



1 seven checks totaling \$18,592 from Earl Alva and Lois Lesta Gipe for the purpose of purchasing  
2 insurance. The Notice concluded that these violations warranted revocation of Hinchliff's Oregon resident  
3 insurance agent license, number 103105, pursuant to ORS 744.013(1)(a) and assessment of a civil  
4 penalty in the amount of \$8,000 pursuant to ORS 731.988.

5 **ISSUES**

- 6 1. Whether Hinchliff misappropriated the proceeds of payments made to purchase insurance in violation of  
7 ORS 744.013(2)(d); and  
8 2. If so, whether Hinchliff's violations warrant revocation of his Oregon resident insurance agent license,  
9 number 103105, and assessment of a civil penalty in the amount of \$8,000.

10 **EVIDENTIARY RULING**

11 The record consists of the department's Exhibits 1 through 41.

12 **FINDINGS OF FACT**

13 Hinchliff was first licensed to sell insurance in Oregon on July 1, 1978. He was appointed by  
14 several insurance companies, including Jackson National. Hinchliff was licensed to sell general, life, and  
15 health insurance as well as variable annuities and small employer health policies. His license expired on  
16 February 28, 2000. Since then, Hinchliff's Oregon insurance agent license has not been renewed or  
17 reissued.<sup>1</sup> (Exs. 1. 19 and Zafuto's testimony).

18 The Small Transaction

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<sup>1</sup> On April 18, 2000, the Oregon Department of Justice notified the department that Hinchliff had failed to pay child support and that his license should be suspended. Rich Zafuto (Zafuto), the Oregon Insurance Division Investigator assigned to investigate Hinchliff's misconduct, testified that Hinchliff's license was not renewed or reissued because he had not paid his child support. The department was also in the process of investigating Hinchliff's misconduct in this matter.

1 Garry Small (Small) first met Hinchliff through Small's daughter who was a friend of Hinchliff's  
2 wife. On June 11, 1996, Small wrote a check for \$3,060 made payable to Hinchliff as a deposit on the  
3 purchase of a life insurance policy for himself through Jackson National. Hinchliff completed and signed  
4 the life insurance application. Even though the policy was to replace another policy, Hinchliff indicated on  
5 the application that it was not a replacement policy.<sup>2</sup> Hinchliff was authorized by Jackson National to  
6 accept only checks for insurance applications made payable to Jackson National. On June 12, 1996,  
7 Hinchliff endorsed and negotiated Small's check for \$3,060 and deposited it in his Teachers Credit Union  
8 account (Exs. 2, 3, 4,5,8, 18 and Small's testimony).

9 Jackson National's insurance agent contracts required all checks for its insurance products to be  
10 made payable to "Jackson National Life Insurance Company." The contracts prohibited the agents from  
11 receiving premium funds made payable to them. The contracts also prohibited agents from withholding  
12 commissions from any premium payment. (Exhibit 18).

13 Jackson National received Small's application on August 16, 1996. Small's check was not  
14 remitted with the application but there was an automatic withdrawal pre-authorization to fund the premium  
15 signed by Small's wife, Lanni Small. Jackson National issued the policy on October 16, 1996.<sup>3</sup> (Ex. 10,  
16 11 and Small's testimony).

17 After several months, Small contacted Hinchliff about the deposit and was told that the deposit  
18 was "with the company on demand to use later for a conversion to a different plan." Small asked Hinchliff  
19 to return the deposit because he had decided to pay the premium as a monthly payment from his account.

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<sup>2</sup> Small, who owns a car dealership in Portland, Oregon also purchased in a separate transaction a 401k plan for his employees. Hinchliff failed to set up the plan and Small eventually paid another carrier more for the plan than he would have initially. (Lanni Small's testimony). However, it is my understanding that any violations by Hinchliff concerning the 401k plan are not at issue here.

1 Hinchliff told Small that he would have Jackson National send a refund check. (Ex. 2 and Small's  
2 testimony).

3 Thereafter, Hinchliff was unresponsive to Small's telephone calls. From October 2, 1996 to  
4 October 15, 1996, Small called Hinchliff 14 times and Hinchliff returned Small's calls only once. Beginning  
5 in January 1997, Small asked his wife to continue to try to contact Hinchliff. When Lanni Small was able  
6 to reach Hinchliff, he assured her that the refund would be there in a week. When the refund never arrived,  
7 she asked Hinchliff to meet with them. They scheduled several meeting times but Hinchliff cancelled . Lanni  
8 Small called Jackson National and Jackson National told her that there was no record of receiving a  
9 deposit but that an enrollment form had been submitted. (Exs. 2, 6, 7 and the testimony of Garry and  
10 Lanni Small).

11 After Jackson National began investigating the incident, Hinchliff repaid Small for the deposit from  
12 his Teachers Credit Union account on April 25, 1997. This was the same account in which Hinchliff had  
13 previously deposited Small's check. By letter dated July 31, 1997, Jackson National terminated  
14 Hinchliff's appointment for contractual violations concerning his receipt of funds not payable to Jackson  
15 National. (Ex. 2, 9, 17).

16 The Gipe Transactions

17 Earl Alva Gipe (Gipe) who is a retired schoolteacher first met Hinchliff when Gipe stopped to  
18 provide road assistance to Hinchiff after his car stalled. Gibe and his wife, Lois Lesta Gipe (Lesta Gipe)  
19 (collectively, the Gipes) had been doing business with Hinchliff for approximately five years. During that  
20 period, Hinchliff was employed by Pac West Financial Resources. (Ex. 19 and Gipe's testimony).

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<sup>3</sup> Hinchliff later admitted that he had received the check from Small. (Ex. 16).

1 Hinchliff previously assisted the Gipes in investing proceeds from the sale of a beach property in  
2 annuities with Jackson National. Jackson National issued two Single Premium Action Annuity policies to  
3 Lesta Gipe. On the policy that issued on August 16, 1996, Jackson National received a one-time payment  
4 from the Gipes of \$25,000. On the policy issued on January 27, 1995, Jackson National received a one  
5 time premium payment of \$85,000. Hinchliff also assisted Lesta Gipe in annuitizing two policies through  
6 Business Men’s Assurance Company of America (BMA). The proceeds from those annuities were  
7 deposited directly into the couple’s bank account. The annuities had performed well and they trusted  
8 Hinchliff and thought he was trustworthy. Because Hinchliff assisted them in setting up the annuities and the  
9 withdrawals from the annuities, he knew exactly when they had money available to purchase other  
10 products. (Exs.33 through 35 and Gipe’s testimony).

11 On June 25, 1997, Hinchliff delivered an insurance annuity check from Jackson National for  
12 \$7,139.92 to Alva and Lesta Gipe. Gipe had requested the annuity payment on March 29, 1999. Hinchliff  
13 told Gipe that this payment was his “commission” and that it was mistakenly sent to them instead of him.  
14 Hinchliff instructed Gipe to deposit the annuity check in their bank account. Then, Gipe was to prepare a  
15 check made payable to Hinchliff in the amount of \$7,139. Gipe deposited the annuity check on June 25,  
16 1997 and wrote Hinchliff a check for \$7,139 noting on the check that this was for “annuity payback.”  
17 Hinchliff endorsed and negotiated the check on June 26, 1997. (Exs. 19, 20, 32, 36, 37).

18 From June 1997 to April 1999, Gipe and his wife purchased various life and long term care  
19 insurance products from Hinchliff. They never received a copy of any policies or an acknowledgment from  
20 the insurance company. Hinchliff ingratiated himself with the Gipes by regularly jogging through their  
21 neighborhood in the early morning and moving their newspaper from the driveway to their front porch.

1 Hinchliff attached his business card to the paper and wrote little notes to the Gipes. (Exs. 19, 21 through  
2 26, 30 and Gipe’s testimony).

3 On November 29, 1997, Gipe wrote a check for \$2,386 for a life insurance product, which Gipe  
4 understood would be issued through Fortis Financial Group (Fortis). Hinchliff had never requested  
5 appointment from Fortis to sell long-term care insurance and had no record of commissions for selling that  
6 type of product. The check was made payable to Hinchliff. Hinchliff gave Gipe a temporary insurance  
7 agreement. Hinchliff endorsed and negotiated the check on December 10, 1997 and did not remit the  
8 proceeds to Fortis. (Exs. 19, 21, 30, 31, 38).

9 On December 18, 1997, Gipe wrote a check for his long-term care insurance made payable to  
10 Hinchliff for \$746. Hinchliff gave Gipe a “conditional receipt” to be attached to the Time Insurance  
11 Company<sup>4</sup> application. Hinchliff endorsed and negotiated the check on December 19, 1997 and did not  
12 remit the proceeds. (Exs. 19, 22, 39).

13 On December 31, 1997, Gipe wrote a check for \$3,128 for his long-term care insurance made  
14 payable to Hinchliff. Hinchliff gave Gipe a temporary insurance agreement. Hinchliff endorsed and  
15 negotiated the check on December 31, 1997 and did not remit the proceeds. (Exs. 19, 23, 40).

16 On February 27, 1998, Gipe wrote a check for \$2,586 for insurance for his wife, Lesta Gipe.  
17 Gipe understood the policy would be through Fortis. The check was made payable to Hinchliff. Hinchliff  
18 endorsed and negotiated the check on February 28, 1999 and did not remit the proceeds. (Exs. 19, 24).

19 On March 30, 1999, Lesta Gipe wrote a check for long-term care insurance for herself in the  
20 amount of \$1,708 made payable to Hinchliff. She understood that the policy would be through Fortis.

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<sup>4</sup> Time Insurance Company was subsequently purchased by Fortis.

1 Hinchliff endorsed and negotiated the check on March 31, 1999 and did not remit the proceeds. (Exs, 19,  
2 25).

3 On April 15, 1999, Gipe wrote a check for \$1,645 for his long-term care insurance through  
4 Fortis. The check was made payable to Hinchliff. Hinchliff endorsed and negotiated the check that same  
5 day and did not remit the proceeds. (Ex. 19, 26).

6 When the department contacted Fortis and Fortis began investigating the matter, Hinchliff failed to  
7 respond to Fortis's requests for information. Fortis never received any insurance applications or premiums  
8 from Hinchliff for Gipe or his wife and there were no insurance policies issued to the Gipes. (Exs. 19, 21  
9 through 26, 30, 31).<sup>5</sup>

10 Hinchliff was subsequently indicted for eight counts of Theft in the First Degree, a Class C  
11 Felony, and one count of Theft In the Second Degree, a Class A Misdemeanor, after Alva and Lesta Gipe  
12 hired an attorney and the attorney reported Hinchliff's misconduct to the police. The matter was civilly  
13 compromised for \$19,996 in Clackamas County Circuit Court on November 14, 2000.<sup>6</sup> (Ex. 41).

#### 14 FINDINGS OF ULTIMATE FACT

15 Hinchliff violated ORS 744.013(d) in one instance by illegally withholding \$3,060 paid to him by  
16 Small as a deposit for life insurance coverage.

17 Hinchliff violated ORS 744.013(2)(d) in seven separate instances by misappropriating the  
18 proceeds of seven checks totaling \$19,338 paid to him by the Gipes for various insurance products.<sup>7</sup>

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<sup>5</sup> The Gipes also made three personal loans to Hinchliff totaling \$9,500. On March 31, 1997, the Gipes loaned Hinchliff \$3,000. On July 29, 1998, Hinchliff borrowed \$6,100 from the Gipes. On November 18, 1998, Hinchliff borrowed \$400 from the Gipes. Hinchliff has never repaid any of the loans. (Exs. 19, 27 through 29).

<sup>7</sup> This amount includes the check for \$7,139, which Hinchliff instructed Gipe to write after Gipe deposited the annuity check in their bank account. However, it does not include \$9,500 in personal loans, which the Gipes made to Hinchliff because they trusted him as their insurance agent. During the relevant period, the Gipes gave Hinchliff a total of \$28,838 for insurance premiums and loans.

1 **CONCLUSIONS OF LAW AND OPINION**

2 The issues to be resolved in this agent sanction case are whether Hinchliff violated ORS  
3 744.013(1)(d) and whether his conduct warrants revocation of his insurance agent license and assessment  
4 of a civil penalty in the amount of \$8,000. In that regard, the department has the burden of proving these  
5 allegations by a preponderance of the evidence. *See* ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or  
6 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the  
7 proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of  
8 legislation adopting a different standard, the standard in administrative hearings is preponderance of the  
9 evidence).

10 ORS 744.013 provides in relevant part:

11 “(1) If the director finds with respect to a licensee \* \* \* that one or more of the  
12 grounds set forth in subsection (2) of this section exist, the director may take the  
13 following disciplinary actions:  
14

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

18 \* \* \* \* \*

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

23 \* \* \* \* \*

24  
25  
26 “(d) Misappropriation or conversion to the licensee’s own use, or illegal  
27 withholding, of money or property belonging to policyholders, insurers,  
28 beneficiaries or others, and received by the licensee in the conduct of business  
29 under the license.”  
30

1        Additionally, ORS 731.988 gives the director the authority to assess a civil penalty in the  
2        amount of \$1,000 for each separate offense.

3                I find that the department has established a *prima facie* case on the record, which convinces me  
4        that the allegations against Hinchliff are true and the sanctions proposed by the director are warranted.

5                With respect to Hinchliff’s conduct in handling the Small transaction, the record establishes, at a  
6        minimum, that Hinchliff illegally withheld \$3,060 from Small for almost a year, from June 1996 to April 25,  
7        1997. Hinchliff endorsed and negotiated Small’s check for \$3,060 and deposited the check into his own  
8        account at the Teachers Credit Union. It was only after Jackson National began investigating the matter  
9        that Hinchliff repaid Small by a check written on his Teachers Credit Union account.

10                In previous correspondence with Jackson National, Hinchliff stated that the money was originally  
11        intended to be used for a “survivor split dollar,” but that Lonnie Small had changed her mind and had  
12        declined the required medical examination. He also stated that Small’s check had been held in suspense  
13        because of a pending deal to leave the funds in a tax-free fund to be used for term conversion and that  
14        Jackson National had simply lost the check. (Ex. 16). However, Hinchliff was not authorized by Jackson  
15        National to receive premium payments made payable to him or to deposit the premium payment in his  
16        personal account. Moreover, Hinchliff’s explanation is inconsistent with the information provided by  
17        Jackson National and Small’s credible testimony. Consequently, I conclude that Hinchliff violated ORS  
18        744.013(1)(d) by illegally withholding Small’s money for almost a year

19                With respect to Hinchliff’s conduct in handling the Gipe transactions, there is no question that  
20        Hinchliff misappropriated \$19,338 of the Gipe’s money.<sup>8</sup> He was able to do so because the Gipes trusted  
21        him as their insurance agent. The record speaks for itself in this regard without any analysis of the facts.

1 Consequently, I conclude that Hinchliff also violated ORS 744.013(2)(d) in seven instances in his  
2 insurance dealings with the Gipes.

3 Appropriate Sanction

4 As previously noted, ORS 744.013, *supra*, gives the director the authority refuse to renew,  
5 suspend or revoke an Oregon insurance agent license for misappropriation or illegal withholding of a  
6 policy holder’s money. Additionally, ORS 731.988 gives the director the authority to assess a civil penalty  
7 in the amount of \$1,000 for each separate offense.

8 In determining the appropriate sanction to impose on an agent for such misconduct, the department  
9 has previously considered both aggravating and mitigating factors. *In the Matter of Boyd & Co.*  
10 *Insurance*, Case No. INS 89-04-04 (1990), *citing*, *In the Matter of Luebke*, 301 Or 321 (1986). *See*  
11 *also In the Matter of Giannetti*, Case No. INS 90-12-006 (1993).

12 This is an egregious case where there is ample evidence of aggravating factors and little if any  
13 evidence of mitigating factors. Hinchliff committed multiple offenses demonstrating a pattern that was both  
14 deceptive and calculating. Hinchliff ingratiated himself with the Gipes by moving their newspaper from the  
15 driveway to their front porch during his early morning runs and attaching his business card to the paper.  
16 Alva and Lesta Gipes were vulnerable elderly individuals who trusted him to the point of even providing  
17 him with numerous personal loans. Hinchliff manipulated their annuity payments so he knew when the  
18 Gipes would have additional money to purchase other insurance products. On six separate occasions,  
19 Hinchliff convinced the Gipes to write him checks to purchase policies allegedly through Fortis, which  
20 were never paid for or issued. On another occasion, he delivered their annuity check from Jackson  
21 National and convinced Gipe to deposit it in the couple’s bank account and then write a check for almost

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<sup>8</sup> Hinchliff also attempted to default on paying another \$9,500 in loans that the Gipe’s made to him. (Gipe’s testimony).  
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INS 00-04-010**



