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BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of

CHARLES D. OLIVER and AMERICAN
EQUITY ADVISORY GROUP, LLC,

Respondents.

Docket No. 14-0229

INSURANCE COMMISSIONER'S
REPLY TO CHARLES OLIVER
AND AMERICAN EQUITY'S
RESPONSE TO INSURANCE
COMMISSIONER'S MOTION TO
DISMISS

I. INTRODUCTION

The sole issue before this Tribunal is whether Commissioner Kreidler should be ordered to remove true and accurate information from his blog. Because Mr. Oliver has failed to carry his burden of demonstrating invalid agency action, this Tribunal should dismiss this hearing request. The Commissioner was well within his authority, both express and implied, to make the post, and Mr. Oliver has failed to cite to any authority that would impose a duty upon the Commissioner to remove it. That the underlying order has been superseded does not make the post inaccurate or misleading. Mr. Oliver does not, and cannot, successfully assert that the post is false in any way. There is no dispute about the facts and the post clearly reflects those facts.

Further, the long standing policy encouraging open and transparent government includes as a fundamental tenet that public knowledge of agency actions is of paramount importance. Dissemination of such knowledge is critical so the public can know how elected officials are performing their duties. Mr. Oliver asks that this Tribunal disregard these principals in favor of his individual business interests. As Mr. Oliver has failed to provide any legal basis for requiring the Commissioner to remove the post, this Tribunal should dismiss Mr. Oliver's hearing request.

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II. LEGAL ARGUMENT

A person challenging an agency action has the burden of demonstrating the invalidity of that action. RCW 34.05.570(a). Mr. Oliver has failed demonstrate that he has standing to challenge any action or inaction in this case. Further, he has not shown that posting the information at issue here was an invalid action or that the Commissioner has a duty to now remove it. The post is consistent with open and transparent government and Mr. Oliver cannot show that it is misleading or inaccurate under any reading of the facts.

A. Mr. Oliver Has Not Demonstrated That He Is An Aggrieved Person Pursuant To RCW 48.01.010 Because Mr. Oliver Has Failed To Specify Grounds Upon Which The Commission Can Be Ordered To Remove The Blog Post.

Mr. Oliver's petition must be dismissed because he has failed to cite any authority this tribunal can rely upon to order the Commissioner to remove a true and accurate blog post. One must specify "the grounds to be relied upon" for the relief demanded. RCW 48.04.010(2). Mr. Oliver has failed to do so. Instead, he asserts that the Commissioner must remove the post because it references a superseded cease and desist order, and because potential customers are allegedly making decisions contrary to his business interests. Mr. Oliver asks that this tribunal order the Commissioner to withdraw accurate information without citing any duty or obligation to do so. Because there is no duty to withdraw or remove the post, Mr. Oliver cannot specify grounds upon which this tribunal can grant relief.

Mr. Oliver next asserts that he has standing because he was aggrieved by an act of the Commissioner pursuant to RCW 48.08.010. However, Mr. Oliver's challenge is to the Commissioner's decision *not* to remove the post. Mr. Oliver does not appear to argue that the post was false or misleading at the time it was published. Rather, he claims that it is now false or misleading because it references a superseded order. Response to Motion to Dismiss, at 5. Thus, Mr. Oliver's challenge is essentially a challenge to the Commissioner's refusal to remove the post, not the initial decision to create it. Mr. Oliver must demonstrate that he was aggrieved by a "failure of the commissioner to act, if such failure is deemed an act under any

1 provision of this code. . . .” RCW 48.08.010. Mr. Oliver has failed to demonstrate that
2 refusing to remove the blog post can be deemed an act under any provision of Title 48. His
3 petition should therefore be dismissed.

4 Next, Mr. Oliver claims that the blog post “may easily mislead consumers to believe
5 the OIC as [sic] proved that Mr. Oliver and American Equity committed all the alleged
6 violations.” Response to Motion to Dismiss, at 5. This claim is self-serving and contrary to
7 the text of the post. The post itself was clear. It expressly provided that the violations were
8 “alleged” and that Mr. Oliver could challenge those violations. Mr. Oliver’s assertion that the
9 Center for Life Insurance Disputes (“Center”) was misled by the post is inaccurate. *Id.* at 5-6.
10 While it is irrelevant how a third party interpreted the blog post, Mr. Oliver’s reading of the
11 Center’s article is incorrect. The Center referenced the blog post explaining that the
12 Commissioner had issued a Cease and Desist order and stated that “[a]mong the near-dozen
13 violations of state law cited by the Commissioner, Mr. Oliver is *accused* of selling insurance
14 without a license and making misleading representations of an insurance transaction.” Decl. of
15 Lawless, Exhibit B (emphasis added). The Center was clearly not misled. Nothing in its
16 reference to the Commissioner’s post misstates the undisputed facts. As stated in the article,
17 Mr. Oliver was issued a Cease and Desist order on April 4, 2013, and was accused of
18 violations of Washington Insurance law.

19 This Tribunal should dismiss Mr. Oliver’s hearing request because he has failed to
20 specify grounds upon which the Commissioner can be ordered to remove true and accurate
21 information. Mr. Oliver has also failed to satisfy the Title 48 standing requirements.

22 **B. Information Disseminated By The Commissioner Need Only “Concern” Insurance**
23 **Law And Can Discuss Enforcement Action.**

24 There is no question that the Commissioner has authority to issue press releases,
25 publish blog posts, or otherwise disseminate information relating to his agency’s actions. Not
26 only is such authority a commonly held tenant of Washington’s long standing policy on

1 encouraging open government and transparency, but the legislature provided express statutory
2 authority and the Washington Supreme Court has held that such authority is inherent in the role
3 of a state official. Mr. Oliver misstates the Commissioner's duties and authority by asserting
4 that the blog post "does not transmit information to the public about a currently effective
5 cease and desist order," and that it "does not explain the state of Washington Insurance Law."
6 Response to Motion to Dismiss, at 5. This assertion is irrelevant because the Commissioner's
7 communications to the public need not relate to a "currently effective cease and desist order,"
8 nor must they "explain the state of Washington Insurance Law."

9 In misstating these duties, Mr. Oliver attempts to narrow the scope of the
10 Commissioner's authority. However, RCW 48.02.160—titled "Special duties"—expressly
11 states that the commissioner shall "[d]isseminate information *concerning* the insurance laws of
12 the state," and shall "[p]rovide assistance to members of the public in obtaining information
13 about insurance products and in resolving complaints involving insurers and other licensees."
14 (Emphasis added). Information disseminated by the Commissioner need do nothing more than
15 "concern" insurance laws of the state. While the scope of this mandate is not specifically
16 defined, it is broad. Thus, contrary to Mr. Oliver's assertion, there is no requirement that the
17 Commissioner's dissemination of information "explain the state of Washington Insurance
18 Law." Nor is there a requirement that the information relate to a "currently effective" order. A
19 blog post explaining enforcement action taken by the Commissioner, whether currently
20 effective or not, clearly "concerns" insurance laws and the Commissioner's official duties.

21 Even if the Commissioner did not have express statutory authority, such authority is
22 inherent in his role as the regulator of Title 48 and insurance laws of the state.
23 The Supreme Court of Washington, in determining that immunity applied to the Attorney
24 General under similar facts, expressly rejected the argument that an elected official need
25 specific statutory authority to disseminate information to the public:
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1 The appellants argue that the Attorney General has no specific statutory duty to
2 inform the public by means of preparation of a press release concerning his
3 initiation of consumer protection litigation. No statutory delineation of such
4 responsibility is necessary, however, inasmuch as the Attorney General, as an
elected officer of cabinet rank in state government, has an implicit duty by
virtue of his position to inform the people of the state of Washington of actions
taken in his official capacity.

5 *Gold Seal Chinchillas, Inc. v. State*, 69 Wn.2d 828, 833, 420 P.2d 698 (1966). The
6 Commissioner, as an elected officer of cabinet rank has this same implicit duty.

7 Mr. Oliver misstates the analysis in *Gold Seal* as requiring a case-by-case analysis of an
8 individual's interest in business reputation versus the interest of the public at large in a
9 transparent and open government. However, *Gold Seal* did not engage in a case specific
10 analysis. Rather, the Court's holding was broad in that it agreed with "the result and
11 underlying reasoning" of "the overwhelming majority" of decisions that "have struck the
12 balance in favor of encouraging public officials to speak with complete candor — and without
13 fear of legal recourse — with respect to their official duties." *Id.* The Court did not weigh the
14 specific facts at issue there. The only condition is that the agency's communication must have
15 "some relation to the general matters committed by law to the control or supervision of the
16 particular state official." *Id.* at 834 (emphasis added). *Gold Seal* stands for the idea that
17 encouraging public officials to speak with complete candor outweighs an individual citizen's
18 private business interests. This idea is particularly important where, as here, the information
19 disseminated is true and accurate.

20 There is no question here that the post here has "some relation" to the general matters
21 committed to the control or supervision of Commissioner Kreidler. The Commissioner is
22 charged with regulating Title 48 RCW, the scope of which includes the violations alleged in
23 the post. While Mr. Oliver is correct that this case is not about qualified immunity for liability,
24 the underlying rationale behind the immunity set forth in *Gold Seal* and RCW 48.01.190
25 supports the Commissioner's authority to disseminate factually accurate information relating to
26 his duties. As the Court explained in *Gold Seal*, public knowledge of enforcement action is of

1 paramount importance to inform the public that laws are being enforced and that an elected
2 officer is adequately performing his duties and meeting his responsibilities. The post here is
3 true and accurate. Requiring the Commissioner to remove the post would directly contradict
4 and discourage an open and transparent government, and would allow private citizens to chill a
5 public official's ability to speak candidly with the public. The analysis and underlying
6 reasoning that justified application of immunity to the Attorney General in *Gold Seal* also
7 supports dismissal of this case. This Tribunal should dismiss this hearing and avoid putting
8 Mr. Oliver's interest in his personal business reputation before the public interest in free and
9 uninhibited dissemination of information.

10 III. CONCLUSION

11 Mr. Oliver has failed to carry his burden of demonstrating any invalid agency action on
12 behalf of the Commissioner. He has also failed to cite to any authority that would require the
13 Commissioner to remove the post. The post is true and accurate under any reading of the facts.
14 Based on the foregoing, and on Washington's long held policy of encouraging open and
15 transparent government, the Commissioner respectfully requests this Tribunal dismiss
16 Mr. Oliver's hearing request.

17 DATED this 27 day of February, 2015.

18 ROBERT W. FERGUSON
19 Attorney General

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21 _____
22 ISAAC WILLIAMSON, WSBA No. 43921
23 Assistant Attorney General
24 Attorneys for the Insurance Commissioner
25
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1 **PROOF OF SERVICE**

2 I certify that I served a copy of this document on all parties or their counsel of record
3 on the date below as follows:

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6 Gulliver A. Swenson
7 Ryan, Swanson & Cleveland, PLLC
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9 I certify under penalty of perjury under the laws of the state of Washington that the
10 foregoing is true and correct.

11 DATED this 27th day of February, 2015, at Olympia, WA.

12 
13 Rowena Santos
14 Legal Assistant