

FILED

2016 MAY 16 A 8:04

HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of

FIRST AMERICAN TITLE INSURANCE
COMPANY,

Authorized Title Insurer.

ORDER NO. 15-0166

FIRST AMERICAN TITLE
INSURANCE COMPANY'S
MOTION FOR
RECONSIDERATION, OR, IN THE
ALTERNATIVE, TO
AMEND/ALTER THE FINDINGS
OF FACT, CONCLUSIONS OF
LAW, AND FINAL ORDER

RELIEF REQUESTED

First American Title Insurance Company ("First American") moves to vacate portions of the Findings of Fact, Conclusions of Law and Final Order dated May 4, 2016 ("Final Order") and/or to Alter or Amend the same pursuant to CR 59(a) and (h), and related law.

First American respectfully disagrees with but accepts the Presiding Officer's findings regarding violations of WAC 284-29-200(6) and 265. However, the Final Order purports to find violations of law beyond the claims of the OIC which were never alleged in the OIC Notice of Hearing. The Presiding Officer found that First American violated WAC 284-29-215, 220(5)(b)(i), and 260(7). The OIC did not charge First American with violations of these rules in its Notice of Hearings. By these Findings, the Presiding Officer exceeded his authority and made findings beyond his authority and jurisdiction in this matter.

FIRST AMERICAN TITLE INSURANCE COMPANY'S
MOTION FOR RECONSIDERATION - 1



1 In addition, the Presiding Officer improperly undertook an independent investigation of
2 additional facts after the hearing and then based his decision in material part upon those facts
3 which were not part of the record during the hearing. The Presiding Officer's personal
4 investigation and use of facts not adduced during the hearing was improper and deprived First
5 American of its right to confront these exhibits, produce its own witnesses and rebut the
6 evidence submitted after the post-hearing evidence. For the reasons set forth below, violations
7 of regulations not set out in the OIC Notice of Hearing and matters which are the result of the
8 Presiding Officer's independent, post-hearing, personal fact investigation should be stricken
9 from the evidentiary record, the Final Order and the Final Order accordingly amended, to
10 conform with applicable law.

11 LAW AND ARGUMENT

12 The purpose of adjudicative proceedings under the Washington Administrative
13 Procedures Act ("APA") is to provide due process for those subject to agency regulation.
14 Integral to this concept is a neutral hearing officer who receives evidence proffered by the
15 regulated entity and the agency in connection with charges made by that agency that specific
16 violations of law have occurred. The hearing officer's role is to preside over the hearing, receive
17 and weigh evidence submitted by the parties and to render a decision based upon a
18 preponderance of that evidence as to whether specific charges of the agency should be upheld
19 or rejected and dismissed. To this end, the Presiding Officer "shall give all parties full
20 opportunity to submit and respond to pleadings." RCW 34.05.437.

21 Prerequisite to any adjudicative proceeding initiated by an agency is a written Notice of
22 Hearing. RCW 34.05.434. That Notice defines the subject of the proceedings. Among other
23 things, the Notice of Hearing must include "a reference to the particular sections of the statutes
24 and rules involved." And "a short and plain statement of the matters asserted by the agency."
25 RCW 34.05.434(2)(g) and (h). The Presiding Officer's role in adjudicative proceedings is to
26 "regulate the course of the proceedings in conformity with applicable rules and the prehearing



1 order.” RCW 34.05.449. The Notice of Hearing is the key pleading of the administrative
2 agency. It is the administrative equivalent of a complaint in superior court, the central purpose
3 of which is to provide adequate notice to the court and the adversary of the nature of the asserted
4 claim. *Shooting Park Ass’n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006)
5 (complaint that fails to give opposing party fair notice is inadequate); *Dewey v. Tacoma School*
6 *Dist. No. 10*, 95 Wn. App. 18, 23, 974 P.2d 847 (1999) (pleading is insufficient if it fails to give
7 opposing party fair notice of what the claim is and the ground upon which it rests).

8 The OIC Notice of Hearing in this matter alleged violations of WAC 284-29-200(6),
9 WAC 284-29-220(2), and WAC 284-29-265.¹ These allegations defined the scope of the
10 hearing. The Presiding Officer’s obligation was to determine whether the particular portions of
11 the rules set out in the Notice of Hearing had been violated.

12 **A. The Presiding Officer Erred by Finding Violations Not Alleged in the Notice of**
13 **Hearing.**

14 The Final Order finds that First American violated WAC 284-29-215 dealing with co-
15 advertising and dedicates nearly three pages of discussion to this subject. Final Order ¶¶21-24,
16 pages 16-18. Neither that rule, nor its subject matter appears anywhere in the Notice of Hearing.
17 Determination of whether this rule was violated was not part of the OIC’s allegations or
18 properly part of this hearing. Respectfully, the Presiding Officer lacked jurisdiction to
19 independently decide matters not within the four corners of the Notice of Hearing. The OIC
20 chose which rules (and specifically which subsections of those rules) it claimed were violated.

21
22
23
24 ¹ WAC 284-29-235 dealing with educational programs was identified in the Notice of Hearing
25 but no violation was alleged. In fact, all evidence submitted by both parties established that the
26 subject matter of the hearing involved trade association related activities governed by
Section 220. The Final Order specifically found that WAC 284-29-220 governs the title
insurance involvement with trade associations and that SCCAR was a trade association. Final
Order 12.



1 First American responded to those allegations. First American had no notice, opportunity, or
2 obligation to defend against “violations” of any other rules during this hearing.

3 Similarly, the Presiding Officer independently found First American violated
4 WAC 284-29-220(5)(b)(i) and WAC 284-29-260(7). See Final Order ¶¶ 14, 17. The OIC made
5 no claim in its Notice of Hearing that First American violated the particular sections of these
6 rules. Identification of “particular section of the rules involved” is a mandatory condition
7 precedent to any determination of regulatory violations. RCW 34.05.434(2)(g). Here, the only
8 portion of WAC 284-29-220 which was alleged to have been violated by the OIC was
9 subsection (2). Accordingly, findings of violations of subsection (5) are beyond the scope of
10 this hearing and should be deleted from portions of the Final Order. For the same reason the
11 Final Order should be amended deleting references to violation of WAC 284-29-260(7).

12 The Presiding Officer should vacate and delete those portions of the Final Order (¶¶ 14,
13 17, 21-24, and related footnotes) dealing with the subjects and claims not alleged in the Notice
14 of Hearing.

15 **B. The Presiding Officer Should Dismiss Claims for Alleged Violation of WAC 284-**
16 **29-220(2).**

17 The Notice of Hearing alleged that First American violated WAC 284-29-220(2) by
18 “excluding some affiliate numbers from the event”. Notice of Hearing, Penalties and Relief
19 Requested, ¶ 3. The Presiding Officer found to the contrary.

20 Both the Electronic Delivery Report (Exhibit FA-6) and Electronic Open
21 Report (FA-7) demonstrate that SCCAR sent notice of the event to all of
22 its members, including affiliates, some of which are title insurers and
direct competitors of First American. Final Order, ¶ 8.

23 Accordingly, this OIC allegation should be dismissed with prejudice. We request that
24 the Final Order be amended to expressly make this ruling.

25
26



1 **C. The Presiding Officer Improperly Conducted a Factual Investigation Post Hearing**
2 **and Improperly Incorporated Those Results Into the Final Order. None of This**
3 **Information was Presented During the Hearing.**

4 The two day hearing in this matter concluded March 29, 2016 after final
5 supplementations of the record by the parties and final argument of counsel. Thereafter, the
6 Presiding Officer independently apparently conducted his own investigation of facts to obtain
7 facts not presented by the parties or even made part of the record during the hearing. The results
8 of that post-hearing investigation were copiously incorporated into the Final Order. The
9 Presiding Officer's post hearing investigation is contrary to Washington law, prejudicial and
10 impermissibly attempts to alter the parties' evidentiary record. All Final Order references to
11 post-hearing "evidence" gathered by the Presiding Officer should, at a minimum, be excised
12 from the Final Order, and the post hearing "evidence" removed from the evidentiary record.
13 Specifically, this includes PO-1 and PO-2.² These documents should be deleted from the record
14 of the proceedings as they were not part of the record during the hearing in this matter and no
15 party had an opportunity to address them.

16 The law in Washington requires that judges and fact finders in litigation proceedings
17 decide issues presented by the parties solely based upon the evidence admitted during the trial
18 or proceedings.

19 It is essential to a fair trial that everything you learn about this case comes
20 to you in this courtroom, and only in this courtroom. You must not allow
21 yourself to be exposed to any outside information about this case.
22 WPI 1.01.

23 Do not seek evidence on your own. Do not consult dictionaries or other
24 reference materials. Do not conduct any research into the facts, the issues
25 or the people involved in this case. This means that you may not use
26 [Google or other internet research engines][internet resources] to look
27 into anything at all related to this case. *Id.*

28
29
30
31
32
33
34
35
36 ² Additional post hearing information obtained by the Presiding Officer also appears in
footnotes 3 and 4 in the Final Order.



1 ... [D]o not try to find out any more about anything related to this case
2 by any means other than what you learn in this courtroom. These rules
insure that the parties will receive a fair trial. *Id.*

3 It is your duty to decide the facts in this case based upon the evidence
4 presented to you during this trial. WPI. 1.02.

5 The above excerpts from the Washington Pattern Jury Instructions are adopted by our
6 Supreme Court and the law of Washington.

7 The Washington APA has similar provisions for Presiding Officers.

8 Initial and final order shall include a statement of findings and
9 conclusions and the reasons and basis therefor, on all matters of fact, law
10 or discretion presented on the record. . . . RCW 34.05.461(3).

11 Findings of Fact shall be based upon the evidence of record in the
12 adjudicative proceedings and on matters officially noticed in that
13 proceeding. (Emphasis applied.) *Id.* at 4.

14 The Presiding Officer's role in adjudicative proceedings is to rule on the admissibility
15 of evidence presented by the parties and then decide the issues set forth in the Notice of Hearing
16 based upon that evidence alone. We are aware of no authority which allows a presiding officer
17 to independently investigate additional facts after the hearing and to retroactively add them to
18 the record in the proceedings.

19 In fact, the APA prohibits anyone who has acted as an investigator, prosecutor or
20 advocate from serving as a Presiding Officer. RCW 34.05.458. By conducting his own post-
21 hearing factual investigation, the Presiding Officer became both an advocate and investigator.
22 Those actions were improper and the evidence obtained through those actions should be
23 removed from the record and deleted from the Final Order.

24 Respectfully, beyond determining admissibility of evidence, hearing officers do not
25 have the power to determine what is included in the evidentiary record of proceedings. That is
26 the province of the parties and their counsel. The evidentiary record is comprised only of what
the litigants produce. Judges are to decide issues solely on the record presented by the parties.
Otherwise, safeguards designed to ensure a fair trial become illusory. Any judge dissatisfied by



1 the evidence adduced by one party during the proceedings could retroactively augment the
2 "record" after the hearing and then base a decision upon evidence which was never considered
3 during the hearing. That's what happened here.

4 1. SCCAR Bylaws are not Properly Part of the Evidentiary Record.

5 As one part of the Presiding Officer's post-hearing investigation, it appears that the
6 Presiding Officer engaged in at least indirect communications with two witnesses in order to
7 obtain evidence not presented during the hearing. By email dated March 30, Ms. Seabourne-
8 Taylor communicated with Messrs. McIrvin and Walquist on the Presiding Officer's behalf and
9 requested those witnesses to voluntarily produce a copy of SCCAR's bylaws "in lieu of OIC
10 Presiding Officer subpoenaing such information pursuant to RCW 34.05.446(1) or WAC 10-
11 08-120(2)." Declaration of Jerry Kindinger in Support of Motion for Reconsideration
12 ("Kindinger Decl."), Ex. 1. Judges are to evaluate witnesses based upon their testimony at trial.
13 Communications with witnesses by the judge are limited to trial proceedings absent
14 extraordinary circumstances. Both Messrs. McIrvin and Walquist testified during the
15 proceedings and both had been formally excused at the conclusion of their testimony by the
16 Presiding Officer. We are aware of no authority which allows hearing officers to have post-
17 hearing contact with witnesses regarding new requests for information.³

18 We respectfully disagree that RCW 34.05.446(1) referenced in Ms. Seabourne-Taylor's
19 email to these witnesses authorizes the Presiding Officer to issue subpoenas for anything other
20 than for discovery purposes or to compel attendance of witnesses at trial. The plain language of
21 this statute pertains to prehearing discovery. We are aware of no authority that authorizes use
22

23 ³ Further, the context of the communications with these witnesses seems inappropriate. The
24 email of Ms. Seabourne-Taylor, on its face, makes an informal request but notes that if
25 necessary, Presiding Officer will issue a subpoena. Post-hearing informal communications with
26 witnesses should not be had in the first instance and having those communications under a
veiled threat of the issuance of a subpoena if documents are not voluntarily produced seems
inappropriate for a judicial officer.



1 of this power by the hearing officer to conduct post hearing investigations or obtain post-hearing
2 information that was not presented by the parties during the hearing itself.

3 When the SCCAR representatives acceded to the Presiding Officer's request, the
4 Presiding Officer *sua sponte* undertook to add the document as hearing exhibit on April 11th.
5 Kindinger Decl., Ex. 2. In doing so, the Presiding Officer exceeded his authority by altering the
6 evidentiary record of the proceedings after the hearing. First American objects to this action.

7 It matters naught that evidence obtained post-hearing might have been relevant if
8 produced by the parties during the hearing. Relevant evidence is often omitted from proceedings
9 as a result of tactical or other decisions by the parties or their counsel. What matters here is that
10 post-hearing, the Presiding Officer improperly substituted his judgment for the judgment of the
11 parties. As a result, neither party had an opportunity during the hearing to address or question
12 any witness regarding the bylaws, or present evidence raised by this document of his post-
13 hearing investigation.

14 2. The October 2006 "investigation" is Irrelevant and not Properly Part of the
15 Evidentiary Record.

16 One of the "exhibits" the Presiding Officer added to the record was an October 2006
17 "investigation" written by OIC representative Jim Tompkins entitled "An Investigation into the
18 Use of Incentives and Inducements by Title Insurance Companies". PO -1. The so-called
19 investigation involved regulations which were repealed over seven years ago. No part of this
20 hearsay document involved any issues set out in the OIC Notice of Hearing, or even the subject
21 matter of trade associations. This document is wholly irrelevant to the issues in this case and
22 irrelevant as to time. None of the parties believed this document was relevant to the issues
23 presented. None offered it. Yet, discussion regarding this ten-year-old unsubstantiated
24 document occupied at least four pages of the Final Order with unflattering excerpts about First
25 American copiously quoted and underscored (presumably for emphasis) apparently to support
26



1 the presiding officers conclusion that ten years ago, some OIC representatives believed First
2 American was a scofflaw. None of the opinions expressed in this document were ever
3 substantiated. Even Jim Tompkins, the author of the document, testified during the hearing that
4 no disciplinary actions were ever commenced against First American to substantiate his
5 opinions and that no administrative findings ever established or proved any of the several
6 statements made about First American in this document. Nonetheless, the Presiding Officer
7 gratuitously wrote:

8 Given this checkered history, I call upon First American's leadership to
9 honor the dictates of RCW 48.31.030 and direct their staff to abstain
10 from deception and practice honesty within the dictates of the laws and
 regulations governing title insurance in this State. Final Order, ¶ 14.

11 This hearing involved (1) whether First American kept adequate business records to
12 substantiate the limited time it donated to a non-profit trade association for a single
13 event (2) whether time was required to be kept for such activities under WAC 284-29-220, and
14 (3) whether less than all trade association members were invited to this free event. Deception
15 and dishonesty were not at issue.

16 The above statement is inappropriate to the issues in this case. It is inappropriate because
17 the nature and tone of the statement is prosecutorial and beyond issues set out in the Notice of
18 Hearing. In addition, it creates a totally incorrect impression. No recognition or reference
19 appears to the actual evidence adduced in the hearing about (1) repeated requests of First
20 American to reach out to the OIC in an effort to ensure compliance or obtain guidance regarding
21 their actions on the very matters at issue. FA-16, 22, 23, 24, 25, testimony of Matthew Sager.
22 The statement also wholly ignores the evidence presented during the hearing about First
23 Americans extensive infrastructure at the national and state level implemented exclusively for
24 the purpose of ensuring compliance with the laws of Washington and every other state in which
25 the company does business and to provide continuous oversight of its business activities to
26 ensure regulatory compliance. It also ignores testimony presented during the hearing regarding



1 the extent to which compliance efforts and discussions are an on-going company emphasis and
2 a frequent topic of discussion at First American offices throughout Washington and elsewhere.
3 Testimony of Matthew Sager; testimony of Sari-Kim Conrad.

4 We request that PO-1 be removed from the record because it is irrelevant to the issues
5 defined by the Notice of Hearing and represents an improper post-hearing addition to the
6 evidentiary record made unilaterally by the Presiding Officer. First American had no
7 opportunity to respond to this document during the hearing. We respectfully request the Final
8 Order be amended removing the above statement as well.

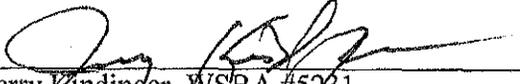
9 **CONCLUSION**

10 First American respectfully requests that its Motion for Reconsideration and
11 amendment or alteration of the Final Order be granted and that the Final Order be amended as
12 set forth above and that PO-1 and PO-2 be deleted from the evidentiary record in these
13 proceedings.

14 DATED this 16th day of May, 2016.

15 Respectfully submitted,

16 RYAN, SWANSON & CLEVELAND, PLLC

17
18 By 

19 Jerry Kindinger, WSBA #5231
20 Attorneys for First American Title Insurance
Company

21 1201 Third Avenue, Suite 3400
22 Seattle, Washington 98101-3034
23 Telephone: (206) 464-4224
24 Facsimile: (206) 583-0359
25 kindinger@ryanlaw.com
26

