

**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 04-04-003**  
)  
**FRANCIS J. DIERICKX** ) **PROPOSED ORDER**  
)  
)

**HISTORY OF CASE**

On April 21, 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 assess Francis J. Dierickx (Respondent) a civil penalty in the amount of \$3,000 pursuant to ORS 731.988. Respondent timely requested a hearing challenging the proposed action. On May 4, 2004, the department referred this matter to the Office of Administrative Hearings (OAH) for hearing.

On August 26, 2004, Administrative Law Judge Ella D. Johnson conducted a hearing in this matter. Assistant Attorney General Kathleen Dahlin represented the department. Respondent appeared in person and represented himself *pro se*. The department called Debra Bunch, agency owner Mathew Maderia and Insurance Division Investigator Gary Holiday as witnesses. Respondent testified on his own behalf. The record closed on August 26, 2004.

**ISSUES**

(1) Whether Respondent violated ORS 744.051(1)(b)(1999) and 744.078(1) in ten instances by acting as an agent of one or more insurers of the SAFECO insurance group (collectively SAFECO) or Sublimity Insurance Company (Sublimity) in ten transactions from September 7, 2001 to March 12, 2002 without being appointed by the insurer or authorized to engage in such transactions by any insurance agency that was appointed by the insurer.

(2) Whether Respondent violated ORS 731.296 by falsely responding to the director's January 29, 2002 request for information concerning allegations that he was misrepresenting to consumers that he affiliated with Oliver Investments, Inc. dba Wayne Oliver Insurance (Oliver Insurance) or Maderia-Cooper and Company, Inc. Insurance dba Oliver Maderia Insurance (Oliver Maderia Insurance)

(3) Whether Respondent violated ORS 731.296 by failing to fully respond to the director's May 8, 2002 letter requesting information, including who signed as the insured on a cancellation request for policy number 02WPO37047 issued by SAFECO to "Harlow Manufacturing."

(4) Whether Respondent violated ORS 731.296 by failing to timely respond to the department's June 11, 2003 letter requesting certain information to be provided by June 20, 2003.

(5) Whether Respondent failed to timely respond to the department's July 15, 2003 letter requesting certain information be provided by July 25, 2003.

(6) Whether Respondent violated ORS 746.100 by misrepresenting to Financial Indemnify Company (FIC) that Debra Bunch signed an application dated September 4, 2004 for automobile insurance policy, number A7771083, when she did not sign the application or authorize anyone else to sign her name.

(7) Whether these violations, if proven, warrant assessment of a civil penalty in the amount of \$3,000 pursuant to ORS 731.988.

### **EVIDENTIARY RULINGS**

The department's Exhibits A1 through A33 and Respondent's Exhibits R1 through R32 were admitted into the record. Respondent objected to Exhibits A6, A9, A13, A17, A26 and A27 based on relevancy. The department established relevancy, his objections were overruled and the proffered exhibits were admitted into the record.

### **FINDINGS OF FACT**

(1) Respondent has been licensed as an Oregon insurance agent for over 30 years since 1977. (Ex. A1; test. of Respondent.) In the past, he has been appointed to sell insurance by a number of insurance companies, including SAFECO Life Insurance Company. (Ex. A1 at 9.) He did not hold an appointment from Sublimity. (Test. of Madeira.) From 1996 to 2001, he was employed as an agent with Oliver Investments, Inc., dba Wayne Oliver Insurance (Oliver). On January 15, 1996, Wayne Oliver Insurance notified SAFECO and other insurers that Respondent's accounts were transferred to that agency. (Exs. A1, A10, A32.) Respondent suffers from a mental illness, Bi-polar Disorder, Type II, and takes Lithium to control his illness. (Ex. R-26; test. of Respondent.)

(2) In 2000, Respondent's binding authority and appointment with SAFECO was terminated. When Oliver Investments, Inc. merged with Medeira-Cooper & Company, Inc. it became Medeira Oliver Insurance, LLC (Medeira-Oliver). Respondent became a subcontract agent for Medeira-Oliver. On December 27, 2000, Respondent entered into a Purchase Agreement with Medeira-Oliver to purchase his book of business with 100 percent of his commissions to be paid to him over the course of two years. The agreement required Respondent to send out a letter to all former customers informing them of the change of ownership and servicing of their accounts within 10 days of the agreement. Respondent failed to send the letter.<sup>1</sup> (Exs. A2 -A5.) The agreement did not have a non-competition clause and

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<sup>1</sup> Respondent testified that he did not send out the letter because he felt it was the agency's duty to do so.

Respondent's customers were free to follow him to another agency and insurer. Respondent did not read the agreement before signing because he trusted Wayne Oliver. (Test. of Respondent.) In October 2001, Wayne Oliver Insurance and Oliver Investments, Inc. were dissolved and the new company, Maderia-Cooper, Inc. Insurance was formed and operated under the dba of Oliver-Maderia Insurance. (Exs. A13, A15, A23- A33; test. of Madeira.)

(3) During the first nine months of 2001, Respondent continued to act as an agent for his previous SAFECO customers even though Medeira-Oliver had purchased the accounts. Respondent's affiliation with Medeira-Oliver and Oliver Investments, Inc. was terminated on October 4, 2001. Respondent no longer held a SAFECO appointment was not authorized by Medeira-Oliver to sell insurance or to service accounts owned by the company. Frank Oliver repeatedly asked Respondent to stop servicing the Medeira-Oliver clients, but Respondent continued to assist his previous customers with their policies by calling and faxing instructions to Medeira-Oliver concerning changes to customers' policies and misrepresenting himself as an agent with Medeira-Oliver. (Exs. A5, R1- R3.)

(4) For the following customers, Respondent requested that Madeira Oliver make changes in their policies with SAFECO: Catherine Hansen (two policies), Harlow Manufacturing,<sup>2</sup> Sierra Instruments, Betty Bielitz, Albion Vickery,<sup>3</sup> Trails Club of Oregon, and Tony Thomas. For the following customers, Respondent requested that Madeira Oliver make changes to their Sublimity policies: Stephen Tyler (two policies), and Eddie Priester. These policy changes included adding a vehicle to the policy to adding a new policy to cancellation of an existing policy. (Ex. A10.) Respondent subsequently notified Wayne Oliver that he had placed Sierra Instrument's policy with another carrier. (Ex. A12.)

(5) By letter dated January 3, 2002, Medeira-Oliver warned Respondent for the last time not to act in the capacity of an agent for his prior accounts, which were now the property of the agency. The letter was to be hand delivered to Respondent by Wayne Oliver.<sup>4</sup> That same date, Medeira-Oliver sent letters to Respondent's former customers to notify them that the agency would now act as their agent and would be service their existing policies. (Ex. R22.) Respondent continued to send instructions to Medeira-Oliver concerning changes to previous customers' policies written for SAFECO and Sublimity insurance. On February 23, 2002, Matt Medeira filed a complaint with the department. (Exs. A5, A6, A9, R12-R18.)

(6) By letter dated January 29, 2002, the department asked Respondent to provide a written response to Madeira's complaint by 5:00 p.m. on February 28, 2002. (Ex. A7.)

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<sup>2</sup> Harlow Manufacturing was subsequently sold to Sierra Instruments and Respondent assisted the new owner to obtain a new business policy from Austin Mutual. (Ex. R10.)

<sup>3</sup> Albion Vickery subsequently placed his business with another insurance agency or company. (Ex. 15.)

<sup>4</sup> Respondent contends that he never received the letter and that all this activity occurred during his hospitalization. However, that is inconsistent with the exhibits that establish that he was hospitalized in 2003.

Respondent responded by appearing instead in-person. On March 9, 2002, Respondent provided a written response. In his response, he denied that he had ever misrepresented himself as an agent with Medeira-Oliver. He stated that he was coerced into signing the Purchase Agreement with the agency. He attributed his interactions with his former customers to their long-term relationship of 20 or more years acting as their agent and his desire to help them. (Ex. A8.) Several of his former customers wrote letters stating that Respondent did not tell them that he represented the Medeira-Oliver or SAFECO or Sublimity, but accommodated them by passing along changes to their policies to Medeira-Oliver. (Exs. R7, R10, R14, R21, R24, R25; test. of Respondent.)

(7) By letter dated May 8, 2002, the department requested that Respondent respond with a written response by 5:00 p.m. on May 30, 2002 to twelve questions concerning his actions in requesting changes to his previous customers' policies, including who signed as the insured on a cancellation request for policy number 02WPO37047 issued by SAFECO to "Harlow Manufacturing." On May 28, 2002, Respondent requested an extension of the time in which to respond. Respondent subsequently responded in writing to the department's questions without answering the question concerning Harlow manufacturing and his response was untimely. (Ex. A14.)

(8) Debra Bunch had previously purchased insurance from Respondent and would occasionally drop by his office to sign documents, pay the bill or ask questions. In September 2002, Bunch contacted Respondent about purchasing automobile insurance for a 1988 Chevrolet, a 1985 Buick Riviera, and a 1981 Cadillac Deville. She was at work and Burton Strode took the money order for a down payment of \$242.00 to Respondent to purchase the policy. Neither Bunch nor Strode signed Bunch's name to the application for insurance. On or about September 4, 2002, Respondent misrepresented to Financial Indemnify Company (FIC) that Bunch had signed an application dated September 4, 2002 for automobile insurance policy number A7771083. Bunch subsequently filed a complaint with the department concerning this transaction. (Exs. 19-22; test. of Bunch.)

(9) By certified letter dated June 11, 2003, the department requested that Respondent provide information concerning Bunch's FIC application no later than 5:00 p.m. on June 20, 2003. Respondent did not respond until June 30, 2003. (Ex. A18, A19.)

(10) By certified letter dated July 15, 2003, the department requested clarification of Respondent's June 30, 2003 response no later than 5:00 p.m. on July 25, 2003. (Ex. A20.) Respondent did not reply until July 30, 2003. (Ex. A21.)

## **CONCLUSIONS OF LAW**

(1) Respondent violated ORS 744.051(1)(b)(1999) and 744.078(1) in ten instances by acting as an agent of one or more insurers of the SAFECO and Sublimity in ten transactions from September 7, 2001 to March 12, 2002 without being appointed by the insurer or authorized to engage in such transactions by any insurance agency that was appointed by the insurer.

(2) Respondent violated ORS 731.296 by untimely and incompletely responding to the

director's January 29, 2002 request for information concerning allegations that he was misrepresenting to consumers that he was affiliated with Oliver Insurance and Oliver Maderia Insurance.

(3) Respondent violated ORS 731.296 by failing to fully respond to the director's May 8, 2002 letter requesting information, including who signed as the insured on a cancellation request for policy number 02WPO37047 issued by SAFECO to "Harlow Manufacturing."

(4) Respondent violated ORS 731.296 by failing to timely respond to the department's June 11, 2003 letter requesting certain information to be provided by June 20, 2003.

(5) Respondent violated ORS 731.296 by failing to timely respond to the department's July 15, 2003 letter requesting certain information be provided by July 25, 2003.

(6) Respondent violated ORS 746.100 by misrepresenting to FIC that Debra Bunch signed an application dated September 4, 2004 for automobile insurance policy, number A7771083, when she did not sign the application or authorize anyone else to sign her name.

(7) These violations are proven and warrant assessment of a civil penalty in the amount of \$3,000.

## OPINION

The issues to be resolved in this agent sanction case are whether Respondent violated ORS 744.051(1)(b) and 744.078 in ten instances, ORS 731.296 in four instances and ORS 746.100 in one instance and whether these violations warrant assessment of a civil penalty in the amount of \$3,000. 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). I conclude that the department has met its burden.

### Violations

The department alleges that Respondent violated ORS 744.051(1)(b), 744.078, 731.296 and 746.100. Beginning with ORS 744.051(1)(b) (1999), that provision states in relevant part:

(1) Except as otherwise provided in this section, a person shall not act as an agent in this state with respect to a domestic risk unless the person

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(b) Is appointed by the insurer for whom the agent acts as an agent.

Additionally, ORS 744.078, which deals with appointment of insurance agents or producers, states in relevant part:

(1) An insurance producer shall not act as an agent of an insurer unless:

(a) The insurance producer is an appointed agent of that insurer; or

(b) The insurance producer transacts insurance on behalf of another insurance producer who is an appointed agent of that insurer according to conditions and limitations established by the Director of the Department of Consumer and Business Services by rule.

An agent is defined as “[o]ne who acts or has the authority to act” or “[o]ne who acts as the representative of another.” *Webster’s II New Riverside University Dictionary* 85 (1984). The record establishes that Respondent passed along major changes to previous customers’ policies to Medeira-Oliver that were insured by SAFECO or Sublimity and owned by Medeira-Oliver. There is no question that Respondent was not appointed by SAFECO or Sublimity to service policies he previously sold to Medeira-Oliver. On these facts, I find that even though Respondent told his previous customers that he was no longer acting as an agent for these insurers, he nonetheless acted on behalf of these insurers when he directed Madeira-Oliver to make these changes. Respondent argued at hearing that he was just accommodating his long-time customer’s requests or acting as a friend to his customers concerning the policies he previously sold them by passing the information on to Medeira-Oliver. However, pursuant to ORS 744.078, an insurance agent is agent of the insurance company, not matters in Oregon. Accordingly, I conclude that Respondent violated ORS 744.051(1)(b) and 744.078 by acting as the insurers’ agent in these matters in ten instances.

I also conclude that Respondent violated ORS 731.296 by failing to truthfully and/or timely respond to the department’s inquires. ORS 731.296 states:

The Director of the Department of Consumer and Business Services may address any proper inquiries to any insurer, licensee or its officers in relation to its activities or condition or any other matter connected with its transactions. Any such person so addressed shall promptly and truthfully reply to such inquiries using the form of communication requested by the director. The reply shall be verified by an officer of such person, if the director so requires. A reply is subject to the provisions of ORS 731.260.

The record establishes that on January 29, 2002, the department asked Respondent to provide a written response to Madeira’s complaint by 5:00 p.m. on February 28, 2002.

Respondent responded by appearing instead in-person and did not provide a written response until March 9, 2002. In his response, Respondent stated that he never represented that he never identified himself as agent for Madeira-Oliver. As set forth above, his response was incomplete as well as untimely. On May 8, 2002, the department requested certain information, including who signed as the insured on a cancellation request. Respondent was required to respond with a written response by 5:00 p.m. on May 30, 2002 to twelve questions concerning his actions in requesting changes to his previous customers' policies. On May 28, 2002, Respondent requested an extension of the time in which to respond and although he eventually responded in writing, the response was not timely. On June 11, 2003, the department requested that Respondent provide information concerning Bunch's FIC application no later than 5:00 p.m. on June 20, 2003. Respondent did not respond until June 30, 2003. The response was untimely. Finally, on July 15, 2003, the department requested clarification of Respondent's June 30, 2003 response no later than 5:00 p.m. on July 25, 2003. Respondent did not reply until July 30, 2003, five days late. (Ex. A21.)

Respondent did not contest that his responses were untimely. Instead, he argued at hearing that the reason he did not timely respond to the department's requests for information was due to his depression. He noted that in March 2003 he was hospitalized, diagnosed with bipolar disorder, and treated with lithium. He contended that the lithium made it difficult for him to process the department's requests. However, he provided only a side effect medication sheet in support of his contention but no medical evidence that it was difficult for him to process the requests due to the lithium. Moreover, two of the requests were made in January and May 2002 before he was diagnosed and treated with lithium; the other two requests, which were sent in June and July 2003, were received by Respondent after he was released from the hospital on April 1, 2003. Therefore, I do not find Respondent's argument for his untimeliness persuasive.

Finally, with regard to Debra Bunch's insurance application, the weight of the credible evidence establishes that Bunch's signature on the application for insurance was not her signature. 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.

Bunch testified that in September 2002, she contacted Respondent about purchasing automobile insurance for a 1988 Chevrolet, a 1985 Buick Riviera, and a 1981 Cadillac Deville. She was at work and Burton Strode took the money order for a down payment of \$242.00 to Respondent to purchase the policy. Bunch testified that the signature on the application for insurance was not her signature and that Strode was not authorized to nor did he sign Bunch's name on the application for insurance. On or about September 4, 2002 when Respondent sent the application to FIC, he misrepresented that Bunch had signed an application dated September 4, 2002 for automobile insurance policy number A7771083. At hearing, Respondent attempted to prove that the signature on the application was indeed Bunch's signature. However, I found Respondent's attempt unpersuasive. Accordingly, I find the allegations set forth in the Notice are proven and affirm.

Sanction

ORS 731.988, which governs civil penalties assessed by the director in insurance violations, provides in material part:.

(1) 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 judgment made by any court upon application of the director, shall forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the director of not more than \$10,000 for each offense. In the case of individual insurance producers, adjusters or insurance consultants, the civil penalty shall be not more than \$1,000 for each offense. Each violation shall be deemed a separate offense.

(2) In addition to the civil penalty set forth in subsection (1) of this section, any person who violates any provision of the Insurance Code, any lawful rule or final order of the director or any judgment made by any court upon application of the director, may be required to forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the director but not to exceed the amount by which such person profited in any transaction which violates any such provision, rule, order or judgment.

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(6) The provisions of this section are in addition to and not in lieu of any other enforcement provisions contained in the Insurance Code.

The department here proposes to assess a civil penalty of only \$3,000. The department could have assessed a civil penalty for each instance where Respondent violated the Insurance Code, which could have resulted in a civil penalty of \$15,000. In addition, these violations are very serious and could have resulted in revocation or suspension of Respondent's insurance agent license. Instead, as noted by the department in its closing argument, it found to its credit that the circumstances under which these violations occurred were a mitigating factor. Accordingly, finding that the penalty proposed here is warranted and well within the department's authority, I affirm the department's proposed action.

**ORDER**

I recommend that the department issue a final order assessing Francis J. Dierickx a civil penalty in the amount of \$3,000.

**IT IS SO ORDERED.**

Dated this 8<sup>th</sup> day of November, 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:

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