IN THE OFFICE OF THE INSURANCE COMMISSIONER

IN THE MATTER OF ANNETTE CABIN	No. 09-0112 RESPONSE TO MOTION TO DISMISS

Petitioner Annette Cabin, by and through her attorney, Robert Goldsmith, hereby responds to the Office of Insurance Commissioner's (OIC) motion to dismiss. Our request for a hearing under RCW 48.04.010 is supported by the clear statutory language and the purposes of the Administrative Procedure Act (APA).

ISSUE

The Commissioner's denial of a waiver to Annette Cabin requested under 18 U.S.C. § 1033(e)(2) is either an act, a failure to act, or an order as those terms are used in RCW 48.04.010(1)(b), thereby granting Ms. Cabin a right to an adjudicative hearing.

FACTUAL BACKGROUND

In a letter dated March 25, 2009, an investigator with OIC sent a letter to Ms. Cabin's employer, Business Benefits Corporation (BBC) asking why Ms. Cabin was still employed at BBC in light of her

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conviction, which violated federal law, 18 U.S.C. 1033. (Copy attached hereto.) Implicit in that letter is an order to terminate Ms. Cabin's employment or risk further administrative or criminal sanction. In a letter dated April 27, 2009, Ms. Cabin requested a waiver under 18 U.S.C. § 1033(e)(2). (copy attached.) Similarly, the President of BBC, Michael Kerner, also submitted a request for waiver under 18 U.S.C. § 1033(e)(2) in a letter dated April 29, 2009. (Copy attached.) On May 19, 2009, the OIC responded to this request for waiver and denied it. (Copy attached.) Thereafter, Annette Cabin, through counsel, requested an appeal of this decision "up your administrative ladder." (Copy of email dated May 22, 2009, attached.) Then on in a letter dated August 20, 2009, the OIC reconsidered and denied the waiver. (Copy attached.) Finally, in a letter dated August 24, 2009, we requested "the next step in the administrative appeal process," and cited our reasons for this appeal. (Copy attached.) Subsequently, a more formal demand for a hearing under RCW 48.04.010 was filed with in this case on September 11, 2009.

ARGUMENT

The statutory language of RCW 48.04.010(1)(b) is clear on its face. The OIC's denial of a waiver is an "act" which needs no further gloss. It is plain on its face. Alternatively, the denial of a waiver can also be construed as a "failure to act." In either case, the word "act" "denotes affirmative; expression of will, purpose; carries idea of performance; primarily that which is done or doing; exercise of power, or effect of which power exerted is cause; a performance; a deed." Black's Law Dictionary, (Rev. 4th ed., 1968). To be sure, the Commissioner's power was exerted: he declined to extend a waiver. In addition, the language "order of the commissioner" in 48.04.010(1)(b) would necessarily encompass the effect of his declination of the waiver: his implicit order that she be terminated from employment by BBC. (See OIC letter of March 25, 2009.)

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In interpreting a statute, the primary objective is to ascertain and give effect to legislative intent. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles,* 148 Wn.2d 224 , 239, 59 P.3d 655 (2002). To determine legislative intent, one first looks to the language of the statute. If the statute is unambiguous, as here, the legislative intent is determined from the plain language of the statute as written. *Tenino Aerie,* 148 Wn.2d at 239. The plain language grants Ms. Cabin the requested hearing.

The OIC's argument in its motion to dismiss is strained and attempts to twist the plain meaning of the language in RCW 48.04.010. What is more, the secondary argument that Ms. Cabin is not aggrieved by an act of the Commissioner since the granting of waivers derives from federal law has no support in the language of 48.04.010. That argument might have some merit if he were a federal official, but the fact of the matter is that the very power of the Commissioner to grant the waiver derives from his authority under "this code." The Commissioner's power and authority derive from chapter 48.02 of the RCW's. In particular, RCW 48.02.060 provides in part: "1) The commissioner shall have the authority expressly conferred upon him by or reasonably implied from the provisions of this code. (2) The commissioner shall execute his duties and shall enforce the provisions of this code." Hence the very power to grant or deny a waiver stems from "this code." Alternatively, the legal basis of the Commissioner's "order" here, whether state or federal law, is not limited by the term, "this code," as it does not modify the word "order" in the in the latter clause of RCW 48.04.010(1)(b).

The APA requires an agency to commence an adjudicative proceeding "[w]hen required by law or constitutional right . . . . RCW 34.05.413(2)." *Crescent Convalescent Ctr. v. Department of Social & Health Servs.*, 87 Wn. App. 353, 356, 942 P.2d 981 (1997)(business subject to DSHS

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sanctions has a constitutional right to an adjudicative hearing because of the deprivation of its property rights that follow from the imposition of the sanctions.) Ms. Cabin, by virtue of the letter of March 25, 2009, is being threatened with termination of her employment. That possibility certainly effects her property rights.

The OIC also argues that judicial review may follow. Whether it will or not is not decisive, but certainly Ms. Cabin does not want to later learn that OIC is claiming she did not exhaust her administrative remedies. Normally the rule is that litigants must exhaust administrative remedies before seeking judicial intervention when an agency has initial authority to evaluate and resolve a claim. *South Hollywood Hills Citizens Ass'n v. King County,* 101 Wn.2d 68, 73, 677 P.2d 114 (1984). Even where an administrative remedy (such as our issue of a whether to grant a waiver or not) is not precisely spelled out in the statutes, exhaustion is still required. *Dioxin/Organochlorine Center v. Department of Ecology,* 119 Wn.2d 761, 777, 837 P.2d 1007 (1992) (pursuit of administrative remedies not inadequate or futile despite absence of injunctive power in agency). *See also, Credit Gen. Ins. Co. v. Zewdu*, 82 Wn. App. 620, 919 P.2d 93 (1996), review denied, 130 Wn.2d 1022, 930 P.2d 1230 (1997)(failure to exhaust administrative remedies can be fatal to later lawsuit involving question of validity of policy's exclusion language.)

In short, RCW 48.04.010(1)(b), the APA, the case law, and Ms. Cabin's constitutional right to due process all support the holding of a hearing in this case.

Dated 7th day of Oct., 2009

Respectfully submitted,

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