

STATE OF IOWA
BEFORE THE BOARD OF MORTUARY SCIENCE EXAMINERS

IN THE MATTER OF:)	DIA NO: 05DPHMS002
)	CASE NO: MS 04-007
ALBERT FENZLOFF d/b/a)	04-016
SUNNYSIDE MEMORY GARDENS,)	
INC., a dissolved Iowa)	
corporation, License)	FINDINGS OF FACT,
No. 151-00759,)	CONCLUSIONS OF LAW,
)	AND ORDER
Respondent.)	

This matter concerns a statement of charges filed against Albert Fenzloff d/b/a Sunnyside Memory Gardens, a dissolved Iowa corporation (respondent) on April 15, 2004. Respondent was charged with numerous violations, including operating a funeral establishment without a license, making false statements on the license application, permitting unlicensed individuals to practice, engaging in misleading, deceptive or fraudulent practices, and other offenses.

The case was set for hearing before the board on June 9, 2005, at the Lucas State Office Building in Des Moines. The following board members were present for the hearing: Karen Thomsen, Margaret Eicher, Ruth Ohde, Eugene Siegert, Marcus Vigen, and Paul Johnson. Jeffrey Farrell, an administrative law judge (ALJ) from the Iowa Department of Inspections and Appeals, assisted the board. John Baty, an assistant attorney general, represented the public interest. Respondent participated in a limited basis by telephone, as more fully discussed below.

PROCEDURAL ISSUES

Motion to continue: Respondent did not personally appear for the hearing. He contacted the board's office by telephone at or about the time the hearing was scheduled to begin. Respondent was allowed to speak to the board by speaker phone.

Respondent asked the board to continue the hearing so he would have additional time to prepare for the hearing. He claimed he was not served until May 9, 2005. He argued this left him inadequate time to prepare a defense.

The State resisted respondent's request. The State presented a copy of a certified mail receipt from the post office showing the statement of charges and notice of hearing was served on April 18, 2005. (Exhibit 1). The receipt is signed by respondent. The State presented a witness, Darby Matteson, who testified that the State emailed respondent a proposed consent order on May 9. The State contends that respondent had sufficient notice to prepare for the hearing.

The Board denied respondent's request to continue the hearing. There is no evidence that respondent made any effort to prepare for the case. There is no evidence he contacted the State's representatives to obtain discovery, exhibits, or the names of witnesses. He did not file a timely request for continuance to the board. Respondent cited no sound reason to support his request.

Respondent's failure to participate in the hearing: After the board denied the request to continue, the board expressly offered the opportunity to participate in the remainder of the hearing by telephone. He declined the request, stating the board had already made up its mind to revoke his license. The ALJ advised respondent that the board had yet to consider the evidence and make any decision on his license. The ALJ again expressly offered respondent the opportunity to participate by telephone. Respondent again stated that he did not want to participate. Respondent hung up. The hearing proceeded without him.

FINDING OF FACTS

Sunnyside Memory Gardens, Inc. (Sunnyside) was first incorporated in 1956. (Exhibit 5). As of 2003, Sunnyside was owned by Northeast Iowa Memorial Gardens, Inc. (Northeast).¹ (Exhibit 2). David Lorsung was the president and sole director of Sunnyside at that time.

On November 6, 2003, Northeast sold all shares in Sunnyside to Mitzi Behne, who is now known as Mitzi Fenzloff. (Exhibit 2). Mr. Lorsung signed the agreement on behalf of Northeast. Mr. Lorsung resigned from all offices of Sunnyside as part of the agreement.

¹ The sale agreement listed Northeast as the owner of Sunnyside, while board records listed Mr. Lorsung as the owner. Any discrepancy is immaterial for purposes of the case against respondent.

Ms. Fenzloff's ownership or involvement in Sunnyside is significant, in part because she has a lengthy criminal history. (See Exhibit 9). As of the date she purchased Sunnyside, Ms. Fenzloff's criminal record included the following convictions and associated events:

- January 25, 1999 - fourth degree theft
- March 14, 2000 - fifth degree theft
- March 21, 2000 - second degree theft
- July 12, 2000 - fifth degree theft
- June 5, 2001 - contempt of court
- August 12, 2002 - probation violation
- August 12, 2002 - third degree theft

Ms. Fenzloff did not immediately file a license application with the board. However, Sunnyside advertised itself as a funeral home and performed services after the sale. Sunnyside issued a price list, effective February 1, 2004, advertising itself as a funeral home, cemetery, mausoleum, and performing cremation services. (Exhibit 25). Sunnyside entered into contracts to provide funeral services on January 16, 2004, and March 12, 2004. (Exhibit 27). Sunnyside performed at least seven services between the date Ms. Fenzloff purchased the business to the date Sunnyside filed any type of application to perform funeral-related services. (Exhibit 26).

Sunnyside operated without a license despite repeated attempts by the Iowa Commissioner of Insurance (the commissioner) directing the business to apply for the appropriate licenses and permits. Lisa Lann of the insurance division testified that her office became aware of the sale between Mr. Lorsung and Ms. Fenzloff. Ms. Lann's office called Sunnyside multiple times directing it to comply with all licensure requirements. On each occasion, Sunnyside's representative said they would comply. Ms. Lann also followed up with a letter, also directing Ms. Fenzloff to file an application to obtain the necessary licenses and/or permits.

On April 15, 2004, more than five months after the sale, respondent filed an "application for establishment permit" with the commissioner. (Exhibit 4). The application listed Mitzi and Albert Fenzloff as managers and owners. (Exhibit 4, pp. 1-2). However, an attachment to the application lists Mr. Fenzloff as the 100 percent owner of the company. (Exhibit 4, exhibit A). Ms. Fenzloff is listed as the president of the

company. The application also required the Fenzloffs to list each misdemeanor and felony conviction. (Exhibit 4, p. 2). They only listed one of Ms. Fenzloff's 2000 theft convictions.

On July 29, 2004, the commissioner denied respondent's application. (Exhibit 4). The application was denied because respondent did not provide requested bank statements, showed signs of insolvency in operations, and was convicted of a criminal offense involving dishonesty or a false statement.²

Sunnyside continued to operate as a funeral home throughout this period. On July 19, 2004, Ms. Fenzloff met with Betty Kellogg to make funeral arrangements for her mother, Ethel Brown. (Exhibit 18). Ms. Fenzloff made the arrangements herself; no licensed funeral director was present. Ms. Kellogg did not meet the funeral director, Randy Sietsema, until the next night at the visitation. Mr. Sietsema's involvement is notable because his license to practice lapsed on July 15, 2003. (Exhibit 20).

Additional problems developed after Ms. Brown's funeral. Ms. Kellogg complained to Ms. Fenzloff about delays in producing the death certificate. The death certificate was not filed with the county recorder until October 6, 2004. (Exhibit 23). The death certificate listed Dennis Huisman as the funeral director. Mr. Huisman had no involvement in the funeral. Mr. Huisman later told a board investigator that the signature was his, but he did not sign this particular document. (Exhibit 21, p. 10). He stated that the former owner of Sunnyside kept a handful of blank certificates with his signature in the event the secretary made clerical error. Mr. Huisman stated that Ms. Fenzloff may have found one of the blank certificates and filled in the remaining information.

On August 2, 2004, the Iowa Secretary of State dissolved Sunnyside Memory Gardens, Inc. as a corporation. (Exhibit 5). The corporation was dissolved for failure to file its biennial report. The secretary of state's records show Ms. Fenzloff as the registered agent and president of Sunnyside.

On August 30, 2004, nearly ten months after the sale, respondent filed a license application with the board. (Exhibit 6). Respondent is the only name listed on the application. Ms. Fenzloff was not listed as owner, partner, director, officer, or

² A similar application for a perpetual care cemetery permit was granted by the commissioner. (Exhibit 3).

shareholder. On September 7, 2004, the board granted the application, based on the information provided in the application. (Exhibit 19).

Ms. Fenzloff remained involved in the operation as an owner or officer. For example, on September 28, 2004, Sunnyside established an account at a local credit union. (Exhibit 7). Ms. Fenzloff signed the authorization card as a "partner" in the business.

The license application listed Mr. Huisman as Sunnyside's funeral director. Mr. Huisman performed some services until severing his agreement with Sunnyside on November 8, 2004. There is no evidence of any other licensed funeral director performing services at Sunnyside.

On December 2, 2004, the Iowa Securities Bureau of the commissioner's office filed an order directing respondent to cease and desist from offering and selling cemetery merchandise, funeral merchandise, or funeral services without prior licensing with the commissioner. (Exhibit 8). The commissioner's action was based on numerous complaints from respondent's customers. (See exhibits 10-11).

On January 3, 2005, the Attorney General's Office filed a petition for appointment of receiver, temporary and permanent injunctive relief, and other equitable remedies. (Exhibit 12). On January 18, 2005, the district court entered an order appointing the commissioner as the receiver for limited purposes. (Exhibit 13). The court also restrained Mr. and Ms. Fenzloff from operating the business or taking or destroying documents. On April 11, 2005, the court entered an order giving the commissioner full operational control of Sunnyside. (Exhibit 14).

Additional violations and concerns were cited by the district court in its orders in the receiver action. Ms. Fenzloff violated probation on one of her prior felony theft convictions, and was sent to prison to serve her five year sentence. Mr. Fenzloff had been charged with two felony thefts for writing checks on accounts with insufficient funds. Sunnyside was not paying operational expenses in a timely manner, and was not maintaining grave sites. The Fenzloffs commingled trust funds with their own funds. None of these allegations were contested by respondent. Ms. Lann testified that her office only

recovered approximately \$200 from Sunnyside after the commissioner was appointed receiver.

CONCLUSIONS OF LAW

The Board of Mortuary Science Examiners was created by the legislature to regulate the practice of mortuary science.³ The board may restrict, suspend, or revoke a license, or place a licensee on probation for violation of a number of designated provisions.⁴

The statement of charges listed eight violations. Each will be discussed separately.

1. Operating without a license. The board may suspend or revoke a license for violations of chapter 156 or any rule adopted pursuant to chapter 156.⁵ The statute prohibits any person from operating a funeral establishment without a license.⁶

A "funeral establishment" is defined as any place of business defined by the board devoted to provide any aspect of mortuary science.⁷ The statute defines "mortuary science" to include preparing a dead body for burial or disposal and making funeral arrangements or furnishing any funeral services in connection with disposition of a dead body.⁸

There is no question respondent operated a funeral establishment without a license. Ms. Fenzloff purchased the business on November 6, 2003. The board did not issue a license until September 7, 2004. Respondent's price list shows how it held itself out to provide variety of funeral services. (Exhibit 25). Respondent performed at least nine funeral services before being licensed. (Exhibit 26). Respondent clearly knew it had to be licensed based on repeated requests from the commissioner's office. The violation is clearly supported by the evidence.

2. Mitzi Fenzloff's criminal history. The board may deny or revoke a license if the applicant or licensee has been convicted

³ Iowa Code sections 147.12, 147.13(14), 272C.1(6)(k); ch. 156.

⁴ Iowa Code sections 147.55, 156.9, 272C.10.

⁵ Iowa Code section 156.15(2)(b).

⁶ Iowa Code section 156.14(1), 156.15(1).

⁷ Iowa Code section 156.1(5).

⁸ Iowa Code section 156.1(7).

of a felony or a misdemeanor involving moral turpitude.⁹ Mitzi Fenzloff has been convicted of second degree theft, which is a felony.¹⁰ Moreover, theft is a crime involving moral turpitude.¹¹ Ms. Fenzloff had five theft convictions at the time respondent filed his application with the board. If the board had known Ms. Fenzloff's role in the business and her criminal history, the application would have been denied.

Ms. Fenzloff was an owner and operator of the business, both before and after licensure. She was the original purchaser of the business; her husband did not sign the purchase agreement and there is no evidence she sold or transferred her interest. Ms. Fenzloff was listed as an owner and president in earlier applications for licenses or permits with the commissioner's office. It is telling that Ms. Fenzloff's name was omitted from the license application filed with the board, after the commissioner denied an application listing Ms. Fenzloff as owner and president. Ms. Fenzloff was listed as a partner in a business credit union account, and she continued to perform services at the funeral home. The violation is supported by the evidence.

3. History of law violations. The State also alleges that section 156.15(2)(b) justifies discipline based on respondent's failure to report Ms. Fenzloff's ownership and involvement in the business. The State's claim is supported by the same evidence supporting the second ground. Respondent also violated section 156.15(2)(b).

4. Aiding, assisting, procuring, advising, or allowing the unauthorized practice of mortuary science. The board may impose discipline on any licensee who knowing aided, assisted, procured, advised, or allowed a person to unlawfully practice mortuary science.¹² Ms. Fenzloff performed funeral services, as discussed relative to the first violation. This ground is also supported by the evidence showing Ms. Fenzloff made arrangements for the Ethel Brown funeral. Respondent used Randy Sietsema, an unlicensed funeral director, to perform the visitation and memorial service for Ms. Brown. Respondent committed the violation as alleged in the statement of charges.

⁹ Iowa Code section 156.15(2)(a).

¹⁰ Iowa Code section 714.2(2).

¹¹ *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Lyzenga*, 619 N.W.2d 327, 330 (Iowa 2000).

¹² Iowa Code section 156.15(2)(c).

5. Failure or ceasing to engage in the business. The board may discipline a licensee if the licensee has failed or ceased to engage in the business for which it was licensed.¹³ Respondent ceased to operate the business as of the date the commissioner's office was appointed as a receiver. The court's orders prohibited respondent from operating the business. The second order gave the commissioner's office full operational control. The board is justified to take action against the license on this basis.

6. Misleading, deceptive, and fraudulent practices. The board may discipline a licensee who knowingly makes misleading, deceptive, untrue, or fraudulent representations in the practice, or who engages in unethical conduct or practice harmful or detrimental to the public.¹⁴ As previously discussed, respondent held out Sunnyside as being able to perform the services of a licensed facility. The board did not issue a license until ten months after the business was sold by Mr. Lorsung. This violation is supported by the evidence.

7. False advertising. The board defines a deceptive practice to include the use of an untruthful or improbable statement in advertisements.¹⁵ As previously discussed, respondent issued a price list advertising numerous funeral services he was not licensed to perform. Respondent clearly violated the rule.

8. Failure to comply with chapter 523A. The board may revoke or suspend a licensee who engages in "professional incompetency."¹⁶ The board defines professional incompetency to include a violation of Iowa Code chapter 523A, if it relates to the practice of mortuary science.¹⁷

The district court found violations of chapter 523A when appointing the commissioner as the receiver of Sunnyside. Those documented violations also constitute violations of the board's rule by incorporation. This ground is supported by the evidence.¹⁸

¹³ Iowa Code section 156.15(c).

¹⁴ Iowa Code section 272C.10(3); 645 IAC 103.3(3)(a) (cited in the statement of charges as 103.3(2)(g)).

¹⁵ 645 IAC 103.3(3)(b) (cited in the statement of charges as 103.3(2)(h)).

¹⁶ Iowa Code section 147.55(2).

¹⁷ 645 IAC 103.3(8)(b) (cited in the statement of charges as 103.3(2)(i)).

¹⁸ The orders may constitute more than evidence of a violation of the regulations; they may also have preclusive effect on the board. See e.g. *Dettmann v. Kruckenberg*, 613 N.W.2d 238, 244 (Iowa 2000).

SANCTION

Revocation is the only justifiable sanction. Respondent operated for several months without a license, he failed to provide material information to the board when he finally filed for a license, he allowed unlicensed individuals to perform funeral director services, and he ultimately forced the State to take over the business. When the State took over, it only recovered approximately \$200 - a telling example of the condition respondent left the business.

The board is empowered to impose a civil penalty up to \$1,000 for each incident in which an unlicensed person acted in violation of chapter 156.16.¹⁹ Each day of a continuing violation constitutes a separate offense. Exhibit 26 shows at least nine funerals conducted by respondent during a period which he was not licensed. The last funeral during that period (involving Ethel Brown) was a continuing violation for at least three days. Ms. Fenzloff committed a violation on July 19, 2004, when she made the funeral arrangements. Respondent committed violations on July 20 and 21 when he allowed Randy Sietsema, who was an unlicensed funeral director at the time, to conduct the visitation and memorial services. Based on these violations, the board also imposes a civil penalty of \$10,000.

DECISION AND ORDER

The Iowa Board of Mortuary Science Examiners revokes the license held by Albert Fenzloff d/b/a Sunnyside Memory Gardens, Inc., a dissolved Iowa corporation, license no. 151-00759. The board also imposes a civil penalty of \$10,000. The civil penalty shall be paid to the Board of Mortuary Science Examiners, at its office in Des Moines, Iowa.

Respondent shall pay also \$75.00 for fees associated with conducting the disciplinary hearing. In addition, the executive secretary/director of the board may bill respondent for any witness fees and expenses or transcript costs associated with this disciplinary hearing. Respondent shall remit for these expenses within thirty days of receipt of the bill.

¹⁹ Iowa Code section 156.16(1).

This Findings of Fact, Conclusions of Law, Decision and Order is approved by the Board on July 15, 2005.

Notice

This is a final decision by the board. Respondent may file an application for rehearing.²⁰ An application for rehearing must state the specific grounds and the relief sought. The application must also state whether the applicant wants reconsideration of part or all of the decision, and whether the applicant want to submit additional evidence. An application must be filed within 20 days after this decision is issued. An application shall be deemed denied unless the board grants the application within 20 days after it is filed.

Respondent may also appeal this decision to district court.²¹ A petition for judicial review must be filed within 30 days of the date the decision is issued.

²⁰ 645 IAC 11.25.

²¹ Iowa Code section 17A.19; 645 IAC 11.29.