

No. **2021-7000**

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

Date: 09/29/2021

Subject Considered:

Texas Department of Insurance

v.

Kayla Leaann Smith

SOAH Docket No. 454-21-0217.C

General remarks and official action taken:

The subject of this order is Kayla Leaann Smith's general lines agent license with a property and casualty qualification and a life, accident, health, and HMO qualification. This order revokes Ms. Smith's license.

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 containing a recommendation that the Texas Department of Insurance (TDI) revoke Ms. Smith's license. A copy of the proposal for decision is attached as Exhibit A.

TDI adopts the administrative law judge's proposed findings of fact and conclusions of law with changes to Conclusion of Law No. 7 as described in this order.

Legal Authority for Changes to 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...

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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) and Texas Occupations Code § 53.021(d)

TEX. INS. CODE § 4005.101 provides grounds on which TDI may discipline a license holder, including revoking the person's license. Under subsection (b)(8), TDI may discipline a license holder if it determines the applicant "has been convicted of a felony[.]" Relatedly, TEX. OCC. CODE § 53.021(a) authorizes licensing agencies such as TDI to revoke a person's license if the "person has been convicted of . . . an offense that directly relates to the duties and responsibilities of the licensed occupation[.]"¹

In 2015, Ms. Smith pleaded guilty to burglary of a habitation and credit card or debit card abuse, both felonies. She received deferred adjudication community supervision for both offenses and her case was ultimately dismissed on May 13, 2020, and she was discharged. The operative question here is whether Ms. Smith's deferred adjudications qualify as convictions for purposes of TEX. INS. CODE § 4005.101(b)(8) and TEX. OCC. CODE § 53.021(a)? The administrative law judge answered in the affirmative.

Generally, a deferred adjudication is not considered a conviction.² See *McNew v. State*, 608 S.W.2d 166, 172 (Tex. Crim. App. 1978) ("[A] 'conviction,' regardless of the context in which it is used, always involves an adjudication of guilt."); *Hassan v. State*, 440 S.W.3d 684, 687 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("[A]n order deferring adjudication of guilt and placing a defendant on probation or community supervision is not a conviction."); Tex. Att'y Gen. Op. No. JC-396 (2001) at 2 ("As commonly defined, the term 'convicted' means "[p]roved or found guilty; condemned.") (citing III Oxford English Dictionary 879 (2d ed. 1989)). TEX. OCC. CODE § 53.021(c) echoes that position by limiting when a deferred adjudication may be considered a conviction under § 53.021.

¹ Section 53.021(a) also authorizes license revocation if the license holder was convicted of certain other serious offenses not at issue here.

² When the Legislature has intended to expand on what constitutes a conviction in a particular area, it has done so in clear and unmistakable terms. See, e.g., TEX. GOV'T. CODE § 411.171(4) (defining "convicted," for purposes of handgun carry laws, to include some deferred adjudications).

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Therefore, in order for TDI to treat Ms. Smith's deferred adjudications as convictions, there must be statutory authorization to do so. TEX. OCC. CODE § 53.021(d) is such a law:

A licensing authority may consider a person to have been convicted of an offense for purposes of this section regardless of whether the proceedings were dismissed and the person was discharged as described by Subsection (c) if:

(1) the person was charged with:

(A) any offense described by Article 62.001(5), Code of Criminal Procedure;
or

(B) an offense other than an offense described by Paragraph (A) if:

(i) the person has not completed the period of supervision or the person completed the period of supervision less than five years before the date the person applied for the license; or

(ii) a conviction for the offense would make the person ineligible for the license by operation of law; and

(2) after consideration of the factors described by 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 the licensed occupation would create a situation in which the person has an opportunity to repeat the prohibited conduct.

After reviewing the record, the administrative law judge concluded that TEX. OCC. CODE § 53.021(d) applied in this case and TDI could treat Ms. Smith's deferred adjudications as convictions for purposes of both TEX. INS. CODE § 4005.101(b)(8) and TEX. OCC. CODE § 53.021(a). TDI finds that the administrative law judge correctly concluded that Ms. Smith's deferred adjudications can be considered convictions for purposes of TEX. OCC. CODE § 53.021(a), but that her conclusion regarding TEX. INS. CODE § 4005.101(b)(8) is incorrect.

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By its plain language, subsection (d) of § 53.021 only applies in the context of that section. *See* TEX. OCC. CODE § 53.021(d) ("A licensing authority may consider a person to have been convicted of an offense for purposes of this section . . .") (emphasis added). It cannot be used to establish a conviction outside the context of § 53.021. The Office of the Attorney General recognized as much in *Tex. Att'y Gen. Op. No. KP-107 (2016)*, albeit indirectly.

At issue in that opinion was the Texas Lottery Commission's statutory authority to revoke a sales agent's license if the agent had been "convicted of . . . gambling or a gambling-related offense[.]" TEX. GOV'T. CODE § 466.155. The operative question posed to the Attorney General was whether the Commission could revoke a license based on a sales agent's deferred adjudication for the offense of gambling, a Class C misdemeanor. After analyzing TEX. GOV'T. CODE § 466.155 and TEX. OCC. CODE § 53.021(d), the Attorney General concluded that the Commission could not revoke a license based on a deferred adjudication for gambling because § 53.021(a) did not extend to Class C misdemeanors. Implicit in that conclusion is a finding that the Commission could not use § 53.021(d) as a basis to treat a deferred adjudication as a conviction for purposes of TEX. GOV'T. CODE § 466.155, where a gambling conviction is expressly listed as a basis for license revocation.

In reaching the opposite conclusion, the administrative law judge explains:

Texas Occupations Code § 53.021 applies to "a licensing authority" when it is determining whether to revoke a license based on a conviction. Texas Occupations Code § 53.001 states that definitions in Texas Government Code chapter 2001 apply to Texas Occupations Code chapter 53. Texas Government Code § 2001.003(3) provides that "'Licensing' includes a state agency process relating to the . . . revocation . . . of a license." The administrative law judge interprets these statutes to mean that in determining under Texas Insurance Code § 4005.101(b)(8) whether a licensee has been convicted of a felony for purposes of deciding whether to revoke a license, the Department may apply the meaning of "conviction"

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under Texas Occupations Code § 53.021(d) rather than its meaning under criminal law.³

The administrative law judge's conclusion, that TEX. OCC. CODE § 53.021(d) serves as a basis to treat a deferred adjudication as a conviction for purposes of TEX. INS. CODE § 4005.101(b)(8), does not follow from this sparse explanation. The administrative law judge cites no supporting authority for her position and fails to even address the plain language of TEX. OCC. CODE § 53.021(d) limiting its application to determinations under § 53.021. Therefore, TDI concludes that the administrative law judge misinterpreted or misapplied the law in concluding that TEX. OCC. CODE § 53.021(d) may be used to treat a deferred adjudication as a conviction for purposes of TEX. INS. CODE § 4005.101(b)(8).⁴ The administrative law judge's proposal for decision is changed accordingly, as described below.

The administrative law judge's proposed Conclusion of Law No. 7 states:

Respondent's felony deferred adjudications may be considered convictions for licensing purposes. Tex. Occ. Code § 53.021(a)(1) and (d)(1)(B)(i), (2); Tex. Ins. Code § 4005.101(b)(8).

³ Proposal for Decision, pg. 14 fn.79.

⁴Admittedly, TDI has not been consistent on this issue. In 1998, TDI Enforcement Staff acknowledged that deferred adjudications could not be considered convictions for purposes of TEX. INS. CODE § 4005.101(b)(8). See Proposal for Decision, SOAH Docket No. 454-97-2358.C, 2004 WL 4171092 at 3, n. 1 (1998) (addressing predecessor to Section 4005.101(b)(8)). But at some point after 1998 and before the first iteration of § 53.021(d) went into effect, Enforcement Staff began to argue that TDI rule 28 TAC § 1.502 allowed the Department to consider deferred adjudications as convictions for purposes of TEX. INS. CODE § 4005.101(b)(8). See, e.g., Proposal for Decision, SOAH Docket No. 454-08-0564.C, 2008 WL 612585 (2008) (focusing on the fact that § 1.502(f) and (g) use the phrase "committed a felony" instead of "convicted of a felony"). Then, in 2012, Commissioner's Order No. 12-0455 clearly stated that deferred adjudications are not a basis for license denial, revocation, or other disciplinary action under TEX. INS. CODE § 4005.101(b)(8). But in 2019, TDI adopted a proposal for decision that concluded, without analysis, that Tex. Occ. Code § 53.021(d) may be used to treat a deferred adjudication as a conviction for purposes of Tex. Ins. Code § 4005.101(b)(8). See Commissioner's Order No. 19-5933 (2019), SOAH Docket No. 454-19-1450.C (2019). The administrative law judge in the present case acknowledges disagreement on the issue with a fellow administrative law judge, but she fails to address the agency's historical approach to the issue.

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

Respondent's felony deferred adjudications may be considered convictions for purposes of TEX. OCC. CODE § 53.021(a)(1). Tex. Occ. Code § 53.021(d)(1)(B)(i), (2).

Findings of Fact

The findings of fact contained in Exhibit A are adopted by TDI and incorporated by reference into this order.


Conclusions of Law

1. Conclusions of Law Nos. 1 – 6 and 8 – 10 as contained in Exhibit A are adopted by TDI and incorporated by reference into this order.
2. In place of Conclusion of Law No. 7 as contained Exhibit A, the following conclusion of law is adopted:

Respondent's felony deferred adjudications may be considered convictions for purposes of TEX. OCC. CODE § 53.021(a)(1). TEX. OCC. CODE § 53.021(d)(1)(B)(i), (2).

Order

It is ordered that Kayla Leaann Smith's general lines agent license with a property and casualty qualification and a life, accident, health, and HMO qualification is revoked.

DocuSigned by:

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Cassie Brown
Commissioner of Insurance

2021-7000

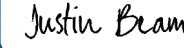
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Recommended and reviewed by:

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James Person, General Counsel

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Justin Beam, Assistant General Counsel



SOAH DOCKET NO. 454-21-0217.C

**TEXAS DEPARTMENT OF
INSURANCE,
Petitioner**

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BEFORE THE STATE OFFICE

v.

OF

**KAYLA LEAANN SMITH,
Respondent**

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Department of Insurance (Department) seeks to revoke the general lines agent license held by Kayla Leaann Smith (Respondent). Staff alleges that Respondent intentionally made material misstatements in her license applications, obtained a license by misrepresentation, engaged in dishonest acts, and has a criminal history that is grounds for revocation. Based on the evidence, the Administrative Law Judge (ALJ) recommends that the Department revoke Respondent’s license.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

Notice and jurisdiction were not disputed and are set forth in the Findings of Fact and Conclusions of Law, below. On January 12, 2021, ALJ Elizabeth Drews convened the hearing on the merits. Attorney Nancy Williams represented Staff. Attorney Kayleigh Smith represented Respondent. The hearing concluded that same day.¹ The record closed on February 10, 2021, the deadline for filing post-hearing briefs.

¹ A court reporter transcribed the hearing into one volume. References to the transcript in this Proposal for Decision are abbreviated as “Tr. at __.”

II. DISCUSSION

A. Applicable Law

The Department may revoke a license if the license holder has intentionally made a material misstatement in the license application, obtained a license by fraud or misrepresentation, engaged in fraudulent or dishonest acts or practices, been convicted of a felony, or been convicted of an offense that directly relates to the duties and responsibilities of the licensed occupation.² In determining whether to revoke a license based on a person's criminal history, the Department "will consider the factors specified in Texas Occupations Code §§ 53.022 and 53.023."³ Texas Occupations Code § 53.022 requires that in determining whether a criminal conviction directly relates to the duties and responsibilities of a licensed occupation, a licensing authority, such as the Department, shall consider each of the following factors:

1. the nature and seriousness of the crime;
2. the relationship of the crime to the purposes for requiring a license to engage in the occupation;
3. 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;
4. the relationship of the crime to the ability or capacity required to perform the duties and discharge the responsibilities of the licensed occupation; and
5. any correlation between the elements of the crime and the duties and responsibilities of the licensed occupation.⁴

If the Department determines that an offense directly relates to the duties and responsibilities of the licensed occupation, it then considers the following factors under Texas

² Tex. Ins. Code § 4005.101(b)(2), (3), (5), (8); Tex. Occ. Code § 53.021(a)(1).

³ 28 Tex. Admin. Code § 1.502(h).

⁴ Tex. Occ. Code § 53.022.

Occupations Code § 53.023 in determining what disciplinary action, if any, to take against a licensee:

1. the extent and nature of the person's past criminal activity;
2. the age of the person when the crime was committed;
3. the amount of time that has elapsed since the person's last criminal activity;
4. the conduct and work activity of the person before and after the criminal activity;
5. evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release;
6. evidence of the person's compliance with any conditions of community supervision, parole, or mandatory supervision; and
7. other evidence of the person's fitness, including letters of recommendation.⁵

Respondent has the responsibility, to the extent possible, to obtain and provide the letters of recommendation to the Department.⁶

Staff has the burden of proving any grounds for revoking Respondent's license, while Respondent has the burden to present any favorable evidence of her fitness to be licensed despite her criminal history.⁷ The standard of proof is by a preponderance of the evidence.⁸

⁵ *Id.* § 53.023(a).

⁶ *Id.* § 53.023(b).

⁷ 1 Tex. Admin. Code § 155.427.

⁸ 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)).

B. Evidence

At the hearing, Staff offered eight exhibits and Respondent offered nineteen exhibits, all of which were admitted without objection. Staff also presented testimony from Lewis Wright, the liaison between the Department's agent and adjuster licensing office and the Department's Enforcement Division.⁹ Respondent testified on her own behalf and presented the testimony of two insurance agents with whom she currently works: Hank Chol, her employer, and Crystal Garcia, her co-worker.

1. Background Facts

On October 4, 2019, the Department issued to Respondent general lines agent license number 2454948 with a property and casualty qualification.¹⁰ The Department issued to Respondent an additional life, accident, health, and health maintenance organization (HMO) qualification on December 4, 2019.¹¹ Respondent submitted her applications for her license and for the additional qualification on September 27, 2021, and November 27, 2019, respectively.¹²

Respondent pleaded guilty to burglary of a habitation and credit card or debit card abuse, both felonies, on December 22, 2015. She was sentenced to seven years deferred-adjudication community supervision for each.¹³ Regarding both felonies, she was discharged from community supervision and her cases were dismissed on May 13, 2020. The court orders state that Respondent "is hereby released from all penalties and disabilities resulting from the deferred adjudication in this cause."¹⁴

⁹ Tr. at 21.

¹⁰ TDI Ex. F at 031. Staff's exhibits offered in this case are referred to as TDI exhibits.

¹¹ *Id.*

¹² *Id.* at 032.

¹³ TDI Ex. E at 026-27, nos. 6 and 7; TDI Ex. G at 053-56; Resp. Ex. G at 029-31.

¹⁴ TDI Ex. G at 057-58; Resp. Exs. H-I.

On April 29, 2016, Respondent was convicted of having committed misdemeanor theft on March 24, 2016, and was sentenced to forty days in jail.¹⁵ Additionally, on July 11, 2016, Respondent was convicted of having committed misdemeanor theft on October 7, 2015, and was sentenced to fifty days in jail.¹⁶ One misdemeanor involved shoplifting; the other involved removing a cash tip jar.¹⁷

In both her September 27, 2019 application for a general lines agent license with a property and casualty qualification and her November 27, 2019 application to add a life, accident, health, and HMO qualification, Respondent answered “No” to the following questions:

- “Have you ever been convicted of a misdemeanor, had a judgment withheld or deferred, or are you currently charged with committing a misdemeanor?”
- “Have you ever been convicted of a felony, had a judgment withheld or deferred, or are you currently charged with committing a felony?”¹⁸

As noted, the Department approved both applications.

Subsequently, on June 30, 2020, a Department employee sent Respondent a First and Final Notice that she may have a criminal history she failed to disclose “on her application” and directed Respondent to provide certified “copies of the court documents regarding each offense reflected on your record” and specified related information.¹⁹ In a statement dated the same day and emailed to the Department on July 2, 2020, Respondent discussed only her felony offenses, stating:

I did not disclose the offenses on my application for my license, because I was never convicted with either of the crimes and never fell short of the requirements that the judge placed upon me to keep my record clean. . . . I do apologize for not disclosing the arrests on my record, but did not release the information because I

¹⁵ TDI Ex. H at 085-87; Resp. Ex. E at 017-19.

¹⁶ TDI Ex. D at 021, no. 8; TDI Ex. H at 080-81; Resp. Ex. F at 023-24.

¹⁷ Tr. at 51.

¹⁸ *Id.* at 27-30; TDI Ex. F at 033-34, 038-39.

¹⁹ TDI Ex. G at 044-45.

was not convicted of the charges and was in the process of being granted early termination of the probation for excellent behavior and proof of complete rehabilitation. . . . I do apologize, again, for not disclosing the offenses on my application, I honestly did not think I had to provide them since I was never convicted and was already in the process of having them dismissed.²⁰

She failed to mention her misdemeanors.²¹ On July 6, 2020, the Department employee sent Respondent an email stating “I also need the documentation on your 2 misdemeanor convictions that were also not disclosed.”²² On July 7, 2020, Respondent sent the Department documentation concerning her two misdemeanor convictions.²³

Respondent admits that her felony offenses “may be considered convictions for licensing purposes because she completed the period of supervision less than five years before the date she applied for the license, as contemplated under Tex. Occ. Code § 53.021(d)(1)(B)(I)” but denies that for the purposes of licensing, her felony offenses are “convictions” as contemplated by Texas Insurance Code § 4005.101(b)(8).²⁴

Based on Respondent’s criminal history and her failure to disclose it on her application, the Department seeks to revoke Respondent’s license.²⁵ Respondent requested a hearing to contest the revocation. She requests that no action be taken against her license.

2. Staff’s Evidence

In his testimony, Mr. Wright explained that the insurance license application is designed to protect Texas consumers, which is part of the Department’s mission.²⁶ He indicated that the

²⁰ TDI Ex. G at 046, 048-50; Resp. Ex. S at 64-65; Tr. at 62-63.

²¹ Tr. at 64.

²² TDI Ex. H at 073.

²³ *Id.* at 076-88.

²⁴ TDI Ex. E at 027.

²⁵ Staff Ex. C at 015-17; Tr. at 60.

²⁶ Tr. at 24.

application is specifically designed to elicit information about an applicant's background, history, administrative actions from any other regulatory bodies, and criminal offenses so that a determination for licensure can be made.²⁷ According to Mr. Wright, the granting of a license "confers an understanding that the Department believes the individual is honest, trustworthy, and reliable."²⁸

Mr. Wright stated that when an application raises concern and requires additional scrutiny, it may be referred to the Department's administrative review section, which would then undertake additional inquiry, including contacting the applicant for additional information.²⁹ He indicated that some applicants with a criminal history still receive a license to sell insurance.³⁰ However, he emphasized, all information provided must be accurate so that the Department may balance the nature and severity of an offense against any rehabilitation evidence an applicant might provide.³¹ If information supplied on an application is not accurate, he added, the Department's ability to protect Texans is limited.³² Based on his review of Respondent's application, Mr. Wright concluded that her answers to the questions related to her criminal history were not true.³³

Mr. Wright testified that all four of Respondent's crimes involved an element of theft and, necessarily, elements of fraud, dishonesty, and deceit.³⁴ He stated that because one of the central problems in the insurance industry is fraudulent acts related to theft and misuse of access to information, the four crimes at issue here are of prime importance.³⁵ Persons holding the license regularly have access to other individuals' sensitive, private information and financial information

²⁷ *Id.* at 31.

²⁸ *Id.* at 24.

²⁹ *Id.* at 22-23.

³⁰ *Id.* at 32-33.

³¹ *Id.* at 31.

³² *Id.*

³³ *Id.* at 28-30.

³⁴ *Id.* at 52.

³⁵ *Id.* at 53.

such as bank account and credit card numbers.³⁶ Consequently, access to this information provides Respondent an opportunity to re-commit theft or credit card abuse.³⁷

Mr. Wright avowed that in deciding to pursue revocation of Respondent's license, Staff considered additional factors in accordance with the Texas Occupations Code. It considered that Respondent was approximately 24 or 25 years old when the crimes were committed.³⁸ Staff considered the amount of time that had passed since her last criminal activity. It considered that she submitted her original application in September 2019 and was not released from community supervision until May 2020.³⁹ Mr. Wright opined that the timing of Respondent's application in relation to her felony crimes was important because she was in the middle of a criminal proceeding at the time of the application process.⁴⁰ Staff also considered Respondent's work conduct following her criminal history.⁴¹ It considered all evidence of rehabilitation that she provided, including the evidence demonstrating that she paid all of her court fees and complied with her community supervision requirements.⁴² Staff considered the recommendation letters Respondent provided, including letters from a current co-worker, Ms. Garcia,⁴³ and from her employer, Mr. Chol, for whom Respondent had worked for approximately eight months.⁴⁴

Mr. Wright concluded that "from my experience, typically there would have been a recommendation to deny licensure had the Department been aware of the information that we're aware of today."⁴⁵ He stated that Staff has "serious concerns" as to whether Respondent can be trustworthy because the responses on her application "indicate[] current evidence of a lack of

³⁶ *Id.* at 26, 49-50.

³⁷ *Id.* at 49-50, 53-54.

³⁸ *Id.* at 46.

³⁹ *Id.* at 47.

⁴⁰ *Id.* at 47-48.

⁴¹ *Id.* at 55-57.

⁴² *Id.* at 58.

⁴³ TDI Ex. H at 090.

⁴⁴ Tr. at 56-57; TDI Ex. G at 067.

⁴⁵ Tr. at 59.

forthrightness and complete honesty,” and, given that “[h]onest[y], trustworthiness, and reliability is what our licenses confer to the public,” Staff has serious concerns as to whether Respondent has “demonstrated the level of responsibility and forthrightness and honesty that the Department requires.”⁴⁶

3. Respondent’s Evidence

Respondent testified in detail that she endured decades of abuse, trauma, and violence both in her childhood homes and from her ex-husband.⁴⁷ She also explained that during her first marriage, with three children to raise, she and her ex-husband had financial problems. He was arrested for stealing from the shop where he worked, spent their savings on his criminal case attorney, and, although the charges were dropped, never worked again, began using drugs frequently, and stole items to pawn. The couple lost their home and was on the verge of losing their car.⁴⁸

Regarding her own criminal offenses, Respondent testified that she stole the cash tip jar to buy diapers.⁴⁹ She stated that she stole the credit card to buy clothes for her daughter’s first day of school and also that the theft was her ex-husband’s idea.⁵⁰ She suggested that she was charged with shoplifting because a video showed clothing “might have been stolen” by Respondent and two other girls and the clothing was found in her home.⁵¹ She stated that she was charged with the burglary because she was living with her husband when items he had stolen were found in their home.⁵²

⁴⁶ *Id.* at 60.

⁴⁷ *Id.* at 74-83.

⁴⁸ *Id.* at 83-85, 88.

⁴⁹ *Id.* at 94-95.

⁵⁰ *Id.* at 87-88.

⁵¹ *Id.* at 95-97.

⁵² *Id.* at 91.

Respondent testified that she did not mention the felonies in her license application because her criminal lawyers had told her that if her felony cases were dismissed, she was not a felon or convicted and no conviction would appear on a background check for her.⁵³ She stated that the lawyers did not advise her about impacts on her ability to obtain a professional license and that no one helped her with the license application process.⁵⁴ As for why she had failed to disclose the misdemeanor convictions a second time when initially responding to the Department's letter requesting information about her criminal history, Respondent cited emotional pain and other difficulty in accessing her memories of the period between her first and last arrests, which she described as "the most traumatic five months of my life" due to her criminal cases and problems relating to custody of and access to her children.⁵⁵

Since her release, Respondent worked full-time for a tanning salon from October 2017 to October 2019, eventually becoming a manager at that location, and worked on obtaining an associate's degree, making good grades on her courses.⁵⁶ Respondent divorced her ex-husband, remarried, and is helping to provide for her dependents.⁵⁷ From October 2019 to the present, Respondent has been employed by Mr. Chol as an insurance agent under her current license.⁵⁸

Mr. Chol's letter of recommendation praised Respondent's work ethic, responsibility, and integrity and described her as the most outstanding employee he had ever had. It states that the Department brought to his attention a charge Respondent "received five years ago that she was completely absolved of. I was not aware of this incident of hers at the time of her employment."⁵⁹

⁵³ *Id.* at 104-05.

⁵⁴ *Id.* at 93, 104-05.

⁵⁵ *Id.* at 105-07.

⁵⁶ *Id.* at 100-01; TDI Ex. G at 046, 049, 059-60, 062-65; Resp. Exs. A at 002, B at 003-04, C.

⁵⁷ Tr. at 109-10; Resp. Exs. A at 002, R.

⁵⁸ Tr. at 55-56; TDI Ex. G at 046, 049, 067.

⁵⁹ TDI Ex. G at 067; Resp. Ex. L.

Mr. Chol testified that he owned an insurance agency and that Respondent is one of the best employees he had ever had, coming in early and staying late.⁶⁰ He did not know she was under felony community supervision when she began working for him.⁶¹ He first became aware she had any criminal offenses in June or July 2020, when the Department requested information about them.⁶² He first learned of her misdemeanor convictions in October or November 2020.⁶³ He was shocked and saddened but allowed Respondent to keep working for him because he regarded her as a fine employee who had given him no cause to believe she was not fit, because life circumstances can cause people to do things out of desperation, and because her license had not been revoked.⁶⁴ Mr. Chol acknowledged that what Respondent “did in the application process was wrong” and that if the Department had known about her criminal history, mostly likely it would not have issued her license and Mr. Chol would not have employed her.⁶⁵

Ms. Garcia, Respondent’s remaining witness, is the office manager at Mr. Chol’s agency.⁶⁶ Her letter of recommendation states that Respondent is a hard-working, reliable individual who has integrity and should not be judged based on mistakes from her past.⁶⁷

Ms. Garcia testified that Respondent is a good insurance agent and a team player who works hard.⁶⁸ She was not aware Respondent had been untruthful in her license applications.⁶⁹ Ms. Garcia first became aware of Respondent’s criminal history when the Department contacted the insurance office.⁷⁰ She learned of the credit card offense when Respondent told her in

⁶⁰ Tr. at 114, 118, 121.

⁶¹ *Id.* at 134.

⁶² *Id.* at 114-15, 120-21.

⁶³ *Id.* at 130.

⁶⁴ *Id.* at 115, 120, 124-25.

⁶⁵ *Id.* at 124.

⁶⁶ *Id.* at 135.

⁶⁷ TDI Ex. H at 090; Resp. Ex. K.

⁶⁸ Tr. at 139.

⁶⁹ *Id.* at 144.

⁷⁰ *Id.* at 137.

connection with Ms. Garcia writing a letter of recommendation, and she learned of the burglary and theft charges the day of the hearing in this case.⁷¹ Ms. Garcia still considers Respondent to be an individual of great integrity and trusts her to handle clients' financial information.⁷²

Another colleague, who did not testify, also provided a strong letter of recommendation about Respondent's work ethic and character, stating he did so with a full understanding that she "was charged with the crimes of Burglary and Fraud in December of 2015 and has since completed deferred probation and was relieved of all offenses." The letter does not mention Respondent's misdemeanor convictions.⁷³

C. Analysis

Staff identified two main bases for denying Respondent's license application—her criminal history, and her misrepresentations relating to that history on her license application.⁷⁴

With respect to the misrepresentations, the ALJ finds that Respondent intentionally made material misstatements in her license application. Respondent answered "No" to these questions: "Have you ever been convicted of a misdemeanor, had a judgment withheld or deferred, or are you currently charged with committing a misdemeanor?" and "Have you ever been convicted of a felony, had a judgment withheld or deferred, or are you currently charged with committing a felony?"⁷⁵ The preponderance of the evidence shows Respondent knew she should have answered "Yes" to those questions. The first question clearly asks whether the applicant has ever been convicted of a misdemeanor. It is implausible that, less than 3½ years after Respondent's April

⁷¹ *Id.* at 142-43.

⁷² *Id.* at 137-38, 145.

⁷³ TDI Ex. G at 066; Resp. Ex. M.

⁷⁴ Staff seeks license revocation on the bases that Respondent (1) intentionally made material misstatements in her license application; (2) obtained a license by misrepresentation; (3) has a criminal history that warrants license revocation; and (4) engaged in dishonest acts. In this analysis, the ALJ combines (1) and (2) because they are related and does not separately discuss (4) because there was no allegation or evidence that Respondent engaged in any dishonest acts apart from misrepresentations in her license application and her criminal offenses.

⁷⁵ Tr. at 27-28.

and July 2016 misdemeanor convictions, for which she was sentenced to forty days and fifty days in jail respectively, Respondent had wholly forgotten both convictions when she applied for the license on September 27, 2019. The second question plainly asks whether Respondent has ever been convicted of a felony *or* had a judgment deferred. Respondent testified that in answering “no,” she relied on previous advice from her criminal attorneys but conceded she did not consult them specifically about how to answer the license application questions. Moreover, she submitted the license application more than seven months before she was discharged from community supervision for her felony offenses. Respondent did not disclose the felonies until months after her license applications were approved, when the Department sent her a formal notification it had learned she had criminal history not disclosed on her application and directed her to provide “copies of the court documents regarding each offense reflected on your record” and related information.⁷⁶ In her initial response to the notification, Respondent did not disclose her misdemeanor convictions, addressing them several days later, after the Department asked about those specifically.

The ALJ finds that Respondent’s “No” answers to those two questions on the application were material misrepresentations and that she obtained the license by misrepresentation. Both Staff witness Mr. Wright and Respondent witness Mr. Chol opined that the Department would not have issued her a license if it had known about her criminal history. Accordingly, the Department may revoke Respondent’s license based on her misrepresentations.⁷⁷

With respect to Respondent’s criminal history, a licensing authority may consider a person to have been convicted of an offense regardless of whether the criminal proceedings were dismissed and the person was discharged, if the person either has not completed the period of supervision or completed the period of supervision less than five years before the date the person applied for the license.⁷⁸ Respondent’s two felony deferred adjudications may therefore be treated as convictions for licensing purposes, because she completed the period of supervision less than

⁷⁶ TDI Ex. G at 044-45.

⁷⁷ Tex. Ins. Code § 4005.101(b)(2), (3), (5).

⁷⁸ Tex. Occ. Code § 53.021(d)(1)(B)(i).

five years before the date she applied for the license.⁷⁹ Indeed, she was still on community supervision seven months after she applied. Furthermore, for reasons explained by Mr. Wright, all four of her offenses are directly related to the duties and responsibilities of the insurance occupation for which she holds a license, as provided in Texas Occupations Code § 53.022. Accordingly, the Department may revoke Respondent's license based on any of her four offenses.⁸⁰

Although the Department has the authority to revoke Respondent's license based on her criminal offenses, it may determine whether to do so only after considering the factors listed in Texas Occupations Code § 53.023.

The first factor is the extent and nature of Respondent's criminal history.⁸¹ This is the most troubling factor for Respondent. She has been convicted of two separate misdemeanor thefts and her felony offenses of burglary of a habitation and felony credit card or debit card abuse may be considered convictions for purposes of licensing. All four offenses are directly related to the duties and responsibilities of the licensed occupation. This factor weighs in favor of revoking her license.

Other factors include Respondent's age when her crimes were committed and the amount of time that has elapsed since her most recent criminal activity.⁸² Her offenses were committed in

⁷⁹ The ALJ concludes that Respondent's felony deferred adjudications may be treated as "convictions" for purposes of both Texas Occupations Code § 53.021(a)(1) (allowing revocation based on "an offense that directly relates to the duties and responsibilities of the licensed occupation") and Texas Insurance Code § 4005.101(b)(8) (allowing revocation if the Department determines that the licensee "has been convicted of a felony"). In this regard, the ALJ respectfully differs with the analysis in *Texas Department of Insurance v. Cody Trace Forcade*, Docket No. 454-20-3957.C, Proposal for Decision at 15-16 (October 13, 2020). Texas Occupations Code § 53.021 applies to "a licensing authority" when it is determining whether to revoke a license based on a conviction. Texas Occupations Code § 53.001 states that definitions in Texas Government Code chapter 2001 apply to Texas Occupations Code chapter 53. Texas Government Code § 2001.003(3) provides that "'Licensing' includes a state agency process relating to the . . . revocation . . . of a license." The ALJ interprets these statutes to mean that in determining under Texas Insurance Code § 4005.101(b)(8) whether a licensee has been convicted of a felony for purposes of deciding whether to revoke a license, the Department may apply the meaning of "conviction" under Texas Occupations Code § 53.021(d) rather than its meaning under criminal law.

⁸⁰ Tex. Ins. Code § 4005.101(b)(5), (8); Tex. Occ. Code § 53.021(a)(1).

⁸¹ Tex. Occ. Code § 53.023(a)(1).

⁸² *Id.* § 53.023(a)(2)-(3).

2015 and 2016, when she was approximately 24 or 25 years old.⁸³ She was not released from community supervision until May 2020. On balance, the facts that her crimes are fairly recent and she had been an adult for several years when they were committed also weigh against allowing her to maintain the license.

The Department must also consider evidence of Respondent's conduct and work activity before and after her crimes and evidence of her rehabilitation or rehabilitative effort while incarcerated or after her release.⁸⁴ Regarding these factors, Respondent divorced her ex-husband and now lives with her new husband and contributes to the support of their dependents.⁸⁵ Since her release, she has maintained a record of good conduct.⁸⁶ She has been steadily employed, working first at a tanning salon, where she eventually became a manager, and then for her current employer, Mr. Chol. She has worked on an associate's degree, earning good grades in her courses. These facts weigh in favor of not revoking the license.

Other factors are evidence of Respondent's compliance with conditions of community supervision and other evidence of her fitness, including letters of recommendation.⁸⁷ She complied with all conditions of community supervision, successfully completed her rehabilitation program and volunteer service, and paid all court costs and fees. She submitted glowing letters of recommendation from Mr. Chol, Ms. Garcia, and another colleague.⁸⁸ These facts weigh in favor of not revoking the license.

Respondent has had a very difficult life and her recent record of good behavior is to be commended. She appears committed to her rehabilitation and has taken important positive steps to stabilize her life, avoid bad influences, and work productively for the benefit of her employer and family. It is also noteworthy that Mr. Chol, a Department licensee, continued employing her

⁸³ Respondent was born in 1991. Tr. at 74.

⁸⁴ Tex. Occ. Code § 53.023(a)(4)-(5).

⁸⁵ Tr. at 109-10.

⁸⁶ Tex. Occ. Code § 53.023(a)(4), (7).

⁸⁷ *Id.* § 53.023(a)(6), (7).

⁸⁸ *Id.* § 53.023(a)(7).

after learning she had a criminal history and that he and Ms. Garcia respect and trust Respondent and testified on her behalf. However, the positive factors do not overcome Respondent's relatively recent dishonest behavior and criminal history. Her offenses are serious and directly relate to the duties and responsibilities of the licensed profession. She was released from community supervision less than a year ago. She has only recently established a law-abiding life, and at this time her period of good behavior has been too short to find her fit to hold a license.

For these reasons, based on Respondent's misrepresentations on her license application and her criminal history, and after consideration of the applicable factors, the ALJ recommends that Respondent's license be revoked.

IV. FINDINGS OF FACT

1. On October 4, 2019, the Texas Department of Insurance (Department) issued to Kayla Leaann Smith (Respondent) a general lines agent insurance license, number 2454948, with a property and casualty qualification. On December 4, 2019, the Department issued to her a life, accident, health, and health maintenance organization qualification.
2. The Department staff (Staff) seeks to revoke Respondent's license.
3. Respondent made a timely request for a hearing to challenge the revocation.
4. On September 25, 2020, Staff issued its Notice of Hearing and Original Petition on revocation of the license. An Amended Petition was filed on December 28, 2020, and a Second Amended Petition was filed on January 4, 2021.
5. The notice of hearing and attached petition as amended by the second amended petition 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 the particular sections of the statutes and rules involved; and either a short, plain statement of the factual matters asserted or an attachment that incorporates by reference the factual matters asserted in the complaint or petition filed with the state agency.
6. The hearing in this case was held on January 12, 2021, before State Office of Administrative Hearings (SOAH) Administrative Law Judge Elizabeth Drews. Staff was represented by Staff attorney Nancy Williams, and Respondent was represented by attorney Kayleigh Smith. The hearing concluded that day. The record closed on February 10, 2021, the deadline for the parties to submit their written closing statements.

7. On December 22, 2015, Respondent pleaded guilty to the felony offense of burglary of a habitation in Case No. 1525044 in the 8th District Court of Hopkins County, Texas, and was sentenced to seven years deferred probation. She was discharged from community supervision and her case was dismissed on May 13, 2020.
8. On December 22, 2015, Respondent pleaded guilty to the felony offense of credit card or debit card abuse in Case No. 1525043 in the 8th District Court of Hopkins County, Texas, and was sentenced to seven years deferred probation. She was discharged from community supervision and her case was dismissed on May 13, 2020.
9. On March 24, 2016, Respondent was found guilty of misdemeanor theft in Case No. 16313091 in Hopkins County and was sentenced to forty days in jail.
10. On July 11, 2016, Respondent was found guilty of misdemeanor theft in Case No. 1632263 in Hopkins County and was sentenced to fifty days in jail.
11. All four of Respondent's criminal offenses involved elements of dishonesty or deceit.
12. Persons holding a general lines agent license issued by the Department regularly have access to other individuals' sensitive, private information and financial information, such as bank account and credit card numbers. Access to this information provides an opportunity to misuse it, including by committing theft and other dishonest acts.
13. In her September 27, 2019 application to the Department for a general lines agent license with a property and casualty qualification and her November 27, 2019 application to add a life, accident, and HMO qualification, Respondent falsely answered "No" to the following questions:
 - a. "Have you ever been convicted of a misdemeanor, had a judgment withheld or deferred, or are you currently charged with committing a misdemeanor?"
 - b. "Have you ever been convicted of a felony, had a judgment withheld or deferred, or are you currently charged with committing a felony?"
14. By answering "no" to those questions, Respondent intentionally made material misstatements on her license application. She obtained her license by misrepresentation.
15. Respondent's criminal offenses are serious and relate directly to the duties and responsibilities of the licensed occupation.
16. Respondent's criminal offenses were committed in 2015 and 2016, when she was approximately 24 or 25 years old. She is now 29 years old.
17. Respondent divorced her ex-husband, who also had a criminal record, and now lives with her new husband and contributes to the support of their dependents.

18. Since her release, Respondent has maintained a record of good conduct, has been steadily employed, and has worked on an associate's degree, earning good grades in her courses.
19. Respondent complied with all conditions of community supervision, successfully completed her rehabilitation program and volunteer service, and paid all of her court costs and fees.
20. Respondent provided the Department with letters of recommendation in support of her application written by her current employer, a current coworker, and another colleague.
21. Respondent has acknowledged her crimes and she is trying to correct her past mistakes.
22. Respondent's rehabilitation efforts are relatively recent and do not establish that she is sufficiently honest and trustworthy to hold the license at this time.
23. The preponderance of the evidence does not show Respondent's current fitness to hold the license.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Tex. Ins. Code chs. 82, 4001, 4005, 4051, 4054; Tex. Gov't Code ch. 2001.
2. SOAH has authority to hear this matter and to 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. Respondent received timely and sufficient notice of the hearing. Tex. Gov't Code ch. 2001; Tex. Ins. Code § 4005.104(b).
4. The Department may revoke a license if the license holder has intentionally made a material misstatement in the license application, obtained a license by fraud or misrepresentation, engaged in fraudulent or dishonest acts or practices, been convicted of a felony, or been convicted of an offense that directly relates to the duties and responsibilities of the licensed occupation. Tex. Ins. Code § 4005.101(b)(2), (3), (5), (8); Tex. Occ. Code § 53.021(a)(1).
5. Staff had the burden of proving its asserted grounds for revoking Respondent's license, while Respondent had the burden to present any favorable evidence of her fitness to be licensed despite the criminal history. 1 Tex. Admin. Code § 155.427. The standard of proof is by a preponderance of the evidence. *Granek v. Tex. St. Bd. of Med. Examn'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.).
6. Respondent intentionally made material misstatements in her license application and obtained her license by misrepresentation. Tex. Ins. Code § 4005.101(b)(2)-(3).

7. Respondent's felony deferred adjudications may be considered convictions for licensing purposes. Tex. Occ. Code § 53.021(a)(1) and (d)(1)(B)(i), (2); Tex. Ins. Code § 4005.101(b)(8).
8. Respondent's four criminal offenses directly relate to the duties and responsibilities of a person who holds a general lines agent license. Tex. Occ. Code § 53.022.
9. Respondent engaged in dishonest acts or practices. Tex. Ins. Code § 4005.101(b)(5).
10. The Department should revoke Respondent's license. Tex. Occ. Code § 53.023(a).

SIGNED April 7, 2021.



ELIZABETH DREWS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS