FST 06-029

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF THE FINANCIAL INSTITUTIONS ACT
R.S.B.C. 1996, C. 141, AS AMENDED

BETWEEN:

THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

APPELLANT

AND:

THE INSURANCE COUNCIL OF BRITISH COUMBIA
and DANA GABRIELA CIOCAN

RESPONDENTS

APPEAL DECISION

BEFORE:	ROBERT J. HOBART PRESIDING MEMBER
DATE OF LAST SUBMISSION:	JANUARY 10, 2007
APPEARING:	RICHARD FERNYHOUGH FOR THE APPELLANT
	DAVID T. MCKNIGHT
	PATRICK J. SULLIVAN FOR THE RESPONDENTS

BACKGROUND

On August 8, 2006 the Insurance Council of British Columbia ("Council") issued an Order with respect to Dana Gabriela Ciocan ("Ciocan"). In this Order, the Council ordered that:

1. Ciocan be fined $1,000.00; and
2. Ciocan be required to pay this fine by November 8, 2006. If the fine is not paid by that date, the license of Ciocan will be suspended effective November 9, 2006.

This Order was issued as a result of a finding by Council that Ciocan, during the period July 2004 to November 2004, breached Section 231 of the *Financial Institutions Act* in that she did not act in good faith and in accordance with the usual practice of the business of insurance. In particular, Ciocan accepted eight completed insurance applications that had been completed by Slavica Nukmanovic ("Nukmanovic") from five different applicants. Without having met any of the applicants, Ciocan signed the applications as "witness" to their signatures on five applications and remitted the documentation on all applications to insurers for placement of coverage under the contracts of her employer Don Wotherspoon & Associates Ltd ("the Agency"). The nominee of the Agency is Don Wotherspoon ("Wotherspoon").

These transactions were the result of an agreement between Wotherspoon and Nukmanovic under which Nukmanovic was empowered to refer insurance business to the Agency on a fee for referral basis. Under this arrangement, it was the expectation of Wotherspoon that Nukmanovic would refer applicants to Ciocan and Ciocan would meet the applicants, complete the transactional requirements and remit the applications to insurers with Wotherspoon being the agent of record and Ciocan being the producing agent. As outlined in the previous paragraph, the process for obtaining these applications differed considerably from Wotherspoon's expectations.

The Council found that both Ciocan and Wotherspoon were led to believe that Nukmanovic was licensed and currently employed in the insurance industry but that her current employer did not have a market for the insurance business she intended to refer to the Agency. Neither, Ciocan nor Wotherspoon made any attempts to independently verify the license status of Nukmanovic.

It turned out that Nukmanovic was not licensed by Council and had not been licensed since April 30, 2003. The Council concluded that after being advised in November 2004 that Nukmanovic was not licensed, Wotherspoon and Ciocan ceased all association with Nukmanovic and Ciocan met with all applicants to review the appropriateness of the coverage that had been placed through the Agency.

It is noteworthy that Council found that Ciocan was unaware of any compensation agreement between Wotherspoon and Nukmanovic respecting the referral arrangement.

Council has noted that the Ciocan case was in some respects similar to the cases of *Financial Institutions Commission v. Insurance Council of British Columbia and Branislav Novko,* FST No. 05-008 ("Novko") and *Financial Institutions Commission v.*

Insurance Council of British Columbia and Maria Pavicic, FST No. 05-009 ("Pavicic"). The Council has, however, drawn distinctions between the Novko and Pavicic cases and the Ciocan case. In particular, the Council found that Novko and Pavicic were aware Nukmanovic was not licensed when they accepted applications from her, whereas Ciocan was led to believe by Nukmanovic that she was licensed as an insurance agent. Council also noted that Ciocan was a salaried employee of the Agency and thus determined that she obtained no personal benefit by accepting the signed applications from Nukmanovic.

THE APPEAL

On September 6, 2006 the Superintendent of Financial Institutions ("Superintendent") filed a Notice of Appeal to the Financial Services Tribunal ("FST") regarding the August 8, 2006 Council decision on Ciocan. The grounds for appeal were that the Council erred in concluding that a $1,000 fine was appropriate discipline for Ciocan for accepting completed insurance applications taken by an unlicensed person and signing the applications as "witness" to the applicants' signatures without having met any of the applicants.

The Appeal process commenced on September 7, 2006 with a request by the FST to the Council for the record pertaining to the decision. I was assigned as the member of the FST to consider the appeal on September 19, 2006.

During the Appeal process that following documents have been received by the FST:

- The record of the Council received on September 26, 2006;
- The submission of the Appellant received on October 27, 2006;
- The submission of the Respondent (Council) received on November 17, 2006;
- The submission of the Respondent (Ciocan) received on December 11, 2006;
- The Appellant's Reply received December 29, 2006;
- A letter of clarification from the Respondent (Ciocan) received on January 5, 2007; and
- A letter of clarification from the Respondent (Council) received on January 10, 2007.

It is this documentation on which this decision is based.

The Appellant is seeking to have the appeal allowed and the penalty imposed on Ciocan by the Council varied to include a suspension of four months and the payment of the costs of the Council's investigation into the matter. The Appellant also seeks the costs of the Appeal against the Council.

The Respondent (Council) is seeking to have the appeal dismissed. The Respondent (Council) also seeks an Order for Costs against the Appellant. Further, the Respondent (Council) seeks an Order requiring the Appellant to pay the actual costs and expenses of the FST with respect to this appeal.

The Respondent (Ciocan) is seeking to have the appeal dismissed and an Order for Costs against the Appellant in the amount of $5,000.

STANDARD OF REVIEW

The scope of the FST's standard of review was analyzed in considerable detail in both the Novko and Pavicic cases. In these cases, the FST concluded that the standard of review must be premised upon whether there were reasonable grounds for the Council to reach its decision based on the evidence that has been presented. No arguments have been received from the Appellant or the Respondents that this is not an acceptable standard in this case.

THE SERIOUS NATURE OF THE CONDUCT

Counsel for the Superintendent has submitted that Council did not adequately address the seriousness of Ciocan's conduct in this case. In the Superintendent's submission, the argument is made that the conduct of Ciocan constituted criminal behavior including forgery and uttering a false document. Counsel for the Superintendent further submits that the practice guidelines of both the Council and the Real Estate Council of British Columbia severely restrict or prohibit the licensing of individuals with a history of criminal convictions.

Counsel for the Council and Counsel for Ciocan take great exception to the arguments that the actions of Ciocan constitute criminal behavior. They correctly point out that Ciocan was not charged with a criminal offence let alone convicted of a criminal offense. Moreover, Counsel for the Council argues that the Superintendent, in fact, had the authority to prepare a report to Crown recommending criminal charges against Ciocan but chose not to do so. In light of this, Counsel for the Council submits that the action of the Superintendent of comparing Ciocan's actions to criminal behavior amounts to an abuse of the appeal process by the Superintendent.

While I do not find the submissions of the Superintendent comparing the actions of Ciocan to criminal actions to be overly helpful, I do not believe the submissions constitute an abuse of process.

In my view, the seriousness of the Ciocan's conduct is well articulated in the Council Bulletin dated April 2006. This Bulletin was included in the submission from the Counsel for Ciocan. The Bulletin states in part:

The proper execution of insurance applications and related documents is a fundamental component of every insurance transaction. A document is falsely executed when:

- *A person's signature is "forged";*
- *A person signs as "witness", when he or she was not present when the document was being executed; or,*
- *A person processes the document knowing a signature has been forged or the document was improperly witnessed.*

Obtaining the signature of an applicant, insured or related party is evidence that, among other things, the person has read and understands the document and confirms that the information submitted is complete and accurate. The objective of witnessing a signature

on an insurance application, or any other instrument, is to verify that the witness was present and observed the person sign the document.

Both of these signatures provide a degree of reliability and a means of verification for those who subsequently rely on the document, including underwriters and claim adjusters. When a person "witnesses" a signature they have not in fact observed being signed, they are misrepresenting a material fact to those subsequently relying on the document. The same is true any time a person's signature is forged.

Insurance licensees must be trustworthy, conducting all professional activities with integrity, reliability and honesty. Licensees also have a duty to insurers not to mislead them through false statements or by withholding material information. Improperly executing a document and forwarding it to an insurer as though it was genuine is misrepresentation and calls into question a person's trustworthiness and their intention to carry on business in good faith and in accordance with the usual and proper practice of insurance.

A falsely executed insurance document misrepresents a material fact, undermines its reliability and can have unforeseen consequences for the insurer, client, beneficiary or other parties.

The Bulletin goes on to state that Council has found that there are an alarming number of such instances. Council indicates that it is putting the industry on notice that when a licensee falsely executes a document without the intent of personal gain and all other factors are favorable, first time offenses will result in a minimum fine of $500.

Finally, the Council indicates that it is taking this action to: specifically deter licensees from further misconduct; generally, to deter other licensees from similar misconduct; and, to protect the public interest and promote confidence in the insurance industry.

Given the Council's position that reliance is placed on insurance applications and documentation by underwriters and claims adjustors and that falsely executed insurance documents can have unforeseen consequences for the insurer, client, beneficiary or other parties, it must be concluded that conduct leading to falsely executed documents is of a very serious nature.

In the case of Ciocan, the misconduct consists of signing as a witness to applicant signatures without having met the applicants and knowingly processing documents that were falsely witnessed.

REVIEW OF THE EVIDENCE

The Record in this case contained among other information, a memo dated May 25, 2006 from Council Investigator Larry Beryer to the Life Investigative Review Committee, a Statement of Wotherspoon dated January 12, 2006, an Evidence Memo dated April 10, 2006 prepared by Investigator Beryer and the transcript of a January 19, 2005 interview of Ciocan by Investigator Stephen Hess of the Financial Institutions Commission ("FICOM").

The evidence contained in these documents is very important to this case. However, I note that some of the evidence in question is not reflected in the Report of the Investigative Review Committee dated June 12, 2006 in the section of the report outlining the information that the Committee considered in making its decision.

The Appellant has raised a series of issues related to this evidence.

(a) Overview of the Conduct of Ciocan

The Council in its decision of August 8, 2006 has taken a somewhat sympathetic view of the actions of Ciocan.

This is reflected in the Report of the Investigative Review Committee and the submissions of the Counsel for the Council. Counsel for the Council and Counsel for Ciocan argue that Ciocan was directed by her employer to work with Nukmanovic and complied with this direction. It is further argued that it was a very manipulative and aggressive Nukmanovic who pressured Ciocan to wrongfully sign the insurance applications and transaction documents as a witness without meeting the applicants.

Once Ciocan became aware that Nukmanovic was not licensesd, she ceased all association with her. She also met with all affected applicants to complete the applications again. She was forthcoming and fully cooperative with the investigator from FICOM and in discussions with the Council. She fully admitted her wrongdoing and is very remorseful. She, in fact, still cannot discuss the issue without breaking into tears.

A closer examination of all the evidence suggests a somewhat less sympathetic view of Ciocan. Although she was instructed by her employer to work with Nukmanovic, she was instructed to process referrals from Nukmanovic. The July 12, 2006 statement by Wotherspoon indicates that this meant that Nukmanovic was to provide names, but that Ciocan was responsible for meeting with the applicants and completing the applications. The transcript of the interview between Ciocan and Investigator Hess of January 19, 2006 indicates that Ciocan fully understood this instruction.

When Nukmanovic approached Ciocan with the first completed applications, it was obvious that the situation was more than a referral arrangement. But Ciocan did not seek any further guidance from her employer over the terms of the arrangement. Rather she accepted the applications, signed as witness to the applicant's signature and forwarded the applications to her employer even though she was fully aware that her conduct was improper. According to the May 25, 2006 memo of Investigator Beryar, she continued with this process for a four-month period commencing in early July 2004 and ending in early November 2004. The statement of Wotherspoon dated January 12, 2006 indicates that Ciocan only informed him of her improper conduct in November when he informed her that Nukmanovic was not licensed. Ciocan, thus, deceived her employer for a period of four months.

When Wotherspoon was informed that Nukmanovic was unlicensed he severed his relationship with her. His statement of January 12, 2006 indicates that he also ordered

Ciocan to meet with every client to ensure that the insurance coverage that had been put in place was appropriate. Ciocan was therefore acting on the instructions from her employer when she met with each applicant.

The evidence also suggests that Ciocan was not cooperative with Investigator Hess of FICOM during his interview with her on January 19, 2005. In fact, the transcript of the interview suggests that during the first half of the interview, she repeatedly lied to Investigator Hess regarding her involvement with the policies in question by falsely asserting that she had attended meetings with applicants. This is not the behavior of a forthcoming and cooperative individual. It was only after Investigator Hess produced strong evidence that revealed her statements to be false, did she confess her actions.

(b) Awareness of the Licensing Status of Nukmanovic

The Council found that Ciocan was led to believe that Nukmanovic was licensed by the Council at the time that all the transactions in question were completed. Counsel for the Superintendent has submitted that the evidence suggests that this is not the case. In her January 19, 2005 interview with Investigator Hess, Ciocan admitted to processing at least one application after she was aware that Nukmanovic was not licensed: The following exchange is contained in the transcript of this interview:

Hess.....*You knew Slavica (Nukmanovic) wasn't licensed at some time during dealing with the policy with Mr. Kridzija?*

Ciocan...*Yes*

Hess.....*But this was completed anyway? This was completed after you found out that she wasn't licensed?*

Ciocan...*Yes*

The evidence suggests that Ciocan became aware that Nukmanovic was not licensed in early November. The evidence presented in the May 25, 2006 memo of Investigator Beryar indicates Mr. Kridzija placed two applications. Both of these applications were processed well before November 2004. One was reportedly processed on August 12, 2004 and one was reportedly processed on July 7, 2004.

Given the conflicting nature of this evidence I am willing to accept that Ciocan was of the view that Nukmanovic was licensed when processing all of the transactions in question.

(c) Breach of Section 231 (1) (c) and Council Code of Conduct Rule 12

As noted in a previous section of this decision, Ciocan lied to and misled Investigator Hess during her interview of January 19, 2005. Counsel for the Superintendent has argued that this constitutes a breach of section 231 (1) (c) of the *Financial Institutions Act* and Rule 12 of the Council's Code of Conduct. The breach consists of Ciocan making a material misstatement to Council.

Counsel for Ciocan has submitted that allowing the Superintendent to raise this allegation during the appeal is unseemly. It is further argued that if the Superintendent had wanted to argue that FICOM had been misled it should have done so prior to the decision of Council. As a result, it is submitted that the Superintendent should not be allowed to raise these new allegations.

I cannot accept this argument. The transcript of the January 19, 2005 interview formed part of the record of the case. Thus, the evidence to support the Superintendent's contention that Ciocan lied to Investigator Hess was part of the evidence provided to Council when it made its decision. The Superintendent is not raising new allegations in this regard. Rather, the Superintendent is making the argument that the Council unreasonably ignored this important evidence when making its decision.

Counsel for Council has submitted that the Superintendent's argument with respect to a material misstatement to Council is not valid. When Ciocan was responding to Investigator Hess she was not responding to Council. Rather she was responding to FICOM with respect to an investigation regarding the activities of Nukmanovic.

I fully agree that when Ciocan was responding to Investigator Hess she was not responding to Council. Rather, she was responding to FICOM with respect to an investigation regarding the activities of Nukmanovic. The fact that Council was provided with the transcript of her interview to assist in formulating its August 8, 2006 decision is irrelevant.

Thus, I accept the arguments of the Council that Ciocan's misstatements were not misstatements to Council. However, Section 231 (1) (c) of the *Financial Institutions Act* indicates that a breach has occurred when it is determined that the licensee or former licensee:

has made a material misstatement in the application for the license of the licensee or in reply to an inquiry addressed under this Act to the licensee.

My interpretation of this section of the *Act* is that it is not necessary for the material misstatement to be made to the Council. Rather, a breach occurs whenever a material misstatement is made in an inquiry made under the authority of the *Financial Institutions Act*. Clearly, the interview between Investigator Hess and Ciocan was under the authority of the *Financial Institutions Act.* Investigator Hess commenced the interview by introducing himself as an employee of FICOM.

Even if my interpretation of this section of *Act* is incorrect, the evidence shows that Ciocan did repeatedly lie to Investigator Hess during January 19, 2005 interview. This reflects badly on the trustworthiness of a person who is licensed in an industry where trust is the foundation for all dealings.

There is no mention of Ciocan's conduct during the Investigator Hess interview in Council's August 8, 2006 decision. Therefore, I can only conclude that Council ignored this evidence in making its decision. I am of the opinion that this is important evidence and that it was unreasonable for Council to ignore it.

THE ISSUE OF PERSONAL BENEFIT

In its decision of August 8, 2006, the Council has noted that Ciocan was a salaried employee of the Agency and obtained no personal benefit by accepting the signed applications from Nukmanovic. This is an important finding because Council uses it as one of the features that distinguishes this case from the Novko and Pavicic decisions.

While it is acknowledged that Ciocan did not receive a commission on the sales of the policies in question, I believe that it is unreasonable for the Council to conclude that Ciocan obtained no personal benefit from the sale of these policies.

It is obvious that the Agency that employs Ciocan is a commercial enterprise with the objective of producing income for its owners. This income is derived from the sale of insurance policies. Ciocan was hired by the Agency to oversee the Agency's life insurance business. If the Agency sold no life insurance policies there would be no need for a life insurance department and no need for Ciocan to oversee the life insurance activities of the Agency. It is obvious that Ciocan's employment is predicated on the Agency making positive net income from the sale of life insurance policies. In fact, in her interview with Investigator Hess, Ciocan indicated that her employer wanted her to *"grow this department"*. In this sense, every policy sold by the life insurance department provides a small personal benefit for Ciocan. Even though she does not obtain a specific commission on each policy, it is incorrect to conclude that she does not obtain personal benefit from the Agency's sale of these policies.

In this case, the Agency received commissions on the eight policies that were sold and positive net income in the form of commissions. In the absence of wrongful conduct, these increased sales would reflect favorably on Ciocan in the eyes of her employer and in the longer term certainly result in continued employment and likely result in increased salary levels.

OTHER ISSUES

There are two other issues that have been raised which are important in determining the decision of this appeal.

(a) Investigative Costs

It is the normal policy of the Council to assess investigative costs against persons that have been sanctioned through a decision of the Council. The Council's decision of August 8, 2006 sanctioned Ciocan but is silent on the issue of investigative costs.

Counsel for the Superintendent has argued that Ciocan should be assessed the costs of the Council's investigation of this case. Counsel for the Council has indicated that investigative costs are meant to compensate Council for the actual costs of their investigation and not meant to be used as a punitive measure. Moreover, Counsel for the Council has indicated that the Ciocan investigation was conducted in conjunction with a parallel investigation into the actions of the Agency and Wotherspoon. It is further

submitted that Council assessed the total costs of the investigation against Wotherspoon. If this is the case, it would not be appropriate to assess investigative costs against Ciocan.

This information did not form part of the record and accordingly Counsel for the Superintendent submits that the information should not be accepted by the FST. No application for the admission of new evidence was received by the FST.

(b) Ciocan Appearance before the Financial Services Tribunal

In a letter dated January 5, 2007 Counsel for Ciocan has made an application pursuant to Section 242.2 (8) of the *Financial Institutions Act*, for Ciocan to appear before the FST. It is submitted that this appearance would allow the FST to observe first hand the true measure of Ciocan's remorse and the impact that this matter has had on her.

I fully agree with the Council's finding that Ciocan is very remorseful for her actions. I further agree with Counsel's submission that the process in this matter has adversely affected her. As such, I do not believe that her appearance before the FST would provide a benefit to the FST in making its decision in this case.

PENALTY

The principles regarding the imposition of the appropriate penalty were considered in detail in the Novko case. They are worth repeating here:

In instances of misconduct, the Insurance Council must be mindful of the goals which are achieved through the penalty process. In The Regulation of Professions in Canada, by James T. Casey (2003) at page 14-5, the author reviews the factors that are to be taken into account in determining how the public is best protected from acts of professional misconduct. These factors include specific deterrence of the licensee from engaging in further misconduct, general deterrents of licensees, rehabilitation of the licensee, punishment of the licensee, the denunciation by society of the conduct, the need to maintain the public's confidence of the integrity of the profession's ability to properly supervise the conduct of its members, and the avoidance of imposing penalties which are disparate with penalties imposed in other cases".

The Appellant and the Respondents have submitted a number of cases that are suggested as being suitable precedents for determining the penalty in this case including the Novko and Pavicic cases. I am of the view that the Novko case and the Pavicic case are the most suitable cases for comparison for two reasons. First, the issues involved in those two cases are virtually identical to those involved in this case. Second, Council has made specific reference to these cases when imposing the penalty on Ciocan.

In addition, the Council Bulletin of April 2006 has provided me with an understanding regarding the appropriate penalties for falsely executed documents.

(a) Council Bulletin

In the Bulletin a document is described as being falsely executed when one of the following three actions has taken place: a person's signature is forged on the document, a person signs as witness when he or she was not present when the document was being executed; or, when a person processes the document knowing a signature has been forged or the document was improperly witnessed. Clearly, the actions of Ciocan are actions two and three of this description.

The Council indicated that falsely executing a document and forwarding it to an insurer is misrepresentation and calls into question a person's trustworthiness. It was further stated that the documentation in question must be reliable because it is used by insurance underwriters and claims adjustors. A falsely executed document can have unforeseen consequences for the insurer, client, beneficiary or other parties.

The Council indicated that it was issuing the Bulletin because it was encountering an alarming number of these incidents. It also indicated that it was imposing stronger penalties to deter the offenders from further misconduct, deter all licensees from similar misconduct and to protect the public interest and promote confidence in the insurance industry.

The Bulletin indicates that first time offences of this nature will result in a minimum fine of $500. The Bulletin strongly implies that this minimum fine will only be imposed where the misconduct was taken without the intent of personal gain and all other factors have been favorable.

There are three reasons why I believe that the penalty suggested in this Bulletin does not apply to Ciocan. First, although this was a first time offence, there were multiple instances of misconduct involving eight different insurance applications. Second, as outlined previously in this decision I believe the Council erred in finding that Ciocan did not undertake her activities without the intent of personal gain. Finally, I am of the view that all other factors are not favorable. The evidence indicates that Ciocan repeatedly lied to Investigator Hess of FICOM.

The actions of Ciocan suggest a penalty well in excess of the minimum penalty suggested by the Council in this Bulletin.

(b) Novko

In Novko case, Mr. Novko signed five insurance applications as agent and signed as "witness" to applicant signatures on transactional documents without having witnessed the signatures and without having met or discussed the transactions with any of the applicants. He then remitted the documents to insurers for placement of coverage under his agent contract.

Mr. Novko received the applications and transactional documentation from Nukmanovic. Nukomanovic indicated that she was currently unlicensed with Council, but had taken the applications while licensed and was in the process of becoming re-licensed with Council. Mr. Novko did not contact the Council to determine Nukmanovic's licensing history. Mr. Novko paid nine hundred dollars to Nukmanovic for her activities.

The dates on the transactional documents were between July 28, 2003 and July 31, 2003. Nukomanovic's license from the Council expired on April 30, 2003. The dates of the transactional documents indicate that Nukmanovic was not licensed when taking the applications as she alleged.

A February 28, 2005 decision of the Council found that Mr. Novko committed two breaches of section 231 (1) (a) of the *Act* in that he did not act in good faith and in accordance with the usual practice of the business of insurance as required under Council Rule 3 and that he compensated an unlicensed person for carrying on activities which require an insurance license contrary to Council Rule 7.

The Council ordered that:

1. Mr. Novko's license be suspended for two weeks;
2. Mr. Novko be fined the sum of one thousand dollars;
3. Mr. Novko pay the cost of the Council's investigation, assessed at $912.50; and
4. the costs and fine be paid by May 28, 2005 failing which Mr. Novko's license be further suspended.

The Superintendent appealed this decision of Council to the FST. The facts of the matter were not in dispute. The Appeal was made on the grounds that the penalty imposed by Council was inadequate under the circumstances.

The FST rendered the following decision on August 22, 2005:

1. The suspension of Mr. Novko's license be increased from two weeks to sixty days;
2. The fine, investigative costs and the time for payment imposed by the Council remain unchanged; and
3. No costs be assessed in relation to this Appeal.

It is very useful to compare in detail the findings in Novko and the findings in Ciocan:

1. Novko participated in wrongful conduct with respect to five insurance applications. Ciocan signed five insurance applications as a witness for applicant signatures without having met the applicants.

2. Novko did not verify the licensing status of Nukmanovic. Ciocan was asked by her employer to work with Nukmanovic. I believe it was reasonable for Ciocan to rely on her employer to conduct the necessary due diligence when entering into the agreement with Nukmanovic.

3. Novko paid $900 to Nukmanovic for her activities. Since Nukmanovic was not licensed this was breach of the Section 178 or the *Financial Institutions Act* and Council Rule 7. In the case of Ciocan, the responsibility for any compensation arrangements with Nukmanovic rested with her employer. Ciocan was unaware of any compensation agreement between Wotherspoon and Nukmanovic.

4. Prior to the Council's awareness of the matter, Novko conducted an "after the fact" review and analysis of each applicant's circumstances. This was considered a mitigating factor. On the instructions of her employer, Ciocan conducted "an after the fact " review and analysis of each applicant's circumstances.

5. Novko expressed remorse for his activities. Ciocan has expressed remorse for her activities.

The FST reached the following conclusion in the Novko case:

These breaches go to the heart of the integrity of the insurance application process. Not only must the penalty imposed against Mr. Novko reflect the seriousness of the breaches but also the penalty must act as a deterrent against further breaches of the Act by Mr. Novko as well as similar potential breaches of the Act by other insurance licensees. The failure by the Insurance Council to address these principles in assessing the penalty against Mr. Novko could have the effect of reducing the deterrence factor against similar breaches or reducing the public's confidence in the administration of the insurance processes in effect in this Province.

The FST concluded that a suspension of 60 days was necessary under the circumstances.

(c) Pavicic

The circumstances of the Pavicic case are almost identical to those of the Novko case. Ms. Pavicic signed five insurance applications and a basic disclosure statement as the agent and signed as "witness" to applicant signatures on transactional documentation without having witnessed the signatures and without having met or discussed the transactions with any of the applicants. She then remitted the documents to insurers for placement of coverage under her agent contract.

Ms. Pavicic received the applications and transactional documentation from Nukmanovic. Nukomanovic indicated that she was currently unlicensed with Council, but had taken the applications while licensed and was in the process of becoming re-licensed with Council. Ms. Pavicic did not contact the Council to determine Nukmanovic's licensing history. Ms. Pavicic paid Nukomanovic $312 for her activities.

The dates on the transactional documents were between May 27, 2003 and July 11, 2003. Nukomanovic's license from the Council expired on April 30, 2003. The dates of the transactional documents indicate that Nukmanovic was not licensed when taking the applications as she alleged.

A February 28, 2005 decision of the Council found that Mr. Pavicic committed two breaches of section 231 (1) (a) of the *Financial Institutions Act* in that she did not act in good faith and in accordance with the usual practice of the business of insurance as required under Council Rule 3 and that she compensated an unlicensed person for carrying on activities that require an insurance license contrary to Council Rule 7.

The Council ordered that:

1. Ms. Pavicic's license be suspended for two weeks;
2. Ms. Pavicic be fined the sum of one thousand dollars;
3. Ms. Pavicic pay the cost of the Council's investigation, assessed at $1,237.50; and
4. the costs and fine be paid by May 28, 2005 failing which Ms. Pavicic's license be further suspended.

The Superintendent appealed this decision of Council to the FST. The facts of the matter were not in dispute. The Appeal was made on the grounds that the penalty imposed by Council was inadequate under the circumstances.

The FST rendered the following decision on November 22, 2005:
1. The Appellant's submission for leave for late filing of the Notice of Appeal be approved;
2. The Appellant's submission for the introduction of new evidence be approved;
3. The suspension of Mr. Pavicic's license be increased from two weeks to thirty days;
4. The fine, investigative costs and the time for payment imposed by the Council remain unchanged; and
5. No costs be assessed in relation to this Appeal.

It is also useful to compare in detail the findings in Pavicic and the findings in this case.

1. Pavicic did not verify the licensing status of Nukmanovic although she made efforts at the start of her association with Nukmanovic to verify information. Ciocan was asked by her employer to work with Nukmanovic. I believe it was reasonable for Ciocan to rely on her employer to conduct the necessary due diligence when entering into the agreement with Nukmanovic.

2. Pavicic signed five insurance applications as witness without meeting the applicants and remitted the documents to insurers for placement of coverage. Ciocan signed five insurance applications as a witness for applicant signatures without having met any of the applicants.

3. Pavicic paid $312 to Nukmanovic for her activities. Since Nukmanovic was not licensed this was breach of the Section 178 or the *Financial Institutions Act* and Council Rule 7. In the case of Ciocan, the responsibility for any compensation arrangements with Nukmanovic rested with her employer. Ciocan was unaware of any compensation agreement between Wotherspoon and Nukmanovic.

4. As a mitigating factor, Pavicic was remorseful for her actions. Ciocan was remorseful for her actions.

5. As a mitigating factor, Council found that Pavicic reported the circumstances of her misconduct to Council and sought direction before Council became aware of her misconduct. She cooperated fully with Council. Ciocan, on the other hand, did not report her misconduct to Council when she became aware in November 2004 that Nukmanovic was unlicensed. In fact, she lied to Investigator Hess of FICOM about her involvement with Nukmanovic during her interview of January 2005. Ciocan only cooperated with Council after Investigator Hess exposed her misstatements.

6. As a mitigating factor, Pavicic made an effort to contact the applicants after she signed the documents to undertake the needs assessments. On the instructions of her employer, Ciocan conducted an "after the fact" review and analysis of each applicant's circumstances.

7. There was no evidence to support the submission that no clients or insurers were harmed by Pavicic's actions. There is no evidence to support the Respondent's submissions that no one was harmed by Ciocan's actions. The Bulletin of Council indicates that a falsely executed insurance document can have unforeseen consequences for the insurer, client, beneficiary or other parties.

(d) Conclusion on Penalty

The Novko, Pavicic and Ciocan cases are very similar. They all involve the creation of falsely executed insurance documents and the submission of these documents to insurers. All cases involve multiple instances of misconduct.

Novko and Pavicic also involve a breach of Section 178 of the *Financial Institutions Act* in that compensation was paid to an unlicensed individual for carrying out insurance activities. This breach was not present in the case of Ciocan.

In Novko the suspension imposed by the FST was increased from the two weeks imposed by the Council to 60 days. In Pavicic the suspension imposed by the FST was increased from the two weeks imposed by the Council to 30 days. The primary distinguishing feature in Pavicic was that Pavicic reported her misconduct to Council before it was discovered.

A distinguishing feature in Ciocan was that Ciocan deceived her employer with respect to her misconduct for a period of four months. Moreover, Ciocan repeatedly lied to the FICOM investigator when questioned about her activities. This is a breach of Section 231 of the *Financial Institutions Act.* I view this as a serious breach as it calls into question the integrity and trustworthiness of Ciocan.

I, therefore, believe a suitable penalty for Ciocan is a license suspension of 60 days. In addition, I believe it is appropriate that Ciocan be required to pay outstanding investigative costs, if any, related to this case.

COSTS OF APPEAL

The Appellant and the Respondents are seeking costs. In addition, Counsel for the Council is seeking that the costs of the FST in conducting this appeal be levied against the Appellant on the grounds of abuse of process.

I do not believe there has been any abuse of process in this case. Furthermore, I note that costs were not awarded in the case of Novko or Pavicic. No costs are awarded in this case.

DECISION

I order that:

1. The application pursuant to Section 242.2 (8) of the *Financial Institutions Act*, for Ciocan to appear before the FST be refused;

2. The penalty imposed on Ciocan by Council be varied from a fine of $1,000 to include a fine of $1,000 and a suspension of 60 days;

3. Any outstanding investigative costs incurred by Council related to this case be assessed against Ciocan; and,

4. No costs be assessed in relation to this appeal.

DATED AT SURREY, BRITISH COLUMBIA, THE 8TH DAY OF FEBRUARY, 2007.

FOR THE FINANCIAL SERVICES TRIBUNAL

ROBERT J. HOBART
PRESIDING MEMBER