

1 were for renewals on policies that Gelfand sold prior to working for Oak Tree. The department further
2 alleged that renewal policies at issue were through Hartford Fire Insurance Company (Hartford Fire) and
3 Oak Tree was not appointed by Hartford Fire. The Notice concluded that these violations warranted
4 assessment of a civil penalty in the amount of \$10,000 pursuant to ORS 731.988.

5 **ISSUE**

6 Whether Oak Tree misappropriated renewal commission checks due and made payable to
7 Gelfand totaling \$705.65 in violation of ORS 744.013(2)(d).

8 **EVIDENTIARY RULING**

9 The record consists of the department's Exhibits 1 through 12 and respondent's Exhibits 101
10 through 107. Respondent's exhibits were admitted into the record without objection. The department's
11 exhibits were admitted over respondent's continuing hearsay objection inasmuch as hearsay is admissible
12 in administrative hearings and may be relied upon in reaching a decision in licensure cases. *Reguero v.*
13 *Teachers Standards and Practices Comm.*, 312 Or 402 (1991). *See also Pierce v. MVD*, 125 Or
14 App 79 (1993) (reliance on hearsay upheld when no evidence that would cast doubt on hearsay evidence
15 produced).

16 **FINDINGS OF FACT**

17 Respondent is an Oregon corporation located in Lake Oswego, Oregon, which is engaged in the
18 business of selling insurance and insurance related products as an independent insurance agency. LaCesa,
19 who is the President of Oak Tree, purchased the business in 1985 and changed the name to Oak Tree.
20 Respondent is licensed by the department to sell life, health and general lines of insurance and holds
21 appointments from numerous insurance companies. It is not appointed to sell flood insurance through
22 Hartford Fire Insurance Company (Hartford). Gelfand holds an individual appointment to sell flood

1 insurance through Hartford and the National Flood Service (NFS). (Exs. 1-1 to 1-28, 2-3 11 and
2 testimony of Gelfand and Johnston).¹

3 Gelfand worked for respondent as an employee sales representative to sell life and health
4 insurance from 1996 through 1999. On November 11, 1996, Gelfand entered into a “Producer
5 Representative Agreement” (the Agreement). (Ex. 4-1). Section (7) of the Agreement prohibited Gelfand
6 from selling insurance on behalf of himself or others during his employment with Oak Tree. (Ex. 4-5).
7 Section (8) of the Agreement provided that, in order to acquire ownership of “coded” business or
8 business he developed, Gelfand was required to work for the Oak Tree for three years. (Ex 4-6).²
9 Gelfand’s commission rate varied with the type of business sold. For new business, he received a
10 commission of 40 percent of the premium, for renewals he received 30 percent, and for nonstandard
11 business he received 25 percent with no renewal compensation. (Ex. 4-12).

12 Section (2) of the Agreement concerning “Compensation” provided that during Gelfand’s
13 employment with Oak Tree he was to receive a percentage of the commission on all new and renewed in-
14 house accounts owned by Oak Tree and assigned to the agent for management. He was also to receive a
15 percentage of the commission on all renewals for policies that he previously sold to individuals or entities
16 who were not Oak Tree’s clients or customers, if they were sold or renewed through Oak Tree. (Ex. 4-
17 3).

¹ Johnston testified that her letter dated May 16, 2000 erroneously stated that Oak Tree, instead of Gelfand, had originally written the flood policies at issue through American National Property and then moved and renewed the files through Hartford. (Exs. 11, 12 and Johnston’s testimony).

² Gelfand testified that he also had an oral agreement with LaCesa that he would be able to keep the business he wrote as an agent for Oak Tree when he left. LaCesa verified in his testimony that he sometimes had additional oral agreements with agents unless the oral agreement conflicted with the written agreement. If there was a conflict, LaCesa stated that the oral agreement was then put in writing as an addendum to the Agreement. I find that Gelfand’s oral agreement with LaCesa is in conflict with Section (8) of the Agreement and should have been memorialized in writing as an addendum. (Testimony of Gelfand and LaCesa).

1 Gelfand's understanding of Section (2) of the Agreement was that, if he sold a policy prior to
2 working for Oak Tree but renewed or rewrote the policies through Oak Tree, he would receive 30
3 percent of the renewal commission. He assumed that if a policy was not renewed through Oak Tree but
4 rather directly through him, he would be entitled to the full amount of the commission. (Exs. 4-1, 9 and
5 Gelfand's testimony).³

6 When Oak Tree received commission checks from insurance carriers, Miller followed
7 respondent's Oak Tree's standard procedure. Miller would stamp the backside of the checks with Oak
8 Tree's bank deposit stamp, regardless of whether respondent or an agent was the payee. If an agent was
9 the payee, Miller would usually type the agent's name on the signature line of the stamp. When she was in
10 a hurry, she sometimes forgot to put the name of the agent on the backside of the check. At other times,
11 she would print or sign the agent's name in her own handwriting on the endorsement. Miller would then
12 enter the payment information into the computer and give the checks to LaCesa to deposit in Oak Trees
13 operating account. (Exs. 5 and Miller's testimony).

14 When Miller prepared the agent's monthly payroll report, the computer would print a commission
15 statement showing each account by name and policy number, the amount of premium and the agent's
16 commission by client. The statement and an adding machine tape were then given to the agent. Prior to
17 computerizing the payroll reports, this was all done by hand and given to the agent. (Exs. 5, 10, 101-107,
18 and Miller's testimony).

³ LaCesa testified it was his understanding that the Agreement did not distinguish between the policies written by the agent prior to employment with Oak Tree and those sold during their employment. He stated that if the agent individually owned the commissions on a policy that would be addressed in an addendum to the contract. While his understanding is relevant, it is not dispositive. (LaCesa's testimony).

1 Between April 7, 1997 and July 8, 1998, Hartford sent seven commission checks were sent to
2 Oak Tree's office, which were made payable to Gelfand. The checks, which totaled \$705.65, were
3 printed on Hartford paper and were drawn on Hartford's account with First Interstate Bank. The checks
4 were written to Gelfand for commissions from the renewal of flood policies sold to Patricia Woods, Sven
5 and Allison Haarhoff, Kenneth and Jeannie West, Juan Pablo and Ric Keen prior to Gelfand's
6 employment with Oak Tree. (Exs. 2, 3, 7, 8).

7 In accordance with Oak Tree's policy, Miller endorsed the checks made payable to Gelfand and
8 entered the information into the computer. LaCesa deposited the checks in Oak Tree's operating account.
9 Miller endorsed all seven checks with Oak Tree's operating account deposit stamp; on three she signed
10 Gelfand's name in her own handwriting, on one she typed Gelfand's name, and on three Gelfand's name
11 did not appear anywhere in the endorsement. Gelfand did not authorize Miller or Oak Tree to sign his
12 name to checks that were made payable to him. (Exs. 2, 3, 5, and Gelfand's testimony).

13 The check numbers, amounts and dates of deposit are as follows: check number 278097 for
14 \$39.00 deposited on April 29, 1997; check number 284060 for \$199.05 deposited on May 28, 1997;
15 check number 290533 for \$44.40 deposited on June 10, 1997; check number 299275 for \$60.75
16 deposited on July 16, 1997; check number 308872 for \$10.15 deposited on October 15, 1997; check
17 number 331355 for \$309.15 deposited on May 13, 1998; and check number 337829 for \$45.15
18 deposited on August 5, 1998. (Ex. 3).

19 Each month, Gelfand received his commission statements and adding machine tapes prepared by
20 Miller showing each account by name and policy number, the amount of premium and the agent's
21 commission by client. From November 1996 to January 1998, Gelfand was given 40 percent, instead of
22 30 percent of the flood insurance renewal commissions through Hartford due to a computer error, which

1 designated the account as new “coded” business. Oak Tree retained 60 percent of the renewal
2 commissions. After January 1998, Gelfand received 30 percent of the renewal commissions and Oak Tree
3 retained 70 percent. (Ex. 10 and testimony of Gelfand).

4 Gelfand assumed that he would receive the full amount of the Hartford flood renewal commission,
5 but did not confirm his assumption with LaCesa. Gelfand assumed that his commissions were being
6 properly paid and did not always review the commission statements because he was too busy. He
7 complained several times about his commissions to Miller but never mentioned the flood insurance
8 renewals. Gelfand never told LaCesa that he had a problem with how his commissions were being paid.
9 Gelfand rewrote most of the policies that he had written through his previous employer through Oak Tree.
10 (Testimony of Gelfand and LaCesa).

11 Gelfand did not discover the existence of these checks until he became involved in litigation⁴
12 concerning a contract dispute with Oak Tree. On December 27, 1999, Gelfand filed a complaint with the
13 department alleging that Oak Tree forged his name on commission checks without his knowledge and
14 consent. (Ex. 2).

15 FINDINGS OF ULTIMATE FACT

16 The flood insurance policies at issue were renewed through Gelfand’s individual appointment with
17 Hartford and NFS, not through Oak Tree.

18 CONCLUSIONS OF LAW AND OPINION

19 The issue to be resolved in this sanction case is whether Oak Tree’s conduct in endorsing and
20 depositing seven renewal commission checks due and made payable to Gelfand constituted

⁴ The litigation (Oak Tree Insurance, Inc. v. Scot Gelfand, Circuit Court Case No. 9902-01292) was filed in Multnomah County and was subsequently settled under a confidentiality agreement. Gelfand appeared and testified at the hearing under subpoena with his attorney present.

1 misappropriation of money in violation of ORS 744.013(2)(d).⁵ In that regard, the department has the
2 burden of proving these allegations by a preponderance of the evidence. *See* ORS 183.450(2) and (5);
3 *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the
4 burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980)
5 (in the absence of legislation adopting a different standard, the standard in administrative hearings is
6 preponderance of the evidence). I find that the department has met its burden.

7 Respondent first contends that Oak Tree did not misappropriate or convert the flood insurance
8 commissions because an insurance agency cannot misappropriate or convert money that it is entitled to
9 under its contract with its agent. Pointing to the language of Sections (7) and (8) of the Agreement,
10 respondent argues that these two provisions give Oak Tree ownership of and the right to retain 70 percent
11 of the flood insurance commissions. Section (7) prohibits Gelfand from actively providing insurance
12 services, individually or to others, while he was working for Oak Tree. (*See* Ex. 4-5). Section (8)
13 provides that the business written by Gelfand through Oak Tree is the exclusive property of Oak Tree and
14 that Gelfand could begin to acquire a partial ownership of the coded business or business he developed
15 only after *inter alia* being employed by the Oak Tree for three years. (*See* Ex. 4-5 through 4-7).

16 Although I do not disagree with respondent’s interpretation of these provisions, respondent misses
17 the point. In order for Oak Tree to have an exclusive ownership of the flood insurance commissions
18 previously written by Gelfand, the policies were required to be renewed through Oak Tree. Section (2) of

⁵ ORS 744.013 provides in relevant part:

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

“* * * * *

“(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.”

1 the Agreement concerning “Compensation” provides in relevant part:

2 “During the term of employment for all sales and renewals of insurance or related
3 insurance products by Producer regarding assigned transfer business⁶ described
4 above, as well as all sales and renewals of insurance or insurance products by
5 Producer to individuals or entities who were not clients or customers of the
6 Company prior to the original sale by producer, which are sold or renewed
7 through the Company as a result of the exclusive efforts of the Producer, the
8 Producer shall receive a commission which equals those percentages of regular
9 commissions which the Company receives which are set forth in Exhibit ‘A.’ For
10 the purposes of this paragraph, commissions received by the Company shall
11 include only standard commissions, and shall not include any form of bonus,
12 override, contingent, or similar or other commissions or payments. (Emphasis
13 added) (Ex. 4-3).
14

15 The record establishes that the flood insurance business at issue here was developed prior to
16 Gelfand’s employment with Oak Tree through Gelfand’s individual appointment from NFS through
17 Hartford. Notwithstanding the fact that Oak Tree’s computer initially categorized the flood insurance
18 business as “coded” or new business, the flood insurance was not written or developed through Oak
19 Tree.⁷ It was also not sold or renewed through Oak Tree.

20 Respondent next argues that the Agreement is ambiguous with respect to whether the flood
21 insurance was renewed through the company because LaCesa’s and Gelfand’s interpretation of the
22 provision differs. Therefore, respondent urges me to look at the course of conduct of the parties in
23 interpreting the Agreement. The department argues that the Agreement should be construed against Oak

⁶ Under provision (2) of the parties’ agreement, “transfer business” was defined as in-house accounts owned by Oak Tree and assigned to the sales representative for management. The sales representative was to receive commissions on renewals of the transfer business. (Ex. 4-3).

⁷ Moreover, even if Gelfand’s receipt of the commission checks from Hartford violated Section (7) of the Agreement, Oak Tree’s remedy was not to endorse and deposit his commission check into its operating account.

1 Tree as the drafter.⁸ But as the court stated in *Hoffman Construction Co. v. Fred S. James & Co.*, 313
2 Or 464 (1992):

3 “For a term to be ambiguous in a sense that justifies resort to the [rules of
4 construction], however, there needs to be more than a showing of two plausible
5 interpretations; given the breadth and flexibility of the English language, the task of
6 suggesting plausible alternative meanings is no challenge to capable counsel.
7 Competing plausible interpretations simply establish ambiguity that will require
8 some interpretive act by the court. 313 Or at 470.
9

10 If, after examining the contract as a whole, only one of the alternative interpretations remains
11 reasonable, the ambiguity is resolved, and there is no need to resort to other aids in construction, such as
12 extrinsic evidence or rules of construction. *Hoffman Construction Co.*, 313 Or at 475.

13 Following my review of the Agreement as a whole, I find that the only reasonable interpretation is
14 that, in order for Oak Tree to have a right to retain a portion of the flood insurance commissions, the
15 policies must be renewed through Oak Tree. This interpretation is confirmed by the record, including
16 Johnston’s testimony that the flood insurance policies were not renewed through Oak Tree because Oak
17 Tree was not appointed by NFS through Hartford to sell the policies. Moreover, the record establishes,
18 with respect to the other business Gelfand developed while working for his former employer, those
19 policies were renewed through Oak Tree and Oak Tree properly retained a portion of Gelfand’s
20 commissions.

21 Finally, respondent argues that Oak Tree did not violate ORS 744.013(2)(d) because this is a
22 “quasi-criminal” proceeding there was no evidence that it intended misappropriate or convert Gelfand’s
23 commissions. However, I do not find respondent’s argument persuasive. As noted by the department, this
24 is not a criminal or a “quasi-criminal” proceeding. It is a regulatory action involving a civil penalty.

⁸ LaCesa testified that he obtained a copy of the Agreement at an agent certification course. Nonetheless, I would still find

1 Respondent also appears to make some type of laches or waiver argument, contending that Oak
2 Tree should not be found in violation of ORS 744.013(2)(d) because Gelfand never specifically brought
3 this matter to the attention of LaCesa or Miller until he was involved in litigation with Oak tree, despite the
4 fact that he received monthly commission statement over the course of several years. I likewise do not find
5 this argument to be persuasive. To begin, this is not a Court of Equity so I decline to consider
6 respondent's laches defense. Furthermore, Gelfand did not waive his right to complain to the department
7 about Oak Tree's misappropriation or conversion of his commissions and Gelfand's alleged waiver did
8 not impact the department's authority to sanction Oak Tree for this conduct. A waiver is "the intentional
9 relinquishment or abandonment of a known right or privilege." *Moore v. Mutual of Enumclaw Ins. Co.*,
10 317 Or 235, 240 (1993). Additionally, "whether a waiver has occurred depends on the particular
11 circumstances of each case." *Id.* On the facts and circumstances of this case, there was no waiver.

12 Accordingly, I find that by endorsing the Hartford flood insurance renewal commission checks
13 made payable to Gelfand without his consent or authorization and depositing them in its operating account,
14 Oak Tree misappropriated or converted Gelfand's money. ORS 731.988(1) gives the director the
15 authority to assess insurance agencies a maximum civil penalty in the amount of \$10,000 for each offense.
16 Consequently, I conclude that the department's proposed action of assessing Oak Tree a civil penalty in
17 the amount of \$10,000 is warranted.

18 In reaching this conclusion I note that, inasmuch as the department has statutory authority to assess
19 a civil penalty in the amount of \$10,000 for each offense, the department could have assessed Oak Tree
20 \$10,000 for each of the seven checks. *See* ORS 731.988(1).

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