

by and through the Insurance Division of the Department of Consumer and Business Services, was represented by Kathleen Dahlin, an Assistant Attorney General. The parties were present, and represented by William G. Fig, the parties' second attorney.

During the hearing, the Insurance Division offered as evidence exhibits marked 1 to 18, which were admitted over the objection of the parties. The Insurance Division called as witnesses Nellie Elliot (Elliot), Carmeadean Byars (Byars), Janet Freiley, William Freiley, Ella Anderson (Anderson), and Joanne Bishop (Bishop). The parties offered as evidence exhibits marked A1 to A17, which were admitted without objection. The parties called Woodward as their only witness.

On June 28, 2001, the hearing officer issued a Proposed Order pursuant to ORS 183.460. The Proposed Order found that Woodward committed all of the violations that were alleged in the Notice, and that Secure Tomorrows was also subject to disciplinary action as alleged in the Notice. The Proposed Order informed the parties that they could file with the Director written exceptions to the Proposed Order pursuant to ORS 183.460. The Proposed Order was mailed to the parties on June 28, 2001 and subsequently received by the parties.

On July 27, 2001, the parties filed with the Director written exceptions to the Proposed Order.

On July 31, 2001, the Insurance Division filed with the Director a response to the parties' exceptions.

As explained below, the Director is not persuaded by the parties' exceptions to make any decision different than the decision proposed in the Notice and the Proposed Order.

Parties' Exceptions

In their exceptions, the parties argue that, as a result of three prehearing rulings by the hearing officer, and the analysis of the rulings and the Proposed Order, they were denied due process under the Fourteenth Amendment of the United States Constitution and "severely prejudiced" under the Oregon Administrative Procedures Act (APA).

Denial of Motion to Reset

In support of their argument, the parties first contend that they were denied due process by the denial of their motion to reset the hearing date to allow additional time to prepare a defense. I do not find the parties' argument in this regard persuasive. The decision to deny a request to continue or reset a hearing is within the discretion of the Hearing Officer Panel and the assigned hearing officer, subject to the approval of the agency. OAR 137-003-0525.

The parties contend that the Proposed Order improperly found that the request for additional time was due to their "failure to timely obtain counsel and counsel's failure to expeditiously prepare the matter for hearing." However, that is a misstatement of the Proposed Order's finding. The Proposed Order found that any delay, inadequate discovery or lack of preparation time was due to a failure of communication between the parties' first and second attorneys, and was not the fault of the Insurance Division. (*Proposed Order* p. 3).

The Insurance Division issued the Notice on January 10, 2001. On January 22, 2001, the Insurance Division responded to the parties' first attorney's request for discovery providing the documents that it intended to rely upon and a copy of Woodward's taped interview. As noted by the Insurance Division's attorney in her response to the exceptions, it can be logically assumed that the parties began preparing their defense at that time. On January 29, 2001, the parties requested a hearing and a February 28, 2001 Notice of Hearing set the date of the hearing as May 2, 2001. It was not until mid-March that the parties' second attorney notified the Insurance Division that he was now representing the parties. On March 26, 2001, the parties' second attorney requested discovery of the same documents already provided to the parties' first attorney and the Insurance Division referred him to the first attorney. On April 12, 2001, the parties' second attorney requested copies of the recordings and transcripts of the Insurance Division's interviews of three witnesses, which were provided on April 12, 2001. The hearing was not held until almost three weeks later on May 2, 2001. This chronology of events establishes that the parties were provided ample time for preparation had the time been used appropriately.

Moreover, the Insurance Division responded in a timely, appropriate manner to the parties' requests.

The parties also contend that they needed additional time to prepare because this was a very complex case and they were given an "extremely short time span" within which to prepare. However, as noted by the Insurance Division's attorney, this was not a particularly complex case. The hearing lasted less than one full day and each party offered less than 20 exhibits each. Additionally, as set forth above, the parties were afforded the opportunity to begin preparing the case as early as January 2001. Consequently, I do not find that the parties' due process rights were violated.

Denial of Petition to Depose Witnesses

The parties next contend that they were denied due process and equal access to discovery by the hearing officer's denial of their petition to depose the Insurance Division's witnesses. I find that the hearing officer properly declined to authorize the depositions. The parties' petition requesting deposition of the Insurance Division's witnesses failed to provide the information required by ORS 183.425 and OAR 137-003-0570(4)(a). Specifically, the petition failed to explain why a deposition rather than another informal means of discovery was necessary and failed to designate an individual before whom the deposition would be taken. A subsequent petition named a person before whom the deposition would be taken but again failed to provide an explanation as to why the deposition was needed. In denying the parties' petition, the hearing officer noted these deficits in the petition and ordered the Insurance Division to provide copies of the tapes of the Insurance Division's interviews with the witness that were thereafter provided to the parties' counsel without delay. Moreover, the testimony of several witnesses also revealed that they did speak to the parties' counsel prior to hearing. On this record, I find no denial of due process by the agency.

Admission of Interview Transcript

Finally, the parties contend that they were denied due process by the hearing officer's admission into the record of the transcript of Woodward's interview by the Insurance Division's investigators. As noted by the Insurance Division's attorney,

ORS 183.450 provides that only irrelevant, immaterial or unduly repetitious evidence shall be excluded. The hearing officer properly found that the transcript of Woodward's interview was relevant and material and admitted it into the record.

The parties contend that the transcript should not have been admitted because Woodward did not have the opportunity to have an attorney present during the interview. The interview transcript directly contradicts the parties' contention. The Insurance Division's investigators conducting the interview repeatedly asked Woodward if he wanted an attorney present. (Exhibit 18, at Pages 1-2). The investigators also advised Woodward after the interview began that he could decline to answer a question and could discontinue the interview at any time. (*Id.* at Page 2). At the end of the interview, Woodward even indicated that he was "impressed" with the interview. (*Id.* at Page 55). Consequently, I conclude that the parties were not denied due process by the hearing officer's admission into the record of the transcript of Woodward's interview.

Standard of Proof

The parties argue that the Proposed Order failed to apply the clear and convincing standard of proof, which they contend is the proper standard in determining whether Woodward violated ORS 744.013(2)(g) and 746.100. As noted by the Insurance Division's attorney, the parties' argument fails for three reasons.²

First, the courts and the legislature have established the preponderance of the evidence standard of proof as the correct standard for contested cases. ORS 183.450(5); *Gallant v. Bd. Of Medical Examiners*, 159 Or App 175, 183 (1999). In *Gallant*, the court cast doubt on the application of the clear and convincing standard in contested cases proceedings by questioning its own analysis in *Bernard v. Board of Dental Examiners*, 2 Or App 22 (1970) and *Van Gordon v. Board of Dental Examiners*, 52 Or App 749 (1981). Both *Bernard* and *Van Gordon* involved license revocation proceedings under the APA and established the court's authority to interpret ORS 183.450(5) and distinguish burdens of proof based on policy. The court

² The Insurance Division's attorney also noted that the hearing officer found that, even under the clear and convincing standard, the Insurance Division met its burden.

stated that the application of the clear and convincing standard in those cases was questionable because the opinions derived the clear and convincing evidence standard by analogizing the administrative proceeding to a civil action for fraud and to attorney disciplinary cases. As a result, the court's decision in those cases was not supported by either statutory or constitutional analysis. *Gallant* at 185-86. Moreover, the court has yet to determine whether due process requires a higher standard in license revocation proceedings where the allegations involve fraud.

Second, the Insurance Division's allegations concerning Woodward's violations of ORS 744.013(2)(g) did not implicate fraud or require proof of fraud. ORS 744.013(2)(g) provides that the licensee may also violate the statute by engaging in dishonest practices or by demonstrating incompetence, untrustworthiness or that he is a source of injury to the public or others. In that regard, the hearing officer found that Woodward's conduct evidenced a pattern of false representations, manipulation and dishonesty that was a source of injury to the elderly victims and their families. The hearing officer made this finding without reference to fraud or the elements of fraud.

Third, the case law relied upon by the parties in their *Hearing Memorandum* as authority for application of the clear and convincing evidence standard, *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987), merely discusses the standard applicable in the common law action of deceit, not the appropriate standard in an administrative proceeding. Moreover, the parties' contention is contrary to a line of cases decided after *Riley Hill*, which rejected a similar contention and stated that the appropriate standard of proof is preponderance of the evidence. *See Gallant; supra; Sobel v. Bd. Of Pharmacy*, 130 Or App 374 (1994), *rev den* 320 Or 588 (1995); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548, *rev den* 308 Or 592 (1989).

Substantial Evidence Argument

The parties next contend that the hearing officer's decision that Woodward violated ORS 744.013(2)(g) and 746.100 is not supported by substantial evidence in the record. The Director may modify a finding of fact, including a "historical fact," only if she determines that the finding is not supported by a preponderance of the

evidence in the record. Or Laws 1999, ch 849, sec 12(3). A “historical fact” is a finding that an event did or did not occur in the past or that a circumstance or status did or did not exist either before the hearing or at the time of the hearing. *Id.* Substantial evidence exists to support a finding when the record, viewed as a whole, would permit a reasonable person to make that finding. ORS 183.482(8)(c). *See Armstrong v. Asten-Hill Co.* 90 Or App 200 (1996).

With respect to Woodward’s violations of ORS 744.013(2)(g), the hearing officer found that Woodward contacted Elliot, Byars and Anderson at or near the time that their annual premiums were due on their Equitable Life & Casualty Insurance Company (Equitable) long term care policies, which Woodward had sold to them when he represented Equitable. Woodward failed to tell the three elderly women that he no longer represented Equitable or failed to explain to them that they would be purchasing life insurance through Pioneer Life Insurance Company. The amounts of the life insurance policies were calculated to approximate the amount of the annual premium on their long-term care policies. He spent only a few minutes with each of the women, which was not enough time to explain the life insurance policy but was enough time to pick up what the women thought were renewal checks for their long term care policies. Each of the three women trusted Woodward and followed his direction in preparing their checks.

With respect to his violations of ORS 746.100, the hearing officer found that Woodward either completed or assisted the women in completing the life insurance application forms. None of the three women knowingly signed the forms and none of them wanted or needed life insurance. Nonetheless, Woodward submitted the applications to Pioneer. By doing so, he made a false statement or representation to Pioneer.

On these facts, I find that the hearing officer’s conclusion that Woodward engaged in conduct which was false, dishonest and untrustworthy and caused injury to the women and their families is supported by a preponderance of the evidence and substantial evidence in the record.

Mitigating and Aggravating Factor Analysis

Finally, the parties argue that the Proposed Order failed to consider the mitigating and aggravating factors in determining the proper sanction for Woodward's violations. I find that the hearing officer fully considered both the mitigating and aggravating factors and correctly determined that the aggravating factors outweighed the mitigating factors. The only mitigating factors present here were Woodward's repayment to Elliot and his lack of a disciplinary record. The hearing officer weighed these factors against the aggravating factors of his deceptive manner, dishonest or selfish motive, building his business by manipulation and deception, no acknowledgment of wrong doing, the elderly age of his victims, blaming the victims and his long experience in the insurance industry. Consequently, I conclude that this argument is also without merit.

Therefore, the Director, having considered the entire record in this matter, now makes the following final decision in this proceeding in accordance with ORS 731.248, 183.450 and 183.470 and related administrative rules.

Findings of Fact, Conclusions of Law and Opinion

The Director adopts, and incorporates herein by this reference, the facts, conclusions and reasoning of the Proposed Order dated June 28, 2001 issued in this matter as the facts, conclusions and reasoning of this order.

Order

The Oregon insurance agent licenses issued to Woodward and Secure Tomorrows shall be revoked on the date of this order pursuant to ORS 744.013(1)(a) and (3) respectively. Woodward and Secure Tomorrows shall not transact insurance in Oregon, including servicing clients, on and after that date.

Woodward shall pay a civil penalty of \$7,000 pursuant to ORS 731.988. Payment shall be made in the form of a check payable to the "Department of Consumer and Business Services" for the full amount due. Payment shall be delivered or mailed to the Insurance Division at 350 Winter Street NE, Room 440, Salem, OR 97301-3883. Payment shall be received by the Insurance Division by 5:00 PM (PT) on the 71st calendar day after the date of this order pursuant to ORS 183.090(2).

Notice of Judicial Review

Pursuant to ORS 183.480 and 183.482, the parties may request the Oregon Court of Appeals to review this order by filing a written petition for judicial review with the Court within 60 calendar days following the date this order is personally delivered or mailed to the parties, whichever occurs first.

Dated September 7, 2001

/s/ Mary C. Neidig
Mary C. Neidig
Director
Department of Consumer and Business Service