

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION, BOARD)
OF FUNERAL DIRECTORS AND)
EMBALMERS,)
)
Petitioner,)
)
vs.) Case No. 04-3696
)
METRO PROFESSIONAL SERVICES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted in this case before Carolyn S. Holifield, duly-designated Administrative Law Judge of the Division of Administrative Hearings, on June 14, 2005, in St. Petersburg, Florida.

APPEARANCES

For Petitioner: Charles F. Tunnickliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Garvin B. Bowden, Esquire
Gardner, Wadsworth, Duggar, Bist
& Wiener, P.A.
1300 Thomaswood Drive
Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

The issues in this case are: (1) Whether Respondent, Metro Professional Services, violated Subsection 470.036(1)(g), Florida Statutes (2004)^{1/}; (2) Whether Respondent violated Subsection 470.036(1)(h), Florida Statutes, through violation of Florida Administrative Code Rule 61G8-24.010(2); and (3) if so, what penalties should be imposed against Respondent's removal service license.

PRELIMINARY STATEMENT

Petitioner, Department of Business and Professional Regulation, Board of Funeral Directors and Embalmers ("Department"), filed an Administrative Complaint on August 26, 2004, and a Corrected Administrative Complaint on November 23, 2004. The two-count Corrected Administrative Complaint alleged that Respondent violated Subsection 470.036(1)(g), Florida Statutes, by committing fraud and deceit in abusing the Department's internet system to attempt to effectuate a change of ownership without following the proper legal procedure for doing so; and Subsection 470.036(1)(h), Florida Statutes, by violating Florida Administrative Code Rule 61G8-24.010(2) in its failure to notify the Department of a change of ownership within ten days of making such change.

Respondent disputed the allegations in the Administrative Complaint and the Corrected Administrative Complaint and

requested a formal administrative hearing pursuant to Subsection 120.57(1), Florida Statutes. The Department referred the case to the Division of Administrative Hearings ("DOAH") on October 13, 2004.

At the final hearing, the Department presented the testimony of Ken Roberson and Andrea Beacraft. The Department's Exhibits 1 through 14 and 19 through 22 were admitted into evidence. Respondent presented the testimony of Stanley Cooper and Herbert DeGroat. Respondent did not submit any exhibits.

The Transcript of the proceeding was filed on June 23, 2005. Both parties filed Proposed Recommended Orders which have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, Department of Business and Professional Regulation, Board of Funeral Directors and Embalmers, is the state agency charged with regulating the practice of funeral directing, embalming, and related activities pursuant to Section 20.165 and Chapters 455 and 470, Florida Statutes.

2. At all times material hereto, Respondent's removal service License No. FR38 has been listed as current and active with the Department.

3. In 1985, before such activity was regulated by the State of Florida, Stanley Cooper began operating a removal service known as Metro Professional Services. In 1988, Herbert

DeGroat began working for Metro Professional Services as a driver, and within two years, he was assisting Mr. Cooper with management of the removal service business. Messrs. Cooper and DeGroat are now co-owners and operators of Respondent's removal service.

4. In 1991, Mr. Cooper was convicted of multiple federal and state drug conspiracy and trafficking charges. Upon Mr. Cooper's incarceration for such convictions, Messrs. DeGroat and Cooper entered into an agreement whereby Mr. DeGroat would continue to run the company in Mr. Cooper's absence, and the two would become equal and joint owners of the company upon Mr. Cooper's release from prison.

5. In order to operate the business as a Florida corporation, Mr. DeGroat created DeGroat, Inc., in 1992 and continued to do business as Metro Professional Services.

6. In 1995, the State of Florida began regulating removal service businesses. Respondent applied for licensure in 1995 as DeGroat, Inc., d/b/a Metro Professional Services. At that time, Mr. Cooper remained incarcerated and was not listed as an officer, director, or shareholder for DeGroat, Inc. The application was approved, and the removal service license was issued to Respondent on August 15, 1995.

7. Upon his release from incarceration, Mr. Cooper went back to work for Respondent. To carry out their original

agreement and to select a more self-explanatory business name, Messrs. Cooper and DeGroat created a new corporation named Metro Mortuary Transport, Inc. This new corporation was filed with the Florida Department of State on September 23, 2002. Two days later, September 25, 2002, Mr. Cooper faxed an application to the Department to change the name and address on Respondent's removal service license. Mr. Cooper submitted the written request at the direction of Department employees and used the particular official form recommended by Department employees.

8. Respondent was notified by the Department that it failed to pay a \$25.00 processing fee necessary to effectuate the name and address change requested in the September 25, 2002, application. Mr. Cooper learned that this fee was not paid, and he remitted the fee on behalf of Respondent. Nothing further was requested by the Department.

9. On November 8, 2002, Mr. Cooper spoke with an agent of the Department to check on the status of Respondent's name and address change application. At the direction of Department employees, Mr. Cooper opened an internet account for Respondent's license. Mr. Cooper was told by agents of the Department that he could make the desired changes by way of the internet account and that further applications would not be necessary. Through the Department's online network, Mr. Cooper changed Respondent's mailing address and inserted his name on

the first line of the mailing address field, which consisted of three lines. The word "owner" was inserted before Mr. Cooper's name. Mr. Cooper also changed the physical address to his home address. No changes were made to the mailing address.

10. The Department's internet database provided no indication or warning that the changes made by Mr. Cooper were prohibited. In fact, the mailing address and field contained therein was a "free text" field. As such, a web user could enter anything in those spaces.

11. Although it is not clear from the record when it was initiated, Mr. Cooper was later contacted by the Department's investigator, John Waddell. Mr. Waddell notified Mr. Cooper that the previous applications for name and address change had not been completed properly. At the direction of Mr. Waddell, Respondent again filed an application with the Department to change the name and address of the business. That application was dated August 8, 2003, and included the same information as the previous application, except the physical address was changed from Mr. Cooper's address to Respondent's original physical address. On that same date, Mr. Cooper spoke with an employee of the Department seeking guidance on the application, and the change made by Mr. Cooper was consistent with what he was told to do. Mr. Cooper followed up with the Department on

August 18, 2003, and October 7, 2003, to check on the status of the name and address change application.

12. On October 10, 2003, the Department accepted the application and accompanying fee, and an employee of the Department changed the name and address of Respondent to Metro Mortuary Transport, Inc. Ultimately, the Department issued a removal service license to Metro Mortuary Transport, Inc., effectively changing the name of the organization or entity operating under removal service License No. FR38. As co-owners of Respondent, Messrs. DeGroat and Cooper relied on that license issuance and continued operating the removal service as Metro Mortuary Transport, Inc.

13. In 2002, contemporaneous with the numerous efforts made by Respondent to change its name and address, the Department began utilizing a new licensing computer database called License-Ease. At the same time, the Department completely reorganized the professional licensing division. The conversion to this new computer database, which had problems at the outset, coupled with new employees carrying out the licensing responsibilities, created some confusion among Department personnel.

14. In or about May 2004, Department investigator, Andrea Beacraft, contacted Mr. Cooper to again notify him that

Respondent had not followed the proper procedure for changing the name and address of the licensed removal service.

15. Ms. Beacraft's instructions were based on the Department's requirement that a new application, not a change of name and address form, be submitted, if ownership of an entity changed and/or the physical location of the business changed. At the direction of Ms. Beacraft, Respondent again filed an application with the Department. This application form was different from the name and address change application and included a question asking whether the new and/or additional owner had a felony conviction. On the application referred to in paragraph 15, Mr. Cooper answered affirmatively the question regarding whether he had been convicted of a felony. When requested by the Department, Mr. Cooper provided additional information regarding his criminal convictions, none of which were related to "removal activities."

16. The application was withdrawn on December 13, 2004, when Respondent's counsel notified Mr. Cooper that the Department would deny the application if Mr. Cooper were listed as a shareholder in the licensed corporation. This was the first time Mr. Cooper or Mr. DeGroat learned that Mr. Cooper's felony convictions would prohibit him from holding an ownership interest in the business.

17. Throughout the two years that Respondent has sought to change its name and to add Mr. Cooper as an owner of the licensed entity, Mr. Cooper has been honest, forthright, and cooperative with the Department. Furthermore, he has sought the assistance of the Department and always followed the instructions of Department staff in an attempt to effectuate these changes.

18. The licensed entity in this case has never had any consumer complaints filed against it. In fact, one of the Department's witnesses, the owner of a funeral home who has used the services of Respondent, testified credibly that he has been satisfied with the services provided and will continue to use the company.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat.

20. The Department is charged with regulating the activities enumerated in Chapter 470, Florida Statutes, including "removal service" as defined by Subsection 470.002(26), Florida Statutes.

21. The Department is authorized to impose disciplinary actions against persons found guilty of any offense enumerated in Section 470.036, Florida Statutes. That section provides, in pertinent part, the following:

(1) The following acts constitute grounds for which the disciplinary actions in subsection (2) may be taken:

* * *

(g) Committing fraud, deceit, negligence, incompetency, or misconduct, in the practice of any of the activities regulated under this chapter.

(h) A violation or repeated violation of this chapter or of chapter 455 and any rules promulgated pursuant thereto.

22. Florida Administrative Code Rule 6168-24.010(2)

provides the following:

(2) The Board shall be notified in writing within ten (10) days when any of the information required in the application changes.

23. Section 470.036, Florida Statutes, establishes penalties for engaging in the activities enumerated therein and includes revocation or suspension of a license and imposition of an administrative fine of up to \$5,000.00 for each offense. § 470.036(2), Fla. Stat.

24. Here, the Department alleges that Respondent committed acts prohibited by Subsection 470.036(1)(g) and (h), Florida Statutes. As the basis for the allegation related to Subsection 470.036(1)(h), Florida Statutes, the Department alleges that Respondent violated Florida Administrative Code Rule 61G8-24.010(2). For these alleged violations, the Department seeks to revoke the license of Respondent.

25. Given the penal nature of sanctions that may be imposed in this case, the burden is on the Department to establish the allegations set forth in the Corrected Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

26. Count One of the Corrected Administrative Complaint alleges Respondent committed fraud and deceit, in violation of Subsection 470.036(1)(g), Florida Statutes, by abusing the Department's internet system by "attempting to effectuate a change of ownership without following the proper legal procedure for doing so." The Department presented no evidence to prove this allegation.

27. Contrary to the Department's allegations, the clear evidence established that the entry made on the Department's internet system by Mr. Cooper was consistent with the form he provided to the Department and was done at the direction of a Department employee. Moreover, the clear and convincing evidence established that Respondent was honest and forthright in its dealings with the Department and made numerous good faith attempts to update the name and address of the company. Mr. Cooper's conduct on behalf of Respondent does not constitute fraud or deceit.

28. Even assuming, arguendo, that Respondent committed fraud or deceit in its efforts to change the name and address information, the Department must also prove by clear and convincing evidence that the allegedly fraudulent or deceitful conduct was "in the practice of any activity regulated under this chapter" in order to establish a violation of Subsection 470.036(1)(g), Florida Statutes. The activity, "removal service," pertinent to this case is regulated by Subsection 470.0301(1), Florida Statutes, and is defined as "any service that operates independently of a funeral establishment, that handles the initial removal of dead human bodies, and that offers its service to funeral establishments and direct disposal establishments for a fee." See § 470.002(26), Fla. Stat. Clearly, the entries made on the Department's internet system are not related to this regulated activity.

29. Count Two of the Corrected Administrative Complaint alleges that Respondent violated Subsection 470.036(1)(h), Florida Statutes, through a violation of Florida Administrative Code Rule 61G8-24.010(2), by changing its ownership to Metro Mortuary Transport, Inc., without notifying the Department within ten days of doing so. The Department failed to prove this allegation in Count Two.

30. The uncontroverted evidence established that Respondent filed an application with the Department within two

days of incorporating its new entity. The Department's own records show that on September 25, 2002, Respondent submitted an application to change the name of the license holder to Metro Mortuary Transport, Inc., a corporation filed with the Florida Department of State on September 23, 2002. Finally, the undisputed evidence established that these changes were accepted by the Department by way of its internet web site and confirmed by issuance of removal service License No. FR38 in the name of Metro Mortuary Transport, Inc.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Corrected Administrative Complaint be DISMISSED.

DONE AND ENTERED this 5th day of August, 2005, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of August, 2005.

ENDNOTE

^{1/} Unless otherwise indicated, all citations are to Florida Statutes (2004).

COPIES FURNISHED:

Charles F. Tunnickliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Stanley K. Cooper
Metro Professional Services
Post Office Box 7342
St. Petersburg, Florida 33734

Garvin B. Bowden, Esquire
Gardner, Wadsworth, Duggar, Bist
& Wiener, P.A.
1300 Thomaswood Drive
Tallahassee, Florida 32308

Juanita Chastain, Executive Director
Board of Funeral Directors
and Embalmers
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Leon Biegalski, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

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 should be filed with the agency that will issue the final order in this case.