

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of) **Case No: INS 03-03-011**
)
PAULA L. BIRCHFIELD) **PROPOSED ORDER**
)
)

HISTORY OF CASE

On July 31, 2003, the Director of the Department of Consumer and Business Services, Insurance Division (the director or department) issued an Amended Notice of Proposed Action (Amended Notice) proposing to revoke the insurance agent license issued to Paul L. Birchfield (Respondent) pursuant to ORS 744.013(2)(a) (1999) and 744.011. Respondent requested a hearing challenging the proposed action. On July 31, 2003, the department referred this matter to the Office of Administrative Hearings for hearing.

On February 19, 2004, Administrative Law Judge Ella D. Johnson conducted a hearing in this matter. The department was represented by Assistant Attorney General Kathleen Dahlin. Respondent appeared by telephone and represented herself *pro se*. The department called Milton Birchfield, Kate Weathers-Anderson, Terri Gaubutt, Sam Soller and department investigator Rich Zufuto as witnesses. Respondent testified on her own behalf and called her daughter Ashley Sade as a witness. The record was left open for submission of additional documents by Respondent and closed on March 8, 2004 following receipt of the department's objections to Respondent's documents.

ISSUES

- (1) Whether in Respondent violated ORS 744.013(2)(o) (1999).
- (2) Whether Respondent violated ORS 744.013(2)(g) (1999).
- (3) Whether these violations, if proven, warrant revocation of Respondent's Oregon insurance agent license.

EVIDENTIARY RULINGS

The department's Exhibits A1 through A13 were admitted into the record without objection. By facsimile dated February 18, 2004, Respondent submitted Exhibits R1 through R2 which were received into the record without objection. Following the hearing, claimant also submitted eight documents by facsimile dated February 23, 2004, which I have marked as Exhibits R3 through R11. The department objects to the documents based on relevancy and the

department's contention that they are already in evidence as part of the department's Exhibit A11, which has already been admitted into the record. Following my review of the record, I find that they are duplicates of documents already in the record as part of the Albany Police report contained in Exhibit A11 and sustain the department's objection. Respondent also faxed a letter from Certified Accountant Donald G. Vanlue that appears to be a letter addressing Respondent's character. Although the letter was also addressed to the department's assistant attorney general, the department did not comment on this exhibit, which I have marked as Exhibit R12. Inasmuch as this appears to be relevant to Respondent's defense, the letter will be admitted into the record.

FINDINGS OF FACT

(1) Respondent was first licensed in Oregon as an insurance agent on August 26, 1998 and thereafter her license was renewed until June 11, 2002. Her office was in the Albany, Oregon area and she held appointments from American Family Life Assurance (AFLAC) to sell life and health insurance. She is also licensed to sell insurance in Florida, Idaho, Montana, Utah, Arizona, California, Washington, and Nevada. (Exs. A1, A12 at 6-7.) Respondent worked as an independent agent from 1999 to April 2001. From February 1999 to April 1, 2001, she was promoted to and served as AFLAC district coordinator for the agents assigned to her district. She was later promoted to regional coordinator with district coordinators assigned to her. They all received mail at Respondent's PO Box in Albany, Oregon. (Ex. A12 at 3.) As district and regional coordinator, Respondent trained agents and managers, following the two-day training provided by AFLAC.¹ (Ex. A12 at 8-9.) As district coordinator, she did not write business but she had a substantial number of agents out writing business and she received 30 percent of their commissions. (Ex. A12 at 11, 31.)

(2) Kate Weathers was one of the agents that Respondent trained as district manager.² Ms. Weathers started with AFLAC in Respondent's district in approximately August 2000, after working for Respondent as her assistant while she was going to insurance school. Respondent paid for half of her school costs. Ms. Weathers learned the business quickly. (Test. of Weathers-Anderson.)

(3) In October 2000, Respondent and Ms. Weathers along other agents, including Terri Garbutt and Bill Bonner, made presentations to the employees at Heritage Place (Heritage), an assisted living facility in Bandon, Oregon, concerning the advantages of purchasing AFLAC's supplemental insurance. They also wrote applications. Ms. Weathers had only been licensed for one or two days at that time. This was a new account for AFLAC and Respondent was the agent of record. Heritage is part of a parent company called Generations, which was opening facilities all around Oregon. The employees signed payroll authorization cards to deduct the cost of the

¹ Respondent was subsequently promoted to director of major markets for Oregon and in that capacity would recruit large employee groups that were employed by multi-state companies. (Ex. A12 at 8.) She now works in AFLAC's main corporate headquarters in Columbus, Georgia as the company's Manager of Recruiting and Coordinating, providing training for AFLAC managers. She does not require licensure to hold this position. (Ex. A12 at 2, 10.)

² Ms. Weathers is now an AFLAC marketing director and associate agent in Lake Oswego, Oregon.

policy or policies from their payroll at Heritage. Ms. Weathers and Ms. Garbutt returned to Heritage in November 2000 to answer employee questions and meet with the facility's human resources department to give them the authorization cards. The policies were to become effective in January 2001. (Ex. A12 at 11-12, 14-28; test. of Weathers-Anderson.)

(4) Heritage subsequently told employees that their payroll was being cut and they were free to cancel the payroll deduction for AFLAC. (Ex. A12 at 29.) The payment was due on March 1, 2001. Heritage did not pay the bill and Gary Brink contacted Respondent to let her know that the employees were dropping off the policies, he was thinking about terminating the AFLAC insurance and the facility was having problems with AFLAC's main office. Fifty percent of the employees wanted to continue the insurance and the other half wanted to cancel. In January 2001, Ms. Weathers went back to Heritage by herself to service the account by answering employees' questions and trying to save the accounts. Ms. Weathers was in constant contact with Respondent because she had never dealt with most of problems posed by the Heritage account. Ms. Weathers called Respondent when she returned from Heritage. Respondent came up with a plan to ensure that the first month's premium was paid. (Exs. A5, A12 at 32-39; test. of Weathers-Anderson.)

(5) At Respondent's direction, Weathers purchased money orders for \$173.20 and \$700 with her own money and sent them to Melanie Dyer at Heritage to pay the first month's premium for the employees' AFLAC supplemental coverage policies.³ (Test. of Weathers-Anderson and Garbutt.) Respondent never saw the money orders but she knew the amounts and knew that the money orders had been sent to Heritage. Because she was a new agent, she would not have known how to do this without someone else's direction. She asked other agents to contribute and left bills on the agent's desks, but they declined. "Rebating" is illegal and violates the Oregon Insurance Code.⁴ (Exs. A2, A3, A5; test. of Weathers-Anderson.)

(6) AFLAC first billed Heritage for the premium on the employees' supplemental coverage 30 days after the effective date of the policies on February 11, 2001. Ms. Dyer submitted a payment in the amount of \$873.20 to AFLAC for the first month of premium for the employees' policies. (Exs. A2, A3; test. of Weathers-Anderson.)

(7) AFLAC agents receive credit for a paid policy when the premium has been applied, whether the policy is active or terminated. The exception to this is if a policyholder is given a full refund of the premium. If the policy is canceled prior to the first month premium payment,

³ In her sworn statement, Respondent vehemently denied that she had instructed and pressured Ms. Weathers to purchase the money orders and send them to Heritage to pay for the first month's premium. She stated that she learned about it after overhearing Ms. Weathers and Ms. Garbutt talking about it and that she thereafter attempted to retrieve the money orders. After being confronted by the fact that others had stated that she directed Weathers to rebate the first month's premium, she stated that she did not recall doing that. (Exs. A12 at 48-50; A13 at 1-5.) However, if that was true, Respondent took no action against Ms. Weathers, even though she knew rebating was illegal. Moreover, the weight of the credible evidence establishes that she did direct Ms. Weathers to purchase the money orders to prevent increasing her rate of "no pays."

⁴ Respondent told investigator Zafuto that Paul Sweeney, an AFLAC state trainer, had told Weathers that rebating was okay. (Ex. A13 at 14-15.) However, she offered no proof to support this statement.

the agent is given a “no pay” status on the policy and the commission is charged back to the agent’s account. Agents who have a no pay rate of 13 percent or less qualify for honors programs, AFLAC awards and conventions. The no pay rate is also used by AFLAC’s Marketing Department to detect agent fraud and determine whether there are problems associated with the agent and how the agent is conducting business. (Exs. A5, A12 at 44; test. of Weathers-Anderson.)

(8) In February 2001, Sam Sollers⁵ was at a meeting where, in front of 11 agents and several managers, Respondent complimented Ms. Weathers for “saving the account” avoiding additional “no pays” by using her own money to help pay for the first month’s insurance premium for Heritage. (Ex. A2; test. of Weathers-Anderson, Garbutt and Sollers.) After the meeting, broker Robert Wells pulled Respondent and Ms. Weathers aside to talk about the announcement that Weathers had engaged in rebating. (Ex. A13 at 12.) Respondent and Ms. Weathers were surprised that was considered rebating. (Ex. A13 at 21.) At the time of the meeting, Ms. Weather’s “no pay” rate was at 57.01 percent and Respondent’s rate was at 19.8 percent. AFLAC’s recommended and most lucrative level of “no pay” rate for an agent was 13 percent or less. (Ex. A5.)

(9) Sollers subsequently took over servicing Weathers’ and Respondent’s accounts at Heritage. He had problems enrolling the employees at Heritage because they said they would take the insurance but only if they received the first month’s premium free, “like last time.” He reported the substance of the February 2001 meeting to the department, stating that he found an “ongoing pattern of deceptions with their customers.” This pattern of deception included using pre-tax quotes when it was impossible for them to know the individual’s tax bracket, and telling some accounts that they could not cancel until the next year’s open enrollment period while telling others that they could cancel at will. Sollers also observed misrepresentations of policies where customers were lead to believe by Weathers and Respondent that they were purchasing one policy when they were really purchasing the policy that gave Weathers and Respondent the highest commission. He noted that these practices caused “mass cancellations” at Heritage.⁶ (Ex. A2; test. of Sollers.)

(10) On March 30, 2001, Dyer notified AFLAC that Heritage was canceling its employee’s supplemental coverage and asked for a refund of the premium paid in the amount of \$873.20. Weathers directed Dyer to submit a check to her for the refund. (Ex. A3.)

(11) Milton Birchfield, who is 78 years old, is Respondent’s father-in-law. His wife, Louise, died in 1996 and he subsequently retired from his heating and air conditioning business. During the period relevant herein, he lived with Respondent and his son in the family home on

⁵ Sollers was a new agent at the time and became the district sales co-coordinator for AFLAC in Albany, Oregon. He now sells cars. (Test. of Sollers.)

⁶ Respondent testified at hearing that Sollers tried to blackmail her by threatening to report her to the department. However, given Respondent’s lack of credibility on other issues concerning her licensure, I do not find this allegation to be persuasive.

Gale Street in Albany, Oregon. Respondent and his son lived in an apartment located in the basement of the home. (Ex. A11; test. of Milton Birchfield.)

(12) In September 2001 while going through Respondent's computer bag, Respondent's former husband John "Kie" Birchfield discovered two credit card statements, which were in his father's name. Kie Birchfield told his father, but his father knew nothing about the credit cards. John Birchfield ordered a credit report. The credit report indicated that Bank of America accessed Milton Birchfield's credit report on December 14, 1999 and the credit card was issued that month. Thereafter, the credit card statement was sent to Respondent at her PO Box 1436 in Albany, Oregon and she paid the monthly payments on the credit card. The signature on the credit card application was not his father's signature. Respondent charged \$11,715.93 on the Bank of America credit card as of April 2001. The current address on Milton Birchfield's credit report had also been changed from the Gale Street address to Respondent's PO Box. Then, after the credit card was issued, it was changed back to the Gale Street address. (Exs. A10, A11; test. of Milton Birchfield.) Respondent had all of the mail for her and Milton Birchfield forwarded to her PO Box in Albany. (Ex. A12 at 73-74.)

(13) Milton Birchfield also discovered that in 1999 Respondent removed his deceased wife's Wells Fargo Bank credit card from his wife's purse that was kept in his closet, again changing the billing address from the Gale Street address to Respondent's PO Box 1436. Respondent charged \$6,905 on the Wells Fargo card as of August 2001 and paid the monthly payments on the card.⁷ Milton Birchfield confronted Respondent and she admitted she opened the Bank of America credit card account and took the Wells Fargo card; she said she was sorry and did not know why she had done it.⁸ Respondent immediately moved out of the family home and the couple filed for divorce. Milton Birchfield thereafter filed affidavits of fraud and forgery with the banks naming Respondent as the perpetrator and closed both accounts. On November 25, 2001, Milton Birchfield filed a complaint for Forgery and Theft I with the Albany Police, stating that the signature on the credit card application was not his and that Respondent had given her PO Box as his address so she could receive the monthly statements. (Exs. A10, A11; test. of Milton Birchfield.)

(14) When interviewed by the Albany Police, Respondent admitted that she had filled out the Bank of America credit card application and had signed Milton Birchfield's name⁹. She also stated, however, that she did so with Milton Birchfield's permission and approval. (Ex. A11;

⁷ Respondent stated in her sworn testimony that she was given the credit card by her husband to use. (Ex. A12 at 54.) However, this is contradicted by Milton Birchfield's testimony at hearing.

⁸ Respondent denied that she admitted to her father-in-law that she had opened the Bank America account and had taken the Wells Fargo credit card. (Ex. A12 at 70.) However, I do not find Respondent's denials persuasive.

⁹ When confronted by Insurance Division investigators about Milton Birchfield's statement that he did not give her authority or permission to sign his name to the Bank America credit card application, Respondent responded only that he forgot that he had done so. However, she also stated that she did not have permission to put his social security number on the application but had his social security number because she did the books. She conceded that he may have thought that he was co-signing for a credit card for her. (Ex. A12 at 64-65.)

test. of Respondent.)¹⁰ Milton Birchfield denied that he knew about the credit card or that he had given Respondent permission to apply for and use the credit card. (Test. of Milton Birchfield.) The Linn County District Attorney declined to prosecute the case against Respondent because the credit card accounts were both current and Respondent continued to make timely payments on the accounts. The statute of limitations had also run on the Bank of America credit card application. (Ex. A11.)

(15) On August 31, 2002, Respondent voluntarily surrendered her license, license number 613886. (Ex. A1.)

CONCLUSIONS OF LAW

(1) Respondent violated ORS 744.013(2)(g) (1999) by directing Katie Weathers to illegally pay or rebate the first month's premium on Heritage employee's supplemental insurance to avoid an increase in her "no pay" policy rate.

(2) Respondent violated ORS 744.013(2)(o) (1999) by applying for and using a Bank of America credit card and forging the name of Milton Birchfield without his authorization or permission and using a Wells Fargo credit card issued to Milton Birchfield and his deceased wife without his authorization or permission.

(3) These violations are proven and warrant revocation of Respondent's Oregon insurance agent license.

OPINION

The issues to be resolved in this agent sanction case are whether Respondent violated ORS 744.013(2)(g) and (o) (1999) and, if so, whether revocation of her Oregon license is warranted. In this regard, the department has the burden of proving the allegations and the propriety of the sanction by a preponderance of the evidence. *See* ORS 183.450(2) and (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). 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).

¹⁰ Respondent claimed that this was all a revenge tactic by her former husband designed to make her lose her insurance agent license. She also claimed that she had previously talked to Milton Birchfield about using the credit cards and promised him that she would pay them off. She also claimed that her former husband was in total control of his father and would yell at him and "be mean" to him if he did not do what he was told to do. However, Milton Birchfield credibly testified that he had not given Respondent permission to apply for and/or use the credit cards and denied that his son told him to say that Respondent illegally applied for and used the credit card. Consequently, I do not find Respondent's claims to be persuasive because she failed to provide evidence establishing that she had not illegally applied for and/or used the credit cards. (See, Ex. 11; test. of Respondent and Milton Birchfield.)

Violations

ORS 744.013(2)(g) and (o) (1999) state in relevant part:

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

* * * * *

(g) Use of a fraudulent or dishonest practice by the licensee in the conduct of business under the license, or demonstration therein that the licensee is incompetent, untrustworthy or a source of injury and loss to the public or others.

* * * * *

(o) Dishonesty, fraud or misrepresentation not related to the business of an agent, adjuster or insurance consultant.

The preponderance of the evidence establishes that Respondent violated both ORS 744.013(2)(g) and (o) (1999). With respect to her conduct as an insurance agent, the record establishes that Respondent instructed her subordinate Katie Weathers to “save” the Heritage account and avoid a higher rate of “no pay” policies by purchasing money orders to pay the first month’s premium on supplemental insurance purchased by Heritage employees. Ms. Weathers-Anderson testified that in October 2000 she and a number of other new agents went with Respondent to make presentations employees Heritage and sell them supplemental insurance which was handled on a pre-tax basis through payroll deduction. Heritage subsequently told employees that their payroll was being cut and they were free to cancel their AFLAC policies. The payment was due on March 1, 2001. Heritage did not pay the bill and contacted Respondent to let her know that the employees were dropping off the policies, he was thinking about terminating the AFLAC insurance and the facility was having problems with AFLAC’s main office. Ms. Weathers went back to Heritage by herself in January 2001 to service the account by answering employees’ questions and trying to save the accounts. She credibly testified that she was in constant contact with Respondent because she had never dealt with most of problems posed by the Heritage account. Ms. Weathers called Respondent when she returned from Heritage. Respondent came up with a plan to ensure that the first month’s premium was paid. Weathers testified that, at Respondent’s direction, she purchased money orders for \$173.20 and \$700 with her own money and sent them to Heritage to pay the first month’s premium for the employees’ AFLAC supplemental coverage policies. Because she was a new agent, she would not have known how to do this without someone else’s direction.

Although Respondent tried to shift the blame to Ms. Weathers and an AFLAC state trainer, it is more probable than not that Respondent was the source of the plan to “save” the account by engaging in the illegal practice of rebating. She even praised Ms. Weather’s for avoiding an increase in the “no pay” rate at a staff meeting in February 2001 and then acted surprised when Robert Wells told her that this practice was illegal. In addition, she argued that

she did not intentionally engage in illegal rebating behavior or advise Weathers to do so. However, I do not find Respondent's testimony credible or her arguments persuasive. Consequently, I conclude that Respondent violated ORS 744.013(2)(g) (1999) by engaging in the illegal practice of rebating.

With respect to her conduct outside her insurance business, the record establishes that Respondent applied for and used a Bank of America credit card and forged the name of Milton Birchfield without his authorization or permission and used a Wells Fargo credit card issued to Milton Birchfield and his deceased wife without his authorization or permission. At hearing, Respondent argued that these allegations were all part of her husband's revenge against her and that she had Milton Birchfield's permission and authorization to apply for and use the Bank of America credit and to sign his name and to use the Wells Fargo credit card issued in his name. Milton denied all of her allegations concerning the family's credit practices and that he had given her permission to apply for and use either credit card. In fact, he filed complaints with both the Albany Police and the Insurance Division concerning this incident. In her defense, she called her daughters as witnesses and had them write letters in support of her character and the problems she had in the Birchfield family. However, I do not find their testimony or letters to be persuasive because they are motivated by their love for their mother and are not relevant to the allegations at issue. Consequently, I conclude that the department has proven by a preponderance of the evidence that Respondent violated ORS 744.013(2)(o) (1999).

Sanction

The department proposes revocation of Respondent's Oregon agent license.

ORS 744.013(1) provides in relevant part:

(1) If the Director of the Department of Consumer and Business Services finds with respect to an adjuster or insurance consultant or an applicant for an adjuster or insurance consultant 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 or the authority under a license to engage in any category of insurance business or any class of insurance.

Additionally, ORS 744.011 provides in relevant part:

(1) The expiration of a license or the voluntary surrender of a license by a licensee under this chapter shall not deprive the Director of the Department of Consumer and Business Services of jurisdiction to proceed with any investigation of, or any action or disciplinary proceedings against, the licensee or to revise or render void an order suspending or revoking the license.

Inasmuch as the department has carried its burden of proving by a preponderance of the evidence that Respondent violated ORS 744.013(2)(g) and (o) and both of these violations demonstrate untrustworthiness and/or incompetence, I conclude that these violations warrant revocation of Respondent's Oregon insurance agent license.

ORDER

I recommend that the department issue the following Final Order:

The Oregon insurance agent license issued to Paula Birchfield shall be revoked.

IT IS SO ORDERED.

Dated this 25th day of March 2004.

/s/ Ella D. Johnson
Ella D. Johnson, Administrative Law Judge
Office of Administrative Hearings

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
Mitchel D. Curzon, Chief Enforcement Officer
Oregon Insurance Division
350 Winter Street NE, Room 440
Salem, OR 97301-3883