

BEFORE THE STATE OF WASHINGTON  
OFFICE OF INSURANCE COMMISSIONER

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In the Matter of:

PACIFIC STAR INSURANCE COMPANY,

Respondent.

Docket No. 16-0043

ORDER ON PACIFIC STAR'S  
OBJECTION TO NOTICE OF RECEIPT  
OF OIC'S NOTICE OF REQUEST FOR  
HEARING AND SCHEDULING OF  
HEARING

HEARINGS UNIT  
OFFICE OF  
INSURANCE COMMISSIONER

**TO:** Pacific Star Insurance Company  
c/o Brian F. Kreger, Counsel  
999 Third Avenue, Suite 3000  
Seattle, WA 98104

**COPY TO:** Mike Kreidler, Insurance Commissioner  
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner  
Doug Hartz, Deputy Commissioner, Company Supervision Division  
AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division  
Drew Stillman, Insurance Enforcement Specialist, Legal Affairs Division  
Office of the Insurance Commissioner  
PO Box 40255  
Olympia, WA 98504-0255

Background.

On May 19, 2016, Drew Stillman, Insurance Enforcement Specialist of the Office of Insurance Commissioner ("OIC") filed and served on Pacific Star Insurance Company ("Pacific Star") a Notice of Intent to Impose Fine After Hearing for alleged violations of RCW 48.05.190(1), RCW 48.30.010, WAC 284-030-330(2)(3) and (16), WAC 284-30-340, WAC 284-30-370 and WAC 284-30-394, involving untimely claims processing and unfair claims handling practices. Included in said Notice was a request that the Hearings Unit of the Office of the Insurance Commissioner ("Hearings Unit") schedule the matter for hearing.

On May 20, 2016, the Hearings Unit filed and served on the OIC and Pacific Star a Notice of Receipt of OIC Notice of Request for Hearing notifying the parties that the Hearings Unit had received the request for hearing and that the parties would be contacted to schedule a telephonic prehearing conference.

On May 24, 2016, Pacific Star filed with the Hearings Unit its Objection to Notice of Receipt of OIC Notice of Request for Hearing and to Scheduling of a Hearing ("Objection"). Upon receipt of the Objection, the undersigned set deadlines for OIC's Response to the Objection, and Pacific

Star's Reply. On June 2, 2016, OIC filed its Response to the Objection. On June 7, 2016, Pacific Star filed its Reply.

- A. Whether the Commissioner must pursue his authority under RCW 48.02.080(3) and await Pacific Star's demand for hearing under RCW 48.04.010, prior to commencing a hearing himself or herself under RCW 48.04.010 and RCW 48.05.185.

At 3:8-11 of its Objection, Pacific Star argues that "any scheduling of a hearing by the Presiding Officer at this time would be premature and would disregard the legal procedures that are clearly established in the insurance code."

RCW 48.04.010 sets out circumstances under which the Commissioner *may* or *shall* conduct a hearing, and states in part:

- (1) The commissioner may hold a hearing for any purpose within the scope of this code as he or she may deem necessary. The commissioner shall hold a hearing:
- (a) If required by any provision of this code; or
  - (b) Except under RCW 48.13.475, upon written demand for a hearing made by any person aggrieved by any act, threatened act, or failure of the commissioner to act, if such failure is deemed an act under any provision of this code, or by any report, promulgation, or order of the commissioner other than an order on a hearing of which such person was given actual notice or at which such person appeared as a party, or order pursuant to the order on such hearing.

(Emphasis added).

RCW 48.04.010 clearly authorizes the Commissioner to hold a hearing "for any purpose" within the scope of this code (RCW Title 48),<sup>1</sup> as he or she "*may* deem necessary." The word "may" in a statute has a permissive or discretionary meaning, and does not create a duty to do a particular act. *National Electrical Contractors Assn. v. Riveland*, 138 Wn.2d 9, 28, 978 P.2d 481 (1999)(citing *Yakima County (W. Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 381, 858 P.2d 245 (1993)).

WAC 284-02-070(1)(a) states that hearings before the OIC are conducted according to RCW Ch. 48.04 and RCW Ch. 34.05, the Administrative Procedure Act. RCW 34.05.010(1) defines "adjudicative proceeding" as:

[A] proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings also include all cases of licensing and rate making in which an application for a license or rate change is denied except as limited by RCW 66.08.150, or

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<sup>1</sup> As RCW 48.01.010 states: "Title 48 RCW constitutes the insurance code."  
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a license is revoked, suspended, or modified, or in which the granting of an application is contested by a person having standing to contest under the law.

(Brackets and emphasis added).

RCW 34.05.413(1) states: "Within the scope of its authority, an agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction." RCW 34.05.413(5) adds: "An adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted."

In *Hutmacher v. Bd. of Nursing*, 81 Wn. App. 768, 771-772, 915 P.2d 1178 (1996), the Court explains the breadth of an adjudicative proceeding, and that an agency may commence one upon its own initiative under RCW 34.05.413, rather than commencing one upon receiving a demand for hearing per RCW 34.05.419, stating:

"An adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted." RCW 34.05.413(5). Thus, an adjudicative proceeding is not limited to the formal hearing itself, but also contemplates other stages of proceedings affecting the rights of an individual under the administrative scheme. See generally William R. Anderson, *The 1988 Washington Administrative Procedure Act--An Introduction*, 64 Wash. L. Rev. 781, 789 (1988).

Here, the Board notified Hutmacher that it would be adjudicating her case by serving the Statement of Charges. This service apprised Hutmacher that an adjudicative proceeding had commenced; the only remaining question was whether the proceeding would be completed via informal settlement, formal hearing, or default. We hold that the Board's filing of the Statement of Charges commenced the adjudicative proceeding. See RCW 34.05.413(1).

[3] Hutmacher's arguments to the contrary are not persuasive. The statute she relies upon relates to commencing an adjudicative proceeding after receipt of a person's application. See RCW 34.05.419; see also RCW 34.05.413(2) (agency shall commence an adjudicative proceeding upon timely application). Hutmacher's answer constituted a response to a pending adjudicative proceeding, not an application for an adjudicative proceeding. Thus, RCW 34.05.419 is inapplicable. We therefore need not reach the issue as to whether the statute's timeline is directory or mandatory. See *Nichel v. Lancaster*, 97 Wn.2d 620, 623-28, 647 P.2d 1021 (1982).

(Emphasis added).

Therefore, RCW 34.05.413(1) and *Hutmacher* permit the Commissioner, and the undersigned, to commence an adjudicative proceeding in this matter, without the necessity of a demand for hearing

filed by Pacific Star per RCW 34.05.419. Further support for this position is found in additional statutory provisions of the insurance code (i.e., RCW Title 48), that also permit or require the Commissioner to hold hearings.

RCW 48.02.060 lists some of the Commissioner's general powers and duties, including that the Commissioner *may* hold hearings for the administration of the insurance code, and states:

- (1) The commissioner has the authority expressly conferred upon him or her by or reasonably implied from the provisions of this code.
- (2) The commissioner must execute his or her duties and must enforce the provisions of this code.
- (3) The commissioner may:
  - (a) Make reasonable rules for effectuating any provision of this code, except those relating to his or her election, qualifications, or compensation. Rules are not effective prior to their being filed for public inspection in the commissioner's office.
  - (b) Conduct investigations to determine whether any person has violated any provision of this code.
  - (c) Conduct examinations, investigations, hearings, in addition to those specifically provided for, useful and proper for the efficient administration of any provision of this code.

(Emphasis added).

RCW 48.02.060 is yet another instance of the Legislature's use of the word "may" in a statute, in this instance to provide the Commissioner with discretion to hold a hearing useful to his administration of RCW Title 48.

The Legislature's habitual use of the word "may" in granting power to the Commissioner continues unbridled in RCW 48.05.185 which explains that the insurance Commissioner *may* levy a fine upon an insurer of at least \$250, and not more than \$10,000, but only after a hearing occurs, or the insurer consents to the fine, stating in part:

After hearing or with the consent of the insurer and in addition to or in lieu of the suspension, revocation, or refusal to renew any certificate of authority the commissioner may levy a fine upon the insurer in an amount not less than two hundred fifty dollars and not more than ten thousand dollars. . . .

The Notice of Intent to Impose Fine After Hearing that the OIC filed in this matter, which among other things, seeks to impose a \$90,000 fine against Pacific Star, represents the OIC's request to

levy a fine under RCW 48.08.185 against Pacific Star. In so doing, the OIC has consciously chosen *not* to pursue an *alternative* form of action against Pacific Star under RCW 48.02.080(3), which states that if the Commissioner has reason to believe that any person<sup>2</sup> is violating or is about to violate any provision of the insurance code, he or she *may*:

(a) issue a cease and desist order; and/or

(b) bring an action in any court of competent jurisdiction to enjoin the person from continuing the violation or doing any action in furtherance thereof.

As discussed above, the Legislature's repeated use of the word "may" in statutes granting the Commissioner power to administer the insurance code, including RCW 48.02.080(3), is the Legislature's conscious recognition of the discretion lodged with the Commissioner to administer RCW Title 48. RCW 48.02.080(3) does not contain language making it mandatory for the Commissioner to pursue the alternative courses of action therein. Under *Riveland*, discussed above, the enforcement option the Commissioner chooses from the potpourri of statutory alternatives in 48.04.010(1), RCW 48.05.140, RCW 48.05.185, RCW 48.02.060(3)(c), and RCW 48.02.080(3), among others, is entirely within his discretion.

At 2:3-7 of its Objection, Pacific Star states that any attempt by the Commissioner and the undersigned *at this time* to note or schedule this matter for hearing pursuant to RCW 48.04.010(1), RCW 48.02.060(3)(c), RCW 48.05.185, and WAC 284-02-070 "deprives Pacific Star of its due process rights protected by the constitution and laws of the state of Washington." However, an administrative body does not have the authority to determine the constitutionality of the law it administers; only the courts have that power. *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974)(citations omitted); *Prisk v. Poulsbo*, 46 Wn. App. 793, 798, 732 P.2d 1013 (1987)(citations omitted); *Carr v. Washington State Liquor Control Bd.*, 188 Wn. App. 212, 226, 352 P.3d 849 (2015).

That said, the fundamental requirement of due process is notice and an opportunity to be heard. *Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995)(citations omitted). So long as the party is given adequate notice and an opportunity to be heard and any alleged procedural irregularities do not undermine the fundamental fairness of the proceedings, this court will not disturb the administrative decision. *Id.* Pursuant to the authority in RCW 34.05.413(1), the Commissioner's authority to conduct a hearing pursuant to RCW 48.04.010(1), RCW 48.02.060(3)(c), RCW 48.05.185, and WAC 284-02-070, and the fundamental safeguards built into RCW 34.05.449(2) guaranteeing that all parties to an adjudicative proceeding before the OIC be given an opportunity to be heard, there appears to be no violation of the standard in *Sherman*. In fact, Pacific Star seems to admit as much at 12:13-14 of its Reply, wherein it states: "Pacific Star does not deny that it will have an opportunity to be heard if this matter proceeds to an administrative adjudicative proceeding." Pacific Star's statement at 6:4-6 of its Reply that by

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<sup>2</sup> RCW 48.01.070 defines "person" as: "[A]ny individual, company, insurer, association, organization, reciprocal or interinsurance exchange, partnership, business trust, or corporation." (Brackets added).

relying on the statutes above, namely RCW 48.04.010(1), RCW 48.02.060(3)(c), and RCW 48.05.185, rather than RCW 48.02.080(3), the Commissioner is acting outside the authority the Legislature granted him, is to no avail, and ignores the legislative fiat bestowed on the Commissioner.

In *Premera v. Kreidler*, 133 Wn. App. 23, 42, 131 P.3d 930 (2006), the court summarizes the broad authority the Legislature conferred upon the Commissioner to enforce the provisions of RCW Title 48 (i.e., the insurance code), stating:

To protect the public in insurance matters, "the legislature created the office of Insurance Commissioner and conferred upon that office the duty of enforcing the provisions of the code." *Ins. Co. of N. Am. v. Kueckelhan*, 70 Wn.2d 822, 831, 425 P.2d 669 (1967). To fulfill this mandate, it vested the Commissioner with broad authority. *Nat'l Fed'n of Retired Persons, Inc. v. Ins. Comm'r*, 120 Wn.2d 101, 109, 838 P.2d 680 (1992). The Commissioner has authority conferred by and reasonably implied from the insurance statutes. RCW 48.02.060(1); *Nat'l Fed'n of Retired Persons*, 120 Wn.2d at 109.

(Emphasis added).

Although a Commissioner cannot bind the courts, the courts appropriately defer to a Commissioner's interpretation of insurance statutes and rules. *Credit General Insurance Co. v. Zewdu*, 82 Wn. App. 620, 627, 919 P.2d 93 (1996); *Premera v. Kreidler*, 133 Wn. App. 23, 37, 131 P.3d 930 (2006). As the Court stated in *Premera*: "An agency's interpretation of the statutes it administers should be upheld if it reflects a plausible construction of the statute's language and is not contrary to legislative intent." 133 Wn. App. at 37.

The OIC's interpretation and construction of RCW 48.04.010(1), RCW 48.05.140, RCW 48.05.185, and RCW 48.02.080(3), at 2:17-21 of its Response is indeed plausible, reflects the broad authority and discretion given the Commissioner, and harmonizes those separate provision of the insurance code, and states:

Upon determining that an insurer has violated Washington's insurance laws, the Commissioner has several enforcement alternatives. He may refuse, suspend, or revoke the insurer's certificate of authority under RCW 48.05.140, he may fine the insurer under RCW 48.05.185, he may issue a cease and desist order under RCW 48.02.080(3)(a), and he may commence a lawsuit under RCW 48.02.080(3)(b). Each of these options is available to the Commissioner in every case, and may be exercised at his discretion.

(Emphasis added).

Statutes that concern the same subject matter, *in pari materia*, should be construed "as constituting one law to the end that a harmonious total schema which maintains the integrity of both is derived." *Beach v. Board of Adjustment*, 73 Wn.2d 343, 346, 438 P.2d 617 (1968); *State v. Houck*, 32 Wn.2d 681, 684, 203 P.2d 693 (1949). In seeking to harmonize provisions of a statute, statutes relating

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to the same subject must be read as complementary instead of in conflict with each other. *State v. Chapman*, 140 Wn.2d 436, 448, 998 P.2d 282 (2000).

RCW 48.04.010(1), RCW 48.05.140, RCW 48.05.185, RCW 48.02.060(3)(c), and RCW 48.02.080(3) are each provisions dealing with a particular matter under the insurance code; be that a hearing, a fine, or disciplinary action. They all contain discretionary language as well. RCW 48.01.150 states: "Provision of this code [RCW Title 48] relating to a particular kind of insurance or a particular type of insurer or to a particular matter prevail over provisions relating to insurance in general or insurers in general or to such matter in general." (Emphasis added). In *Gomez v. Life Insurance Co. of North America*, 84 Wn. App. 562, 567, 928 P.2d 1153 (1997), the Court echoes this sentiment and emphasizes that a more specific provision of the insurance code (RCW Title 48) controls over a more general provision, and states:

The structure of our insurance code indicates that the Legislature intended to treat life insurance and disability insurance separately. "[S]tatutes must be read together to determine legislative purpose to achieve a "harmonious total statutory scheme . . . which maintains the integrity of the respective statutes."" Under the insurance code, a more specific provision of the code controls over a general. The insurance code includes separate chapters governing disability insurance, group disability, life insurance, and group life. Other sections of the insurance code, such as the "Insurance Contract" chapter, treat life insurance differently from disability insurance.

(Emphasis added).

By exercising discretion specifically bestowed upon him or her under one, part, or all of the provisions RCW 48.04.010(1), RCW 48.05.140, RCW 48.05.185, RCW 48.02.060(3)(c), and RCW 48.02.080(3), the Commissioner is correctly applying the provision of the insurance code per RCW 48.01.150 and *Gomez*.

In *In the Matter of Case E-368* (or *Arnett v. Seattle General Hosp.*), 65 Wn.2d 22, 29-30, 395 P.2d 503 (1964), in setting aside the trial court's modification of an order of the Washington State Board Against Discrimination, the Court emphasized the sanctity of an agency's choice as to how it administers a statute that gives it discretion, stating:

It is the well-established law in this state, as well as in other jurisdictions, that modifications of administrative orders by a court of review are limited to acts that are arbitrary or capricious, or where the tribunal proceeded on a fundamentally wrong basis, or beyond its power under the statute. The general rule is well stated in 2 Am. Jur. (2d), Administrative Law § 672:

"Administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority, especially where a statute expressly authorizes the agency to require that such action be taken as will effectuate the purposes of the act being administered. The relation of remedy to policy is peculiarly one for the administrative

agency and its special competence, at least the agency has the primary function in this regard. In particular cases, it is held that the fashioning of the remedy or the propriety of the order is a matter for the administrative agency and not for the court; that the courts may not lightly disturb the agency's choice of remedies; that the order should not be overturned in the absence of a patent abuse of discretion or a showing that it is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the statute; or that the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist, or is unwarranted in law or without justification in fact. Where there is a sufficient basis for the orders issued it is no concern of the court that other regulatory devices might be more appropriate, or that less extensive measures might suffice. Such matters are the province of the legislature and of the administrative agency. . . ."

See *Whatcom Cy. v. Langlie*, 40 Wn. (2d) 855, 246 P. (2d) 836 (1952); *Morgan v. Department of Social Sec.*, 14 Wn. (2d) 156, 127 P. (2d) 686 (1942); *Sweitzer v. Industrial Ins. Comm.*, 116 Wash. 398, 199 Pac. 724 (1921).

The reasoning of the trial judge in his oral opinion modifying the tribunal order was not based on the ground that the tribunal exceeded its statutory power, or that the board's action was arbitrary or capricious, but the order was modified solely because the trial judge disagreed with the judgment exercised by the tribunal as to the necessary action to be taken in this case to effectuate the policy against further discrimination. The trial judge substituted his judgment for that of the tribunal and, in so doing, acted beyond his power.

(Emphasis added).

Per *Arnett*, while Pacific Star argues that the Commissioner may *only* exercise his authority under RCW 48.02.080(3), nothing precludes the Commissioner from exercising his authority and discretion under RCW 48.04.010(1), RCW 48.05.140, RCW 48.05.185, and RCW 48.02.060(3)(c).

B. *Whether Pacific Star may demand a hearing before OAH.*

At 6:22-24 of its Objection Pacific Star states: "If Pacific Star exercises its legal right to demand a hearing, Pacific Star can also demand that the hearing be presided over by an independent administrative law judge."

RCW 48.04.010(5) states: "A licensee under this title may request that a hearing authorized under this section be presided over by an administrative law judge assigned under chapter 34.12 RCW [Office of Administrative Hearings – "OAH"]. Any such request shall not be denied." (Brackets and emphasis added). However, Pacific Star is not a licensee under RCW Title 48 (i.e., the insurance code). Rather, as the OIC explains in ¶1 of its Notice of Intent to Impose a Fine after Hearing, Pacific Star is an authorized insurer domiciled in Wisconsin, and duly authorized to engage in the business of insurance in the state of Washington. At ¶ 12 of its Notice the OIC states

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that “in addition to or in lieu of the suspension, revocation, or refusal to renew the insurer’s certificate of authority, RCW 48.05.185 authorizes the Insurance Commissioner to levy up to a \$10,000 fine for an insurance law violation after a hearing.” (Emphasis added).

RCW 48.05.030(1) states in part: “No person shall act as an insurer and no insurer shall transact insurance in this state other than as authorized by a certificate of authority issued to it by the commissioner and then in force. . . .” However, contrary to the use of the phrase “certificate of authority” in RCW Ch. 48.05, the chapter of the insurance code pertaining to insurers, RCW 48.17.060, contained within the chapter of the insurance code pertaining to, among other things, producers, uses verbs associated with a license, and states: “A person shall not sell, solicit, or negotiate insurance in this state for any line or lines of insurance unless the person is licensed for that line of authority in accordance with this chapter.”<sup>3</sup> In particular, RCW 48.17.010(8) defines “license” in part as: “[A] document issued by the commissioner authorizing a person to act as an insurance producer or title insurance agent for the lines specified in the document.” The distinction between one who receives a certificate of authority and a licensee is also noted in RCW 48.01.110. See also WAC 284-02-070(2)(c)(“The commissioner may suspend or revoke any license, certificate of authority, or registration issued by the OIC.”)(Emphasis added); WAC 284-17-001(8)(defining licensee as: “[A] person licensed by the commissioner under Title 48 RCW to sell, solicit or negotiate insurance and includes adjusters and surplus line brokers.”)(Brackets and emphasis added).

The statutory provisions governing both insurers and producers demonstrate that the OIC must issue insurers a certificate of authority to operate as an insurer in this state, whereas the OIC issues producers a license to do so. This is not a distinction without a difference. The Legislature specifically references licensees in RCW 48.04.010(5), and not insurers who hold a certificate of authority. Where the Legislature uses certain statutory language in one statute and different language in another, a difference in legislative intent is evidenced. *In re Forfeiture of one 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009)(citation omitted); *Dep’t of Revenue v. Federal Deposit Insurance Corp.*, 190 Wn. App. 150, 162, 359 P.3d 913 (2015) (“It is an elementary rule that where the Legislature uses certain language in one instance, and different language in another, there is a difference in legislative intent.”)(citations omitted). As such, Pacific Star may not demand a hearing before OAH per RCW 48.04.010(5).

C. *Whether Insurance Enforcement Specialists employed by the OIC may appear before the Hearings Unit in a hearing in this matter.*

At pages 6-10 of its Reply, Pacific Star cites legal authority and argues that *only* the Attorney General’s Office may represent the OIC in this matter. Pacific Star notes that the Insurance Enforcement Specialist assigned by the OIC’s Legal Affairs Division to handle this matter is also a member of the Washington State Bar Association, and argues that he may not appear for the OIC in this matter. In particular, at 10:5-7 of its Reply, Pacific Star states that it “reserves the right to

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<sup>3</sup> See also RCW 48.15.070 which similarly discusses the *licensing* surplus line brokers.

file appropriate motions to have the Insurance Commissioner's legal representative disqualified." I address this matter now.

RCW 43.10.067 states in part:

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

...

(Emphasis added).

RCW 43.10.040 states in part:

The attorney general shall also represent the states and all . . . agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, and advise all officials. . . or agencies of the state in all matters involving legal or quasi legal questions. . . .

RCW 43.10.030(2) states that the Attorney General shall: "Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer. . . ."

GR 24(a)(3) states that the practice of law includes: "Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review." (Emphasis added).

In 1984 Op. Atty Gen. Wash. No. 23 ("AG Opinion"), pages 2-4, the Attorney General addressed an agency's employment of attorneys, and reached the conclusion that it was not prohibited, stating in part:

In addition, by its enactment, in 1941, of a further statute the legislature specifically prohibited all but certain designated state agencies from employing attorneys to serve as legal counsel in place of the Attorney General. See, § 2, chapter 50, Laws of 1941 which, as last amended by § 1, chapter 268, Laws of 1981, is currently codified as RCW 43.10.067 and provides, in part, as follows:

"No officer, director, administrative agency, board, or commission of the state, other than the attorney general, shall employ, appoint or retain in employment any attorney for any administrative body, department, commission, agency, or tribunal or any other person to act as attorney in any legal or quasi legal capacity in the

exercise of any of the powers or performance of any of the duties specified by law to be performed by the attorney general, . . ."

And, as you have noted in your letter, although RCW 43.10.067 then lists certain exceptions (e.g., the state bar association and the judicial council) the Washington State Patrol is not an agency which has thus been exempted from the prohibition--either by RCW 43.10.067 itself or by any other statute now in existence.

It must also be noted, however, that the provisions of RCW 43.10.067, supra, do not purport to prohibit state agencies from employing, in any capacity, individuals who are lawyers. Instead, the statute only prohibits the employment of lawyers to perform those functions or duties " . . . specified by law to be performed by the attorney general, . . ." Thus, it is not a violation of the statute for a state agency to employ a person who happens to be a lawyer so long as that person is not employed to act as attorney for the agency or to represent it in court proceedings or the like.

You are, on that count, correct in your understanding that the State Patrol now employs individuals who are law school graduates and at least one of those employees has been admitted to practice law in this state. We understand, however, that a substantial portion of that person's time is devoted to training programs and informational updates on developments in the criminal law field.

He is not (and cannot legally be) the attorney for the Patrol as you have used that term. For we may assure you that those attorney services continue to be provided by this office as required by law--through the assignment of a regularly-appointed assistant attorney general. Thus, the individual in question is an employee of the Patrol and is not the attorney for either the Patrol or the Chief of the Patrol.

(Emphasis added).

Clearly the instant proceedings before the OIC represent an "adjudicative proceeding," as defined in RCW 34.05.010(1), and discussed in A. above. However, the Insurance Enforcement Specialists employed by the OIC's Legal Affairs Division are not *representing* the OIC as the OIC's *attorney* in these proceedings, which arguably they are prohibited from doing under RCW 43.10.030(2), RCW 43.10.040, and RCW 43.10.067. Rather, they appear as an employee of the OIC, and indirectly via the Commissioner's broad authority to establish a Legal Affairs Division.

RCW 48.02.090(2) states that the Commissioner "may appoint additional deputy commissioners for such purposes as he or she may designate." The Commissioner historically has appointed a Deputy Commissioner for Legal Affairs. Employees located in the OIC's Legal Affairs Division are tasked with, among other things, appearing for the OIC in adjudicative proceedings the undersigned presides over. Some of those employees happen to be members of the Washington State Bar Association. RCW 48.02.090(4) adds: "The commissioner may employ examiners, and such actuarial, technical, and administrative assistant and clerks as he or she may need for proper

discharge of his or her duties.” (Emphasis added). RCW 48.02.100 gives the Commissioner the ability to delegate authority to employees of the OIC, and states: “Any power or duty vested in the commissioner by any provision of this code may be exercised or discharged by any deputy, assistant, examiner, or employee of the commissioner acting in his or her name and by his or her authority.” (Emphasis added). To reiterate, as I explain in Section A. above, under *Premera v. Kreidler*, 133 Wn. App. 23, 42, 131 P.3d 930 (2006), in fulfilling his statutory duties, the Commissioner maintains broad authority conferred by and reasonably implied from the insurance statutes.

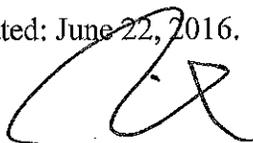
Pacific Star’s reference at 8:17 of its Reply to the Court’s decision in *State v. Gattavara*, 182 Wash. 325, 47 P.2d 18 (1935), to support its position is not on point. In that matter, attorneys not employed or affiliated with the Attorney General’s Office, or with a government agency, filed an action in King County Superior Court on behalf of the Department of Labor and Industries to collect industrial insurance and medical aid delinquent premiums and penalties for the benefit of the state worker’s compensation fund. The Court held that since the Attorney General did not commence the suit against the delinquent employers, but rather other private attorneys did, the action should be dismissed and writs of garnishment against the employers quashed. This case is distinguishable from the instant proceeding because it involved an action filed in court by private attorneys (not employees), who *represented* the Department of Labor and Industries. As explained above, that is not the case here.

Pacific Star also cites to *Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095 (2011) at 7:23 of its Reply in support of its position. However, that facts of that case distinguish it from the instant proceeding. In *Goldmark*, the Court held that the Attorney General had an affirmative duty to represent the Commissioner of Public Lands on appeal of a trial court order. Again, it did not address the question of whether employees of an agency appearing in an adjudicative proceeding under the APA, who happen to be licensed attorneys, are *representing* the agency as its attorney.

I conclude that under RCW 43.10.030(2), RCW 43.10.040, RCW 43.10.067, RCW 48.02.090, *Premera*, and the AG Opinion, involvement of Insurance Enforcement Specialists employed by the OIC, and housed in the OIC’s Legal Affairs Division, is proper in this matter.

Having noted and rejected Pacific Star’s objections to this adjudicative proceeding, the OIC Hearings Unit will now proceed with the scheduling of the prehearing conference in this matter.

Dated: June 22, 2016.



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WILLIAM PARDEE  
Presiding Officer

CERTIFICATE OF SERVICE

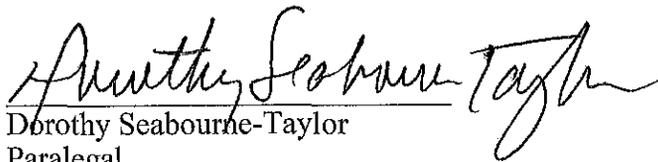
The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be filed and served the foregoing Order on Pacific Star's Objection to Notice of Receipt of OIC's Notice of Request for Hearing and Scheduling of Hearing on the following people at their addresses listed below:

Pacific Star Insurance Company  
c/o Brian F. Kreger, Counsel  
999 Third Avenue, Suite 3000  
Seattle, WA 98104

Mike Kreidler, Insurance Commissioner  
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner  
Doug Hartz, Deputy Commissioner, Company Supervision Division  
Molly Nollette, Deputy Commissioner, Rates and Forms Division  
AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division  
Drew Stillman, Insurance Enforcement Specialist, Legal Affairs Division  
Office of the Insurance Commissioner  
PO Box 40255  
Olympia, WA 98504-0255

Dated this 22nd day of June, 2016, in Tumwater, Washington.



Dorothy Seabourne-Taylor  
Paralegal  
Hearings Unit