



1 **EVIDENTIARY RULING**

2 The record consists of the department's Exhibits 1 through 29 and Respondent's Exhibits  
3 101 through 106.

4 **FINDINGS OF FACT**

5 Hamilton has been an insurance agent for approximately ten years. During the relevant  
6 period, he was an independent agent and sold insurance for a number of insurance companies  
7 including Progressive Insurance Company (Progressive) and Infinity Insurance Company (Infinity).  
8 His insurance agency, AA Associates, is structured as a limited liability company (LLC). Hamilton is  
9 the sole owner and officer. During the relevant period, Mauro A. Pinzon (Pinzon) and Gabriel T.  
10 Williams (Williams) became affiliated with AA Associates and the affiliations of Dennis C. Dietz  
11 (Dietz), Timothy M. Martens (Martens) and Pamela K. Hamrick (Hamrick) were terminated. The  
12 department's agent licensing records did not contain these any of changes in affiliation.

13 Early afternoon on Saturday, July 12, 1997, Charity Carter (Carter) and her 16 year-old  
14 friend Michelle Hendrix (Hendrix) arrived at Thomason Toyota, Inc. (Thomason or dealership) in  
15 Hendrix's car. Carter, who was 18 years old at the time, had never purchased or leased a car before.  
16 She told the salesperson, Najib Houdroge (Houdroge), that she was just looking. By the late  
17 afternoon, she had entered into a "Red Carpet Lease" with Thomason to lease a 1995 Dodge Neon  
18 automobile (Neon). The lease was financed through Ford Motor Credit Company (Ford).

19 Hendrix was present throughout the transaction. During the transaction, Carter dealt with  
20 Houdroge, Brian Hardey (Hardey), who was Thomason's sales manager, and an unnamed finance  
21 person who handled the closing on the lease. Hardey wanted \$1,000 as a down payment so that the  
22 lease would be approved by Ford. Carter had no vehicle as a trade-in and had saved only \$700 for  
23 both the down payment and auto insurance. Hardey agreed that Thomason would pay for the first

1 30 days of Carter's insurance premium and signed an Agreement to Provide Insurance (agreement)  
2 dated July 12, 1997. Houdroge telephoned Hamilton and received a quote for insurance through  
3 Infinity.

4 Hardey did not tell Carter how much her insurance payment would be or who the insurer  
5 was. She had only one check in her checkbook and used it to write Thomason a check for \$700 for  
6 part of the down payment. Carter drove the Neon back to her mother's residence to pick up more  
7 checks and a copy of her mother's child support check. Hendrix went with her and Houdroge  
8 followed them in another vehicle. Carter wrote Thomason a post-dated check for August 11, 1997  
9 in the amount of \$300 for the rest of the down payment. She did not speak with or meet with  
10 Hamilton that day, or pay cash or write a check for a down payment for auto insurance.

11 Carter signed a document captioned "Red Carpet Lease Certificate of Insurance"  
12 (certificate) as the lessee bearing the temporary binder number NBINFI0345 and naming Ford as an  
13 additional insured and loss payee. The number indicated that the quote was for new business placed  
14 with Infinity for \$345. This was an internal number used by Hamilton to identify the matter prior to  
15 a binder or policy number being assigned.

16 Progressive's Oregon sales manager, Ann Leighty, previously instructed Hamilton that using  
17 such numbers on Progressive's applications was not acceptable and reviewed his options for  
18 obtaining a valid binder number. Progressive's underwriting guide for the relevant period also  
19 detailed the manner in which binder numbers were obtained both by computer and telephone.

20 On the certificate, Hamilton was listed as the insurer and the agent. The certificate contained  
21 Hamilton's office telephone number but not his pager number or his agency's name. The portion to  
22 be completed by the agent had not been completed. Neither the certificate nor the agreement was

1 signed by Hamilton. The agreement, the car title and the registration application all referenced the  
2 Infinity temporary binder number.

3 Compared to Infinity, Progressive's rates were generally higher. With Infinity, agents were  
4 required to call an 800 number on the spot before a policy number would be assigned and binding  
5 would occur. Agents could also place the application in the mail to Infinity and the postmark date  
6 would be the date the policy would be bound. Infinity's 800 number was available 24 hours a day.

7 Progressive's guidelines for binding coverage in effect at the time of the transaction were  
8 more flexible than Infinity's. Progressive allowed agents to bind a policy so long as the policy  
9 information was uploaded to the company within 72 hours of binding. The signed applications were  
10 thereafter on file with the agents. Progressive would occasionally audit the agents' files.

11 The applications uploaded through Progressive's computer program, the "ProRater Plus  
12 System," were assigned computer-generated policy numbers and effective dates. The computer-  
13 generated effective date could be manipulated by the computer operator. Agents were instructed to  
14 use Progressive's 800 telephone number, called the "PARTner System," to obtain a binder number if  
15 they were unable to upload the policy information. Both the ProRater and PARTner systems were  
16 available 24 hours a day.

17 In order to bind an application for Progressive, agents were required to have in their  
18 possession an application signed in person by the applicant and the premium down payment.  
19 Progressive's underwriting policies prohibited backdating applications. Carter drove the Neon off  
20 Thomason's lot with the certificate as her proof of insurance.

21 Sunday, July 13, 1997, Carter was involved in an automobile accident in the early afternoon.  
22 She had one passenger, a friend named Emily Labbe. The accident resulted in bodily injury to Carter  
23 and the occupants of the other two vehicles involved in the accident. The accident also resulted in

1 the total loss of the Neon and the other two vehicles. Carter thought that she had a green light and  
2 that one of the other vehicles had run a red light. After the accident Carter provided the certificate  
3 to the police officer at the scene and confirmed that the certificate was her proof of insurance. The  
4 Traffic Accident Information Exchange Form referenced the Infinity temporary binder number. The  
5 Neon was towed from the scene and Carter was taken by ambulance to the hospital emergency  
6 room. She was released later that day. Progressive's adjuster later determined that Carter had run a  
7 red light and that the accident was her fault.

8 Carter's mother was out of town when the accident occurred and her father was unavailable.  
9 She called the number on the certificate but could not reach Hamilton because it was Sunday and  
10 the office was closed. She called Thomason and they gave her his pager number. Hamilton spoke  
11 with Carter numerous times by telephone that Sunday and assured her that everything would be  
12 taken care of. He represented that he was with Progressive. He did not tell her he was an  
13 independent insurance agent or the name of his agency.

14 At 9:48 am on Monday July 14, 1997, Hamilton uploaded Carter's insurance policy to  
15 Progressive on his computer. Later that same morning, he met with Carter at her mother's  
16 residence. Hendrix was present during the meeting. This was the first time Carter had met or spoken  
17 with Hamilton, other than by telephone, after the accident. Hamilton explained that it was necessary  
18 for him to backdate her policy because she might not otherwise have insurance to cover the  
19 accident. He told her to tell Progressive that she had met with him at the dealership on Saturday,  
20 July 12, 1997. She trusted Hamilton and relied on him to help her. She did not question his request  
21 until Progressive started investigating. Hamilton had her sign a cash receipt for \$409.36 and an  
22 application for insurance through Progressive, both dated July 12, 1997.

23 Hamilton then drove to the dealership and picked up a check in the amount of \$409.36

1 issued by Thomason on July 14, 1997 to pay for Carter's insurance. Hamilton subsequently sent a  
2 FAX to Progressive which contained a copy of Carter's computer-generated policy with an effective  
3 date of July 14, 1997 and a copy of Carter's signed application dated July 12, 1997. The  
4 application was also signed by Hamilton and dated July 12, 1997 with a time of 4:30 pm. Hamilton  
5 noted in the FAX cover letter that the policy was uploaded "in error" and that the effective date  
6 should have been July 12, 1999.

7 Hamilton mailed Carter's computer-generated receipt and her temporary insurance card to  
8 her on July 15, 1997. He spoke with her several times after their meeting. When Progressive called  
9 Carter about the accident, Hamilton told her to stick with the story they had discussed the Monday  
10 following the accident.

11 When Progressive began investigating the transaction, Carter initially told the investigators  
12 the story that Hamilton had asked her to tell; that she had met with him at the dealership on July 12,  
13 1997. Later, she started elaborating on the story she had agreed to tell and became confused. She  
14 subsequently told the investigators the truth; that she did not meet with Hamilton or sign an  
15 insurance application until after the accident on July 14, 1997.

16 Carter's checks for \$700 and \$300 were returned to Thomason by the bank due to  
17 insufficient funds. The \$700 check cleared when it was submitted a second time. Carter did not  
18 deposit additional funds in her account to cover the \$300 check. She subsequently received a letter  
19 from Ford stating the lease had been rejected because she did not qualify for financing on the Neon.

20 Progressive paid out in excess of \$18,000 for losses sustained in Carter's accident, including  
21 \$7,000 to Thomason for the Neon. After the accident, Thomason contacted Carter and asked her to  
22 come to the dealership on the pretext that the odometer disclosure statement was incorrect and  
23 needed to be re-signed. When she arrived, Thomason wanted her to sign a new lease.

1 The certificate on file at Thomason had been altered. Infinity and the temporary binder  
2 number for Infinity had been crossed out, and Progressive was written on Thomason's copy.  
3 Thomason's copy also included Hamilton's address and what was purported to be Hamilton's  
4 signature, but was not. The certificate contained an effective date of "7-12-97" and an expiration  
5 date of "1-12-97."

6 On July 9, 1998, the name of Hamilton's agency was changed with the Oregon  
7 Secretary of State from AAA Associates Insurance Agency to AA Associates Insurance Agency. On  
8 June 9, 1999, Hamilton notified the department of the name change.

9 On June 2, 1999, the department requested that Hamilton provide an answer to certain  
10 questions concerning this matter and directed him to provide a written response no later than 5:00  
11 pm on June 22, 1999. On June 24, 1999, Hamilton provided incomplete written answers. On June  
12 30, 1999, the department requested additional information which was omitted from Hamilton's  
13 response to the department's June 2, 1999 questions. Hamilton did not respond to the request.

#### 14 **FINDINGS OF ULTIMATE FACT**

15 Hamilton's testimony was not persuasive because it was inconsistent with the weight of the  
16 credible evidence.

17 Hamilton back dated Carter's insurance policy with Progressive to make it appear that the  
18 policy was in effect when the accident occurred.

19 Hamilton's action of misrepresenting to Progressive that the policy was bound prior to the  
20 accident, when it was not, was a dishonest and fraudulent act.

#### 21 **OPINION AND CONCLUSIONS OF LAW**

22 With respect to the violations alleged in the Notice, the department has the burden of  
23 proving these allegations by a preponderance of the evidence. *See* ORS 183.450(2) and (5); *Harris*

1 v. *SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the  
2 burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437  
3 (1980) ( in the absence of legislation adopting a different standard, the standard in administrative  
4 hearings is preponderance of the evidence).

5 Hamilton

6 The department alleged that Hamilton violated ORS 744.013(2)(g) by knowingly  
7 misrepresenting to Progressive that he had bound Progressive to provide automobile insurance to  
8 Carter on July 12, 1997. I find that the department has met its burden of proof. ORS 744.013 states  
9 in pertinent part:

10 “(1) If the director finds with respect to a licensee \* \* \* that one or more of  
11 the grounds set forth in subsection (2) of this section exist, the director may  
12 take the following disciplinary actions:  
13

14 “(a) The director may \* \* \* revoke a license issued under ORS 744.002 or  
15 the authority to engage in any category of insurance business or any class of  
16 insurance.  
17

18 “ \* \* \* \* \*

19  
20 “(2) The director may take any disciplinary action under subsection (1) of this  
21 section on one or more of the following grounds:  
22

23 “ \* \* \* \* \*

24  
25 “(g) Use of fraudulent or dishonest practice by the licensee in the conduct  
26 of business under the license, or demonstration therein that licensee is  
27 incompetent, untrustworthy or a source of injury or loss to the public or  
28 others.”  
29

30 I find that Hamilton violated ORS 744.013(2)(g). During Thomason’s transaction with Carter,  
31 Houdroge called Hamilton by telephone and received a quote of \$345 for coverage through Infinity.  
32 Hamilton gave him the temporary binder number, NBINFI0345. There is no persuasive evidence

1 that he met with Carter later that day or that she signed the policy application on July 12, 1997.  
2 Carter's credible testimony, which was corroborated by the testimony of Hendrix who was present  
3 during the transaction at Thomason and the meeting with Hamilton on July 14, 1997, was that  
4 Hamilton met with Carter on July 14, 1997, the day after the accident. He back-dated the  
5 application to July 12, 1997 and had her sign it.

6 Furthermore, all of the unaltered documents from Thomason indicated that the insurance would  
7 be provided for \$345 through Infinity. To place Carter's insurance with Infinity, Hamilton would  
8 have been required to call Infinity's 800 number for a policy number at the time that Carter signed  
9 the application and only then would Infinity be bound. Because Hamilton did not meet with Carter  
10 until after the accident, he could not use Infinity. He had to use Progressive, even though the rates  
11 were higher, because he had binding authority so long as he uploaded the transaction within 72  
12 hours.

13 Hamilton argued at hearing that Carter's version of the events should not be believed because  
14 her statements were inconsistent and she had repeatedly lied to investigators. However, I do not find  
15 Hamilton's argument persuasive. Once Carter decided that she had to tell the truth about what had  
16 occurred, her statements were consistent with respect to all material facts. Her initial statements to  
17 the investigators were a lie because Hamilton told her to lie about when they met to sign the  
18 insurance application. He pressured her to lie by telling her that the accident would not be covered  
19 by insurance if she did not.

20 Additionally, Hamilton testified that Carter paid him \$409.36 for the insurance the day before  
21 the accident and points to the receipt signed by Carter and dated July 12, 1997. He explained that  
22 the insured will sometimes pay for the insurance and then Thomason will cut a check back to the  
23 insured. However, the undisputed evidence was that Thomason was going to pay for at least the

1 first month of insurance and the check issued by Thomason was issued on July 14, 1997 to AA  
2 Associates, not to Carter. Moreover, the evidence establishes that the scenario described by  
3 Hamilton could not have occurred. Carter did not have an additional check or cash to pay for the  
4 insurance on July 12, 1997. Carter credibly testified that Hamilton had her sign a back-dated receipt  
5 after the accident on July, 14, 1997.

6 On this record, I find that Progressive was not bound on July 13, 1997 when Carter was  
7 involved in the automobile accident. In light of my findings concerning Hamilton's actions in back-  
8 dating Carter's application and the receipt, I conclude that he intentionally misrepresented to  
9 Progressive that coverage was bound on July 12, 1997, when it was not. I also conclude that  
10 Hamilton's dishonest and fraudulent practice in this regard demonstrates that he is untrustworthy  
11 and a danger to the insurance-buying public, warranting revocation of his license.

12 In reaching these conclusions I note that Hamilton wrote a substantial amount of business  
13 through Thomason during this period of time. As argued by the department at hearing, Hamilton  
14 wanted to ensure that his business relationship with Thomason continued by making sure that the  
15 dealership would be compensated for the loss of the vehicle by back-dating Carter's application and  
16 binding coverage with Progressive. Hamilton responded that he had no reason to do so because the  
17 losses would be covered by his Errors and Omissions (E & O) Insurance. However, as pointed out  
18 by the department, E & O insurance is intended to cover mistakes by the agent, not intentional  
19 misconduct.

20 The department also alleged that Hamilton violated ORS 731.296. ORS 731.296 states:

21 "The Director of the Department of Consumer and Business Services may  
22 address any proper inquiries to any insurer, licensee or its officers in relation  
23 to its activities or condition or any other matter connected with its  
24 transactions. Any such person so addressed **shall promptly and truthfully**  
25 **reply** to such inquiries using the form of communication requested by the  
26 director." (Emphasis added).

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The evidence establishes, and Hamilton concedes, that he failed to respond completely on June 24, 1999 to a letter from the Insurance Division (division) dated June 2, 1999 which requested certain information, and failed to respond to a follow-up letter dated June 30, 1999 requesting the missing information. He argues, and I agree, that such a violation is not a “hanging” offense. The sanction for such violations is a fine. Here, the department assessed Hamilton a civil penalty in the amount of \$2,000 for his failure to properly respond to the department’s June 2 and June 30, 1999 requests.

Accordingly, based on these violations, I conclude that revocation of Hamilton’s license and assessment of a civil penalty in the amount of \$2,000 is warranted.

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AA Associates

The department alleged that AA Associates violated ORS 744.028(2) by failing to timely notify the division that it had changed its name from AAA Associates Insurance Agency, LLC to AA Associates Insurance Agency, LLC.

ORS 744.028 states in pertinent part:

“(2) Not later than the 30th day after a change in or deletion or addition of an assumed business name under which a licensee transacts business under a license as an agent, \* \* \* the licensee shall notify the director of the change.”

Here, the undisputed evidence establishes that AA Associates began using the new name on or about July 9, 1998 and failed to notify the department of the change until June 9, 1999. Hamilton stated in his June 9, 1999 notification to the department of the name change that this was the second

1 time he had provided notice. However, I do not find this statement credible because the department  
2 has no record of a previous notification. Therefore, I conclude that AA Associates violated ORS  
3 744.028.

4 The department also alleged that AA Associates violated ORS 744.031(1) in five instances  
5 by failing to notify the division that two new agents, Pinzon and Williams, had affiliated with the  
6 agency and that the affiliation with three agents, Dietz, Martens and Hamrick, had been terminated  
7 by the agency. ORS 744.031(1) requires an agency to notify the division no later than the 30th day  
8 after the authority of an individual licensee to transact insurance for the agency has commenced or  
9 terminated. Here, I find that AA Associates failed to notify the department within 30 days from the  
10 date of these changes in affiliation. Consequently, I conclude that a civil penalty in the amount of  
11 \$1,000 is appropriate. In reaching this conclusion, I note that a civil penalty in the amount of \$1,000  
12 is more than fair inasmuch as ORS 731.988(1) gives the department the discretion to assess a civil  
13 penalty in the amount of \$1,000 for each separate violation.

14 Finally, the department alleged that AA Associates was subject to administrative action  
15 pursuant to ORS 744.013(3) because the allegations concerning Hamilton were proven and  
16 Hamilton was an officer, controlling person, and employee of AA Associates. In that regard, ORS  
17 744.013(3) states in pertinent part:

18 “The director may \* \* \* revoke the license of a firm or corporation \* \* \* if  
19 the director finds that any of the grounds set forth in subsection (2) of this  
20 section exists:

21  
22 “(a) With respect to any individual licensee employed by \* \* \* the firm or  
23 corporation.

24  
25 “ \* \* \* \* \*

26  
27 “(c) With respect to any person who directly or indirectly has the power to  
28 direct or cause to be directed the management, control or activities of the  
29 licensee.”



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**NOTICE OF OPPORTUNITY FOR ADMINISTRATIVE REVIEW**

NOTICE: Pursuant to ORS 183.460, the parties are entitled to file written exceptions to this Proposed Order and to present written argument concerning those exceptions to the Director. Written exceptions must be received by the Department of Consumer and Business Services within 30 days following the date of service of this proposed order. Mail exceptions to:

Department of Consumer and Business Services  
Insurance Division Hearings Unit  
350 Winter Street NE, #440-6  
Salem, OR 97310

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