No. **2021-6775**

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

**Date: 04/07/2021**

**Subject Considered:**

Texas Department of Insurance
v.
Cody Trace Forcade

SOAH Docket No. 454-20-3957.C

**General remarks and official action taken:**

The subject of this order is Cody Trace Forcade's application for a general lines agent license with a life, accident, and health qualification. The Texas Department of Insurance (TDI) grants Mr. Forcade's license application with a two-year probated suspension.

## Background

After proper notice was given, this case was heard by an administrative law judge (ALJ) for the State Office of Administrative Hearings. The ALJ made and filed a proposal for decision containing findings of fact and conclusions of law. A copy of the proposal for decision is attached as Exhibit A.

Staff for TDI filed exceptions to the ALJ's proposal for decision. In response to the exceptions, the ALJ agreed to propose two additional conclusions of law and to remove Conclusion of Law No. 9, but otherwise made no revisions to the proposal for decision. A copy of the ALJ's response to exceptions is attached as Exhibit B.

TDI adopts the ALJ's proposed findings of fact and conclusions of law, as modified by Exhibit B, but with changes to Finding of Fact No. 5 and Conclusion of Law No. 7 as described in this order. TDI also adopts new Conclusion of Law No. 6.1 as described in this order. TDI grants Mr. Forcade's license application, but with a two-year probated suspension.

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

The legal authority for the changes to the proposal for decision made in this order is TEX. GOV'T CODE § 2001.058(e)(1), which provides 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...."

## Analysis

Texas Insurance Code § 4005.101(b)(8)

TEX. INS. CODE § 4005.101 provides grounds on which TDI may deny a license to a license applicant. Under paragraph (b)(5), TDI may deny a license if it determines the applicant "has engaged in fraudulent or dishonest acts or practices[.]" And under paragraph (b)(8), TDI may deny a license if it determines the applicant "has been convicted of a felony[.]" TDI sought to deny Mr. Forcade's license application under both paragraphs (b)(5) and (b)(8).

The ALJ concluded that TDI staff met its burden to show that Mr. Forcade did engage in dishonest acts or practices, as contemplated in TEX. INS. CODE § 4005.101(b)(5), but that staff failed to show that he was convicted of a felony. Thus, the ALJ concluded that TEX. INS. CODE § 4005.101(b)(8) was not a proper basis to deny Mr. Forcade's license application.

The circumstances of Mr. Forcade's criminal conduct are described in detail in the proposal for decision, and they will not be repeated in full here. But on March 27, 2019, Mr. Forcade pleaded guilty to facilitation to commit burglary in Arizona. This offense was classified as a class 6 felony under Arizona law, and it carried a presumptive sentence of one year in prison. ARIZ. REV. STAT. § 13-702(D).[1] However, pursuant to Arizona law, the trial court sentenced Mr. Forcade to probation and left the offense undesignated, subject to later designation as a misdemeanor upon the successful completion of probation. *See id*. § 13-604 (court "may place the defendant on probation

[1]This offense would also qualify as a felony under Texas law. *See* Tex. Pen. Code § 1.07(a)(23) ("'Felony' means an offense so designated by law or punishable by death or confinement in a penitentiary.").

. . . and refrain from designating the offense as a felony or misdemeanor until the probation is terminated.").

The ALJ concluded, based entirely on Mr. Forcade's testimony[2], that he successfully completed probation and his offense is now designated as a misdemeanor.[3] Because Mr. Forcade's offense was initially undesignated and ultimately designated as a misdemeanor, the ALJ concluded that Mr. Forcade had not been convicted of a felony for purposes of TEX. INS. CODE § 4005.101(b)(8). But Arizona law provides that an undesignated offense "shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor." *Id*. Based on that Arizona law, the department was correct to invoke TEX. INS. CODE

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[2] TDI staff takes issue with the fact that the ALJ relied entirely on Mr. Forcade's testimony that he had successfully completed his probation and the sentencing court had designated the offense as a misdemeanor. Mr. Forcade did not enter into the record any documentation to support his testimony, though the hearing transcript shows that he did offer to provide TDI staff with supporting documentation from the Arizona court. *See* Transcript of Hearing Proceedings, 38-39 (July 28, 2020). Nevertheless, the ALJ concluded that Mr. Forcade's testimony was evidence in and of itself and that he had testified truthfully. *See Ex parte Jackson*, 470 S.W.2d 679, 682 (Tex. Crim. App. 1971) ("'Testimony' is evidence given by a competent witness under oath or affirmation as distinguished from evidence derived from writing and other sources.").

A presiding ALJ is generally in a better position than the Commissioner to judge a witness's credibility. That is certainly true when the hearing is conducted in person or even by video. *See Yarborough v. State*, No. 14-00-00929-CR, 2001 WL 1386441 at 4 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (not designated for publication) ("The trier of fact has the opportunity to observe the demeanor of the witnesses on the stand and is able to better judge their credibility."); *see also Manzi v. State*, 88 S.W.3d 240, 248 (Tex. Crim. App. 2002) (Womack, J., concurring) ("variations in demeanor and tone of voice . . . bear so heavily on the listener's understanding of and belief in what is said").

In this case, however, the hearing was conducted over the phone, so the ALJ never had the opportunity to observe Mr. Forcade's demeanor. Based on that, it is reasonable to question whether the ALJ's determination regarding Mr. Forcade's credibility should be entitled to the same level of deference as it would had the hearing been conducted in person or over video. *See In re Navajo Nation*, 587 S.W.3d 883, 890 (Tex. App.—Amarillo 2019, no pet.) ("[H]aving material witnesses appear telephonically would make credibility and reliability determinations difficult, or impossible, for the fact finder."). But upon further review of the record, the ALJ's credibility determination is left undisturbed.

[3] The record does not indicate when that designation occurred, but it is clear that the earliest it could have happened was after Mr. Forcade successfully completed his one-year probation term.

§ 4005.101(b)(8) in seeking to deny Mr. Forcade's application because he was considered to be convicted of a felony at the time his application was submitted to TDI.

In *Canava v. Department of Homeland Security*, 817 F.3d 1348 (Fed. Cir. 2016), the Federal Circuit Court of Appeals considered a question similar to the one presented here. Federal law mandates the removal of law enforcement officers who are "convicted of a felony." 5 U.S.C. § 7371. The officer in question in *Canava* had pleaded guilty to an offense that was classified under Arizona law as a felony, but like with Mr. Forcade, the Arizona court left the offense undesignated. The officer's employing agency moved to remove him from his post claiming he had been convicted of a felony. The officer contended that since the offense was left undesignated, he was never actually convicted of a felony. The Federal Circuit ultimately disagreed with the officer, ruling that he was convicted of a felony and subject to removal under federal law because his undesignated offense was to be treated as a felony under Arizona law.

The Federal Circuit's analysis in *Canava* is sound, and when applied to the case at hand, it becomes clear that because Mr. Forcade's undesignated offense was to be treated as a felony, he had been convicted of a felony for purposes of TEX. INS. CODE § 4005.101(b)(8) at the time he submitted his license application to TDI. It was not until the hearing took place that Mr. Forcade testified that his offense had been designated as a misdemeanor. Therefore, TDI was correct in seeking to deny Mr. Forcade's application under TEX. INS. CODE § 4005.101(b)(8). The ALJ's proposal for decision is changed accordingly, as described below.

The ALJ's proposed Finding of Fact No. 5 states:

> On March 27, 2019, pursuant to a plea bargain, Mr. Forcade pleaded guilty to and was convicted on a charge of "facilitation to commit" burglary and received one year of supervised probation. At time of sentencing, the offense was left undesignated as either a felony or misdemeanor but was ultimately designated a misdemeanor after Mr. Forcade successfully completed his probation.

Based on the analysis above showing the ALJ misinterpreted or misapplied the law, Finding of Fact No. 5 is changed to state:

> On March 27, 2019, pursuant to a plea bargain, Mr. Forcade pleaded guilty to and was convicted on a charge of "facilitation to commit" burglary, a class six felony, and received one year of supervised probation. At time of sentencing,

> the offense was left undesignated as either a felony or misdemeanor but was ultimately designated a misdemeanor after Mr. Forcade successfully completed his probation.

Based on the analysis above showing the ALJ misinterpreted or misapplied the law, new Conclusion of Law No. 6.1 is adopted:

> Mr. Forcade was considered to be convicted of a felony until the Arizona court actually entered an order designating his offense a misdemeanor. ARIZ. REV. STAT. § 13-604.

The ALJ's proposed Conclusion of Law No. 7 states:

> Staff met its burden to show that Mr. Forcade engaged in "dishonest acts or practices" within the meaning of Texas Insurance Code § 4005.101(b)(5). Staff did not meet its burden to show that Mr. Forcade was convicted of a felony within the meaning of Texas Insurance Code § 4005.101(b)(8).

Based on the analysis above showing the ALJ misinterpreted or misapplied the law, Conclusion of Law No. 7 is changed to state:

> Staff met its burden to show that Mr. Forcade engaged in "dishonest acts or practices" within the meaning of Texas Insurance Code § 4005.101(b)(5). Staff met its burden to show that Mr. Forcade was convicted of a felony at the time his application was submitted to TDI within the meaning of Texas Insurance Code § 4005.101(b)(8).

Texas Occupations Code §§ 53.022 – 53.023 and 28 TAC § 1.502

TDI may not issue Mr. Forcade a license unless the factors specified in TEX. OCC. CODE §§ 53.022-53.023 and 28 TAC § 1.502(h) outweigh the serious nature of his offense when viewed in light of the occupation being licensed. *See* 28 TAC § 1.502(f). State law and TDI rules require that all applicable factors must be weighed in determining an applicant's fitness for licensure. *See* TEX. OCC. CODE §§ 53.022-53.023(a) (stating that "the licensing authority shall consider" enumerated factors) (emphasis added); 28 TAC § 1.502(h)(1)-(2) (stating that "the department shall consider" enumerated factors) (emphasis added). Thus, a failure to properly weigh all applicable factors is a misapplication of law and agency rules that could warrant changes to the proposal for decision under TEX. GOV'T CODE § 2001.058(e)(1).

In this case, TDI staff assert that the ALJ failed to weigh several applicable factors. The ALJ purported to engage in the required analysis and concluded that the factors outweigh the serious nature of Mr. Forcade's offense and that he is fit to perform the duties and discharge the responsibilities of a licensed insurance agent. Upon closer examination of the proposal for decision, however, it is not clear that the ALJ actually weighed all applicable factors in reaching his conclusion.[4] In some cases, this would necessitate changes to the proposal for decision or a remand to the ALJ for further hearing. *See* TEX. INS. CODE § 40.059(d); 28 TAC § 1.90(g)(6). But in this case TDI has reviewed the record and weighed all applicable factors, and still agrees with the ALJ's conclusion. Therefore, changes to the proposal for decision or remand for further hearing is not warranted.

While the factors overall weigh in favor of granting Mr. Forcade a license, one specific factor that weighs against Mr. Forcade is particularly noteworthy in this case: the amount of time that has elapsed since Mr. Forcade's last criminal activity. TEX. OCC. CODE § 53.023(a)(3); 28 TAC § 1.502(h)(2)(C). On or about April 9, 2018, Mr. Forcade committed the criminal act for which he was convicted on March 27, 2019. He applied for licensure on April 2, 2019, a little less than a year after he committed the criminal act and a mere six days after being convicted. The hearing in this case took place approximately 16 months after he was convicted and only a few months after he presumably completed probation. In light of the short amount of time that elapsed since Mr. Forcade's last criminal activity, TDI finds that Mr. Forcade's license should be placed on probated suspension for two years.

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[4] The ALJ notes, correctly, that the application of the factors is not formulaic. However, a nonformulaic approach does not mean applicable factors may be disregarded. Based on the evidence cited in the proposal for decision, an inference can be made that the ALJ may have considered the applicable factors when drafting his proposal for decision. But, in addition to satisfying the requirements of statute and rule, an actual discussion of the ALJ's consideration of all applicable factors assists the agency in understanding the ALJ's recommended findings and conclusions when making a final determination.

## Findings of Fact

1. Findings of Fact Nos. 1 through 4 and 6 through 11 as contained in Exhibit A are adopted by the Texas Department of Insurance and incorporated by reference into this order.

2. In place of Finding of Fact No. 5 as proposed in Exhibit A, TDI adopts the following finding of fact:

   On March 27, 2019, pursuant to a plea bargain, Mr. Forcade pleaded guilty to and was convicted on a charge of "facilitation to commit" burglary, a class six felony, and received one year of supervised probation. At time of sentencing, the offense was left undesignated as either a felony or misdemeanor but was ultimately designated a misdemeanor after Mr. Forcade successfully completed his probation.

## Conclusions of Law

1. Conclusions of Law Nos. 1 through 6, 7.1, 8, 8.1, and 10 as contained in Exhibit A and revised consistent with Exhibit B are adopted by the Texas Department of Insurance and incorporated by reference into this order.

2. TDI adopts the following as Conclusion of Law No. 6.1:

   Mr. Forcade was considered to be convicted of a felony until the Arizona sentencing court actually entered an order designating his offense a misdemeanor. ARIZ. REV. STAT. § 13-604.

3. In place of Conclusion of Law No. 7 as proposed in Exhibit A, TDI adopts the following conclusion of law:

   Staff met its burden to show that Mr. Forcade engaged in "dishonest acts or practices" within the meaning of Texas Insurance Code § 4005.101(b)(5). Staff met its burden to show that Mr. Forcade was convicted of a felony at the time his application was submitted to TDI within the meaning of Texas Insurance Code § 4005.101(b)(8).

4. Conclusion of Law No. 9 is deleted, consistent with Exhibit B.

## Order

It is ordered that Cody Trace Forcade's application for a general lines agent license with a life, accident, and health qualification is granted.

It is further ordered that Mr. Forcade's license is suspended for two years. The suspension is probated for this amount of time, and during the period of probation, Mr. Forcade must comply with the following terms and conditions:

If, during the probation period imposed by this order, the department issues any additional licenses or authorizations to Mr. Forcade, those additional licenses or authorizations will be suspended until the probation period imposed by this order has ended. The suspension will be probated, and the same terms and conditions stated in this order will apply.

Beginning from the date of this order and continuing through the probation period, Mr. Forcade must provide written notice of his criminal record to any appointing company, agency, employer, sponsor, or other entity on behalf of which he performs the acts of an agent. Mr. Forcade must provide the department with a copy of the notification within 30 days of the appointment, employment, or sponsorship by emailing it to TDI at EnforcementReports@tdi.texas.gov.

Beginning from the date of this order and continuing through the probation period, Mr. Forcade must file a written report, on or before the 15th day of the month on a quarterly basis for the months of April, July, October, and January, with TDI by emailing it to EnforcementReports@tdi.texas.gov.

The reports must include the following information:

a. Mr. Forcade's current mailing address and telephone number;

b. the name, mailing address, and telephone number of Mr. Forcade's employer, and if Mr. Forcade is self-employed, a statement that he is self-employed and the name, mailing address, and telephone number of his business;

c. the name and address of any insurer which has appointed Mr. Forcade as an agent;

d. the name and address of any insurer which has cancelled Mr. Forcade's appointment as an agent; and

e. a copy of any and all contracts Mr. Forcade has entered into with an insurer, broker, agent, agency, managing general agent, or any other person or entity in the business of insurance.

Mr. Forcade must notify TDI immediately of the following by emailing EnforcementReports@tdi.texas.gov:

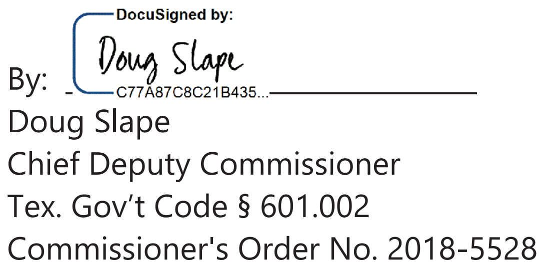
a. any charges or indictments filed against him for a misdemeanor or felony during the period he is required to file reports, excluding traffic offenses and Class C misdemeanors;

b. any state or regulatory actions taken against him including formal and informal actions;

c. any change in his employment or his residence; and

d. any complaint made against Mr. Forcade concerning his performance as an agent, as well as a written explanation detailing the steps taken to resolve it.

Commissioner of Insurance

By: 


Doug Slape
Chief Deputy Commissioner
Tex. Gov't Code § 601.002
Commissioner's Order No. 2018-5528

Recommended and reviewed by:

James Person, General Counsel

Justin Beam, Assistant General Counsel

2021-6775

Exhibit A

**SOAH DOCKET NO. 454-20-3957.C**

| | | |
|---|---|---|
| **TEXAS DEPARTMENT OF INSURANCE,** Petitioner | § | **BEFORE THE STATE OFFICE** |
| | § | |
| | § | |
| **v.** | § | **OF** |
| | § | |
| **CODY TRACE FORCADE,** | § | |
| Respondent | § | **ADMINISTRATIVE HEARINGS** |

## PROPOSAL FOR DECISION

The staff (Staff) of the Texas Department of Insurance (Department) seeks to deny the application of Cody Trace Forcade for a general-lines-agent license with a life, accident, and health qualification. Staff's asserted grounds for denial are predicated on a 2018 Arizona burglary-related offense to which Mr. Forcade pleaded guilty and received a single year of probation. After considering the evidence and the applicable law, the Administrative Law Judge (ALJ) recommends that the Department grant Mr. Forcade's license application.

## I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing on the merits was held by telephone on July 28, 2020, before ALJ Robert Pemberton. Staff was represented by Allison Anglin and Patrick Quigley, while Mr. Forcade represented himself. The hearing concluded that same day and the record closed on August 19, 2020, with the filing of the hearing transcript. Notice and jurisdiction were not disputed and are thus addressed solely in the Findings of Fact and Conclusions of Law, below.

## II. DISCUSSION

### A. Relevant Licensing Law

Staff has alleged two bases for the Department's authority to deny Mr. Forcade's license application[1]: (1) that Mr. Forcade "has been convicted of a felony" within the meaning of Texas

[1] Staff Ex. 1 at Bates TDI 006 (alleging only these two statutory grounds as "acts for which a license may be denied").

Insurance Code § 4005.101(b)(8);[2] and/or (2) that "[b]ased on [Mr. Forcade's] criminal history, he engaged in fraudulent or dishonest acts or practices" within the meaning of Texas Insurance Code § 4005.101(b)(5).[3] The Department's exercise of any such authority is governed by 28 Texas Administrative Code § 1.502, titled "Licensing Persons With Criminal Backgrounds."[4] Subsection (h) of Rule 1.502 requires that the Department "will consider the factors specified in Texas Occupations Code §§ 53.022 and 53.023 in determining whether to grant [or] deny . . . any license or authorization under its jurisdiction."[5] Texas Occupations Code §§ 53.022 and 53.023 are key components of Occupations Code Chapter 53, the regime of requirements and limitations that generally govern state "licensing authorities," such as the Department, when determining whether to deny or revoke licensure based upon an individual's criminal history.

Section 53.022 prescribes factors that a licensing authority must consider in determining whether a criminal conviction "directly relates to the duties and responsibilities of the licensed occupation."[6] Section 53.023 then prescribes additional factors, in the nature of mitigating circumstances and other considerations that may bear upon the individual's fitness for licensure despite having criminal history, that the licensing authority must weigh in its ultimate determination to deny or revoke licensure based on the criminal history.[7] Rule 1.502 prohibits the Department from issuing a license despite criminal history "unless the commissioner [of insurance] finds that the matters set out in subsection (h) of this [rule] outweigh the serious nature of the criminal offense when viewed in light of the occupation being licensed."[8]

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[2] Tex. Ins. Code § 4005.101(b)(8) ("The department may deny a license application . . . if the department determines that the applicant . . . has been convicted of a felony").

[3] *Id.* § 4005.101(b)(5) (similarly authorizing license denial where Department determines that the applicant "has engaged in fraudulent or dishonest acts or practices").

[4] 28 Tex. Admin. Code § 1.502.

[5] *Id.* § 1.502(h).

[6] *See* Tex. Occ. Code § 53.022; *see also id.* § 53.0211 (generally requiring that, "[n]otwithstanding any [other] law," "a licensing authority shall issue to an otherwise qualified applicant" either the license for which the applicant applied or a provisional license, despite criminal history, "unless the applicant has been convicted of an offense described by Section 53.021(a)," which include "an offense that directly relates to the duties and responsibilities of the licensed occupation").

[7] *See id.* § 53.023.

[8] 28 Tex. Admin. Code § 1.502(f).

In addition to cross-referencing Occupations Code Sections 53.022 and 53.023, Subsection (h) of Rule 1.502 explicitly incorporates their substance and virtually all of their wording, albeit in the versions that applied prior to the Legislature's recent amendments that took effect on September 1, 2019:

> (1) In determining whether a criminal offense directly relates to the duties and responsibilities of the licensed occupation, the department shall consider the following factors:
>
> (A) the nature and seriousness of the crime;
>
> (B) the relationship of the crime to the purposes for requiring a license to engage in the occupation;
>
> (C) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and
>
> (D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the licensed occupation.
>
> (2) In addition to the factors listed in paragraph (1) . . . the department shall consider the following evidence in determining the fitness to perform the duties and discharge the responsibilities of the licensed occupation of a person who has committed a crime:
>
> (A) the extent and nature of the person's past criminal activity;
>
> (B) the age of the person when the crime was committed;
>
> (C) the amount of time that has elapsed since the person's last criminal activity;
>
> (D) the conduct and work activity of the person prior to and following the criminal activity;
>
> (E) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or following release;
>
> (F) other evidence of the person's present fitness, including letters of recommendation . . . .
>
> (G) . . . proof that the applicant . . . has:

(i) maintained a record of steady employment;
(ii) supported . . . dependents where applicable;
(iii) otherwise maintained a record of good conduct; and
(iv) paid all outstanding court costs, supervision fees, fines, and restitution.

(3) It shall be the responsibility of the applicant . . . to the extent possible to secure and provide to the commissioner the information required by paragraph (2) of this subsection.[9]

Because Mr. Forcade submitted his license application prior to the effective date of the 2019 amendments, his application continues to be governed by the prior versions of Sections 53.022 and 53.023.[10] Consequently, the ALJ has no occasion to address the extent of any inconsistencies between Subsection (h)'s text and the amended Sections 53.022 and 53.023, or the implications.

The analysis under Subsection (h) and Sections 53.022 and 53.023 must also take account of certain "guideline" crimes, identified in Subsection (e) of Rule 1.502, that the Department "considers to be of such serious nature that they are prime importance in determining fitness for licensure or authorization."[11] Staff has alleged three such categories of crimes here: (1) "an offense with the essential elements of . . . a burglary offense, as described by Penal Code, Chapter 30"[12]; (2) "any offense for which fraud, dishonesty, or deceit is an essential element"[13]; and (3) "any felony involving moral turpitude or breach of fiduciary duty."[14] Rule 1.502 also emphasizes that the Department "considers it very important that license and authorization holders and applicants . . . be honest, trustworthy, and reliable."[15]

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[9] *Id.* § 1.502(h); *cf.* Acts 2019, 86th Leg., R.S., ch. 765 (H.B. 1342), §§ 6-8, 12, 15.

[10] *See* Acts 2019, 86th Leg., R.S., ch. 765 (H.B. 1342) § 14 ("The changes in law made by this Act apply only to an application for a license submitted on or after the effective date of this Act. An application for a license submitted before the effective date of this Act is governed by the law in effect on the date the application was submitted, and the former law is continued in effect for that purpose.").

[11] 28 Tex. Admin. Code § 1.502(e); *see* Tex. Occ. Code § 53.025 (requiring licensing authorities to publish "guidelines relating to [their] practice . . . under [Occupations Code Chapter 53]," which "must state the reasons a particular crime is considered to relate to a particular license and any other criterion that affects the decisions of the licensing authority").

[12] 28 Tex. Admin. Code § 1.502(e)(4)(E).

[13] *Id.* § 1.502(e)(1).

[14] *Id.* § 1.502(e)(3).

[15] *Id.* § 1.502(c).

Staff bears the burden of proving its asserted grounds for denying Mr. Forcade's license application, while Mr. Forcade has the burden to prove his fitness to be licensed despite the existence of any such grounds.[16] The standard of proof is by a preponderance of the evidence.[17]

Furthermore, in addition to these licensing requirements and limitations under Texas law, the federal Violent Crime Control and Law Enforcement Act of 1994 requires that "[a]ny individual who has been convicted of any criminal felony involving dishonesty or a breach of trust" cannot "engage in the business of insurance or participate in such business" unless the person obtains written consent from the Commissioner of Insurance.[18]

## B. Evidence

Staff offered four exhibits, all of which were admitted without objection. Staff Exhibits 1, 2, and 3 went to jurisdiction and notice,[19] while Staff Exhibit 4 was the Department's "Application Package" or file regarding Mr. Forcade's license application.[20] Staff also called two witness, Department employee Lewis Weldon Wright IV, who testified in both Staff's direct case and on rebuttal, and Mr. Forcade. Mr. Forcade also testified in his own behalf. He did not offer any additional exhibits.

To summarize the parties' respective presentations, they agree that in April 2018, when Mr. Forcade was twenty years old and attending college in Arizona, he entered an apartment not his own without the resident's consent and stole a laptop computer not belonging to him. There is also no dispute that Mr. Forcade was apprehended shortly thereafter by law enforcement, was

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[16] *See* Tex. Ins. Code § 4005.101(b)(5), (8); Tex. Occ. Code §§ 53.0211(b), .022, .023; 1 Tex. Admin. Code § 155.427; 28 Tex. Admin. Code § 1.502(h).

[17] *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)).

[18] 18 U.S.C. § 1033(e)(1)(A)-(2).

[19] Staff Ex. 1 (Bates TDI 001-007) is a copy of the notice of hearing, Ex. 2 (Bates TDI 008-010) is a copy of Staff's original petition (also an attachment to Ex. 1), and Ex. 3 (Bates TDI 011-013) is a copy of SOAH Order No. 1, which prescribed procedures for conducting the hearing by telephone.

[20] Staff Ex. 4 at Bates TDI 013-046.

subsequently prosecuted by Arizona authorities, ultimately pleaded guilty to an offense of "facilitation to commit" burglary, and received one year of supervised probation. But the parties advocated divergent views of how Mr. Forcade's offense should bear upon his license application.

### 1. Application Package (Staff Ex. 4)

The Application Package consisted of a printout of Mr. Forcade's licensing application or contents thereof[21] and additional documents that Mr. Forcade apparently compiled and submitted either when making his application or subsequently upon the Department's demand. These additional documents included court papers from Mr. Forcade's Arizona criminal proceedings, written descriptions of the underlying conduct provided by both the arresting officer and Mr. Forcade, and recommendation letters that Mr. Forcade obtained in support of his license application.[22]

#### a. Application

The application printout reflects that Mr. Forcade submitted his application on April 2, 2019,[23] and that he was seeking, and had previously passed the examination for, a general-lines-agent license with a life, accident, and health qualification.[24] Mr. Forcade also answered "Yes" to a question inquiring, "Have you ever been convicted of a felony, had a judgment withheld or deferred, or are you currently charged with committing a felony?"[25]

#### b. Court papers

The court papers must be examined in the context of Arizona penal statutes they reference and apply.

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[21] The application appears to have been submitted through an online form. *Id.* at Bates TDI 013-017.

[22] *Id.* at Bates TDI 017-022, 023-024, 026-029, 030-043.

[23] *Id.* at Bates TDI 013.

[24] *Id.* at Bates TDI 013-014, 017.

[25] *Id.* at Bates TDI 014.

Following his arrest, Mr. Forcade was initially charged with the offense of "burglary in the second degree,"[26] a felony offense that is materially similar to the offense of burglary under the Texas Penal Code.[27] Burglary in the second degree under Arizona law is classified as a "class 3" felony under that state's six-tier felony classification system[28] and carried a presumptive punishment of a three-and-a-half-year term of imprisonment.[29] However, on March 27, 2019, pursuant to a plea bargain, Mr. Forcade pleaded guilty to a reduced charge of "facilitation to commit" the originally charged crime of burglary in the second degree—essentially, aiding and abetting *another person's* commission of second-degree burglary[30]—and received one year of supervised probation.[31] This lesser offense would generally be classified as a "class 6" (*i.e.*, lowest-tier) felony under Arizona law.[32] But the sentencing court, employing a procedure authorized by that state's law, left the offense "undesignated" as either a felony or misdemeanor and subject to later designation as a misdemeanor upon Mr. Forcade's successful completion of his probation.[33] This sentencing treatment reflects judicial determinations that Mr. Forcade's criminal conduct was neither "dangerous" nor "repetitive" and that, "having regard to the nature and circumstances of the crime and to the history and character of the defendant, . . . it would be unduly harsh to sentence the defendant for a felony."[34]

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[26] *Id.* at Bates TDI 031-032.

[27] The elements of burglary in the second degree under Arizona law are (1) "entering or remaining unlawfully" (*i.e.*, without being "licensed, authorized, or otherwise privileged") in or on (2) "a residential structure" (defined as "any structure, movable or immovable, permanent or temporary, that is adapted for both human residence and lodging whether occupied or not") (3) "with the intent to commit any theft or any felony therein." Ariz. Rev. Stat. §§ 13-1501(2), (11); 13-1507(A). Similarly, "burglary" under Chapter 30 of the Texas Penal Code occurs if, without the "effective consent" of the owner, a person, *inter alia*, (1) enters a habitation with intent to commit a felony or theft, or (2) enters a building or habitation and attempts or attempts to commit a felony or theft. Tex. Penal Code § 30.02.

[28] Ariz. Rev. Stat. § 13-1507(B); *see id.* § 13-601(A).

[29] *See id.* § 13-702(D).

[30] *See id.* § 13-1004(A), (C). "A person commits facilitation if, acting with knowledge that another person is committing or intends to commit an offense, the person knowingly provides the other person with means or opportunity for the commission of the offense." *Id.* § 13-1004(A).

[31] Staff Ex. 4 at Bates TDI 036-039, which is a certified copy of Mr. Forcade's sentencing order. There is also an uncertified copy of the same order at Bates TDI 019-021.

[32] Ariz. Rev. Stat. § 13-1004(C).

[33] *See* Staff Ex. 4 at Bates TDI 036-037; Ariz. Rev. Stat. § 13-604(A).

[34] Staff Ex. 4 at Bates TDI 036; *see* Ariz. Rev. Stat. § 13-604(A) (available "if a person is convicted of any class 6 felony not involving a dangerous offense and if the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that it would be unduly harsh to sentence the defendant for a felony").

On the other hand, Arizona law also provided that "until such time as the court may actually enter an order designating the offense as a misdemeanor," the undesignated offense "shall be treated as a felony for all purposes."[35] Consequently, at the time Mr. Forcade submitted his licensing application—April 2, 2019, less than one week after the date of his sentencing order—his offense was to be "treated as a felony for all purposes," at least as far as Arizona law was concerned. But the offense would be considered a misdemeanor if and when Mr. Forcade successfully completed his probation and the sentencing court so designated it.

Finally, the sentencing order also contemplated that Mr. Forcade would be able to serve his probation in Texas, his home state.[36]

### c. Accounts of the underlying conduct

The Arizona court documents also included a probable-cause statement from the arresting officer. According to the officer,

> Investigation revealed that [Mr. Forcade] and [an accomplice] were walking down the stairs from [a second-floor apartment] and observed [a] silver Apple Macbook with multiple stickers (valued at $2000.00) sitting on the table inside [a first-floor apartment]. They spoke amongst themselves and decided that they would take the laptop . . . . [Mr. Forcade] entered the apartment's fully enclosed patio area by going over the short wall and then opened the sliding glass door to the apartment which was unlocked but closed. [Mr. Forcade] entered the apartment and removed the laptop while [the accomplice] waited outside.[37]

The officer went on to recount that Mr. Forcade and the accomplice were apprehended near the apartment, with the laptop in their possession, and that they "admitted to taking the laptop."[38] The officer also recorded that the arrest occurred at approximately 4:30 a.m. and that Mr. Forcade was under the influence of alcohol.[39]

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[35] Ariz. Rev. Stat. § 13-604(A).

[36] Staff Ex. 4 at Bates TDI 037.

[37] *Id.* at Bates TDI 034.

[38] *Id.* The officer added that the victim was able to describe the stickers on the laptop, knew the password to access it, and also had a profile on the device. *Id.*

[39] *Id.* at Bates TDI 033-034.

Although acknowledging that he entered the apartment and took the laptop, Mr. Forcade's written accounts of the offense differ from that of the arresting officer in some respects, including providing an explanation of his motive that the officer did not mention. The first account Mr. Forcade provided, apparently when submitting his application, was the following:

> I am a music producer and I had my laptop stolen by someone. I was told by someone else that they knew who took the laptop. So one night, when a friend and I were out drinking at a friend[']s apartment, they told me we were in the same apartments that the person who took my laptop lived in. We went to this person's apartment and their patio door was open. I went inside to look for my laptop and didn't find it, [and I was] assuming they had already sold it. Me being still under the influence, and still mad that my laptop was stolen, I took theirs to make up for mine being taken. I guess he called police when I left and they were already on a call in the area so I was stopped by them and arrested on the spot. I have resolved this case and am now on probation for one year.[40]

Mr. Forcade's second account, evidently given in response to the Department's demand for more detailed information,[41] elaborated:

> When I was 20 and living in Arizona about a year or two ago, a person stole my laptop. This means a lot to me because I am a producer and use my laptop to make music, which in turn makes me money when I sell beats to artists. I was also in college at the time so my schoolwork as on there. I ended up finding out who took the laptop through a friend and I went to their apartment to go try and get it back. The porch door was open so I went in and tried to look for my laptop. I did not find my laptop, [and I] assum[ed] they had already pawned it off or sold it to someone. I was still very upset that this person took this extremely expensive laptop with years of music on it as well as all my college schoolwork, so instead I took their laptop that I saw sitting out.[42]

He added,

> This was my very first criminal offense. . . . I am in no way a criminal and this was a single incident which was very specific to my situation. I never have and never will have intentions of taking from people I do not know, outside of this event. I was simply frustrated at the person in the moment. I know that still does not make it right, but I want to at least point these things out very clearly as to help aid your

[40] *Id.* at Bates TDI 018.

[41] *Id.* at Bates TDI 023.

[42] *Id.* at Bates TDI 041.

> decision in approving my license. . . . [T]his kind of behavior will never happen again and it was simply a mistake I made out of anger when I was in college.[43]

Mr. Forcade further indicated that while he would "have the opportunity to get this [offense] wiped off my record" eventually, "the felony is still on my record at the moment" and was impeding his employment prospects.[44] He urged that he needed the license "because I have an opportunity with a company who is willing to accept me despite my record" and that this was "my last hope at this point in finding a good job."[45]

**d. Recommendation letters**

Mr. Forcade submitted three letters recommending his licensure, which echoed the themes that he was a hardworking, goal-oriented, otherwise-upstanding young man whose criminal offense was not representative of his behavior or character generally.[46] The authors were a man who claimed to be "close friends" with Mr. Forcade's father and to have known Mr. Forcade since his childhood;[47] a middle-school classmate of Mr. Forcade who had come to know him "very well" during "the past couple of years";[48] and an individual who had known Mr. Forcade during his college days at Arizona State University.[49]

**2. Direct testimony of Lewis Weldon Wright IV**

Mr. Wright testified that he is a thirteen-year Department employee who currently serves as the "Administrative Review Liaison" between the Department's Enforcement division and the division that handles licensing of agents and adjusters.[50] He explained that his role entailed scrutinizing potentially "problematic" or non-standard applications, such as where the applicant

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[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at Bates TDI 027-029.

[47] *Id.* at Bates TDI 027.

[48] *Id.* at Bates TDI 029.

[49] *Id.* at Bates TDI 028.

[50] Tr. at 19.

has a criminal history.[51] Mr. Wright noted that Mr. Forcade had disclosed his criminal history in his application, prompting further investigation.[52]

When asked to convey his understanding of Mr. Forcade's offense, Mr. Wright explained that Mr. Forcade had pleaded guilty to a felony charge of "facilitation to commit burglary," but then elaborated regarding the nature of that crime by reading from the original charging instrument that had alleged the more serious crime of burglary instead.[53] Mr. Wright opined that Mr. Forcade's offense fell within categories of crimes that were "of prime importance" under Department Rule 1.502, as it had entailed a "fraudulent or dishonest act," a "felony conviction," and burglary, in addition to implicating a broader concern that licensees be "honest, trustworthy, and reliable."[54] These considerations had elevated importance to the Department, according to Mr. Wright, because of the opportunity to reoffend that an insurance agent's license would afford, adding that "a lot of [the Department's] fraud cases deal with theft of money, embezzlement of money, deception regarding coverage, deception [] regarding premium amounts required, [or] deception regarding details of circumstance regarding the claim."[55]

With respect to burglary in particular, Mr. Wright opined that licensing would afford an "exponentially increased" opportunity to reoffend.[56] This was so, he explained, because the duties of a licensed general lines life, accident, and health agent (the license Mr. Forcade is seeking) would entail "direct contact with the public and with the consumers of Texas," including possibly entering consumers' "residence[s], discussing products, discussing coverage, discussing premium payments or collection of premiums, [and] processing of application[s]."[57]

Referencing the Application Package, Mr. Wright observed that the date of Mr. Forcade's offense was April 9, 2018; that Mr. Forcade had pleaded guilty to facilitation to commit burglary

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[51] *Id.* at 19-20.

[52] *Id.* at 21.

[53] *Id.* at 21-22.

[54] *Id.* at 23-26.

[55] *Id.* at 25-26.

[56] *Id.* at 26-27.

[57] *Id.*

and been sentenced on March 27, 2019; and that Mr. Forcade had submitted his licensing application only five days thereafter, on April 2, 2019, even before he had reported to his first meeting with his Texas probation officer.[58] In Mr. Wright's view, the recentness of Mr. Forcade's offense was "a negative factor in considering the [extent of] rehabilitation," as "there hasn't really been an opportunity to really set a record of rehabilitative behavior."[59]

### 3. Testimony of Mr. Forcade

As noted previously, Mr. Forcade was first called adversely during Staff's direct case. After a series of questions calculated to establish that Mr. Forcade would have some form of livelihood even if he were unable to obtain an insurance license,[60] he was examined regarding various details of his prior written explanations of his offense. Staff elicited Mr. Forcade's acknowledgments that he had been drinking alcohol while under Arizona's legal age,[61] that he had acted based on merely a "general" but "[n]ot exactly specific[]" idea as to who had stolen his laptop,[62] and that he had taken the laptop out of frustration while knowing that it did not belong to him.[63] He further admitted that he had entered the apartment through a patio door after climbing over a fence, and that he had no right to be in the apartment.[64] However, Mr. Forcade insisted—contrary to the arresting officer's account—that the patio door had been "open" and not merely unlocked.[65]

In direct testimony, Mr. Forcade again acknowledged that his criminal act was "still not right" but urged that it was his first and only offense, that "all I was doing was just trying to get my laptop back," and that "I got upset."[66] To similar effect, Mr. Forcade argued that his offense

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[58] *Id.* at 22-23; *see* Staff Ex. 4 at Bates TDI 013, 031-032, 036-040.

[59] Tr. at 27.

[60] In response to this line of questioning, Mr. Forcade indicated that he was presently self-employed full-time teaching audio-production classes and would "[m]ost definitely" maintain that work if not granted a license. *Id.* at 31-32. He also stated that he did some additional work "tak[ing] people's trees down . . . and stuff like that, help[ing] with stuff on their properties and ranches." *Id.* at 32.

[61] *Id.* at 33-34.

[62] *Id*.

[63] *Id*. at 35.

[64] *Id*. at 34-35.

[65] *Id*. at 35.

[66] *Id*. at 39-40.

"was impulsive," "acting out of anger," and "something I definitely shouldn't have done and I definitely do regret."[67] He added that "I personally don't even understand . . . the process of how you can steal someone's money in the insurance industry," given the extent of regulation and likelihood of detection, and that he also would not want to harm the company seeking to hire him after licensure, which was owned by a "friend" of his.[68] Mr. Forcade expressed the hope "to move on" from his misdeed "and actually do something with my life"—and frustration at "being treated like I'm an untrustworthy piece of garbage" based solely on a "piece of paper saying [he's] a criminal" rather than "knowledge of who that person is."[69]

Mr. Forcade also testified that he had completed his probation "a couple of months" earlier, but had been unable to supply the Department with documentary proof of that fact despite his repeated attempts to obtain it from the probation office.[70] He added that the Arizona sentencing court had recently "dropped [the felony charge] to a misdemeanor"[71] (which would be consistent with the ultimate disposition of the charge, upon Mr. Forcade's successful completion of probation, prescribed by the Arizona laws described previously). And with that charge now designated as a misdemeanor, Mr. Forcade expressed the understanding and intent that he can now obtain expunction of his conviction, further suggesting that his current difficulties in obtaining licensing due to his criminal history may ultimately amount merely to bad timing or over-eagerness in not waiting longer to apply.[72]

In response to questioning from the ALJ, Mr. Forcade reiterated that he had no other criminal history beside the Arizona matter.[73]

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[67] *Id*. at 47.

[68] *Id.* at 47-48.

[69] *Id*.

[70] *Id*. at 36-37, 38. He asserted that "I've called [the probation office] . . . six or seven times asking for documents; and they still haven't returned my calls or given me anything." *Id.* at 37.

[71] *Id*. at 38-39.

[72] *Id.* at 39.

[73] *Id*. at 40.

#### 4. Rebuttal testimony of Mr. Wright

On rebuttal, Mr. Wright indicated that Mr. Forcade's testimony had not changed his view that the Department had properly denied licensure.[74] Mr. Wright further insinuated that Mr. Forcade's explanations of his offense were not credible. He pointed to asserted "inconsistencies" between Mr. Forcade's accounts and the arresting officer's probable-cause statement. Mr. Wright suggested that the officer's account established the offense to have been an opportunistic theft, in contrast to Mr. Forcade's claims of attempted self-help and retaliation.[75] Mr. Wright further emphasized that the officer had described an entry through an unlocked but closed patio door, which differed from Mr. Forcade's claim of entering through an open door.[76] He added that the police report had indicated that the victim was female, whereas Mr. Forcade had seemed to indicate that the target of his attempted self-help and retaliation was male.[77] Implicitly crediting the police account as a complete and error-free account of the underlying events, Mr. Wright accused Mr. Forcade of not being "forthcoming" in his explanation of his offense.[78]

### C. Analysis and Recommendation

The evidence establishes that Mr. Forcade was convicted of a criminal offense that was initially "undesignated" although "treated as a felony for all purposes" under Arizona law pending his successful completion of probation. As Mr. Forcade credibly testified, he successfully completed his probation, and the offense is now designated as a misdemeanor. Mr. Forcade's description of the process he had followed also squares with the relevant Arizona criminal procedure law. And Staff could easily have rebutted Mr. Forcade's assertions about the status of the charge if it had any good-faith basis to do so.

Staff insists that the ultimate designation of the offense as a misdemeanor is of no moment because the Department can consider Mr. Forcade to have a felony conviction regardless. Staff

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[74] *Id*.

[75] *Id*. at 41-42.

[76] *Id*. at 42.

[77] *Id*. at 42-43.

[78] *Id*. at 43.

relies on Subsection (d) of Texas Occupations Code § 53.021, which authorizes licensing authorities, when certain conditions are met, to "consider a person to have been convicted of an offense for purposes of this section" based on a deferred adjudication.[79] In Staff's view, those conditions are met here,[80] such that the Department may deem Mr. Forcade's "deferred adjudication" (as Staff terms it) to be a felony conviction. And this deemed felony conviction, Staff further argues, would establish the Department's authority to deny licensure under Texas Insurance Code § 4005.101(a)(8), the provision permitting license denial upon determination that the applicant "has been convicted of a felony."[81]

Staff's arguments rest on two assumptions: (1) that an "undesignated" offense under Arizona law is the same or equivalent to a deferred adjudication as contemplated by Texas Occupations Code § 53.021(d), and (2) that Subsection (d) can be used to prove that an applicant "has been convicted of a felony" for purposes of Texas Insurance Code § 4005.101(a)(8) despite that Mr. Forcade was never actually convicted of a felony. Even if the first assumption is correct (and there are reasons to question it[82]), Subsection (d) *of Texas Occupations Code § 53.021* is not a means of proving a felony conviction under *Texas Insurance Code § 4005.101.* Neither statute mentions the other, and Subsection (d) explicitly speaks to deferred adjudications "*for purposes of this section*" (*i.e.*, § 53.021), not with respect to any external statute like the Texas Insurance Code. Staff has not pleaded any ground in Occupations Code § 53.021 as a basis for the Department's

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[79] Tex. Occ. Code § 53.021(d).

[80] As potentially relevant here, the conditions include (1) the person has not completed the period of supervision or completed it less than five years before the date the person applied for the license, and (2) "after consideration of the factors described by [Occupations Code] Sections 53.022 and 53.023(a), the licensing authority determines that: (A) the person may pose a continued threat to public safety; or (B) employment of the person in a licensed occupation would create a situation in which the person has an opportunity to repeat the prohibited conduct." *Id.* § 53.021(d)(1)(B)(i), (2).

[81] Tex. Ins. Code § 4005.101(b)(8).

[82] Subsection (d) of Occupations Code § 53.021 presumes the absence of any conviction, as would occur with a Texas deferred adjudication unless revoked prior to successful completion. *See* Tex. Occ. Code § 53.021(d) (written as an exception applying "regardless of whether the proceedings were dismissed and the person was discharged as described by Subsection (c)"); *cf. id.* § 53.021(c) (generally providing that, "[n]otwithstanding other law, a licensing authority may not consider a person to have been convicted of an offense for purposes of this section if, regardless of the statutory authorization: (1) the person pleaded a plea of guilty or nolo contendere; (2) the judge deferred further proceedings without entering an adjudication of guilt and placed the person under the supervision of the court or an officer under the supervision of the court; and (3) at the end of the period of supervision, the judge dismissed the proceedings and discharged the person."). Under the Arizona procedure, by contrast, the sentencing court enters a judgment of conviction, but the designation of the offense as a felony versus misdemeanor is left contingent on the outcome of probation.

authority to deny licensure.[83] And in the absence of proof that Mr. Forcade was ever convicted of a felony, Staff did not establish the Department's authority under Texas Insurance Code § 4005.101(b)(8).

This leaves Staff's alternative asserted ground that Mr. Forcade "engaged in fraudulent or dishonest acts or practices" within the meaning of Insurance Code § 4005.101(a)(5). There is no evidence that Mr. Forcade engaged in any sort of fraud. As for "dishonest acts or practices," the question turns on the sense in which "dishonest" is used. While the word "dishonest" can denote a broad or general sense of unfairness, lack of integrity, or moral turpitude, and thereby encompass Mr. Forcade's burglary-related offense (and an expansive array of other crimes), it also has a narrower and more specific meaning that would require an element of deceit or falsehood arguably lacking here.[84] However, the Department's Rule 1.502 seems to reflect a broad construction of "dishonest" (and one that would be reasonable and consistent with the statutory text, given the varied meanings to which the word is susceptible[85]), as the rule distinguishes "dishonesty" from both "fraud" and "deceit"[86] and reflects an overarching concern that licensees "be honest, trustworthy, and reliable."[87] In this broad sense of "dishonesty," at least, Mr. Forcade's admitted acts of intentionally entering a dwelling where he had no right to be and then taking property of another, or assisting another person in such acts (the offense to which he actually pleaded guilty),

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[83] Staff Ex. 1 at Bates TDI 006 (alleging only the two Insurance Code § 4005.101(b) grounds as "acts for which a license may be denied").

[84] Honest. In The American Heritage Dictionary of the English Language (5th ed. 2020) ("1. Marked by or displaying integrity; upright: *an honest lawyer*"; "2. Not deceptive or fraudulent; genuine: *honest weight*"; "3. *Equitable; fair: honest wages for an honest day's work*"; "4.a. Characterized by truth; not false: *honest reporting*"; "5.a. Of good repute; respectable"; "6. Virtuous"); *see also id.* definition of Dishonest ("Disposed to lie, cheat, defraud, or deceive" and noting that synonyms include "lying, untruthful, deceitful, mendacious," with dishonest being "the least specific"); National Inst. of Ins. Comm'nrs, *Guidelines for State Insurance Regulators to the Violent Crime Control and Law Enforcement Act of 1994* (2011), at 21-25 (discussing potential difficulties in construing and applying "criminal felony involving dishonesty and breach of trust" standard under 18 U.S.C. § 1033 and, in light of jurisprudence applying similar language in Fed. R. Evid. 609(a)(2), suggesting that term might well exclude crimes of theft that lack an element of deceit); *cf. Perez v. State*, 11 S.W.3d 218, 228 n.4 (Tex. Crim. App. 2000) (Holland, J., concurring) (in another context, asserting that "crimes which do *not* involve dishonesty or false statement include murder, sexual assault, *burglary*, robbery, possession or distribution of controlled substances, and felony intoxication offenses") (emphases added).

[85] *See Railroad Comm'n of Tex. v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011) (discussing principles of deference to agency's formally adopted construction of statute it administers, if reasonable and consistent with the statutory text).

[86] *See* 28 Tex. Admin. Code § 1.502(e)(1) (offenses deemed "of prime importance in determining fitness for licensure" include "any offense for which fraud, dishonesty, or deceit is an essential element").

[87] *Id.* § 1.502(c).

would suffice as "dishonest acts or practices" and provide the Department grounds under Texas Insurance Code § 4005.101(b)(5) to deny his application.

However, the ALJ concludes that the Department Rule 1.502(h) factors ultimately weigh in favor of granting Mr. Forcade's application. It is true that Mr. Forcade's offense of facilitating burglary and admitted underlying conduct would facially implicate at least one of the enumerated types of "guideline" crimes that the Department has deemed to be "of such serious nature that they are of prime importance in determining fitness for licensure."[88] But Subsection (h)—and ultimately Occupations Code §§ 53.022 and 53.023—demand more than merely formulaic application. The analysis must also take account of other evidence, specific and unique to the case and person, that also inform the relative "nature and seriousness" of Mr. Forcade's offense *vis a vis* his ability, capacity, and fitness to perform the duties of a licensed insurance agent.[89] And that evidence includes the actual disposition of Mr. Forcade's criminal charge and its import in the context of the Arizona law being applied.

Although Mr. Forcade was originally charged with the serious felony crime of burglary in the second degree, he was ultimately afforded a plea bargain for the significantly reduced charge of "facilitation to commit" burglary and a single year of probation. Moreover, the offense was left "undesignated" and subject to being classified as a misdemeanor once Mr. Forcade had completed his probation. This disposition, as explained previously, reflected judicial determinations under Arizona law that Mr. Forcade's criminal conduct was neither "dangerous" nor "repetitive" and that, "having regard to the nature and circumstances of the crime and to the history and character of [Mr. Forcade], . . . it would be unduly harsh to sentence [him] for a felony."[90]

This disposition—and with but a single year of probation for Mr. Forcade to complete in order to secure the misdemeanor designation—also tends to lend credence to the explanation that

[88] 28 Tex. Admin. Code § 1.502(e)(4)(E) (offense having essential elements of a burglary offense as described in Penal Code Chapter 30), and arguably also (e)(1) (an "offense for which . . . dishonesty . . . is an essential element," assuming a broad definition of "dishonesty").

[89] *See id.* § 1.502(h)(1)(A), (D), (2).

[90] Staff Ex. 4 at Bates TDI 036; *see* Ariz. Rev. Stat. § 13-604(A) (available "if a person is convicted of any class 6 felony not involving a dangerous offense and if the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that it would be unduly harsh to sentence the defendant for a felony").

he consistently presented in his hearing testimony and written accounts, accounts also echoed in his recommendation letters. Namely, it is consistent with the sort of punishment that judges and prosecutors would deem commensurate with a one-time, college-age, lapse into very poor (and likely drunken) judgment, especially if occurring under idiosyncratic circumstances that he perceived (perhaps mistakenly) at the time, and that he regrets and is disinclined to ever repeat again. And to the extent that the police report would truly raise "inconsistencies" with Mr. Forcade's account, it should not be given much weight as compared to the ultimate disposition of the charge, especially considering that the report principally reflected the victim's perspective, as the officer recounted it.[91]

In short, the ultimate disposition of Mr. Forcade's criminal charge, and the explanation of the underlying facts that he has consistently and credibly maintained, tend to bely any notion that he presents an ongoing danger to society and should be red-flagged or tarred as he begins his adult professional life. Likewise, once these considerations are factored into the Subsection (h) analysis, Mr. Forcade has shown himself fit for licensure notwithstanding his criminal history.

Given the disposition of Mr. Forcade's criminal charge, the ALJ also concludes that Mr. Forcade has not been "convicted of any felony involving dishonesty or breach of trust" within the meaning of 18 U.S.C. § 1033, so as to require him to obtain a consent letter.[92] But if the Commissioner concludes that a letter is required, the ALJ would recommend that it issue, for the reasons described when analyzing the Subsection (h) factors.

## III. FINDINGS OF FACT

1. On April 2, 2019, Cody Trace Forcade applied to the Texas Department of Insurance (Department) for a general lines agent license with a life, accident, and health qualification.

2. On May 7, 2019, the Department staff (Staff) proposed to deny Mr. Forcade's application. On June 3, 2019, Mr. Forcade timely requested a hearing.

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[91] Staff Ex. 4 at Bates TDI 035.

[92] 18 U.S.C. § 1033(e)(1)(A)-(2).

3. On June 15, 2020, Staff issued a notice of hearing to Mr. Forcade, which attached and incorporated by reference its petition in the case. On June 25, 2020, the Administrative Law Judge (ALJ) issued Order No. 1, which clarified that the hearing would be held by telephone and provided call-in information. The notice of hearing, petition, and Order No. 1 contain a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to particular sections of the statutes and rules involved; and the factual matters asserted.

4. The hearing was held by telephone on July 28, 2020, before ALJ Robert Pemberton. Staff was represented by attorneys Allison J. Anglin and Patrick Quigley. Mr. Forcade represented himself. The hearing concluded on the same day and the record was closed on August 19, 2020, with the filing of the hearing transcript.

5. On March 27, 2019, pursuant to a plea bargain, Mr. Forcade pleaded guilty to and was convicted on a charge of "facilitation to commit" burglary and received one year of supervised probation. At time of sentencing, the offense was left undesignated as either a felony or misdemeanor but was ultimately designated a misdemeanor after Mr. Forcade successfully completed his probation.

6. Mr. Forcade was twenty years old and in college at the time of his offense.

7. Mr. Forcade has not been charged with any other crimes, whether before his offense or since.

8. The Arizona sentencing court determined that Mr. Forcade's criminal conduct was neither dangerous nor repetitive and that, having regard to the nature and circumstances of the crime and Mr. Forcade's history and character, it would be unduly harsh to sentence him for a felony.

9. Mr. Forcade's offense was an isolated aberration on a record of otherwise-good conduct.

10. Mr. Forcade regrets his offense and accepts responsibility. Mr. Forcade is eager to put this unfortunate episode behind him and pursue future professional endeavors.

11. The likelihood of Mr. Forcade reoffending is low.

## IV. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Tex. Ins. Code §§ 4001.002, .105, 4005.101.

2. The State Office of Administrative Hearings has authority to hear this matter and issue a proposal for decision with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003; Tex. Ins. Code § 4005.104.

3. Mr. Forcade received timely and sufficient notice of hearing. Tex. Gov't Code ch. 2001; Tex. Ins. Code § 4005.104(b).

4. The Department may deny a license application if the applicant has engaged in fraudulent or dishonest acts or practices. Tex. Ins. Code § 4005.101(b)(5).

5. The Department may deny a license application if the applicant has been convicted of a felony. Tex. Ins. Code § 4005.101(b)(8).

6. Staff has the burden to prove by a preponderance of the evidence that grounds exist to deny Mr. Forcade's license, while Mr. Forcade has the burden to prove by a preponderance of the evidence that he is fit to perform the duties and discharge the responsibilities of an insurance agent despite his criminal history. *See* Tex. Ins. Code § 4005.101(b)(5), (8); Tex. Occ. Code §§ 53.0211(b), .022, .023; 1 Tex. Admin. Code § 155.427; 28 Tex. Admin. Code § 1.502(h).

7. Staff met its burden to show that Mr. Forcade engaged in "dishonest acts or practices" within the meaning of Texas Insurance Code § 4005.101(b)(5). Staff did not meet its burden to show that Mr. Forcade was convicted of a felony within the meaning of Texas Insurance Code § 4005.101(b)(8).

8. Weighing the factors under 28 Texas Administrative Code § 1.502(h), Mr. Forcade has shown that he is fit to perform the duties and discharge the responsibilities of a licensed insurance agent, notwithstanding his criminal history.

9. Mr. Forcade's license application should be approved.

10. Mr. Forcade has not been "convicted of any felony involving dishonesty or breach of trust" within the meaning of 18 U.S.C. § 1033. In the alternative, Mr. Forcade should be granted consent to engage in the business of insurance under 18 U.S.C. § 1033(e)(1).

**SIGNED October 13, 2020.**

**ROBERT H. PEMBERTON**
**ADMINISTRATIVE LAW JUDGE**
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**2021-6775**

**Exhibit B**

# State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

December 2, 2020

Kent Sullivan
Commissioner of Insurance
Texas Department of Insurance
333 Guadalupe, Tower 1, 13th Floor, MC 113-2A
Austin, TX 78714

**VIA EFILE TEXAS**

**RE: Docket No. 454-20-3957.C; *Texas Department of Insurance v. Cody Trace Forcade***

Dear Commissioner Sullivan:

The Proposal for Decision (PFD) in this case was issued on October 13, 2020. On October 28, 2020, Staff of the Texas Department of Insurance (Department) filed exceptions to the PFD. Mr. Forcade did not file exceptions or a response to Staff's exceptions. Having reviewed Staff's exceptions and the PFD, the Administrative Law Judge (ALJ) provides the following responses and proposed changes.

Staff excepts to Finding of Fact No. 8, asserting that it "misapplies the law to the facts by making misstatements from the sentencing paperwork included in the Department's exhibits." On the contrary, Finding of Fact No. 8 is solidly grounded in the language of the criminal court's sentencing order and the Arizona law the court referenced and applied.[1] The criminal proceedings against Mr. Forcade were brought in Arizona, under Arizona law; consequently, some consideration of that Arizona law is necessary to make sense of Staff's documentary evidence from those proceedings. And viewed in that proper context, Staff's documentary evidence established that, as stated in Finding of Fact No. 8, "[t]he Arizona sentencing court determined that Mr. Forcade's criminal conduct was neither dangerous nor repetitive and that, having due regard to the nature and circumstances of the crime and Mr. Forcade's history and character, it would be unduly harsh to sentence him for a felony." The documents further showed that the court was very

[1] Staff Ex. 4 at Bates TDI 036 (order indicating that offense was "Undesignated" and also "Non Dangerous-Non Repetitive"); *see* Ariz. Rev. Stat. § 13-604(A) (allowing "undesignated" treatment "if a person is convicted of any class 6 felony not involving a dangerous offense and if the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that it would be unduly harsh to sentence the defendant for a felony").

lenient in its sentencing treatment, requiring Mr. Forcade to complete only one year of community supervision in order to obtain the ultimate designation of the charge as a misdemeanor. These judicial actions also squared with, and tended to lend additional credence to, Mr. Forcade's account that his offense was a one-time, college-age episode of poor (and likely intoxicated) judgment under idiosyncratic circumstances (relating to his own stolen laptop) that would not be repeated again.

Staff's exceptions 1, 2, 3, and 5 directly or indirectly implicate Finding of Fact No. 5 (that Mr. Forcade's previously "undesignated" offense was ultimately designated a misdemeanor after he completed his probation) and Conclusion of Law No. 7 (that Staff did not meet its burden to show that Mr. Forcade had been "convicted of a felony" within the meaning of Tex. Ins. Code § 4005.101(b)(8)). The ALJ does not recommend any changes here for two sets of reasons.

First, Staff's arguments rest on the premise that there is "no evidence" that Mr. Forcade's heretofore "undesignated" offense was ultimately designated a misdemeanor. Staff apparently reasons that the ultimate designation can be proven only through documentary evidence and not also through Mr. Forcade's testimony. That is incorrect—the ALJ could consider Mr. Forcade's testimony and give it weight, as the ALJ did.

Second, Staff arguments about supposed "mischaracterization" concerning deferred adjudication are themselves misleading and ultimately misplaced. Because Mr. Forcade was not actually "convicted" of a "felony" in any ordinary sense through his sentencing treatment under Arizona law, there was a threshold legal question, pointed out by the ALJ, as to whether or how Staff could establish nonetheless that Mr. Forcade "has been convicted of a felony" under Tex. Occ. Code § 4005.101(b)(8). During the hearing and in post-hearing briefing, Staff attempted to bridge the gap through reliance upon Tex. Occ. Code § 53.021(d), which addresses deferred adjudications, thus logically implying (if not also arguing explicitly) that Staff was equating Mr. Forcade "undesignated" offense to a Texas deferred adjudication (as otherwise § 53.021(d) would not apply). Staff now disclaims that position, but does not overcome its more fundamental problem that, based on the evidence presented at the hearing, Mr. Forcade was never convicted of a felony, only of an offense that was initially "undesignated" and ultimately designated as a misdemeanor. If Tex. Occ. Code § 4005.101(b)(8) should work differently in this situation, the remedy properly lies with the Texas Legislature.

The ALJ would add that even if Mr. Forcade had been "convicted of a felony" in some relevant sense, that finding or conclusion would be effectively redundant of those already contained in the PFD. In the PFD, the ALJ concluded that Staff had proved the other ground it had asserted for denying licensure—that Mr. Forcade had engaged in "dishonest acts or practices" within the meaning of Tex. Occ. Code § 4005.101(b)(5)—and then proceeded to the Tex. Occ. Code §§ 53.022-.023/28 Tex. Admin. Code § 1.502(h) analysis. Especially in light of the aforementioned evidence from the Arizona proceedings, merely adding the alternative Tex. Occ. Code § 4005.101(b)(8) ground as a second predicate would not materially alter the ultimate analysis, whether the offense be labeled "felony," "misdemeanor," "undesignated," or anything else.

In response to Staff's remaining exceptions, the ALJ proposes the following additional conclusions of law:

| | |
|---|---|
| Conclusion of Law 7.1 | Mr. Forcade's offense is within categories that the Department considers to be of such "serious nature" that they are of "prime importance" in determining fitness for licensure. 28 Tex. Admin. Code § 1.502(e)(4)(F); *see* Tex. Occ. Code § 53.025. |
| Conclusion of Law 8.1 | The factors under 28 Texas Administrative Code § 1.502(h) outweigh the "serious nature of the criminal offense when viewed in light of the occupation being licensed." 28 Tex. Admin. Code § 1.502(f). |

These changes do not affect the proposed decision.

Additionally, the ALJ recommends removing Conclusion of Law No. 9, which merely states the ultimate licensing determination that would follow from the preceding conclusions of law and the findings of fact.

The ALJ does not recommend any other changes to the PFD.

Sincerely,

Robert H. Pemberton
Administrative Law Judge

RP/tt

cc: Allison Anglin, Staff Attorney, Texas Department of Insurance, 333 Guadalupe, Tower 1, 13th Floor, Austin, Texas 78701 - **VIA EFILE TEXAS**
Patrick Quigley, Staff Attorney, Texas Department of Insurance, 333 Guadalupe, Tower 1, 13th Floor, Austin, Texas 78701 - **VIA EFILE TEXAS**
Cody T. Forcad [redacted], Cypress, TX 77433 - **VIA EFILE TEXAS**