

**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 04-02-019**  
 )  
**EDDIE KAM-CHUNG YEN** ) **PROPOSED ORDER**  
 )  
 )

**HISTORY OF CASE**

On March 12, 2004, the Director of the Department of Consumer and Business Services, Insurance Division (the director or department) issued a Notice of Proposed Action (Notice) proposing to revoke the Oregon resident agent license issued to Eddie Kam-Chung Yen (Respondent) pursuant to ORS 744.013(1)(a) (1999) and 744.074(1). Respondent timely requested a hearing challenging the proposed action. On April 2, 2004, the department referred this matter to the Office of Administrative Hearings (OAH) for hearing.

The matter was originally set for hearing on September 2, 2004. The hearing was postponed at Respondent's request. The hearing was held on March 4, 2005 in Salem, Oregon. Administrative Law Judge Alison Greene Webster presided. Assistant Attorney General Kyle Martin represented the department. Respondent appeared in person and was represented by Attorney Anthony Furniss. The department called Lisa Shardeer, Doug Horst, Joshua LaRoche, Carl Schellenger, Aretina Trepczyk, Michell Curzon and Ruth Johnson as witnesses. Respondent testified on his own behalf. The record remained open for telephonic closing argument, and closed on March 14, 2005.

**ISSUES**

(1) Whether Respondent violated ORS 744.083(1) in 36 instances by failing to properly account for and maintain premium funds in a trust account separate from all other business and personal funds.

(2) Whether Respondent violated ORS 744.074(1)(d) in 28 instances by improperly withholding, misappropriating or converting moneys received in the course of doing business.

(3) Whether Respondent violated ORS 744.013(2)(d) (1999) in one instance by illegally withholding money belonging to the insurer.

(4) Whether Respondent violated OAR 836-074-0025 in 26 instances by failing to deposit premium funds into a trust account no later than seven days after his receipt of the funds.

(5) Whether Respondent violated ORS 746.100 in one instance by making a false or fraudulent statement in connection with Lisa Sharteer's application for insurance for the purpose of obtaining a fee, commission, money or benefit from the insurer.

(6) Whether these violations, if proven, warrant revocation of Respondent's Oregon insurance agent license.

### **EVIDENTIARY RULINGS**

The department's Exhibits A1 through A41 and Respondent's Exhibits R1, R6, R7 and R8 were admitted into the record. Respondents Exhibits R2 through R5 were deemed irrelevant and not admitted.

### **FINDINGS OF FACT**

(1) At all times pertinent to this matter, Respondent was licensed in Oregon as a resident insurance agent. He was first licensed in Oregon in 1981. In 1994, Respondent became a "captive agent" for Farmers Insurance Group (Farmers). (Test. of Yen.)

(2) Since 1999, Farmers has used an Agents Credit Advice ("ACA") Co/Banking network system to collect premiums that are paid to agents. Farmers' written policy requires agents to open and close their ACAs on a daily basis, and to deposit premiums daily.<sup>1</sup> Agents are required to generate a receipt for every premium payment received and to input each transaction into Farmers' network system. Upon closing the ACA, agents are to verify the daily ACA total against the daily collections total, print the computer screens and then deposit collected cash and checks in the bank within 24 hours. (Exs. A30, A31.)

(3) Farmers set up an account at Wells Fargo Bank for Respondent to deposit premiums collected pursuant to the ACA system. The deposit slips for the Co-Banking account bore the name of Farmers Insurance Exchange, along with Respondent's name and account number. (Exs. A11, A14.) Respondent was not authorized to withdraw funds from this account. Once funds were deposited into the Co-Banking account, Farmers swept the account every 24 hours and transferred the money elsewhere. Farmers considers the agents' Co-Banking accounts as "informal" trust accounts. (Test. of Schellenger.)

### **Sharteer Policy**

(4) In late November or early December 2001, Respondent met with Lisa Sharteer while

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<sup>1</sup> In setting out the agent's responsibilities, the insurer's ACA Co/Banking User Guide explains as follows:

Use of the ACA Co/Banking program necessitates that the money to cover each ACA be available in the Co/Banking Account on the business day after the ACA is transmitted. The good business practice of depositing collections daily is now essential.

(Ex. A30.)

she was in the process of purchasing her first home. She came to Respondent's agency to request a quote for homeowner's insurance on the property. Respondent quoted her an annual premium of \$370. Ms. Shardeer was happy with this quote. She signed and completed an application for insurance at that time. She was not provided with a copy of the completed application. (Test. of Shardeer.)

(5) In connection with the closing on Ms. Shardeer's property purchase, Respondent prepared a memorandum of coverage on the property. On December 18, 2001, Respondent sent the document, titled "Evidence of Insurance for Mortgage Interests," to the mortgagee, Washington Mutual Bank, F.A. The document named Ms. Shardeer as the insured for premises located at 4714 NE 102nd Avenue in Portland. It further indicated that homeowner's policy no. 73 92191-04-93 was effective from December 19, 2001 to December 19, 2002. (Ex. A1.)

(6) The following day, Pacific Northwest Title of Oregon issued Respondent's agency a check in the amount for \$370 for Ms. Shardeer's annual premium payment. (Ex. A3.) The check was mailed to Respondent no later than December 20, 2001. (Ex. A37).

(7) Respondent received the \$370 check within a few days. On January 11, 2002, he issued a receipt for the payment. On both the receipt and the check, Respondent wrote Ms. Shardeer's name and the following policy number: 73 921927989. (Ex. A3, A4.) Although Respondent did not realize it at the time, he wrote down the wrong policy number. Sometime between December 18, 2001 and January 11, 2002, his agency had already assigned no. 73 921927989 to a policy purchased by Bikram Raghubansh. (Test. of Yen; Exs. A5, A6 and A7.)

(8) On January 16, 2002, Respondent deposited the check for Ms. Shardeer's premium payment into the Wells Fargo bank Co-Banking account. (Ex. A3.) Because Respondent used the wrong policy number when submitting the ACA, Farmers credited the funds to Mr. Raghubansh's policy. (Ex. A5.) Due to a computer mistake (the system may have rejected the duplicate policy number) or inadvertence on Respondent's part, Farmers had no record of Ms. Shardeer's insurance application from December 2001. (Test. of Yen.)

(9) Sometime in May 2002, Respondent discovered that Farmers had not issued a homeowner's policy to Ms. Shardeer. (Test. of Yen; Ex. A38 at 98-99.) He went back and reviewed his records from the previous December and January. He realized that Ms. Shardeer's premium payment had been credited to another insured's account. (Test. of Yen.) Respondent tried, unsuccessfully, to contact Ms. Shardeer. On May 21, 2002, he electronically submitted to Farmers another application for Ms. Shardeer's homeowner's insurance. The application indicated, among other things, that the policy was to be effective as of May 18, 2002 and that the home was built in 1960.<sup>2</sup> (Test. of Yen; Ex. A2.) Farmers issued a policy, but the premium of \$646 was substantially more than the \$370 Respondent had quoted to Ms. Shardeer in December. (Test. of Shardeer.)

(10) Farmers sent Ms. Shardeer a premium statement requesting payment of \$646. Upon

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<sup>2</sup> The 1960 construction date was incorrect. (Test. of Shardeer.) In hindsight, Respondent could not recall why he represented on the application that the home was built in 1960. (Test. of Yen.)

receipt of that bill, Ms. Shardeer called Respondent. Respondent explained that there had been an error with regard to her policy, and he was working on fixing it. (Test. of Shardeer.)

(11) Respondent met with Ms. Shardeer in early June 2002. He advised that she now had a policy in place, although Farmers had increased the premium. When Respondent explained that the policy was effective as of May 18, 2002, Ms. Shardeer demanded coverage dating back to her December 19, 2001 closing date. Respondent tried to convince Ms. Shardeer to accept the policy with the May 18, 2002 effective date, but she declined. (Test. of Shardeer.)

(12) Farmers subsequently sent Ms. Shardeer a cancellation notice, asserting that it had not received any payment on the policy. Ms. Shardeer had to lodge a complaint with the Insurance Division before Farmers credited the \$370 to her account and agreed to reinstate the policy as of December 19, 2001. (Test. of Shardeer.)

### **ACAs 307 and 313**

(13) During the latter part of 2001 and early 2002, Respondent's property and casualty business increased to such an extent that he was unable to keep up with his paperwork. Although Farmers' written policies required agents to open, close and deposit ACAs on a daily basis, Respondent was unable to do so. Instead, he kept his ACAs open for three days or a week during this time. (Test. of Yen.)

(14) Between March 1, 2002 and March 7, 2002, Respondent's agency collected \$9,727.18 in premium payments for Farmers' policies. Respondent opened ACA 307 on or about March 1, 2002 and closed it on Friday, March 8, 2002. ACA 307 included 41 customer transactions. While ACA 307 was open, Respondent collected \$3,507.55 in cash,<sup>3</sup> and 25 checks

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<sup>3</sup> The name of the insured, the date Respondent collected the cash and the amount of cash collected for ACA 307 is set forth below:

<u>Insured</u>	<u>Date Collected</u>	<u>Amt. Collected</u>
Garcia, Mario A.	3/1/2002	\$120
Phan, Cuong	3/4/2002	\$200
Flores, Arturo V.	3/4/2002	\$130
Pratt, James E.	3/4/2002	\$48.16
Andronache, Samuel	3/4/2002	\$360
Ly, Vu Thi	3/4/2002	\$186
Bueno, Jerry M.	3/4/2002	\$50
Vasquez-Avila, Froilan	3/4/2002	\$82
Wu, Xiong	3/4/2002	\$135
Nguyen, Lam Viet	3/5/2002	\$200
Velasquez, Edolofo W.	3/5/2002	\$100
Cimpean, Octavian C.	3/5/2002	\$126
Soberan, Juan B.	3/5/2002	\$43
Tran, Co Thi	3/5/2002	\$57
Nguyen, Linh Thuy	3/5/2002	\$50
Diep, Terry Thao	3/5/2002	\$339.59

totaling \$6,219.63. (Ex. A12.) Because Respondent was busy with other matters during the day, he did not have time to prepare a deposit slip or deposit the money before close of business on March 8, 2002. (Test. of Yen.)

(15) During the day, Respondent generally kept the cash payments in an unlocked drawer at the office. Respondent believes that, when he left the office on the evening of Friday, March 8, he placed approximately \$4,100 in cash in his coat pocket. This cash amount included the \$3,507.55 collected from ACA 307, plus another approximately \$600 that Respondent collected after he closed ACA 307. (Test. of Yen.)

(16) Sometime over the weekend, the approximately \$4,100 in cash that Respondent had taken from the office went missing. On Monday, March 11, 2002, Respondent generated a deposit slip for ACA 307. He still could not find the missing cash. (Test. of Yen.) The deposit slip for ACA 307 listed currency of \$3,507.55 and the 25 checks totaling \$6,219.63. (Ex. A12.)

(17) Sometime before Respondent went to the bank on March 13, 2002, he wrote a check (no. 2701) on his business account with Northwest Farmers Insurance Group Federal Credit Union in the amount of \$3,507.55. This amount represented the missing cash premium payments that he had collected from 20 customers while ACA 307 was open. Respondent dated the check March 10, 2002. At 3:33 p.m. on March 13, 2002, Respondent deposited that check, along with the 25 checks he collected between March 1 and 7, 2002,<sup>4</sup> into the Wells Fargo Bank Co-Banking account. (Exs. A11, A12.) Respondent issued the check on his business account because he knew he was liable to Farmers for the premium money. (Test. of Yen.)

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Nguyen, Thuy	3/5/2002	\$643.40
Pham, Hai Van	3/5/2002	\$91
Tran, Su	3/5/2002	\$416
Lei, Jin Rong	3/6/2002	<u>\$130</u>
		\$3,507.55

(Exs. A12; A40 at 2.)

<sup>4</sup> When Respondent deposited these 25 checks on March 13, 2002, he had had 11 of them in his possession for more than seven days, as follows:

<u>Insured</u>	<u>Date Collected</u>	<u>Date Deposited</u>	<u>Days Late</u>
Nguyen, Thoi	3/1/2002	3/13/2002	5
Chan, Ben	3/2/2002	3/13/2002	4
Li, Zhang	3/2/2002	3/13/2002	4
Pham, Chanh	3/4/2002	3/13/2002	2
Ngo, Loi	3/4/2002	3/13/2002	2
Nguy, Huong	3/4/2002	3/13/2002	2
Huynh, Duol	3/4/2002	3/13/2002	2
Nguyen, Thi	3/4/2002	3/13/2002	2
Tran, Lan	3/4/2002	3/13/2002	2
Cao, Nhan	3/4/2002	3/13/2002	2
Bui, Minh	3/5/2002	3/13/2002	1

(Ex. A12.)

(18) When Respondent deposited check no. 2701 into the Co-Banking account on March 13, 2002, he did not have sufficient funds in his business account to cover it. Respondent deposited \$4,500 into his business account the following day (March 14, 2002), but the credit union placed a hold on a portion of those funds (\$3,500) until it could collect the money. Consequently, when check no. 2701 for \$3,507.55 posted, there was still insufficient collected money in Respondent's credit union account to cover it. (Exs. A16, A36.) The credit union returned the check to Wells Fargo Bank unpaid. (Exs. A11, A36.)

(19) Respondent closed ACA 313 on March 14, 2002. ACA 313 included customer premium payments made between March 7 and March 13, 2002. While this ACA was open, Respondent collected \$3,770.98 in cash and \$6,756.62 in checks, for a total of \$10,527.60. On March 15, 2002, Respondent generated a deposit slip for ACA 313. The deposit slip listed currency of \$3,770.98 and 23 checks. (Exs. A14, A15.)

(20) On March 18, 2002 Respondent wrote another check on his business account (check no. 2726) in the amount of \$3,770.98. This check represented all the cash Respondent collected while ACA 313 was open. On March 20, 2002, he deposited that check, along with the other 23 checks received into the Wells Fargo Bank Co-Banking account.<sup>5</sup> (Ex. A15.) When check no. 2726 was posted to Respondent's business account on March 21, 2002, the credit union initially marked it for return. The credit union then removed the hold it had placed on the \$3,500. Check no. 2726 was resubmitted and cleared the next day. On March 22, 2002, Respondent also deposited an additional \$4,780 into his business account, but check no. 2701 had already been returned unpaid. (Exs. A16, A36.)

(21) From March 1, 2002 to March 12, 2002, Respondent collected \$7,278.53 in cash from 36 Farmers' customers. Respondent did not turn this cash over to Farmers. Instead, he deposited the two checks drawn on his business account. (Exs. A12, A14, A16.)

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<sup>5</sup> When Respondent deposited the 23 checks on March 20, 2002, he had had 14 of those checks in his possession for more than seven days, as follows:

Insured	Date Collected	Date Deposited	Days Late
Basz, Marla	3/7/2002	3/20/2002	6
Duy, Nguyen	3/7/2002	3/20/2002	6
Sidorenko, A.	3/8/2002	3/20/2002	5
Ng, Michael	3/9/2002	3/20/2002	4
Pop, Abel	3/9/2002	3/20/2002	4
Ngoc, Cong	3/11/2002	3/20/2002	2
Ngoc, Di Tu	3/11/2002	3/20/2002	2
Ngo, Minh	3/11/2002	3/20/2002	2
Ngoc, Chau	3/11/2002	3/20/2002	2
Tran, Phuc	3/11/2002	3/20/2002	2
Tran, Dung	3/12/2002	3/20/2002	1
Pham, Chanh	3/12/2002	3/20/2002	1
Trun, Luong	3/12/2002	3/20/2002	1
Bui, Tuyen	3/12/2002	3/20/2002	1

(Ex. A14.)

## April 2002 Agency Audit

(22) Respondent's uncollected check to Farmers prompted the insurer to audit and investigate his agency. On April 15, 2002, Aretina Trepczyk, an internal auditor with Farmers at that time, conducted an audit of Respondent's agency. She found, among other things, that Respondent had a cash shortage of \$602.33. (Test. of Trepczyk.) Respondent indicated that his wife may have taken the missing cash home because she was preparing the ACA. During the audit, Respondent signed a release granting Farmers' access to his business and personal bank accounts. (Ex. A21.)

(23) From April 9, 2002 to April 12, 2002, Respondent collected 10 checks totaling \$2,582.66 and \$1,422.33 in cash from eight customers.<sup>6</sup> But, at the time of the audit on April 15, 2002, he had only \$820 cash in his possession. Following the audit, Respondent closed ACA 415. The morning of April 16, 2002, he deposited the 10 checks and the \$820 cash into the Co-Banking account at Wells Fargo Bank. (Ex. A18.)

(24) Ms. Trepczyk returned to Respondent's agency on April 16, 2002 to review his business account bank ledger and check book. At that time, Respondent turned over to Farmers the \$602.33 in cash that had been missing the day before, but he declined Farmers' any access to his bank records. (Test. of Trepczyk; Ex. A23.)

(25) In an April 18, 2002 memorandum to Respondent, Farmers requested reimbursement in the amount of \$3,507.55 for the uncollected check from ACA 307. (Ex. A26.)

(26) Respondent did not respond to the April 18, 2002 request. Farmers subsequently recouped the money from Respondent's commissions in late May 2002. (Test. of LaRoche; Exs. A28, A29.)

(27) Effective June 14, 2002, Farmers terminated its agency relationship with Respondent. Farmers based the termination on Respondent's failure to remit funds and his refusal to grant access to his business and personal bank records during the audit. (Ex. A29.)

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<sup>6</sup> The name of the insured, the date Respondent collected the cash and the amount of cash collected in connection with ACA 415 is set forth below:

Insured	Date Collected	Amt. Collected
Hung, Kim	4/9/2002	\$131
Chau, Van	4/9/2002	\$300
Phuong, Tra	4/9/2002	\$91.86
Mendoza, B.	4/9/2002	\$160.50
Dam. Pham	4/10/2002	\$115.10
Qc, Tran Ut	4/10/2002	\$90
Qui, Le	4/11/2002	\$398.87
Tiffany, Tr	4/12/2002	<u>\$135</u>
		\$1422.33

(Exs. A18, A20, A41.)

## CONCLUSIONS OF LAW

(1) Respondent violated ORS 744.083(1) in 36 instances by failing to properly account for and maintain premium funds in a trust account separate from all other business and personal funds.

(2) Respondent violated ORS 744.074(1)(d) in 28 instances by improperly withholding, misappropriating or converting moneys received in the course of doing business.

(3) Respondent violated ORS 744.013(2)(d) (1999) in one instance by illegally withholding money belonging to the insurer.

(4) Respondent violated OAR 836-074-0025 in 26 instances by failing to deposit premium funds into a trust account no later than seven days after his receipt of the funds.

(5) Respondent violated ORS 746.100 in one instance by making a false or fraudulent statement in connection with Lisa Sharteer's application for insurance for the purpose of obtaining a fee, commission, money or benefit from the insurer.

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

## OPINION

The department seeks to revoke Respondent's insurance agent license based on his alleged violations of ORS 744.074(1)(d), 744.013(2)(d) (1999), 744.083(1), 746.100 and OAR 836-074-0025. The department has the burden of proving the allegations 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). In this case, for the reasons set forth below, the department has met its burden.

### Violations

#### 1. *Failing to Properly Account for Premium Funds*

ORS 744.083(1) provides: "All premium funds received by a resident insurance producer shall be accounted for and maintained in a trust account separate from all other business and personal funds." The department asserts that Respondent violated this provision in 36 instances because he failed to properly account for, and deposit into a trust account, cash premium payments totaling \$7,278.53 that he received from 36 customers between March 1, 2002 and March 13, 2002. The department maintains that although the insurer ultimately received money, Respondent did not "account for" these 36 cash premium payments he collected, and did not deposit that cash into the Co-Banking trust account.

Respondent, on the other hand, contends that this statute is inapplicable because he did not have a premium fund "trust account." Citing to ORS 744.083(4)(b),<sup>7</sup> Respondent asserts that he is exempt from this section because the Wells Fargo Bank Co-Banking account belonged to the insurer and not him. This contention is unpersuasive.

Under ORS 744.083(4)(b), the director is authorized to designate by rule classes of insurance producers that are exempt from the premium funds trust account requirements. The director has done so in OAR 836-074-0017,<sup>8</sup> but Respondent is not among the class of insurance producers so exempted by this rule. Consequently, the provisions of subparagraph (4)(b) do not exempt Respondent from the requirements of ORS 744.083(1).

Respondent further asserts that the Co-Banking account at Wells Fargo Bank was not a "trust account" under subsection (1) because the account was not in his name and he had no control over the money once deposited. Respondent argues that the Co-Banking account was an account of the insurer as described in OAR 836-074-0025(3)(b)(C). This position is also unconvincing.

First, nothing in ORS 744.083(1) requires that the "trust account" belong to the agent. The statute simply requires that the agent account for and maintain premium funds received in a separate trust account. Second, the fact that the Co-Banking account belongs to the insurer does not render the statute inapplicable. The department promulgated OAR 836-074-0020 and 836-074-0025 to implement the provisions of ORS 744.083.<sup>9</sup> OAR 836-074-0020 deals with the more traditional trust accounts set up by resident and non-resident agents. It begins with the sentence: "*Except as otherwise provided in OAR 836-074-0025, an agent shall deposit in one or more premium funds trust accounts all premium funds received by the agent under the agent's license.*" OAR 836-074-0025, in turn, contemplates an informal or less traditional trust account

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<sup>7</sup> ORS 744.083(4) provides:

This section does not apply to:

- (a) Any financial institution or trust company, as those terms are defined in ORS 706.008, or any entity licensed under ORS chapter 725 or 726.
- (b) Any class of insurance producers that the Director of the Department of Consumer and Business Services designates by rule. The director may exempt a class of insurance producer from this section if the director determines that the requirements of this section are unduly burdensome to the insurance producers in relation to the public good served.

<sup>8</sup> OAR 836-074-0017 provides:

**Exemptions**

OAR 836-074-0005 to 836-074-0050 do not apply to:

- (1) An agent who is exclusively a salaried employee of an insurer.
- (2) An agent who sells only industrial life insurance, as that term is defined in ORS 731.166.

<sup>9</sup> ORS 744.083 was formerly numbered OAR 744.225.

arrangement. The rule specifically requires insurance agents to "deposit and pay premium funds received as provided in this rule." It further states, "[w]hen deposit is required, the agent shall deposit the funds not later than the seventh day after they are received." Subsection (3) of the rule addresses an agent's receipt of cash payments. It provides as follows:

*Except as otherwise provided in this section, when an agent receives a payment of premium funds in the form of cash or an instrument requiring endorsement by the agent, the agent shall deposit the premium funds in the trust account or endorse and forward the instrument to the insurer, another agent, the surplus lines agent or the premium finance company that is entitled to the premium funds received. An agent:*

*(a) Need not deposit premium funds that are paid in cash if the agent does not maintain a premium trust account because the agent does not engage in transactions for which a trust account must be established, and if the agent complies with all of the following requirements:*

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*(b) May deposit the premium funds under procedures established by the insurer entitled to the funds if the procedures meet the requirements of this section and the insurer has given those procedures to the agent in writing. Such other procedures must:*

*(A) Recognize that the agent is receiving premiums directly on behalf of the insurer;*

*(B) Direct the agent to give adequate receipts on behalf of the insurer;*

*(C) Require deposit of the proceeds into the account of the insurer.*

Subparagraph (3)(b) recognizes that an insurer may set up direct deposit accounts for captive agents who receive premiums on the insurer's behalf. The rule does not, however, trump the statute, nor does it exempt agents employing the provisions of subparagraph (3)(b) from the general obligation to account for and maintain premium funds "in a trust account separate from all other business and personal funds." To the contrary, the rule permits the agent to satisfy the "trust account" requirement of ORS 744.083(1) by utilizing a direct deposit procedure established by the insurer entitled to the premium funds. The rule recognizes the agent's fiduciary duty to the insurer to deposit and pay premium funds received by the agent. Consequently, in this case, the fact that the Wells Fargo Bank Co-Banking account satisfies requirements of subparagraph(3)(b) does not relieve Respondent of his obligation under ORS 744.083(1) to account for and deposit into that account all premium funds he received on the insurer's behalf.

Finally, Respondent argues that he did not violate ORS 744.083(1) because the ACA summaries "account for" the premium funds received on the insurer's behalf.<sup>10</sup> This contention

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<sup>10</sup> The computer generated "Summary of Closed ACA" pages document the name of the insured, the receipt number, the date collected, the amount collected and form of payment.

is also unavailing. The \$7,278.53 in cash that Respondent collected from 36 customers between March 1, 2002 and March 13, 2002 was not accounted for because it was not deposited into the Co-Banking account. Respondent could not account for approximately \$4,100, other than to say that the cash was lost sometime between March 8, 2002 and March 12, 2002. Respondent did not account for the remaining cash (the approximately \$3,100 he collected from March 11, 2002 to March 13, 2002), even though this money presumably remained in his possession. In any event, because Respondent converted these 36 cash premium payments into two checks drawn on his business account, he did not comply with his statutory obligation to "account for and maintain" these premium funds received in a trust account separate from all other business and personal funds. Thus, the department has established that Respondent violated ORS 744.083(1) in 36 instances.

## *2. Improper Withholding*

The department next contends that Respondent violated ORS 744.074(1)(d) in 28 instances by improperly withholding or misappropriating moneys received in the course of doing business. ORS 744.074(1) provides, in pertinent part, as follows:

The Director of the Department of Consumer and Business Services may place a licensee on probation or suspend, revoke or refuse to issue or renew an insurance producer license and may take other actions authorized by the Insurance Code in lieu thereof or in addition thereto, for any one or more of the following causes:

\* \* \*

(d) Improperly withholding, misappropriating or converting any moneys or properties received in the course of doing insurance business.

The department asserts that Respondent violated ORS 744.074(1) because he failed to remit 28 customers premium payments to Farmers in a manner consistent with the insurer's guidelines. Specifically, the department asserts that Respondent withheld \$3,507.55 in cash (representing 20 premium payment collected or between March 1, 2002 and March 5, 2002) from the insurer from March 6, 2002 to May 22, 2002. The department further contends that Respondent improperly withheld an additional \$1,422.33 in cash collected from eight customers between April 9, 2002 and April 12, 2002.

The department interprets "improper withholding" as used in ORS 744.074(1)(d) to include an agent's failure to remit premiums as required by law and/or the insurer's guidelines. The plain meaning of "improper" is "not in accordance with the right procedure." *Webster's Third Int'l Dictionary* (1993). "Withholding" means "to desist or refrain from granting, giving or allowing: to keep in one's possession or control: to keep back." *Webster's Third Int'l Dictionary* (1993). The department's construction of the term is reasonable and consistent with the plain meaning of the words.

Respondent denies that he improperly withheld money from Farmers. Respondent contends that he lost or misplaced the money, and a person cannot withhold what he does not

have. Respondent further contends that he did not act improperly or illegally because he did not have any intention or motive to deprive the insurer of its money. These contentions are unpersuasive.

Contrary to Respondent's assertion, an agent need not continue to possess the insurer's premium funds to improperly withhold such funds under ORS 744.074(1)(d). Furthermore, the agent's motivation is not an element of the violation. In *Denise J. Averette* case no. INS 04-05-021 (May 2004), the agent had premium payments of approximately \$22,000 in cash stolen from her automobile before she could deposit the funds into her employer's trust account. The agent used of her own money, and premiums collected from other insureds to replace some of the missing money. She later borrowed money and repaid the balance. Even though the money was stolen, and the agent had no intention to deprive the insurer of its money, the agent's conduct violated ORS 744.074(1)(d) in an unknown number of instances. The director further held that these violations justified revocation of the agent's license.

In this case, the record establishes that Respondent violated ORS 774.074 in 20 instances in connection with the missing \$3,507.55 in cash from ACA 307. Respondent collected cash premium payments from 20 customers, but he failed to remit that cash to the insurer. Respondent acted contrary to the insurer's guidelines by writing a check on his business account to replace the lost cash, and by not depositing the moneys the next business day. Furthermore, because Respondent's check was returned unpaid, the insurer was deprived of the \$3,507.55 from March 6, 2002 until May 22, 2002, when it recouped the money from Respondent's commissions. Respondent therefore improperly withheld these premium payments from the insurer.

As noted above, the department also asserts that Respondent improperly withheld \$1,422.33 in cash collected from eight persons from April 9, 2002 to April 12, 2002. Respondent had \$820 in his possession when the insurer audited his agency on April 15, 2002, but he could not account for the remaining \$620.33. Respondent then deposited the \$820 as part of ACA 415 on April 16, 2002. He turned over the remaining balance to the insurer, but it was not deposited into the Wells Fargo account as ACA 415. Because Respondent delayed forwarding these eight cash payments and acted contrary to the insurer's procedures for remitting premiums, he violated ORS 774.074(1)(d) in these instances as well.

### *3. Illegal Withholding*

The department also alleges that Respondent violated ORS 744.013(2)(d) (1999)<sup>11</sup> by illegally withholding money belonging to the insurer in connection with Ms. Sharteer's December 2001 insurance application. ORS 744.013 (1999) authorized the director to refuse to renew, suspend or revoke an insurance agent's license under certain circumstances. Subsection (2)(d) stated, in relevant part, as follows:

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<sup>11</sup> Prior to the 2001 amendments to ORS Chapter 744, ORS 744.013(2)(d) applied to insurance agents. With the enactment of ORS 744.074 (effective January 1, 2002) ORS 744.013 was limited to disciplinary actions against adjustors, insurance consultants or applicants for either license.

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

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

In *Grant H. Gilbertson*, case no. INS-02-04-013 (October 2003), the department held that for purposes of ORS 744.013(2)(d) (1999), an agent commits the offense of “illegal withholding” by retaining monies due an insurer and for which no insurance is ultimately provided. The department also held that an agent commits “illegal withholding” by retaining monies beyond the time in which the agent is contractually required to remit payments. *Id.*

In this case, as discussed above, Respondent was required to process ACAs daily, then deposit the premium funds the next business day. He received Ms. Shardeer's premium check in December 2001, did not process it until January 11, 2002 and did not remit it to the insurer until January 16, 2002. Respondent therefore illegally withheld money belonging to the insurer in violation of ORS 744.013(2)(d) (1999).

#### 4. *Failing to Timely Deposit Premium Funds*

As set out above, OAR 836-074-0025 requires that agents deposit premium funds received "not later than the seventh day after they are received." Here, the record establishes that Respondent failed to deposit Ms. Shardeer's premium check in a timely manner. It was deposited more than two weeks late. Respondent also failed to deposit 25 checks received from customers during March 2002 within the seven day timeframe. Consequently, the department has proven these 26 violations of OAR 836-074-0025.

#### 5. *Making a False or Fraudulent Statement*

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 insurance producer.

Here, the department asserts that Respondent made a false statement for the purpose of obtaining a fee or commission when he submitted Ms. Shardeer's information to the insurer on May 21, 2002. Specifically, the department asserts that when Respondent transmitted Ms. Shardeer's application to the insurer on May 21, 2002, he falsely represented the policy's effective date as May 18, 2002 because he knew that Ms. Shardeer's homeowner's policy was to be effective December 19, 2001. The department also alleges that Respondent falsely represented to the insurer that the home was built in 1960.

Respondent, on the other hand, asserts that ORS 746.100 does not apply to this situation, because the statute is directed toward those agents who make false representations in complicity with their customers. Respondent also contends the representation regarding the policy's effective date was not false because he was prevented by the insurer from back-dating the effective date to December 2001. These defenses are not persuasive.

First, the application of ORS 746.100 is not as limited as Respondent suggests. The statute broadly prohibits any person from making a false statement relative to an insurance application *or* for the purpose of obtaining a fee or commission from an insurer. Second, regardless of the insurer's policy against back-dating, Respondent knew when he submitted the application for Ms. Sharteer's policy on May 21, 2002 that the policy should have been effective December 19, 2001. Therefore, he falsely represented to the insurer that the effective date of the policy was May 18, 2002. Even if Respondent had no intention to deceive, his false representation to the insurer violated ORS 746.100. *See, e.g., Pierce v. Dept. of Public Safety Standards and Training*, 196 Or App 190 (2004) (holding that the term "falsify" as used in ORS 181.662 means to represent incorrectly; an intent to deceive is not an implicit requirement of the statute).

### Sanctions

The director proposes to revoke Respondent's license pursuant to 744.074(1) and ORS 744.013(1)(a) (1999) for numerous violations of improper and/or illegal withholding of premium funds. Both statutes authorize the director to suspend, revoke an agent's license or take other actions authorized by the Insurance Code. The director asserts that revocation is warranted in this case and consistent with past decisions. *See, e.g., Ryan D. Brown*, case no. 03-12-003 (August 2004) (agent's license revoked based on violating ORS 744.013 (1999) in two instances); *Denise J. Averette*, case no. INS 04-05-012 (agent's license revoked for violating ORS 744.074 in an unknown number of instances); *Susan D. Fredrickson and Peoples Insurance Center, Inc.*, case no. INS 03-11-014 (December 2003) (agent's license revoked for violating OAR 836-074-0025 in 18 instances, and illegally withholding premiums in 11 instances.)

Respondent, on the other hand, argues that revocation is an egregiously harsh sanction under the circumstances. He contends that he had no motive to deprive or deceive the insurer. He also asserts that he should not be denied his livelihood for a single act of inadvertence, misplacing the \$4,100 in cash.

If this case truly involved just a single incident of inadvertence, perhaps mitigation of the proposed sanction would be appropriate. But, contrary to Respondent's contention, this case is not so simple. Respondent has substantial experience in the insurance profession. There is no evidence of prior disciplinary offenses, but there is a record of careless business practices. In December 2001 and the first few months of 2002, Respondent failed to keep up with his paperwork and breached his fiduciary obligations to the insurer. He delayed processing Ms. Sharteer's insurance application for weeks after receiving the premium payment in late 2001. He then used the wrong policy number when he issued the receipt and remitted the payment to the insurer, which resulted in no policy being issued to Ms. Sharteer in January 2002. Later, he made a false representation to the insurer when he realized that the policy had not been issued.

He also encouraged Ms. Sharteer to accept the policy effective as of May 18, 2002, when he knew, or should have known, that she needed coverage dating back to the December 19, 2001 purchase of the home.

In addition to misplacing the approximately \$4,100 in cash, Respondent failed to timely submit his ACAs and timely remit premium payments received during March and April 2002. The cash that was lost between March 8, 2002 and March 11, 2002 did not, in and of itself, prevent Respondent from depositing money to cover the cash from ACA 307 the next business day. This is evidenced by the fact that Respondent's business check no. 2701 was dated March 10, 2002. Respondent's conduct in delaying deposits to the Co-Banking account resulted in the improper withholding of the insurer's money, as well as 26 violations of OAR 836-074-0025. Respondent also failed to properly account for all 36 cash premium payments collected between March 1, 2002 and March 12, 2002, even though he only misplaced a portion of those funds. Respondent tried to cover for the lost cash by drawing a check on his business account, and did not notify the insurer that the money was lost until the next month, when the insurer came to audit the agency and investigated the unpaid check.

Finally, Respondent did not fully cooperate with the insurer's April 2002 audit and investigation into the unpaid check (by denying access to his business checking account records), and did not respond to the request for reimbursement of the \$3,507.55. The insurer did not recoup this money until late May 2002, more than two months after Respondent's check was returned unpaid. Under these circumstances, the sanction of revocation is appropriate and consistent with other department actions, including *Denise J. Averette*, case no. INS 04-05-012.

### **ORDER**

I recommend that the department issue a final order revoking Eddie Kam-Chung Yen's Oregon resident insurance license pursuant to ORS 774.074(1) and ORS 744.013(2)(d) (1999).

### **IT IS SO ORDERED.**

Dated this 8<sup>th</sup> day of April 2005.

/s/ Alison Greene Webster  
Alison Greene Webster, 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:

Mitchel D Curzon  
Chief Enforcement Officer  
Oregon Insurance Division  
PO Box 14480  
Salem, OR 97309-0405