

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND	)	
PROFESSIONAL REGULATION,	)	
DIVISION OF FUNERAL DIRECTORS	)	
AND EMBALMERS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-4803PL
	)	
MARK L. TISHMAN,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Sarasota, Florida, on February 20, 2001.

APPEARANCES

For Petitioner: Joseph W. Malka  
Assistant General Counsel  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

For Respondent: Jordan L. Wallach  
Jordan L. Wallach, P.A.  
1800 Second Street, Suite 900  
Sarasota, Florida 34236

STATEMENT OF THE ISSUE

The issue is whether Respondent is guilty of fraudulent advertising or violation of other laws directly applicable to the funeral business.

PRELIMINARY STATEMENT

By Administrative Complaint dated August 28, 2000, Petitioner alleged that Respondent was the funeral director of the Tishman Funeral Home, which was owned by Independent Mortuary Services International. The Administrative Complaint alleges that Respondent was vice president and Richard Martin was president of Independent Mortuary Services International.

The Administrative Complaint alleges that on May 26, 1999, the Department of Banking and Finance, Board of Funeral and Cemetery Services, entered a final order against Independent Mortuary Services International, Mr. Martin, and Respondent revoking the certificate of authority of Independent Mortuary Services International to sell pre-need funeral contracts, imposing an administrative fine of \$10,000, and assessing records-examination costs of \$4125. The Administrative Complaint alleges that the respondents had failed, upon request, to produce copies of pre-need funeral contracts and had failed, upon request, to pay the required records-examination costs. The Administrative Complaint alleges that the final order required payment of the fines and costs within 30 days of entry of the final order, but none of the respondents had paid these sums.

The Administrative Complaint alleges that on May 28, 1999, Respondent placed an advertisement in the September 1999 GTE Yellow Pages for Sarasota promoting Tishman Memorial Chapel. However, the Administrative Complaint alleges that Tishman Memorial Chapter has never been licensed as a funeral establishment under Chapter 470, Florida Statutes.

Count One of the Administrative Complaint alleges that the discipline imposed by the Department of Banking and Finance constitutes a violation of Section 470.036(1)(x), Florida Statutes, which prohibits acts or omissions that constitute a violation of Chapter 497, Florida Statutes, or that directly relate to the ability to practice under Chapter 470, Florida Statutes.

Count Two of the Administrative Complaint alleges that the advertising of an unlicensed funeral establishment constitutes a violation of Section 470.036(1)(f), Florida Statutes, which prohibits advertising in a manner that is fraudulent, false, deceptive, or misleading.

Respondent timely requested a formal hearing.

At the hearing, Petitioner called no witnesses and offered into evidence 11 exhibits. Respondent called one witness and offered into evidence two exhibits. All exhibits were admitted.

The court reporter filed the transcript on March 13, 2001.

FINDINGS OF FACT

1. At all material times, Respondent has been a licensed funeral director and embalmer, holding license number FE 0003136.

2. In 1990, Respondent incorporated Mark L. Tishman Funeral Home, Inc., to operate Tishman Funeral Home. Three years later, Respondent entered into a business relationship with Richard Martin, another licensed funeral director and embalmer. In 1993, Mr. Martin and Respondent incorporated Independent Mortuary Services International (IMSI) to provide funeral services.

3. A 1995 audit of IMSI revealed problems with IMSI's sale of funeral pre-need contracts. IMSI lacked documentation for many such contracts. Mr. Martin managed the business, and Respondent was in the field. However, in July 1998, when Mr. Martin was on vacation, Respondent discovered that Mr. Martin had misappropriated pre-need contract funds.

4. Respondent confronted Mr. Martin when he returned. Their relationship deteriorated, and, by early December 1998, Respondent could no longer access corporate funds.

5. The Department of Banking and Finance commenced an administrative proceeding against IMSI, Mr. Martin, and

Respondent. The issue in the case was whether the respondents had failed to cooperate with agency examiners trying to examine IMSI records concerning pre-need contracts.

6. No representative of IMSI appeared at the final hearing, which took place on February 17, 1999. The resulting final order, which was issued on May 26, 1999, imposed an administrative fine of \$10,000 and assessed record-examination costs of \$4125. The order imposed this fine and costs against each respondent, individually and collectively, and gave them 30 days to pay the administrative fine of \$10,000.

7. According to the final order, the Department of Banking and Finance had mooted the request for an order revoking IMSI's certificate of authority. The Department of Banking and Finance had declined to reissue the certificate when it expired on January 14, 1999, and IMSI had failed to demand a formal hearing on this action.

8. Eventually, IMSI was liquidated. Respondent claims to have paid some sums to the receiver, but he has not paid the fine and costs assessed against him by the Department of Banking and Finance, nor has IMSI or Mr. Martin.

9. Following the resolution of the Department of Banking and Finance proceedings involving IMSI, Mr. Martin, and Respondent, Respondent ordered an advertisement in the GTE Yellow Pages for Sarasota. The advertisement was for Tishman

Memorial Chapel, L.L.C., and displayed Respondent's picture, under which was his name and the letters, "LFD," with the text, "Serving You Since 1990."

10. At no time has Tishman Memorial Chapel, L.L.C., been licensed as a funeral establishment. Apparently, Respondent believed mistakenly that he would be able to obtain the necessary license prior to the publication of the yellow pages. Claiming never to have received a proof of the advertisement, Respondent tried to cancel the advertisement, but was untimely in his effort, and the advertisement ran in the yellow pages. However, Respondent never answered the telephone number advertised as the Tishman Memorial Chapel, so as not to exacerbate the situation.

#### CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes. All references to Rules are to the Florida Administrative Code.)

12. Section 470.036(1)(f) and (x) provides that the Board of Funeral Directors and Embalmers may take disciplinary action against any licensee guilty of:

(f) Advertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content.

(x) Having been disciplined by a regulatory agency in any jurisdiction for any offense that would constitute a violation of this chapter . . . or that directly relates to practice under this chapter.

13. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

14. Petitioner has proved that Respondent ordered a yellow-pages advertisement for the Tishman Funeral Home when it was an unlicensed establishment. This is an act of fraud.

15. Petitioner has proved that Respondent was disciplined by the Department of Banking and Finance for failing to cooperate with an agency examination of business records concerning the sale of funeral pre-need contracts. This directly relates to the funeral practice under Chapter 470.

16. For violations of Section 470.036(1), Section 470.036(2) authorizes the Board of Funeral Directors and Embalmers one or more of several penalties. These penalties are to revoke or suspend a license, place a license on probation, reprimand a license, impose an administrative fine of not more than \$5000 per separate offense, restrict the

scope of practice, impose investigation costs, and require remedial education.

17. Rule 61G8-30.001(4) provides that the disciplinary guidelines for a violation of Section 470.036(1) is:

(f) [For a violation of Section] 470.036(1)(f), Florida Statutes, the range is from]: Fine of \$2500, 6 months['] probation, and costs [to] Revocation.

(x) [For a violation of Section] 470.036(1)(x), Florida Statutes, the range is from]: Reprimand, fine of \$1000, 6 months['] probation, and costs [to] Revocation.

18. Rule 61G8-30.001(6) provides that the Board may deviate from the penalty guidelines due to aggravating or mitigating circumstances, such as the severity of the offense, the damage caused by the violation, and the effect of the penalty on the licensee's livelihood.

19. Neither party developed much evidence concerning aggravating or mitigating circumstances. In the absence of persuasive evidence as to aggravating or mitigating circumstances, the Board of Funeral Directors and Embalmers should confine itself to the guideline penalties.

20. In isolation, the advertising violation would call for the minimum penalty due to the lack of public damage, which Respondent prevented by not exploiting the improper advertisement for commercial advantage.

21. The failure to cooperate with an agency examination of business records, which are clearly connected to the funeral business, is more serious because it jeopardizes the public welfare to a greater extent. Generally, the evidence does not establish in much detail the extent of the public injury arising out of the violation, which was a failure to cooperate with an agency examination, not the underlying mishandling of pre-need contracts.

22. Two factors militate in favor of a penalty at the maximum end of the range. First, Petitioner has proved two offenses. Second, Respondent has never paid the costs and fines imposed upon him, jointly and severally, by the Department of Banking and Finance for his acts and omissions in connection with the agency's examination of the IMSI business records involving the sale of pre-need contracts. Respondent's failure to discharge these professional obligations suggests that he is unfit for licensure under the Board of Funeral Directors and Embalmers.

23. The maximum penalty specified in the rules of the Board of Funeral Directors and Embalmers is revocation, not, as Petitioner advocates, revocation, fines, and costs. Absent sufficient evidence justifying an upward deviation from the penalty guidelines, the proper penalty in this case is revocation.

RECOMMENDATION

It is

RECOMMENDED that the Board of Funeral Directors and Embalmers enter a final order revoking Respondent's license.

DONE AND ENTERED this 23rd day of March, 2001, in Tallahassee, Leon County, Florida.

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ROBERT E. MEALE  
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Filed with the Clerk of the  
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this 23rd day of March, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.