

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL )  
SERVICES, BOARD OF FUNERAL, )  
CEMETERY AND CONSUMER SERVICES, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 11-3693  
 )  
LANDMARK FUNERAL HOME, INC., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by webcast in Tallahassee, Florida, on September 6, 2011. The Administrative Law Judge, parties, and attorneys for the parties attended in Tallahassee. The court reporter attended in Fort Lauderdale. Witnesses appeared in both locations.

APPEARANCES

For Petitioner: Thomas A. David, Esquire  
Department of Financial Services  
200 East Gaines Street  
Suite 612, Larson Building  
Tallahassee, Florida 32399-0333

For Respondent: Edward Holodak, Esquire  
Edward Holodak, P.A.  
2500 Hollywood Boulevard, Suite 212  
Hollywood, Florida 33020

Brady J. Cobb, Esquire  
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Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

The issues are whether Respondent is guilty of:

1) advertising for preneed services without possessing a valid preneed license, in violation of sections 497.152(5)(a), 497.157(1), 497.166(1), and 497.452(1)(a), and 2) obtaining its license by misrepresentation or error of the Board of Funeral, Cemetery, and Consumer Services (Board) known to Respondent or, alternatively, failing to limit the activities of two persons in accordance with representations made to the Board, in violation of section 497.152(1)(b) and (4)(f) and (g), Florida Statutes. If Respondent is guilty of any of these charges, an additional issue is the penalty to be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated May 3, 2010, Petitioner alleged that Respondent possessed a funeral establishment license, but not a preneed license. Count I alleges that Respondent unlawfully advertised preneed services, in violation of the statutes set forth above. Respondent has not contested this violation. The parties have agreed that the violation was not willful and agreed on the penalty--a \$500 administrative

fine. This recommended order therefore will not address Count I in detail.

Count II alleges that, on April 8, 2009, the Board conducted a meeting, at which it considered the pending application of Respondent. During the meeting, Jonathan Shaw, Respondent's owner, allegedly informed the Board that Valerie Panciera-Rieth would have no involvement with Respondent's business, nor would her father, Irving R. Panciera, except as a lessor of the business premises to Respondent. Allegedly in reliance, in part, on these representations, the Board granted Respondent a funeral establishment license at its next meeting, which took place on May 6, 2009.

Count II alleges that, after the license was issued, Mr. Panciera and Ms. Panciera-Rieth appeared in advertisements for Respondent, Mr. Panciera represented himself as a consultant for Respondent in business cards, and the Greater Hollywood Chamber of Commerce directory listed Ms. Panciera-Rieth as a contact for Respondent. Count II alleges that Mr. Shaw's representations to the Board were thus false or, alternately, Respondent failed to limit the activities of Mr. Panciera and Ms. Panciera-Rieth to conform to Mr. Shaw's representations, in violation of the statutes cited above.

At the hearing, Petitioner called five witnesses, and Respondent called three witnesses. The parties offered into

evidence four joint exhibits: Joint Exhibits I-IV. Petitioner offered into evidence 11 exhibits: Petitioner Exhibits A-H and J-L. All exhibits were admitted.

The court reporter filed the transcript on September 28, 2011. The parties filed proposed recommended orders on October 10, 2011.

#### FINDINGS OF FACT

1. This case involves four applications for three funeral establishment licenses at two addresses by three corporations. The principals of at least two of the corporations include two feuding siblings. This case also involves the distinction between a corporate applicant for a funeral establishment license and its principals (i.e., owners and officers).

2. The two siblings are Ms. Panciera-Rieth and her brother, Mark Panciera. For 50 years, their father operated Panciera Memorial Home at 4200 Hollywood Boulevard. As he approached retirement, to assist his two children in their pursuit of the funeral business, the father appears to have transferred the Panciera Memorial Home name to the son and the 4200 Hollywood Boulevard address to the daughter.

3. Each sibling naturally wished to leverage the goodwill associated with the name or business location that the father had earned in half of a century of operations. As relevant to this case, this pursuit of leverage resulted in the filing of

complaints against the other sibling, as she or he pursued a funeral establishment license for the corporate applicant for which he or she was a principal.

4. On the present record, it is impossible to determine whether the complaints were filed against the other sibling personally, a corporation (or similar entity) with which the sibling had been involved, or the corporate applicant with which the sibling was involved in the licensing process. Certain minutes of Board meetings, as cited below, identify the offending party as "the applicant." The suggestion that each corporate applicant was doing business prior to obtaining a license is worrisome, but the Board's repeated failure, as discussed at length below, to differentiate between a corporation and its principals suggests that each complaint was probably filed against the competing sibling personally.

5. The complaints themselves do not appear to have been very serious and are described briefly below. The main difference between the complaint of Mark Panciera and the complaint of Ms. Panciera-Rieth initially appears to be the number of violations. Ms. Panciera-Rieth's complaint involves a single violation in the form of a misleading ad, and Mark Panciera's complaint involves either four or six violations, also involving advertising. This distinction is misleading, though. Ms. Panciera-Rieth's complaint identifies a misleading

ad at a bus stop in front of 4200 Hollywood Boulevard, so the violation, if not continuing, reached many potential customers. Mark Rieth's complaint seems to identify a single ad in a church bulletin, so, given the shelf-life of such publications, the potential audience may not have exceeded, or even approached, the audience reached by the lone offending bus stop ad.

6. As a practical matter, the more important distinction between the two complaints is the persistence of Mark Panciera, through his representative, in opposing to the Board the application of his sister's corporation. By contrast, Ms. Panciera-Rieth appears to have filed her complaint and let the Board deal with it as it wished. The persistence of Mark Panciera's representative was so pronounced that, at times, a casual reader of the minutes might think that the representative was a member of the Board or a representative of the Division.

7. The story begins with the Board minutes of February 4, 2009, which employ a flashback device to take us back three months earlier. On November 7, 2008, the Board received an application for a funeral establishment license from Valerie Panciera Funeral Home, Inc., later renamed Presidential Circle Funeral Home, Inc. (Presidential Circle). The applicant's owner was Ms. Panciera-Rieth, the applicant's funeral director in charge (FDIC) was Ms. Panciera-Rieth's husband, Keith Rieth, the applicant's business address was 4200

Hollywood Boulevard, and the proposed facility later passed an inspection on November 10, 2008. This is Presidential Circle Application I.

8. Continuing the backstory, the February 4 minutes next describe the Board's December 3, 2008, meeting, at which the Board had first considered Presidential Circle Application I. The Division of Funeral, Cemetery, and Consumer Services (Division) had recommended approval of Presidential Circle Application I. However, prior to the December 3 meeting, Petitioner had received a complaint from Mark Panciera alleging that "the applicant" had conducted a business as an unlicensed funeral establishment and had misled the public by representing itself as Panciera Memorial Home. Confronted with this complaint, the Board had deferred action on Presidential Circle Application I, so that Petitioner could complete its investigation.

9. Foreshadowing the confusion between a corporation and its principals that plagues Count II, the minutes' use of "the applicant" is unclear. The only applicant is the corporation, so, on its face, the statement states that Presidential Circle engaged in unlicensed practices. However, another mention of "the applicant" at this point in the minutes suggests that the Board probably meant someone or something else.

10. After receiving Mark Panciera's complaint, the Division assigned an investigator, but later learned that the investigator had had a prior employment relationship with "the applicant" and Mark Panciera, so the Division assigned another investigator to the case. If the investigator had worked for the previously unlicensed Presidential Circle, he or she had participated in a serious unlicensed-practice violation, months or even years before Presidential Circle had filed its application for a license. Much more likely, the investigator had lawfully worked for one or more licensed entities, with which the warring siblings were also involved. In other words, the investigator had not worked for "the applicant."

11. The ensuing investigation had determined unspecified violations of chapter 497, Florida Statutes--by whom or what is unstated. However, the Division stated that the violations were not of the type "that would warrant a denial of a license." The Division therefore had agreed to a proposed consent order, under which "the Respondent"--otherwise unidentified--had agreed to pay an administrative fine of \$1000. The copy of the investigative report was attached to the official minutes, but not to the copy that is an exhibit in this case.

12. The plot thickened when, at the February 4, 2009, meeting, the Board rejected the settlement agreement and denied Presidential Circle Application I. In the discussion, one Board



member criticized the proposed fine as too lenient, but conceded that there was no basis for denying the application. The minutes do not adequately describe some of the persons who address the Board in terms of their relationship to the business under consideration. At this point in the minutes, one such person, John Rudolph, addressed the Board, evidently representing Presidential Circle, Ms. Panciera-Rieth, or, most likely, both.

13. Mr. Rudolph stated that the Board should have issued the license in December and, if appropriate, prosecuted a disciplinary case against the newly licensed funeral establishment. Mr. Rudolph warned of the "travesty" of denying a license or deferring action every time a competitor files a complaint against an applicant.

14. Countering these assertions, Wendy Wiener, the representative of Mark Panciera, reminded the Board that the investigation had confirmed six instances of misleading the public. The representative argued that the violations of chapter 497 precluded licensure of the corporate applicant, even if the violations had been brought to the Board's attention "in the context of a family dispute." These comments seemed to turn the tide against Presidential Circle Application I.

15. The dramatic climax of the family feud occurred at the April 8, 2009, Board meeting, at which the Board considered a

new application from Presidential Circle and an application from the corporation of which Mark Panciera was a principal.

16. The new application from Presidential Circle had been filed on March 10, 2009--one day after Jonathan Shaw had acquired the stock of the corporate applicant. The business address was again 4200 Hollywood Boulevard, but the FDIC was Jeffrey Brady, and the facility had passed another inspection on March 20, 2009. This is Presidential Circle Application II.

17. The April 8 minutes noted that, six days after denying Presidential Circle Application I, the Board had received an application from Boyd Panciera Family Funeral Care, Inc., d/b/a Panciera Memorial Home Chapel, of which Mark Panciera was vice president. In that six-day interval, Ms. Panciera-Rieth had filed her complaint, which has been identified above.

18. The April 8 minutes report that the ensuing investigation had found that Panciera Memorial Home, Inc., whose relationship to the corporate applicant or Mark Panciera is undisclosed, had placed a sign on a bus stop in front of 4200 Hollywood Boulevard that was misleading to the public. The sign stated that the Panciera Memorial Home had moved to four nearby locations, even though "the funeral establishment" owned only two of these locations.

19. The April 8 minutes disclose that the Division had entered into a settlement stipulation with "Respondents," which

referred to Mark Panciera and Panciera Memorial Home, Inc., for the payment of an administrative fine of \$1000. Without discussion or opposition from Mr. Rudolph, the Board approved the settlement stipulation and pending application, imposing a condition on the funeral establishment license of also obtaining a preneed license.

20. Turning to the Presidential Circle matter, the April 8 minutes note that the Board had tabled Presidential Circle Application I at its December meeting and denied Presidential Circle Application I at its February meeting. Stating that Ms. Panciera-Rieth was among the principals of Presidential Circle, the April 8 minutes refer to Presidential Circle Application I as the "'Valerie Panciera application.'" The April 8 minutes note that "Applicant" had requested a formal administrative hearing on the denial.

21. However, the April 8 minutes acknowledge that, on March 9, 2009, an unidentified entity--perhaps, but unlikely, the actual applicant--had filed a motion to withdraw Presidential Circle Application I. The April 8 minutes note that the Board had received Presidential Circle Application II.

22. Ms. Weiner, now representing Panciera Memorial Home, advised the Board that it was too late to withdraw Presidential Circle Application I because the Board had considered it in depth and denied it. Ms. Weiner stated that, once a denied

applicant filed a request for hearing, it no longer had the option to withdraw its tentatively denied application.

Ms. Weiner also pointed out that the Board could not consider Presidential Circle Application II while Presidential Circle Application I was still pending.

23. Alluding to the distinction between the corporate applicant and its principal, Ms. Weiner argued that Ms. Panciera-Rieth had filed the request for hearing in her personal capacity, and the corporate applicant should have filed the request. Ms. Weiner reasoned that the Board had already denied the application of Presidential Circle and the denial was "permanent" due to this mistake.

24. Asking if anyone was present representing Ms. Panciera-Rieth, Stephen Turner introduced himself as a representative of her "in so far as [the proceedings affect] the application of Mr. Shaw." Mr. Rudolph was absent due to a death in the family. A Board member replied that it was not considering "Mr. Shaw's application" at this time, and Mr. Turner agreed, noting only that his firm's representation of Mr. Shaw was implicated by the withdrawal. Mr. Turner explained that he wanted the Board to accept the withdrawal to clear the way for consideration of "Mr. Shaw's application."

25. Board counsel advised that she disagreed with Ms. Weiner that the Board could not grant the motion to withdraw

Presidential Circle Application I. The Division Director agreed with Ms. Weiner's second point, though, that the Board could not approve Presidential Circle Application II while Presidential Circle Application I was still pending.

26. Mr. Turner stated that the Board did not have any discretion to deny the request to withdraw Presidential Circle Application I because the applicant could withdraw its application at anytime prior to factfinding. Mr. Turner added that the Board could seek to impose discipline against Ms. Panciera-Rieth, but it should clear the pathway to consideration of Presidential Circle Application II.

27. Mr. Turner stated that there was no relationship between Ms. Panciera-Rieth and Mr. Shaw, who had other businesses along Hollywood Boulevard and wished to invest in the funeral business at this location. Mr. Turner added that protection from competition, which he argued was the real objective of Ms. Weiner's client, was no basis for denial of an application.

28. Some Board members then discussed some finer points of administrative law as to when an applicant may withdraw its application relative to proposed agency action. Ms. Weiner again reminded the Board of a broader point of corporate law-- namely, that the applicant whose application had been denied had been Presidential Circle. Again, she argued that the wrong

entity had filed a request a hearing. But the Division Director wisely counseled the Board that this formality would unlikely result in a determination, under administrative law, that the applicant had failed timely to request a hearing.

29. Wheeling dexterously, Ms. Weiner now argued that the Board could consider Presidential Circle Application II, even while Presidential Circle Application I was still pending. Board counsel dispensed with this argument by noting the unacceptable possibility that both applications could eventually be granted to operate at the same location.

30. Board deliberations seemed bogged down by this time. The advocates had neatly framed the question of whether the Board could allow Presidential Circle to withdraw Presidential Circle Application I, rather than merely "its" request for hearing. If Presidential Circle could withdraw only its request for hearing, the Board's denial of Presidential Circle Application I would become final and, thus, serve as an impediment to another application from the same corporate applicant. On the other hand, Board counsel and the Division Director clearly recognized that the Board could not take action that might result in the granting of both applications.

31. After a much-needed break, the Board took up Presidential Circle Application II. The Division sensibly provided the Board with alternative recommendations. The Board

should approve Presidential Circle Application II, if it approved the request to withdraw Presidential Circle Application I. But, if the Board denied the motion to withdraw Presidential Circle Application I, the Board should deny Presidential Circle Application II because there was already a pending application for a funeral establishment at this location (and from the same applicant).

32. Maureen Daughton, who is a member of the law firm of which Mr. Turner is a member, told the Board that Mr. Shaw has other businesses on Hollywood Boulevard, Mr. Shaw has no relationship with Ms. Panciera-Rieth, and Mr. Shaw "is not intending to employ [Ms. Panciera-Rieth]." Mr. Shaw himself added that Ms. Panciera-Rieth would have "nothing to do with the funeral home." Responding to questions, Mr. Shaw stated that Mr. Brady had not worked for Ms. Panciera-Rieth, and he had no arrangement with Ms. Panciera-Rieth or her father on how to operate the business or a future change in ownership. Mr. Shaw noted only that Mr. Panciera owned the building at which Presidential Circle would operate its funeral home, if licensed.

33. The Board's Chair said that it was "kind of odd" that Mr. Shaw had purchased the corporate applicant at this time. Mr. Shaw replied that he has lived for 20 years within two blocks of the facility and became interested in the business when he noticed that the signs had been down at the funeral home

for a couple of months. He added that he had already invested \$25,000 in the business, but would not invest what he projected to be \$70,000 until he obtained a license.

34. At this point, Ms. Weiner reminded the Board that the applicant had listed Ms. Panciera-Rieth's husband as its FDIC. Mr. Shaw responded by saying that he might hire Mr. Rieth, if Mr. Brady approved him, and Mr. Rieth had done nothing wrong. Ms. Weiner noted that Mr. Rieth had been the FDIC on Presidential Circle Application I. This argument of Ms. Weiner went nowhere.

35. However, the Board then denied approval of the motion to withdraw Presidential Circle Application I. Mr. Turner obtained a short break to consider other options.

36. Turning again to Presidential Circle Application II, no one on the Board could say that he or she had "any concerns" about Presidential Circle Application II, assuming that the outstanding issues about Presidential Circle Application I could be resolved. Mr. Turner then advised that, during the break, Ms. Panciera-Rieth had authorized Mr. Turner, on behalf of Presidential Circle, to withdraw the request for hearing.

37. Ms. Weiner expressed satisfaction with this approach, saying that her "primary concern was that the new ownership by Mr. Shaw was not a mechanism for Valerie, her husband or her father to control the business in some way." That may have been



Ms. Weiner's primary concern--and it may have been satisfied-- but no member of the Board endorsed Ms. Weiner's subtle transformation of a technical solution to a procedural problem to an acceptance of licensing restrictions on the involvement of Ms. Panciera-Rieth, her husband, and her father with the funeral home business licensed to operate at 4200 Hollywood Boulevard.

38. Addressing the technical problem, Corinne Olvey, whose role is not described in the minutes, accurately observed that, if the denial of Presidential Circle Application I became final, it would operate as a denial of Mr. Shaw's corporation, as the two applicants were the same legal entity. Evidently failing or unwilling either to grasp Ms. Olvey's point or the limited effect of a corporate name change, Mr. Turner offered to rename Presidential Circle. The Division Director essentially agreed with Ms. Olvey and warned that Presidential Circle would have to disclose previous discipline. Joining her partner, Ms. Daughton said that it might behoove Mr. Shaw to modify or change the corporate name.

39. After some more discussion, Mr. Turner asked whether "the Applicant" should organize a new corporation. The Division Director replied that he would recommend that the Board table Presidential Circle Application II to allow Mr. Shaw to form a new corporation. Mr. Turner agreed to do this. A Board member asked Mr. Shaw if he understood the decision, and Mr. Shaw

assured him that he did. Mr. Turner restated that he would organize a new corporation and "questioned whether the application could be approved with the condition of the new application." Speaking next, Ms. Weiner stated that, because there was a "valid denial" by the Board--apparently of Presidential Circle Application I--"the Board would want to see the new corporate entity or the new legal entity before it granted that approval." Again, Ms. Weiner's bald attempt to insinuate herself into the decisionmaking delegated to the Board fell flat. Failing to accept Ms. Weiner's implied suggestion, Board counsel recommended only that the Board table further consideration of Presidential Circle Application II. And so ended the April 8, 2009, minutes.

40. Mr. Shaw wasted no time after the April 8 Board meeting. He caused the incorporation of Respondent effective April 16, 2009. On April 17, 2009, Respondent filed an application for a funeral establishment license. In the application, the owner and president is Mr. Shaw, address of the business is again 4200 Hollywood Boulevard, FDIC is again Mr. Brady, and inspection is again that of March 20, 2009.

41. The May 6, 2009, Board meeting is, after the April meeting, necessarily anticlimactic. There is no replay of the family feud. The Board seems disengaged, at least as compared to the involved proceeding one month earlier. The minutes

misstate repeatedly the effect of the activity described in the preceding paragraph. First, even though there is no legal relationship between Presidential Circle and Respondent, the title of this item of business is: "Landmark Funeral Home, Inc formerly Presidential Circle Funeral Home Inc." Second, even though an entirely new application, with a new application fee, had been filed three weeks earlier, the minutes identify the application as Presidential Circle Application II. Third, ignoring the new application, the minutes state that the Presidential Circle Application II is "being resubmitted," and the Division recommends approval.

42. Interestingly, a Board member moved to approve the "application(s)." This motion passed unanimously. In the limited discussion, Ms. Weiner stated that, given the representations of Mr. Shaw at the last meeting regarding the "distinction between his business and Mrs. Valerie Panciera-Rieth," "it is important that the Board members know that before [denying Presidential Circle Application I] an ad was placed in the local yellow pages . . . listing Presidential Circle Funeral Home[,] and the listed telephone number rings in the building of Respondent."

43. No Board member expressed any interest in Ms. Weiner's latest round of disclosures. The sole response was from the Division Director, who promised little with the perfunctory

assurance, "[t]he matter will be looked into." These are the last words of the Board on Respondent's application, and a license was then duly issued on May 9, 2009, without restrictions or conditions.

44. Respondent proceeded to operate as a licensed funeral establishment at 4200 Hollywood Boulevard, as of May 9, 2009. While operating, Respondent caused to be published advertisements that promoted "pre-arrangements," which, unknown to Respondent, required licensure that Respondent did not possess. The violation was not willful.

45. Mr. Brady served as the FDIC for four months until he was replaced by Mr. Rieth. Mr. Panciera served as a consultant to Respondent following its commencement of licensed operations and maintained business cards so stating, in the format of Respondent's other business cards, in the lobby of the funeral home. Subsequent claims by Mr. Shaw and Mr. Rieth not to have known of this obvious display of Mr. Panciera's business cards cannot be credited, given the prominent location of the cards. Additionally, Ms. Panciera-Rieth held herself out as the director of bereavement services at Respondent and stated in an online social site that she was self-employed at "Landmark Funeral Home, formerly known as Panciera Funeral Home." In fact, a fourth Panciera emerged, Ms. Panciera-Rieth's mother, in

local ads published just a few days after the Board issued the license.

46. But the most startling example of Panciera involvement in Mr. Shaw's investment, took place on January 21, 2011, when Ms. Panciera-Rieth filed an application for change in ownership of Respondent from Mr. Shaw to herself and her husband, Mr. Rieth. Ms. Panciera-Rieth "explained" only that this filing was in error, and Mr. Shaw agreeably subscribed to this "explanation."

47. Based on the facts cited in the two preceding paragraphs, Respondent's fallback argument that it excluded Mr. Panciera and his daughter from business operations is, to put it mildly, not supported by the evidence. On a slow day at the funeral home, Pancieras, by blood and marriage, probably outnumbered cadavers. So, to this point, Petitioner has established that Mr. Shaw made statements of future operations, and operations did not conform to these statements. What remains is proof that these statements rose to the level of representations that induced the Board to grant the license one month later to a different corporate applicant, mistakenly failing to impose conditions on the license reflective of these supposedly material statements made by Mr. Shaw to the Board.

48. Petitioner offers no evidence to establish this missing link in its theory of Count II. Stripping away

Ms. Weiner's commentary, the salient facts are that the Board denied Presidential Circle Application I, Presidential Circle filed a request for hearing, Ms. Panciera-Rieth sold her shares to Mr. Shaw, Presidential Circle filed Presidential Circle Application II before the final disposition of Presidential Circle Application I, the Board refused to allow Presidential Circle to withdraw Presidential Circle Application I, Presidential Circle withdrew its request for hearing, the Board tabled Presidential Circle Application II so Mr. Shaw could form a new corporation and file a new application that would not be hampered by the denial of Presidential Circle Application I, a new corporation filed a new application, and the Board granted it at the its meeting the next month.

49. The Board took only four actions in this chain of events. The decisionmaking mode of the Board was to listen to argument and then vote without much, or any, discussion. The Board did not discuss the statements made by Mr. Shaw, it did not accept his offers as restrictions upon the license he was seeking for Presidential Circle, and it did not express any intent to condition the issuance of a license to Presidential Circle or another corporation owned by Mr. Shaw on the performance of any conditions that might be inferred from Mr. Shaw's statements.

50. The Board displayed an imperfect understanding of the application that it was granting at the May meeting. But the defects in the Board's understanding did not go to its failure to attach conditions to the license. The imperfect understanding concerned how Mr. Shaw had managed to extricate everyone from the dilemma that he and Ms. Panciera-Rieth had created by causing Presidential Circle to request a hearing on the denial of Presidential Circle Application I and, prior to final disposition, file a new application. In fact, Mr. Shaw extricated everyone from the dilemma by doing exactly what the Division Director, in the presence of the Board, had told him to do. Thus, the imperfect understanding of the Board during the May meeting is immaterial because it goes entirely to the form of the transaction and does not reflect an inadvertent failure to impose conditions on the license or otherwise acknowledge some material representations of Mr. Shaw.

51. Petitioner seems to equate Mr. Shaw's projections of future operations to representations of past criminal or disciplinary history, whose materiality to licensing is indisputable. Based on its allegations, Petitioner has somehow distinguished Mr. Shaw's statements about future operations and the exclusion of Ms. Panciera-Rieth and her father from his statement that he intended to spend another \$70,000 in preparing to commence operations.

52. If the Board wishes to identify a principal's projections of future operations as a material element of the license that, if violated, may support discipline of the license, the safest way to do so is for the Board to impose conditions incorporating such projections in clear, enforceable language. From the minutes, it appears that Mr. Shaw, representing Presidential Circle, would have been agreeable to such conditions, at least if the Board had granted the license during the April meeting. But the Board did not accept Mr. Shaw's apparent offer, on behalf of Presidential Circle. When the Board had a second opportunity, at the May meeting, to impose these conditions, again it did not do so. These two failures to act are not mistakes. They are reflective of the lack of a determination by the Board of the necessity for such conditions.

53. Further undermining Petitioner's argument is the lack of definition in Mr. Shaw's putative representations. Is the restriction never to employ, as an employee or contractor, Mr. Panciera or his daughter? Is another restriction never to allow either Panciera to serve as an officer or director of Presidential Circle? Is another restriction never to allow either Panciera to purchase shares in Presidential Circle or lend money to the corporation? Obviously, if the Board had been interested enough in what Mr. Shaw was saying to address these



matters, they would have acquired some definition. These vague remarks in no way may serve as a basis to have induced Board action or, two and one-half years later, as a basis for discipline.

54. It is clear from these minutes that the Board knows its own mind. It rejected the advice of the Division Director and denied Presidential Circle Application I. It rejected the arguments of Presidential Circle's representatives and refused to allow Presidential Circle to withdraw Presidential Circle Application I. It rejected the arguments of Presidential Circle's representatives and refused to grant Presidential Circle Application II. And it rejected the repeated invitations of Ms. Weiner to formalize some sort of anti-Pancier condition upon the license issued to the entity that was to commence operations at the storied location of 4200 Hollywood Boulevard.

55. Petitioner's alacrity in pursuing Count II is understandable given the incontrovertibility of Mr. Shaw's statements during the April meeting and the implausible defense of Respondent that its subsequent operations conformed to these representations. But to supply the missing link--the materiality of Mr. Shaw's statements in inducing the Board to grant a license and the mistaken failure of the Board to impose corresponding conditions on the license--Petitioner shoves

aside the Board to impose on Respondent Petitioner's view of what the Board meant to do two and one-half years ago.

56. In this case, the Board has displayed a sharp sense of self-autonomy, as well as a streamlined approach to decisionmaking. The Board has ruled only on what it must and has explained little.

57. Having boldly fabricated an elaborate overlay of rulings and explanations to the laconic workings of the Board, Petitioner, without even calling a Board member as a witness, now invites the more circumspect Administrative Law Judge to do the same. Specifically, Petitioner asks the Administrative Law Judge to join it in displacing the Board by: 1) selecting some of Mr. Shaw's statements during the April meeting; 2) attributing great significance to these statements in the minds of a majority of the Board members; 3) reducing these statements that acquired great significance in the minds of a majority of the Board members to clear, enforceable representations, which the Board would have done if it had not incompetently failed to do so when it issued the license in May; and, of course, 4) punish Respondent for its acts and omissions, mostly two years ago, that violated Mr. Shaw's statements that the Board thought were important, but mistakenly failed to include as conditions of the license, and that, now, the

Administrative Law Judge has reduced to enforceable license conditions.

58. This labyrinthine construct of Petitioner is busy with material representations assigned to Mr. Shaw, complex thoughts in the minds of a majority of the Board members, and incompetence on the part of the Board in issuing an unconditional license. Sometimes factfinding is best guided by the twin principles of lex parsimoniae, State v. Sutherby, 165 Wash. 2d 870, 891, 204 P.3d 916, 925-26 (Wash. 2009) (logician's "law of parsimony" holding that the "simplest, most obvious explanation is usually correct") and Ockham's Razor, J. S. v. Shoreline Sch. Dist., 220 F. Supp. 2d 1175, 1186 (W.D. Wash. 2002) ("the simplest, most obvious explanation is usually the correct one"); Kramer v. U.S., 579 F. Supp. 314, 318 (D.C. Md. 1984) ("the fewer assumptions used to explain a hypothesis, the more reliable the hypothesis"); In re Bimini Island Air, Inc., 355 B.R. 358, 361 (S.D. Fla. BR 2006) (applying Ockham's Razor, court rejected elaborate hypotheses to explain inadvertent alteration of a memorandum, when the evidence did not affirmatively support such hypotheses, in favor of the simplest explanation--the recipient altered it). Absent evidence supporting Petitioner's elaborate hypotheses, the more likely explanation is that the Board did not discuss Mr. Shaw's statements because it did not care enough about them to discuss

them, Mr. Shaw needed a new corporate applicant to escape the licensure denial suffered by Presidential Circle on Presidential Circle Application I, and the Board issued an unconditional license one month later to Respondent because it found no need to restrict the license, probably thinking that it had already invested too much time in what was, at least originally, a family feud and perhaps wishing that it had followed the recommendation of the Division Director in the first place.

#### CONCLUSIONS OF LAW

59. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat.

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

61. As to Count I, section 497.152(5)(a), Florida Statutes, prohibits offering to practice beyond the scope of the offeror's license. As noted above, the parties do not dispute this matter, including a finding that the violation was not willful, and they have agreed on a \$500 administrative fine for Count I.

62. As for Count II, Petitioner's proposed recommended order, in paragraphs 55-57, possibly contends that the burden of

proof rests on Respondent because this proceeding is some sort of extension of the application process, although Petitioner may merely be arguing that, as an applicant, Respondent had the burden of proving its entitlement to the license. If Petitioner is contending the former, the Administrative Law Judge rejects this contention, but the same result would have obtained if Respondent had borne the burden of proof as to Count II.

63. Section 497.152(4)(f), Florida Statutes, prohibits an attempt to obtain a license or the obtaining of a license through "misrepresentation or through an error of the department or board known to the applicant." As noted above, there is no misrepresentation in Respondent's application, nor is any failure of the Board to impose any conditions on Respondent's license through an error of the Board or Division and certainly not through an error known to Respondent.

#### RECOMMENDATION

It is

RECOMMENDED that the Board enter a final order finding Respondent guilty of Count I and imposing an administrative fine of \$1000 and finding Respondent not guilty of Count II.

DONE AND ENTERED this 27th day of October, 2011, in  
Tallahassee, Leon County, Florida.



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ROBERT E. MEALE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of October, 2011.

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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.