

No. **2024-8564**

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

**Date: 3/1/2024**

**Subject Considered:**

Texas Department of Insurance

v.

Luis F. Barbaresco Garcia

SOAH Docket No. 454-24-03558.C

**Order Overruling "Order No. 2 Denying Motions to Dismiss, Retaining  
Contested Case on Docket, and Directing Department to Issue New Notice of  
Hearing"**

**General Remarks and Official Action Taken:**

The subject of this order is the interim order issued by the State Office of Administrative Hearings (SOAH) administrative law judge (ALJ) Susan Rodriguez titled "Order No. 2 Denying Motions to Dismiss, Retaining Contested Case on Docket, and Directing Department to Issue New Notice of Hearing" (Order No. 2). In Order No. 2, the ALJ declines to issue notice withdrawing this matter from SOAH's docket, as required by Tex. Ins. Code § 40.004 and 28 Tex. Admin Code § 1.90.

This order (1) overrules Order No. 2, (2) rejects the direction in Order No. 2 to issue a new notice of hearing, (3) directs the ALJ to withdraw this matter from SOAH's docket, (4) declares the matter dismissed, and (5) affirms the revocation in Commissioner's Order No. 2023-8406 of any licenses held by Luis F. Barbaresco Garcia.

**Background**

On October 23, 2023, the Texas Department of Insurance (TDI) filed with SOAH a notice of hearing and an original petition for this matter. TDI sent copies of the notice of hearing and original petition to Mr. Garcia's last known address provided in writing to

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TDI. Copies of the notice of hearing and original petition were also sent to Mr. Garcia by email.

Mr. Garcia failed to file a written response to the notice of hearing within 20 days of the date the notice was provided to him, as required by 28 Tex. Admin Code §§ 1.88 and 1.90. As of the date of this order, Mr. Garcia has still provided no written response to the notice of hearing.

Consistent with Tex. Ins. Code § 82.055; Tex. Gov. Code § 2001.056; and 28 Tex. Admin. Code §§ 1.88, 1.89, and 1.90, on December 14, 2023, TDI informally disposed of this matter through default by issuing Commissioner's Order No. 2023-8406.

Under Tex. Gov. Code § 2001.146 and 28 Tex. Admin Code §§ 1.89 and 1.90, Mr. Garcia had the opportunity to file a motion for rehearing and a motion to set aside the default order and reopen the matter. Such motions were required to be filed no later than the 25th day after the date Commissioner's Order No. 2023-8406 was signed. Mr. Garcia failed to file any such motions; so, on Monday, January 8, 2024, this matter became final under Tex. Gov. Code § 2001.144.

As required by 28 Tex. Admin. Code § 1.90(f)(6), TDI Enforcement staff notified SOAH of the informal disposal of the matter. TDI Enforcement staff provided notice to SOAH twice, filing notices of nonsuit on December 19, 2023, and again on January 9, 2024.

On January 12, 2024, SOAH issued Order No. 2, retaining the matter on SOAH's docket and directing that a hearing would be convened on March 5, 2024. Order No. 2 instructed TDI to issue a new notice of hearing. Order No. 2 was issued after the matter became final under Tex. Gov. Code § 2001.144.

On February 21, 2024, TDI Enforcement staff filed an appeal of Order No. 2 with the commissioner.

## Discussion

Under Tex. Ins. Code Chapter 40, administrative hearings required to be held or that may be held under the Insurance Code are conducted by SOAH.<sup>1</sup> TDI has adopted rules addressing administrative hearings, including a rule containing a memorandum of

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<sup>1</sup> See Tex. Ins. Code § 40.002, concerning Duties of State Office of Administrative Hearings.

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understanding (MOU) governing hearings conducted by SOAH that was agreed to by the commissioner and the chief ALJ of SOAH.

Order No. 2 asserts that the rules of a state agency govern procedural matters that relate to a hearing conducted by SOAH only to the extent that the chief ALJ's rules adopt the agency's procedural rules by reference, and it says that the chief ALJ has not adopted TDI's procedural rules, so they are not applicable. Order No. 2 cites Tex. Gov. Code § 2003.050 to support this conclusion.

However, Tex. Ins. Code § 40.004 requires the commissioner and the chief ALJ to adopt an MOU governing hearings conducted by SOAH under the Insurance Code, and this section requires that the commissioner and the chief ALJ cooperate in conducting hearings. The commissioner and the chief ALJ entered into such an MOU and, consistent with Tex. Ins. Code Chapter 40, the MOU was adopted by rule at 28 Tex. Admin Code § 1.90.

Under the Code Construction Act, general provisions and special or local provisions should be construed so that effect is given to both, if possible.<sup>2</sup> But if a conflict is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.<sup>3</sup>

The applicable provision in Tex. Gov. Code § 2003.050 supporting the contention that TDI's rules are inapplicable<sup>4</sup> was added to the Texas Government Code by the 75th Legislature in 1997 and became effective January 1, 1998.<sup>5</sup> On the other hand, Tex. Ins. Code § 40.004 was adopted by the 76th Legislature in 1999, with an effective date of

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<sup>2</sup> Tex. Gov. Code § 311.026.

<sup>3</sup> *Id.* See also *In re Miller*, 641 S.W.3d 924, 928 (Tex. App.—Fort Worth 2022, no pet.).

<sup>4</sup> Tex. Gov. Code § 2003.050(b), which provides: "Notwithstanding other law, the procedural rules of the state agency on behalf of which the hearing is conducted govern procedural matters that relate to the hearing only to the extent that the chief administrative law judge's rules adopt the agency's procedural rules by reference."

<sup>5</sup> See Acts 1997, 75th Leg., Ch. 605, Sec. 3, eff. Jan. 1, 1998.

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September 1, 1999.<sup>6</sup> Further, there is nothing to indicate a manifest intent that Tex. Gov. Code § 2003.050 should control over Tex. Ins. Code § 40.004.<sup>7</sup>

Therefore, to the extent that there is any conflict between Tex. Gov. Code § 2003.050 and Tex. Ins. Code § 40.004, Tex. Ins. Code § 40.004 controls. SOAH and the ALJ are bound to follow both Tex. Ins. Code § 40.004 and the MOU agreed to by the commissioner and chief ALJ under that section.

As previously noted, Tex. Ins. Code § 40.004 requires the commissioner and the chief ALJ to adopt an MOU governing hearings conducted by SOAH under the Texas Insurance Code. This MOU is adopted at 28 Tex. Admin. Code § 1.90.

The MOU addresses procedures for hearings conducted by SOAH at 28 Tex. Admin. Code § 1.90(f). This subsection contemplates applicability of both TDI and SOAH rules, stating in paragraph (1):

Hearings, including prehearing proceedings on contested cases, shall be conducted in accordance with the Government Code, Chapter 2001, the Insurance Code, *the TDI rules of procedure, and the SOAH rules of procedure*; any other applicable law and accompanying regulations." [Emphasis added.]

The MOU also contemplates the possibility of conflicts between TDI and SOAH rules, noting in subsection (f)(2):

In the event of any conflict between the SOAH rules of procedure and the TDI rules of procedure, the rules of TDI control, unless otherwise specifically stated in the SOAH rules of procedure. . . ."

TDI is not aware of any SOAH rules that specifically state that they control over TDI rules.<sup>8</sup>

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<sup>6</sup> See Acts 1999, 76th Leg., Ch. 101, Sec. 1, eff. Sept. 1, 1999.

<sup>7</sup> To the contrary, in two separate legislative sessions, three bills have been proposed that would repeal Tex. Ins. Code § 40.004, but all have failed to pass. See HB 2778 (88R, 2023); SB 1432 (88R, 2023); HB 2580 (87R, 2021).

<sup>8</sup> SOAH does generally address the rules of other agencies in 1 Tex. Admin. Code § 155.3(c), stating, "The procedural rules of a state agency govern SOAH proceedings only to the extent that SOAH's rules adopt the agency's procedural rules by reference, unless otherwise required by law." However, this does not specifically address TDI's rules, as required by the MOU. Further, the MOU is required by law.

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In regard to default orders, the MOU provides at subsection (f)(6):

If the commissioner or the commissioner's designee informally disposes of a contested case by stipulation, agreed settlement, consent order, agreed order or default as provided in the Insurance Code, Article 1.10(7)(d) [now codified at Tex. Ins. Code § 82.055], and the Government Code, §2001.056, the appropriate party or parties shall file a request to withdraw the case from the SOAH docket and include a copy of the order. SOAH shall then issue an order withdrawing the case from the SOAH docket.

The MOU also addresses interim orders issued by a SOAH ALJ, such as Order No. 2.<sup>9</sup> Subsection (f)(3) of the MOU provides:

Any party may appeal any interim order issued by the ALJ to the commissioner. An order entered by the commissioner on any appeal of an interim order is binding upon the parties and the ALJ subject to the right of an aggrieved person to seek judicial relief.

The Background section of this order addresses the procedures followed by TDI Enforcement staff in issuing the notice of hearing, informally disposing of this matter through default when Mr. Garcia failed to timely respond to the notice of hearing, and properly notifying the ALJ of the requirement to withdraw the case from SOAH's docket because the matter was informally disposed of through issuance of a default order. The Background section also notes Mr. Garcia's failure to timely avail himself of the options available to him under Tex. Gov. Code § 2001.146 and 28 Tex. Admin Code §§ 1.89 and 1.90.

The procedures followed by TDI Enforcement staff were consistent with the requirements of the MOU adopted by the commissioner and the chief ALJ under Tex. Ins. Code § 40.004. Despite this, Order No. 2 improperly declines to withdraw the matter from SOAH's docket, as required by 28 Tex. Admin. Code § 1.90(f)(6). Therefore, Order No. 2 is overruled.

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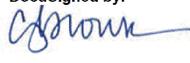
<sup>9</sup> The MOU defines "interim order" as "an order by an ALJ which decides discovery and prehearing matters, including, but not limited to, matters concerning motions, evidence, or testimony, but which is not a final decision disposing of the whole case." 28 Tex. Admin. Code § 1.90(a)(4).

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**Order**

It is ordered that Order No. 2 is overruled, the direction in Order No. 2 to issue a new notice of hearing is rejected, and the ALJ is directed to withdraw this matter from SOAH's docket.

It is further ordered that the dismissal of this matter and revocation of any licenses held by Luis F. Barbaresco Garcia by Commissioner's Order No. 2023-8406 stands.

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Cassie Brown  
Commissioner of Insurance

Recommended and reviewed by:

DocuSigned by:  
  
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Jessica Barta, General Counsel

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Justin Beam, Chief Clerk