

No. 2023-7809

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

Date: 04/25/2023

Subject Considered:

Texas Department of Insurance

v.

Jose Jaime Rodriguez & Aguila Insurance Co.

SOAH Docket No. 454-21-0107.C

General Remarks and Official Action Taken:

The subject of this order is Jose Jaime Rodriguez's general lines agent license with a property and casualty qualification and a life, accident, and health qualification, and Mr. Rodriguez's activities through his company, Aguila Insurance Co. (Aguila), which is not licensed or registered with the Texas Department of Insurance (TDI). This order (1) suspends Mr. Rodriguez's license for two years, (2) probates the suspension and imposes reporting requirements on Mr. Rodriguez during the suspension period, (3) orders that Mr. Rodriguez pay restitution in the amount of \$20,000 to Maverick County Solid Waste Authority (MCSWA), and (4) requires Mr. Rodriguez to cease and desist from engaging in the business of insurance through Aguila.

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 Mr. Rodriguez be required to cease and desist from engaging in the business of insurance under Aguila. The administrative law judge found that Mr. Rodriguez violated certain sections of the Texas Insurance Code, but she did not recommend a specific sanction. 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. Mr. Rodriguez filed a reply to the exceptions.

COMMISSIONER'S ORDER

TDI v. Jose Jaime Rodriguez & Aguila Insurance Co.

SOAH Docket No. 454-21-0107.C

Page 2 of 8

In response to the exceptions, the administrative law judge did not recommend revising the proposal for decision. A copy of the administrative law judge's response to exceptions is attached as Exhibit B.

The administrative law judge's proposed findings of fact, with changes to Findings of Fact No. 8 as described in this order, and Conclusions of Law Nos. 1–5 and 7–15, are adopted by the commissioner. For the reasons set forth in this order, Conclusion of Law No. 6 is not adopted. This order also addresses other issues with the proposal for decision that do not require changes to the proposed findings of fact and conclusions of law.

The administrative law judge concluded that Mr. Rodriguez violated Tex. Ins. Code §§ 4005.004(b) and 4005.054 by receiving fees from both the customer and a third party without providing the required disclosures and obtaining the customer's prior documented acknowledgment. The administrative law judge also concluded that Mr. Rodriguez violated Tex. Ins. Code §§ 101.102, 4001.101, 4005.053, and 4051.051 and 28 Tex. Admin. Code § 19.902(a) by engaging in acts constituting the business of insurance through his unlicensed company, Aguila. However, the administrative law judge explained that, in light of the circumstances as shown by the record, such violations do not justify revocation of his license, and that in the absence of evidence supporting a lesser penalty, she is unable to recommend one.

Discussion of Applicable Law

Texas Insurance Code § 4005.101(b)(1)

TDI Enforcement alleged that Mr. Rodriguez's violations of the insurance laws were committed "willfully" and therefore are sanctionable under Tex. Ins. Code § 4005.101(b)(1). The administrative law judge found violations on the basis of Mr. Rodriguez's failure to provide required disclosures and conducting the business of insurance through Aguila. However, the administrative law judge concluded that TDI Enforcement did not show that such violations were willful, and the evidence did not demonstrate that the willfulness standard was met.

Although the administrative law judge acknowledged that TDI has defined the term "willful" for purposes of Tex. Ins. Code § 4005.101(b)(1) as "deliberate, voluntary, or intentional," she cites the definition of "willful" in Black's Law Dictionary, which states that "[t]he term *willful* is stronger than *voluntary* or *intentional*; it is traditionally the

COMMISSIONER'S ORDER

TDI v. Jose Jaime Rodriguez & Aguila Insurance Co.

SOAH Docket No. 454-21-0107.C

Page 3 of 8

equivalent of *malicious, evil, or corrupt.*¹ This citation incorrectly implies, in contradiction to TDI's definition, that conduct must be more than voluntary or intentional in order to constitute a willful violation under Tex. Ins. Code § 4005.101(b)(1). Nevertheless, such citation in the proposal for decision does not necessitate any changes to the findings of fact or conclusions of law.

Texas Insurance Code § 4005.101(b)(5)

TDI Enforcement also alleged that Mr. Rodriguez committed fraudulent or dishonest acts, in violation of Tex. Ins. Code § 4005.101(b)(5). The basis for this allegation is that that Mr. Rodriguez allegedly (1) assisted Carlyle Poindexter and his companies in overcharging MCSWA approximately \$300,000 in premiums; (2) collected payments from both Mr. Poindexter and MCSWA for the same services; (3) failed to obtain the required written disclosures; (4) engaged in the business of insurance through his unlicensed company, Aguila Insurance Co.; and (5) provided contradicting testimony.

On pages 25 and 26 of the proposal for decision, the administrative law judge concluded that (1) TDI Enforcement failed to establish that Mr. Rodriguez assisted Mr. Poindexter in misappropriating funds; (2) the inconsistencies in Mr. Rodriguez's testimony were not fraudulent or dishonest but, rather, were due to his erroneous usage of the terms "commission" and "referral fee" interchangeably and were offset by other consistent testimony; (3) the record did not indicate that Mr. Rodriguez used Aguila to conceal his actions regarding the MCSWA bond; and (4) while Mr. Rodriguez's failure to make the required disclosures is "more questionable" and "shows a lack of transparency," without more, the administrative law judge "cannot say that such failure rises to the level of fraudulent or dishonest conduct."

The administrative law judge also concluded that the amendments of the Texas Insurance Code in 2001 cited by TDI Enforcement were not intended to remove the requirement that conduct be committed "knowingly" in order to be fraudulent or dishonest. These conclusions by the administrative law judge give the false impression that only an act committed knowingly or an act intended to conceal can qualify as fraudulent or dishonest under Tex. Ins. Code § 4005.101(b)(5).

As has been explained in prior Commissioner's orders, a fraudulent act may be committed by someone acting knowingly or recklessly, though negligence is not

¹ Proposal for Decision, pg. 27.

COMMISSIONER'S ORDER

TDI v. Jose Jaime Rodriguez & Aguila Insurance Co.

SOAH Docket No. 454-21-0107.C

Page 4 of 8

sufficient.² Similarly, TDI has found that "a dishonest act is marked by deliberate or reckless deception—an honest mistake will not suffice."³ While the administrative law judge misstated the applicable standard for establishing a fraudulent or dishonest act, her analysis of the evidence did not include findings of reckless acts or conduct marked by deliberate or reckless deception by Mr. Rodriguez. Therefore, no changes to the findings of fact or conclusions of law relating to Tex. Ins. Code § 4005.101(b)(5) are necessary.

Changes to Findings of Fact and Conclusions of Law

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

Findings of Fact No. 8

Proposed Finding of Fact No. 8 states that the MCSWA surety bond was placed with Lexon Insurance Company and "renewed annually with Lexon through 2018." However, the bond was renewed with Lexon through the 2017–2018 bond term ending on May 1, 2018, and MCSWA obtained a replacement surety bond with the United States Fire Insurance Company effective June 19, 2018.⁴

Conclusions of Law No. 6

Proposed Conclusion of Law No. 6 states:

Respondents provided services to MCSWA. Tex. Ins. Code § 550.001(6).

² See, e.g., *Tex. Dep't of Ins. v. Elizabeth Carolina Perez*, SOAH Docket No. 454-20-2384.C, Commissioner's Order 2021-6974, pg. 2 (citing *Meyer v. Tex. Dept. of Ins.*, No. 03-10-00642-CV, 2011 WL 5865240 (Tex. App.—Austin 2011, pet. denied) (mem. op)).

³ *Id.* pg. 3, footnote 3.

⁴ See TDI Exhibit 6, Bates No. TDI1322; Exhibit 9, Bates No. TDI1612.

COMMISSIONER'S ORDER
TDI v. Jose Jaime Rodriguez & Aguila Insurance Co.
SOAH Docket No. 454-21-0107.C
Page 5 of 8

Tex. Ins. Code § 550.001(6) provides that an agent may not solicit or collect a payment for an insurance application or policy other than the specified fees, which includes "a service fee, including a charge for costs described by Section 4005.003" as identified under paragraph (6). The term "service fee" is defined in 28 Tex. Admin. Code § 19.1502(8) as:

A charge by a local recording agent for actual costs incurred in obtaining a motor vehicle record of a person, or a photograph of property, insured under, or to be insured under, an insurance policy; or the reasonable costs of special delivery of postal charges, printing and reproduction costs, electronic mail costs, telephone transmission costs, and similar costs incurred by the agent on behalf of the client.

The administrative law judge concluded that the four payments of \$5,000 that Mr. Rodriguez received from MCSWA are service fees under Tex. Ins. Code § 550.001(6), for services in the form of obtaining financial data necessary to renew the surety bond, delivering the premium invoices to MCSWA, and being available to answer questions from MCSWA.⁵ However, there is nothing in the record to indicate that the \$5,000 payments are for the types of costs provided for in 28 Tex. Admin. Code § 19.1502(8) and incurred by Mr. Rodriguez in providing such services to MCSWA. While the invoices described the \$5,000 charges as "bond placement" fees and "service" fees, they do not identify any costs incurred by Mr. Rodriguez or provide any breakdown of the charges.⁶

By failing to consider the definition of "service fee" in 28 Tex. Admin. Code § 19.1502(8), the administrative law judge erred in concluding that the payments are service fees provided for in Tex. Ins. Code § 550.001(6). Because the administrative law judge misinterpreted or misapplied Tex. Ins. Code § 550.001(6), Conclusion of Law No. 6 is not adopted.

Sanctions

Although TDI agrees with the administrative law judge's assessment that Mr. Rodriguez's collection of four \$5,000 payments from MCSWA, without disclosure of the four \$20,000 payments from Mr. Poindexter for the same services, is questionable and

⁵ Proposal for Decision, pg. 21.

⁶ See TDI Exhibit 18, Bates Nos. TDI1994-TDI2003.

COMMISSIONER'S ORDER

TDI v. Jose Jaime Rodriguez & Aguila Insurance Co.

SOAH Docket No. 454-21-0107.C

Page 6 of 8

showed a lack of transparency,⁷ TDI also agrees with the administrative law judge's ultimate conclusion that Mr. Rodriguez's violations do not justify revocation of his license.⁸

Instead, sanctions in the form of restitution and probated restitution are appropriate, both to compensate MCSWA for charges made by Mr. Rodriguez without the required disclosures and to allow TDI to maintain oversight during the suspension period to ensure no further violations or questionable conduct are repeated. Therefore, the commissioner finds that Mr. Rodriguez should return the four payments of \$5,000 collected from MCSWA and his license should be placed on probated suspension for two years, with reporting requirements, to allow TDI to observe how he continues to perform as a licensee.

Findings of Fact

1. Findings of Fact Nos. 1–7 and 9–26 as contained in Exhibit A are adopted by the commissioner and incorporated by reference into this order.
2. In place of Findings of Fact No. 8 as contained in Exhibit A, the following finding of fact is adopted:

Mr. Poindexter placed the surety bond with Lexon Insurance Company (Lexon) in the initial amount of \$2,856,515 for the 2012–2013 term. The surety bond was renewed annually with Lexon through May 1, 2018.

Conclusions of Law

1. Conclusions of Law Nos. 1–5 and 7–15 as contained in Exhibit A are adopted by the commissioner and incorporated by reference into this order.
2. Conclusions of Law No. 6 is not adopted.

⁷ Proposal for Decision, pg. 26.

⁸ Proposal for Decision, pg. 28; *see also Yarborough v. State*, No. 14-00-00929-CR, 2001 WL 1386441, at *4 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (not designated for publication) ("The trier of fact has the opportunity to observe the demeanor of the witnesses on the stand and is able to better judge their credibility.").

COMMISSIONER'S ORDER

TDI v. Jose Jaime Rodriguez & Aguila Insurance Co.

SOAH Docket No. 454-21-0107.C

Page 7 of 8

Order

It is ordered that Jose Jaime Rodriguez must cease and desist from engaging in acts constituting the business of insurance through Aguila Insurance Co.

It is further ordered that Mr. Rodriguez must pay restitution of \$20,000 to the Maverick County Solid Waste Authority within 90 days from the date of this order. The restitution must be paid by cashier's check or money order made payable to the named entity in the amount specified in this order. TDI Enforcement staff will provide the applicable mailing addresses to which the restitution must be sent. Mr. Rodriguez must provide written confirmation of payment to TDI within 90 days of the date of this order by emailing it to EnforcementReports@tdi.texas.gov.

It is further ordered that Mr. Rodriguez's license is suspended for two years. The suspension is probated, and during this period of probation, Mr. Rodriguez must comply with the terms and conditions in this order.

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

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

The report must include the following information:

- a. Mr. Rodriguez's current mailing address and telephone number;
- b. the name, mailing address, and telephone number of Mr. Rodriguez's employer, and if Mr. Rodriguez is self-employed, a statement that he is self-employed and the name, mailing address, and telephone number of his business;
- c. the name and address of any insurer that has appointed Mr. Rodriguez as an agent;

COMMISSIONER'S ORDER

TDI v. Jose Jaime Rodriguez & Aguila Insurance Co.

SOAH Docket No. 454-21-0107.C

Page 8 of 8

- d. the name and address of any insurer that has cancelled Mr. Rodriguez's appointment as an agent; and
- e. a copy of any and all contracts Mr. Rodriguez enters into with an insurer, broker, agent, agency, managing general agent, or any other person or entity in the business of insurance.

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

- a. any charges or indictments filed against him for a misdemeanor or felony during the period he is required to file reports, excluding traffic offenses and Class C misdemeanors;
- b. any state or regulatory actions taken against him, including formal and informal actions;
- c. any change in his employment or his residence; and
- d. any complaint made against Mr. Rodriguez concerning his performance as an agent, as well as a written explanation detailing the steps taken to resolve it.

DocuSigned by:

FC5D7EDFFBB4F8...

Cassie Brown
Commissioner of Insurance

Recommended and reviewed by:

DocuSigned by:

5DAC5618BBC74D4...

Jessica Barta, General Counsel

DocuSigned by:

67EF0C22C3604B8...

Taryn Lam, Attorney

**SOAH DOCKET NO. 454-21-0107.C
TDI ENFORCEMENT FILE NOS. 18246 & 23931**

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Department of Insurance (Department or TDI) brought this enforcement action to revoke the general lines agent license held by Jose Jaime Rodriguez and to require him to cease and desist from engaging in the business of insurance under Aguila Insurance Co. (Aguila) (collectively, Mr. Rodriguez and Aguila are referred to as Respondents). Staff alleges that Respondents violated the Texas Insurance Code in several ways, including misappropriating money belonging to an insured, engaging in fraudulent or dishonest acts or practices, assessing and collecting agent fees without proper disclosure, and engaging in the business of insurance through Aguila without a license.

The Administrative Law Judge (ALJ) finds that Staff did not establish that Respondents misappropriated funds or engaged in fraudulent or dishonest acts, but did establish that Respondents failed to provide required disclosures and operated Aguila without a license. Based on those findings, the ALJ recommends that Respondents be required to cease and desist from engaging in the business of insurance under Aguila. Further, the ALJ finds that Mr. Rodriguez committed violations, but based on the evidence, is unable to recommend a specific sanction.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Jurisdiction and notice were not contested, so those matters are addressed solely in the findings of fact and conclusions of law below. The hearing on the merits was held via Zoom videoconference on December 13, 2021, before ALJ Cassandra Quinn of the State Office of

Administrative Hearings (SOAH). Attorneys Cassie Tigue and Stephanie Andrews represented Staff. Attorney Bogdan Rentea represented Respondents. The hearing concluded that day. The record remained open until February 15, 2022, so the parties could file written closing arguments and responses, at which point the record closed.¹

II. DISCUSSION

A. Background

Mr. Rodriguez holds a general lines agent license with a property and casualty qualification and a life, accident, and health qualification issued by the Department on October 20, 2008.² Aguila is a d/b/a (doing business as) name registered in Maverick County under which Mr. Rodriguez conducted certain insurance activities between 2008 and 2018, but that was not licensed or registered with the Department.³

The allegations in this proceeding stem from a surety bond procured by the Maverick County Solid Waste Authority (MCSWA) in 2012. A surety bond is a three-party financial guarantee in which the surety (an insurance company) financially guarantees to an obligee (the entity requiring the bond) that the third party, referred to as the principal, will act as required by the obligee.⁴ In this case, the Texas Commission on Environmental Quality required MCSWA, the principal, to obtain a bond to meet the financial assurance requirements for closure/post-closure of a landfill.⁵ The surety bond was issued by Lexon Insurance Company (Lexon) initially in the amount of \$2,856,515.⁶ The bond was renewed with Lexon on an annual basis through 2018.

¹ SOAH Order No. 9 (Dec. 14, 2021).

² TDI Ex. 13 at 1850.

³ Tr. at 40-41, 71-72; TDI Ex. 14.

⁴ Tr. at 46-47.

⁵ Tr. 48-49; *see also* 30 Tex. Admin. Code § 37.221.

⁶ TDI Ex. 3 at 1014-16.

At issue in this case is Respondents' role in procuring and renewing the surety bond, and Respondents' compensation received in connection with the bond. Respondents' role in procuring the bond is disputed and is discussed below in connection with the parties' evidence and arguments. However, it is undisputed that the surety bond was placed with Lexon by then-licensed insurance agent Carlyle Poindexter and one of his insurance agencies, Surety One, Inc. (collectively, Mr. Poindexter). In connection with the bond, from 2015 to 2018, Mr. Rodriguez received \$20,000 per year from Mr. Poindexter and an additional \$5,000 per year from MCSWA invoiced by Mr. Rodriguez d/b/a Aguila.⁷

In 2016, after discovering a discrepancy in the amounts Mr. Poindexter had charged MCSWA for the surety bond, Lexon initiated an anti-fraud investigation and concluded that Mr. Poindexter had overcharged MCSWA for the bond from 2012 to 2017.⁸ Thereafter, the Department brought an enforcement action against Mr. Poindexter seeking to revoke his individual and agency licenses. A hearing was convened by SOAH on February 4, 2020, at which Mr. Rodriguez testified on Mr. Poindexter's behalf.⁹ The ALJ in that proceeding found that Mr. Poindexter had overcharged MCSWA by approximately \$300,000, thereby committing several violations of the Insurance Code, and recommended that Mr. Poindexter's licenses be revoked.¹⁰ The Commissioner of Insurance issued an order on October 8, 2020, adopting the ALJ's recommendation and revoking Mr. Poindexter's licenses.¹¹

In this proceeding, Staff alleges that Respondents facilitated the placement of the surety bond with Mr. Poindexter, acted as his subagent, and assisted in overcharging MCSWA. Staff further alleges that, by conducting insurance activities through Aguila, Respondents engaged in

⁷ Tr. at 77-79; TDI Ex. 18 at 1993-2004.

⁸ TDI Exs. 8, 9.

⁹ TDI Ex. 10.

¹⁰ TDI Ex. 11 (*Tex. Dep't of Ins. v. Carlyle T. Poindexter, Poindexter & Associates, Inc., and Surety One, Inc.*, SOAH Docket No. 454-19-2215.C, Proposal for Decision (June 18, 2020)).

¹¹ TDI Ex. 12 (*Tex. Dep't of Ins. v. Carlyle T. Poindexter, Poindexter & Associates, Inc., and Surety One, Inc.*, SOAH Docket No. 454-19-2215.C, Commissioner's Order No. 2020-6501 (Oct. 14, 2020)).

the business of insurance without a license from the Department. Respondents admit they conducted insurance activities through Aguila without a license, but deny all other allegations.

B. Applicable Law

The Texas Insurance Code authorizes the Department to regulate the business of insurance in this state and to take disciplinary action against agents who violate the laws or rules related to insurance.¹² As is relevant to this case, the Department may take disciplinary action under Texas Insurance Code § 4005.101 against a license holder who has willfully violated an insurance law of this state; has misappropriated, converted to the license holder's own use, or illegally withheld money belonging to an insured; or has engaged in fraudulent or dishonest acts or practices.¹³

Additionally, Staff alleges Respondents assessed and collected agent fees without proper disclosure and consent as required by Texas Insurance Code §§ 550.001, 4005.002, 4005.003, 4005.004, and 4005.054. Section 550.001 does not specifically address disclosures, but provides, in pertinent part, that:

- (a) An insurer or an insurer's agent or sponsoring organization may not solicit or collect, in connection with an application for insurance or the issuance of a policy, a payment other than:
 - (1) a premium;
 - (2) a tax;
 - (3) a finance charge;
 - (4) a policy fee;
 - (5) an agent fee;
 - (6) a service fee, including a charge for costs described by Section 4005.003;

¹² Tex. Ins. Code §§ 31.002(1), (3); 4005.102.

¹³ Tex. Ins. Code § 4005.101(b)(1), (b)(4)(C), (b)(5).

- (7) an inspection fee; or
- (8) membership dues in a sponsoring organization.

Section 4005.002 authorizes certain agents to obtain motor vehicle records and photographs of property in connection with providing insurance, and Section 4005.003 addresses fees and disclosures for those actions, as follows:

- (a) A general property and casualty agent or personal lines property and casualty agent may charge a client a fee to reimburse the agent for costs the agent incurred in obtaining a motor vehicle record or photograph of property described under Section 4005.002. The fee may not exceed the actual costs to the agent.
- (b) For services provided to a client, a property and casualty agent described by Subsection (a) may charge a reasonable fee, including a fee for:
 - (1) special delivery or postal charges;
 - (2) printing or reproduction costs;
 - (3) electronic mail costs;
 - (4) telephone transmission costs; and
 - (5) similar costs that the agent incurs on behalf of the client.
- (c) A property and casualty agent described by Subsection (a) may charge a client a fee under this section only if, before the agent incurs an expense for the client, the agent:
 - (1) notifies the client of the agent's fee; and
 - (2) obtains the client's written consent for each fee to be charged.

Section 4005.004 addresses required disclosures in subsection (b), as follows:

- (b) If an agent, or any affiliate of an agent, receives compensation from a customer for the placement or renewal of an insurance product, other than a service fee described under Section 4005.003, an application fee, or an inspection fee, the agent or the affiliate may not accept or receive any compensation from an insurer or other third party for that placement or renewal unless the agent has, before the customer's purchase of insurance:

- (1) obtained the customer's documented acknowledgment that the compensation will be received by the agent or affiliate; and
- (2) provided a description of the method and factors used to compute the compensation to be received from the insurer or other third party for that placement.

Section 4005.054, titled "Receiving Additional Fee Prohibited," provides that:

A person who holds a license under this code and receives a commission or other consideration for services as an agent may not receive an additional fee for those services provided to the same client except for a fee:

- (1) described by Section 550.001 or 4005.003; and
- (2) for which disclosure is made as required under Section 4005.003 or Section 4005.004.

Finally, Staff alleges Respondents violated several provisions of the Insurance Code by engaging in acts constituting the business of insurance without a license or other authorization from the Department.¹⁴

Staff has the burden of proof in this proceeding by a preponderance of the evidence.¹⁵

C. Evidence

At the hearing, Staff had 18 exhibits admitted into evidence and presented the testimonies of Andrew Gibson Smith and Mr. Rodriguez. Respondents presented the testimonies of Wesley Becknell and Mr. Rodriguez, and did not offer any documentary evidence.

¹⁴ See Tex. Ins. Code §§ 101.102, 4001.101, 4005.053, 4051.051, 4054.051; 28 Tex. Admin. Code § 19.902.

¹⁵ 1 Tex. Admin. Code § 155.427; *Granek v. Tex. St. Bd. of Med. Examn'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.).

1. Testimony of Mr. Smith

Mr. Smith is an assistant vice-president of compliance with Sompo International Insurance (Sompo), which acquired Lexon on June 1, 2018.¹⁶ Prior to the acquisition, Mr. Smith had been a director of compliance and chair of the anti-fraud committee at Lexon since April 2007. As is relevant to this proceeding, Mr. Smith participated in the anti-fraud investigation Lexon conducted regarding MCSWA's surety bond.

Mr. Smith testified that his company is a specialty insurer, with surety bonds making up 98% of its business.¹⁷ According to Mr. Smith, the ability to place a surety bond depends on the financial standing and overall experience of the entity tasked with completing the work being financially guaranteed.¹⁸ To obtain a surety bond, Mr. Smith explained that typically a third party insurance agent/agency will submit an application to an insurance company (here, Lexon) that will then perform underwriting to determine if it will write the bond.¹⁹ If so, the insurance company will select a rate that has previously been filed with the Department, then bill the insurance agent/agency, which in turn will bill the entity obtaining the bond.²⁰ Mr. Smith stated that this billing arrangement was initially used for MCSWA's surety bond—specifically, Lexon billed Mr. Poindexter, who then billed MCSWA.²¹ However, beginning in October 2016, Lexon began direct billing MCSWA after having difficulty collecting the premium payments through Mr. Poindexter.²² Mr. Smith noted that surety bonds typically have a one-year term, so they need to be renewed each year.²³

¹⁶ Tr. at 43.

¹⁷ Tr. at 50.

¹⁸ Tr. at 49.

¹⁹ Tr. at 47.

²⁰ Tr. at 47-48.

²¹ Tr. at 48.

²² Tr. at 48.

²³ Tr. at 56.

According to Mr. Smith, Lexon's anti-fraud investigation discovered that the amounts Lexon billed to Mr. Poindexter were significantly lower than the amounts Mr. Poindexter billed to MCSWA.²⁴ At the hearing, Mr. Smith described TDI Exhibit 9,²⁵ which contains the following summary comparing the amounts Lexon charged for the surety bond to the amounts billed to the "Client" (MCSWA) by the "Agent," referring to Mr. Poindexter:²⁶

Term	Agent Billed Client	Client Payment To Agent	Premium Charged by Lexon Ins. Co.	Agent Commission	Agency Payment to Lexon Ins. Co.	Agent Overbilled
6/1/2012 - 6/1/2013	\$ 99,979.00	\$ 99,979.00	\$ 57,130.30	\$ 11,426.06	\$ 45,704.24	\$ 42,848.70
6/1/2013 - 6/1/2014	\$ 93,302.00	\$ 93,302.00	\$ 58,920.00	\$ 11,784.00	\$ 47,136.00	\$ 34,382.00
5/1/2014 - 5/1/2015	\$ 127,360.00	\$ 127,360.00	\$ 72,777.00	\$ 14,555.40	\$ 58,221.60	\$ 54,583.00
5/1/2015 - 5/1/2016	\$ 129,145.00	\$ 129,145.00	\$ 73,796.00	\$ 14,759.20	\$ 58,221.60	\$ 55,349.00
5/1/2016 - 5/1/2017	\$ 130,434.00	\$ 130,434.00	\$ 74,534.00	\$ 14,906.80	\$ 59,627.20	\$ 55,900.00
5/1/2017 - 5/1/2018	\$ 132,130.00	\$ 132,130.00	\$ 75,503.00	\$ 15,100.60	\$ 60,402.40	\$ 56,627.00
5/1/2018 - 5/1/2019			\$ 75,503.00*			
			<u>\$ 712,350.00</u>	<u>\$ 412,660.30</u>		<u>\$ 299,689.70</u>

For example, as shown on Row 1 from left to right, for the initial term of the surety bond (6/1/2012 - 6/1/2013), Mr. Poindexter billed to MCSWA, and MCSWA paid to Mr. Poindexter, \$99,979.00. However, Lexon charged a premium of only \$57,130.30, of which Mr. Poindexter was entitled to a commission of \$11,426.06. Mr. Poindexter paid to Lexon \$45,704.24, which was the actual premium amount for that term minus his commission. The final column titled "Agent Overbilled" provides the difference between the premium Lexon charged and the amount MCSWA paid and, therefore, shows the amount Mr. Poindexter overbilled MCSWA. The overbilling for the first term was \$42,848.70, and in total over six years, was nearly \$300,000.

Mr. Smith's first knowledge of Mr. Rodriguez came in January 2019, when a replacement surety bond for MCSWA was placed with one of Sompo's competitors and the premium was paid

²⁴ Tr. at 58.

²⁵ Although TDI Exhibit 9 was filed as confidential, counsel for Staff stated at the hearing that non-redacted information in their exhibits was public. Tr. at 9-10. Additionally, the same information contained in TDI Exhibit 9 was presented publicly in Mr. Poindexter's February 2020 SOAH proceeding. See TDI Ex. 11 at 1781.

²⁶ Tr. at 56-57, 59-61.

through Mr. Rodriguez and Aguila.²⁷ Thereafter, Mr. Smith said he learned at Mr. Poindexter's SOAH hearing in February 2020—at which both Mr. Smith and Mr. Rodriguez testified—that Mr. Rodriguez had also had a role in the original surety bond written by Lexon.²⁸ Mr. Smith said he was surprised to learn that Mr. Rodriguez had been speaking with MCSWA regarding the Lexon surety bond because Mr. Smith had believed Mr. Poindexter was the sole agent communicating with MCSWA; instead, it sounded to Mr. Smith as if Mr. Rodriguez had been acting as a subagent for Mr. Poindexter.²⁹ Mr. Smith noted that Lexon required all agents, subagents, and agencies to be appointed to do business with the company, but Mr. Rodriguez and Aguila had never been appointed.³⁰

On cross-examination, Mr. Smith acknowledged that Lexon's anti-fraud investigation only examined the activities of Mr. Poindexter, not Mr. Rodriguez; that from Lexon's standpoint Mr. Poindexter had overbilled MCSWA; and that Lexon had made no findings regarding Mr. Rodriguez.³¹ Further, Mr. Smith agreed that the references in TDI Exhibit 9 to "Agent" do not include Mr. Rodriguez.³² Mr. Smith also testified that, from his investigation, he determined that Mr. Rodriguez did not bill MCSWA for the bond premiums, but instead, Mr. Poindexter directly billed MCSWA for the premiums, and MCSWA directly paid Mr. Poindexter.³³ Additionally, Mr. Smith testified that Lexon paid commissions to Mr. Poindexter, but not to Mr. Rodriguez.³⁴

2. Testimony of Mr. Becknell

Mr. Becknell testified that, approximately 10 years ago, while he was a licensed insurance agent in Texas, he was contacted by Frank Pruski with La Vernia Insurance Agency (La Vernia)

²⁷ Tr. at 45, 50-51.

²⁸ Tr. at 51-52.

²⁹ Tr. at 54.

³⁰ Tr. at 50, 63-64.

³¹ Tr. at 63, 67.

³² Tr. at 60.

³³ Tr. at 60-62, 66-67.

³⁴ Tr. at 62-63.

to obtain a surety bond for Maverick County.³⁵ Mr. Becknell said none of the bonding companies he normally used would write the bond, so he did an Internet search related to surety bonds, and Mr. Poindexter's company was the top search result. Mr. Becknell called Mr. Poindexter, who quoted the cost of the bond as 3.5% of the bond amount.³⁶ Mr. Becknell shared that information with Mr. Pruski and Mr. Rodriguez. However, Mr. Becknell noted that Mr. Rodriguez did not have any involvement in locating Mr. Poindexter for the surety bond.³⁷

Mr. Becknell did not recall receiving an invoice from Mr. Poindexter, nor having any conversations directly with Maverick County.³⁸ He stated that he had received a finder's fee for the first year of the bond, but had no further involvement thereafter.³⁹ Additionally, he noted that he was not responsible for charging any premiums or fees related to the bond.⁴⁰

3. Testimony of Mr. Rodriguez

Mr. Rodriguez testified that he does not work directly for an insurance agency, but is a "producer" who refers work to La Vernia.⁴¹ As part of that role, he assists La Vernia with obtaining property, automobile, workers' compensation, and health insurance for Maverick County.⁴² Regarding the MCSWA bond, Mr. Rodriguez said he informed Mr. Pruski with La Vernia that the county needed the bond, and Mr. Pruski reached out to Mr. Becknell to try to place the bond.⁴³ Mr. Rodriguez learned from Mr. Becknell that the bond had been placed through Mr. Poindexter.⁴⁴ According to Mr. Rodriguez, he had never worked with Mr. Poindexter before and did not work

³⁵ Tr. at 115.

³⁶ Tr. at 116-17, 119.

³⁷ Tr. at 115.

³⁸ Tr. at 121.

³⁹ Tr. at 121.

⁴⁰ Tr. at 122.

⁴¹ Tr. at 71.

⁴² Tr. at 72-73.

⁴³ Tr. at 74-75.

⁴⁴ Tr. at 75-76.

with him on anything other than the MCSWA bond.⁴⁵ Mr. Rodriguez testified that, each time the bond was going to be renewed, Mr. Poindexter would contact him to obtain information, including updated financial data.⁴⁶

Mr. Rodriguez stated that Mr. Poindexter paid him \$20,000 per year for four years (2015-2018) as a “referral fee” for the bond.⁴⁷ In exchange for this fee, Mr. Rodriguez provided Mr. Poindexter with MCSWA’s updated financial information each year and delivered Mr. Poindexter’s disclosures and invoices for the bond to MCSWA.⁴⁸ Mr. Rodriguez acknowledged that in prior communications with the Department he had referred to the payments as a commission and that the “memo” line on one of the checks stated: “Maverick County SWA bond commission.”⁴⁹ Additionally, Mr. Rodriguez agreed that he had testified as follows at Mr. Poindexter’s hearing:

Q: (TDI COUNSEL) Did you receive a commission off of this bond?

A: (MR. RODRIGUEZ) I received a commission, yes.

Q: What did you receive?

A: \$20,000.

Q: From whom?

A: From Mr. Poindexter.⁵⁰

However, at his own hearing, when asked if he believed the \$20,000 payments were a commission, Mr. Rodriguez responded that “in our business, everything is called a commission, but it was just a referral that I sent to him, you know, for the business.”⁵¹

⁴⁵ Tr. at 76.

⁴⁶ Tr. at 76-77.

⁴⁷ Tr. at 77, 84. Mr. Rodriguez believed La Vernia Insurance was paid for the first two terms of the bond. Tr. at 77.

⁴⁸ Tr. at 85.

⁴⁹ Tr. at 86-91; TDI Ex. 7 at 1482, 1484.

⁵⁰ Tr. at 90; TDI Ex. 10 at 1699.

⁵¹ Tr. at 87.

From 2015 to 2018, Mr. Rodriguez was also paid \$5,000 each year by the MCSWA as a placement fee for the bond.⁵² Mr. Rodriguez invoiced MCSWA annually for that amount with the description “Bond fee with surety one for placement” in 2015 and 2016, “Bond Placement and Service Fee” in 2017, and “Bond placement and delivery fee” in 2018.⁵³ The invoices were from Mr. Rodriguez d/b/a Aguila. Mr. Rodriguez testified that, apart from the invoices, he did not provide any other documentation for that fee,⁵⁴ and did not obtain a written acknowledgement from MCSWA.⁵⁵ Mr. Rodriguez said he provided services in exchange for those payments, including making the 70-mile trip back and forth to the landfill to work with MCSWA’s engineers to obtain the financial information Mr. Poindexter needed for the bond.⁵⁶

Regarding his communications with MCSWA, Mr. Rodriguez explained that he would email Mr. Poindexter’s invoices for the surety bond to MCSWA’s landfill manager. Mr. Rodriguez also attended MCSWA’s board meetings in case there were questions, but did not present the invoices to the board.⁵⁷ When asked if he knew the invoices contained “premiums plus fees,” Mr. Rodriguez stated that, while he understood now from Mr. Smith’s testimony that they did, “[t]o me they were always just called a premium.”⁵⁸ Mr. Rodriguez emphasized that he did not know Mr. Poindexter was charging excess fees.⁵⁹ He presented the invoices to MCSWA, which only included what Mr. Poindexter called a “premium.”⁶⁰

Mr. Rodriguez acknowledged that he testified as follows at Mr. Poindexter’s hearing regarding his disclosures to the MCSWA board:

⁵² Tr. at 78-83; *see also* TDI Ex. 18 at 1993-2004.

⁵³ Tr. at 85; TDI Ex. 18 at 1995, 1997, 2000, 2003.

⁵⁴ Tr. at 83.

⁵⁵ Tr. at 97-98.

⁵⁶ Tr. at 84.

⁵⁷ Tr. at 93.

⁵⁸ Tr. at 93.

⁵⁹ Tr. at 93.

⁶⁰ Tr. at 93.

Q: (MR. POINDEXTER'S COUNSEL) Was Maverick County SWA aware of charges excess of premium from Mr. Poindexter?

A: (MR. RODRIGUEZ) Yes, they were made aware of that when Mr. Poindexter came to me and we were working together. He provided me with a general indemnity agreement for the insurance company and a broker's disclosure for any fees that would be compensated above and beyond the premium amounts that needed to be taken to the Maverick County Solid Waste Authority for review and approval, and then had to be taken to Maverick County Solid Waste Authority's board for approval together with the invoice for payment.⁶¹

...

Q: And you specifically disclosed those fees each year?

A: I disclosed those fees, yes, sir, and had a broker's closure [sic] signed every year and I actually spoke to Mr. Herring and let them know. And we talked about the broker disclosure, and Mr. Herring was the attorney at the time for the Solid Waste Authority.⁶²

However, at his own hearing, Mr. Rodriguez clarified that what he had disclosed to the board was the amount on Mr. Poindexter's invoices, as well as Mr. Poindexter's broker disclosure indicating that MCSWA might be charged a fee.⁶³ Mr. Rodriguez stated that "I told them there was possibly going to be fees, it was going to be very expensive because it was a hard-to-place bond, and the financial position was not favorable."⁶⁴ Mr. Rodriguez noted that he had testified at Mr. Poindexter's hearing that the bond was difficult to place because Maverick County's commissioners "were being sent to prison for money laundering."⁶⁵

⁶¹ Tr. at 96; TDI Ex. 10 at 1683.

⁶² Tr. at 95; TDI Ex. 10 at 1688.

⁶³ Tr. at 93-94, 99-101.

⁶⁴ Tr. at 94.

⁶⁵ Tr. at 87; TDI Ex. 10 at 1682. Specifically, in Mr. Poindexter's hearing, Mr. Rodriguez testified that:

[I]n December of 2011, they [MCSWA] had seven denials from current carriers because of their financial situation. Their Commissioners' Court had been indicted for embezzlement and kickback schemes. Their landfill manager was indicted for theft and embezzlement and kickback. So there was nobody willing to work with Maverick County or touch them. Their financial position was -- was gone.

When questioned about an email he sent to Mr. Poindexter in 2017 asking if there was “[a]ny chance to make more money?”, Mr. Rodriguez said he was asking if there was an insurance carrier other than Lexon that paid a higher commission.⁶⁶ According to Mr. Rodriguez, Mr. Poindexter had told him Lexon paid a 10% commission, but another carrier paid a 20% commission.

As to Aguila, Mr. Rodriguez explained that, when he was first licensed in 2008, he intended to use “Aguila Insurance” as the name of his agency, so he obtained a d/b/a in his local county.⁶⁷ Although he never opened the agency, Mr. Rodriguez acknowledged that through Aguila he had written automobile insurance policies for himself and his father in 2008 and had invoiced MCSWA from 2015 to 2018.⁶⁸ Mr. Rodriguez said he stopped using Aguila in 2018 after receiving a notice from the Department indicating that it was improper.⁶⁹

4. Email Communications

The evidentiary record also includes certain email communications related to the MCSWA surety bond. The earliest is from May 3, 2014, from Mr. Poindexter to Mr. Rodriguez stating:

My commission for this class of bond (landfill and reclamation) is 10% of the gross premium. I was able to make a special exception in your case here to be able to give you a “referral fee” of so much money. If instead of paying you a “flat fee”, I will share the commission 50%50%, your part would be +/- \$7,200. Believe me you will come out winning. Also, most bond companies put a limit (cap) on commissions. From your perspective, a producer should not make so much money on a single bond, since that producer has no liability for the bond. \$20,000 is the annual salary of somebody[.] :-) ⁷⁰

⁶⁶ Tr. at 104.

⁶⁷ Tr. at 71-72.

⁶⁸ Tr. at 72.

⁶⁹ Tr. at 78.

⁷⁰ TDI Ex. 19A at 2064 (English translation of email correspondence at TDI Ex. 19 at 2047).

Mr. Rodriguez responded the following day that: “There is no problem and appreciate your help and support.”

Toward the end of Mr. Poindexter’s involvement with the bond, he emailed Mr. Rodriguez on February 13, 2017, noting that it was time to start collecting the financials to renew the bond.⁷¹ He told Mr. Rodriguez that “I understand that the carrier is also doing an internal audit so we need to make sure that our paperwork is right. I have CTR/broker disclosures from this principal but let’s freshen them up. Fee will be the same unless you wish to discount them this year. Do you want to prep the invoice or I?” Mr. Rodriguez responded the following day that “I will get started in [sic] this. Are we keeping the same carrier[?] Any chance to make more money?”

Additionally, the following year, on April 12, 2018, Mr. Poindexter emailed Mr. Rodriguez:

I am on this every minute. Lexon is trying to steal the business from us by cutting us out, taking out the commission and billing it directly. They will send a renewal by overnight if Maverick pays the \$75Gs but that will put us out of the deal altogether. I am working this with two carriers but they are not really happy with the financial condition of MCSWA. That has always been a problem.⁷²

Mr. Rodriguez responded, “The MCSWA is solvent. Would bank statements help? I can hold them off a bit.”

D. Argument and Analysis

1. Unlicensed Activity

It is undisputed that Mr. Rodriguez engaged in the business of insurance through Aguila, a d/b/a that was not licensed by the Department. Under Aguila, Mr. Rodriguez wrote automobile

⁷¹ TDI Ex. 19 at 2051.

⁷² TDI Ex. 19 at 2054.

insurance policies for himself and his father in 2008 and invoiced MCSWA from 2015 to 2018 in connection with the surety bond.⁷³ Accordingly, the Department demonstrated that Respondents engaged in acts constituting the business of insurance without a license or other authorization from the Department in violation of the Texas Insurance Code and Department rules.⁷⁴

Separately, Staff alleges that Mr. Rodriguez does not hold the correct license type to write a surety bond policy and, therefore, he personally engaged in unlicensed activity.⁷⁵ However, Staff does not provide any citation or explanation regarding the license type it contends Mr. Rodriguez needed, and Mr. Rodriguez testified that he did not write any surety bonds.⁷⁶ Instead, the evidence showed that Lexon wrote the MCSWA surety bond and it was placed with Lexon by Mr. Poindexter, not Mr. Rodriguez. Accordingly, the ALJ finds Staff did not show that Mr. Rodriguez personally engaged in the unlicensed business of insurance, except as stated above with respect to using Aguila.

2. Disclosure of Fees

In its Original Petition, Staff contends Respondents assessed and collected agent fees without proper disclosure and consent as required by Texas Insurance Code §§ 550.001, 4005.002, 4005.003, 4005.004, and 4005.054.⁷⁷

As an initial matter, Staff does not explain how Sections 4005.002 and 4005.003 apply to Respondents. These sections address an insurance agent's authorization and fees, respectively, for obtaining a motor vehicle record or photograph of property, neither of which is at issue here. Accordingly, the ALJ concludes that Sections 4005.002 and 4005.003 do not apply in this case.

⁷³ Tr. at 72.

⁷⁴ See Tex. Ins. Code §§ 101.102, 4001.101, 4005.053, 4051.051; 28 Tex. Admin. Code § 19.902(a).

⁷⁵ Staff Closing Arguments at 10.

⁷⁶ Tr. at 75.

⁷⁷ TDI Ex. 1 at 996. The Original Petition also cites a violation of 28 Texas Administrative Code § 19.1503, which addresses procedures for charging fees by local recording agents. However, Staff did not address this rule at the hearing or in post-hearing arguments, and therefore, the ALJ considers it waived. See 1 Tex. Admin. Code § 155.425(c).

The applicability of the remaining three statutes turns on Respondents' role in connection with the MCSWA bond, so that issue is addressed first. Respondents assert that Sections 550.001, 4005.004, and 4005.054 do not apply to them because they were not acting as an agent with respect to the MCSWA bond. In their view, Lexon was the insurer and Mr. Poindexter was the agent. While it is true that Mr. Poindexter was the agent appointed with Lexon for the MCSWA bond, the analysis does not end there. During the time period at issue in this case, the Insurance Code also contained the following definition of "subagent":

"Subagent" means a person engaging in activities described under Subdivision (1) [defining "Agent"] who acts for or on behalf of an agent, whether through an oral, written, electronic, or other form of communication, by soliciting, negotiating, or procuring an insurance or annuity contract or health maintenance organization membership, or collecting premiums or charges on an insurance or annuity contract or health maintenance organization membership, without regard to whether the subagent is designated by the agent as a subagent or by any other term. A subagent is an agent for all purposes of this title [Title 13 of the Texas Insurance Code], and a reference to an agent in this title, Chapter 21, or a provision listed in Section 4001.009 includes a subagent without regard to whether a subagent is specifically mentioned.⁷⁸

This definition was repealed on September 1, 2021, but was in effect at all times relevant to this proceeding.

Respondents argue that they did not engage in the acts that define an agent, i.e., soliciting, negotiating, procuring, or collecting a premium on an insurance product.⁷⁹ Although these terms are not defined by the Insurance Code, the ALJ finds that, at a minimum, Mr. Rodriguez's acts fall within the plain meaning of "procuring." Procuring is generally defined as "to get possession of (something) : to obtain (something) by particular care and effort" and "to bring about or achieve (something) by care and effort."⁸⁰ While Mr. Becknell, rather than Mr. Rodriguez, assisted with

⁷⁸ Formerly Tex. Ins. Code § 4001.003(9), *repealed by* Act of May 26, 2021, 87th Leg., R.S., Ch. 355, § 22(1), effective September 1, 2021 (H.B. 4030).

⁷⁹ Respondents Closing Arguments at 4.

⁸⁰ *Procure*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/procure> (last visited Apr. 10, 2022).

procuring the bond initially, it had to be renewed annually. Mr. Rodriguez testified that each year he worked with MCSWA to gather the information Mr. Poindexter needed to renew the bond, delivered Mr. Poindexter's invoices to MCSWA, and was available at the MCSWA board meetings to answer any questions. As contemplated by the definition of procuring, Mr. Rodriguez was obtaining something—the renewal of the surety bond—through his care and effort.

These services were also taken on behalf of an agent, Mr. Poindexter. If Mr. Rodriguez had not provided these services, Mr. Poindexter would have had to communicate directly with MCSWA or through another subagent. Mr. Rodriguez's role as a subagent is further supported by email communications from Mr. Poindexter asking if he would like to prepare the invoice for MCSWA, and separately informing him that "Lexon is trying to steal the business from us by cutting us out."⁸¹ At Mr. Poindexter's hearing, Mr. Rodriguez also identified himself as "an agent on the bond."⁸² In addition, in response to requests for information from the Department, Mr. Rodriguez stated that he "operated as a producer for surety one [Mr. Poindexter's agency] under my individual license."⁸³ Mr. Rodriguez also received compensation of \$20,000 directly from Mr. Poindexter for each renewal of the MCSWA bond.⁸⁴ Accordingly, the ALJ concludes that Mr. Rodriguez acted as a subagent for Mr. Poindexter in connection with the renewals of the MCSWA bond.

As provided in the definition of subagent above, references to an "agent" in Title 13 of the Texas Insurance Code include a subagent without regard to whether a subagent is specifically mentioned. Because Sections 4005.004 and 4005.054 are within Title 13, Mr. Rodriguez may be considered an agent for purposes of those statutes. Section 550.001 is not within Title 13, but is relevant to determining whether a violation of Section 4005.054 occurred.

⁸¹ TDI Ex. 19 at 2051, 2054.

⁸² TDI Ex. 10 at 1698.

⁸³ TDI Ex. 18 at 1990.

⁸⁴ Tr. at 77.

Section 4005.004(b) requires that, if an agent receives compensation from a customer for the placement or renewal of an insurance product, the agent may not accept or receive any compensation from an insurer or other third party for that placement or renewal unless the agent has, before the customer's purchase of insurance:

- (1) obtained the customer's documented acknowledgment that the compensation will be received by the agent; and
- (2) provided a description of the method and factors used to compute the compensation to be received from the insurer or other third party for that placement.⁸⁵

As used here, "compensation from an insurer or other third party" includes payments, commissions, fees, awards, overrides, bonuses, contingent commissions, loans, stock options, gifts, prizes, or any other form of valuable consideration, whether or not payable under a written contract or agreement.⁸⁶ "Documented acknowledgement" means a customer's dated acknowledgment, obtained before the customer's purchase of an insurance product, as demonstrated by the customer's written or electronic signature or recorded voice, or by other additional methods that the Insurance Commissioner may authorize by rule.⁸⁷ However, the disclosure requirement in Section 4005.004 does not apply to "a licensed agent who acts only as an intermediary between an insurer and the customer's agent."⁸⁸

As to the MCSWA surety bond, Respondents received "compensation from a customer for the placement or renewal of an insurance product." Specifically, from 2015 to 2018, Respondents received \$5,000 per year from the customer, MCSWA, as a "bond placement fee." Respondents separately received compensation from a third party, Mr. Poindexter. Therefore, unless an exemption applies, Respondents were required to disclose the arrangement to MCSWA. Respondents assert they are exempt from disclosure because they "at most, acted only as

⁸⁵ Section 4005.004(b) excepts from disclosure the following three types of fees that are not applicable here: a service fee described under Section 4005.003, an application fee, or an inspection fee.

⁸⁶ Tex. Ins. Code § 4005.004(3).

⁸⁷ Tex. Ins. Code § 4005.004(6).

⁸⁸ Tex. Ins. Code § 4005.004(c)(1).

intermediaries between Lexon, the insurer, and [Mr.] Poindexter, the agent.”⁸⁹ Staff disagrees, arguing that, for Respondents to be considered an intermediary for purposes of the disclosure statute, they would have had to deal directly with Lexon, which they did not.⁹⁰ Respondents respond that the statute does not require direct contact with the insurer.⁹¹

Although “intermediary” is not defined, the plain language of the statute refers to an intermediary acting between the insurer, in this case Lexon, and the customer’s agent, here Mr. Poindexter. Regardless of whether Mr. Rodriguez worked *directly* with Lexon, he was not acting between Lexon and Mr. Poindexter. Instead, he was assisting in the relationship between the agent, Mr. Poindexter, and the customer, MCSWA. Accordingly, Mr. Rodriguez was not acting as an intermediary as that term is used in Section 4005.004. Because the exemption does not apply, Mr. Rodriguez was subject to the disclosure requirement.

The ALJ next turns to Section 4005.054. Under that statute, a person who is licensed by the Department and receives a commission or other consideration for services as an agent may not receive an additional fee for those services provided to the same client except for a fee:

- (1) described by Section 550.001 or 4005.003; and
- (2) for which disclosure is made as required under Section 4005.003 or Section 4005.004.

Staff argues that Respondents violated this statute by charging MCSWA \$5,000 per year for “bond placement fees” while separately receiving \$20,000 per year from Mr. Poindexter for the same services.⁹²

⁸⁹ Respondents Closing Arguments at 4.

⁹⁰ Staff Closing Arguments at 9.

⁹¹ Respondents Response to Closing Arguments at 2-3.

⁹² Staff Closing Arguments at 8.

The ALJ finds that Mr. Rodriguez received “consideration for services as an agent” in the form of the four \$20,000 payments from Mr. Poindexter. Therefore, under Section 4005.054, he could not receive an additional fee for those services except as described in Section 550.001 or 4005.003. As stated at the outset, the types of fees addressed in Section 4005.003—fees for obtaining a motor vehicle record or photograph of property—are not at issue here. Under Section 550.001, an insurer or insurer’s agent may not solicit or collect, in connection with an application for insurance or the issuance of a policy, a payment other than: (1) a premium; (2) a tax; (3) a finance charge; (4) a policy fee; (5) an agent fee; (6) a service fee, including a charge for costs described by Section 4005.003; (7) an inspection fee; or (8) membership dues in a sponsoring organization.⁹³ Mr. Rodriguez separately received four \$5,000 payments from MCSWA. These payments appear to be “service fees” as provided for in Section 550.001(6). Mr. Rodriguez’s invoice to MCSWA in 2017 specifically stated that the payment was for a “Bond Placement and Service Fee,” and he testified that the services he provided each year were the same.⁹⁴

While Mr. Rodriguez received two separate streams of payments, Section 4005.054 also requires that the dual compensation be for the same services. Here, that requirement is met because the record does not demonstrate any meaningful distinction between the services Mr. Rodriguez was compensated for by Mr. Poindexter versus MCSWA. For each, he assisted with obtaining the necessary financial data to renew the bond, delivered Mr. Poindexter’s invoices to MCSWA, and was available for MCSWA to answer questions. Thus, the ALJ concludes that Mr. Rodriguez received compensation from Mr. Poindexter and MCSWA for the same services. Therefore, Section 4005.054(2) provides a separate basis for triggering the disclosure requirement under Section 4005.004.

While Respondents’ primary position is that the disclosure requirement does not apply, they alternatively argue that, to the extent the \$5,000 per year charges to the MCSWA require disclosure, Respondents did disclose those fees, in writing, prior to any payment by MCSWA.⁹⁵

⁹³ Tex. Ins. Code § 550.001(a).

⁹⁴ Tr. at 83-84; TDI Ex. 18 at 2000.

⁹⁵ Respondents Closing Arguments at 4.

Presumably, Respondents are referring to the fact that they invoiced MCSWA in advance of each payment.⁹⁶ However, the ALJ finds that the invoices are not sufficient to comply with the disclosure requirement. Section 4005.004 requires a “documented acknowledgment” in advance *from the customer*. An invoice *from the agent* does not satisfy this requirement. Moreover, the disclosure must inform the customer that two payments are being received—one from the customer and one from an insurer or other third party. It is expected that the customer will be aware of the compensation it is providing to the agent. The importance of the disclosure is that it informs the customer that the agent is separately receiving compensation from an insurer or other third party. The record does not contain any indication that Mr. Rodriguez provided such disclosure, and Mr. Rodriguez testified that he did not obtain a written acknowledgement from MCSWA.⁹⁷ Accordingly, the ALJ concludes that Staff met its burden to show that Respondents violated the disclosure requirements in Texas Insurance Code §§ 4005.004 and 4005.054.

3. Reasonableness of Fees

Staff’s Original Petition asserts that Mr. Rodriguez assessed and collected agent fees that were unreasonable, as contemplated by Texas Insurance Code § 4005.003.⁹⁸ As discussed above, however, this statute addresses fees for obtaining a motor vehicle record or photograph of property, which are not at issue here. Additionally, Staff did not present evidence regarding what range of fees is reasonable for a \$2.9 million surety bond. Accordingly, Staff did not show that Respondents violated Section 4005.003.

4. Misappropriation, Conversion, and Illegally Withholding Money Belonging to an Insured

As part of the 2020 enforcement action against Mr. Poindexter, the Commissioner of Insurance has already concluded that Mr. Poindexter violated the Insurance Code by

⁹⁶ Tr. at 126.

⁹⁷ Tr. at 97-98.

⁹⁸ TDI Ex. 1 at 4.

misappropriating, converting, or illegally withholding money belonging to an insured, MCSWA, by overcharging for the surety bond premiums from 2012 to 2017.⁹⁹ In this proceeding, Staff argues that Mr. Rodriguez similarly violated the Insurance Code by assisting Mr. Poindexter in overcharging MCSWA.¹⁰⁰

In support, Staff points to Mr. Rodriguez's alleged inconsistent statements at Mr. Poindexter's and his own hearings. Staff notes that at the first hearing, Mr. Rodriguez referred to his compensation from Mr. Poindexter as a commission, but now says it was a referral fee.¹⁰¹ Additionally, Staff emphasizes that, at Mr. Poindexter's hearing, Mr. Rodriguez testified that he discussed with Mr. Poindexter the appropriate amount to charge MCSWA each year and personally presented the amounts to the MCSWA board.¹⁰² In Staff's view, Mr. Rodriguez was not credible at his own hearing when he testified that he was unaware MCSWA was overcharged, as it begs the question of where the money came from for Mr. Poindexter to pay Mr. Rodriguez \$20,000 every year.¹⁰³ Further, according to Staff, Respondents received \$25,000 in total each year for "inconsequential" services.¹⁰⁴

In response, Respondents contend they were never in possession of any of the premiums billed and collected and, therefore, could not have converted or illegally withheld money paid by MCSWA.¹⁰⁵ Further, they point out that, as Mr. Becknell testified, the cost of the surety bond (3.5% of the bond amount) was determined before Mr. Rodriguez became involved.¹⁰⁶ And finally, Respondents disagree that Mr. Rodriguez's testimonies were inconsistent. Instead, they contend

⁹⁹ TDI Ex. 12 at Exhibit A, Conclusion of Law Nos. 5, 7.

¹⁰⁰ Staff Closing Arguments at 6-7.

¹⁰¹ Staff Closing Arguments at 8.

¹⁰² Staff Closing Arguments at 6.

¹⁰³ Staff Closing Arguments at 8.

¹⁰⁴ Staff Closing Arguments at 12.

¹⁰⁵ Respondents Closing Arguments at 3.

¹⁰⁶ Respondents Response to Closing Arguments at 3.

that Mr. Rodriguez explained how he interpreted certain questions at Mr. Poindexter's hearing and that “[m]isunderstanding a question does not make one dishonest.”¹⁰⁷

Given the outcome of Mr. Poindexter's hearing, it is undisputed that money belonging to MCSWA was misappropriated, converted, or illegally withheld. However, that does not necessarily extend to Mr. Rodriguez. Notably, Mr. Smith, the Department's only witness (other than Mr. Rodriguez), acknowledged that his investigation did not involve Respondents and that he only became aware of their connection to the bond at Mr. Poindexter's hearing.¹⁰⁸ The strongest support for Staff's position is Mr. Rodriguez's testimony at Mr. Poindexter's hearing that he made MCSWA aware of charges in excess of premium.¹⁰⁹ Additionally, Mr. Rodriguez's compensation generally appears high for the services he provided, which is supported by Mr. Poindexter's email stating that “[f]rom your perspective, a producer should not make so much money on a single bond, since that producer has no liability for the bond. \$20,000 is the annual salary of somebody.”¹¹⁰

On the other hand, Mr. Becknell testified that he informed Mr. Rodriguez that the bond premium was 3.5% of the bond amount, which is what Mr. Poindexter charged on his invoices to MCSWA each year. Mr. Rodriguez testified that what he disclosed to the board was the 3.5% identified by Mr. Poindexter as the premium.¹¹¹ The evidence does not show that Mr. Rodriguez knew Lexon was actually charging only 2.0% of the bond amount.¹¹² Additionally, in 2014, when Mr. Poindexter emailed Mr. Rodriguez to explain how he would be paid, Mr. Poindexter stated that “I was able to make a special exception in your case here to be able to give you a ‘referral fee’

¹⁰⁷ Respondents Response to Closing Arguments at 3.

¹⁰⁸ Tr. at 54.

¹⁰⁹ Tr. at 96; TDI Ex. 10 at 1683.

¹¹⁰ TDI Ex. 19A at 2064 (English translation of email correspondence at TDI Ex. 19 at 2047).

¹¹¹ Tr. at 93.

¹¹² The 2.0% premium can be calculated by looking at the initial bond amount of \$2,856,515 compared to the premium charged by Lexon that year of \$57,130.30, which is 2.0% of the bond amount. TDI Ex. 3 at 1014-16; TDI Ex. 9; see also TDI Ex. 3 at 1010 (email from Lexon authorizing Mr. Poindexter to go as low as 1.5%, but with a handwritten note that “Did 2%”).

of so much money.”¹¹³ The email appears to be Mr. Poindexter advising Mr. Rodriguez to accept the flat “referral fee” rather than share commissions. It does not indicate that Mr. Rodriguez was colluding with Mr. Poindexter to misappropriate funds from MCSWA.

The ALJ is also not persuaded that the alleged inconsistencies in Mr. Rodriguez’s statements are dispositive. While Staff focused on Mr. Rodriguez’s characterization of his compensation at different times as a commission or referral fee, Mr. Rodriguez appeared to be using those terms interchangeably.¹¹⁴ Further, Mr. Poindexter’s 2014 email to Mr. Rodriguez uses the term “referral fee,” which indicates Mr. Rodriguez did not invent that term for his own hearing. Additionally, although Mr. Rodriguez stated at Mr. Poindexter’s hearing that he had made MCSWA aware of charges in excess of premium, he was consistent at both hearings that what he had disclosed to the board was that Mr. Poindexter’s broker disclosure indicated fees may be charged and that the bond would be expensive because it was hard to place.¹¹⁵

After weighing the evidence presented, the ALJ concludes that Staff did not show by a preponderance of the evidence that Respondents misappropriated, converted, or illegally withheld money belonging to MCSWA.

5. Fraudulent or Dishonest Acts/Practices

Staff alleges the following conduct constitutes fraudulent or dishonest acts or practices by Respondents in violation of Texas Insurance Code § 4005.101(b)(5): assisting Mr. Poindexter in overcharging premium payments to MCSWA, being paid twice for the same services rendered, failing to obtain written disclosures, engaging in the business of insurance without a proper license, and providing a “sudden change in testimony.”¹¹⁶ While not defined in the Insurance Code, a

¹¹³ TDI Ex. 19A at 2064 (English translation of email correspondence at TDI Ex. 19 at 2047).

¹¹⁴ Tr. at 87.

¹¹⁵ Tr. at 94; TDI Ex. 10 at 1706-07.

¹¹⁶ Staff Closing Arguments at 11.

“fraudulent act” is generally “[c]onduct involving bad faith, dishonesty, a lack of integrity, or moral turpitude.”¹¹⁷

Staff notes that the Insurance Code was amended in 2001 to repeal language authorizing disciplinary action if an agent had “knowingly deceived or defrauded a policyholder.”¹¹⁸ Staff interprets this change as meaning an agent “who acts in a fraudulent or dishonest way” may be disciplined, presumably without regard to whether it was “knowingly.” However, the amendment was part of a broader effort by the Legislature to “promote uniformity in the licensing, examination, continuing education, and disciplinary requirements for agents in this state and with other states.”¹¹⁹ Therefore, the ALJ concludes that the revised language was not specifically intended to remove the requirement that conduct be committed “knowingly” in order to be fraudulent or dishonest.

As discussed above, the preponderance of the evidence did not show that Respondents assisted Mr. Poindexter in misappropriating funds. Additionally, for the reasons discussed above, the ALJ finds that the record does not demonstrate that the alleged inconsistencies in Mr. Rodriguez’s testimony were fraudulent or dishonest. Staff’s remaining claims boil down to whether Mr. Rodriguez’s unlicensed use of Aguila and failure to disclose that he was receiving two payments for the same services were fraudulent or dishonest. Regarding Aguila, the record does not indicate that Mr. Rodriguez used the d/b/a to conceal his actions regarding the MCSWA bond. He obtained the d/b/a in 2008, at least three years before the bond was issued; used it for policies for himself and his father; was personally involved with all of the transactions under Aguila; and stopped using the d/b/a once notified by the Department that it was improper. Mr. Rodriguez’s failure to make the required disclosures is more questionable, as it shows a lack of transparency. However, without more, the ALJ cannot say that such failure rises to the level of fraudulent or dishonest conduct. Accordingly, the ALJ finds that Staff did not demonstrate by a

¹¹⁷ *Fraudulent Act*, Black’s Law Dictionary (11th ed. 2019).

¹¹⁸ Staff Closing Arguments at 10 (citing Act of May 15, 2001, 77th Leg., R.S., ch. 703, § 8.01, effective Sept. 1, 2001 (S.B. 414) (repealing Tex. Ins. Code § 21.15)).

¹¹⁹ Act of May 15, 2001, 77th Leg., R.S., ch. 703, § 1.05, effective Sept. 1, 2001 (S.B. 414).

preponderance of the evidence that Respondents committed fraudulent or dishonest acts or practices.

6. Willful Violation of Insurance Laws

Staff further alleges that each of Respondents' violations of insurance laws were committed "willfully" and, therefore, are separately sanctionable under Texas Insurance Code § 4005.101(b)(1). The Insurance Code does not define "willfully," but the Department has previously determined that the term means "deliberate, voluntary, or intentional."¹²⁰ Similarly, Black's Law Dictionary defines "willful" as follows:

Voluntary and intentional, but not necessarily malicious. A voluntary act becomes willful, in law, only when it involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong. The term *willful* is stronger than *voluntary* or *intentional*; it is traditionally the equivalent of *malicious*, *evil*, or *corrupt*.¹²¹

Thus far, the ALJ has found that Respondents violated the Insurance Code by failing to provide required disclosures and by engaging in the business of insurance through Aguila without a license. Staff does not explain how these violations were willful, and the evidence does not demonstrate that they meet the standard defined above. Therefore, the ALJ concludes that Staff did not show Respondents willfully violated insurance laws.

E. ALJ's Recommendation

Because Staff established that Respondents engaged in conduct for which they can be disciplined, the issue becomes what discipline is appropriate. Under Texas Insurance Code § 4005.102, the Department may, among other things, suspend or revoke a license, assess an

¹²⁰ *Tex. Dep't of Ins. v. Everett Wayne Collier*, SOAH Docket No. 454-18-4457.C, Commissioner's Order No. 2019-6028 at 3 (July 31, 2019) (citing *Otis Engineering Corp. v. Pennington*, No. 05-91-00002-CV, 1992 WL 172389 at 9 (Tex. App.—Dallas 1992, no writ) (not designated for publication)).

¹²¹ *Willful*, Black's Law Dictionary (11th ed. 2019).

administrative penalty, or reprimand a license holder. Additionally, under Texas Insurance Code § 82.052, a license holder may be required to cease and desist from an activity that is a violation of the Insurance Code or related rules.

Staff requests that Mr. Rodriguez's license be revoked and that he be required to cease and desist from engaging in the business of insurance under Aguila. The ALJ finds that requiring Respondents to cease and desist from using Aguila without a license is appropriate. In support of revocation, Staff argues that Respondents' violations taken together show a pattern of behavior that requires severe sanction.¹²² However, Staff only established two violations—that Respondents failed to provide required disclosures and engaged in the business of insurance without a license. The lack of disclosure was significant because it may have contributed to MCSWA's lack of awareness that it was being overcharged by Mr. Poindexter. However, Staff did not prove the most serious violations alleged. Additionally, Mr. Rodriguez has been licensed in Texas since 2008, and no evidence was presented of any other disciplinary history. He also appears to have been responsive to the Department's requests for information for Mr. Poindexter's and his own enforcement actions, and further to have ceased using Aguila once he became aware it constituted unlicensed activity. Taking these factors into consideration, the ALJ does not find that Respondents' violations justify revocation. However, Staff did not present evidence supporting any lesser penalty, and the Department's rules do not include a penalty matrix or other guidance from which to select one. Therefore, the ALJ to be unable to recommend a specific penalty.

For the reasons stated above, the ALJ recommends that Respondents be required to cease and desist from engaging in the business of insurance under Aguila. The ALJ also finds that Mr. Rodriguez committed violations of the Insurance Code, but is unable to recommend an appropriate penalty. The ALJ proposes the following findings of fact and conclusions of law.

¹²² Staff Closing Arguments at 12.

III. FINDINGS OF FACT

1. Jose Jaime Rodriguez holds a general lines agent license with a property and casualty qualification and a life, accident, and health qualification originally issued by the Texas Department of Insurance (Department) on October 20, 2008.
2. Mr. Rodriguez obtained a d/b/a (doing business as) name of Aguila Insurance Co. (Aguila) in 2008 from Maverick County, but did not license or register Aguila with the Department.
3. Mr. Rodriguez and Aguila, collectively, are the Respondents in this case.
4. Mr. Rodriguez does not work directly for an insurance agency, but is a “producer” who refers work to La Vernia Insurance Agency (La Vernia). As part of that role, he assists La Vernia with obtaining property, automobile, workers’ compensation, and health insurance for Maverick County.
5. In 2012, the Maverick County Solid Waste Authority (MCSWA) sought a surety bond to meet the financial assurance requirements of the Texas Commission on Environmental Quality for closure/post-closure of a landfill.
6. Mr. Rodriguez informed Frank Pruski with La Vernia that MCSWA needed the bond, and Mr. Pruski contacted Wesley Becknell, a licensed insurance agent in Texas at the time, to try to place the bond.
7. The bonding companies Mr. Becknell normally used would not write the bond, so he did an Internet search related to surety bonds and found then-licensed insurance agent Carlyle Poindexter and one of his insurance agencies, Surety One, Inc. (collectively, Mr. Poindexter).
8. Mr. Poindexter placed the surety bond with Lexon Insurance Company (Lexon) in the initial amount of \$2,856,515 for the 2012-2013 term. The surety bond was renewed annually with Lexon through 2018.
9. From 2012 to 2016, Lexon billed the bond premiums to Mr. Poindexter, who then billed MCSWA. In 2016, Lexon began direct billing MCSWA after having difficulty collecting the premium payments through Mr. Poindexter.
10. Lexon initiated an anti-fraud investigation in 2016 concluding that Mr. Poindexter had overcharged MCSWA by approximately \$300,000 from 2012 to 2017.
11. The investigation showed that, although Lexon billed the bond premium as 2.0% of the bond amount, Mr. Poindexter billed MCSWA 3.5% of the bond amount.
12. The Department brought an enforcement action against Mr. Poindexter seeking to revoke his individual and agency licenses. Mr. Rodriguez testified on Mr. Poindexter’s behalf. The Administrative Law Judge (ALJ) in that proceeding found that Mr. Poindexter had overcharged MCSWA by approximately \$300,000, thereby committing several violations

of the Insurance Code, and recommended that Mr. Poindexter's licenses be revoked. The Commissioner of Insurance issued an order on October 8, 2020, adopting the ALJ's recommendation and revoking Mr. Poindexter's licenses.

13. From 2015 to 2018, Mr. Rodriguez took actions to procure the renewal of the surety bond through his care and effort.
14. Mr. Rodriguez acted as a subagent for Mr. Poindexter in connection with the renewal of the MCSWA bond.
15. From 2015 to 2018, Mr. Rodriguez received \$20,000 per year from Mr. Poindexter as a referral fee.
16. From 2015 to 2018, Mr. Rodriguez also received \$5,000 per year from MCSWA as a bond placement fee invoiced by Mr. Rodriguez d/b/a Aguila.
17. In exchange for the compensation he received from Mr. Poindexter and MCSWA, Mr. Rodriguez worked with MCSWA to gather the information Mr. Poindexter needed to renew the bond, delivered Mr. Poindexter's invoices to MCSWA, and was available at the MCSWA board meetings to answer questions.
18. Mr. Rodriguez received compensation from Mr. Poindexter and MCSWA for the same services.
19. Mr. Rodriguez did not obtain a documented acknowledgement from MCSWA that he was separately receiving compensation from Mr. Poindexter.
20. The evidence did not establish that Mr. Rodriguez assisted Mr. Poindexter in misappropriating, converting, or illegally withholding money belonging to MCSWA.
21. Under Aguila, Mr. Rodriguez wrote automobile insurance policies for himself and his father in 2008 and invoiced MCSWA from 2015 to 2018 in connection with the surety bond.
22. Mr. Rodriguez operated Aguila without a license or other authorization from the Department, but ceased using Aguila in 2018 after he was notified by the Department that it was improper.
23. On September 11, 2020, the Department mailed a Notice of Hearing to Respondents that 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 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.
24. After multiple continuances, State Office of Administrative Hearings (SOAH) Order No. 8, issued on September 8, 2021, reset the hearing on the merits for December 13, 2021, by Zoom videoconference.

25. The hearing on the merits was held via Zoom videoconference on December 13, 2021, before SOAH ALJ Cassandra Quinn. Attorneys Cassie Tigue and Stephanie Andrews represented Staff. Attorney Bogdan Rentea represented Respondents. The hearing concluded that day.
26. Staff and Respondents filed written closing arguments on January 28, 2022, and responses to closing arguments on February 15, 2022, on which date the record closed.

IV. CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter of this proceeding. Tex. Ins. Code §§ 82.051-.055, 84.021-.044, 4001.002, 4005.101-.102.
2. SOAH has jurisdiction over all matters relating to the conduct of the proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003; Tex. Ins. Code § 4005.104.
3. Adequate and timely notice of the hearing was provided. Tex. Gov't Code §§ 2001.051-.052; Tex. Ins. Code § 4005.104(b).
4. Staff has the burden of proof to establish a violation by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427; *Granek v. Tex. St. Bd. of Med. Examn'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.).
5. Staff did not demonstrate that Respondents willfully violated an insurance law of this state; misappropriated, converted to their own use, or illegally withheld money belonging to an insured; or engaged in fraudulent or dishonest acts or practices. Tex. Ins. Code § 4005.101(b)(1), (4)(C), (5).
6. Respondents provided services to MCSWA. Tex. Ins. Code § 550.001(6).
7. Respondents were not charging fees to MCSWA as the term fees is used in Texas Insurance Code §§ 4005.002-.003.
8. Respondents did not violate Texas Insurance Code § 4005.003.
9. At all times relevant to this proceeding, references to an “agent” in Title 13 of the Texas Insurance Code included a subagent without regard to whether a subagent was specifically mentioned. Tex. Ins. Code § 4001.003(9), *repealed by* Act of May 26, 2021, 87th Leg., R.S., Ch. 355, § 22(1), effective September 1, 2021 (H.B. 4030).
10. Respondents did not serve as an intermediary between the insurer, Lexon, and the customer's agent, Mr. Poindexter. Tex. Ins. Code § 4005.004(c)(1).
11. Respondents violated Texas Insurance Code § 4005.004(b) by receiving compensation from a customer, MCSWA, for the placement or renewal of an insurance product while also receiving compensation from a third party, Mr. Poindexter, for that placement or

renewal without first obtaining the customer's documented acknowledgment that the compensation would be received.

12. Respondents violated Texas Insurance Code § 4005.054 by receiving consideration for services as an agent, plus an additional fee for those same services provided to the same client, without providing the disclosure required by Texas Insurance Code § 4005.004.
13. Respondents engaged in acts constituting the business of insurance without a license or other authorization from the Department. Tex. Ins. Code §§ 101.102, 4001.101, 4005.053, 4051.051; 28 Tex. Admin. Code § 19.902(a).
14. Mr. Rodriguez should be required to cease and desist from using Aguila to engage in acts constituting the business of insurance without a license. Tex. Ins. Code § 82.052(2).
15. The Department is authorized to sanction Mr. Rodriguez but has not established that his license should be revoked.

SIGNED April 18, 2022.



**CASSANDRA QUINN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

2023-7904

FILED
454-21-0107
5/19/2022 12:08 PM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Pegah Nasrollahzadeh, CLERK



ACCEPTED
454-21-0107
5/19/2022 12:23:33 pm
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Pegah Nasrollahzadeh, CLERK

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

May 18, 2022

Exhibit B

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

VIA E-FILE TEXAS

RE: Docket No. 454-21-0107.C; *Texas Department of Insurance v. Jose Jaime Rodriguez & Aguila Insurance Co.*

Dear Commissioner Brown:

Please be advised that, on May 3, 2022, the staff (Staff) of the Texas Department of Insurance (TDI) filed exceptions to the Proposal for Decision (PFD) in this case. On May 16, 2022, Jose Jaime Rodriguez and Aguila Insurance Co. (Respondents) filed a response. For the reasons discussed below, the Administrative Law Judge (ALJ) does not recommend changes to the PFD.

In its exceptions, Staff contends that the PFD misinterpreted and misapplied the Texas Insurance Code in several ways. Respondents disagree. Each of the referenced statutes is addressed below.

Tex. Ins. Code § 4005.101(b)(1) – Staff asserts that the PFD introduced a new standard for defining willful conduct. As stated in the PFD, the ALJ applied the standard established by TDI in the *Collier* case, which concluded that “willfully” means “deliberate, voluntary, or intentional.”¹ Staff’s exceptions state that “ignorance of the law is not a defense” and that Mr. Rodriguez, as a licensed insurance agent, is charged with knowing the actions he can and cannot take. Therefore, Staff concludes his violations of the Insurance Code were willful. However, under this broad interpretation, any violation by a licensed agent would be willful, which appears to be contrary to

¹ PFD at 27 (citing *Tex. Dep’t of Ins. v. Everett Wayne Collier*, SOAH Docket No. 454-18-4457.C, Commissioner’s Order No. 2019-6028 at 3 (July 31, 2019) (citing *Otis Engineering Corp. v. Pennington*, No. 05-91-00002-CV, 1992 WL 172389 at 9 (Tex. App.—Dallas 1992, no writ) (not designated for publication)).

TDI's conclusion in *Collier* that there must be an element of intent. Accordingly, the ALJ does not recommend any changes in response to this exception.

Tex. Ins. Code § 4005.101(b)(4) – According to Staff's exceptions, the PFD incorrectly concluded that Staff failed to meet its burden of proof to show that Respondents misappropriated money belonging to the Maverick County Solid Waste Authority (MCSWA). Staff notes that, in a prior case (*Poindexter*), the Commissioner of Insurance already found that formerly licensed insurance agent Carlyle Poindexter misappropriated \$300,000 in premium payments from MCSWA in connection with obtaining a surety bond.² Mr. Poindexter paid Mr. Rodriguez \$20,000 annually for four years in connection with the bond. Staff argues that, because the money was not legally obtained, Mr. Rodriguez misappropriated and converted it to his own use when he deposited the funds into his account. However, the finding that Mr. Poindexter misappropriated funds and then paid Mr. Rodriguez is not definitive in determining whether Mr. Rodriguez participated in or knew about the misappropriation. This issue required a weighing of the evidence presented, which is fully discussed in the PFD.³ For the reasons stated there, the ALJ does not recommend changes.

Tex. Ins. Code § 4005.101(b)(5) – Staff's exceptions allege that Mr. Rodriguez committed fraudulent or dishonest acts or practices by allegedly testifying differently at Mr. Poindexter's hearing than his own. This issue is fully addressed in the PFD,⁴ and for the reasons stated there, the ALJ does not recommend changes.

Tex. Ins. Code § 4005.003 – Staff contends the PFD improperly concluded that Section 4005.003 does not apply in this case. In particular, Staff argues Subsection (b) applies, which states that:

For services provided to a client, a property and casualty agent described by Subsection (a) may charge a reasonable fee, including a fee for: (1) special delivery or postal charges; (2) printing or reproduction costs; (3) electronic mail costs; (4) telephone transmission costs; and (5) similar costs that the agent incurs on behalf of the client.

The applicability of Subsection (b), however, is circumscribed by its reference to “a property and casualty agent described by Subsection (a).” Subsection (a) refers to a general property and casualty agent or personal lines property and casualty agent who is charging a client a fee to reimburse the agent for costs incurred to obtain a motor vehicle record or photograph of property. This type of charge is not at issue here, and therefore, the ALJ concluded the statute does not

² *Tex. Dep't of Ins. v. Carlyle T. Poindexter, Poindexter & Associates, Inc., and Surety One, Inc.*, SOAH Docket No. 454-19-2215.C, Commissioner's Order No. 2020-6501 (Oct. 14, 2020).

³ PFD at 22-25.

⁴ PFD at 25.

apply. The ALJ in the *Poindexter* case reached the same conclusion,⁵ which was adopted by the Commissioner of Insurance.⁶ Therefore, the undersigned ALJ does not recommend any changes.

Tex. Ins. Code Chapter 82 – Staff contends that the PFD misinterpreted Chapter 82 by concluding that, although Mr. Rodriguez violated the Insurance Code, his license should not be revoked.⁷ According to Staff, the PFD improperly limits the Commissioner of Insurance’s authority because “revocation is a sanction available for any violation of the Insurance Code.”⁸ While the Commissioner is clearly authorized to impose revocation as a sanction,⁹ it is among the most severe sanctions available, and the PFD addresses why it is not warranted for the two violations found in this case.¹⁰

Finally, consistent with its exceptions, Staff requests certain changes to the proposed Findings of Fact and Conclusions of Law. After reviewing the requested changes, the ALJ concludes they are either inconsistent with the PFD or are already sufficiently addressed by other Findings of Fact. Therefore, the ALJ does not recommend adopting the changes.

Accordingly, the ALJ recommends the PFD be adopted as written. Because SOAH has concluded its involvement in the matter, the case is being remanded to TDI. *See Tex. Gov’t Code § 2003.051(a).*

Sincerely,



Cassandra Quinn
Administrative Law Judge

CQ/nm

cc: Cassie Tigue and Stephanie Andrews, Texas Department of Insurance, 333 Guadalupe, Tower 1, 13th Floor, Austin, Texas 78701 - VIA E-FILE TEXAS
Chief Clerk, Texas Department of Insurance, 333 Guadalupe, Tower I, Suite 1300D, Austin, Texas 78701 - VIA E-FILE TEXAS and INTERAGENCY MAIL
Attorney: Bogdan Rentea, Rentea & Associates, [REDACTED], Austin, TX 78746 - VIA E-FILE TEXAS

⁵ *Tex. Dep’t of Ins. v. Carlyle T. Poindexter, Poindexter & Associates, Inc., and Surety One, Inc.*, SOAH Docket No. 454-19-2215.C, PFD at 6, 18, & Conclusion of Law (COL) No. 8 (June 18, 2020).

⁶ *Tex. Dep’t of Ins. v. Carlyle T. Poindexter, Poindexter & Associates, Inc., and Surety One, Inc.*, SOAH Docket No. 454-19-2215.C, Commissioner’s Order No. 2020-6501 (Oct. 14, 2020).

⁷ See PFD at 27-28 & COL No. 15.

⁸ Staff’s Exceptions at 11.

⁹ Tex. Ins. Code § 82.051.

¹⁰ PFD at 28.