

FINDINGS OF FACT

1. Respondent Michael K. Frazier was first licensed as an insurance agent in 1984 in Washington. In 1992, he obtained an Oregon insurance agent license and purchased an insurance agency in Sutherlin, Oregon. (Ex. A24; testimony of Respondent.) In 2001, he sold the insurance agency and founded Frazier Financial, a sole proprietorship specializing in retirement planning. Frazier Financial made commission sales only. (Exs. A23 and R1; testimony of Respondent.) With the exception of the current matter, Respondent has never faced a disciplinary action. Respondent has never received a Better Business Bureau complaint. (Testimony of Respondent.)

2. In 1993, Respondent and his wife became friends of the Plannettes' daughter, Sharon and her husband. (Testimony of Respondent.) In 1998, Paul and Claire Plannette moved from Southern California to Sutherlin. Sharon introduced her parents to Respondent and he sold them a homeowners insurance policy. (Ex. R2; testimony of Respondent.) Respondent and his wife purchased the Plannettes' motor home and all four of them worked on the motor home together. For several years, Respondent and his family visited the Plannettes on holidays and brought Mrs. Plannette flowers on Mothers' Day. (Testimony of Plannette and Respondent.)

3. In 2000, the Plannettes' son-in-law was killed in an automobile accident. (Testimony of Respondent.) In 2002, the Plannettes' daughter, Sharon was diagnosed with cancer. Following surgery, and during her illness, Mr. and Mrs. Plannette cared for Sharon in their home and Respondent and his wife visited her there. During this period, Respondent and his wife formed a friendship with the Plannettes. (Exs. R14-3 and R14-5; testimony of Respondent.) Sharon passed away in 2001. (Testimony of Plannette and Respondent.)

4. The Plannettes inherited West Premier Bank stock, an IRA, a CD and a life insurance policy from their daughter. (Ex. R13; testimony of Respondent.) Mr. Plannette believed that owning stock was too risky. (Testimony of Respondent.) Mr. and Mrs. Plannette sought advice from Tonya Thompson, a financial advisor at West Premier Bank. Thompson discouraged them from liquidating the bank stock because a rapid sale might reduce the stock value. Thompson suggested consulting a tax advisor before selling stock. (Ex. A14-2; testimony of Thompson.) The Plannettes later informed Thompson that they were selling the bank stock. (Testimony of Thompson.)

5. In 2002, the Plannettes contacted Respondent concerning investing assets they had recently inherited from their daughter. (Testimony of Plannette and Respondent.) They had no experience with investing and had never purchased an annuity. (Testimony of Claire Plannette.) They saw Respondent's advertisement in the newspaper and on August 1, 2002, they attended a retirement planning seminar. The Plannettes invited Respondent to visit their home for a free one-hour consultation. (Ex. A1.)

6. On August 9, 2002, Respondent visited the Plannettes in their home. Respondent and Mr. and Mrs. Plannette sat at the kitchen table and Respondent gathered

information regarding their financial status and preferences. (Testimony of Plannette and Respondent; Ex. A2.) The Plannettes owned their house outright and their only income was social security benefits. (Ex. A2-3.) They were interested in making a secure investment to generate monthly income. (Ex. A2-2; testimony of Respondent.) Respondent made no sale at the first meeting with Plannettes. (Ex. A2; testimony of Respondent.)

7. In 2002, Respondent's commission sales were reduced because he devoted time to caring for his dying father. (Testimony of Respondent.) In August 2002, Respondent owed \$17,000 in back taxes and the Internal Revenue Service (IRS) had begun collection proceedings. (Exs. A 20-1 and A25-54; testimony of Respondent.)

8. On August 15, 2002, Respondent made a second visit to the Plannettes' home. (Testimony of Respondent.) Respondent and Mr. and Mrs. Plannette sat at the kitchen table and discussed investment options to generate monthly income, including an illustration of an Americo annuity for \$100,000. (Exs. A3 and A4; testimony of Respondent.) During the August 15, 2002 meeting, Respondent and the Plannettes telephoned Thompson and agreed to sell West Premier stock at the highest price possible. (Ex. A14-2; testimony of Thompson and Respondent.) Respondent provided the Plannettes with a copy of a flyer advertising Americo annuities. (Ex. A12; testimony of Respondent.) At end of this meeting, the Plannettes said they needed time to consider purchasing an annuity. (Testimony of Plannette.)

9. On August 24, 2002, Respondent made a third visit to the Plannettes in their home. Respondent and Mr. and Mrs. Plannette sat at the kitchen table and discussed the contents of the Americo advertising flyer. (Ex. A12; testimony of Respondent.) They discussed annuity surrender charges. In this meeting, Mr. and Mrs. Plannette purchased a \$100,000 Americo annuity. (Exs. R4 and A14-4.) Mrs. Plannette made handwritten notes during this meeting. (Ex. R13¹; testimony of Plannette.) The note indicates that the Plannettes took \$90,000 from savings and \$25,000 from their daughter's CD totaling \$115,000 to purchase an annuity. Mrs. Plannette also noted that she wrote two checks on August 24, 2004: one for \$100,000 and the other for \$15,000. (Ex. R13; testimony of Plannette.) Mr. and Mrs. Plannette understood that they were purchasing a \$100,000 Americo annuity through Respondent as their insurance agent. Mr. and Mrs. Plannette further understood that they were providing Respondent with an additional \$15,000 in order to purchase another Americo annuity a few days later when they obtained the proceeds of their daughter's life insurance policy. (Exs. A14, R13, R14; testimony of Plannette.) Mr. and Mrs. Plannette further understood that the total value of their annuities was \$115,000. (Exs. R13 and R14; testimony of Plannette.)

10. On August 24, 2002, Respondent wrote two checks on the Plannette's bank account and Claire Plannette signed them. (Testimony of Plannette and Respondent.) Respondent wrote the first check to "Americo Life + Annuity" for \$100,000 and marked it "Annuity Contract." (Exs. A7-1, A9-4 and R4-2.) Respondent made the second check

¹ The note is misdated August 22, 2004 rather than August 24, 2004.

to “Americo or Frazier Financial” for \$15,000 and marked it “Annuity Contract.” (Exs. A8-1 and A14-5.) Mrs. Plannette signed both checks. She gave Respondent a void check and a deposit slip, requesting him to arrange for Americo to deposit monthly interest payments directly into the Plannette’s bank account. (Exs. A17-6 and R9.)

11. No written loan agreement or promissory note exists. (Ex. A20-1 and A25-48; testimony of Plannette and Respondent.)

12. On August 26, 2002, Respondent cashed the \$15,000 check on behalf of his sole proprietorship, Frazier Financial. (Ex. A14-5; testimony of Respondent.) Respondent used the \$15,000 to pay back taxes and to pay his monthly house payment and car payment. (Ex. A17-1; testimony of Respondent.)

13. On October 17, 2002, Respondent met with Mr. and Mrs. Plannette and delivered the Americo annuity contract. (Ex. A11 and A17-10; testimony of Respondent.)

14. Beginning in October 2002, Americo directly deposited monthly interest payments into the Plannettes’ bank account. The monthly interest amounts ranged from \$455.67 to \$254.33. (Exs. A15 and R6, R7; testimony of Thompson.)

15. On October 21, 2002 Respondent deposited \$275 into the Plannettes bank account using a money order. Ex. A20-2; testimony of Respondent.) Beginning on February 3, 2003, Respondent made monthly cash deposits into the Plannettes’ bank account using a counter deposit slip. The monthly interest amount began at \$68.75 and, in October 2003, changed to \$62.50. (Exs. A14-6, A14-7, A15-2, A20-2, R10; testimony of Thompson and Respondent.)

16. After purchasing the annuity, Mr. and Mrs. Plannette contacted Respondent several times complaining that the annuity was not set up the way they expected. (Ex. A14.)

17. In 2003, Mrs. Plannette noticed bank deposits from an unidentified source in addition to the Americo annuity interest payments. She asked her husband who would deposit money into their account and he replied that he did not know. (Ex. R14-4; testimony of Plannette.) Mrs. Plannette did not pursue the matter because her husband was ill. (Ex. R14-4; testimony of Planette.) On March 29, 2004, Paul Plannette passed away. (Testimony of Claire Planette.)

18. During spring vacation in March 2004, Respondent and his wife and children traveled abroad celebrating a wedding anniversary. They did not learn of Mr. Plannette’s death until several weeks later. (Testimony of Respondent.) Respondent did not tell his wife that he had received any money for personal use from the Plannettes. (Ex. A25.)

19. On April 13, 2004, Mrs. Plannette went to Premier West Bank and consulted Tonya Thompson concerning the deposits from an unidentified source into her account.

(Ex. A14; testimony of Plannette and Thompson) The bank traced the checks and determined that Respondent had made cash deposits on a counter deposit slip for the interest on \$15,000. (Exs. A14-4, A14-7 and A15-2.) On April 13, 2004, Tonya Thompson reported Mrs. Plannette's concerns to the Insurance Division. (Ex. A14.)

20. On April 23, 2004, the Insurance Division contacted Respondent to initiate an investigation of his business conduct with the Plannettes. (Ex. A16.)

21. On Mother's Day in May 2004, Respondent, his wife and children took flowers to Mrs. Plannette at her home as they had done in previous years. Mrs. Plannette received Respondent's wife and children warmly but was cold to Respondent. (Testimony of Respondent.)

22. On May 17, 2004, Respondent made a cash deposit of \$15,125 into Mrs. Plannette's bank account using a counter deposit slip. (Exs. A19 and R11.) In repaying Mrs. Plannette, Respondent used money that he had planned to pay to the IRS for back taxes. (Testimony of Respondent.)

23. In May 2004, Respondent went to Mrs. Plannette's home and, finding her car trunk open in the driveway, he picked up a sack of groceries and carried it into the house. He gave Mrs. Plannette a receipt for the \$15,125 he had deposited into her bank account. He apologized for any misunderstanding. Mrs. Plannette said she needed time to recover from the loss of her husband. (Exs. A19 and R11; testimony of Plannette and Respondent.)

CONCLUSIONS OF LAW

1. Respondent violated ORS 744.074(1)(d) by improperly withholding, misappropriating or converting \$15,000 received from Paul and Claire Plannette in the course of doing insurance business.

2. License revocation is warranted.

OPINION

I. Burden of Proof

ORS 183.450 provides in pertinent part:

(2) All evidence shall be offered and made a part of the record in the case, and except for matters stipulated to and except as provided in subsection (4)² of this section no

² ORS 183.450(4) provides:

The hearing officer and agency may take notice of judicially cognizable facts, and may take official notice of general, technical or scientific facts within the specialized knowledge of the hearing officer or agency. Parties shall be notified at any time during the proceeding may in any event prior to the final decision of

other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. **The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.**

(5) No sanction shall be imposed or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party, and as supported by, and in accordance with, reliable, probative and substantial evidence.

(Emphasis added.)

Pursuant to ORS 183.450, the Department has the burden of proving the factual allegations and its position concerning the proposed sanction by a preponderance of the evidence.³ *See Harris v. SAIF*, 292 Or 683, 690 (1982) (burden of proof 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 of proof 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).

II. Violation

ORS 744.074 provides in pertinent part:

(1) 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.

material officially noticed and they shall be afforded an opportunity to contest the facts so noticed. The hearing officer and agency may utilize the hearing officer's or agency's experience, technical competence and specialized knowledge in the evaluation of the evidence presented.

³ At hearing, the parties raised no issue concerning burden of proof.

The Department alleges that Respondent violated ORS 744.074(1)(d) in one instance by misappropriating \$15,000 in the course of insurance business with Paul and Claire Plannette. In contrast, Respondent denies that he misappropriated funds; rather, Respondent takes the position that the Plannettes made a personal loan to him. I find that the Department has carried its burden of proving by a preponderance of the evidence that Respondent violated ORS 744.074(1)(d).

Respondent contends that the Plannettes made a \$15,000 loan to him because they were personal friends and because he was in financial need. In support of his position, Respondent argues that he had a verbal agreement with Paul Plannette who has since passed away and that Claire Plannette is an unreliable historian concerning a loan. In contrast, Claire Plannette testified that she and her husband intended to purchase a \$100,000 annuity and a second annuity for \$15,000 a few days later when they obtained the proceeds of their daughter's life insurance policy. Claire Plannette testified that she and her husband did not intend to loan \$15,000 to Respondent. I find that the Department has met its burden of proving that a statutory violation occurred.

Based on Claire Plannette's demeanor at hearing, I find her testimony reliable despite her advanced age. Although she suffers a mild hearing loss, she fully participated in the contested case hearing. I find it more likely than not that she physically heard any conversation that took place at her kitchen table. Consequently, I am not persuaded by Respondent's argument that he and Paul agreed on a personal loan at the August 15, 2002 meeting but Claire did not hear the conversation. Next, I find Claire Plannette's memory reliable. Although she did not recall the dates she had seen certain documents, she did identify without hesitation which documents she had seen before. Similarly, although she did not recall the dates that certain meetings took place or how many meetings took place, she was very clear in stating that in 65 years of marriage, she and her husband never loaned money to a non-family member such as Respondent. Moreover, Claire's testimony that she and her husband made financial decisions jointly is supported by Tonya Thompson's testimony and also by the fact that Claire signed the checks in question. Furthermore, Claire Plannette documented the meeting when she and her husband purchased the annuity. Even though the note is misdated by two days, the two checks are correctly listed, and the dollar figures add up, supporting her testimony that there was no personal loan. Finally, before Paul's death, Claire asked him about the unidentified deposits into their bank account and he did not indicate that there was any personal loan to Respondent. For these reasons, I find Claire Plannette's testimony that there was no personal loan persuasive.

In contrast, I find Respondent's testimony concerning a purported loan not credible. To begin, the record contains no reliable documentation such as a promissory note to establish that the Plannettes intended to loan \$15,000 to Respondent. Respondent concedes that no written agreement or promissory note exists. Respondent points to his own handwritten notes which are unreliable, ambiguous and fail to establish that any loan took place. On the other hand, Claire Plannette documented the dollar amounts she and her husband invested and recorded the two checks, supporting her contention that there

was no personal loan. Moreover, as a licensed insurance agent with more than 20 years experience, Respondent was sophisticated and knew that business transactions are documented in order protect the interests of all parties. Next, Respondent filled out the \$15,000 check in a suspicious manner by making it payable to either the insurance company or to his own company and marking it "For Annuity Contract" rather than for a personal loan. Furthermore, Respondent made monthly interest payments in a clandestine manner by depositing money orders into the Plannette's account using a counter deposit slip. Significantly, Respondent offered no explanation why he used money orders rather than checks from either his business or personal bank account. This repayment method did not identify Respondent as the payor and was consistent with Claire Plannette's belief that they had purchased annuities totaling \$115,000. Furthermore, I find it telling that Respondent did not mention to his wife that he had received \$15,000 from the Plannettes, especially in light of the personal friendship between the two couples. Finally, in March 2004, Respondent and his family took a trip outside the country to celebrate a wedding anniversary when they owed \$17,000 to the IRS and \$15,000 to the Plannettes. Based on the record, I find it more likely than not that Respondent misappropriated \$15,000 from the Plannettes because the opportunity arose and because his family was in financial distress. Accordingly, I conclude that Respondent violated ORS 744.074(1)(d) by improperly withholding, misappropriating and converting to his own use \$15,000 received from Paul and Claire Plannette in the course of doing insurance business.

III. Appropriate Sanction

In past cases, the Department has considered aggravating and mitigating facts when determining the proper remedy. *In the Matter of Boyd & Co. Insurance*, Case No. INS 89-04-04 (1990), *citing, In the Matter of Luebke*, 301 Or 321 (1986); *In the Matter of Gianetti*, Case No. INS 90-12-006 (1993). *See also, In the Matter of Grant H. Gilbertson and Gilbertson Insurance*, Case No. INS 02-04-013 (October 14, 2003) (in the Final Order, the Department adopted and incorporated the Proposed Order which applied aggravating and mitigating analysis); *In the Matter of Dean J. Hinchcliff*, Case No. INS 00-04-010 (January 25, 2001) (in the Final Order, the Department adopted and incorporated the Proposed Order which applied aggravating and mitigating analysis). Here, I find that the Department has met its burden of proving that license revocation is warranted.

The aggravating factors include: Prior disciplinary offenses; dishonest or selfish motive; a pattern of misconduct; multiple offenses; bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary process; submission of false evidence; false statements, or other deceptive practices during the disciplinary process; refusal to acknowledge wrongful nature of conduct; vulnerability of victim; substantial experience in the profession; and indifference to making restitution.

The mitigating factors include: absence of a prior disciplinary record; absence of a dishonest or selfish motive; personal or emotional problems; timely good faith effort to

make restitution or to rectify consequences of misconduct; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; inexperience in the profession; character or reputation; physical or mental disability or impairment; delay in disciplinary proceedings; interim rehabilitation; imposition of other penalties or sanctions in this proceeding; remorse; and remoteness of prior offenses.

Aggravating Factors

I find that the following factors aggravate. Respondent had a dishonest and selfish motive in misappropriating \$15,000 and he engaged in a pattern of deception to cover up the misappropriation by making clandestine deposits into the Plannette's bank account. The Plannettes' were particularly vulnerable victims because of their age, relative unsophistication in business transactions, grief, and friendship with Respondent and his wife. Additionally, Respondent has over twenty years experience in the insurance sales profession.

Mitigating Factors

I find that the following factors mitigate. To begin, Respondent has no prior disciplinary record. In over twenty years experience in the insurance sales profession, Respondent has not faced a Better Business Bureau complaint. Next, Respondent paid monthly interest payments, but he did so in a secretive manner that was consistent with Claire Plannette's understanding that she and her husband had purchased a \$15,000 annuity rather than making a personal loan to Respondent. Similarly, Respondent repaid the full \$15,000 plus interest to the Plannettes, but only after the Insurance Division had begun an investigation. Finally, Respondent cooperated with the Department investigation by providing documents and submitting to an interview.

In this case, there are both aggravating and mitigating circumstances. Based on the record, I find that the aggravating factors outweigh the mitigating factors. Consequently, I conclude that the Department has met its burden of proving by a preponderance of the evidence that license revocation is warranted.

ORDER

I recommend that the Department issue a final order revoking the Oregon insurance agent license of Michael K. Frazier.

DATED this 21st day of March 2005.

/s/ Catherine P. Coburn
Catherine P. Coburn, 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 these 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