

**DECLARATION OF MAILING**

I declare under penalty of perjury that I am the State Insurance Commissioner of Washington that on the date listed below, I mailed or caused delivery of a true copy of this document to the parties listed below  
DATED this 16th day of October, 2009 at Tumwater, Washington.

Signed: Sally Johnson

**STATE OF WASHINGTON**



**OFFICE OF INSURANCE COMMISSIONER HEARINGS UNIT**

Fax: (360) 664-2782

Phone: (360) 725-7000  
www.insurance.wa.gov

Patricia D. Petersen  
Chief Hearing Officer  
(360) 725-7105

Sally Johnson  
Paralegal  
(360) 725-7002  
[Sallyj@oic.wa.gov](mailto:Sallyj@oic.wa.gov)

**BEFORE THE STATE OF WASHINGTON  
OFFICE OF INSURANCE COMMISSIONER**

IN THE MATTER OF,

ANNETTE CABIN,

Petitioner.

NO. 09-0112

**ORDER ON THE OFFICE OF  
THE INSURANCE  
COMMISSIONER'S  
MOTION TO DISMISS**

**TO:** Robert W. Goldsmith  
Attorney at Law  
1300 Hoge Building  
705 Second Avenue  
Seattle, WA 98104

Annette Cabin  
2513 187<sup>th</sup> Place SE  
Bothell, WA 98012

**COPY TO:** Mike Kreidler, Insurance Commissioner  
Mike Watson, Chief Deputy Insurance Commissioner  
James T. Odiorne, Deputy Commissioner, Company Supervision  
John F. Hamje, Deputy Commissioner, Consumer Protection  
Carol Sureau, Deputy Commissioner, Legal Affairs Division  
Marcia Stickler, Staff Attorney, Legal Affairs Division  
Office of the Insurance Commissioner  
P.O. Box 40255  
Olympia, WA 98504-0255



### NATURE OF PROCEEDING

On September 30, 2009, the Washington State Office of the Insurance Commissioner (OIC), by and through Marcia Stickler, Staff Attorney in his Legal Affairs Division, filed a Motion to Dismiss in this matter. On October 7, 2009, Annette Cabin (Cabin), by and through her attorney, Robert W. Goldsmith of Seattle, filed her Response to Motion to Dismiss with attachments. On October 8, 2009, the OIC filed its OIC Reply to Petitioner's Response to Motion to Dismiss. Accordingly, as duly scheduled, the undersigned heard arguments from the parties, by telephone, on the OIC's Motion to Dismiss on October 12, 2009.

### ISSUE

In his Motion to Dismiss, the OIC asserts, correctly (with bracketed clarifications), that the issue herein as Is the commissioner's declination [denial] of a federal waiver request under 18 USC Sec. 1033 [(e)(2), the federal Violent Crime Control and Law Enforcement Act of 1994] an act [or failure to act] under the Insurance Code subject to adjudicative challenge in an administrative hearing under RCW 48.04.010? The OIC urges that the OIC's refusal to grant an 18 USC Sec. 1033(e)(2) waiver is not appealable in an administrative hearing under RCW 48.04.010, based upon his arguments that 1) the OIC's declination to grant a waiver under this federal Act is not an "act" but a "failure to act;" 2) that the OIC's declination is under federal law, not the Insurance Code and is therefore not a *failure of the commissioner to act, if such failure is deemed an act under any provision of this code* as required in order to be entitled to appeal in an administrative hearing under RCW 48.04.010; and 3) that a convicted felon disqualified by her own criminal history and federal law from engaging in the business of insurance is not entitled to an adjudicative hearing under the Insurance Code to attempt to compel the OIC to grant clemency from the federal prohibition.

Cabin argues, correctly, that 18 USC Sec. 1033(e)(2) specifically provides that a "prohibited person" which by definition in the federal Act includes herself; may engage in the business of insurance only if the prohibited person can obtain an 18 USC Sec. 1033(e)(2) waiver from the state regulatory official (the OIC) of the state in which s/he wishes to conduct business. Cabin argues that the OIC's refusal to grant an 18 USC Sec. 1033(e)(2) waiver is an "act" or "failure to act" of the Insurance Commissioner which can be appealed in an adjudicative proceeding.

### FACTS

On April 27, 2009, as required by 18 USC 1033(e)(2), Cabin applied to the OIC for an 18 USC Sec. 1033(e)(2) waiver, submitted various documents in support of her application, and advised that she had completed the required insurance courses at Slater Insurance School in March 2009 and was looking forward to possibly applying for an agent's license as she was already working for an insurance agency *advising agents/producers on*

*the different plan designs offered by the insurance carriers [her employer] represents to help them understand the unique nature of the benefits each of them may offer or the limitations that may affect their clients, and ensuring that the accuracy of those plans represented in the proposals match [her employer's] internal data systems.*

In response, by letter dated 5/19/09, the OIC advised Cabin that he had reviewed her request for waiver including the documents she submitted in support of her request and stated that *[a]fter review of your request and the other information presented with your request, please be advised that the Insurance Commissioner of the State of Washington rejects your request for a consent letter required under 18 USC Sec. 1033(e)(2).* Subsequently, by letter dated 8/20/09 from the OIC to Cabin which was apparently in response to Cabin's request for reconsideration to the OIC, the OIC stated that he had *carefully reconsidered this matter and regrets to advise that your request that the Commissioner give consent under 18 USC Sec. 1033(e)(2) is once again denied* [emphasis added] and went on to explain his reasons for his denial of Cabin's application for an 18 USC Sec. 1033(e)(2) waiver.

#### CONCLUSIONS OF LAW

1. RCW 48.04.010(1)(b) requires the OIC to hold a hearing in pertinent part only in the following circumstances:

*...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 ....*

2. The OIC argues that Cabin seeks to compel an act, not challenge one, and that because the OIC's authority to grant 18 USC Sec. 1033(e) waivers derives solely from federal law, the OIC's denial of Cabin's application for an 18 USC Sec. 1033(e) waiver is not a "failure of the commissioner to act, if such failure is deemed an act under any provision of this code," and is therefore not appealable in an administrative hearing under RCW 48.04.010. In response, the OIC's review of Cabin's application for an 18 USC Sec. 1033(e) waiver and decision to deny her application is an affirmative decision by the OIC – made by the OIC once, and once again on reconsideration. As such, it is either an affirmative act of the OIC or is a failure to act. Further, it cannot be reasonably concluded that Cabin is not an aggrieved party, as the insurance-related activities in which she is engaged in her employment are in question. [It is recognized that Cabin arguably should have sought and been granted this waiver prior to her engaging in these activities, but that is not relevant to the issue herein.] Because the OIC's review and decision to deny Cabin's application is an "act" under RCW 48.04.010 by which she is aggrieved, Cabin is entitled to an administrative hearing under RCW 48.04.010.

3. It has also been argued that the actions of the OIC in reviewing and making a determination to deny Cabin's application for an 18 USC Sec. 1033(e) waiver could be considered a "refusal to act" under RCW 48.04.010. In this situation, the OIC argues that because the "failure to act" must be in regard to an "act" which is authorized in the Insurance Code (such as a disciplinary action against an agent for e.g. misrepresentation), and not an act which is authorized under federal law. While the OIC cites no authority for concluding that the "failure to act" must concern an act which is authorized under the Insurance Code, it is not necessary to decide this issue as it has been decided herein that the OIC's review and denial of Cabin's application for an 18 USC Sec. 1033(e) waiver is an affirmative act which is appealable in an administrative proceeding under RCW 48.04.010.

4. The OIC's further arguments concerning the fact that no Insurance Code license is at issue in this case, that the Insurance code imposes no duty on the OIC to grant 18 USC Sec. 1033(e) waivers under any circumstances and affords neither Cabin or any other entity the right to compel such a waiver, are arguments to presented at hearing and not here. Further, the OIC's argument that once an adjudicative hearing is held judicial review may follow, that this decision may open the floodgates to administrative adjudication of nonjusticiable controversies, has no relevance to the decision herein regarding Cabin's statutory right to hearing. (While the likelihood of opening the floodgates to excessive litigation in this area would be a matter for the legislature and is not relevant in an analysis of RCW 48.04.010 as it is currently written, it is noted that the last, and likely only, prior appeal filed challenging the OIC's refusal to grant an 18 USC Sec. 1033(e) waiver occurred some 15 years ago, as is also the experience of other states.)

#### **ORDER**

Based upon the above activity, and on the Conclusions of Law stated above,

**IT IS HEREBY ORDERED** that Annette Cabin is entitled to an administrative hearing pursuant to RCW 48.04.010 to challenge the Insurance Commissioner's decision to deny her 18 USC Sec. 1033(e) application for a waiver.

**IT IS FURTHER ORDERED** that the parties will be contacted shortly to schedule a prehearing conference in this matter which will review procedure to be expected at hearing, schedule a mutually convenient hearing date and answer any questions or concerns of the parties.

ENTERED AT TUMWATER, WASHINGTON, this 16<sup>th</sup> day of October, 2009.



---

PATRICIA D. PETERSEN  
Presiding Officer  
Chief Hearing Officer