

744.074 Authority of director to place licensee on probation or to suspend, revoke or refuse to issue or renew license.

(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:

(a) Providing incorrect, misleading, incomplete or materially untrue information in the license application.

(b) Violating any insurance laws, or violating any rule, subpoena or order of the director or of the insurance commissioner of another state or Mexico or Canada.

(c) Obtaining or attempting to obtain a license through misrepresentation or fraud.

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

744.083 Trust account for premium funds; commingling; exceptions; rules. (1) 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.

(2) Except as provided in subsection (3) of this section, a resident insurance producer may not commingle or otherwise combine premiums with any other moneys.

(3) A resident insurance producer may commingle with premium funds in the trust account required by subsection (1) of this section any additional funds the insurance producer deems prudent for the purpose of advancing premiums, establishing reserves for the paying of return premiums, or for any contingencies that may arise in the course of receiving and transmitting premium or return premium funds.

(4) 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. [Formerly 744.225; 2003 c.364 §22]

744.084 Certificate of deposit in lieu of trust account; rules. (1) In lieu of the trust account required by ORS 744.083, a resident insurance producer may keep a certificate of deposit from an institution insured by the federal government or an instrumentality thereof if the resident insurance producer has an average monthly balance of premium funds received and held for the last 12 months of at least \$2 million. A resident insurance producer who keeps a certificate of deposit shall have satisfactory evidence of the certificate available at all times for inspection by the Director of the Department of Consumer and Business Services.

(2) A certificate of deposit authorized under subsection (1) of this section shall be for an amount at least equal to the average monthly balance of premium funds received and held by the resident insurance producer for the last 12 months. Nothing in this subsection requires that the required amount of the certificate of deposit be calculated, or the amount changed, more often than once a month.

(3) The director may adopt rules specifying what constitutes satisfactory evidence for purposes of subsection (1) of this section.

(4) Authorization to use a certificate of deposit may be revoked by the director at any time upon a determination that the resident insurance producer has failed to comply with the provisions of this section or rules adopted under subsection (3) of this section. Upon revocation, the resident insurance producer shall comply immediately with the provisions of ORS 744.083. [Formerly 744.227; 2003 c.364 §23]

Chapter 744 — Insurance Producers; Life Settlement Providers, Brokers and Contracts;
Adjusters; Consultants; Third Party Administrators; Reinsurance Intermediaries; Rental
Company Limited Licenses



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Theodore R. Kulongoski, Governor

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Oregon Insurance Division Bulletin INS 2008-2

DATE: February 5, 2008
TO: All Insurers Transacting Insurance in Oregon
RE: Application of HB 2007, Oregon's Domestic Partnership Legislation

Oregon Insurance Division Bulletin INS 2007-6 is withdrawn.

The purpose of this bulletin is to guide insurers in applying HB 2007 to the transaction and regulation of insurance in Oregon, because the Insurance Code as affected by that legislation imposes new responsibilities on insurers and on the Department of Consumer and Business Services. HB 2007 (now ch. 99, Oregon Laws 2007) recognizes and authorizes domestic partnerships in Oregon. This legislation was to take effect January 1, 2008. A subsequent legal challenge stayed the application of this statute until it was heard and reviewed by the Federal District Court. The court upheld the legislation. A domestic partnership is defined in section 3, ch. 99, Oregon Laws 2007 to mean "a civil contract entered into in person between two individuals of the same sex who are at least 18 years of age, who are otherwise capable and at least one of whom is a resident of Oregon."

This bulletin explains how ch. 99, Oregon Laws 2007 affects the Insurance Code and is not intended as either an independent statement of policy or as an extension of the legislation. **Examples** of application of the legislation to the Insurance Code are available on the website of the Insurance Division (insurance.oregon.gov). These examples are intended to answer practical and specific questions that have arisen and will continue to arise as ch. 99, Oregon Laws 2007 is implemented.

Section 9, ch. 99, Oregon Laws 2007 states the general scope of legal rights and responsibilities to which domestic partnerships are subject. In summary, section 9 provides that a privilege, immunity, right or benefit granted to an individual by a statute, administrative or court rule, policy, common law or any other law because of the marital relationship is granted on equivalent terms to an individual because the individual is or was in a domestic partnership or because of a specific relation between the individual and another because of the domestic partnership. In addition, Senate Bill 2 (ch. 100, Oregon Laws 2007) prohibits discrimination in providing employment benefits, public accommodations and housing, as well as in other specific situations, based upon race, religion, color, sex, national origin, sexual orientation or familial status.

The Director will apply the following principles to implement ch. 99, Oregon Laws 2007:

1. Terms and provisions in the Insurance Code and in rules adopted under the Code that refer to or indicate the marital relationship, its dissolution and dependents in a marital relationship will apply in the same manner to domestic partnerships, to their dissolution and to dependents in the partnership. These references appear in the Code and rules with respect to a class or line of insurance in some cases and in other cases in connection with the regulation of insurance generally, such as in connection with credit scoring.
2. When provisions in the Insurance Code or related rules described in the preceding paragraph specifically apply to terms of a policy form, the Code provisions must be applied generally to other provisions in the policy form as well. The same is true with respect to a privilege, immunity, right or benefit under provisions of the Code or rules that apply to an individual by virtue of the marital relationship.
3. Chapter 99, Oregon Laws 2007 applies to forms filed for approval on or after February 4, 2008, but the Department does not consider ch. 99, Oregon Laws 2007 to apply to a group life or health policy issued or renewed before April 1, 2008, when the policy form was filed and approved for use prior to February 4, 2008.
4. An insurer must rate the members of a domestic partnership according to the same standards that the insurer uses to rate a husband and wife. If the insurer uses a "married" rate for a husband and wife, the insurer may not apply the "named insured" classification to each member of a domestic partnership. The insurer may use appropriate rating methods that reflect the composition of a domestic partnership, in the same way that the insurer uses rating methods to reflect the composition of a marriage. For example, if a married rate is determined by using or otherwise taking into account the age and sex of each member of the married couple, the insurer may apply a comparable rate that takes into account the fact that the members of a domestic partnership are both men or both women.
5. Ch. 99, Oregon Laws 2007 does not alter federal law, which confers marriage rights and privileges only to opposite-sex married couples. (See 1 U.S.C.A. sec. 7, defining marriage, under Federal Defense of Marriage Act, as a "legal union between one man and one woman.")
6. Ch. 99, Oregon Laws 2007 does not affect stop-loss policies for self-insured group health plans.
7. An insurer may issue a policy to an employer only if the employer's health plan is compliant with ch. 99, Oregon Laws 2007.
8. For the purpose of policy coverage, discounts and other matters provided in connection with marriage, an insurer must require and apply the same level of proof for existence of a domestic partnership that the insurer requires and applies for existence of a marriage.
9. Ch. 99, Oregon Laws 2007 does not prevent insurers from using actuarial data relating to gender, for both underwriting and rating decisions. If loss results experience is different for same sex couples, underwriting rules and rates may therefore reflect the differences without

conflict with ch. 99, Oregon Laws 2007, whether the data relate to a marriage, a male-male partnership or a female-female partnership.

10. Regarding commercially insured ERISA plans, the Insurance Division will carry out its authority under the Insurance Code without distinction between commercial insurance plans sold to employers subject to ERISA and commercial insurance plans sold to employers not subject to ERISA. The savings provision in ERISA for state regulation of insurance authorizes the Director to apply provisions of the Insurance Code affected by ch. 99, Oregon Laws 2007 to all group health insurance policies, regardless of whether the policyholder is otherwise an ERISA employer. Consequently:

- Commercially insured employee benefit plans that are currently subject to state regulation remain subject to the Insurance Code; and
- The exception in section 9(7), ch. 99, Oregon Laws 2007 applies to self-insured plans.

11. Regarding credit scoring, Insurance Code provisions prohibiting an insurer from rerating an existing policy or rerating a customer based on a customer's credit history when the marital status of the customer changes due to death or divorce applies with the same force to a customer who belongs to a domestic partnership that ends because of death or dissolution. Concern has been expressed that this application of ch. 99, Oregon Laws 2007 will conflict with federal law such as the Fair Credit Reporting Act and will otherwise cause inconvenience and confusion for consumers. In response, there should be no conflict because ch. 99, Oregon Laws 2007 applies only to matters of Oregon law. To the extent that a federal law applies in credit scoring or any other matter, then that federal law would apply. For example, if the federal Fair Credit Reporting Act (FCRA) governs the use of credit information with respect to a divorced husband and wife, then ch. 99, Oregon Laws 2007 could not require application of the FCRA provision to members of a domestic partnership that has been dissolved. Of course, if Oregon law independently applies in the circumstance, the fact that federal law applies as well would not prevent application of the state law.

This bulletin is intended as a general statement of principles for enforcing and applying the Insurance Code in light of ch. 99, Oregon Laws 2007, and is not meant to answer all questions that may arise because of that legislation. Consequently, specific questions should be directed toward the Insurance Division for resolution.

This bulletin is dated February 5, 2008, at Salem, Oregon.

(Signed)

Scott J. Kipper
Insurance Administrator

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),⁷ 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 836-074-0017,⁸ 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 744.083.⁹ 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

⁷ 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.

⁸ 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.

⁹ 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:

** * **

(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.¹⁰ This contention

¹⁰ 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)¹¹ 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:

¹¹ 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. Sharteer'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. Sharteer'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. Sharteer's information to the insurer on May 21, 2002. Specifically, the department asserts that when Respondent transmitted Ms. Sharteer'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. Sharteer'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 8th 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