STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION

BEFORE THE DIRECTOR

In the Matter of	)	**Case No. INS 98-03-014**
	)	
DONALD R. TIERNEY	)	**PROPOSED ORDER**
	)	
	)	

This matter was heard on August 4, 1998 in Salem, Oregon by Hearings Officer Ella D. Johnson. Assistant Attorney General Kathleen Dahlin represented the Oregon Department of Consumer and Business Services, Insurance Division (the department). Prior to the hearing, Petitioner Donald R. Tierney (Tierney) notified the department that he would not appear at the hearing and would not be represented by counsel.

After review and consideration of the entire record in this matter, I now issue this Proposed Order.

NOTICE

On April 21, 1998, the department mailed to Tierney a Notice of Proposed Action (Notice) by regular mail and certified mail with return receipt. The Notice proposed to revoke the Oregon insurance agent license issued to Tierney alleging that he violated ORS 744.013(2)(d) by unlawfully misappropriating or converting a check received on May 6, 1997 from policyholder Viktor Khrul (Khrul). The department further alleged that the check was made payable to DAT Insurance Services (DAT) in the amount of $1548, that Tierney was not authorized by DAT to negotiate the check and that he deposited the check in his personal account using the proceeds to pay his own personal expenses.

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ISSUE

Whether, in the conduct of business under his insurance agent license, Tierney unlawfully misappropriated or converted a check made payable by Khrul to DAT for the payment of insurance warranting revocation of Tierney's Oregon insurance agent license.

EVIDENTIARY RULING

The record consists of the department's Exhibits 1 through 4.

FINDINGS OF FACT

Tierney has been engaged in the business of selling insurance since 1967. During the period relevant here, he was employed as an insurance agent at DAT, an insurance agency located in Portland, Oregon. Don Baglien (Baglien) is the director of DAT. Khrul was one of DAT's insurance clients.

During this period, Tierney was under financial pressure. He was making payments to both the Internal Revenue Service and the Oregon Department of Revenue to resolve past due taxes. In addition, DAT had changed its commission structure as of October 1996 and Tierney believed that DAT owed him commissions totaling $30,000.

On May 6, 1997, Khrul delivered a check to Tierney in the amount of $1548 which was a down payment for two insurance policies Khrul was purchasing through DAT. Instead of depositing the check in DAT's client trust account, Tierney endorsed the check and deposited the proceeds it in his own personal bank account. He subsequently used the proceeds to pay his own personal expenses. Tierney was not authorized by DAT to negotiate the check or to use the proceeds from the check for his own personal expenses.

Baglien subsequently became concerned because DAT's records indicated that Khrul had not paid the down payment necessary to bind his insurance policies. Baglien discussed the

non-payment with Tierney. Instead of telling him the truth, Tierney told him that Khrul had planned to pay the down payment through a truck financing disbursement and repeatedly assured Baglien that the non-payment was just an "oversight" that could be easily resolved through a call to Khrul.

Baglien notified Khrul by letter dated August 29, 1997 that he intended to contact the insurance companies and request that Khrul's insurance policies be canceled. On September 3, 1997, Baglien spoke to Khrul by telephone. Khrul told him the down payment had been paid and would provide a copy of his canceled check. Khrul provided a copy of the canceled check to Baglien. When Tierney returned from vacation on September 4, 1998, he saw the canceled check on a desk outside Baglien's office and confessed to Baglien that he had deposited the check in his own personal account and had lied to him about Khrul's failure to pay the down payment. Tierney apologized and said that he had hoped to repay the money before his misappropriation had been discovered.

Baglien suspended Tierney and contacted the department about the incident. Tierney resigned his position with DAT on September 4, 1997. On September 8, 1997, Tierney also contacted the department to confess his misappropriation. On September 16, 1997, he repaid the money to DAT.

An audit conducted by DAT's auditors found no evidence of any additional misappropriations by Tierney. The insurance companies were paid in full and there was no lapse in Khrul's coverage on either policy. Tierney's Oregon insurance agent license expired on June 30, 1998.

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ULTIMATE FINDINGS OF FACT

Tierney misappropriated Khrul's premium down payment in the conduct of business under his insurance agent license.

OPINION AND CONCLUSIONS OF LAW

The issue to be resolved here is whether, in conducting business under his Oregon insurance agent license, Tierney violated ORS 744.013(2)(d) by allegedly misappropriating or converting a check received from an insurance client that was made payable to DAT and whether this incident warranted revocation of Tierney's agent license pursuant to ORS 744.013(1)(a).

In that regard, the department has the burden of proving this allegation 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 by preponderance of the evidence).

ORS 744.013 states in pertinent part:

> "(1) If the director finds with respect to a licensee * * * that one or more of the grounds set forth in subsection (2) of this section exist, the director may take the following disciplinary actions:
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> "(a) The director may * * * revoke a license issued under ORS 744.002 or the authority to engage in any category of insurance business or any class of insurance.
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> " * * * * *
>
> "(2) The director may take any disciplinary action under subsection (1) of this section one or more of the following grounds:
>
> " * * * * *

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

Here, I find that, by his own admission, Tierney misappropriated the money entrusted to him by Khrul for the down payment of the insurance policies which Khrul purchased through DAT. I further find that Tierney did so in the conduct of his business under his Oregon insurance agent license and that Petitioner's misappropriation is an offense warranting revocation. Although it is commendable that Tierney ultimately confessed his offense to both his employer and the department, I note that he did so only after seeing the canceled check and realizing that his misappropriation had been discovered. I also note that while this was the only incident of misappropriation discovered, by itself it demonstrates a level of dishonesty warranting revocation of his license. Additionally, even though Tierney's license has expired, I find that revocation is necessary to prevent him from obtaining a license in other states.

I therefore conclude that the department has met its burden. Accordingly, the department's proposed action of revoking Tierney's license is affirmed.

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ORDER

For misappropriating or converting to his own use $1548 received from a policyholder in the conduct of his business under his insurance agent license in violation of ORS 744.013(2)(d), Donald R. Tierney's Oregon insurance agent license shall be revoked pursuant to ORS 744.013(1)(a).

IT IS SO ORDERED.

Dated this _____ day of August 1998 at Salem, Oregon.

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

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Ella D. Johnson, Hearings Officer
Insurance Division

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
Insurance Division Hearings Unit
350 Winter Street NE, #440-6
Salem, OR 97310

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