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**STATE OF OREGON
CENTRAL HEARINGS PANEL
for
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

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In the Matter of)	Case No. INS 99-08-004
)	
ELLEN M. O'BRIEN.)	PROPOSED ORDER
)	

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Hearings Judge Ella D. Johnson heard this matter on November 23, 1999 in Salem, Oregon. Assistant Attorney General Kathleen Dahlin represented the Oregon Department of Consumer and Business Services, Insurance Division (the department). Ellen M. O'Brien (O'Brien) did not appear at the hearing, nor was she represented by counsel. O'Brien appeals a September 1, 1999 Notice of Proposed Action (Notice).

After review and consideration of the entire record in the matter, I now issue this Proposed Order.

NOTICE

On September 1, 1999, the director of the department issued the Notice by regular and certified mail. In the Notice, the department alleged that it had reason to believe that O'Brien violated ORS 744.013(2)(d) by: (1) soliciting and receiving from Ethel E. Glad (Glad) a check dated October 18, 1997 made payable to Bankers Life and Casualty Company (BLCC) in the amount of \$489.76 as an additional premium payment on a nursing home health care insurance policy (policy) issued to Glad by BLCC; (2) endorsing and negotiating Glad's check; and (3) remitting to BLCC \$91.72 as partial payment of the premium and retaining the balance of the payment totaling \$398.04 without authorization from Glad or BLCC.

1 In October 1997, Glad who was 79 years old at the time lived in Portland, Oregon. She
2 received correspondence from BLCC concerning nursing home health care insurance. Glad was
3 looking for that type of insurance and sent a card back to BLCC requesting information. O'Brien
4 responded to Glad's request for information. (Glad's testimony).

5 When she met with O'Brien on October 6, 1997, O'Brien sold Glad a short-term care
6 nursing home health care insurance policy and had Glad complete BLCC application N130. N130
7 policy applications are automatically approved without going through underwriting. (Ex. 10). The
8 benefit period on the N130 application was 90 days and the elimination period was zero. (Ex. 2).

9 Glad thought she was purchasing a long-term nursing home health care insurance policy.
10 (Ex. 10). At the time, that type of policy was not available for sale in Oregon. (Ex. 12).

11 Glad gave O'Brien a check for \$176 as a down payment. The check was dated October 16,
12 1997, numbered 5932 and drawn on U.S. National Bank of Oregon. (Glad's testimony and Exs. 2
13 and 3). Glad also gave O'Brien a second check for \$489.76. The check was dated October 18,
14 1997, numbered 5941 and drawn on U.S. National Bank of Oregon. (Exs.4 and 10 and Glad's
15 testimony). Glad's application did not call for an additional payment. (Johnson's testimony).

16 Glad wanted to pay the insurance premium on the policy semi-annually instead of monthly
17 and asked O'Brien to arrange for the semi-annual payment. She never authorized O'Brien or BLCC
18 to electronically transfer the premium payment directly from of her checking account. (Glad's
19 testimony).

20 BLCC required all checks to be submitted directly through the company's branch sales office
21 in Chicago. Agents do not have check-cashing authority. (Ex.12 and Bossart's testimony).

22 O'Brien submitted the first check numbered 5932 for \$176 to BLCC. (Ex.3 and Bossart's
23 testimony). She personally endorsed check number 5941 for \$489.76 on behalf of BLCC and

1 deposited the check in her account. She did not remit the payment to BLCC and kept the monies
2 for her own use. (Exs. 4, 7 through 10 and 20 and Johnson's testimony). O'Brien received a
3 commission of \$218.69 on the sale of the initial policy. (Ex. 12).

4 Without Glad's authorization, O'Brien subsequently requested that BLCC change the benefit
5 period on Glad's policy from 90 days to 180 days and the elimination period from zero to 20 days.
6 The change increased the premium amount and O'Brien's commission on the policy. (Exs. 2 and 5
7 and Johnson's testimony). O'Brien sent BLCC her personal check for \$91.72 to pay for the
8 difference in premium. (Exs. 5 and 6 and Johnson's testimony). O'Brien was paid an additional
9 commission in the amount of \$102.57 as a result of the change. (Ex. 12).

10 On December 2, 1997, O'Brien fabricated a confirmation letter addressed to herself,
11 purportedly signed by a BLCC agent services representative acknowledging receipt of \$91.16 and
12 \$377.84 and changing the payment to a semi-annual direct billing plan. She gave the letter to Glad.
13 BLCC's address was incorrect. The person who purportedly signed the letter was the Branch Office
14 Administrator, not an agent services representative, and her name was misspelled. (Exs. 9, 10, 16
15 and 20 and Johnson's testimony).

16 In December 1997 and January 1998, BLCC automatically transferred \$133.86 from Glad's
17 checking account. When the Glad received her bank statement and noted the automatic transfers
18 from her account, she contacted her bank and learned what had occurred. She tried to contact
19 O'Brien but O'Brien did not return her telephone calls. In April 1998 when Glad could not contact
20 O'Brien, she called BLCC. (Exs. 7 through 10 and Glad's and Johnson's testimony). The January
21 and February transfers were subsequently returned to Glad's account. (Ex. 12).

22 BLCC charged the unearned commissions back to O'Brien plus the unreported premium
23 collection of \$489.76. BLCC replaced Glad's initial policy with a long-term nursing home health

1 care policy. (Ex. 12). BLCC revoked O'Brien's appointment in the State of Washington
2 (Washington) for cause because it concluded that she misappropriated funds paid by Glad for
3 premium payments. On October 14, 1998, Washington notified the department that O'Brien's
4 appointment had been revoked and attached BLCC's letter which set forth the facts and
5 circumstances of O'Brien's revocation. (Ex. 1).

6 **FINDINGS OF ULTIMATE FACT**

7 O'Brien solicited, received, and deposited in her bank account a check in the amount of
8 \$489.76 from Glad and retained \$398.04 of the monies for her own use.

9 O'Brien's fabrication of the BLCC letter as confirmation that Glad's payments had been
10 remitted to BLCC was a fraudulent or dishonest practice demonstrating untrustworthiness.

11 O'Brien's change in the benefit and elimination periods of Glad's policy without Glad's
12 authorization was a fraudulent or dishonest practice demonstrating untrustworthiness.

13 **OPINION AND CONCLUSIONS OF LAW**

14 The issue to be resolved in this agent sanction case is whether O'Brien violated ORS
15 744.013(2)(d) and (g) warranting revocation of her insurance agent license and assessment of a civil
16 penalty in the amount of \$3,000. In that regard, the department has the burden of proving its
17 allegations by a preponderance of the evidence. *See* ORS 183.450(2) and (5); *Harris v. SAIF*, 292
18 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the
19 proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence
20 of legislation adopting a different standard, the standard in administrative hearings is preponderance
21 of the evidence).

22 ORS 744.013 states in pertinent part:

1 “(1) If the director finds with respect to a licensee * * * that one or more of
2 the grounds set forth in subsection (2) of this section exist, the director may
3 take the following disciplinary actions:
4

5 “(a) The director may * * * revoke a license issued under ORS 744.002 or
6 the authority to engage in any category of insurance business or any class of
7 insurance.
8

9 “ * * * * *

10
11 “(2) The director may take any disciplinary action under subsection (1) of this
12 section on one or more of the following grounds:
13

14 “ * * * * *

15
16 “(d) Misappropriation or conversion to the licensee's own use, or illegal
17 withholding of money or property belonging to policyholders, insurers,
18 beneficiaries or others, and received by the licensee in the conduct of business
19 under the license.
20

21 “* * * * *

22
23 “(g) Use of fraudulent or dishonest practice by the licensee in the conduct
24 of business under the license, or demonstration therein that licensee is
25 incompetent, untrustworthy or a source of injury or loss to the public or
26 others.”
27

28 I find that the department has met its burden of proving that O’Brien violated ORS
29 744.013(2)(d). The evidence establishes that O’Brien solicited and received an additional and
30 unnecessary payment from Glad in the amount of \$489.76. Moreover, O’Brien admitted that she
31 endorsed and deposited Glad’s check in her own checking account and remitted only \$91.72 of that
32 to BLCC, retaining \$398.04 the monies for her own use.

33 Although O’Brien’s submissions to the department denied any intent to use or withhold Glad’s
34 monies for her own purposes, I do not find O’Brien’s statements to be persuasive. Therefore, I find
35 that O’Brien’s conduct in this regard constitutes an illegal use or withholding of Glad’s monies in
36 violation of ORS 744.013(2)(d).

1 I also find that O'Brien's conduct with respect the BLCC letter she created and the changes
2 made to the benefit and elimination period in Glad's policy without Glad's authority violated ORS
3 744.013(2)(g). The evidence establishes that O'Brien created the BLCC letter in order to provide
4 Glad with confirmation that she had forwarded the monies when in fact she had not. The evidence
5 also establishes that O'Brien requested that BLCC change the benefit period from 90 days to 180
6 days and the elimination period from zero to 20 days without Glad's consent. This change increased
7 O'Brien's commission from the initial policy.

8 In her submissions to the department, O'Brien states that she had Glad's authorization to
9 make those changes because she had a "clear understanding" with Glad and her nephew that they
10 wanted the increased coverage. She states that when she initially sold Glad's policy, Glad and her
11 nephew were interested in higher coverage but because of Glad's impending birthday, coverage had
12 to be applied for immediately or Glad would no longer be eligible. However, the evidence does not
13 corroborate O'Brien's statement. Consequently, I give no weight to O'Brien's statements and find
14 that her conduct in this regard violates the statute in that it demonstrates untrustworthiness and
15 dishonesty in the manner in which she transacted insurance.

16 Accordingly, based on these violations, I conclude that revocation of O'Brien's license and
17 assessment of a civil penalty in the amount of \$3,000 is warranted.

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1 **ORDER**

2 For violations of ORS 744.013(2)(d) and (g), I recommend that O'Brien's Oregon resident
3 insurance agent license, number 604284, be revoked pursuant to ORS 744.013(1)(a) and a civil
4 penalty in the amount of \$3,000 be assessed pursuant to ORS 731.988.

5 *IT IS SO ORDERED.*

6 Dated this _____ day of January, 2000 at Salem, Oregon.

7
8 _____
9 Ella D. Johnson
10 Hearings Judge
11 Central Hearings Panel
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14 **NOTICE OF OPPORTUNITY FOR ADMINISTRATIVE REVIEW**

15 NOTICE: Pursuant to ORS 183.460, the parties are entitled to file written exceptions to the
16 Proposed Order and to present written argument concerning those exceptions to the Director.
17 The Department of Consumer and Business Services must receive written exceptions within 30 days
18 following the date of service of the Proposed Order. Mail exceptions to:

19
20 Department of Consumer and Business Services
21 Insurance Division
22 350 Winter Street NE, #440-6
23 Salem, OR 97301-3883
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28 O'Brien1/00