

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RAFAIY ALKHALIFA,)
)
 Petitioner,)
)
 vs.) Case No. 10-9189
)
 DEPARTMENT OF FINANCIAL)
 SERVICES,)
)
 Respondent,)
)
 and)
)
 ZABIDA HASIN AND FUNERARIA LA)
 CUBANA, INC.,)
)
 Intervenors,)
)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 5, 2011, at Tallahassee, Florida, before Administrative Law Judge Eleanor M. Hunter of the Division of Administrative Hearings (DOAH). Following Judge Hunter's retirement, the case was transferred to Administrative Law Judge Claude B. Arrington pursuant to section 120.57(1)(a), Florida Statutes, for all further proceedings, including the entry of the recommended order.¹

APPEARANCES

For Petitioner: Wilson Jerry Foster, Esquire
Law Offices of Wilson Jerry Foster
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For Respondent: Thomas A. David, Esquire
Department of Financial Services
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Tallahassee, Florida 32399

For Intervenor: Melanie A. Cambridge, Esquire
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STATEMENT OF THE ISSUE

Whether Rafaiy Alkhalifa (Petitioner) is entitled to a change of name and change of location for the funeral establishment operating pursuant to the subject license because Respondent failed to approve or deny the requested change within 90 days as required by the "deemer" provision set forth in section 120.60(1).

If the "deemer" provision was not triggered, whether Petitioner is otherwise entitled to a change of name and change of location for the funeral establishment operating pursuant to the subject license.

PRELIMINARY STATEMENT

On December 1, 2009, Petitioner filed two forms with Respondent. One form was filed to change the name of the funeral home operating pursuant to the subject license and the other was to change its location. During a telephone call on or

about January 15, 2010, Respondent's staff person informed Petitioner's counsel that the forms were not being processed because Petitioner was not the owner of the funeral establishment operating pursuant to the subject license.

On June 7, 2010, Petitioner filed a notice to claim the subject license by default due to Respondent's inaction. Petitioner predicates his claim on the "deemer" provision of section 120.60(1). Respondent contends: (1) that the forms filed by Petitioner were not applications; (2) that Petitioner did not own the establishment he wished to rename and relocate based on the terms of a marital settlement agreement with his ex-wife (the Mediated Marital Settlement Agreement, referred to herein as MMSA); and (3) that the "deemer" provision was not triggered because Respondent's staff person told Petitioner's attorney that Respondent would not process Petitioner's forms because Petitioner was not the owner of the funeral home operating pursuant to the subject license.

At the formal hearing, Petitioner testified on his own behalf and presented the testimony of Jasmin Richardson, a financial examiner with Respondent's Division of Funeral, Cemetery, and Consumer Services. Respondent also presented the direct testimony of Ms. Richardson. Joint Exhibits 1-5 were received in evidence. Respondent's Exhibits A-H were also

received in evidence. Proposed Recommended Orders (PROs) were filed on February 8, 2011.

On March 11, 2011, Judge Hunter, having reviewed the arguments set forth in the PROs, determined that a decision concerning the rights of the parties could also affect the substantial interests of a non-party. Accordingly, an Order Requiring Notice Pursuant to Florida Administrative Code Rule 28-106.109, was issued. As required by the order, Respondent, on March 11, 2011, gave notice of the Right to Intervene to Zabida Hasin (Petitioner's ex-wife).

After requesting an extension of time, Ms. Hasin and Funeraria La Cubana, Inc. (La Cubana), filed their response to the notice, which Judge Hunter treated as a petition to intervene. By order entered by Judge Hunter on April 18, 2011, Ms. Hasin and La Cubana were granted status as Intervenors. In their response, Intervenors generally pled the affirmative defenses of laches, equitable estoppels, res judicata, unclean hands, issue in fact preclusion, and collateral estoppel. Intervenors base their defenses on the MMSA, which was incorporated by reference in the final judgment dissolving the marriage of Petitioner and Ms. Hasin. Petitioner asserts that the MMSA had no effect on the subject license.

On April 22, 2011, Judge Hunter issued an Order Allowing Legal Memoranda to allow the parties the opportunity to submit legal arguments in favor of their respective positions. The Order noted that "The parties offered no legal support for their positions." Judge Hunter set May 5, 2011, as the deadline for the submission of memoranda. Petitioner and Respondent submitted memoranda prior to the deadline, but Intervenors did not.

A Transcript of the proceedings, consisting of one volume, was filed on January 19, 2011. The PROs submitted by the Petitioner and the Respondent and their memoranda have been duly considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. In 1993, Petitioner applied for a license to operate a funeral establishment named Funeraria Nacional Hialeah (FNH), located at 198 Hialeah Drive, Hialeah, Florida 33010. Petitioner was listed as the sole owner of the business.

2. The application was received and processed by the Board of Funeral Directors and Embalmers, Department of Professional Regulation (DPR Board). The DPR Board was responsible for the regulation of funeral establishments prior to October 2005. Following its review, the DPR Board approved the application and issued license number FH0002027, effective December 22, 1993.

The license authorized Petitioner to operate the identified funeral establishment at the identified location.

3. On October 1, 2005, the legislature created the Board of Funeral, Cemetery, and Consumer Services within the Department of Financial Services (DFS Board) and transferred the regulatory and licensure services for funeral establishments from the DPR Board to the DFS Board.²

4. After it received responsibility for regulation funeral establishments, the DFS Board issued license F040780 (the subject license) to replace the license that had been issued by the DPR Board.

5. The DFS Board relies on filings with the Florida Department of State, Division of Corporations (Division of Corporations), to verify the corporate status of funeral establishments.

6. In Articles of Incorporation filed with the Division of Corporations on June 26, 1997, Petitioner was listed as the registered agent for "La Cubana" with an address being the same as FNH's. La Cubana became the successor in interest to FNH.

7. On the 1999 Annual Corporation Report filed for La Cubana, Ms. Hasin was added as an officer/director. A name that appears to be Petitioner's was deleted as an officer/director.

8. From 2000 through 2002, Delia Kennedy was the registered agent for La Cubana and Ms. Hasin was the sole officer/director.

9. On January 24, 2002, Petitioner and Ms. Hasin were married. They separated two years later.

10. Ms. Hasin replaced Ms. Kennedy as the registered agent on the 2003 Annual Corporate Report for La Cubana. Ms. Hasin continued to be listed as both the registered agent and officer/director on the 2003, 2004, and 2005 reports.

11. Petitioner filed an amended 2005 Annual Corporate Report for La Cubana on December 2, 2005, in which he listed himself as both the new registered agent and officer/director, replacing Ms. Hasin in those capacities. On January 3, 2006, Ms. Hasin filed a supplemental report that replaced Petitioner's name with her name in those capacities.

12. Ms. Hasin continued to be listed as the registered agent and officer/director in the Annual Corporate Reports filed for La Cubana in 2007, 2008, and 2009.

13. In 2005, Petitioner filed a petition for dissolution of marriage in the Circuit Court in and for Miami-Dade County, which was assigned Case Number 05-35433 FC 07. On March 5, 2009, the presiding circuit judge entered a final judgment dissolving the marriage between Petitioner (using his Christian name of Hilbert Ervin Mohabir) and Ms. Hasin. The final

judgment incorporated by reference the terms and agreement of the MMSA, which both Petitioner and Ms. Hasin signed on February 19, 2009.

14. The MSMA recited that the parties owned five corporations and thereafter listed the name of each corporation. The name of each corporation includes either the word "Funeral" or "Funeraria." La Cubana is one of the listed corporations. The MSMA does not specifically mention the license required to operate La Cubana or the licenses of any of the other listed corporations.

15. Pursuant to the terms of the MMSA, the following was to be distributed to Ms. Hasin: "Funeraria La Cubana, Inc., together with all stock, assets and liabilities connected with them"

16. The MMSA also contained the following provision under the heading "Execution of Necessary Documents":

Each party shall, upon the request of the other, execute, acknowledge and deliver any and all papers or documents or other instruments of release or conveyance, as may be necessary to enable the other Party [sic] to effectuate the foregoing distribution of property and other provisions of this Marital Settlement Agreement.

17. The MMSA provided Petitioner with an option to repurchase La Cubana for \$150,000 by 5:00 p.m. on August 18, 2009. Petitioner did not exercise that option.

18. In April 2009, Ms. Richardson received a copy of the MMSA. On April 8, 2009, without notice to Petitioner, Ms. Richardson changed the owner-of-record in the DFS Board's database for the subject license from Petitioner's name to Ms. Hasin's name.

19. On September 9, 2009, the DFS Board received from Ms. Hasin a form with the title "Change of Name & Request for Revised License Certificate - Entities." By submitting this form, Ms. Hasin sought to change the name of the licensed facility on the subject license from La Cubana to the name Funeraria Hialeah Memorial, Inc. On the license, next to the words "Business Location" was the following: "OWNER S. FAFAIY ALKHALFIA, 198 HIALEAH DRIVE, HIALEAH, FL 33010." The mailing address on the license was to La Cubana, c/o Ms. Hasin at the address of 198 Hialeah Drive, Hialeah, FL 330210. Ms. Richardson testified that she processed the request.³

20. Following the execution of the MMSA, Petitioner asserted no claim to the subject license until December 1, 2009, when he filed two forms with the DFS Board.

21. The first form was styled "Notice of Change in Location of Funeral Establishment." The form is referenced as "Form DFS-N1-2001." The form contains the following information: "This form is used to report a change in location of a funeral establishment, and to request an inspection of the

proposed new location pursuant to section, 497.380(12)(b), Florida Statutes." The form advised that: "Operations at the new location may NOT start until an inspection of the new location by [the DFS Board] has been conducted and passed." Petitioner identified the name of the funeral establishment he wished to locate as being Funeraria Hialeah Memorial, Inc. Petitioner identified the subject license as being the license for the funeral establishment he wished to relocate and provided the following street address for the new location: 4529 Hollywood Blvd., Hollywood, FL 33021.

22. The second form was styled "Change of Name & Request for Revised License Certificate - Entities." The form is referenced as "Form DFS-N1-1764." The form referenced the subject license and requested that the subject license be revised to reflect the new name and new location of the funeral establishment. The form requires the party requesting the change to insert "Licensee's current name (enter exact name under which currently licensed)." In response, Petitioner inserted the name S. Rafaiy Alkhalifa. Petitioner provided the Hollywood Boulevard address as the address to which the revised certificate should be mailed.

23. Petitioner checked the following representation on the form: "Applicant is unable to attach the original of its certificate of license because it has been lost, stolen, or

destroyed." Petitioner's statement that the certificate of license had been lost, stolen, or destroyed was false. Petitioner knew that the certificate was in the funeral establishment that Ms. Hasin operated.

24. Petitioner signed the following certification on the form: "I, the person signing below as licensee representative, do hereby swear or affirm that I am duly authorized to make this application on behalf of the licensee, and that the information supplied in the application is true and correct, and I do hereby request on behalf of the licensee, that the [DFS Board] issue a duplicate certificate to the licensee."

25. The two forms submitted by Petitioner on December 1, 2009, reached the desk of Ms. Richardson for processing. After checking her database, Ms. Richardson determined that the two requests could not be processed because Petitioner was not the owner of the subject license. Consequently, no action was taken on the two requests.

26. The parties stipulated that on January 15, 2010, 45 days after the forms were filed, Ms. Richardson had a telephone conversation with Petitioner's attorney who had called her to inquire as to the status of the two requests. The parties stipulated that Ms. Richardson told Petitioner's attorney that Petitioner was not the owner of the subject funeral

establishment and that the DFS Board was not processing the forms.

27. On June 7, 2010, Petitioner filed a "Notice as Required under Subsection 120.60(1), Florida Statutes," to claim a licensure by default. On July 1, 2010, Petitioner filed a Petition with Respondent to approve the changes to the subject license he requested on December 1, 2009, pursuant to the "deemer" provision of section 120.57.

28. On August 17, 2010, the DFS Board issued a written Notice of Denial that denied the petition Petitioner had filed on July 1, 2010. The Notice of Denial recites that the MMSA extinguished any ownership rights Petitioner may have had concerning the funeral establishment operated by Ms. Hasin. The Notice of Denial also relied on Ms. Richardson's informing Petitioner's counsel that the "documents" submitted by Petitioner would not be processed.

CONCLUSIONS OF LAW

29. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to sections 120.569 and 120.57(1).

30. This is a de novo proceeding designed to formulate final agency action. See Hamilton Cnty Bd. of Cnty Comm'rs v. Dep't. Env't'l Reg., 587 So. 2d 1378 (Fla. 1st DCA 1991) and section 120.57(1) (k).

31. Respondent asserts that the papers submitted by Petitioner were not applications, but were forms. Relying on Florida Administrative Code Rule 69K-1.001, Respondent argues that the agency has distinguished between an "application" and a "form" as follows:

69K-1.001 List of Approved Forms;
Incorporation by Reference.

The following forms are hereby adopted and incorporated by reference, and can be obtained from the Department . . .

* * *

(64) DFS-N1-1748, "Application for Funeral Establishment License," Rev. 10-06.

* * *

(80) DFS-N1-1764, "Change of Name & Request for Revised License Certificate - Entities," Eff. 10-06.

* * *

(99) DFS-N1-2001, "Notice of Change in Location of Funeral Establishment," Eff. 10/09.

32. The forms Petitioner filed with the DFS Board sought authorization to move a license to another location and the issuance of a revised license with a change in the name of the licensee. These actions cannot lawfully occur without DFS Board approval. Respondent's argument that these forms are not applications is rejected. The nature of the action required, rather than the name of a document, should be determinative of

whether or not a form is also an application. Because the forms requested specified approvals by the DFS Board, the forms are construed by the undersigned to be applications.

33. As the applicant, Petitioner has the burden of proving his entitlement to the relief he seeks by a preponderance of the evidence. See Dep't of Banking and Fin. v. Osborne Stern, 670 So. 2d. 932 (Fla. 1996) and Dep't of Transp. v. J. W. C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

34. A "preponderance" of the evidence means the greater weight of the evidence. See Fireman's Fund Indemn. Co. v. Perry, 5 So. 2d 862 (Fla. 1942).

35. Section 120.60 pertains to applications for licenses. To determine whether the applications submitted by Petitioner were applications for licenses within the meaning of section 120.60, the definition of the term "license," set forth in section 497.005(40), has been considered. That definition is as follows:

(40) "License" includes all authorizations required or issued under this chapter, except where expressly indicated otherwise, and shall be understood to include authorizations previously referred to as registrations or certificates of authority in chapters 470 and 497 as those chapters appeared in the 2004 edition of the Florida Statutes.

36. Because the definition of the term "license" includes "all authorization required or issued," the authorizations

requested by Petitioner as to the subject license are construed to be license applications within the meaning of section 120.60(1).

37. Section 120.60 provides, in relevant part, as follows:

(1) . . . An application for a license must be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. The 90-day time period is tolled by the initiation of a proceeding under ss. 120.569 and 120.57. Any application for a license which is not approved or denied within the 90-day or shorter time period, within 15 days after conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and the parties, whichever action and timeframe is latest and applicable, is considered approved unless the recommended order recommends that the agency deny the license. ... Any applicant for licensure seeking to claim licensure by default under this subsection shall notify the agency clerk of the licensing agency, in writing, of the intent to rely upon the default license provision of this subsection, and may not take any action based upon the default license until after receipt of such notice by the agency clerk.

* * *

(3) Each applicant shall be given written notice, personally or by mail, that the agency intends to grant or deny, or has granted or denied, the application for license. The notice must state with particularity the grounds or basis for the issuance or denial of the license, except when issuance is a ministerial act. Unless waived, a copy of the notice shall be

delivered or mailed to each party's attorney of record and to each person who has made a written request for notice of agency action. Each notice must inform the recipient of the basis for the agency decision, inform the recipient of any administrative hearing pursuant to ss. 120.569 and 120.57 or judicial review pursuant to s. 120.68 which may be available, indicate the procedure that must be followed, and state the applicable time limits. The issuing agency shall certify the date the notice was mailed or delivered, and the notice and the certification must be filed with the agency clerk.

38. The court addressed the "deemer" provision in Sumner v. Dep't of Prof'l Reg., Bd of Psychological Examiners, 55 So. 2d 919 (Fla. 1st DCA 1990). Sumner appealed the denial of her application for certification to take a licensure examination. She was told by telephone within the 90-day period that her application had been denied. She received a written denial after the 90-day period had lapsed. In explaining that the verbal notice was sufficient to prevent the "deemer" provision from being triggered, the court stated as follows at 921:

We agree with the Board that the deemer provisions of section 120.60(2) does not incorporate the written notice requirements of section 120.60(3) so that the Board was required to file its written notice of intent to deny within ninety days after receipt of Sumner's application. If the legislature had intended to specifically require written notice within ninety days, it would have been a simple matter to have inserted the limitation in the statute.

. . .

39. The court in State Dep't of Trans. v. Calusa Trace Dev., Corp. 571 So. 2d 543 (Fla. 4th DCA 1990) agreed with the rationale expressed in Sumner in answering in the negative the following question: "Does section 120.60(2) require the DOT to grant or deny a connection permit in writing within ninety days after receipt of that application; otherwise, the application is deemed approved." In that case, a DOT official told a representative of the applicant that the application was denied within the 90-day period, but there was no written denial within the 90-day period.

40. The court in Sumner was dealing with subsections 120.60(2) and (3), Florida Statutes (1987), and the court in Calusa Trace dealing with subsections 120.60(2) and (3), Florida Statutes (1989). There are no material differences between the version of the statutes at issue in those cases and the version of the statute at issue in this case.

41. Based on the foregoing, it is concluded that the "deemer" of section 120.60(1) has not been triggered in this case because Ms. Richardson told Petitioner's counsel within the 90-day period that the applications were not going to be processed.

42. Section 497.141(10) provides:

(10) No license issued under this chapter shall be assignable or transferable except

to the extent specifically provided by this chapter.

43. Even if one were to accept Petitioner's argument that Ms. Richardson improperly transferred the subject license out of Petitioner's name because the license had been issued to Petitioner as an individual and not to a corporation, Petitioner's applications should nevertheless be denied. It is clear to the undersigned that the subject license was an asset "connected with" La Cubana within the meaning of the MMSA, and it is also clear that Petitioner would be required by the terms of the MMSA to sign all appropriate paperwork necessary to legally complete the transfer. The DFS Board correctly determined that Ms. Hasin is the equitable owner of the subject license and is the owner of the corporate entity. The DFS Board should deny any transfer of the subject license until the competing claims of Petitioner and Ms. Hasin to ownership of the subject license have been resolved by a court of competent jurisdiction.

44. The applications should also be denied because Petitioner falsely represented that the license had been lost, stolen, or destroyed.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions

of Law, it is hereby RECOMMENDED that Department of Financial Services enter a final order denying the two applications filed by Petitioner.

DONE AND ENTERED this 17th day of August, 2011, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of August 2011.

ENDNOTES

¹ Section 120.57(1)(a) provides, in relevant part as follows: "If the administrative law judge assigned to a hearing becomes unavailable, the division shall assign another administrative law judge who shall use any existing record and receive any additional evidence or argument, if any, which the new administrative law judge finds necessary." The undersigned, having reviewed the pleadings, transcript, and exhibits has concluded that no further proceeding is necessary prior to the entry of the Recommended Order. All statutory references are to Florida Statutes (2011).

² This legislative action was a part of chapter 2004-301, Laws of Florida. Section 497.101 created the Board of Funeral, Cemetery, and Consumer Services within the Department of Financial Services.

³ The undersigned construes that testimony to mean that the request was granted and the license was changed from the name La Cubana to the name Funeraria Hialeah Memorial, Inc. The record is not clear as to why Funeraria Hialeah Memorial, Inc., did not intervene as the successor in interest to La Cubana. That intervention would not have changed the conclusions contained herein.

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 should be filed with the agency that will issue the Final Order in this case.