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BEFORE THE STATE OF WASHINGTON

Hearings Unit, DIC
Patricia D. Peterson
Chief Hearing Officer

OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of,

ANNETTE CABIN,

Petitioner.

NO. 09-0012

**OIC REPLY TO PETITIONER'S
RESPONSE TO MOTION TO
DISMISS**

The Office of the Insurance Commissioner ("OIC"), by and through its pro se representative, hereby replies to Petitioner's October 7, 2009 Response to OIC's Motion to Dismiss a hearing on this matter.

ARGUMENT AND AUTHORITY

The Commissioner has declined to issue a waiver that Ms. Cabin requested. Because of her criminal past, she is a prohibited person under federal law. The one chance she has to avoid this prohibited status is if she can persuade the Commissioner to issue a waiver. This she has been unable to do. The Commissioner is not issuing an order, promulgating a rule, publishing a report, nor taking an action here.

While Petitioner tries to argue that RCW 48.04.010(1)(b) is "clear on its face," he fails to note the critical language that for a hearing right to vest, such a failure to act (in this case, failure to issue the requested consent letter) must be "deemed an act under any provision of this code, or by any report, promulgation or order of the commissioner." The only tangential connection to the Insurance Code in this entire matter is the fact that the waiver must be obtained from a state "regulatory official" authorized to regulate the insurer as required by 18 U.S.C. § 1033(e)(2). Where in RCW 48, or in any other document issued by the Commissioner, is granting or declining a § 1033 waiver request deemed an "act?" Nowhere. It is not mentioned in RCW 48. Petitioner begs the question when she asserts that because the Commissioner's authority to regulate insurance in Washington derives from the insurance code, any act or failure to act by the Commissioner, in any capacity whatsoever, therefore arises under the insurance code, even when there is simply no applicable provision in the code! Apparently, Petitioner believes that the authority of the commissioner to grant the waiver request mystically derives from RCW 48, without having been mentioned in RCW 48, simply by virtue of his status as Insurance Commissioner. It does not. It comes from "a provision" of 18 U.S.C. § 1033.

Petitioner's argument that the OIC investigator's March 25, 2009 letter was a threat of

employment termination justifying a hearing right is absurd. In the first place, her employment there is/was illegal. But the fact of the matter is that Cheryl Penn's March 25, 2009 letter merely informed Ms. Cabin's employer of the basic law requiring agent licensure, and asked for his response to her continued employment as a prohibited person under § 1033, as well. She didn't even mention the fact that the employer himself is at risk of prosecution for enabling Ms. Cabin's prohibited employment under 18. U.S.C. § 1033 (e)(1)(B). A federal prosecutor may have an issue with Ms. Cabin's continued employment, but the Commissioner has no authority to require she be terminated from employment and has certainly not threatened to do so here. Ms. Penn made no threats in that letter, but was simply investigating the allegations and providing information.

There is absolutely no due process issue involved here that would merit a hearing because Ms. Cabin has no Constitutionally-protected property interest in obtaining a § 1033 waiver. The cases cited by Petitioner are not applicable inasmuch as there is no threat of any sanction or withdrawal of benefits whatsoever in this matter. As the Supreme Court clearly stated in *Board of Regents v. Roth*,

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims."

408 U.S. at 577 (1972)

The NAIC Guidelines for dealing with § 1033 waiver requests echo this conclusion:

"The burden of persuasion and evidence for going forward with a request for written consent is on the prohibited person seeking the relief. Such a person has no right to receipt of written consent, nor does the state's presumptive rehabilitation laws apply to consideration by the Commissioner. Study of other federal statutes makes this clear."

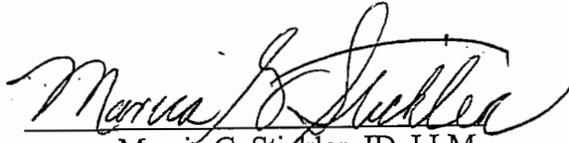
NAIC Guidelines for State Insurance Regulators to the Violent Crime Control and Law Enforcement Act of 1994, page 13, March 1998.

CONCLUSION

The Insurance Code affords Ms. Cabin no legal right to relief from the Commissioner from the consequences of her prior felony conviction and the provisions of the federal Violent Crime Control and Law Enforcement Act of 1994. The Insurance Code imposes no duty on the Commissioner to grant her request for relief from the federal Act. Because the Commissioner's declination is a failure to act that is not deemed an act under any provision of the Insurance Code, it is not subject to adjudicative review under RCW 48.04.010(1). Ms. Cabin's hearing request should therefore be denied and this proceeding dismissed.

Respectfully submitted this 8th day of October, 2009.

By



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