

TENNESSEE BOARD OF FUNERAL DIRECTORS AND EMBALMERS

MINUTES OF BOARD MEETING

March 9, 2010

President Dennis Hamilton called the meeting to order at 10:00 A.M. in the Second Floor Conference Room of the Andrew Johnson Tower, Nashville, Tennessee.

Board members present were Dennis Hamilton, President, Eugene Williams, Vice President, Wayne Hinkle, Jill Horner, Clark McKinney and Tony Hysmith. Board member Paula Bridges was absent.

Staff members present were Robert Gribble, Executive Director, Adrian Chick, Assistant General Counsel and Jimmy Gossett, Administrative Assistant.

President Dennis Hamilton introduced Mr. Steven Majchrzak, the Assistant Commissioner for Regulatory Boards of the Tennessee Department of Commerce and Insurance. Mr. Majchrzak gave a report on the work of the Regulatory Boards Division and thanked the board members for their service.

ADOPTION OF AGENDA:

A motion was made by Clark McKinney to approve the agenda as printed.

Seconded by Eugene Williams

Adopted by voice vote

APPROVAL OF MINUTES:

A motion was made by Eugene Williams to approve the minutes of the January 12, 2010 Board Meeting with the correction of a typing error dealing with the date of expenditures on the financial recap for fiscal year July 1, 2008 – June 30, 2009.

Seconded by Wayne Hinkle

Adopted by voice vote

INFORMAL HEARINGS REGARDING SUMMARY SUSPENSIONS:

President Dennis Hamilton recused himself from the summary suspension proceedings and turned the chair over to Vice President Eugene Williams.

Assistant General Counsel Chick advised the Board that the summary suspension dealt with the first five (5) complaints and proceeded with the legal report.

LEGAL REPORT:

ADRIAN CHICK, ASSISTANT GENERAL COUNSEL

1. Case No.: L09-FUN-RBS-2009024371
2. Case No.: L09-FUN-RBS-2009024381
3. Case No.: L10-FUN-RBS-2010004141
4. Case No.: L10-FUN-RBS-2010004131
5. Case No.: L10-FUN-RBS-2010001401

There are two establishments owned by the same person(s) located adjacent to each other. The first establishment, Respondent No. 1, houses a retort and is managed by Respondent No. 2, a licensed funeral director. The adjacent establishment, Respondent No. 3, houses a body cooler and is managed by Respondent No. 4, also a licensed funeral director. The Complainant is a funeral director who at the time was licensed by another state, but not Tennessee. The Complainant, subsequent to this incident, has obtained a funeral director license from Tennessee by reciprocity, but moved back to his home state. Due to the Complainant's involvement in the incident, a complaint has also been opened against him, and he therefore has become Respondent No. 5.

The Complainant states that upon arriving at work for Respondent No. 1 in June, 2009, he noticed that the name of Billie Sue Smith was marked on the white board as being cremated the previous night. However, Billie Sue Smith's body was still in the cooler. At the same time, he noticed that the body of John G. Hughes, who was scheduled for a direct burial, was not present. Realizing that the remains of John G. Hughes had apparently been cremated by mistake, the Complainant reported the mix up to Respondent No. 2. According to the Complainant, Respondent No. 2 went to the cooler, verified the mistake, and then instructed Complainant to assist in removing the identification devices from Billie Sue Smith and placing her body in the casket purchased for John G. Hughes. Acting under direction of Respondent No. 2, the Complainant then delivered the casketed remains of Billie Sue Smith to the cemetery where it was buried as John G. Hughes.

Respondent No. 2 recalls a mix-up being brought to his attention, but claims that immediately following the notification, it was reported that there had not been a mix-up. Respondent No. 2 states that he went to the cooler, unzipped the body bag, verified the toe tag as that of John Hughes, and then zipped the bag up again.

Upon receiving the complaint, Legal requested an expedited investigation. After receiving the results, and because it appeared that there was substantial merit to

the complaint, the family of Billie Sue Smith was notified. John G. Hughes has no surviving next of kin. The family of Billie Sue Smith obtained a court order for the disinterment of John G. Hughes' gravesite. On February 16, 2010, the man's grave marker was set aside and disinterment began. Upon opening the casket, the Assistant Medical Examiner unzipped the body bag and verified that the remains were those of a female. The Medical Examiner's office later identified the remains by a pacemaker serial number and dental records as those of Billie Sue Smith. An examination by the Medical Examiner's office revealed that there was no identification device attached to the body of Billie Sue Smith.

Documents from the Respondents indicate that there was never a cremation authorization or cremation permit obtained for John G. Hughes. Furthermore, of the remaining eight (8) cremations on the crematory's log and burn charts, each took place prior to the cremation permit being obtained from the Department of Health. Additionally, each of the nine (9) cremations was performed by an unlicensed individual. Documents signed by Respondent No.'s 3 and 4 indicate that, in addition to the wrong remains being released to the family of Billie Sue Smith, the pacemaker had been removed (which was not the case) and a cremation permit had been obtained (which was not obtained until five (5) days after the cremation).

Complaint History: None Related.

Recommendation: To be discussed.

Legal presented the following statutes to the Board:

- TCA § 4-5-320(c)(d) regarding the guidelines that a Summary Suspension can be issued;
- TCA § 62-5-504 concerning the responsibilities of a crematory;
- TCA § 62-5-507(h) system for identifying cremains and returning them to the proper individuals.

Guy David Keller, a licensed funeral director and embalmer and former owner of the two establishments was given the opportunity to address the Board.

Herbert Shane McElveen, a licensed funeral director and current co-owner of the establishments addressed the Board.

Next to appear before the Board was Margie Beasley White, a licensed funeral director and manager of one of the affected establishments.

Another co-owner, Charlotte McElveen, addressed the Board.

After much questioning and discussion, Assistant General Counsel Chick informed the Board of their options.

A motion was made by Wayne Hinkle to file charges against each of the five (5) respondents and have the cases heard at a formal hearing.

Seconded by Clark McKinney

Adopted by voice vote

A motion was then made by Wayne Hinkle for the state to conduct periodical inspections of these establishments until such time of a formal hearing. The establishments will be assessed the usual re-inspection costs. This will be done in lieu of a summary suspension being issued and to assure the Board that correct procedures are being followed.

The motion died for lack of a second.

Tony Hysmith made a motion to issue a summary suspension of establishment / respondent number one (1) suspending the operation of the crematory until a formal hearing is held. The suspension of the crematory would become effective with any calls the establishment / respondent receives for cremation on or after March 9, 2010.

Seconded by Clark McKinney

Vice President Eugene Williams directed for a roll call vote:

<u>BOARD MEMBER</u>	<u>VOTE</u>
Wayne Hinkle	Yes
Jill Horner	Yes
Tony Hysmith	Yes
Clark McKinney	Yes
Eugene Williams	Yes

Adopted by roll call vote

Tony Hysmith made a motion that was seconded by Clark McKinney to allow Executive Director Robert Gribble to sign documentation for this case in lieu of either President Dennis Hamilton or Vice President Eugene Williams.

Adopted by voice vote

Vice President Eugene Williams turned the chair back over to President Dennis Hamilton.

At 12:07 p.m., President Dennis Hamilton asked for a motion for a ten (10) minute recess.

A motion was made by Tony Hysmith for a ten (10) minute recess.

Seconded by Wayne Hinkle

Adopted by voice vote

President Dennis Hamilton called the meeting back to order at 12:20 p.m. and legal counsel resumed the legal report.

6. Case No.: L10-FUN-RBS-2010003741

This complaint was filed by a concerned member of the public based upon a recent Tennessee Supreme Court ruling. In that case the decedent died on October 28, 2007. At the joint request of his fourteen (14) year old son and the decedent's fiancée, the Respondent made arrangements for the cremation of decedent's remains. The decedent's mother then brought suit in the U.S. District Court alleging that she alone was entitled to control the disposition of her son's body, and that the Respondent had either negligently or intentionally failed to either ascertain or respect her right to do so.

Response: In its response to the civil suit, Respondent first alleges that the fiancée and child led it to believe that the mother had not survived the decedent. Secondly, the Respondent alleges that the fourteen (14) year old son had the right to control the disposition of his father's remains.

District Court: The district court was of the opinion that *questions of law* were present for which there was no precedent. The district court certified three questions of law to the Supreme Court of Tennessee as follows:

1. Who has the legal control over the disposition of the remains of a decedent when there is no surviving spouse? Specifically, with respect to the facts of this case, with whom is such control vested among a sole surviving parent of the decedent, a fiancée of the decedent, and a fourteen (14) year old minor child of the decedent?

2. If the fourteen (14) year old has no legal or superior right to such control, is such a child considered an "heir" of the decedent for purposes of the safe harbor provisions of Tenn. Code Ann. § 62-5-511?

3. Does the funeral home fall under the definition of a crematory facility for purposes of Tenn. Code Ann. § 62-5-511, given that its role was only to arrange the cremation that was carried out by Respondent?

With regard to the first question, the Supreme Court stated, "Until our General Assembly provides more explicit guidance on the subject, we adopt the following order of priority as to the right to dispose of a dead body". The order was then set out as follows:

- (1) the decedent,

- (2) the spouse of the decedent,
- (3) adult children of the decedent,
- (4) parents of the decedent,
- (5) adult siblings of the decedent,
- (6) adult grandchildren of the decedent,
- (7) grandparents of the decedent,
- (8) an adult who exhibited special care and concern for the decedent.

With regard to the second question in which the Supreme Court was asked whether a minor child may be an "heir" for purposes of the safe harbor provision, the answer was "yes", because the word "heir" is not limited to adults.

With regard to the third question, the Supreme Court noted that it could not answer the question definitively because the Court does not have access to the factual record. As a general rule however, the Court noted that a funeral home which merely makes arrangements but does not itself perform the cremation will not be protected by the safe harbor provisions of Tenn. Code Ann. 62-5-511.

Dissenting Opinion: A dissenting opinion was filed by Williams Koch, Jr., J., stating that "In the absence of a surviving spouse, the authority to make decisions regarding the disposition of a decedent's remains rests with the decedent's next of kin. The term "next of kin" refers to those persons who, according to the rules of consanguinity, as next or nearest in blood to the decedent. Based on these rules, a decedent's fourteen-year-old child may authorize the disposition of a parent's remains unless a court determines that the child lacks the capacity to make his or her own independent and considered decision. If the child is capable of making an independent and considered decision, the child's decision is entitled to preference over that of the decedent's surviving parents."

Complaint History: None related.

Recommendation: The U.S. District Court and Tennessee Supreme Court both agree that the current statutes do not adequately address the issue of who may authorize a cremation. Further, the dissenting opinion agrees that a fourteen-year-old child's preference should normally have priority over the decedent's parents. Given the lack of guidance by current statutes, it cannot reasonably be said that the Respondent has acted in violation of our statutes or rules. Legal recommends that this complaint be **dismissed without prejudice**.

A motion was made by Eugene Williams to accept Counsel's recommendation.

Seconded by Wayne Hinkle

Adopted by voice vote

ADMINISTRATIVE MATTERS:
ROBERT B. GRIBBLE, EXECUTIVE DIRECTOR

LICENSEE REPORT:

**REPORT OF LICENSES ADMINISTRATIVELY APPROVED BY EXECUTIVE
 DIRECTOR PURSUANT TO BOARD AUTHORITY FOR THE PERIOD OF
 JANUARY 13, 2010 – MARCH 8, 2010**

Establishments

Strawther & White Funeral Home, Inc. Hartsville, TN	New Establishment
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Individuals

Lawrence Dobson Childress Kingsport, TN	Funeral Director
Justin Joseph Ford Bartlett, TN	Funeral Director
Donnie Wayne Ownby Knoxville, TN	Funeral Director
Ronald Lloyd Strong Cookeville, TN	Funeral Director
Donald Allen Wilson Atoka, TN	Funeral Director Reciprocity
Candice Marie Jackson Cordova, TN	Funeral Director/Embalmer
Christopher Roy McCord New Market, AL	Funeral Director/Embalmer Reciprocity
Kathryn Denise Shumate Middlesboro, KY	Funeral Director/Embalmer Reciprocity
Rejane Marie Wintter Florence, AL	Funeral Director/Embalmer Reciprocity

CLOSED ESTABLISHMENT REPORT:

Two (2) establishments have reported closing since the last board meeting:

- **Grandview Funeral Home**

2304 Tuckaleechee Pike, Maryville, TN

- **William Gunter and Sons Funeral Directors, Inc.
1711 Jo Johnston Avenue, Nashville, TN**

DISCIPLINARY ACTION REPORT:

The Board has previously authorized each Consent Order and Civil Penalty. The Consent Orders have been signed and unless otherwise noted, the Civil Penalty has been paid by the Respondent. The Executive Director requests the Board's acceptance of the following Consent Orders.

Complaint No. 2009012671

Violation: Consistently charging for "washing, disinfecting, dressing and cosmetology" whenever the body is embalmed and multiple aspects of the establishment's price lists did not comply with the Funeral Rule

Action: \$750 Civil Penalty

Complaint No. 2009012811

Violation: The reason for embalming is missing on Statements of Funeral Goods and Services Selected and multiple aspects of the establishment's price lists did not comply with the Funeral Rule

Action: \$250 Civil Penalty

Complaint No. 2009012581

Violation: The reason for embalming is missing on Statements of Funeral Goods and Services Selected

Action: \$500 Civil Penalty

Complaint No. 2009021461

Violation: The establishment offers direct cremation but does not list an alternative container on its price list and the price range on the General Price List for outer burial containers does not match the prices on the Outer Burial Container Price List

Action: \$250 Civil Penalty

Complaint No. 2009023521

Violation: Immoral or unprofessional conduct (received payments on account of preneed funeral contracts on fourteen separate occasions but did not deposit all payments into a separate trust account as required by law and failed to maintain records of preneed funeral contracts as required by rules) and violations of statutes pertaining to the pre-arrangement and pre-financing of a funeral

Action: Revocation of licenses as a funeral director and embalmer

Complaint No. 2008014221

Violation: During an inspection, conditions at the establishment were of such nature and magnitude to constitute unprofessional conduct

Action: \$500 Civil Penalty

Complaint No. 2008019871

Violation: During an inspection, conditions at the establishment were of such nature and magnitude to constitute unprofessional conduct

Action: \$500 Civil Penalty

Complaint No. 2009016211

Violation: Operating the establishment on an expired license, the preparation room was not in a sanitary condition and the outer burial container price range was not accurate on the General Price List

Action: \$2200 Civil Penalty

Complaint No. 2009014191

Violation: The establishment name on signs and stationery does not match name approved by the Board and a copy of the current license and latest inspection report of the crematory that the funeral home uses was not available for inspection

Action: \$250 Civil Penalty

Complaint No. 2009012861

Violation: The establishment utilized the services of an embalmer on multiple occasions whose license was expired, the funeral director license of the manager was not available for inspection and the outer burial container price range on the General Price List was inconsistent with the Outer Burial Container Price List

Action: \$1500 Civil Penalty

Complaint No. 2009012631

Violation: The name of the establishment on signage and paperwork was different than the name approved by the Board and multiple aspects of the establishment's price lists did not comply with the Funeral Rule

Action: \$750 Civil Penalty

Complaint No. 2009013041

Violation: The establishment name on its sign was different than the approved by the Board and multiple aspects of the establishment's price lists did not comply with the Funeral Rule

Action: \$250 Civil Penalty

Complaint No. 2009026631

Violation: Multiple aspects of the establishment's price lists did not comply with the Funeral Rule

Action: \$350 Civil Penalty

Complaint No. 2009017401

Violation: Offering to engage in the operation of an establishment without first becoming duly licensed

Action: \$1000 Civil Penalty

A motion was made by Eugene Williams to approve the Executive Director's request for the Board's acceptance of the above listed Consent Orders.

Seconded by Clark McKinney

Adopted by voice vote

OPEN COMPLAINT REPORT:

As of March 5, 2010, there were 92 open complaints.

ADJOURN:

A motion was made by Clark McKinney to adjourn.

Seconded by Eugene Williams

Adopted by voice vote

There being no further business, the meeting was adjourned by President Dennis Hamilton at 12:40 P.M.

Respectfully submitted,

Robert B. Gribble

Robert B. Gribble, CFSP
Executive Director