

No. **2022-7152**

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

Date: 01/05/2022

Subject Considered:

Texas Department of Insurance

v.

Noemi Cervantes

SOAH Docket No. 454-21-0066.C

General remarks and official action taken:

The subject of this order is Noemi Cervantes' application for a general lines agent license with a property and casualty qualification. This order denies the application.

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) approve Ms. Cervantes' application. A copy of the proposal for decision is attached as Exhibit A.

Enforcement staff for TDI filed exceptions to the administrative law judge's proposal for decision. Ms. Cervantes did not file a reply to the exceptions. In response to the exceptions, the administrative law judge added a citation to 1 TEX. ADMIN. CODE § 155.427 in Conclusion of Law No. 8. The administrative law judge did not otherwise revise the proposal for decision. A copy of the administrative law judge's response to exceptions is attached as Exhibit B.

TDI adopts the administrative law judge's proposed findings of fact and conclusions of law with the addition of new Finding of Fact No. 18.A and new Conclusion of Law No. 4.A and changes to Findings of Fact Nos. 2 and 20 and Conclusions of Law Nos. 5, 7, 8, and 9 as described in this order.

Legal Authority for Changes to the Proposal for Decision

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"

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 or deny a person's license application. Under subsection (b)(8), TDI may deny a license application 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 disqualify a person from receiving a license if the "person has been convicted of . . . an offense that directly relates to the duties and responsibilities of the licensed occupation[.]"¹

In 2017, Ms. Cervantes pleaded guilty to Medicaid fraud, a third-degree felony. She received, and is presently on, deferred adjudication community supervision for the offense. A deferred adjudication is generally not considered a conviction unless otherwise provided in statute. 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)).

In this case, the administrative law judge concluded, without analysis, that Ms. Cervantes' deferred adjudication qualifies as a conviction for purposes of TEX. INS. CODE

¹ Section 53.021(a) also authorizes TDI to deny a license application if the applicant was convicted of certain other serious offenses not at issue here.

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§ 4005.101(b)(8).² As support for her conclusion the administrative law judge simply cites to TEX. OCC. CODE § 53.021(d), which provides:

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.

By its plain language, however, 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

² In TDI's Original Petition, Enforcement staff did not cite TEX. INS. CODE § 4005.101(b)(8) as a legal basis to deny Ms. Cervantes' application. Instead, staff cited TEX. INS. CODE § 4005.101(b)(5), TEX. OCC. CODE §§ 53.021-.023, and 28 TEX. ADMIN. CODE § 1.502. *See* Original Petition, Legal Allegations Nos. 1-5.

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Office of the Attorney General recognized as much in Tex. Att'y Gen. Op. No. KP-107 (2016), albeit indirectly.³

Therefore, based on the analysis above, 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). See Commissioner's Order Nos. 2021-7018⁴ and 2021-7000⁵ (both concluding that a deferred adjudication is not a conviction for purposes of TEX. INS. CODE § 4005.101(b)(8)).

While TEX. OCC. CODE § 53.021(d) may not be used to treat a deferred adjudication as a conviction for purposes of TEX. INS. CODE § 4005.101(b)(8), it can be used as such for purposes of TEX. OCC. CODE § 53.021(a). Section 53.021(a) applies in this case because Medicaid fraud is a crime that directly relates to the duties and responsibilities of the licensed occupation. See 28 TEX. ADMIN. CODE § 1.502(e)(1). Therefore, while TEX. INS. CODE § 4005.101(b)(8) may not serve as a basis to deny Ms. Cervantes' application, TEX. OCC. CODE § 53.021(a) does. The administrative law judge's proposal for decision is changed accordingly, as described below.

Based on the analysis above showing the administrative law judge misinterpreted or misapplied the law, new Conclusion of Law No. 4.A is adopted:

The Department may deny a license if the applicant has been convicted of an offense that directly relates to the duties and responsibilities of the licensed occupation. TEX. OCC. CODE § 53.021(a)(1).

³At 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.

⁴ *Texas Department of Insurance v. Jesse Juarez*, issued October 13, 2021.

⁵ *Texas Department of Insurance v. Kayla Leann Smith*, issued September 9, 2021.

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The administrative law judge's proposed Conclusion of Law No. 5 states:

The Department may consider a person who has pleaded guilty, but whose adjudication has been deferred, to be convicted if the period of supervision is ongoing and the licensing authority determines that the employment of the person in the licensed occupation would create a situation in which the person has the opportunity to repeat the prohibited conduct. Tex. Occ. Code § 53.021(d).

Based on the analysis above showing the administrative law judge misinterpreted or misapplied the law, Conclusion of Law No. 5 is changed to state:

The Department may consider a person who has pleaded guilty, but whose adjudication has been deferred, to be convicted for purposes of TEX. OCC. CODE § 53.021(a) if the period of supervision is ongoing and the Department determines that the person may pose a continued threat to public safety or the employment of the person in the licensed occupation would create a situation in which he or she has the opportunity to repeat the prohibited conduct. TEX. OCC. CODE § 53.021(d).

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

Contrary to assertions made by the administrative law judge, TDI Enforcement staff properly alleged two factual bases to deny Ms. Cervantes a license: (1) her deferred adjudication for Medicaid fraud; and (2) her failure to abide by the terms of her probated adjuster trainee license.⁶ Denial based on the Medicaid fraud offense is under both TEX. OCC. CODE § 53.021(a), as noted above, and TEX. INS. CODE § 4005.101(b)(5), while denial based on her failure to abide by the terms of her probated license is under TEX. INS. CODE § 4005.101(b)(5). The former is discussed in detail in the proposal for decision, but the administrative law judge failed to analyze and determine whether the latter was itself a fraudulent or dishonest act under § 4005.101(b)(5).

TEX. INS. CODE § 4005.101(b)(5) provides that TDI may deny a license application if the applicant "has engaged in fraudulent or dishonest acts or practices[.]" To determine whether an act or practice is fraudulent for purposes of this statute, we turn to the generally accepted definition of fraud, which involves a material misrepresentation,

⁶ See Original Petition, Factual Allegations Nos. 2 and 5 and Legal Allegations No. 1; see also TEX. GOV'T CODE § 2001.052 (Contents of Notice).

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which was false, and which was asserted as a positive assertion without knowledge of its truth. *See Zaal v. Tex. Dept. of Ins.*, No. 03–11–00512–CV, 2013 WL 5878912 at 6 (Tex. App.—Austin 2013, no pet.) (mem. op.). A fraudulent act may be committed by someone acting knowingly or recklessly; negligence is not sufficient. *See Meyer v. Tex. Dep't of Ins.*, No. 03–10–00642–CV, 2011 WL 5865240 (Tex. App.—Austin 2011, pet. denied) (mem. op.). Similarly, "a dishonest act is marked by deliberate or reckless deception – an honest mistake will not suffice." Commissioner's Order No. 2021-6974⁷, pg. 3 n. 3; *see also Zaal*, 2013 WL 5878912 at 6 (a dishonest act is characterized by a lack of truth, honesty, or trustworthiness).

Failure to abide by probation terms is not inherently a fraudulent or dishonest act or practice, but Ms. Cervantes' situation is unique. She made little to no effort to fulfill any of the terms of her agreement with TDI, failing to even submit the initial report. This was shortly after she signed a statement saying that she would comply with the terms of the agreement with TDI and swore to the agreement before a notary.⁸ In her testimony Ms. Cervantes explained her noncompliance by saying, "At that moment I didn't think that I was going to stay in the insurance industry, so I just basically let . . . what Texas Department was asking me to do, I completely disregarded it . . ."⁹ But she continued to work for an insurer for six months after she signed the agreement and five months after she was to submit her initial report.¹⁰ The evidence in the record clearly shows that Ms. Cervantes knew the terms of her agreement and she swore to follow those terms, but she, in her own words, "completely disregarded it." In doing so, and by continuing to work under the license she received, she knowingly or at the very least recklessly¹¹ deceived TDI and thus violated TEX. INS. CODE § 4005.101(b)(5).

⁷ *Texas Department of Insurance v. Elizabeth Carolina Perez, et al.*, issued August 30, 2021.

⁸ TDI Exhibit 3, Bates number 042.

⁹ Hearing transcript, page 36.

¹⁰ *See* TDI Exhibit 3, Bates numbers 042 and 043 (Ms. Cervantes' agreement with TDI, signed on April 14, 2018, and providing that Ms. Cervantes would file an initial report no later than May 11, 2018) and Proposal for Decision, page 6 (noting Ms. Cervantes' testimony that she left Fred Loya Insurance in October 2018).

¹¹ *See Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 527 (Tex. 1998) ("[A] representation is recklessly made if the speaker knows that he does not have sufficient information or

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TDI may not issue Ms. Cervantes a license unless the factors specified in TEX. OCC. CODE §§ 53.022-53.023 and 28 TEX. ADMIN. CODE § 1.502(h) outweigh the serious nature of her Medicaid fraud offense and her failure to abide by the terms of her probated license 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 TEX. ADMIN. CODE § 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, the administrative law judge purported to engage in the required analysis regarding the Medicaid fraud offense and concluded that the factors outweigh the serious nature of the offense and that Ms. Cervantes is fit to perform the duties and discharge the responsibilities of a licensed insurance agent. But because the administrative law judge chose not to treat Ms. Cervantes' failure to abide by the terms of her probated license as an independent basis for denial, she did not properly weigh the applicable factors in reaching her ultimate conclusion that Ms. Cervantes should be granted a license.

An individual's failure to abide by prior licensure terms imposed by TDI demonstrates that individual's lack of trustworthiness and reliability, and it is an especially serious act when that same individual applies for a new license from TDI. *See* 28 TEX. ADMIN. CODE § 1.502(c) ("The department considers it very important that license and authorization holders and applicants . . . be honest, trustworthy, and reliable."). It demonstrates a lack of respect for the agency entrusted with protecting consumers and regulating the business of insurance in this state. *See* TEX. INS. CODE § 31.002 (Duties of Department). Should Ms. Cervantes be given a new license, she could easily disregard requirements imposed on that license just as she previously did. Her failure to abide by the terms of her probated license clearly calls into question her ability, capacity, and fitness to perform the duties and discharge the responsibilities of any occupation requiring

basis to support it, or if he realizes that he does not know whether or not the statement is true.") (internal citations omitted).

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licensure by TDI. All these factors weigh against her being approved for a new license. *See* 28 TEX. ADMIN. CODE § 1.502(h)(1).

Further, the extent and nature of Ms. Cervantes' disregard of the terms of her previous license has strong bearing on whether she should be granted another license, as does the timeframe of her previous license and her current application. When she failed to file an initial report on or before May 11, 2018, Ms. Cervantes violated the first term of her agreement. This was within a month of making the agreement and less than a year before TDI received her current application on April 10, 2019. And she violated the final term of her agreement (to complete 12 hours of continuing education) on April 11, 2019, the day after TDI received her current application. This means no amount of time had passed between the acts and Ms. Cervantes' current application—she was the same age, she had no applicable work activity or conduct to consider, and there was no time for rehabilitation or other evidence of fitness. All these factors weigh against Ms. Cervantes being approved for a new license. Ms. Cervantes did provide two letters of recommendation praising her work ethic and ability to learn, but there is no indication that the writers were aware of her failure to abide by the terms of her previous license. These letters provide minimal support in favor of licensure. Overall, however, the factors under 28 TEX. ADMIN. CODE § 1.502(h)(2) weigh against Ms. Cervantes being approved for a new license.

The administrative law judge concluded, after weighing factors solely for the Medicaid fraud offense, that Ms. Cervantes is currently fit to hold a general lines agent license. However, after properly weighing the required factors for *both* Ms. Cervantes' Medicaid fraud offense and her failure to abide by the terms of her probated adjuster trainee license, it is clear that those factors do not outweigh the serious nature of her acts when viewed in light of the license she now seeks. Accordingly, the department shall not approve her application. *See* 28 TEX. ADMIN. CODE § 1.502(f). In concluding otherwise, the administrative law judge misinterpreted or misapplied the law or agency rules.

The administrative law judge's proposal for decision is changed accordingly, as described in the following paragraphs.

As included in the proposal for decision, Finding of Fact No. 2 states:

On May 30, 2019, the staff (Staff) of the Department proposed to deny her application based on her criminal history.

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Based on the analysis above showing that the administrative law judge misinterpreted or misapplied the law or agency rules, Finding of Fact No. 2 is changed to state:

On May 30, 2019, the staff (Staff) of the Department proposed to deny her application based on her criminal history and her failure to abide by the terms of an adjuster trainee license previously issued to Ms. Cervantes.

Based on the analysis above showing the administrative law judge misinterpreted or misapplied the law, new Finding of Fact No. 18.A is adopted:

18.A Ms. Cervantes' decision to disregard the terms of the prior licensure agreement and continue to work under the license was a fraudulent or dishonest act.

As included in the proposal for decision, Finding of Fact No. 20 states:

The mitigating factors Ms. Cervantes established outweigh the serious nature of her criminal offense.

Based on the analysis above showing that the administrative law judge misinterpreted or misapplied the law, Finding of Fact No. 20 is changed to state:

Ms. Cervantes did not establish mitigating factors to outweigh the serious nature of her criminal offense and her failure to abide by the terms of her previous licensure agreement.

As included in the proposal for decision, Conclusion of Law No. 7 states:

The Department will consider the factors listed in Texas Occupations Code §§ 53.022 and 53.023 in determining whether to issue a license to an applicant with a criminal history and will not issue a license unless those mitigating factors outweigh the serious nature of the criminal offense when viewed in the light of the occupation being licensed. 28 Tex. Admin. Code § 1.502(g), (h).

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

The Department will consider the factors listed in Texas Occupations Code §§ 53.022 and 53.023 in determining whether to issue a license to an applicant with a criminal history or who has engaged in fraudulent or dishonest activity and will not issue a license unless those mitigating factors outweigh the serious

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nature of the criminal offense and the fraudulent or dishonest activity when viewed in the light of the occupation being licensed. 28 TEX. ADMIN. CODE § 1.502(g), (h).

As included in the proposal for decision and revised in response to exceptions, Conclusion of Law No. 8 states:

Ms. Cervantes has shown that she is currently fit to hold a general lines agent license despite her criminal offense. Tex. Occ. Code §§ 52.022–023; 28 Tex. Admin. Code § 1.502(h); 1 Tex. Admin. Code § 155.427.

Based on the analysis above showing that the administrative law judge misinterpreted or misapplied the law, Conclusion of Law No. 8 is changed to state:

Ms. Cervantes has not shown that she is currently fit to hold a general lines agent license. TEX. OCC. CODE §§ 52.022–023; 28 TEX. ADMIN. CODE § 1.502(h); 1 TEX. ADMIN. CODE § 155.427.

As included in the proposal for decision, Conclusion of Law No. 9 states:

The Department should grant Ms. Cervantes's application for a license.

Based on the analysis above showing that the administrative law judge misinterpreted or misapplied the law, Conclusion of Law No. 9 is changed to state:

The Department should not grant Ms. Cervantes' application for a license.

Findings of Fact

1. Findings of Fact Nos. 1 and 3–19 as contained in Exhibit A are adopted by TDI and incorporated by reference into this order.
2. In place of Finding of Fact No. 2 as contained in Exhibit A, the following finding of fact is adopted:

On May 30, 2019, the staff (Staff) of the Department proposed to deny her application based on her criminal history and her failure to abide by the terms of an adjuster trainee license previously issued to Ms. Cervantes.
3. The following Finding of Fact No. 18.A is adopted:

18.A Ms. Cervantes' decision to disregard the terms of the prior licensure agreement and continue to work under the license was a fraudulent or dishonest act.

4. In place of Finding of Fact No. 20 as contained in Exhibit A, the following finding of fact is adopted:

Ms. Cervantes did not establish mitigating factors to outweigh the serious nature of her criminal offense and her failure to abide by the terms of her previous licensure agreement.

Conclusions of Law

1. Conclusions of Law Nos. 1–4 and 6 as contained in Exhibit A are adopted by TDI and incorporated by reference into this order.

2. The following Conclusion of Law No. 4.A is adopted:

The Department may deny a license if the applicant has been convicted of an offense that directly relates to the duties and responsibilities of the licensed occupation. TEX. OCC. CODE § 53.021(a)(1).

3. In place of Conclusion of Law No. 5 as contained in Exhibit A, the following conclusion of law is adopted:

The Department may consider a person who has pleaded guilty, but whose adjudication has been deferred, to be convicted for purposes of TEX. OCC. CODE § 53.021(a) if the period of supervision is ongoing and the Department determines that the person may pose a continued threat to public safety or the employment of the person in the licensed occupation would create a situation in which he or she has the opportunity to repeat the prohibited conduct. TEX. OCC. CODE § 53.021(d).

4. In place of Conclusion of Law No. 7 as contained in Exhibit A, the following conclusion of law is adopted:

The Department will consider the factors listed in Texas Occupations Code §§ 53.022 and 53.023 in determining whether to issue a license to an applicant with a criminal history or who has engaged in fraudulent or dishonest activity and will not issue a license unless those mitigating

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factors outweigh the serious nature of the criminal offense and the fraudulent or dishonest activity when viewed in the light of the occupation being licensed. 28 TEX. ADMIN. CODE § 1.502(g), (h).

5. In place of Conclusion of Law No. 8 as contained in Exhibit A and revised by Exhibit B, the following conclusion of law is adopted:

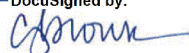
Ms. Cervantes has not shown that she is currently fit to hold a general lines agent license. TEX. OCC. CODE §§ 52.022–023; 28 TEX. ADMIN. CODE § 1.502(h); 1 TEX. ADMIN. CODE § 155.427.

6. In place of Conclusion of Law No. 9 as contained in Exhibit A, the following conclusion of law is adopted:


The Department should not grant Ms. Cervantes' application for a license.

Order

It is ordered that Noemi Cervantes' application for a general lines agent license with a property and casualty qualification is denied.

DocuSigned by:

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Cassie Brown
Commissioner of Insurance

Recommended and reviewed by:

DocuSigned by:

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James Person, General Counsel

DocuSigned by:

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Justin Beam, Assistant General Counsel



<p>TEXAS DEPARTMENT OF INSURANCE</p> <p>v.</p> <p>NOEMI CERVANTES, Applicant</p>	<p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p>	<p>BEFORE THE STATE OFFICE</p> <p>OF</p> <p>ADMINISTRATIVE HEARINGS</p>
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PROPOSAL FOR DECISION

The staff (Staff) of the Texas Department of Insurance (Department) seeks to deny the application of Noemi Cervantes for a general lines agent license based on her criminal history. After considering the evidence and the applicable law, the Administrative Law Judge (ALJ) recommends the Department grant Ms. Cervantes’s license application.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing in this case was held via Zoom videoconference on December 1, 2020, before ALJ Rebecca S. Smith at the State Office of Administrative Hearings. Staff was represented by staff attorney Patrick Quigley. Ms. Cervantes represented herself. The hearing concluded and the record closed the same day. Notice and jurisdiction were not disputed and are set out in the Findings of Fact and Conclusions of Law below.

II. DISCUSSION

A. Background

On May 22, 2017, Ms. Cervantes pleaded guilty to Medicaid fraud, a felony, in Cause No. CR-1069-17-F, in the 332nd District Court in Hidalgo County, Texas.¹ Adjudication was deferred, and Ms. Cervantes was placed on community supervision for ten years. She was ordered to pay \$38,224.37 in restitution and \$263.00 in court costs.

¹ Staff Ex. 3 at 48. According to the indictment, the offense began on or about April 20, 2010, and continued through January 15, 2015. Staff Ex. 3 at 46.

On April 13, 2018, the Department entered into an agreement with Ms. Cervantes, under which it issued her a probated license as an adjuster trainee. Under the agreement, Ms. Cervantes was required to file an initial report, to notify the Department of any change in her employment, and to complete twelve hours of continuing education by April 11, 2019.² It is undisputed that Ms. Cervantes left her employment and did not complete the terms of her agreement with the Department, including the requirement that she obtain continuing education. The probated adjuster trainee license expired on April 16, 2019.

On April 10, 2019, Ms. Cervantes applied for a general lines agent license with the Department. On May 30, 2019, Staff proposed to deny her application based on her criminal record. Ms. Cervantes timely requested a hearing.³

B. Applicable Law

The Department may deny a license to an applicant who has engaged in fraudulent or dishonest acts or practices or who has been convicted of a felony.⁴ The Department may consider a person who has pleaded guilty to an offense, but whose adjudication has been deferred, to be convicted if the period of supervision is ongoing and the Department determines that the person may pose a continued threat to public safety or the employment of the person in the licensed occupation would create a situation in which he or she has the opportunity to repeat the prohibited conduct.⁵

To guide its decision making, the Department has identified certain crimes that it considers to be of such a serious nature that they are of prime importance in determining fitness for

² Staff Ex. 3 at 42.

³ Staff Ex. 3 at 9.

⁴ Tex. Ins. Code § 4005.101(b)(5), (8).

⁵ Tex. Occ. Code § 53.021(d). The legislature amended Texas Occupation Code chapter 53, effective September 1, 2019. The amendments apply to applications submitted after September 1, 2019. *See* Acts 2019, 86th Leg, ch. 765 (H.B. 1342), § 14, eff. Sept. 1, 2019. Because Ms. Cervantez applied for a license before the amendments, the prior version of chapter 53 applies and is cited in this Proposal for Decision.

licensure.⁶ These crimes include any offense for which fraud, dishonesty, or deceit is an essential element.⁷

The Department considers the factors listed in Texas Occupations Code §§ 53.022 and 53.023 in determining whether to grant a license to an applicant with criminal convictions.⁸ Under its rules, the Department is to deny a license application unless it finds these factors outweigh the seriousness of the criminal offense.⁹

The first set of factors that the Department considers are those that are used to determine whether a conviction directly relates to the occupation:

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 the 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
4. The relationship of the crime to the ability, capacity, or fitness required to perform the duties and responsibilities of the licensed occupation.¹⁰

The Department must also consider the following factors related to fitness:

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 prior to and following the criminal activity;

⁶ 28 Tex. Admin. Code § 1.502(e).

⁷ 28 Tex. Admin. Code § 1.502(e)(1).

⁸ 28 Tex. Admin. Code § 1.502(h).

⁹ 28 Tex. Admin. Code § 1.502(f).

¹⁰ Tex. Occ. Code § 53.022.

5. evidence of the person's rehabilitation or rehabilitative effort while incarcerated or following release;
6. other evidence of the person's present fitness, including letters of recommendation from:
 - a. prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;
 - b. the sheriff or chief of police in the community where the person resides; and
 - c. any other persons in contact with the convicted person; and
7. proof furnished by the applicant that the applicant has:
 - a. maintained a record of steady employment;
 - b. supported the applicant's dependents;
 - c. maintained a record of good conduct; and
 - d. paid all outstanding court costs, supervision fees, fines, and restitution ordered in any criminal case in which the applicant or holder has been convicted.¹¹

C. Evidence

Staff offered four exhibits, which were admitted into evidence. Staff also offered the testimony of Lewis Weldon Wright, IV, an Administrative Review Liaison for the Department. Ms. Cervantes testified on her own behalf, but did not offer any exhibits.

1. Testimony of Mr. Wright

Mr. Wright testified that, when an applicant has no criminal history, the Department's application review process is short. The Department confirms that the applicant is over 18, has passed the required examination, and has paid the licensing fee. If an applicant has a criminal history, however, the application goes through administrative review, which is the section where Mr. Wright works.

¹¹ Tex. Occ. Code § 53.023.

Mr. Wright testified that Ms. Cervantes's application was not a run-of-the-mill application due to her criminal history. According to Mr. Wright, the Department considers felony Medicaid fraud to be a serious offense because it involves dishonesty and deception. He added that there is a direct relationship between Medicaid fraud and the business of insurance and that because being an agent required transmitting documents and claims, licensure would present the opportunity to commit similar offenses.

Focusing on the other licensure factors, Mr. Wright testified that the Medicaid fraud was Ms. Cervantes's only criminal offense, but that the criminal activity took place over five years. She was 32 years old at the beginning of the offense. Mr. Wright also testified that Ms. Cervantes's resume indicated she had a solid work history before her crime and reflected her attempts to remain employed. He added that Ms. Cervantes provided evidence of rehabilitation through her work history and her reference letters.

He noted that the Department wants to know that an applicant on community supervision is in good standing and current with court costs, fines, and restitution. Staff asked Ms. Cervantes for proof that her restitution payments were up-to-date, and, in response, merely received a letter from Ms. Cervantes's probation officer indicating that Ms. Cervantes was in good standing on her community supervision, but not focusing on her restitution payments.

Mr. Wright's conclusion, as he testified, was that Ms. Cervantes's application should be denied because her community supervision was still ongoing and because she did not meet the terms of the agreement granting her an adjustor trainee license. He noted that Ms. Cervantes's previous license provided certain safeguards that a general lines agent license would not. In particular, according to Mr. Wright, her trainee license required Ms. Cervantes to be sponsored by an already-licensed individual, and that under the agreement, her probation term would have continued for two years, including once she obtained her adjuster, not just trainee, licensee. He described the probated license agreement as an opportunity for Ms. Cervantes to prove herself and to demonstrate to the Department her responsibility and willingness to comply.

2. Testimony of Ms. Cervantes

Ms. Cervantes testified that she did not realize the importance of the continuing education requirement, and at the time she failed to complete it, did not think she would stay in the insurance business. She left Fred Loya Insurance, where she had been working as a trainee, in October 2018. She admits disregarding the agreement's requirements to file an initial report, obtain 12 hours of continuing education, and informing the Department when she changed employment. She regrets disregarding what the Department told her to do.

Ms. Cervantes testified that she currently works under a senior executive, who must approve everything she does. She has been steadily employed since 2002, working in several capacities, including at two insurance companies.

Ms. Cervantes testified that, in the past, she has had troubling making full restitution payments, but that as of 2020, she was making full payments. She does not know how much she has paid toward restitution. She added that since she was behind in payments, her payment amounts are first credited to her probation fees. She knows she got behind, but she was single and paying all her bills by herself.

3. Letters of Reference

Ms. Cervantes provided two reference letters to the Department, which were introduced into evidence. Those reference letters praise Ms. Cervantes's ability to learn, her work ethic, and responsibility.¹²

D. Analysis

Under Texas Insurance Code § 4005.101(b)(5), the Department may deny a license application if the Department determines that the applicant has engaged in fraudulent or dishonest acts or practices. The Department may also deny a license application if the applicant has been

¹² Staff Ex. 3 at 56-57.

convicted of a felony, as contemplated by Texas Insurance Code § 4005.101(b)(8). Ms. Cervantes's guilty plea was for a felony fraud offense. Because she has not yet completed her period of community supervision, and being licensed would provide her an opportunity to reoffend, her guilty plea may be treated as a conviction.¹³

Pursuant to 28 Texas Administrative Code § 1.502(h), the Department will consider the factors listed in Texas Occupations Code §§ 53.022 and 53.023, set out above, in determining whether to grant Ms. Cervantes's license application. Regarding these factors, the evidence established that the Medicaid fraud was Ms. Cervantes's only criminal activity, but that it was a serious offense. Ms. Cervantes was 32 years old at the time, so her actions were not a youthful crime. At the time of hearing, over five years had passed since her last criminal activity. Ms. Cervantes has an extensive work history and positive letters of recommendation that focus on her work ethic. Ms. Cervantes was issued a probated adjuster trainee license, and while she did not use the license for the entirety of its term and did not complete all the terms of the agreement, she did not use her license inappropriately. And in fact, the criminal activity is only farther in the past now than when the Department issued the probated license.

At hearing, Staff emphasized that Ms. Cervantes did not complete the terms of the agreement issuing her a probated license.¹⁴ But Staff did not plead that as a reason for denying her application. Instead, the bases Staff pleaded for denying the application were Ms. Cervantes's fraudulent conduct and criminal history, which have not changed since her probated license was issued. At most, Ms. Cervantes' decision to walk away from her adjuster trainee license and employment could be relevant to her trustworthiness. But that is only one licensure factor among many.

The ALJ recognizes the ways in which Ms. Cervantes's two applications are different. A trainee license suggests greater supervision than an agent license, and the previous agreement was for a probated license. But if Staff's concern is Ms. Cervantes's criminal history, there is no

¹³ Tex. Occ. Code § 53.021(d).

¹⁴ **Q:** Didn't I tell you that you were given a probated license agreement and you failed to comply with that and why should you expect TDI to give you another probated license agreement?

A: Yes.
(Tr. at 44).

difference between when the Department agreed to issue Ms. Cervantes a probated trainee license and the time of her more recent application for the general lines agent license. In fact, even more time—including time when she was licensed—has passed without criminal activity. There are no new allegations of criminal conduct, and Ms. Cervantes’s probation officer indicated that she has been compliant with her supervision requirements. Nor is the fact that she has not repaid all her restitution determinative. To the extent that the Department remains concerned, it could issue Ms. Cervantes a probated license.

Accordingly, the ALJ concludes that Ms. Cervantes’s application for a general lines agent license should be granted. In support of this recommendation, the ALJ makes the following findings of fact and conclusions of law.

III. FINDINGS OF FACT

1. On April 10, 2019, Noemi Cervantes applied for a general lines agent license with the Texas Department of Insurance (Department).
2. On May 30, 2019, the staff (Staff) of the Department proposed to deny her application based on her criminal history.
3. Ms. Cervantes requested a hearing to challenge the denial.
4. On September 21, 2020, Staff issued a notice of hearing on the denial of her application.
5. The notice of hearing contained 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 incorporated by reference the factual matters asserted in the complaint or petition filed with the state agency.
6. The hearing in this case was held Zoom videoconference on December 1, 2020, before Administrative Law Judge Rebecca S. Smith at the State Office of Administrative Hearings (SOAH). Staff was represented by staff attorney Patrick Quigley. Ms. Cervantes represented herself. The hearing concluded and the record closed the same day.
7. On May 22, 2017, Ms. Cervantes pleaded guilty to Medicaid fraud, a felony, in Cause No. CR-1069-17-F, in the 332nd District Court in Hidalgo County, Texas. Adjudication was deferred, and Ms. Cervantes was placed on community supervision for ten years. She was ordered to pay \$38,224.37 in restitution and \$263.00 in court costs.

8. On April 13, 2018, the Department entered into an agreement with Ms. Cervantes, under which it issued her a probated license as an adjuster trainee. This license expired on April 16, 2019.
9. The April 13, 2018 agreement required Ms. Cervantes to file an initial report, to notify the Department of any change in her employment, and to complete twelve hours of continuing education by April 11, 2019.
10. Ms. Cervantes left her adjuster trainee job and did not complete the tasks required by the April 13, 2018 agreement.
11. Licensure as a general lines agent would provide Ms. Cervantes the opportunity to reoffend.
12. Medicaid fraud involves fraudulent conduct or dishonesty.
13. Ms. Cervantes has no criminal history other than her guilty plea to Medicaid fraud.
14. Ms. Cervantes's criminal conduct occurred between April 20, 2010, and January 15, 2015.
15. Approximately six years have elapsed since Ms. Cervantes's offense.
16. Ms. Cervantes was 32 years old at the beginning of her criminal activity.
17. Ms. Cervantes worked steadily both before and after her criminal activity.
18. Ms. Cervantes's community supervision has been in good standing, but she fell behind for some of her payments.
19. Two people who know Ms. Cervantes praised her work ethic and ability to learn.
20. The mitigating factors Ms. Cervantes established outweigh the serious nature of her criminal offense.

IV. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Tex. Ins. Code §§ 4001.002, .105, 4005.101.
2. SOAH 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. Ms. Cervantes received timely and sufficient notice of hearing. Tex. Gov't Code §§ 2001.051-.052.; Tex. Ins. Code § 4005.104(b).

4. The Department may deny a license if the Department determines that the applicant has engaged in fraudulent or dishonest acts or practices or has been convicted of a felony. Tex. Ins. Code § 4005.101(b)(5), (8).
5. The Department may consider a person who has pleaded guilty, but whose adjudication has been deferred, to be convicted if the period of supervision is ongoing and the licensing authority determines that employment of the person in the licensed occupation would create a situation in which the person has the opportunity to repeat the prohibited conduct. Tex. Occ. Code § 53.021(d).
6. The Department has determined that certain crimes are of such a serious nature that they are of prime importance in determining fitness for licensure. These crimes include any offense for which fraud, dishonesty, or deceit is an essential element. 28 Tex. Admin. Code § 1.502(e)(1).
7. The Department will consider the factors listed in Texas Occupations Code §§ 53.022 and 53.023 in determining whether to issue a license to an applicant with a criminal history and will not issue a license unless those mitigating factors outweigh the serious nature of the criminal offense when viewed in the light of the occupation being licensed. 28 Texas Administrative Code § 1.502(g), (h).
8. Ms. Cervantes has shown that she is currently fit to hold a general lines agent license despite her criminal offense. Tex. Occ. Code §§ 52.022-023; 28 Tex. Admin. Code § 1.502(h).
9. The Department should grant Ms. Cervantes's application for a license.

SIGNED January 21, 2021.


REBECCA S. SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

2022-7152

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454-21-0066
4/26/2021 12:16 PM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Carol Hale, CLERK



ACCEPTED
454-21-0066
04/26/2021 12:37 PM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Carol Hale, CLERK

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

Exhibit B

April 26, 2021

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. 454-21-0066.C; Texas Department of
Insurance v. Noemi Cervantes**

Dear Commissioner Sullivan:

On February 5, 2021, Staff of the Texas Department of Insurance filed exceptions to the Proposal for Decision (PFD) that had been issued on January 21, 2021. Respondent Noemi Cervantes did not file responses to the exceptions.

In the exceptions letter, Staff indicates that the PFD did not give appropriate weight to Ms. Cervantes's criminal history and underlying facts behind it. The ALJ believes that the PFD did address the factors and discussed the weighing of them. Similarly, the ALJ stands by the statement in the PFD that Staff failed to plead that Ms. Cervantes's failure to comply with the agreement was a basis for denying the application. As support, the ALJ notes that the following are the entire Legal Allegations contained in the Original Petition, none of which provide notice that failure to comply would be a basis for denial.

Legal Allegations

1. Cervantes committed acts for which a license may be denied because:
 - a. She engaged in fraudulent or dishonest acts or practices, as contemplated by TEX. INS. CODE § 4005.101(b)(5).
 - b. The department may consider her to have committed a felony, as contemplated by TEX. OCC. CODE § 53.021 (d)(1)(B)(i).

2. In accordance with the requirements of Texas Occupations Code § 53.025, the department has developed guidelines relating to the matters which the department will consider in determining whether to grant, deny, suspend, or revoke any license or authorization under its jurisdiction.
3. Cervantes committed an offense for which fraud, dishonesty, or deceit is an essential element, as contemplated in 28 TEX. ADMIN. CODE § 1.502(e)(1) and TEX. OCC. CODE §§ 53.021-53.023.
4. Cervantes committed an offense with the essential elements of fraud, as contemplated in 28 TEX. ADMIN. CODE § 1.502(e)(1) and (3) and TEX. OCC. CODE §§ 53.021-53.023.
5. Department guidelines, 28 TEX. ADMIN. CODE § 1.502(c)-(e), emphasize that TDI:
 - a. Considers it very important that applicants be honest, trustworthy, and reliable;
 - b. May refuse to issue an original license if the department determines that the applicant has committed an offense that directly relates to the duties and responsibilities of the licensed occupation; and
 - c. Considers any offense for which fraud, dishonesty or deceit is an essential element and any theft offense to be of prime importance when determining fitness for licensure.

Also the ALJ notes that, contrary to Staff's assertions, the PFD does properly place the burden of proof on Ms. Cervantes in Conclusion of Law No. 8, which states that Ms. Cervantes has shown that she is currently fit to hold the license. This places the burden on her. The ALJ would recommend, however, adding a citation to 1 Tex. Admin. Code § 155.427 to that Conclusion of Law.

With that change, the PFD is ready for consideration.

Sincerely,



Rebecca S. Smith
Administrative Law Judge

RS/tt

cc: Patrick Quigley, Staff Attorney, Texas Department of Insurance, 333 Guadalupe, Enforcement Division, MC110-1A, Austin, TX 78701 - [VIA EFILE TEXAS](#)
Chief Clerk, Texas Department of Insurance, P.O. Box 149104, MC112-2A, Austin, TX 78714 - [VIA EFILE TEXAS](#)
Noemi Cervantes [REDACTED] Edinburg, TX 78542 - [VIA EFILE TEXAS](#)