

FILED

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NOV 9 2007

DEPARTMENT OF FINANCIAL SERVICES,
DIVISION OF FUNERAL, CEMETERY AND
CONSUMER SERVICES,

Docketed by: J.J.

Petitioner,

vs.

Case No. 07-1442

A CREMATION CENTER AT HORIZON
FUNERAL HOME,

Respondent.

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DIVISION OF ADMINISTRATIVE
HEARINGS

DEPARTMENT OF FINANCIAL SERVICES,
DIVISION OF FUNERAL, CEMETERY AND
CONSUMER SERVICES,

Petitioner,

vs.

Case No. 07-1443PL

MARK E. DAVIS,

Respondent.

FINAL ORDER

THESE CAUSES came before the Board of Funeral, Cemetery and Consumer Services (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on October 10, 2007, in Tallahassee, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order and Respondents' Exceptions to the Recommended order (copies of which are attached hereto as Exhibits A and B) in the above-styled causes. Petitioner was

represented by Elizabeth Teegen, Chief Counsel. Respondents were represented by Garvin B. Bowden, Attorney at Law. Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in these cases, the Board makes the following findings and conclusions.

RULINGS ON RESPONDENT'S EXCEPTIONS

The Board reviewed and considered Respondents' Exceptions and ruled as follows:

1. **FIRST EXCEPTION:** Respondents filed an exception to the findings of fact contained in paragraph 12 and the conclusions of law set forth in paragraphs 40 and 41 of the Recommended Order. To the extent that paragraphs 40 and 41 contained factual findings, the Board hereby finds that the above-stated factual findings are based on competent substantial evidence. To the extent that paragraphs 40 and 41 contained conclusions of law, the Board does not concur with Respondents' argument that Petitioner's Examiner made an official determination that Respondents' registration forms were not pre-need contracts. Based on the findings of the Board that the factual findings are based on competent substantial evidence and that the Board does not concur with Respondents' position concerning Petitioner's Examiner's determination that the registration forms were not pre-need contracts, the Board denies Respondents' first exception.

2. **SECOND EXCEPTION:** Respondents filed an exception to the conclusions of law listed in paragraphs 39, 40, and 41 of the Recommended

Order. During the hearing, Respondents argued that Petitioner was equitably estopped from pursuing the violations alleged in the Amended Administrative Complaints. The Administrative Law Judge rejected Respondents' argument and found as a conclusion of law that Petitioner was not estopped from prosecution of Respondents. Because the Board does not have substantive jurisdiction to determine whether equitable estoppel is applicable to the facts of these cases, the Board is precluded from granting this exception. *Barfield v. Department of Health, Board of Dentistry*, 805 So.2d 1008 (Fla. 1st DCA 2001). Therefore, Respondents' Second Exception is denied.

3. THIRD EXCEPTION: Respondents filed an exception to the conclusions of law set forth in paragraphs 10, 23, 26, 28, 33, wherein the Administrative Law Judge found that the registration forms at issue in the cases constituted pre-need contracts and that Respondents did not have valid certificates of authority to sell pre-need contracts. To the extent that these paragraphs contained findings of fact, the Board denies this exception because there is competent substantial evidence in the record to support the Administrative Law Judge's findings of fact. To the extent that this exception sets forth conclusions of law, the Board denied the exception because it did not concur with Respondent's position that the Administrative Law Judge erred when he determined that Respondents' use of the registration forms operated as a sale of funeral services or merchandise. Based on the findings of the Board that the factual findings are based on competent substantial evidence and that the Board does not concur with Respondents' position that the use of the registration forms

operated as a sale of funeral services or merchandise, the Board denies Respondents' third exception.

4. EXCEPTION FOUR: Respondents filed an exception to the conclusion of law set forth in paragraph 45 of the Recommended Order wherein the Administrative Law Judge stated that the additional prohibitions included in Section 497.452(1)(a), Florida Statutes, as of October 2005, are not relevant to this proceeding. The Board denied this exception because it did not concur with Respondents' argument that the evidence presented by Petitioner was insufficient to establish a violation of Section 497.405, Florida Statutes. Upon review of the exception, the record, and argument of Respondents, to the extent that the paragraph includes findings of fact, the Board finds that there is competent substantial evidence to support the findings of fact, and, therefore, the exception is denied. To the extent that the exception requires the Board to determine the applicability of the principle of *expressio unius est exclusion alterius* to these causes, the Board does not have substantive jurisdiction to make such determination and is therefore, precluded from doing so. *Barfield*, see above. Based on the Board's finding that competent substantial evidence exists to support the findings of fact and the Board's lack of substantive jurisdiction to rule on the applicability of the principle of *expressio unius est exclusion alterius*, Respondents' fourth exception is denied.

5. FIFTH EXCEPTION: Respondents filed an exception to paragraph 47 of the Recommended Order. To the extent that this paragraph contains findings of fact, the Board denies this exception because the Board finds that

there is competent substantial evidence in the record to support the Administrative Law Judge's findings of fact. To the extent that this exception sets forth conclusions of law, the Board does not concur with Respondents' position that the Probable Cause Panel did not properly consider the violations set forth in the Amended Administrative Complaints. Based on the findings that there is competent substantial evidence to support the findings of fact and that the Board does not concur with Respondents' position that the Probable Cause Panel did not properly consider the violations set forth in the Amended Administrative Complaints, Respondents' fifth exception is denied.

6. SIXTH EXCEPTION: Respondents filed an exception to the recommended penalty. The Administrative Law Judge recommended as a penalty the issuance of a formal reprimand and that the penalty "should additionally require that the Respondents execute a document to be prepared by Petitioner, which specifically obligates the Respondents to provide to each registrant the services selected at the prices stated on such registrant's form, and providing a mechanism for enforcement of the obligation." Respondents take exception to such recommended penalty to the extent of the requirement that Respondents executes a separate document obligating Respondents to provide the services listed on the registration forms because such action is not authorized by Section 497.153, Florida Statutes, which sets forth disciplinary procedures and penalties or Rule 69K-30.001, Florida Administrative Code, which sets forth the disciplinary guidelines and penalties. Petitioner agreed with Respondents' exception. Based on its review of the record, the exceptions,

arguments of the parties, the Board accepts Respondents' exception to the recommended penalty.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated by reference herein.
2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 497, Florida Statutes.
2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated by reference herein.

PENALTY

Upon a complete review of the record in this case, the Board determines that the penalty recommended by the Administrative Law Judge is REJECTED. The Board accepted Respondents' Sixth Exception and modifies the penalty recommended by the Administrative Law Judge. WHEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that

1. Respondents are found to have sold pre-need contracts without proper certification as required by Section 497.405(1)(a), Florida Statutes (2004).
2. For the above-stated violation, Respondents shall receive a formal reprimand from the Board.

This Final Order shall take effect upon being filed with the Clerk of the Department of Financial Services.

DONE AND ORDERED this 12th day of October, 2007.

BOARD OF FUNERAL, CEMETERY AND CONSUMER SERVICES

Diana Marr

Diana Marr, Executive Director
for GREGORY BRUDNICKI, CHAIR



NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to: A Cremation Center at Horizon Funeral Home and Mark E. Davis, by sending same to counsel of record, Garvin B. Bowden, Attorney at Law, Gardner, Wadsworth, Duggar, Bist & Wiener, P.A., 1300 Thomaswood Drive, Tallahassee, Florida 32308; William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and Elizabeth A. Teegen, Chief Counsel, Florida Department of Financial Services, Division of Legal Services, 612 Larson Building, Tallahassee, Florida 32399-0333, on this 9th day of November, 2007.

A handwritten signature in cursive script, reading "Diana Shumans", written over a horizontal line.

Diana Shumans, Assistant General Counsel