

STATE OF WASHINGTON

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2009 JAN 16 A 9:49



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~~MIKE KREIDLER~~ OF MAILING
STATE INSURANCE COMMISSIONER
under the laws of the State of
Washington that on the date listed
below, I mailed or caused delivery
of a true copy of this document to
parties listed below
DATED this 16th day of Jan 2009
at Tumwater, Washington.
Signed W. Galloway

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

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of:)
)
CHICAGO TITLE INSURANCE)
COMPANY,)
)
An Authorized Insurer.)
_____)

No. D07-308
ORDER ON CHICAGO TITLE
INSURANCE COMPANY'S
PETITION FOR DISQUALIFICATION

To: David C. Neu, Esquire
Kimberly Osenbaugh, Esquire
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Chicago Title Insurance Company
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Copy To: Mike Kreidler, Insurance Commissioner
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I. NATURE OF PROCEEDINGS

On February 29, 2008, this matter was referred to Judge Cindy Burdue, an administrative law judge with the Office of Administrative Hearings, with instructions to hear the case and enter an initial or recommended order therein. During the course of that proceeding, Judge Burdue bifurcated the issues in this case: Phase I involves *the preliminary issue of the legal responsibility of [Chicago] for the actions of Land Title Company of Kitsap County*. Depending on the outcome of Phase I, Judge Burdue proposes to hear argument on, and enter an initial or recommended decision regarding, *whether the expenditures of the Kitsap County Company violate the law*. In accordance with this plan, on October 30, 2008, Judge Burdue entered an initial decision in Phase I, recommending that the undersigned enter a final order ruling that Chicago (Chicago) is not liable for the activities of Land Title Company of Kitsap County, which activities are arguably in violation of WAC 284-30-800, the Illegal Inducement Regulation.

Following Judge Burdue's entry of her initial or recommended order in Phase I, the file was transmitted to the undersigned for review and entry of a final order in Phase I.

Pursuant to established procedure, on November 18, 2008, Wendy Galloway, Paralegal to the undersigned, wrote a letter to all parties outlining the procedure for review and, upon request of the undersigned, advising that the undersigned would like to hear oral argument before entering a final decision.

Apparently before receipt of the undersigned's November 18, 2008 letter, on November 19, 2008, the Office of the Insurance Commissioner (OIC) filed the OIC's Brief in Support of Review of Initial Order with the undersigned. Further, during that time 1) Chicago requested an Order from the undersigned documenting that Chicago had permission to serve and file its Reply to the OIC's Brief in Support of Review of Initial Order on or before December 10, 2008, and by Stipulation and Order re Reply to OIC Petition for Review entered by the undersigned on December 2, 2008, the undersigned so gave Chicago the permission it requested; 2) Chicago requested that the undersigned granted it permission to file its brief by e-mail, which the undersigned granted. Subsequently, oral argument was scheduled before the undersigned to commence at 10 a.m. (PST), on Thursday, January 22, 2009.

However, 1) on December 8, 2008, Chicago filed the subject Petition for Disqualification, asking that the undersigned disqualify herself from reviewing Judge Burdue's

initial order and entering the final order on Chicago's Motion for Summary Judgment (Phase 1 of this proceeding, as referenced above); and 2) on December 10, 2008, Chicago filed Chicago's Limited Motion to Strike Declaration of Alan Michael Singer. This instant Order concerns only the Petition for Disqualification.

While in its Petition for Disqualification Chicago *wishes to stress that in seeking the disqualification of Judge Petersen, it is not in any way seeking to impugn her integrity*[,] Chicago cites three bases for its Petition: 1) RCW 34.05.425(3); 2) Canon 3(D) of the Code of Judicial Conduct; and 3) the appearance of fairness doctrine.

II. RCW 34.05.425(3)

RCW 34.05.425 provides, in relevant part:

(3) Any individual serving or designated to serve alone or with others as presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter or for which a judge is disqualified.

In factual support of its Petition, Chicago requests disqualification of the undersigned under this section based upon her

historical role in dealing with the precise issue raised by the [OIC] in this proceeding. When serving as Deputy Insurance Commissioner, Judge Petersen was charged with the interpretation and enforcement of the insurance code including WAC 284-30-800 (the "Inducement Regulations"). In 1989, Judge Petersen authored a letter (the "Petersen Letter") setting forth the OIC's position that Title Insurance Underwriters are liable for violations of the Inducement Regulation committed by underwritten title companies ("UTCs") – the precise issue which is now before her. The Petersen Letter was submitted by the OIC as evidence in support of its position (Exhibit M to Declaration of Alan Singer dated September 24, 2008), and relied upon by the OIC in its argument (Response and Opposition to Chicago's Motion for Summary Judgment re: Agency Liability at pp. 19-20). The interpretation of the OIC's authority, as expressed in the Petersen Letter, directly contradicts to [sic] the conclusions of law made by Judge Cindy Burdue of the Office of Administrative Hearings. Furthermore, if the summary judgment were reversed and the matter remanded for an evidentiary hearing, Ms. Petersen could be a witnesses [sic].

As cited above, Chicago's Petition is based on a November 1, 1989, letter I wrote to Joseph J. Zelazny, III, President of Commonwealth Title Insurance Company in Tacoma, in

my then position as a Deputy Insurance Commissioner. First, Chicago asserts that in this 1989 Petersen Letter I am *setting forth the OIC's position that Title Insurance Underwriters are liable for violations of the Inducement Regulation committed by underwritten title companies ("UTCs") – the precise issue which is now before her.* However, nowhere in this letter is this position stated and I have never even heard of an "underwritten title company (UTC)." Second, contrary to Chicago's statement, I served as just one of approximately six Deputy Insurance Commissioners at all relevant times, and I was only one of at least three of these six Deputy Insurance Commissioners, plus the Chief Deputy Insurance Commissioner and Insurance Commissioner himself, who *was charged with the interpretation and enforcement of the insurance code including WAC 284-30-800 (the "Inducement Regulations").*

Third, I do not remember this 1989 Petersen Letter, which was apparently written by me 20 years ago (until it was raised in a similar case approximately two months ago). Further, I do not remember any of the circumstances which prompted this letter nor the facts concerning Commonwealth. At any rate, in this 1989 Petersen Letter, I purported to interpret WAC 284-30-800 as it was written and apparently interpreted at that time. In addition, as I read this letter, it states in the fifth paragraph, *In addition to my continuing work in handling substantive title insurance cases, in August of this year [1989] Commissioner Marquardt assigned to me the responsibility of enforcing this illegal inducement regulation [WAC 284-30-800].* As shown in the rulemaking history of WAC 284-30-800, it was written by Commissioner Marquardt, Deputy Commissioner Robert E. Johnson and Deputy Commissioner June Mulcahey in 1988. Further, I did not either propose or draft Bulletin 88-5 which purports to interpret the then newly enacted WAC 284-30-800.

Fourth, as the 1989 Petersen Letter reflects, in August 1989, I was assigned the duty to interpret and enforce this regulation – actually along with Deputy Commissioners Johnson and Mulcahey and Insurance Commissioner Marquardt, with the other Deputy Commissioners having optional input - and in that capacity I would have been authorized to write the subject letter. Because in the course of this interpretation I came to agree with the title insurers that the then \$12 limitation was far too small, I amended the regulation in 1990 only insofar as to raise the limit from \$12 to \$25; I did not participate in the drafting or promulgation of WAC 284-30-800 or any later amendments. Shortly thereafter, in 1991, Insurance Commissioner Marquardt hired a Washington attorney from the title industry, James E. Tompkins, to be the sole

individual in charge of all title matters including interpretation and enforcement of WAC 284-30-800. Mr. Tompkins retained this area as his responsibility for some 13 years and although I understand he is still employed by the OIC he did at some point since approximately 2004 transfer the responsibility of interpretation and enforcement of WAC 284-30-800 to someone else; I am not certain who is now responsible for interpretation, enforcement and other involvement concerning this regulation.

Fifth, I have had no involvement with the interpretation or enforcement of this regulation for at least these past 18 years and am entirely unfamiliar with the facts and circumstances which have lead up to the current investigatory, enforcement and disciplinary proceedings at issue herein or any other situations similar to it. I have not conducted or participated in any investigation and/or enforcement of any kind in the OIC for many years.

III. CANON 3(D) OF THE CODE OF JUDICIAL CONDUCT

Although Canon 3(D) is cited by Chicago, the Code of Judicial Conduct (CJC) does not apply to administrative law judges in administrative proceedings in Washington. However, because RCW 34.05.425 can be read to incorporate CJC 3(D) by reference, I choose to comply with the CJC and have here reviewed and considered CJC 3(D) in making my decision. CJC 3(D) provides, in relevant part:

Disqualification. (1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which: (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (b) the judge previously served as a lawyer or was a material witness in the matter in controversy, ...; (d) the judge ... (iii) is to the judge's knowledge likely to be a material witness in the proceeding.

In support of its argument that CJC 3(D) requires disqualification herein, Chicago states that in this 1989 Petersen Letter I write that I am *setting forth the OIC's position that "Title Insurance Underwriters are liable for violations of the Inducement Regulation committed by underwritten title companies ("UTCs")."* Although, as above, I find no such statement at all in the 1989 Petersen Letter, nor have I ever heard of the term "underwritten title companies." An examination of CJC 3(D) reveals that factually the closest case to this situation is Ethics Advisory Committee Opinion 00-19, found at

http://www.courts.wa.gov/programs/orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=0019.

In this situation, a judge had taken certain positions on issues similar to that at issue before him. In the opinion, the judge was allowed to hear and decide the case in question, ruling that it is not grounds for disqualification to have taken certain positions on a similar issue in past jobs or past cases.

In this instant situation, as stated above, I have not participated in the interpretation or enforcement of WAC 284-30-800 for some 18 years, and only then for a very short time until an attorney from the title industry could be hired by the OIC to handle all interpretation and enforcement and other activities involving the title industry and regulations pursuant thereto. Further as above, I did not draft this regulation: my sole involvement in drafting the regulation was in 1990 when I agreed to increase the amount of the limit at the request of the title industry, and I have no idea how many times it has been amended since 1990 or what types of interpretations and enforcement have been conducted in the last 18 years. I have taken no position in title matters, have no knowledge of enforcement actions, or familiarity with any particular title insurance compan(ies), for at least the past 18 years (except for handling contested cases as presiding officer). Additionally, the only piece of the regulation which I drafted was in 1990 when I merely changed the \$12 limitation to \$25.

I am very cognizant of CJC 3(D) and respect and follow its dictates in all my activities involved in my adjudicative responsibilities. I certainly have no feelings either way about the policy behind this regulation, Chicago or any individuals or entities associated therewith, the agency's action taken herein or any other matters related to this issue in this situation. I do not find that my impartiality might reasonably be questioned and I have no personal bias or prejudice concerning this or any other title insurance matters. Finally, because I have not been involved in interpretation or enforcement, or in any other manner involving WAC 284-30-800 for 18 years, I could not reasonably serve as a material witness in this or any other proceeding involving this regulation or this issue in general.

IV. THE APPEARANCE OF FAIRNESS DOCTRINE

Chicago cites State v. Baughman, 199 Wn.App. 1025, Not reported in P.2d, 2003 WL22753623 (2003) for the proposition that *[t]he law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial* [quoting its earlier decision in

State v. Madry, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972)]. The undersigned agrees that the same standards apply to disqualification of an administrative law judge as are applicable to disqualification of a superior court judge. However, in Baughman, the issue was whether the superior court judge violated the appearance of fairness doctrine by hearing evidence and determining the existence of probable cause and directing the issuance of a summons to Ms. Baughman and then later presiding over the trial. In that case, where Ms. Baughman was unable to show actual prejudice, the court declined to rule that she had shown even "potential bias" and therefore ruled that the appearance of fairness doctrine did not require the judge's disqualification from presiding over the case. In Madry, the court elucidated this same requirement, advising that the appearance of impartiality requires that *no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome ... That interest cannot be defined with precision. ... However, [e]very procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused, denies the later due process of law.* The court in Madry stated that, by inferences, *[o]ne can conclude only that [the trial judge at issue] w[as] conducting an investigation^{of} into the activities of the defendant substantially before the trial and during portions of the trial ... [a letter signed by the trial judge presenting conclusions from his investigation of defendant] was written a month before the motion for a new trial was denied [by that trial judge].* For that reason, the Madry court concluded, the trial judge had an interest in the outcome of the case before him and should have been disqualified. Neither Baughman or Madry support disqualification in the instant case.

Chicago further cites State v. Dugan, 96 Wn.App. 346, 354, 979 P.2d 885 (1999) for the proposition that *to prevail under the appearance of fairness doctrine, the claimant must provide some evidence of the judge's or decisionmaker's actual or potential bias.* In that case, the trial judge found appellant county prosecutor in contempt, and, using his own county bar number, actively represented the criminal defendant on appeal in attempting to have the matter remanded to his trial court, writing substantial parts of the appellate brief. On remand to his trial court, the judge refused to recuse himself and issued his decision in the case. On appeal, the Dugan court, while reciting the above position regarding the appearance of fairness doctrine, still did not apply it against this judge. At any rate, the facts in Dugan are entirely different than those at issue herein.

Finally, Chicago cites Sherman v. State, 128 Wn.2d 164, 188, 905 P.2d 355(1996)(citing Narrowsview Preservation Ass'n v. City of Tacoma, 84 Wn.2d 416, 420, 526 P.2d 897 (1974)) for the proposition that the appearance of fairness doctrine requires that an administrative body must be fair, free from prejudice, and have the appearance of impartiality. As in the above cases and in Sherman, it is critical to look to how the court interpreted and applied this doctrine to the facts: In Sherman, the court concluded that disqualification was not required under either RCW 34.05.425, the CJC or the appearance of fairness doctrine where the chief adjudicative officer in a physician's termination hearing, which presiding officer was also an employee of the employer, also served as the employer's designated representative in the physician's personal lawsuit against the employer. In Narrowsview, where the vice-chairman of the City of Tacoma Planning Commission voted in favor of rezoning a specific piece of property to greatly enhance its value was shown to be an employee of the bank which had given the landowner a large loan, holding only the subject land as collateral, the court ruled that the adjudicator had an interest in the outcome and therefore ruled that the appearance of fairness doctrine dictated his disqualification. In each case, the facts are distinguishable from the instant facts but they do show the requirement that at the least the adjudicator must have an interest in the outcome of the case they judge.

Further cases address other issues surrounding the appearance of fairness doctrine: In order to be ineligible to hear a case in which disqualification is sought, the presiding officer must be shown by clear and convincing evidence to have an unalterably closed mind on the critical issues. Alaska Factory Trawler Ass'n. v. Baldrige, 831 F.2d 1456 (9th Cir. 1987). Mere exposure to adjudicative facts is not disqualifying. E.g., Smith v. Mount, 45 Wn.App. 623 (1986); see also Hortonville Joint School Dist. No. 1 v. Hortonville Educational Ass'n., 426 U.S. 482, 493 (1976).

Rather than presuming, as required by Hoquiam v. PERC, 97 Wn.2d 481, 646 P.2d 129 (1982) that the undersigned will legally and properly perform her official duties, Chicago presumes the opposite. Further, even if there were not 20 years between the time of authorship of the Petersen Letter and the 1989 to 1991 time frame in which some title oversight was within the jurisdiction of the undersigned, the Washington Supreme Court in Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 479, 663 P.2d 457 (1983) found that:

The bare fact that the same administrative adjudicators also are clothed with investigative powers does not mean the case will be decided on an improper basis or that there will arise a prejudgment on the ultimate issues. We must presume the board members acted properly and legally performed their duties until the contrary is shown. Hoquiam v. PERC, 97 Wn.2d 481, 646 P.2d 129 (1982); Rosso v. State Personnel Bd., 68 Wn.2d 16, 20, 411 P.2d 138 (1966). We are convinced the mere combination of adjudicative and investigative powers in one agency, without more, would not be viewed by a reasonably prudent and disinterested observer as denying any party a fair, impartial and neutral hearing.

In Johnston, the Washington Supreme Court found that a party must demonstrate actual prejudice or bias on the part of the decisionmakers and that, even where the same decisionmakers in Johnston had heard substantial preliminary information and summarily suspended Johnston's medical license, this fact did not disqualify that decisionmaker from later hearing Johnston's appeal. The court found, rather, that a party must demonstrate actual prejudice or bias on the part of the decisionmaker to require disqualification.

At the least, under the ruling of Kendall v. Reid, 93 Wn.App. 1050, not reported in P.2d, 1999 WL 7828 (1999), the court ruled that *In Order to show bias, Kendall must make an affirmative showing of prejudice other than a general predilection toward a given result.* Medical Disciplinary Bd. v. Johnston, 99 Wn.2d 466, 474-75, 663 P.2d 457 (1983).

Further, the application of the appearance of fairness doctrine was revised by the Washington Supreme Court in 1992. As noted in State v. Carter, 77 Wn.App. 8 (Div. III, 1995):

The threshold requirement for application of the appearance of fairness doctrine was reformulated in State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992). Evidence of a judge's actual or potential bias is now required. ... As explained in Post, at 619 n.9:

Past decisions of this court have applied the appearance of fairness doctrine when decision-making procedures have created an appearance of unfairness. ... Our decision here does not overrule this line of decisions, but reformulates the threshold that must be met before the doctrine will be applied: evidence of a judge's or decisionmaker's actual or potential bias. This enhanced threshold requirement is more closely related to the evil which the doctrine is designed to prevent.

Carter, 77 Wn.App. at 11.

The court in Post went on to hold that *Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit.* State v. Post, 118 Wn.2d at 619. The court of appeals in State v. Carter found no violation of appearance of fairness despite the fact that the trial judge had actually recited facts relating to the defendants' guilt (and according to the dissent, expressed an opinion beyond fact finding) in presiding over the hearing to accept the defendant's *Alford* plea, which was later withdrawn.

In the instant Petition for Disqualification, Chicago asserts only the existence of the 20 year old Petersen Letter. Its argument is devoid of any evidence of actual or even potential bias or prejudice of the undersigned as required by current case law interpreting the requirements of the appearance of fairness doctrine to support disqualification. In applying the applicable standards set forth in case law to support disqualification under the appearance of fairness doctrine, Chicago's argument fails to show that I have any interest in the outcome of this proceeding, and fails to show that a reasonable person would conclude that there is any question that this proceeding will be fair and impartial.

In fact, I am very cognizant of the appearance of fairness doctrine and respect and follow its dictates in all my activities as an administrative law judge. I certainly have no interest in the outcome of this proceeding, I have no feelings either way about the policy behind this regulation, about Chicago or any individuals or entities associated therewith, or about the OIC's enforcement action taken against Chicago or any other matters related to this issue. I have no preconceived notions or even general feelings one way or the other about the issues involved in this case, the OIC's enforcement action under review, or the parties involved, and I do not find that my impartiality might reasonably be questioned. Finally, because I have not been involved in interpretation or enforcement, or in any other manner involving WAC 284-30-800 for 18 years, and then only for a brief time, I could not reasonably serve as a material witness in this or any other proceeding involving this regulation or this issue in general.

V. ORDER

Based upon a careful review of RCW 34.05.425, CJC 3(D), the appearance of fairness doctrine and the facts stated above, I find that disqualification in this case is neither required or advisable.

This being the decision of the undersigned,

IT IS HEREBY ORDERED THAT Chicago's Petition for Disqualification of Judge Patricia Petersen is **DENIED**. Oral argument on the Insurance Commissioner's Petition for Review will proceed as scheduled at 10 a.m. (PST) on Thursday, January 22, 2009, at the office of the Insurance Commissioner, 5000 Capitol Boulevard, Tumwater, Washington. Preliminarily, Wendy Galloway, Paralegal to the undersigned, will schedule argument on Chicago's Limited Motion to Strike Declaration of Alan Michael Singer filed with the undersigned on December 10, 2008.

ENTERED this 16th day of January, 2009, at Tumwater, Washington, pursuant to RCW 34.05.RCW, Title 48 RCW, Canon of Judicial Conduct 3(D) and regulations and case law pertinent thereto.



PATRICIA D. PETERSEN
Presiding Officer