receive due process including a hearing and decision before a fair and impartial judge which is guaranteed in the Insurance Code, the APA and the Constitution. To ensure fair and impartial hearings and decisions, and to ensure that individuals and entities appealing acts of the Commissioner under the Insurance Code receive the due process to which they are constitutionally entitled, and a fair and impartial hearing before an impartial judge we are required to strictly comply with the provisions of the Insurance Code, the APA, rules of ethics, the Canons of Judicial Conduct as guidelines, case law and the constitution as described above.

Finally, as a means of maintaining an effective and professional communication between us, please keep the volume and the tenor of your communications in the private meetings you call with me in a conversational range. Please also strive to maintain respectful communication both in the tone and content of your verbal comments to me during these private meetings. In order for me to continue to feel comfortable meeting with you one-on-one as you have requested since you became Chief Deputy and my supervisor and these apparently high profile cases have commenced, please do not continue to raise your voice at me during these meetings those basic professional expectations need to be maintained. Please also understand that the Responses herein are made in a strong effort to protect this agency; to protect the integrity of the judicial and adjudicative process; to protect the rights of individuals and entities to receive their entitlement of due process and a fair and impartial decision which is not influenced by ex parte contacts or other pressure applied on me by you; and finally to protect me as well because my Bar license as an attorney would be in jeopardy should I fail to adhere with applicable laws and rules guaranteeing citizens their right to fair hearings. I remain most ready and willing and interested in coming to a mutual understanding of the requirements of the hearing process, while still preserving my integrity as a judge and an attorney, and still protecting the rights of individuals and entities who expect and are entitled to fair hearings before an impartial judge.

Patricia A. Allen
May 6, 2014



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EXH. B

**State of Washington**
**Office of the Insurance Commissioner**
**invites applications for the position of:**

careers.wa.gov
Working for Washington State

# Presiding Officer (Civil Service Exempt)

**SALARY:** $65,000.00 - $85,000.00 Annually

**OPENING DATE:** 02/25/15

**CLOSING DATE:** Continuous

**DESCRIPTION:**
The OIC is recruiting to fill a Civil Service Exempt position: Presiding Officer for the Hearings Unit. The Presiding Officer position serves as the Insurance Commissioner's designee to issue final orders in adjudicative proceedings and to review initial orders presented by the Office of Administrative Hearings (OAH). This position also provides legal, legislative, and policy support to the Commissioner.

The Office of the Insurance Commissioner (OIC) operates under the direction of the state's Insurance Commissioner, a statewide elected official. The agency's mission is consumer protection and regulation of the state's insurance industry. With approximately 220 employees, we are one of the smaller state agencies in Washington state government and are fortunate to have a stable funding source that does not rely on the state's general fund. The OIC values its employees and diversity in the workplace. We challenge our employees to continuously improve the way we do business, and to meet and exceed the needs of our customers. To learn more about this agency, we invite you to visit our website at www.insurance.wa.gov.

**Continuing Legal Education: The OIC will pay for your CLEs!**

**DUTIES:**
Operating within delegated scope of authority, the position will include the following duties:

• Primarily be responsible for serving as the fact finder in adjudicative proceedings where a party to a matter has filed an appeal, specific statutes require a hearing, or the Commissioner has initiated a hearing;

• Review initial orders prepared by OAH and enter final orders consistent with law and Commissioner's policies;

• Conducts adjudicative proceedings as the Commissioner's delegee, to include presiding at hearings, ruling on motions, performing legal analysis and issuing final orders according to the laws of Washington State, including RCW 34.05, Title 59 RCW, and Title 284 WAC;

• As the Commissioner's delegee or designee, communicates with the Commissioner about agency policy to further the agency's goal of regulating the insurance industry in a fair and efficient manner;

• Manages the hearing process, beginning with case intake to the issuance of a final order and posting on the OIC Internet page;

• Provides legislative, rulemaking and policy support to the Commissioner;

• Oversees certification of official hearing records to superior court as necessary; and,

• Supervision of paralegal position assigned to the Hearings Unit.

**QUALIFICATIONS:**
**Required Qualifications:**

• Admission to practice law in the state of Washington;

and,

• At least five years of legal experience working in the fields of litigation, administrative law, insurance regulation, or policy.

**Desirable Qualifications:**

The OIC is most interested in candidates who have relevant experience, skills and abilities; such as:

• Significant prior experience in governmental decision making capacity, preferably in insurance regulation. Enforcement work is highly desirable.

• Demonstrated ability to effectively research, analyze, understand and apply foreign and alien jurisdiction case law, statutes, regulations and rules of evidence to international supervisory standards.

• Experience researching and applying WA State laws related to administrative adjudicative proceedings.

• Familiarity with the programs and functions of the Office of the Insurance Commissioner.

• Legislative work experience at the state, local or federal level.

**Position Specific Competencies**

• Demonstrated ability to effectively research, analyze, understand, and apply WA State case law, statutes, regulations and rules of evidence to complex and varied issues for purposes of formulating decisions.

• Knowledge of laws and regulations related to regulation of the insurance industry.

• Demonstrated ability to communicate legal and policy issues, both orally and in writing, in a clear manner.

• Ability to effectively collaborate with stakeholders and constituents on policy issues; ability to build and foster productive relationships.

• Demonstrated ability to lead and organize projects, effectively managing time and prioritizing varied work assignments.

• Using sound judgment, have the ability to effectively negotiate and address problems with creative and effective solutions.

• Cultural competency and the ability to demonstrate respect and sensitivity to others.

• Refined judicial temperament that will allow incumbent to maintain proper control of proceedings while evidencing respect for all parties in oral and written communications.

• Ability to produce timely, concise written orders that have a reasonable expectation of being upheld if appealed.

**OIC Core Competencies:**

Respect, recognition and inclusiveness: Engages in constructive working relationships characterized by a high level of acceptance, cooperation, and mutual respect; helps create a work environment that embraces and appreciates diversity; and, recognizes contributions of others within the organization --- all of which will enhance the attainment of organizational goals.

Accountability: Demonstrates understanding of the link between job responsibilities and organizational goals. Accepts personal responsibility and accountability for the quality and timeliness of own work, and adhering to agency processes/policies. Manages his or her own performance to meet expectations and achieve expected results.

Communication and Collaboration: Actively listens and engages in open, respectful, and cooperative manner. Conveys messages that are effective in communicating information and ideas with others.

Customer Focus: Builds and maintains internal and external customer satisfaction with services offered by the organization, both regulatory and consumer based. Demonstrates sensitivity to public's perceptions and attitudes.

Professionalism and Integrity: Through consistent honesty, forthrightness, and professionalism in all interactions, earns the trust, respect and confidence of co-workers and customers.

Leadership: Inspires, motivates, and brings out the best in others. Guides team members toward a shared vision and accomplishment of goals. Displays balanced thinking that combines analysis, wisdom, experience and perspective.

Strategic Management: Seeing the long-range picture, aligns the direction, resources, products, services and performance of the division/program with the OIC Strategic Plan. When appropriate, embraces changing business needs and adapts approach, goals, and methods to achieve success.

Human Resource Management: Effectively manages human resources in a consistent and equitable manner.

**SUPPLEMENTAL INFORMATION:**
**Compensation**

This announcement is open until the position is filled; however, initial candidate review will be scheduled for March 4, 2015. Applicants are encouraged to submit at the earliest point of opportunity for first interview consideration. The hiring authority has the right and may exercise the option to make a hiring decision at any time.

The position is overtime exempt and eligible for both retirement and health care benefits.

The Compensation will vary depending on qualifications. (Up to $85,000 annually.)

Outstanding benefits include health, dental, life and long-term disability insurance; vacation, sick, military and civil leave; dependent care assistance program; employee assistance program; deferred compensation plans; 11 paid holidays plus a personal holiday; tuition reimbursement; commute trip reduction; training; and state retirement plans.

**HOW TO APPLY**

To be considered for this opportunity, complete an online application with the materials listed

below.

1. Go to www.careers.wa.gov
2. Click the "Look for jobs" button
3. Click the "Office of the Insurance Commissioner" box in the Department section.
4. Click the "Apply Search" button.
5. Click Presiding Officer (Exempt)
6. Click the "Apply" button.
7. Follow the online application instructions to complete the online application & include these materials:

• An Online Questionnaire;
• Current resume;
• A detailed letter of interest describing your skills and experience as they relate to the qualifications outlines in this job announcement; and,
• A list of three professional references, including at least one supervisor, with current telephone numbers and addresses.

Incomplete application packages may disqualify the applicant from the selection process.

A Juris Doctorate degree and admission to practice law in the State of WA is required for this position. Proof of degree(s) will be required at the finalist stage; therefore; candidates may want to pre-plan for this.

Note: The act of submitting application materials is considered affirmation that the information provided is complete and truthful. When submitted electronically, you are confirming that all information is true and complete.

**OTHER INFORMATION**

This position is exempt from civil service. It is located in Tumwater, Washington in an office setting, requiring the ability to work both independently as well as in a team environment. The position may require infrequent travel.

In accordance with RCW 48.02.090(5), Office of Insurance Commissioner employees are prohibited from having any interest, directly or indirectly, in an insurance company other than as a policy holder. This prohibition includes the receipt of renewal commissions.

This announcement is published by the Washington State Office of Insurance Commissioner. The state of Washington is an equal opportunity employer with a commitment to supporting diversity in the workplace. Women, racial and ethnic minorities, persons over 40 years of age, and disabled and honorably discharged veterans or military status are strongly encouraged to apply.

Persons with a disability, who need assistance in the application or testing process, or those needing this announcement in an alternative format, may call Lindsey Henderson, HRC4, at (360) 725-7004. Applicants who are deaf or hard of hearing may call through the Washington Relay Service at 7-1-1.

**Presiding Officer (Civil Service Exempt) Supplemental Questionnaire**

* 1. Do you have a Juris Doctor degree?

❑ Yes
❑ No

* 2. Are you an active member of the WA State Bar Association?

❑ Yes

- ❑ No

* 3. Do you have five or more years of legal experience in the fields of litigation, administrative law, insurance regulation or policy?

- ❑ Yes
- ❑ No

* 4. If you answered Yes to Question 3, how much of that experience is within the last five years?

- ❑ 2 or less years
- ❑ 3 years
- ❑ 4 years
- ❑ 5 years

* 5. Please select the answer that best describes your experience with administrative procedure and rule making.

- ❑ Fewer than 24 months
- ❑ 24 to 35 months
- ❑ 36-47 months
- ❑ 48 or more months

* 6. Indicate the number of years you have served as an administrative law judge, adjudicator, or hearing officer/examiner.

- ❑ Less than 1 year
- ❑ 1 to 2 years
- ❑ 2 to 5 years
- ❑ 5 to 10 years
- ❑ More than 10 years

* 7. How many decisions have you written that included findings of fact and/or conclusions of law?

- ❑ None
- ❑ 1-26
- ❑ 26 or more

* 8. Please describe your experience and familiarity with the Administrative Procedure Act (chapter 34.05 RCW). Include specific timeframes and details regarding your experience with this law. If you do not have this experience, please type N/A.

* 9. Have you been convicted of a misdemeanor or felony within the past ten (10) years? (Answering yes will not automatically bar you from employment)

- ❑ Yes
- ❑ No

* 10. If you answered yes to the question above, please list the conviction, date of conviction and county and state in which the conviction occurred. If you answered no, please type N/A.

* 11. In accordance with RCW 48.02.090(5), Office of Insurance Commissioner employees are prohibited from having any interest, directly or indirectly, in an insurance company other than as a policy holder. This prohibition includes the receipt of renewal commissions. If hired, do you agree to abide by this law?

- ❑ Yes
- ❑ No

12. We're interested in knowing if our advertising is working. Where did you hear about this job opening?

* Required Question

EXH. C

**From:** Hamie, John (OIC)
**To:** Odiorne, Jim (OIC)
**Subject:** RE: Draft documents for your review - Delegation of Authority/Protocol/Screening Protocol
**Date:** Tuesday, December 16, 2014 3:40:25 PM

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Jim,

First, I'm going to provide questions, comments, and suggestions specific to the documents you shared and the process they reflect. Then I have some general observations and suggestions.

**Preventing ex parte communications.** The "Screening Protocol" is clearly intended to prevent improper ex parte communications. Some suggestions to consider:

- No. 2 involves screening from "charging or prosecutorial functions." But these are not the only functions that may result in administrative proceedings. For instance, Form A filings may result in hearings that require the Commissioner to be screened as well as appeals of regulatory actions such as disapproval of filed rates and forms. One approach you might consider is to include a general requirement that as soon as it appears a non-enforcement regulatory matter becomes adversarial or may be the subject of an appeal or litigation, the Commissioner, etc., should be screened from communications about the specific facts of the matter.
- No. 4 discusses establishing separate "case files." What does this mean? Is it a reference to hard copy files or to electronic or both? If it is a reference to electronic case files in SIMBA, it would require IT resources to set it up since, based upon my understanding, SIMBA does not currently possess this functionality.
- The "Table" contains an entry entitled "Licensing Hearings." What is intended by that term? Is it a reference to enforcement matters involving licensees (insurance producers, *i.e.*, agents and brokers) or holders of certificates of authority (ordinarily insurers, HMOs, and HCSCs), or both? Or is it a reference to matters where licensing issues are the subject of the proceeding? If the latter is the case, there would be few and would include some but not all enforcement cases. For instance, if the alleged misconduct involved activities relating to the sale of a product, that would not involve licensing issues.
- Also, the "Table" has only two categories: "License Hearings" and "Other OIC Hearings." What about those matters that are of such a complex nature that it is determined to assign them for hearing to someone other than the OIC Presiding Officer or the OAH? Based upon my review of the other documents (for example, the Delegation of Authority), it appears that the Commissioner has retained the authority to make these special assignments. If this should be a third category, the process for these assignments should be established. (See below.)

**Process for assignment of cases.** It is important to avoid a conflict of interest in the process for assigning matters for hearing whether to the OAH, the OIC Presiding Officer, or to a contracted hearings officer. That is, the assignment should not be influenced by anyone that is connected to a party in the matter. Perhaps the OIC Presiding Officer and the Commissioner could meet regularly—and fairly frequently—to discuss matters for assignment that are out of the ordinary. (Although it may be a bit awkward for the Commissioner to communicate his intent to the OIC Presiding Officer to delegate handling matters of a complex nature to someone other than the OIC Presiding Officer.)

In addition, I didn't spot anywhere in the contract documents with the OAH any reference to the Commissioner's retaining authority to make different delegations with respect to a specific proceeding.

**Communication of agency policy.** The draft position description includes under the section entitled "Primary Responsibilities" the following: "As the Commissioner's delegate, communicates with the Commissioner about agency policy to further the agency's goal of regulating the insurance industry in a fair and efficient manner." Does this create the appearance of an impropriety since agency policy may influence the decision yet the policy may not be known by or communicated to the parties in the case (not part of the hearing record) and the appealing party may not be able to challenge it at the hearing? If the final agency decision does not reference the relevant agency policy, the appealing party can't challenge it on appeal to superior court and it is possible that the court could reverse the decision without considering the agency policy. My suggestion is that an avenue for presenting evidence of agency policy be established—by rule?—for the purpose of ensuring fairness of the proceedings by providing notice of the elements that must be addressed during the hearing. Then the OIC Presiding Officer and the Commissioner may discuss the agency policy and consider the grounds put forward by the appealing party challenging it.

**OAH.** The document entitled "Exhibit A, OAH Contract No. MOU14-02, Statement of Work" on page 1 in paragraph 1.A.2. uses "agent" in the sentence "For those appeals where an *agent* has (*sic*) is entitled to an automatic stay in accordance with RCW _48.04.020___, OIC expects a hearing on stay be convened within ten business days after OAH receives the appeal."

- It is not clear what the term "agent" is intended to reference. If it is intended to refer to a licensee licensed under chapter 48.17 RCW, then the proper term should be "insurance producer" since the license authorizes the holder to act as an agent or a broker or both. What about companies that demand a hearing? They are holders of a certificate of authority and not ordinarily referred to as licensees. Are they to be included within the scope of this Statement of Work?
- Finally, I'm not sure that an expectation that a hearing will be convened "within ten days after OAH receives the appeal" is realistic. I defer to AnnaLisa on this point but, based upon my experience with hearing officer and attorney schedules, it's possible that a prehearing conference could be held within that time frame—although not likely. The time frame also does not take into account the need for a prehearing conference or discovery. Even if the ten-day limit remains in the Statement of Work, it is probable that a motion for continuance would be granted in almost every case thereby rendering the requirement entirely ineffective.

Next are some general observations and suggestions.

Rather than maintain an in-house hearings officer, perhaps you should consider another approach. The general rule would be that all matters are referred to the OAH for hearing except for "specific proceedings" that are delegated on a case-by-case basis to a contracted attorney or other qualified person. The criteria for the determination to do so would include factors such as complexity, the regulatory significance of the involved issues, and the personal participation of the Commissioner in the proceeding. All referred matters, except those in which the Commissioner participates, will be

submitted to the Commissioner via the initial order process. The Commissioner will have the benefit of a legal advisor to assist in preparing final orders. I suggest that any such legal advisor be an assistant attorney general or a contracted attorney (or law firm). This will preserve the attorney-client privilege. (Under the approach reflected in the draft documents, conversations between the OIC Presiding and the Commissioner would not be privileged.) The legal advisor will not be an employee and will serve only when needed. Most matters that result in initial orders will be straightforward and fairly routine. The legal advisor could also consult with the Commissioner in determining whether a specific proceeding should be delegated to someone other than the OAH for hearing.

To accomplish this, rulemaking would be necessary. OAH judges (along with presiding officers who are recipients of delegations in specific proceedings) may need some help in figuring out the OIC policy that should be applied in each case. My suggestion is that rules be adopted to permit the introduction of specified categories of evidence to ensure that the policy will be in the hearing record. In addition, rules could also be adopted that permit the parties in a matter to submit briefs (limited in length and scope, etc.) to the Commissioner prior to his consideration of an initial order. That way, if the OIC staff (or other parties) have issues with the initial order, they can be communicated on the record and the opposing party will have an opportunity to respond.

Please let me know if you have any questions.

**John Hamje**
Consumer Protection
360-725-7262

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**From:** Kraft, Jen (OIC) **On Behalf Of** Odiorne, Jim (OIC).
**Sent:** Wednesday, December 10, 2014 4:55 PM
**To:** Gellermann, AnnaLisa (OIC); DeLeon, Marta (ATG); Siems, Jason (OIC); Hamje, John (OIC)
**Cc:** Watness, Melanie (OIC)
**Subject:** Draft documents for your review - Delegation of Authority/Protocol/Screening Protocol

To all,

Please review the attached documents, reply with your comments and suggested edits by December 18; we will request review by AGO after we have internal consensus.

Thank you and please have a good evening.

Jim

James T. Odiorne, CPA, JD
Chief Deputy Insurance Commissioner