

No. 2023-8097

**Official Order
of the
Texas Commissioner of Insurance**

Date: 7/27/2023

Subject Considered:

Texas Department of Insurance v.
Irma Graciela Gutierrez

SOAH Docket No. 454-21-0506.C

General Remarks and Official Action Taken:

The subject of this order is Irma Graciela Gutierrez's general lines agent license with a life, accident, health, and HMO qualification and a property and casualty qualification. This order adopts the administrative law judge's recommendation that no disciplinary action be imposed on Ms. Gutierrez.

Background

After proper notice was given, the above-styled case was heard by an administrative law judge for the State Office of Administrative Hearings. The administrative law judge made and filed a proposal for decision finding no violation of the insurance laws as alleged by TDI Enforcement and recommending that no disciplinary action be imposed.

TDI Enforcement filed exceptions to the administrative law judge's proposal for decision. Ms. Gutierrez filed a reply to the exceptions.

In response to the exceptions, the administrative law judge issued an amended proposal for decision. A copy of the amended proposal for decision is attached as Exhibit A.

For the reasons set forth in this order, the administrative law judge's proposed findings of fact and conclusions of law, with changes to Findings of Facts Nos. 1, 8, and 9, are adopted by the commissioner.

Legal Authority for Changes to Findings of Fact and Conclusions of Law

The legal authority for the changes to the amended proposal for decision made in this order is Tex. Gov't Code § 2001.058(e)(1) and (3), which provide that "[a] state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines . . . that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies [of the agency], or prior administrative decisions . . . or . . . that a technical error in a finding of fact should be changed."

Analysis

Texas Insurance Code § 4001.101(c)

In her analysis of Tex. Ins. Code § 4001.101, the administrative law judge states that subsection (c) of the section applies to licensed agents, including Ms. Gutierrez, and concluded that Ms. Gutierrez did not violate subsection (c) because she did not appoint Ms. Rivera or any other unlicensed person to act as an agent. This is an incorrect interpretation of subsection (c), which by its express language, prohibits an insurer, not a licensed agent, from appointing an unlicensed or uncertified person to act as an agent.¹ Thus, Tex. Ins. Code § 4001.101(c) does not apply to Ms. Gutierrez. Because the administrative law judge did not apply § 4001.101(c) to find any violation by Ms. Gutierrez, no changes to the findings of fact or conclusions of law relating to Tex. Ins. Code § 4001.101(c) are necessary.

Finding of Fact No. 1

Proposed Finding of Fact No. 1 states that Ms. Gutierrez holds a general lines agent license with a life, accident, health, HMO, property, and casualty qualification originally issued on December 1, 1999. This date is correct for the life, accident, health, and HMO qualification, but the property and casualty qualification was issued on March 6, 2002, as stated in factual allegation No. 1 as included in the Second Amended Petition. Finding of Fact No. 1 as adopted by this order is revised to correct this error.

¹ Tex. Ins. Code § 4001.101(c) states, "An insurer described by Subsection (b) may not appoint a person to act as its agent unless the person holds: (1) a license under this title; and (2) if required by rules adopted under Chapter 4008, a certificate to sell a designated product or product line."

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Findings of Fact Nos. 8 and 9

Proposed Findings of Fact Nos. 8 and 9 misspell Ms. Gonzalez as "Ms. Gonzales."
Findings of Fact Nos. 8 and 9 as adopted by this order are revised to correct this error.

Findings of Fact

1. Findings of Fact Nos. 2–7, 8a, and 10–23 as contained in Exhibit A are adopted by the commissioner and incorporated by reference into this order.
2. In place of Finding of Fact No. 1 as contained in Exhibit A, the following finding of fact is adopted:

Respondent Irma Graciela Gutierrez holds a general lines agent license with a life, accident, health, and health maintenance organization qualification, originally issued by the Texas Department of Insurance (Department) on December 1, 1999, and a property and casualty qualification originally issued by the Department on March 6, 2002.

5. In place of Finding of Fact No. 8 as contained in Exhibit A, the following finding of fact is adopted:

Ten of the Policies were submitted under Ms. Gonzalez's bind ID between noon on September 19, 2017, and 12:45 p.m. on September 20, 2017.

6. In place of Finding of Fact No. 9 as contained in Exhibit A, the following finding of fact is adopted:

Ms. Gonzalez was out of the office from noon September 19, 2017, to noon September 20, 2017.


Conclusions of Law

The conclusions of law contained in Exhibit A are adopted by the commissioner and incorporated by reference into this order.

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Order


No disciplinary action is imposed on Irma Graciela Gutierrez.

DocuSigned by:

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Cassie Brown
Commissioner of Insurance

Recommended and reviewed by:

DocuSigned by:

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Jessica Barta, General Counsel

DocuSigned by:

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Taryn Lam, Attorney

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4/22/2022 1:38 PM
STATE OFFICE OF
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Pegah Nasrollahzadeh, CLERK



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ADMINISTRATIVE HEARINGS
Pegah Nasrollahzadeh, CLERK

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

Exhibit A

April 22, 2022

Cassie Brown
Commissioner of Insurance
Texas Department of Insurance
333 Guadalupe, Tower 1, 13th Floor, Mail Code 113-2A
Austin, TX 78714

VIA E-FILE TEXAS

**RE: Docket No. 454-21-0506.C; Texas Department of Insurance
v. Irma Graciela Gutierrez**

Dear Commissioner Brown:

On March 7, 2022, a Proposal for Decision (PFD) was issued in this case. In Order No. 8 issued March 14, 2022, the deadline for filing exceptions to the PFD was extended. On March 29, 2022, Staff (Staff) of the Texas Department of Insurance (Department) timely filed exceptions to the PFD. Irma Graciela Gutierrez (Respondent) did not file exceptions but timely filed a reply to Staff's exceptions on April 13, 2022, which was in support of the PFD. I have reviewed Staff's exceptions and Respondent's response; and I make the following changes to the Proposal for Decision.

Staff requests modifications to Finding of Fact No. 8 and requests that additional Findings of Fact be adopted. These requested modifications and additions are appropriate, in principle, and should be made to the Proposal for Decision. Consequently, minor alterations reflecting the requested modifications and additions are also necessary in the Evidence and Analysis sections. This does not change my overall conclusion that the Department's allegations are not supported by the preponderant evidence, nor my recommendation that no disciplinary action be imposed on Respondent.

Accordingly, I would make the following amendments to the evidence, analysis, and findings of fact set forth in the PFD:

Evidence:

- Modify the Evidence section's fourth paragraph, last sentence, to state: "Wrapping up her discussion of bind IDs, Ms. Gold explained Allstate's table of policies

investigated, which showed that ~~all~~ ten of the thirteen policies were completed with Ms. Gonzalez's bind ID (no. 0A4389) and three were completed with Ms. Gutierrez's."

Analysis:

- Modify the Analysis section's Fraud and Misrepresentation subsection, sixth bulleted paragraph, to state: "~~All~~ Ten of the policies in question were submitted under Ms. Gonzales's bind ID in a single 24-hour period, on September 19-20, 2017, when Ms. Gonzales said she was out of the office and may have left her computer logged-in. Ms. Gold explained, and Allstate's investigation found, that ten of the thirteen policies were ~~all~~ submitted on September 19-20, 2017.¹¹⁰ Ms. Gonzalez's medical records show she was at the doctor on September 20, 2017; and she testified that she was out of the office that day and the previous afternoon.¹¹¹ She speculated that she may have remained logged-in while she was out those days. And Ms. Gonzalez, Ms. Gutierrez, and Ms. Olmos all testified that Allstate's system had, on occasion, kept them logged-in even though they had logged out."

Findings of Fact:

- Modify Finding of Fact No. 8, to state: "~~All~~ Ten of the Policies were submitted under Ms. Gonzales's bind ID ~~in a single 24 hour period,~~ between noon on September 19, 2017, ~~to noon~~ and 12:45 p.m. on September 20, 2017."
- Add a new Finding of Fact No. 8a: "Three of the Policies were submitted under Respondent's bind ID, on September 19, 2017, October 31, 2017, and November 7, 2017."
- Modify Finding of Fact No. 12, to state: "Ms. Gonzalez's and Ms. Gutierrez's bind IDs and passwords were available to Ms. Rivera."

With these changes, the Proposal for Decision is ready for your review and I recommend its adoption as modified above.

Sincerely,



Heather Hunziker
Administrative Law Judge

2023-8097

Exceptions Letter

April 22, 2022

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xc: Sydney Moore, Staff Attorney, Texas Department of Insurance, 333 Guadalupe, Tower 1, 13th Floor, Austin, Texas 78701- **VIA E-FILE TEXAS**
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**SOAH DOCKET NO. 454-21-0506.C
TDI FILE NO. 18605**

TEXAS DEPARTMENT OF INSURANCE, Petitioner	§	BEFORE THE STATE OFFICE
	§	
	§	
	§	
v.	§	OF
	§	
IRMA GRACIELA GUTIERREZ, Respondent	§	ADMINISTRATIVE HEARINGS

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**SOAH DOCKET NO. 454-21-0506.C
TDI FILE NO. 18605**

TEXAS DEPARTMENT OF INSURANCE, Petitioner	§	BEFORE THE STATE OFFICE
	§	
	§	
	§	
v.	§	OF
	§	
IRMA GRACIELA GUTIERREZ, Respondent	§	ADMINISTRATIVE HEARINGS

AMENDED PROPOSAL FOR DECISION

The Staff (Staff) of the Texas Department of Insurance (Department) brought this enforcement action seeking to revoke the general lines agent license held by Irma Graciela Gutierrez and impose an administrative penalty upon her. Staff alleges that Ms. Gutierrez violated the Texas Insurance Code by submitting renter’s insurance policy applications without the knowledge and consent of the insured and allowing an unlicensed employee to perform the duties of an insurance agent. The Administrative Law Judge (ALJ) finds that Staff failed to prove its allegations and recommends that no disciplinary action be imposed on Ms. Gutierrez.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There are no disputed issues of notice or jurisdiction in this case. Therefore, those matters are addressed in the findings of fact and conclusions of law without further discussion here.

When initially referred to the State Office of Administrative Hearings (SOAH), the named respondents in this case included both Ms. Gutierrez and her daughter and employee, Clarisa Dane Gonzalez.¹ On September 8, 2021, in SOAH Order No. 5, the ALJ dismissed Ms. Gonzalez and all claims against her.

¹ See SOAH Order No. 1, issued November 4, 2020.

The hearing on the merits was held via Zoom videoconference on November 17, 2021, before ALJ Heather D. Hunziker. Staff appeared and was represented by Staff Attorney Sydney Moore. Ms. Gutierrez was represented by attorney Rodney Montes. The record closed on January 7, 2022, upon filing of written closing briefs.²

II. APPLICABLE LAW

The Texas Insurance Code authorizes the Department to regulate the business of insurance in this state and to take disciplinary action against agents who violate the law or rules related to insurance.³ In particular, the Department may take disciplinary action against a license holder for willfully violating an insurance law of this state; engaging in fraudulent or dishonest acts or practices; and materially misrepresenting the terms and conditions of an insurance policy or contract.⁴ An agent of an insurer authorized to do business in Texas may not appoint an unlicensed, uncertified person to perform the duties of a licensed agent.⁵ Staff bears the burden of proof on these allegations by a preponderance of the evidence.⁶

If an agent is found to be in violation of the Texas Insurance Code or the Department's rules, the Department's Commissioner (Commissioner) may revoke the agent's license or certificate.⁷ In addition, the Commissioner may suspend the license for a up to a year; order the license holder to cease and desist from the activity determined to be a violation; assess an administrative penalty; direct the license holder to make restitution; reprimand the license holder;

² SOAH Order No. 7, issued November 19, 2021, held the record open for replies to closing arguments until January 7, 2022. Staff filed its closing brief on December 22, 2021; Ms. Gutierrez filed her closing brief on December 22, 2021, and her reply brief on January 7, 2022.

³ Tex. Ins. Code §§ 31.002(1), (3), 4005.102.

⁴ Tex. Ins. Code § 4005.101(b)(1), (5), (6).

⁵ Tex. Ins. Code § 4001.101(c).

⁶ 1 Tex. Admin. Code § 155.427; *See Granek v. Texas St. Bd. of Med. Examn'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.) (in rejecting application of higher proof standard, observing that “agency license-revocation proceedings are civil in nature [and] that in civil cases, no doctrine is more firmly established than that issues of fact are resolved by a preponderance of the evidence” (internal citations and quotations omitted)).

⁷ Tex. Ins. Code §§ 82.051, 4005.102(2).

require the license holder to qualify, or re-qualify, for a certificate to sell a product or product line; or any combination of those actions.⁸

III. EVIDENCE, ARGUMENT, AND ANALYSIS

Ms. Gutierrez holds a general lines agent license originally issued by the Department in 1999, with a qualification for life, accident, health, health maintenance organization, property, and casualty.⁹

At the hearing, Staff offered two exhibits, which were admitted, and presented the testimony of two witnesses: (1) Allstate investigator Megan Gold; and (2) Ms. Gutierrez's former employee, Briana Rivera. Ms. Gutierrez offered one exhibit, which was admitted over objection except for subpart L, for which the objection was sustained.¹⁰ Ms. Gutierrez testified on her own behalf and presented the testimony of five other witnesses: (1) Ms. Gonzalez; (2) customer and relative Andrea Gutierrez (hereinafter referred to as Witness Gutierrez); (3) character witness Sally Olmos; (4) character witness Elizabeth Perez; and (5) character witness Lisa Hinojosa.

A. Evidence

1. Testimony of Megan Gold

⁸ Tex. Ins. Code §§ 82.052-.053, 84.021, 4005.102. The penalty amount must be based on numerous factors, including: (1) the seriousness of the violation, including its nature, circumstances, extent, and gravity, and the hazard or potential hazard created to the health, safety, or economic welfare of the public; (2) the economic harm to the public interest or public confidence caused by the violation; (3) the history of previous violations; (4) the amount necessary to deter a future violation; (5) efforts to correct the violation; (6) whether the violation was intentional; and (7) any other matter that justice may require. Tex. Ins. Code § 84.022.

⁹ Department's Closing Brief at 2; Ms. Gutierrez's Closing Brief at 1.

¹⁰ Gutierrez Exhibit 1 consists of 21 documents, 20 of which were admitted, that Ms. Gutierrez submitted to the Department in response to the Department's allegations. The admitted documents include six letters of reference—all positive—describing Ms. Gutierrez as honorable, professional, ethical, and dependable. Gutierrez Exhibits 1H, 1I, 1J, 1K, 1M, and 1N.

Ms. Gold is an investigator for Allstate. She supervised Allstate's 2018 investigation into the alleged falsification of renter's insurance policy applications by Ms. Gutierrez's agency while Ms. Gutierrez's agency had a contract with Allstate to sell insurance products.¹¹

Ms. Gold testified that Allstate's investigation began when an Allstate audit identified thirteen insurance policies issued out of Ms. Gutierrez's office in November 2017 that were terminated without any coverage, seven of which were paid from the same or similar bank account.¹² That triggered Allstate to investigate because, according to Ms. Gold, it is unusual to have so many customers terminate without any type of payment or coverage and can indicate that customers have not actually consented to those policies.¹³ Additionally, it would be unusual for seven people to have their policies paid from the same bank account if they are unrelated to each other, which could indicate that those policies were paid by someone in the agency.¹⁴

By comparing the insureds' addresses, Ms. Gold said Allstate found that a number of them appeared to have family relationships to either the agent, other individuals in the agency, or employees of the agency.¹⁵ Additionally, Allstate found that the first policy payment from the bank account common to many of the policies took place in January 2016—over a year and a half before the policies in question issued.¹⁶

Ms. Gold explained policy "binding," which is how Allstate determines which agent each policy is associated with. Allstate issues each individual in the agency a user identification called a "bind ID," "binding ID," or a "subproducer code," so that Allstate can identify who in the agency issued a specific policy.¹⁷ According to Ms. Gold, Allstate determined that individuals in Ms. Gutierrez's agency did not share bind IDs, which Allstate took to indicate that whoever's

¹¹ See Department Ex. 1 (Allstate Investigation Report).

¹² Transcript (Tr.) at 15-16.

¹³ Tr. at 16.

¹⁴ *Id.*

¹⁵ Tr. at 19.

¹⁶ Tr. at 19-20.

¹⁷ Tr. at 20-21.

bind ID or subproducer code was on the policy was the person who wrote the policy.¹⁸ Admitting that she has never logged into Allstate's system with a bind ID because she is not an agent, Ms. Gold described the procedure for a licensed agent to log into Allstate's policy-creating system as a two-factor authentication system, with the bind ID and a password, as well as an individually-assigned "VIP number" or "VIP code."¹⁹ She said the VIP code could be on someone's mobile phone or a key fob. While Ms. Gold was unaware which version Ms. Gutierrez's agency used, she was confident that VIP codes were used there.²⁰ She opined that, with an agent's bind ID and password, and key fob or VIP code, anyone could probably log into Allstate's system.²¹ Wrapping up her discussion of bind IDs, Ms. Gold explained Allstate's table of policies investigated, which showed that ten of the thirteen policies were completed with Ms. Gonzalez's bind ID (no. 0A4389) and three were completed with Ms. Gutierrez's.²²

Ms. Gold stated that Allstate's table of policies investigated also lists the bank account and insured address provided for each policy in question.²³ As is clear from the table, seven policies used the same bank account (ending in 1208).²⁴ She noted that the bank account had first been used in January 2016 on a policy issued by Ms. Gonzalez; and it was subsequently used ten more times for policies issued by Ms. Gonzalez and Ms. Gutierrez before being used on the 2017 policies in question.²⁵ On cross examination, Ms. Gold conceded that no payment was ever made from that common bank account on the policies in question.²⁶

Ms. Gold testified that, as for the customers and addresses listed on the policies in question, Allstate's investigator determined many of them were related to Ms. Gutierrez.²⁷ Ms. Gutierrez

¹⁸ Tr. at 21.

¹⁹ Tr. at 22-23.

²⁰ Tr. at 23-24, 34.

²¹ Tr. at 24.

²² Department Ex. 1 at 119-120; Tr. at 25-26.

²³ Tr. at 25-26, 40-41.

²⁴ Department Ex. 1 at 119-120; Tr. at 25-27, 40-41.

²⁵ Tr. at 32-33.

²⁶ Tr. at 41-42.

²⁷ Tr. at 25-27, 40-41.

owned one of the properties and was “listed on the audit as the property address [owner] for” two more; and one of the properties was associated with her daughter, Ms. Gonzalez.²⁸ However, on cross examination, Ms. Gold conceded that the named individuals in eight of the policies under investigation were actually relatives of *Ms. Rivera’s* ex-boyfriend or otherwise related to *Ms. Rivera*, and not related to Ms. Gutierrez or her daughter.²⁹ Yet, Ms. Gold said Witness Gutierrez and Ms. Rivera—each named as the insured on a policy in question—told Allstate’s investigator that they did not purchase renter’s policies.³⁰

On cross examination, Ms. Gold agreed that nine of the ten policies that were voided by Allstate were submitted on the same afternoon, September 19, 2017, between noon and 6:32 p.m., and the tenth was submitted around noon the next day.³¹

According to Ms. Gold, Ms. Gonzalez and Ms. Gutierrez told Allstate they did not recognize the bank account number common to seven policies and surmised that Ms. Rivera might have improperly issued the policies using Ms. Gonzalez’s login credentials.³² Ms. Gold acknowledged that Ms. Gonzalez’s bind ID was used for nine of the policies in question;³³ but she noted that, as the lead agent, Ms. Gutierrez was expected to monitor the policies that issued from her agency on a daily or weekly basis.³⁴ Ms. Gold was skeptical that someone else could have accessed the system with Ms. Gonzalez’s login information without Ms. Gonzalez’s or Ms. Gutierrez’s knowledge.³⁵

²⁸ Tr. at 35.

²⁹ Department Ex. 1 at 123-124; Tr at 47-52.

³⁰ Tr. at 29-30.

³¹ Tr. at 57-59. The policy holders named in the September 19, 2017 policies were: America Castanera, Christian Castanera, Emmanuel Rivera, Andrea Gutierrez, Clarisa Gonzales, Castaneda Cirlo, Cirlo and America Castaneda, Brianna Rivera, and Guillermina Granados. Department Ex. 1 at 19, 27, 35, 43, 51, 59, 67, 75, 83.

³² Tr. at 30-31, 34.

³³ Tr. at 52-53. And, of the thirteen policies in question, only ten were voided by Allstate. Department Ex. 1 at 119-120; Tr. at 53-54.

³⁴ Tr. at 28-29.

³⁵ Tr. at 31-32.

Ms. Gold speculated that benefits to an agent of creating false policies and then terminating them could include commission or an increase in the agent's bonus or policy issuance count—depending on the agency's compensation structure.³⁶ Benefits to customers could include lower premiums with multi-policy discounts, which would remain for a minimum of six months.³⁷ Ms. Gold opined that such benefits could be retained by the agency and customers even if the policies are terminated; however, she admitted being unfamiliar with the “chargeback scheme” (that is, the system of recompense when a policy terminates before being paid).³⁸ And, according to Ms. Gold, Ms. Gutierrez had suggested Ms. Rivera might have been incentivized to create the policies by the agency's spa day incentive (rewarding staff for increased sales with a spa day) or extra paid time off.³⁹ On cross examination, Ms. Gold admitted that Ms. Rivera's ex-boyfriend would have benefited from the multi-policy discount by having renter's insurance issued in his name and cancelled without payment.⁴⁰

Ms. Gold testified that, based on its investigation, Allstate concluded Ms. Gutierrez and Ms. Gonzales created the false renter's policies without the customers' knowledge or consent; and the evidence supported the termination of Ms. Gutierrez's agency agreement with Allstate and the revocation of Ms. Gonzalez's authority to issue policies or handle Allstate business.⁴¹

2. Testimony of Briana Rivera

Ms. Rivera worked as a receptionist for Ms. Gutierrez, who was a friend of her mother's, from February 2017 to January 2018.⁴² She testified that her job duties included answering phones, data entry, and taking payments.⁴³ She said she has never held an insurance license, but when she

³⁶ Tr. at 17.

³⁷ Tr. at 17, 39-40.

³⁸ Tr. at 17, 40.

³⁹ Tr. at 34-35.

⁴⁰ Tr. at 63.

⁴¹ Department Ex. 1 at 10; Tr. at 20, 35-36.

⁴² Tr. at 68-69.

⁴³ Tr. at 69, 89.

was hired she was told Ms. Gutierrez would help her obtain one.⁴⁴ According to Ms. Rivera, she was initially given books to study and other licensing support, but such assistance faded as her time at the agency passed.⁴⁵

As far as computer access, Ms. Rivera said her specific login identification only allowed her to take payments and review policies that had already been created.⁴⁶ However, she testified she was given, and would use, the agents' passwords and login information to "be able to do any sort of thing that a licensed person could have done" when the agents were not in the office.⁴⁷ This included entering policy information such as names, addresses, vehicles, and payment information; and getting the client's physical signature, in person, in order to bind the policy.⁴⁸ Ms. Rivera revealed that she even worked, at times, on other employees' computers, using their login credentials; and she claimed this was done with the permission of Ms. Gutierrez or Ms. Gonzalez.⁴⁹ In order to get into their accounts, she said, Ms. Gutierrez or Ms. Gonzalez would give her their VIP codes.⁵⁰ According to Ms. Rivera, she was never able to log in under the agents' names without their knowledge or consent, or without asking them for their VIP codes.⁵¹ However, on cross-examination Ms. Rivera agreed that: (1) if an agent was already logged-in, Ms. Rivera would not need the agent's VIP code to access Allstate's system on the agent's computer; and (2) once someone is logged-in with the VIP code, they stay logged in.⁵²

Ms. Rivera described a time when, around the Fourth of July weekend, she was in the office alone and the agents asked her to assist with completing a policy for a customer and taking

⁴⁴ Tr. at 69-70.

⁴⁵ Tr. at 70.

⁴⁶ Tr. at 70-71.

⁴⁷ Tr. at 71.

⁴⁸ Tr. at 89, 99. Ms. Rivera recalled that payment information like bank account and debit card numbers was saved in the system and could be selected from later. Tr. at 99.

⁴⁹ Tr. at 71.

⁵⁰ Tr. at 71-72.

⁵¹ Tr. at 72.

⁵² Tr. at 86-87.

payment, by using the agent's login information.⁵³ During that time, she said she took care of customers who came in, including adding and removing vehicles from a policy; and she noted that the work she was doing was "basically like if I was licensed."⁵⁴ Ms. Rivera stated she got approval for all of the things she was doing in the office; however, she also explained that if the task was something she was able to do, then she would do it without asking an agent.⁵⁵ She clarified that if it the task was creating a new policy "or anything like that," it was first sent to Ms. Gonzalez.⁵⁶

Ms. Rivera testified that she was aware that the agency had a multi-policy discount and a competition to get the most multi-policies.⁵⁷ As a result, she said, she would keep a list of the new renter's policies to go back later and cancel them so the insured would not be charged.⁵⁸ Ms. Rivera alleged that the customers were not in the office when the renter's insurance policies were created; but, when questioned whether the policies were being created without customer's knowledge and consent, she did not answer.⁵⁹ She said she never requested the renter's policy that was issued in her name—she had no need for it since she lived with her in-laws at the time—but she did consequently receive a multi-policy discount on her auto insurance.⁶⁰ Ms. Rivera stated that her in-law, America Castaneda, was also unknowingly issued a renter's policy, although as a homeowner and insured with Allstate, Ms. Castaneda would not need renter's insurance.⁶¹

Ms. Rivera discussed her reasons for leaving the agency. She said one reason was that she had "caught on to what was going on . . . [t]he fake policies that were being made."⁶² Another reason was that she had started with hopes of becoming licensed but Ms. Gutierrez eventually

⁵³ Tr. at 72-73.

⁵⁴ Tr. at 73.

⁵⁵ Tr at 73-74.

⁵⁶ Tr. at 74.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Tr. at 75.

⁶⁰ Tr. at 75-76.

⁶¹ Tr. at 76-77.

⁶² Tr. at 79.

stopped training her and hired another licensed employee, Ivette Luna.⁶³ Ms. Rivera said she was doing the work of a licensed agent but not being paid for it; and she described herself as “thrown to the side.”⁶⁴

Ms. Rivera maintained that she did not issue policies for her relatives and did not personally enter information for them.⁶⁵ Although she described keeping a list at work of the policies to cancel and agreed that the policies investigated by Allstate were canceled during her time with the agency, Ms. Rivera did not recall seeing the following people on the list: her ex-boyfriend, Christian; her mother- and sister-in-law, both named America Castaneda; her brother, Emmanuel Rivera; or herself.⁶⁶

Ms. Rivera acknowledged that there were incentives for her if the whole office sold to or got a certain number of clients, including spa days; and she acknowledged getting a spa day.⁶⁷ She stated that she did not get any commission because she was not licensed.⁶⁸ She did not recall asking, as an incentive, for paid time off for a trip to Mexico during Christmas 2017; but she agreed that she had taken the time off, although she could not recall whether she was paid for it.⁶⁹ Ms. Rivera said that she did not create the policies in question to gain any personal or familial benefit.⁷⁰

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Tr. at 79-80.

⁶⁶ Tr. at 92-93. Per Allstate’s tables of potentially policies in question, these individuals were all named as insured with renter’s insurance policies canceled in November 2017. Department Ex. 1 at 119-120, 123-124.

⁶⁷ Tr. at 80, 95.

⁶⁸ Tr. at 94.

⁶⁹ Tr. at 96.

⁷⁰ Tr. at 107

3. Testimony of Irma Gutierrez

Ms. Gutierrez testified that she has been licensed in insurance for over twenty years and worked for several different insurance companies.⁷¹ She said she began with Allstate in 2013; and she contracts directly with Allstate but hires her own staff.⁷² Ms. Gutierrez explained that her duties are producing insurance and providing services; and her licensed sales producer's duties (in 2017 that was Ms. Gonzalez) are selling and providing insurance to customers, taking payments, and filing claims.⁷³

Ms. Gutierrez explained that, in 2017, her commission on a policy was nine to ten percent; Ms. Gonzalez and Ms. Rivera were salaried, but they did not receive commission.⁷⁴ She said if a policy was canceled for non-payment, then the commission was charged back, with no credit given; and such canceled policies hurt her "persistency ratio" or retention ratio, which is used for bonuses, prizes, and other incentives.⁷⁵

Ms. Gutierrez testified that, once Allstate informed her of the investigation, she reviewed her records and found many repetitive names and policies under Ms. Gonzalez's bind ID, naming Ms. Rivera's family members—including several issued and then canceled for the same person.⁷⁶ Ms. Gutierrez opined that the policies in question were created by Ms. Rivera to get paid time off and a spa day.⁷⁷ She noted that Ms. Rivera had returned from Mexico in January 2018 with a bad attitude; and there was conflict between Ms. Rivera and the newly-hired Ms. Luna.⁷⁸

Ms. Gutierrez stated that Ms. Rivera was never given the agents' access codes; but that anyone with credentials for the system would be able to access customers' names, dates of birth,

⁷¹ Tr. at 118-119.

⁷² Tr. at 119-121.

⁷³ Tr. at 120-121.

⁷⁴ Tr. at 122-123.

⁷⁵ Tr. at 123, 125-126.

⁷⁶ Tr. at 134.

⁷⁷ Tr. at 127, 136-137.

⁷⁸ Tr. at 144-145.

and other information, and could use it to create new policies for existing customers.⁷⁹ Similarly, when inputting information into the system, lists of previously used account numbers would auto-populate.⁸⁰ She noted that she had experienced instances when, using Allstate's system, she would sometimes remain logged-in when she had definitely logged off.⁸¹ She observed that Ms. Rivera had occasionally used other employees' computers, when hers was freezing up.⁸² She said Ms. Gonzalez was in and out of the office a lot, and working only half-days, during the timeframe in question because she was having a difficult pregnancy.⁸³

For her part, Ms. Gutierrez testified that she had long-term relationships with customers, billboards, and other ongoing business; so, she had no reason to issue policies without customers' knowledge or consent.⁸⁴ She pointed out that creating false policies for family members would cause familial conflict.⁸⁵ She said that she had never been investigated by the Department before or had any other trouble with Allstate.⁸⁶ Ms. Gutierrez testified that she did not create the policies in question; but because of them she was let go from Allstate and lost her contract, her bonus of around \$47,000, a trip to Dublin, and her office.⁸⁷

4. Testimony of Clarisa Gonzalez

Ms. Gonzalez is Ms. Gutierrez's daughter and was her office manager and licensed sales producer in 2017-2018.⁸⁸ She testified that she was having a very uncomfortable pregnancy in September 2017 and was in and out of the office a lot.⁸⁹ Specifically, she recalled that she was not

⁷⁹ Tr. at 137.

⁸⁰ Tr. at 142.

⁸¹ Tr. at 139.

⁸² Tr. at 140.

⁸³ Tr. at 143-144.

⁸⁴ Tr. at 131.

⁸⁵ Tr. at 132.

⁸⁶ Tr. at 147.

⁸⁷ Tr. at 132-133.

⁸⁸ Tr. at 148.

⁸⁹ Tr. at 151.

in the office on September 20, 2017, because she was visiting her obstetrician, as indicated in her medical records.⁹⁰

Ms. Gonzalez observed that almost all the policies in question that were voided by Allstate were submitted under her bind ID between September 19-20, 2017.⁹¹ She affirmed that she did not go into the office or write any policies on September 20, 2017; and stated that, although one of the policies in question was issued under her individual bind ID on September 20, 2017, it could not have been her that issued it since she was not in the office.⁹² Similarly, she said she was only in the office on the *morning* of September 19, 2017, so she could not have submitted policies in the afternoon; but it is possible that she did not log out of her computer when she left.⁹³ She also pointed out that she already had renter's insurance at that time; so the policy in question in her name was unwarranted.⁹⁴

Ms. Gonzalez stated that Ms. Rivera frequently used others' computers in the office because of issues with her own computer.⁹⁵ Ms. Gonzalez said her personal login information would sometimes be retained in Allstate's login system, which she noticed occasionally upon returning from lunch or other brief absences from her desk; and that might have allowed someone else to use her information.⁹⁶ Ms. Gonzalez accused Ms. Rivera of lying about being given Ms. Gutierrez's and Ms. Gonzalez's system access information to complete policies while they were out of the office; and Ms. Gonzalez pointed out that, when not in the office, Ms. Gonzalez did not work because she just wanted to relax and rest.⁹⁷

⁹⁰ Tr. at 153-154. *See* Gutierrez Ex. 1E at 15.

⁹¹ Tr. at 152.

⁹² Tr. at 154.

⁹³ Tr. at 162-163.

⁹⁴ Tr. at 154-155.

⁹⁵ Tr. at 155-156.

⁹⁶ Tr. at 157.

⁹⁷ Tr. at 158-159, 163.

Ms. Gonzalez concluded her testimony by stating that her mother, Ms. Gutierrez, is a wonderful agent.⁹⁸ And she confirmed that any cancelled policy would be charged back to the agent without commission.⁹⁹

5. Testimony of Andrea Gutierrez

Witness Gutierrez is Ms. Gutierrez's sister-in-law and was an insurance client in 2017-2018.¹⁰⁰ She pointed out that she did not need renter's insurance at that time because she lived with her mom; so the policy in question listing her as insured was unwarranted.¹⁰¹ Witness Gutierrez stated that she does not believe that Ms. Gutierrez would "put everything in jeopardy by doing this."¹⁰² She speculated that, by issuing policies without the knowledge or consent of the insured, Ms. Gutierrez would lose not only business, but also family, because she insures family members.¹⁰³ Witness Gutierrez described Ms. Gutierrez as very professional and always there for clients.¹⁰⁴

6. Testimony of Sally Olmos, Elizabeth Perez, and Lisa Hinojosa

Ms. Olmos is an agency owner, formerly with Allstate, who has known Ms. Gutierrez for five or six years. Ms. Perez worked with Ms. Gutierrez as a staff agent in another insurance office for over five years. Ms. Hinojosa worked with Ms. Gutierrez in a State Farm Insurance office and has known her since they were teenagers. All three women served as character witnesses for Ms. Gutierrez, describing her as reliable, ethical, and professional.¹⁰⁵

⁹⁸ Tr. at 161-162.

⁹⁹ Tr. at 149-150.

¹⁰⁰ Tr. at 168.

¹⁰¹ Tr. at 167.

¹⁰² Tr. at 168.

¹⁰³ Tr. at 169.

¹⁰⁴ Tr. at 170.

¹⁰⁵ Gutierrez Exs. 1I and 1J; Tr. at 187, 188, 193, 194, 196.

Ms. Olmos, Ms. Perez, and Ms. Hinojosa agreed that that there is no benefit to an agent for issuing a non-paid policy; and policies cancelled without payment would not be credited to the agent for end of the year bonuses or prizes, and would negatively affect the agent's persistency ratios.¹⁰⁶ Ms. Olmos and Ms. Perez confirmed that when a policy is cancelled for non-payment, it looks bad and any commission paid to the agent for that policy would be charged back to the agent.¹⁰⁷ Ms. Olmos called Ms. Gutierrez the victim in this situation.¹⁰⁸

Ms. Olmos additionally noted, from her own experience as an agent using Allstate's system, that she would sometimes remain logged-in when she thought she had logged off.¹⁰⁹

B. Analysis

1. Fraud and Misrepresentation

Staff seeks to discipline Ms. Gutierrez for engaging in fraudulent or dishonest acts in violation of the Texas Insurance Code, and materially misrepresenting the terms and conditions of an insurance policy or contract, by submitting renter's insurance policy applications without the knowledge and consent of the insured.

There is conflicting evidence in this case, and much is unclear about what happened at Ms. Gutierrez's agency in autumn 2017. However, the following is clear from the evidence:

- **In 2017-2018, Ms. Gutierrez was an Allstate agent, and Ms. Gonzalez and Ms. Rivera worked for her.**
- **Multiple policies were issued that were not requested by the named individuals.** Ms. Rivera, Ms. Gonzalez, and Witness Gutierrez all testified that renter's insurance policies were submitted in their names; but they neither requested the policies, nor needed renter's insurance. Ms. Rivera testified that her parents were likewise surprised to discover that renter's insurance had been submitted in their names.

¹⁰⁶ Tr. at 182-183, 184, 188-190, 195.

¹⁰⁷ Tr. at 174, 181-182, 188-189.

¹⁰⁸ Tr. at 175.

¹⁰⁹ Tr. at 177.

- **Ms. Rivera had access to clients' information, including Ms. Gonzalez's.** Ms. Gutierrez testified that names, addresses, payment information, and vehicle information, from pre-existing clients was in the system and available to anyone with Allstate credentials. Ms. Rivera confirmed that she could access such information, as well as payment information, with her Allstate credentials. Ms. Gonzalez testified to having a renter's policy. Witness Gutierrez, the only named insured with no connection to Ms. Rivera or the office, may similarly have had her information available in the system, through her pre-existing insurance policy.
- **Eight of the ten named insureds were related to Ms. Rivera; whereas only two insureds were related to Ms. Gutierrez.** Ms. Gold confirmed these relationships. Ms. Rivera's relatives' addresses and other information may have been available to her from their other policies with Allstate for which their information would be in the system, as evidenced by Ms. Gold's statement that they would benefit from multi-policy discounts.
- **Ms. Gutierrez and Ms. Gonzalez each testified that they did not submit the policies in question.**
- **Ten of the policies in question were submitted under Ms. Gonzales's bind ID in a single 24-hour period, on September 19-20, 2017, when Ms. Gonzales said she was out of the office and may have left her computer logged-in.** Ms. Gold explained, and Allstate's investigation found, that ten of the thirteen policies were submitted on September 19-20, 2017.¹¹⁰ Ms. Gonzalez's medical records show she was at the doctor on September 20, 2017; and she testified that she was out of the office that day and the previous afternoon.¹¹¹ She speculated that she may have remained logged-in while she was out those days. And Ms. Gonzalez, Ms. Gutierrez, and Ms. Olmos all testified that Allstate's system had, on occasion, kept them logged-in even though they had logged out.
- **Ms. Rivera had access to Ms. Gonzalez's computer and, possibly, her login information.** Ms. Gutierrez and Ms. Gonzalez concurred with Ms. Rivera that she would occasionally use their computers. According to Ms. Gold, Allstate's investigation determined that individuals in Ms. Gutierrez's agency did not share bind IDs. Nevertheless, while it is unclear whether Ms. Gonzalez's bind ID and passwords were freely shared or merely left logged-in, Ms. Rivera testified that they were available to her.
- **Many of the policies in question were associated with the same bank account; and bank account numbers auto-populated.** Ms. Gold stated, and Allstate's investigation found, that seven of the policies listed the same bank account.¹¹² She added that the bank account was used in 2016 for a policy that was not in question; therefore, it was

¹¹⁰ See Department Ex. 1 at 19, 27, 35, 43, 51, 59, 67, 75, 83.

¹¹¹ Gutierrez Exhibit 1E at 15.

¹¹² See Department Ex. 1 at 119.

already in Allstate's system. Ms. Gutierrez testified that bank account numbers would auto-populate in their system; and Ms. Rivera recalled bank account and debit card numbers being saved in the system to be selected from later.

- **Ms. Rivera had incentive to submit the policies in question.** Ms. Rivera, Ms. Gutierrez, and Ms. Gonzalez all testified about the agency's spa day incentive; and Ms. Gutierrez said Ms. Rivera requested time off related to the agency's sales. Multiple agent witnesses discussed the multi-policy discount; and Ms. Gold said it applied to Ms. Rivera's ex-boyfriend and his relatives who were named in the policies in question. Moreover, as Ms. Rivera testified, she was upset about a new employee seeming to usurp her role, and about not being trained as she had expected to be.
- **Ms. Gutierrez had no incentive to submit the policies in question.** Despite the speculation of Ms. Gold, who is not an agent, that Ms. Gutierrez stood to gain commission off the policies, numerous agent witnesses confirmed that any such commission would be charged back. Furthermore, Ms. Olmos, Ms. Perez, and Ms. Hinojosa agreed with Ms. Gutierrez that canceled policies would not be credited to her for year-end bonuses or prizes and would negatively affect her persistency ratios. Additionally, both Ms. Gutierrez and Witness Gutierrez testified that business and family would be lost if Ms. Gutierrez created policies for her family members without their knowledge or consent.
- **Ms. Gutierrez was described as ethical and professional by Ms. Olmos, Ms. Perez, Ms. Hinojosa, and four additional authors of recommendation letters.**¹¹³

Based on this evidence, The ALJ finds that renter's insurance policy applications were submitted without the knowledge and consent of the insured; however, the preponderance of the evidence does not indicate that Ms. Gutierrez submitted the applications. Accordingly, Staff has not established a basis for disciplining Ms. Gutierrez under Texas Insurance Code section 4005.101(b)(5) or (6).

2. Willful Violation of Insurance Law

Staff seeks to discipline Ms. Gutierrez for willfully violating an insurance law of this state, in violation of Texas Insurance Code section 4001.101. Staff alleges, or at least infers, that Ms. Rivera solicited or received applications for insurance and/or aided in the transaction of the business of insurance; and that Ms. Gutierrez somehow, thereby, violated Texas Insurance Code

¹¹³ See Gutierrez Exhibits 1H, 1K, 1M, and 1N.

section 4001.101. However, that section's strictures against such activities, found in subsections (a) and (b), apply to only the *unlicensed* person (here, Ms. Rivera) performing the unauthorized activities.¹¹⁴ The only part of section 4001.101 that applies to licensed agents, including Ms. Gutierrez, is section 4001.101(c), which states: "An [insurer authorized to engage in business in this state] may not appoint a person to act as its agent unless the person holds: a license"¹¹⁵

The ALJ did not find credible Ms. Rivera's testimony that she was given Ms. Gutierrez's and Ms. Gonzalez's information to log into Allstate's system. On the contrary, Ms. Gutierrez and Ms. Gonzalez provided credible testimony that Ms. Rivera was not given any login information and they did not authorize her to submit claims. According to Ms. Gold, Allstate determined that individuals in Ms. Gutierrez's agency did not share bind IDs. The ALJ finds the preponderant evidence does not indicate that Ms. Gutierrez appointed Ms. Rivera, or any other unlicensed person, to act as an agent in violation of Texas Insurance Code section 4001.101(c). Accordingly, Staff has not established a basis for disciplining Ms. Gutierrez under Texas Insurance Code section 4005.101(b)(1).

B. Conclusion

For the reasons stated above, the ALJ concludes that the Department's allegations are not supported by the preponderant evidence and recommends that no disciplinary action be imposed on Ms. Gutierrez. The ALJ proposes the following Findings of Fact and Conclusions of Law.

IV. FINDINGS OF FACT

1. Respondent Irma Graciela Gutierrez holds a general lines agent license with a life, accident, health, health maintenance organization, property, and casualty qualification, originally issued by the Texas Department of Insurance (Department) on December 1, 1999.
2. In 2017-2018, Ms. Gutierrez had a contract with Allstate to sell insurance products, and Clarisa Gonzalez and Briana Rivera worked for her.

¹¹⁴ See Tex. Ins. Code § 4001.101(a)-(b).

¹¹⁵ Tex. Ins. Code § 4001.101(c).

3. Allstate began an investigation into Ms. Gutierrez when an Allstate audit identified thirteen renter's insurance policies (the Policies) issued out of Ms. Gutierrez's office in November 2017 that were terminated without any coverage, seven of which were paid from the same or similar bank account.
4. Many of the Policies were submitted from Ms. Gutierrez's agency without the knowledge or consent of the individuals insured (Insureds).
5. Allstate's investigation uncovered that the first policy payment from the bank account that was common to many of the Policies took place in January 2016.
6. Eight Insureds were related to Ms. Rivera; two Insureds were related to Ms. Gutierrez.
7. Ms. Rivera had access to clients' information, including names, addresses, dates of birth, and payment information.
8. Ten of the Policies were submitted under Ms. Gonzales's bind ID between noon on September 19, 2017, and 12:45 p.m. on September 20, 2017.
- 8a. Three of the Policies were submitted under Respondent's bind ID, on September 19, 2017, October 31, 2017, and November 7, 2017.
9. Ms. Gonzales was out of the office from noon September 19, 2017, to noon September 20, 2017.
10. On occasion, in 2017, Allstate's system kept agents logged-in even after they logged out.
11. Ms. Rivera had access to Ms. Gonzalez's computer and used it occasionally.
12. Ms. Gonzalez's and Ms. Gutierrez's bind IDs and passwords were available to Ms. Rivera.
13. Allstate's computer system saved bank account and debit card numbers in the data fields, to be selected from later.
14. Ms. Rivera had incentive to submit the Policies, including a spa day incentive, time off, and multi-policy discounts for relatives; and she was upset about her position at Ms. Gutierrez's agency.
15. Ms. Gutierrez had no incentive to submit policies that would be canceled without payment. She was not in a position to gain commission, credit for her for year-end bonuses, or prizes off such policies; and they would negatively affect her persistency ratios. Additionally, if Ms. Gutierrez created policies for her family members without their knowledge or consent, it might negatively impact both her business and her family relations.
16. Seven people described Ms. Gutierrez as ethical and professional.
17. Ms. Gutierrez did not submit the Policies.

18. Ms. Gutierrez did not knowingly give Ms. Rivera her access codes or login information for Allstate's system, or authorize Ms. Rivera to submit claims.
19. Ms. Gutierrez did not appoint Ms. Rivera, or any other unlicensed person, to act as an agent.
20. On September 9, 2021, the Department mailed an Amended Notice of Hearing to Ms. Gutierrez. The notice contained a statement of the time and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted or an attachment that incorporated by reference the factual matters asserted in the complaint or petition filed with the state agency.
21. On September 8, 2021, SOAH Order No. 5 set the matter for hearing by Zoom videoconference on November 17, 2021.
22. Together, the Department's notice and SOAH Order No. 5 advised the parties of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted or an attachment that incorporated by reference the factual matters asserted in the complaint or petition filed with the state agency.
23. The hearing on the merits was held via Zoom videoconference on November 17, 2021, before State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) Heather D. Hunziker. Staff appeared and was represented by Staff Attorney Sydney Moore. Ms. Gutierrez was represented by attorney Rodney Montes. The parties submitted post-hearing briefing, and the record closed January 7, 2022.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter of this proceeding. Tex. Ins. Code §§ 4001.002, 4005.102.
2. SOAH has jurisdiction over all matters relating to the conduct of the proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003; Tex. Ins. Code §§ 84.043, 4005.104.
3. Adequate and timely notice of the hearing was provided. Tex. Gov't Code §§ 2001.051-.052; Tex. Ins. Code § 4005.104(b).
4. Staff had the burden of proof by a preponderance of the evidence to establish grounds for disciplinary action. 1 Tex. Admin Code § 155.427; *Granek v. Texas St. Bd. of Med. Examin'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.).

5. Staff did not establish that Ms. Gutierrez willfully violated an insurance law of this state in violation of Texas Insurance Code § 4005.101(b)(1).
6. Staff did not establish that Ms. Gutierrez engaged in fraudulent or dishonest acts or practices in violation of Texas Insurance Code § 4005.101(b)(5).
7. Staff did not establish that Ms. Gutierrez materially misrepresented the terms and conditions of an insurance policy or contract in violation of Texas Insurance Code § 4005.101(b)(6).
8. Ms. Gutierrez's license should not be revoked, and no administrative penalty should be imposed.

SIGNED April 22, 2022.



**HEATHER HUNZIKER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**