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HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of

NO. 16-0043

PACIFIC STAR INSURANCE
COMPANY,

REPLY MEMORANDUM

of

Pacific Star Insurance Company

Authorized Insurer,

The Insurance Commissioner is acting outside the scope of his authority.

The Insurance Commissioner's own words, which are clearly stated in his Notice of Intent to Impose Fine After Hearing ("Notice of Intent"), are essentially a verbatim quote from the clear and unambiguous language of the provision of the Insurance Code that defines that only legal actions available to the Insurance Commissioner is cases of suspected violation of the Insurance Code.

The Notice of Intent, page 1, asserts: "The Insurance Commissioner has reason to believe that Pacific Star Insurance Company has violated the insurance laws of Washington."

Chapter 2 of Title 48 Revised Code of Washington is entitled "Insurance Commissioner" and sets out the general authority of the Insurance Commissioner granted by the Legislature of the State of Washington. In this enabling legislation, the Legislature also set forth certain specific parameters on the Insurance Commissioner's authority. One such parameter is set forth in RCW 48.02.080(3):

REPLY MEMORANDUM - 1

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1 “(3) If the commissioner has cause to believe that any person is violating or is
2 about to violate any provision of this code or any regulation or order of the commissioner,
3 he or she may:

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

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

7 The law is not vague or ambiguous. The Legislature could not have been any
8 clearer is describing the legal options available to the Insurance Commissioner in cases
9 where he has reason or cause to believe that any person is violating or is about to violate
10 the Insurance Code.

11 In his Response to Respondent’s (*sic*) Objection (“Response”), the Insurance
12 Commissioner makes a conclusory statement that “The Commissioner has the authority
13 to commence a hearing in this matter now.” (Response, page 2, ¶1; emphasis added), and
14 then cites, as apparent authority for that legal conclusion, several sections of Washington
15 law and one appellate court decision. The Insurance Commissioner’s reliance on those
16 laws and decisions is not well placed and merits a closer look at what they actually say.

17 RCW 34.05.413(1), a part of the Washington Administrative Procedure Act
18 (“APA”) states: “Within the scope of its authority, an agency may commence an
19 adjudicative proceeding with respect to a matter within the agency’s jurisdiction.”
20 (Emphasis added). The Insurance Commissioner conveniently, and unfortunately,
21 ignores the critical introduction to an agency’s authority to commence an adjudicative
22 proceeding, namely, that this authority must be “within the scope of the agency’s
23 authority.”
24

1 As noted above, the Washington Legislature has established the authority of the
2 Insurance Commissioner to “bring an action” where the Insurance Commissioner has
3 reason to believe a person has violated the Insurance Code. The Insurance Commissioner
4 cannot “commence a hearing” under RCW 34.05.413(1) merely because he thinks he can
5 do so. Such an action must be “within the scope” of the Insurance Commissioner’s
6 authority. In accord with the Legislature’s clear directive in RCW 48.02.080(3), the
7 Insurance Commissioner cannot, on his own, claim such authority under RCW
8 34.050.413(1).

9 The appellate decision relied on by the Insurance Commissioner, *Hickethier v.*
10 *Dep’t of Licensing*, 159 Wn. App. 203, 244 P.3d 1010 (2011), also does not support the
11 Insurance Commissioner. That case involved a Department of Licensing quasi-penal
12 action to revoke a real estate broker’s license for, among other things, theft and
13 misappropriation of funds. The only mention of RCW 34.05.413(1) in that decision is
14 where the Court noted that, “And, an agency may hold a hearing “any time,” RCW
15 34.05.413(1) . . . ” (*Hickethier*, at 218; quotes in original). That’s it! This mere
16 recognition by the Court of two words in a section of the APA does not rise to the level
17 of legal authority to support Insurance Commissioner’s unfounded conclusion that he
18 can “commence a hearing” in this matter now. The Insurance Commissioner is without
19 authority to commence an adjudicative proceeding in this matter because such an action
20 is not “within the scope of [his] authority” as specifically established by the Legislature.

21 The Court’s opinion in *Kabbae v. DSHS*, 144 Wn. App. 432, 192 P.3d 903 (2008)
22 is instructive. Although that case was concerned with a state agency’s authority to enact
23 a certain type of regulation, and, as such, is not factually identical to the current matter,
24 the Court’s holding on the general scope of authority of an agency is directly on point.

1 After noting that DSHA did not have authority to enact the regulation in question, the
2 Court held:

3 “But because administrative agencies are “ ‘creatures of the legislature
4 without inherent or common-law powers,’ ” an agency has only those powers that are
5 conferred either expressly or by necessary implication. *Human Rights Comm’n v.*
6 *Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 125, 641 P. 2d 163 (1982) (quoting *State v.*
7 *Munson*, 23 Wn. App. 522, 524, 597 P.2d 440) (1979). If an enabling statute does not
8 authorize a particular regulation, either expressly or by necessary implication, that
9 regulation must be declared invalid. *In re Consol. Cases Concerning the Registration of*
10 *Elec. Lightwave, Inc.*, 123 Wn.2d 530, 536-540, 869 P.2d 1045 (1994) (“we do not defer
11 to an agency the power to determine the scope of its own authority”). (*Kabbae*, at 440;
12 Emphasis added; quotes and parentheses in original).

13 Other Washington Appellate Court decisions are in accord with the holding of
14 *Kabbae* that state agencies, including the Office of the Insurance Commissioner, are
15 limited to the authority that the State Legislature has granted them. See also, for
16 example, *Transp. Benefit Area v. PERC*, 173 Wn. App. 504, 517, 294 P.3d 803 (2013)
17 “Washington agencies are limited to the authority that the legislature has granted.”, and
18 *Northlake Marine Works v. Nat. Res.*, 134 Wn. App. 272, 282, 138 P.3d 626 (2006) “An
19 agency may exercise only those powers conferred by statute and cannot authorize action
20 in absence of statutory authority.”

21 The Legislature has conferred on the Insurance Commissioner the only authority
22 he has to “bring an action” against a person suspected of violating the insurance laws of
23 the State of Washington. The Legislature has clearly and explicitly laid out that authority
24 in RCW 28.02.080.

1 The Insurance Commissioner cannot legitimately determine the scope of his own
2 authority. The Courts are quite clear on this point of law. Yet, the Insurance
3 Commissioner cites three sections of the insurance code apparently to support his notion
4 that he *can* determine the scope of his own authority. He refers to RCW 48.04.010(1),
5 which states only that the “commissioner may hold a hearing.” He refers to RCW
6 48.02.060 (3)(c), which states only that the “commissioner may . . . [c]onduct . . .
7 hearings.” And, he refers to RCW 48.05.185 which states only that the commissioner
8 may take certain actions, such as impose a fine, but not until after a hearing. The
9 Insurance Commissioner seems to equate the authority to “conduct” or “hold” a hearing
10 with the power to “bring an action” (RCW 48.02.080) or to “commence an adjudicative
11 proceeding” (RCW 34.05.413).

12 It is so obvious that it hardly needs to be said that holding or conducting a hearing
13 is *not* the same as commencing or bringing an action. Courts and administrative
14 tribunals, and the judges and hearing officers presiding in our State’s courts and tribunals,
15 hold and/or conduct hearings as a routine part of their authority. But, that authority to
16 conduct or hold a hearing is *not* the same as initiating a legal proceeding. An analogy
17 can be drawn from the Civil Rules. Under CR 3, a civil action is commenced by the
18 filing of a complaint by one party (either at the outset of a case or after service) against
19 another party. However, hearings are conducted by the judge after the action has been
20 commenced and upon motion properly brought by one of the parties (for example,
21 preliminary hearings under CR 12(d)).

22 Holding a hearing in a matter is dramatically different and legally distinct from
23 bringing an action or commencing a proceeding. The Insurance Commissioner
24 obviously has authority to engage in the activities of holding or conducting hearings.

1 But, his authority to bring an action or commence a proceeding is strictly limited to the
2 authority granted to the Insurance Commissioner and the Office of the Insurance
3 Commissioner by the Legislature.

4 The Insurance Commissioner is acting outside the authority granted to him by the
5 Legislature in its clear and unambiguous enactment that is now RCW 48.02.080.

6
7 **The Insurance Commissioner cannot delegate legal representation.**

8 The Insurance Commissioner asserts that he has “discretion to choose the
9 appropriate remedy and hearing participants.” (Response, page 2, ¶2). And, he observes
10 that “When the Commissioner initiates any proceeding under the Insurance Code, he may
11 request the Attorney General . . . to prosecute or defend the proceeding.” (Response, page
12 2, ¶2; emphasis added). The Insurance Commissioner then states that “Traditionally,
13 however, the Commissioner has chosen to delegate his authority to conduct and hold
14 hearings to a Presiding Officer, with representation at the hearing through designated
15 staff.” (Response, page 2, ¶2; emphasis added).

16 Here again, the Insurance Commissioner wrongly equates bringing an action or
17 commencing a proceeding with holding or conducting a hearing. As discussed above,
18 these legal and procedural actions are distinct and are not interchangeable, and should
19 not be considered to be identical. But he also relies on his own tradition for his acts.

20 Furthermore, since the Insurance Commissioner uses his Response to introduce
21 the concept of the Attorney General serving as the Insurance Commissioner’s lawyer to
22 prosecute or bring an action, it must be observed that the Washington State Constitution
23 requires that the attorney general “shall be the legal advisor of the state officers, and shall
24 perform such other duties as may be prescribed by law.” WASH. CONST. art. III, §21.

1 The attorney general's "other duties" in regard to state agencies are spelled out
2 in several sections of the Revised Code of Washington.

3 RCW 43.10.030 states, in pertinent part: "The attorney general shall . . . (2)
4 Institute and prosecute all actions and proceedings for, or for the use of the state, which
5 may be necessary in the execution of the duties of any state officer;" (Emphasis added).

6 RCW 43.10.040 states: "The attorney general shall also represent the state and
7 all officials, boards, commissions and agencies of the state in the courts, and before all
8 administrative tribunals or bodies of any nature, in all legal or quasi-legal matters,
9 hearings, or proceedings, and advise all officials, departments, boards, commissions, or
10 agencies of the state in all matters involving legal or quasi-legal questions, except those
11 declared by law to be the duty of the prosecuting attorney of any county." (Emphasis
12 added).

13 To emphasize that the Attorney General is the only legal representative of the
14 Insurance Commissioner, the Legislature enacted RCW 43.10.067, which reads, in
15 pertinent part: "No officer, director, administrative agency, board, or commission of the
16 state, other than the attorney general, shall employ, appoint or retain in employment any
17 attorney for any administrative body, department, commission, agency, or tribunal or any
18 other person to act as attorney in any legal or quasi-legal capacity in the exercise of any
19 of the powers or performance of any of the duties specified by law to be performed by
20 the attorney general . . ." (Emphasis added).

21 The attorney general is the *only* legal representative the law allows the Insurance
22 Commissioner to engage, as the Washington State Supreme Court has held in *Goldmark*
23 *v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095 (2011). When the attorney general refused
24 to represent the commissioner of public lands to appeal a lower court decision, the

1 commissioner sought a writ of mandamus to compel the attorney general to represent the
2 commissioner and his agency. The Supreme Court cited and relied on the same sections
3 of the Washington Constitution and the Revised Code of Washington cited above. The
4 Court held that the attorney general must represent the commissioner and noted, "The
5 plain language of the statutes, however, leaves little to question" that "the attorney
6 general has a statutory duty to represent the commissioner." (*Goldmark* at 573). The
7 Court continued: "Moreover, only the attorney general or an SAAG [special assistant
8 attorney general] may represent the commissioner since RCW 43.10.067 prohibits the
9 commissioner from hiring outside counsel." (*Id.*, emphasis added).

10 Then, the Court further noted that, ". . . pursuant to RCW 43.10.067, the
11 commissioner may not "employ, appoint, or retain . . . any attorney . . . to act in any legal
12 or quasi legal capacity in the performance of any of the duties specified by law to be
13 performed by the attorney general." (*Id.*)

14 There are penalties where an attorney other than the attorney general acts as the
15 representative of a state official, such as the Insurance Commissioner, in a legal or quasi-
16 legal matter. The matter must be dismissed.

17 In *State v. Gattavara*, 182 Wash. 325, 47 P.2d 18 (1935), the Department of
18 Labor and Industries brought an action against the defendant to recover delinquent
19 industrial insurance premiums and statutory penalties. The defendant unsuccessfully
20 moved to dismiss the case on the ground that it was not brought by the attorney general.
21 On appeal, the Supreme Court reversed, holding that it was error to deny the motion to
22 quash and dismiss the action. The Supreme Court further held that under that state
23 constitution and applicable statutes, the authority of the attorney general to bring actions
24 for state agencies is exclusive and not a mere technicality. The Court stated: "Litigants

1 who are sued always have the right to raise the question that no proper party has sued
2 them. It goes to the basis of the action. It is not a mere technicality, for they are entitled
3 to the protection of the action being instituted, maintained, and a judgment validly
4 authorized by the proper official." (*Gattavara*, at 329).

5 In this current matter, the Insurance Commissioner relies on "tradition" to
6 delegate his authority and to be represented in proceedings by designated staff. In this
7 matter, the "staff" the Insurance Commissioner has designated to represent him is, in
8 fact, an attorney licensed in the State of Washington. This representative is acting in a
9 legal or quasi-legal capacity which is clearly contradictory to the mandate of RCW
10 43.10.067, under which the commissioner may not "employ, appoint, or retain . . . any
11 attorney . . . to act in any legal or quasi legal capacity."

12 The Insurance Commissioner's representative is acting in a legal capacity, and is
13 engaged in the practice of law, as defined in Supreme Court General Rule 24:

14 "The practice of law . . . includes but is not limited to: . . .

15 (2) Selection, drafting, or completion of legal documents or agreements which
16 affect the legal rights of an entity or person(s).

17 (3) Representation of another entity or person(s) in a court, or in a formal
18 administrative adjudicative proceeding or other formal dispute resolution process
19 or in an administrative adjudicative proceeding in which legal pleadings are filed
20 or a record is established as the basis for judicial review."

21
22 The Insurance Commissioner cannot determine his own authority on some self-
23 imposed notion of "tradition." The Insurance Commissioner is not in compliance with
24

1 the mandates of the Constitution or laws of the State of Washington, in particular, RCW
2 43.10.067. This non-compliance is no mere technicality.

3 The remedy available to Pacific Star Insurance Company in this matter is that the
4 Insurance Commissioner's acts and threatened acts against Pacific Star, and the current
5 proceeding, shall be dismissed. Pacific Star reserves the right to seek such a remedy,
6 and all other available remedies, and also reserves the right to file appropriate motions
7 to have the Insurance Commissioner's current legal representative disqualified.
8

9 **The Insurance Commissioner continues to deny Pacific Star Insurance**
10 **Company its legal and procedural due process rights.**

11 The Insurance Commissioner filed his Notice of Intent to Impose a Fine on
12 Pacific Star after a hearing. The Insurance Commissioner *did not* request a hearing in
13 his Notice of Intent. In fact, the Insurance Commissioner acknowledged, rightly, that
14 "Pacific Star Insurance Company may make a written request for a hearing as set forth
15 in WAC 284-02-070 and RCW 48.04.010." (Notice of Intent, page 4, ¶2).

16 RCW 48.04.010 unequivocally allows a person aggrieved by any act or
17 threatened act of the Insurance Commissioner to file a written demand for hearing.
18 Pacific Star is such an aggrieved person and, in accordance with this law, is authorized
19 to make a demand for hearing within ninety days of receipt notice of the Insurance
20 Commissioner's acts or threatened acts.

21 WAC 284-02-070, based on RCW 48.04.010, is in accord: "(i) A hearing can also
22 be demanded by an aggrieved person based on any report, promulgation, or order of the
23 commissioner." Any such demand for hearing must be made within ninety days.
24

1 Pacific Star received notice of the Insurance Commissioner's threatened acts in
2 his Notice of Intent to Impose a Fine on May 19, 2016. RCW 48.04.010 and WAC 284-
3 02-070 afford Pacific Star the statutorily-prescribed ninety-day period in which to
4 consider what, if any, legal proceeding it will pursue. That is the law.

5 Now, the Insurance Commissioner claims he can simply ignore both the law and
6 his own regulations and force this matter into an adjudicative posture prematurely. The
7 Insurance Commissioner brazenly asserts that the legal procedures available to Pacific
8 Star "are no longer applicable because the Commissioner commenced the proceeding on
9 his own accord – there is no longer any need to request a hearing, nor is there any further
10 procedure that is necessary to protect Pacific Star from an order becoming final without
11 a hearing on the merits." (Response, page 3).

12 This is a stunning statement by the Insurance Commissioner through his legal
13 representative. The Insurance Commissioner asserts that by simply by telling his
14 delegate hearing officer to schedule a hearing this not only is the same as the Insurance
15 Commissioner "commencing a proceeding," it also is sufficient to totally ignore the legal
16 due process rights available to Pacific Star. Here is another example of the Insurance
17 Commissioner acting outside the scope of his authority. But, this time the Insurance
18 Commissioner claims he is above the law, he can ignore the statutory mandates of
19 procedure, and can deny another the due process rights that are clearly theirs to exercise.

20 "Due process requires governments to treat citizens in a fundamentally fair
21 manner." *Valley View v. Redmond*, 107 Wn.2d 621, 733 P.2d 182 (1987). "Due process
22 protects a person from state action depriving that person of life, liberty, or property." *In*
23 *re Estate of Hayes*, 185 Wn. App. 567, 342 P.3d 1161 (2015).
24

1 The Insurance Commissioner threatens to take Pacific Star's vested property
2 rights, namely its monetary assets, which are protected under the federal and Washington
3 State constitutions prohibiting the state from depriving any person of life, liberty, or
4 property without due process of law. U.S. CONST. amend. XIV; WASH CONST. art. I,
5 §3; *In re Estate of Hayes, supra*. By first acknowledging that Pacific Star has a legal
6 right to request a hearing within the statutorily-prescribed time frame (Notice of Intent,
7 page 4, ¶2) and later absolutely ignoring the procedural standards in the law and asserting
8 that no further legal procedure is necessary (Response page 3), the Insurance
9 Commissioner deprives Pacific Star of its due process rights. The Insurance
10 Commissioner appears to be more interested in seeking punishment and depriving
11 Pacific Star of its property rights and its legal right to protect its property, that he is in
12 following all the laws that apply to him and the issues involved in this matter.

13 Pacific Star does not deny that it will have an opportunity to be heard if this matter
14 proceeds to an administrative adjudicative proceeding. Pacific Star is not delaying this
15 matter from proceeding to an administrative adjudicative hearing. Pacific Star asserts
16 only that it has not had an opportunity to exercise the procedural due process rights that
17 the laws of the State of Washington afford it. Accordingly, while Pacific Star readily
18 acknowledges that this matter may ultimately proceed to an administrative adjudicative
19 hearing (unless it is dismissed for reasons set forth above), it simply states that it is
20 premature to schedule a hearing in this matter at this time. Pacific Star has ninety days
21 to demand a hearing to defend itself against the acts and threatened acts of the Insurance
22 Commissioner.
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Conclusion

By attempting to bring an action or commence a proceeding other than as specifically authorized in the Insurance Code, the Insurance Commissioner is acting outside the scope of his authority as granted by the Legislature.

By designating a legal representative other than the attorney general to represent the Insurance Commissioner in this matter and engaging that person to act in a legal and quasi-legal capacity as the Insurance Commissioner's representative, the Insurance Commissioner violates the clear mandates of the Washington State Constitution and applicable statutes and court rules.

By acknowledging, and then withdrawing, Pacific Star's right to request a hearing within the legal standards allowed in the Insurance Code and Regulations, the Insurance Commissioner disregards the law and deprives Pacific Star of its legal and due process rights.

The Insurance Commissioner should follow the legislative mandates that apply to him and his agency and allow this matter to proceed fairly and in a timely manner.

DATED this 7th day of June, 2016.

KREGER BEEGHLY, PLLC



Brian F. Kreger,
WSBA Number 10670

Attorney for Pacific Star Insurance Co.

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CERTIFICATE OF SERVICE

I, Brian F. Kreger, under penalty of perjury under the laws of the State of Washington do hereby declare and certify that I served and caused to be delivered by electronic mail and regular United States Postal delivery, the foregoing Reply Memorandum of Pacific Star Insurance Company on the following parties or persons at the last known addresses given below:

Hearings Unit
Office of the Insurance Commissioner
P.O. Box 40257
Olympia, WA 98504-0257

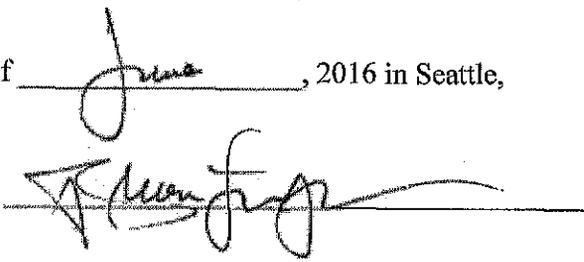
Mr. Drew Stillman
Office of the Insurance Commissioner
P.O. Box 40255
Olympia, WA 98504-0255

Attention: William Pardee
Presiding Officer

and to: DrewSt@oic.wa.gov

And to: Dorothy Seabourne-Taylor
DorothyS@oic.wa.gov

Executed on this 7th day of June, 2016 in Seattle,
Washington.



Brian F. Kreger