

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL)	
SERVICES, DIVISION OF FUNERAL,)	
CEMETERY, AND CONSUMER)	
SERVICES,)	
)	
Petitioner,)	
)	
vs.)	Case No. 07-1442
)	
A CREMATION CENTER AT HORIZON)	
FUNERAL HOME,)	
)	
Respondent.)	
)	
<hr/>		
DEPARTMENT OF FINANCIAL)	
SERVICES, DIVISION OF FUNERAL,)	
CEMETERY, AND CONSUMER)	
SERVICES,)	
)	
Petitioner,)	
)	
vs.)	Case No. 07-1443PL
)	
MARK E. DAVIS,)	
)	
Respondent.)	
)	
<hr/>		

RECOMMENDED ORDER

On June 1, 2007, a formal administrative hearing in this case was held in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Casia R. Sinco, Esquire
Elizabeth Teegen, Esquire
Department of Financial Services
200 East Gaines Street, Room 612
Tallahassee, Florida 32399-0333

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

STATEMENT OF THE ISSUES

The issues are whether the allegations set forth in the separate Amended Administrative Complaints filed by the Department of Financial Services (Petitioner) against the Respondents, A Cremation Center at Horizon Funeral Home (Horizon) and Mark E. Davis, are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Amended Administrative Complaint filed against Horizon and dated February 23, 2007, the Petitioner alleged that Horizon sold approximately 497 preneed funeral service contracts without being properly licensed. Another Amended Administrative Complaint dated February 23, 2007, containing essentially the same allegations, was filed against Mr. Davis as the funeral director in charge of Horizon. The Respondents disputed the allegations and requested formal administrative hearings. The complaints and requests were forwarded to the Division of

Administrative Hearings, where the cases were consolidated and scheduled to be heard on June 1, 2007. The cases were transferred to the undersigned Administrative Law Judge on May 18, 2007.

On May 24, 2007, the Respondents filed a Motion for Order to Direct Dismissal or to Quash Administrative Complaints and/or Relinquish Jurisdiction and to Award Attorney Fees and Costs in Favor of Respondents. On May 29, 2007, the Petitioner filed a Motion to Amend the Administrative Complaints. On May 30, 2007, the Petitioner filed a Motion to Strike the Respondents' Motion and a Response in Opposition to the Respondents' Motion. Hearing on the pending motions was held on May 30, 2007, at which time the Petitioner's Motion to Amend was denied. Ruling on the Motion for Order to Direct Dismissal or to Quash Administrative Complaints was reserved until completion of the evidentiary hearing and is hereby denied.

At the hearing, the Petitioner presented the testimony of two witnesses and had Exhibits 1 through 4 admitted into evidence. At the conclusion of the hearing, the Petitioner requested and was granted leave to have a late-filed exhibit admitted as Petitioner's Exhibit 5. The Respondents presented the testimony of two witnesses and had exhibits identified as A through D admitted into evidence.

A Transcript of the hearing was filed on June 13, 2007. Both parties filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is the state agency charged under Chapter 497, Florida Statutes (2006), with regulation of funeral establishments, director/embalmers, and the sale of preneed funeral service contracts.

2. At all times material to this case, Horizon was a funeral establishment holding Florida license FH2372, located at 1605 Colonial Boulevard, Fort Myers, Florida.

3. At all times material to this case, Mark E. Davis was a funeral director and embalmer holding Florida license FE4335 and was employed by Horizon in that capacity.

4. From 1999 through October of 2005, the Respondents produced "Registration Forms" which were supplied to individuals seeking to make preneed direct cremation arrangements. A registrant would complete the form and return it to the Respondents with a non-refundable fee of \$48.00.

5. Registrants received no discount when services were eventually purchased, but "locked in" the price being charged at the time the registration form was completed and returned with the \$48 fee. The prices on the registration forms were the same as those charged to customers in need of the services during the

time registrants submitted the forms and fees. The \$48 fee was not credited to the cost of the services chosen during registration.

6. Although there was minor variation between some versions of the document, the "Registration Form" generally contained the following language:

I, the undersigned [sic] request Horizon Funeral Home & Cremation Center to record the following information. Enclosed is the \$48.00 Registration Fee which will cover registration expenses, place the following information on permanent file, and FREEZE THE PRICE of the services and merchandise selected below.

7. The form included space for the registrant to set forth personal identifying information including name, address, date of birth, social security number, occupation, and next of kin.

8. Following the personal identification information part of the document, the form listed the prices of available services and merchandise and directed a registrant to make choices as follows:

DESIGNATE YOUR WISHES:
CHECK THE ITEMS YOU WISH TO RECORD.
Simple Cremation \$495.____
Cremation with Memorial Service \$795.____
Cremation with Rental Casket & Funeral
Service \$2380____

ALTERNATIVE CONTAINERS (Required by law in
lieu of a casket)
Corrugated Cardboard \$95.____
Pressed Wood \$195.____

DISPOSITION OF CREMATED REMAINS

Scatter @ Sea \$150.____

Pack & Ship \$65.____

Cardboard Container, No Charge____

Family To Select An Urn, (Price Range \$65 to
\$1995)____

The above prices do not include the
following: Medical Examiner Cremation
Approval Fee, Certified Copies of death
certificate, classified obituary.

THE REGISTRATION FEE OF \$48.00 IS NOT
REFUNDABLE.

9. The registrant made selections, and then signed and dated the document. The form contained no area for Mr. Davis or any other representative of Horizon to acknowledge receipt of the form or to document any agreement to provide the services selected by the registrant. There were approximately 500 forms completed and submitted to the Respondents with the \$48 fee.

10. At the hearing, Mr. Davis testified that although there was no signature from the Respondent on the form, by his act of accepting the registration form and fee, he was agreeing to provide the services at the prices set forth on the form in accordance with each registrant's wishes.

11. At no time have the Respondents been licensed or authorized to sell preneed contracts for final disposition of cremated human remains. Mr. Davis, an experienced funeral director, was familiar with the requirements to sell preneed contracts. He did not believe that the "Registration Forms"

were preneed contracts. There was no evidence that Mr. Davis made any attempt to conceal the registration process from state regulators at any time.

12. The use of the registration forms was observed during an investigation of the Respondents in 2004. At that time, the investigator believed that the forms were preneed contracts and drafted a complaint related to alleged unlicensed preneed contract sales, but for reasons unknown, persons who reviewed his work apparently disagreed, and the complaint was not pursued.

13. A second investigation was initiated in November 2006 based on a complaint related to signage. The signage complaint raised concerns related to proposed transfer of Horizon ownership to a hospice organization, which was a topic of some controversy.

14. As an investigator (not the 2004 investigator) drove to Horizon, he received a call from his supervisor which directed him to review the registration issue while was at the facility.

15. The signage issue was resolved without difficulty. When the investigator inquired about the registration process, Mr. Davis produced the registration forms for review. The investigator believed that the forms were preneed contracts and stated so in his investigative report. The Petitioner

apparently agreed and initiated the disciplinary process at issue in these cases.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2006).

17. License revocations and discipline procedures are penal in nature. The Petitioner must demonstrate the truthfulness of the allegations in the Administrative Complaints by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

18. The "clear and convincing" standard requires:

[T]hat the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

As to the alleged violations of Subsections 497.152(1)(a) and 497.405(1)(a), Florida Statutes (2004), the burden has been met.

As to the alleged violation of Subsection 497.405(2)(a), Florida Statutes (2004), the burden has not been met.

19. Section 497.005, Florida Statutes (2004), provides the following relevant definitions:

(7) "Burial service," "funeral service," or "service" means any service offered or provided by any person in connection with the final disposition, memorialization, interment, entombment, or inurnment of human remains.

* * *

(12) "Certificateholder" or "licensee" means the person or entity that is authorized under this chapter to sell preneed funeral or burial services, preneed funeral or burial merchandise, or burial rights. Each term shall include the other, as applicable, as the context requires. For the purposes of chapter 120, all certificateholders, licensees, and registrants shall be considered licensees.

* * *

(15) "Cremation" includes any mechanical or thermal process whereby a dead human body is reduced to ashes. Cremation also includes any other mechanical or thermal process whereby human remains are pulverized, burned, recremented, or otherwise further reduced in size or quantity.

* * *

(18) "Final disposition" means the final disposal of a dead human body whether by interment, entombment, burial at sea, cremation, or any other means and includes, but is not limited to, any other disposition of remains for which a segregated charge is imposed.

(19) "Funeral director" means any person licensed in this state to practice funeral directing pursuant to the provisions of chapter 470.

* * *

(30) "Preneed contract" means any arrangement or method, of which the provider of funeral merchandise or services has actual knowledge, whereby any person agrees to furnish funeral merchandise or service in the future.

20. During the hearing, Mr. Davis testified that by accepting the registration form, he was agreeing to provide the services sought by the consumer at the price set forth on the form.

21. The registration form clearly constitutes a "preneed contract" as the term is statutorily defined, because the form is an "arrangement or method" whereby Mr. Davis agreed to furnish cremation and disposition services in the future. By definition, "services" include any service offered in connection with the final disposition of human remains. "Final disposition" includes cremation.

22. The Administrative Complaints filed against the Respondents allege that the Respondents violated Subsection 497.405(1)(a) Florida Statutes (2004), which provides as follows

497.405 Certificate of authority
required. --

(1)(a) No person, including any cemetery exempt under s. 497.003, may sell a preneed contract without first having a valid certificate of authority.

23. Neither Horizon nor Mr. Davis held a valid certificate of authority for the sale of preneed contracts at any time material to this case. The evidence establishes that the Respondents sold preneed contracts without proper certification.

24. The Administrative Complaints filed in these cases allege that the Respondents violated Subsection 497.152(1)(a), Florida Statutes (2004), which provides that violation of any provision of Chapter 497, Florida Statutes, or any lawful order of the board or department or of the statutory predecessors to the board or department are grounds for discipline against a licensee.

25. Florida Administrative Code Rule 61G8-21.007(3) (2004), now renumbered as 69K-21.007(3), provides that the funeral director at a funeral establishment is responsible for assuring that the funeral establishment and persons employed therein comply with applicable statutes and rules. The rule also states that the funeral establishment itself is also legally responsible for such compliance.

26. By engaging in the sale of preneed service contracts without proper certification, the Respondents violated

Subsections 497.152(1)(a) and 497.405(1)(a), Florida Statutes (2004).

27. The Administrative Complaints further allege that the Respondents violated Subsection 497.405(2)(a), Florida Statutes (2004), which provides as follows

(2)(a) No person may receive any funds for payment on a preneed contract who does not hold a valid certificate of authority.

28. The evidence fails to establish that the Respondents received funds "for payment on a preneed contract." The fee paid by consumers in connection with the registration form was not credited in any way towards the payment for the services to be provided under the form. The prices of the services listed on the form were the same as those charged to persons who sought the services at the time of need. The evidence fails to establish that the registration fee constituted "payment on a preneed contract."

29. Florida Administrative Code Rule 69K-30.001 sets forth the range of penalties applicable in this case. The penalty range for an intentional violation of Subsection 497.152(1)(a), Florida Statutes (2004), for a first offense is "Reprimand, fine of \$1000-2500 + costs, 6 mos-1 year Probation with usual conditions."

30. The evidence fails to establish that the violation in this case was intentional. Mr. Davis was familiar with the

statutes and rules related to the sale of preneed contracts, having been involved in the industry for a period of time. He made no attempt to conceal the registration process from investigators because he did not believe that the registration forms were preneed contracts. After the 2004 investigation resulted in no disciplinary action, he assumed that the Petitioner had determined that the forms were not preneed contracts and continued the registration process.

31. Although the Petitioner indicated in the Motion to Amend the Administrative Complaints, filed shortly prior to the hearing, that at least one form was accepted after October 2005, Mr. Davis testified that he believed the 2005 amendments affected the legal status of the registration program, and he essentially ceased the registration process at that time.

32. Florida Administrative Code Rule 69K-30.001(2) provides that disciplinary action other than the recommended penalties may be imposed based upon consideration of the following factors:

(2) Based upon consideration of the following factors, the Board may impose disciplinary action other than the penalties recommended in subsections (1) through (5):

- (a) The danger to the public;
- (b) The length of time since date of violation;
- (c) The number of complaints filed against the licensee;

- (d) The length of time licensee has practiced;
- (e) The actual damage, physical or otherwise, caused by the violation;
- (f) The deterrent effect of the penalty imposed;
- (g) The effect of the penalty upon the licensee's livelihood;
- (h) Any efforts for rehabilitation;
- (i) The actual knowledge of the licensee pertaining to the violation;
- (j) Attempts by licensee to correct or stop violations or refusal by licensee to correct or stop violations;
- (k) Related violations against a license in another state including findings of guilt or innocence, penalties imposed and penalties served;
- (l) Actual negligence of the licensee pertaining to any violation;
- (m) Penalties imposed for related offenses under subsections (1) through (5); and
- (n) Any other mitigating or aggravating circumstances.

33. The registration form process posed no danger to the public. Other than the \$48 registration fee, registrants were under no obligation to use the Respondent's facilities or services at time of need. Registrants were under no obligation to make any additional payments until the time of need. There is no evidence that any registrant was injured or damaged in any manner. There is no evidence that any registrants were denied the services chosen during the registration process or that any registrants were ultimately charged more than the prices listed on the registration forms.

34. There is no evidence that any registrant or funeral service consumer filed any complaint against the Respondents.

35. The Respondents essentially halted the registration process in October 2005, and there is no evidence that any other funeral service provider is engaging in a similar practice. The deterrent effect of a substantial penalty would be negligible.

36. The Respondents were not asked to stop the registration process, and, therefore, there is no evidence that the Respondents refused to correct or stop the practice.

37. There was no evidence that the Respondents had been the subject of any prior disciplinary actions.

38. Based on the foregoing review of the penalty guidelines and the mitigation factors, the recommended penalty set forth below is minimal.

39. In the Motion for Order to Direct Dismissal or to Quash Administrative Complaints, the Respondents have asserted that the Petitioner should be estopped from prosecuting the allegations in the Administrative Complaints because the registration form practice was investigated by regulators in 2004, and no disciplinary action was taken at that time.

40. Although the investigator who conducted the 2004 review believed that the forms constituted preneed contracts, regulators took no action against the Respondents. The Respondents have asserted that they relied upon the lack of

disciplinary action to indicate that regulators had determined that the forms were not preneed contracts and that the registration did not violate the requirements of state law.

41. There was no credible evidence presented that regulators affirmatively determined after the 2004 investigation that the registration form process did not violate statutes related to preneed contract sales. In any event, the Petitioner utilized the registration form process from 1999 until 2004 with no apparent attempt to obtain any regulatory clearance for the document or the practice. Even were the Respondents' assertion accepted, the pre-2004 registrations would have served as grounds for these disciplinary proceedings.

42. The Respondents further suggested that the prosecution of this case was the result of complaints in 2006 by competing funeral establishment operators, which were opposed to the proposed ownership of Horizon by a hospice organization. Although there is some evidence that the ownership issue was controversial, there is no evidence to support the Respondents' assertion that this prosecution was based solely on such controversy, and the underlying rationale behind the Petitioner's prosecution does not excuse the Respondents' unlicensed sales of preneed service contracts.

43. The Respondents have also asserted that the Probable Cause Panel for the Board of Funeral and Cemetery Services erred

in consideration of this matter sufficiently to warrant dismissal of the complaints. The Respondents correctly stated that the Probable Cause Panel erroneously applied the amended post-October 2005 statutes during consideration of the case because counsel for the Petitioner incorrectly cited the law in presenting the case to the Panel. The applicable 2004 law was set forth in the Administrative Complaints filed in these cases and has been cited herein.

44. Comparison of the 2004 statute with the 2005 amendments indicates that both versions of the statutes specifically prohibited the sale of preneed contracts by unlicensed persons. The 2005 statutory changes broadened the scope of prohibited activities related to preneed funeral contracts to include prohibitions against advertising to sell preneed contracts and against making arrangements for preneed contracts.

45. The additional prohibitions included as of October 2005 are not relevant to this proceeding. There was no evidence presented that the Respondents advertised the availability of the registration forms. There was no evidence presented that the registration forms constituted an arrangement for a preneed contract, because each registrant exercises the right to obtain the services identified on the registration form at the time of need.

46. The 2005 statutory amendments did not alter the existing prohibition against the unlicensed sale of preneed contracts. Review of the transcript of the Panel's meeting establishes that the sale of preneed contracts was the focus of the disciplinary inquiry. As set forth herein, the Respondents' unlicensed sale of preneed contracts forms the basis for this proceeding. The erroneous citation of applicable law before the Probable Cause Panel was of no material effect.

47. Additionally, the Respondents asserted that the Probable Cause Panel failed to make a factual determination of whether probable cause existed because it merely "rubber-stamped" the staff recommendation. Review of the Panel meeting transcript indicates that the members received a package of materials related to the case and considered the factual allegations prior to determination that probable cause existed to proceed with the disciplinary action.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Financial Services enter a final order finding that the Respondents committed the statutory violations identified herein and issuing a letter of reprimand. The final order should additionally require that the Respondents execute a document to be prepared by the Petitioner, which specifically obligates the Respondents to provide to each

registrant the services selected at the prices stated on each registrant's form, and providing a mechanism for enforcement of the obligation.

DONE AND ENTERED this 26th day of July, 2007, in Tallahassee, Leon County, Florida.

S

WILLIAM F. QUATTLEBAUM
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 26th day of July, 2007.

COPIES FURNISHED:

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

Casia R. Sinco, Esquire
Elizabeth Teegen, Esquire
Department of Financial Services
200 East Gaines Street, Room 612
Tallahassee, Florida 32399-0333

Diana M. Evans, Director
Bureau of Funeral and Cemetery Services
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0350

Robert Beitler, General Counsel
Department of Financial Services
200 East Gaines Street, Suite 526
Tallahassee, Florida 32399-0350

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.