

Issues

1. Whether Respondent violated ORS 746.100 in two instances.
2. If so, whether these violations warrant revocation of Respondent's insurance agent license and assessment of a civil penalty in the amount of \$2,000.

Evidentiary Rulings

The department offered Exhibits A1 through A26, which were admitted into the record without objection. Respondent offered Exhibits R1 through R10, which were also admitted into the record without objection.

Included with her exceptions, Ms. Thatcher moves the director to supplement the record with a document captioned "Answer to an Amended Complaint," filed by Foremost in the case of Alexander v. Foremost, et. al. (See Ex R10). The director declines to add this exhibit to the record. It is neither relevant nor probative since there is no corresponding Amended Complaint in the record. (There is only the original complaint filed by the Alexanders. (Ex A23)). The record was not held open after the hearing for the admission of additional evidence. And respondent fails to explain in her "motion" (see note 1 at page 4 of Exceptions) any basis for the director to now admit this document into the record.

Findings of Fact

1. Ms. Thatcher initially worked as a secretary performing clerical duties for Bancorp Insurance Agency (Bancorp), which is an independent agency owned by Rex Leseuer and located in LaPine, Oregon. Ms. Thatcher then worked for the LaPine Farmers Insurance Agency for two and one-half years as a secretary. She returned to work for Bancorp in December 1997. On March 2, 1998, she became licensed as an insurance agent and began working for Bancorp in that capacity. Ms. Thatcher was appointed to sell personal lines of insurance for Foremost Insurance Group (Foremost) at Bancorp. She is paid by the hour at Bancorp regardless of her production. (Exs. A1 at 1, A21 at 6-9, 24; test. of Thatcher).
2. On December 16, 1999², Patty Alexander called Bancorp and talked to Ms. Thatcher about obtaining insurance for two mobile homes located in Christmas Valley, Oregon which were owned by her and her husband, Max. The reason why Mrs. Alexander wanted insurance was that she and her husband were planning to leave the state for an extended time and they had recently had a

² In her complaint, Mrs. Alexander stated that she first called Bancorp on December 17, 1999. (Ex. A2 at 3.)

fire loss to another, uninsured mobile home. The fire loss was common knowledge in the area where the mobile home was located and, if asked, Mrs. Alexander would have told Ms. Thatcher about the previous fire loss. (Ex. A2 at 3; test. of Alexander). Ms. Thatcher asked Mrs. Alexander questions concerning the property and the mobile homes. The questions addressed whether there were other farm buildings on the property, the size and year of the mobile homes and the amount of coverage desired on each. During that first phone call, Ms. Thatcher did not ask Mrs. Alexander whether she had any prior claims. (Ex A6 at 2; A7 at 2; test. of Alexander; test. of Thatcher). Mrs. Alexander indicated that one mobile home was a 1980³ Hillcrest. Mrs. Alexander made notes as she spoke to Ms. Thatcher. She agreed to come to Ms. Thatcher's office the next day to sign the insurance papers. (Ex. A3 at 1).

3. Ms. Thatcher also took notes as she talked to Mrs. Alexander. She took notes on Bancorp's "Homeowners Quote Sheet" as was her practice. Ms. Thatcher noted that the mobile homes were both located on the same 20-acre property and that Mrs. Alexander had horses, cows with calves, goats and pigs on the property. The Homeowners Quote Sheet did not contain the precise underwriting questions contained in the insurance application but they did contain spaces for specific information. (Ex A4 at 2, A5 at 2; A6; A7). Several sections of the Homeowners Quote Sheet were filled in "yes," "no" or by a dash, indicating, for example, that the mobile homes did not contain woodstoves or fireplaces, but that they did contain smoke detectors. (Ex A6, A7). The space for prior claims was left blank. (Ex A6, A7). The blank spaces indicated that it was likely Ms. Thatcher never asked Ms. Alexander about prior claims when Ms. Thatcher completed the quote sheets. (Test. of Thatcher at 62). The quote sheets were stamped, "Quote Only, No Coverage Bound." (Ex A6, A7).
4. The following day, December 17, 1999, Ms. Thatcher prepared two "Insurance Worksheets" for the Alexander mobile homes. (Ex A4; A5). These "Insurance Worksheets" also serve as the application for insurance. (Test. of Thatcher). On the back, or second, page, the "Insurance Worksheets" contain several underwriting questions. One of the underwriting questions asks: "[h]as any applicant had a fire, theft, or liability loss of **more than \$2500** and/or **2 or more** fire, theft or liability losses (any amount) during the past 3 years? (If yes, SUBMIT with explanation.)" (Ex A4 at 2; A5 at 2.) (Emphasis in original.)
5. Bancorp's Activity Log recorded the date, time, and substance of Mrs. Alexander's insurance transactions on December 17, 1999. (Ex. A8). On December 17 at 10:14 a.m., Ms. Thatcher contacted Foremost by telephone to

³ Mrs. Alexander testified that she later called Ms. Thatcher back to let her know that the Hillcrest mobile home was a 1978 and not a 1980 model.

obtain a premium quote and reference number which she recorded on the worksheet-application. (Ex A8). She completed portions of the worksheet-application from the quote sheet information. (Test. of Thatcher). Mrs. Alexander and her grandson arrived at Bancorp's office at approximately 2:00 to 3:00 p.m. on December 17, 1999. It was the one and only time Mrs. Alexander was in the Bancorp offices. Mrs. Alexander signed the worksheet-applications. (Test. of Alexander). After Mrs. Alexander left, Ms. Thatcher again contacted Foremost at 3:12 and 3:19 p.m. and obtained an assigned policy number, indicating that the policy was bound. (Ex A8; A15 at 3 and 5; test. of Thatcher).

6. When Mrs. Alexander arrived at Bancorp, Ms. Thatcher had the worksheets-applications filled out. On the copies of the insurance applications presented to Mrs. Alexander, the underwriting questions had not been completed, no date of birth or social security number was listed for Mrs. Alexander, there was no instruction for billing the down payment and no policy number was listed. (Ex A4; A5). Ms. Thatcher asked Mrs. Alexander to review the applications for accuracy. Mrs. Alexander noted that some items had been left blank, but believed that Ms. Thatcher, as the insurance agent, knew which portions of the application needed to be completed. Mrs. Alexander signed and dated the application forms. Mrs. Alexander had come to the Bancorp office with cash to pay the down payment. Ms. Thatcher advised that Foremost would bill Mrs. Alexander for the down payments and would mail policies to her. Since Mrs. Alexander had no proof of insurance at the time of her visit, she requested a copy of the insurance worksheet-applications. Mrs. Thatcher took the forms that Mrs. Alexander signed and had copies made, which were stamped "copy" and provided those copies to Mrs. Alexander. On the copies, the underwriting questions (including the question regarding prior losses) were blank. (Ex A4; A5; test. of Alexander).
7. As was the practice between Bancorp and Foremost, Ms. Thatcher provided the information to Foremost by telephone when she obtained the quote and later when she bound the insurance. Ms. Thatcher stamped the hard copies of the applications "Entered December 17, 1999" and left them to be filed in the Bancorp files. She did not send copies of the applications to Foremost. (Ex A15 at 3 and 5; test. of Thatcher).
8. On December 20, 1999, Mr. and Mrs. Alexander left to winter in Arizona. (Ex. A2 at 3.)
9. Mrs. Alexander subsequently received billings and copies of the insurance policies in the mail. Mrs. Alexander remitted premium payments to Foremost. (Ex A9; A10; test. of Alexander). On January 14, 2000, a fire destroyed one of the mobile homes. The Alexanders' daughter called to notify them about the

fire. Mrs. Alexander called the local fire marshal and then called Foremost to file a claim. The fire marshal investigated the fire for possible arson. (Ex A2 at 3-4; A8 at 1; A11 at 1; test. of Alexander.)

10. When Foremost received Mrs. Alexander's claim, the insurance company requested from Bancorp copies of the front and back of the insurance applications. Bancorp supplied only copies of the front of the two worksheet-applications and not the back side of the forms, which contained the underwriting questions. (Ex A8; A11 at 1).
11. Foremost discovered that the Alexanders had two previous arson fire losses which were not disclosed in response to the underwriting questions on the back of the insurance applications for the two mobile homes. One loss occurred in August 1999 when a haystack burned to the ground and the other occurred in November 1999 when a mobile home in La Pine, Oregon burned to the ground. The previous losses were uninsured. (Ex A11 at 6 – 8). Foremost again requested from Bancorp copies of the worksheet-applications – this time, the front and back of each. (Ex A8, A11 at 9). Bancorp copied the two worksheet-application forms – these forms differed from those earlier provided to Mrs. Alexander in the following respects: they contained policy numbers, they contained the date of birth and social security number for Patty Alexander, they indicated the down payment should be billed to the insured, they contained the signature of Karen Thatcher as the agent and, most importantly, the underwriting questions on the back side were checked off. In the case of the question asking “has any applicant had a fire, theft or liability loss of more than \$2500 and/or 2 or more fire, theft, or liability losses (any amount) during the past 3 years?,” the corresponding box was checked “no.” (Ex A15 at 3 – 6).
12. In February 2000, Ms. Thatcher told Foremost's adjuster that she did not recall the Alexander transaction. When providing a recorded statement in March 2000, Ms. Thatcher again stated that she did not specifically recall the Alexander transaction. However, Ms. Thatcher told Foremost's adjuster that it was likely that the application was completed and the underwriting questions were asked over the telephone and that Mrs. Alexander later came in and signed the application. (A8; A11 at 9 and 11; A14 at 5.) She later told the adjuster that Mr. and Mrs. Alexander were in her office and she read the underwriting questions orally to Mrs. Alexander. As Mrs. Alexander answered the questions, Ms. Thatcher recalled that she recorded the answers on the applications and Mrs. Alexander signed the applications. (Ex. A11 at 10.) Still later, Ms. Thatcher told the adjuster that she did not specifically recall the meeting with Mrs. Alexander but that her practice was to read the underwriting questions to the applicants and record their responses on the applications. (Ex. A11 at 11 and 14). In her interview with the Insurance Division of the department, Ms. Thatcher first told the investigators that she

recorded Mrs. Alexander's responses to the underwriting questions before Mrs. Alexander signed the documents. (Ex A19 at 24). After conferencing with her attorney, Ms. Thatcher changed her answer to reflect that she did not record Mrs. Alexander's responses to the underwriting questions before Mrs. Alexander signed the documents. (Ex A19 at 24). In her deposition testimony, Ms. Thatcher recalled that she had met in person with Mrs. Alexander on December 17, 1999, had given her a copy of the application before asking her the underwriting questions, and then had completed the application with Mrs. Alexander, including Mrs. Alexander's responses to the underwriting questions. (Ex. 21 at 48.) At the hearing, Ms. Thatcher once again claimed that she asked and checked off the underwriting questions before she had Mrs. Alexander sign the documents. (Test. of Thatcher). In addition, at the hearing, Ms. Thatcher repudiated several of her earlier statements. (Test. of Thatcher). Ms. Thatcher's inconsistent statements concerning the transaction with Mrs. Alexander indicate that Ms. Thatcher was not a credible witness with respect to whether or not she asked the underwriting questions and as to how she completed the worksheet-application forms.

13. Ms. Thatcher did not ask Mrs. Alexander the underwriting questions (Ex. A11 at 14; test. of Alexander.)
14. By certified letter dated March 2, 2000, Foremost rescinded the insurance policies on the Alexander's mobile homes and returned the premium paid because it appeared that the policy applications failed to disclose two previous arson fire losses in response to the applications' underwriting questions. Mrs. Alexander did not have a mail service that was authorized to accept certified mail in her absence, so Foremost's letter and refund checks were returned by the post office as unclaimed. (Ex A-2; A8 at 1; A16 at 1 and 7 – 10; test. of Alexander.) Eventually, Mrs. Alexander received a copy of the Foremost rescission letter and spoke with Mike Wolkwitz, the Foremost adjuster. (Test. of Alexander). Mr. Wolkwitz told Mrs. Alexander that the company had rescinded coverage because of false information that Mrs. Alexander supplied. He then read from the underwriting questions on the application form supplied by Bancorp. Mrs. Alexander advised Mr. Wolkwitz that she had never been asked the underwriting questions and, moreover, her copy of the application did not contain any answers to those questions. (Test. of Alexander).
15. On April 6, 2000, Patty and Max Alexander filed a complaint with the department alleging misconduct by Ms. Thatcher. (Ex. A2.)
16. On April 9, 2000, the Alexanders' other Christmas Valley mobile home burned to the ground and the investigators found that the fire was arson. The Alexanders filed a claim with Foremost for the other mobile home loss. (Ex. A8)

at 2 and 4.) Because the policies were rescinded, there was no coverage and Foremost denied the claims on both mobile homes. (Ex. A11 at 13.)

17. Patty and Max Alexander called Mr. Leseuer on May 4, 2000 to obtain information about Bancorp's Errors and Omissions policy. Mr. Alexander called back and told Mr. Leseuer that he was "going after [Mr. Leseuer]" and that he would "appreciate it if [Leseuer] would work with [Mr. Alexander] on this." (Ex. A8 at 3).
18. On October 18, 2000, Mike Wolkwitz, Foremost Adjuster, received a copy of the Alexanders' application from the Insurance Division. (Ex A11 at 21). He contacted Ms. Thatcher to ask for an explanation why it differed from the copy provided by Bancorp. He asked her to discuss the matter with Mr. Leseuer and look at it with "an open mind." (Ex 11 at 22). Mr. Leseuer spoke with Ms. Thatcher and advised Foremost that the document provided to Mrs. Alexander was only a premium quote and that the agent "will always ask the underwriting questions, sign and submit to the insurance company." (Ex A11 at 21). On the basis of Bancorp's representation, Foremost maintained its rescission and refused to pay the Alexanders' claims. (Ex A11 at 24).
19. The Alexanders hired an attorney who initiated litigation against Foremost, Bancorp and Karen Thatcher. (Ex A23). On October 3, 2001, the Alexanders settled the case against Foremost for \$45,902.50. (Ex. A24). The Alexanders subsequently settled the case against Bancorp and Ms. Thatcher for \$1,500. (Ex. A25).
20. The Insurance Division investigated the conduct of Karen Thatcher. Ms. Thatcher wrote the Insurance Division a letter on April 20, 2000, stating that she went over the underwriting questions with Mrs. Alexander and was advised the answers to the questions were "no." (Ex A15 at 2). That statement is not true. See Finding 13. In a subsequent interview with the Insurance Division, Ms. Thatcher stated that she met with Max Alexander on December 16, 1999, which was not true. Ms. Thatcher stated that she did not think she had ever spoken by phone with Mrs. Alexander when in fact the original contact was made by telephone. Ms. Thatcher stated that Mrs. Alexander came into her office twice on December, which was not true. (Ex A19 at 5 and 27; test. of Alexander). The Insurance Division sent Ms. Thatcher a list of follow up questions. In response to these questions, Ms. Thatcher states in fifteen responses, "I do not recall." Five times she states, "I'm not sure" or "I am unsure." (Ex A22).
21. Respondent has a reputation for honesty, integrity, and professionalism in her community. (Ex. R9.)

Modifications to Factual Findings

For the reasons set forth below, the department deleted or modified certain factual findings made by the hearing officer.

1. The department deleted Proposed Order Finding of Fact 6 relating to the usual practices of Ms. Thatcher with regards to insurance transactions. While evidence of habit can be relevant, here some of Ms. Thatcher's direct testimony concerned general office procedures (rather than her procedures) or was inconsistent with her testimony on cross-examination. In sum, evidence of "usual practices" was not determinative of what occurred during this transaction, which can be deduced from the testimony and exhibits presented at the hearing. The finding included the statement "[Ms. Thatcher] always follows this procedure and always reads the underwriting questions to the applicant and records the responses." This finding is not correct inasmuch as this is not what occurred in the Alexander transaction.
2. The department deleted portions of Finding of Fact 11, namely that if Mrs. Alexander had disclosed that she had two or more fire losses in the past three years, Foremost would not have written the policy. The effect of such disclosure was not that the policy would not have been written, but that additional information would have been necessary so that Foremost could consider whether or not to underwrite the policy. (Ex A4 – compare underwriting question "Has any applicant had a fire, theft, or liability loss of more than \$2,5000 and/or 2 or more fire, theft, or liability losses (any amount) during the past 3 years? *(If yes, SUBMIT with explanation)*," (italics added), with question indicating "if yes, do not bind coverage; the risk is UNACCEPTABLE).
3. Proposed Order Finding of Fact 12 refers to Foremost's "investigator." Mike Wolkwitz was an insurance adjuster. (Ex A11 – Adjuster's Diary).
4. Despite not having observed Ms. Thatcher testify, the department can make credibility findings because credibility is determinable from a number of factors other than witness demeanor. The credibility, i.e., the weight, that attaches to testimony can be determined in terms of the inherent probability, or improbability of the testimony, the possible internal inconsistencies, the fact that it is or is not corroborated, that it is contradicted by other testimony or evidence and finally that human experience demonstrates it is logically incredible. *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245, 256, 602 P2d 1161 (1979), *rev den* 288 Or 667 (1980) (Richardson, J., concurring in part, dissenting in part); *Tew v. DMV, supra* at 449. The inconsistencies with the physical evidence and internal inconsistencies of Ms. Thatcher's statements demonstrate that Ms. Thatcher was not a credible witness with respect to the

transaction, rather than that she was “not a good historian” as found by the hearing officer. See Proposed Order, Findings of Fact, note 5.

5. The department modified Proposed Order Finding of Fact 17 because the statements were made to Rex Leseuer, not to Karen Thatcher. (Ex A8 at 3).

Deletions and modifications were also made for clarity and textual placement. Spelling and grammatical errors were corrected. In addition, the department added several findings of fact that are fully supported by the record and that more fully and fairly describe the course of the transactions and events.⁴

Conclusions of Law

1. Respondent violated ORS 746.100 in two instances.
2. These violations warrant revocation of Respondent’s insurance agent license and the assessment of a civil penalty in the amount of \$2,000.

Opinion

The issues to be resolved in this agent sanction case are whether Ms. Thatcher’s conduct violated ORS 746.100 in two instances, and if so, whether these violations warrant revocation of her insurance agent license and assessment of a civil penalty in the amount of \$2,000. In this regard, the department has the burden of proving the allegations by a preponderance of the evidence. See ORS 183.450(2), (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence).⁵ Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

⁴ Factual findings were added in paragraphs 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 14, 17, 18, 19 and 20 of the Amended Proposed Order.

⁵ The hearing officer’s proposed order opined that the department had the burden of proving the allegations and *the propriety of the proposed sanction* by a preponderance of the evidence. The cases cited do not require proving the propriety of the proposed sanction, nor are we aware of any law requiring such.

Violations

ORS 746.100 provides:

No person shall make a false or fraudulent statement or representation on or relative to an application for insurance, or for the purpose of obtaining a fee, commission, money or benefit from an insurer or agent.

The department contends that Respondent violated ORS 746.100 by falsely answering “no” to the underwriting questions on the two insurance applications which asked: “[h]as any applicant had a fire, theft, or liability loss of **more than \$2500** and/or **2 or more** fire, theft or liability losses (any amount) during the past 3 years.” (Emphasis in original.) The department has met its burden of proof that Respondent violated ORS 746.100.

Mrs. Alexander’s statements prior to and at the hearing concerning the transaction were consistent and credible. Respondent’s statements were not.

Mrs. Alexander testified that when she arrived at Bancorp on December 17, 1999, Respondent had the applications filled out. Respondent asked her to review the applications for accuracy. Because there were other portions left blank, she was not concerned that the underwriting questions on the back were unanswered. She signed the applications. Ms. Thatcher never asked Mrs. Alexander about prior claims or fire, theft or liability losses, either in their first telephone conversation on December 16, 1999, or later at their face-to-face meeting in the Bancorp offices on December 17, 1999. The application that Mrs. Alexander signed and Ms. Thatcher copied for her did not contain any answers to underwriting questions, including the underwriting question about prior fire losses.

Respondent’s explanation for the difference in the two versions of the application forms was that the copies given to Mrs. Alexander were only a quote and the application was not finalized until Mrs. Alexander made a second trip to her office to accept the quote and complete the application, including answering the underwriting questions. But there was no second visit. The department offered a more believable explanation that Respondent gave Mrs. Alexander a copy of the application that Respondent had completed prior to Mrs. Alexander’s arrival, which Mrs. Alexander reviewed for accuracy and signed. After obtaining Mrs. Alexander’s signature, Ms. Thatcher filled in yet more information on the form: Mrs. Alexander’s date of birth and social security number, information about billing and her own signature. She also called Foremost after Mrs. Alexander left, around 3:12 p.m., and reported the transaction and obtained the policy number – indicating the policy was bound. That policy number was also recorded on the form after it was provided to Mrs. Alexander. But before Bancorp forwarded their copy of the

application to Foremost, Respondent completed the underwriting questions, filling them in with the answer “no.” The department’s explanation is more believable and more consistent with the credible evidence. In sum, we conclude that, in two instances, Karen Thatcher violated ORS 746.100.

Sanction

ORS 744.013 (1999) provides:

- (1) If the Director of the Department of Consumer and Business Services finds with respect to a licensee or an applicant for a license that one or more of the grounds set forth in subsection (2) of this section exist, the director may take the following disciplinary actions:
 - (a) The director may refuse to renew or may suspend or revoke a license issued under ORS 744.002 * * *.
 - (2) The director may take any disciplinary action under subsection (1) of this section on one or more of the following grounds:

* * * *

- (c) Violation of or noncompliance with any applicable provision of the Insurance Code or any rule or order of the Director.⁶

The department proposes to revoke Respondent’s insurance agent’s license based on her false statements or representations on two applications for insurance wherein she answered “no” to the underwriting question concerning whether the Alexander’s had two or more fire losses during the past three years when in fact they had two fire losses within that same year.

The department also proposes to assess a civil penalty of \$2,000 for Respondent’s violations of ORS 746.100. ORS 731.988(1) provides:

Any person who violates any provision of the Insurance Code, any lawful rule or final order of the Director of the Department of Consumer and Business Services or any final judgment or decree made by any court upon application to the director, shall forfeit and pay to the General Fund of the State Treasury a civil

⁶ The hearing officer’s Proposed Order incorrectly quoted ORS 744.013(2)(g) rather than ORS 744.013(2)(c). See department’s opening statement.

penalty in an amount determined by the director of not more than \$10,000 for each offense. In the case of individual agents, adjusters or insurance consultants, the civil penalty shall not be more than \$1,000 for each offense. Each violation shall be deemed a separate offense.

The false statements at issue were not made by Respondent in a vacuum. They were provided via a copy of the applications to Foremost while the company was investigating the Alexander's claim for payment on their policies. Later, when Foremost realized there were two different versions of the forms and requested an explanation, Respondent Thatcher did not offer any explanation that corresponded with the truth, namely that Ms. Alexander did not answer the underwriting questions. Respondent knew, or should have known, that by providing this misinformation she was ensuring the likelihood that Foremost would continue to refuse to pay the claim. This is precisely what occurred.⁷ As a result, the Alexander's had to hire an attorney and seek restitution via the courts for a policy in which they made no false representations, as they were accused. When Foremost discovered the "second" application forms (submitted by the Alexanders to the Insurance Division), it gave Respondent one more opportunity to review the matter "with an open mind." Again, Respondent stuck by her incredible story that Mrs. Alexander answered the underwriting questions in the negative and Respondent recorded those answers. Throughout, Respondent gave inconsistent and evasive statements to Foremost, the Insurance Division and, ultimately, in her sworn deposition. This was more than a mere mistaken false statement – this was a statement made with the clear intent to mislead Foremost into believing what was not true, namely that Mrs. Alexander had falsely answered the underwriting questions.

The department has plenary authority to reject the hearing officer's suggested sanction⁸ and enter its own sanction, subject to the statutory limits on its authority and to the other limits on its discretion expressed in ORS 183.482(8)(b). Here, the facts are well within the law permitting the sanction of revocation. See ORS 744.013(2)(c) (1999); 746.100.

Citing *In the Matter of Leubke*, 301 Or 321 (1986), Respondent argues that her license should not be revoked based on mitigating factors. In past cases, the department has considered aggravating and mitigating factors when determining the proper remedy. Aggravating factors include: prior disciplinary offenses;

⁷ Whether or not, as a matter of *law* (see ORS 742.013), Foremost could prevent the Alexanders from ultimately recovering on their policies, as a matter of *fact*, Foremost could, and did, rescind the policies and refused to make payment.

⁸ The hearing officer recommended a \$2,000 civil penalty as the sole sanction in this matter.

dishonest or selfish motive; a pattern of misconduct; multiple offenses; bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary process; submission of false evidence, false statements, or other deceptive practices during the disciplinary process; refusal to acknowledge wrongful nature of conduct; vulnerability of victim; substantial experience in the profession; and indifference to making restitution. Mitigating factors include: absence of a prior disciplinary record; absence of a dishonest or selfish motive; personal or emotional problems; timely good faith effort to make restitution or to rectify consequences of misconduct; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; inexperience in the profession; character or reputation; physical or mental disability or impairment; delay in disciplinary proceedings; interim rehabilitation; imposition of other penalties or sanctions in this proceeding; remorse; and remoteness of prior offenses. *See In the Matter of Boyd & Co. Insurance*, Ins. Div. case no. INS 89-04-04 (1990); *In the Matter of Giannetti*, Ins. Div. case no. INS 90-12-006 (1993).

There are both aggravating and mitigating factors in this case. Unlike the hearing officer, the department does not find that the mitigating factors outweigh the aggravating factors to an extent that a license disciplinary sanction should be omitted.

Respondent engaged in conduct that was intended to obstruct the disciplinary process, notably by making false and evasive statements to the Insurance Division. Respondent refused to acknowledge the wrongful nature of her conduct. Respondent was indifferent to making restitution to the Alexanders and only by the settlement of litigation brought against her (and her employer) was there any restitution made. There was no timely good faith effort to make restitution or rectify the consequences of her misconduct. Throughout the Alexanders' ordeal, eventually requiring them to retain an attorney and sue the insurer and the agency, Respondent did everything but cooperate toward a resolution. Respondent did not provide full and free disclosure to the disciplinary authority (the department) either upon investigation or at the hearing on this matter, but continued a pattern of inconsistent and incredible statements. Clearly, Respondent demonstrated no remorse. There are some mitigating factors: respondent (who has only been licensed a short time) has no prior disciplinary sanctions, there were not multiple victims, respondent lacks substantial experience as an insurance agent and there was evidence of good character in other dealings in the community. It is unclear whether or not there was a selfish or dishonest motive – while Respondent was paid an hourly wage rate but her production was monitored by a quote tracking system. The nature of the violation taken together with the harm to the policyholders and the lack of responsibility of Respondent to be open and truthful and set straight the record compels us to conclude that this is an appropriate case for disciplinary sanction beyond a mere civil penalty. The proposed sanction of revocation is neither extreme nor inconsistent with other department sanctions. *See In the Matter of*

Jeffrey Bartlett, Ins. Div. case no. INS 02-04-016 (2002); *In the Matter of Brian R. Da Vault*, Ins. Div. case no. INS 01-02-006 (2001); *In the Matter of Steven B. Sacre*, Ins. Div. case no. INS 96-09-008 (1997).

Order

Pursuant to ORS 744.013(1) (1999), Thatcher's Oregon insurance agent license shall be revoked on the date of this order.

Pursuant to ORS 731.988, Thatcher shall pay a civil penalty of \$2,000. The payment shall be made in the form of a check payable to the "Department of Consumer and Business Services" for the full amount due. The payment shall be delivered to the Insurance Division at the Labor and Industries Building, 350 Winter Street NE, Room 440 (4th Floor), Salem, Oregon; or mailed to the Insurance Division at PO Box 14480, Salem, OR 97309-0405. Pursuant to ORS 183.090(2), the payment shall be received by the Insurance Division by 5:00 PM (PT) on the 71st calendar day after the date of this order, unless the party timely appeals the order.

Notice of Right to Judicial Review

The party has the right to appeal this order to the Oregon Court of Appeals pursuant to ORS 183.480 and 183.482. A party may appeal the order by filing a written petition for judicial review with the Court of Appeals in accordance with the current Oregon Rules of Appellate Procedure. The Court of Appeals must receive the petition within 60 days from the date the order was served on the party. If the order was personally delivered to a party, then the date of service is the day the party received the order. If the order was mailed to a party, then the date of service is the day the order was mailed to the party, not the day the party received the order. If a party does not file a petition within the 60-day time period, then the party will lose the right to appeal the order. If a party appeals the order, the party should also send a copy of the petition to the Insurance Division by delivering it to the Labor and Industries Building, 350 Winter Street NE, Room 440 (4th Floor), Salem, Oregon; or mailing it to PO Box 14480, Salem, OR 97309-0405, faxing it to 503-378-4351; or e-mailing it to mitchel.d.curzon@state.or.us.

Dated July 18, 2003

/s/ Cory Streisinger
Cory Streisinger
Director
Department of Consumer and Business Services