STATE OF OREGON
for the
STATE MORTUARY AND CEMETERY BOARD

IN THE MATTER OF:	) OAH Case No.: 1403981
	) Agency Case Nos.: 13-1030A, 14-1013B
KLAMATH TRIBUTE CENTER, LLC	)
FE-8725	)
	)
Respondent	) **FINAL ORDER**

HISTORY OF THE CASE

On November 5, 2014, the Oregon Mortuary and Cemetery Board (Board) issued a Notice of Proposed Disciplinary Action and Opportunity for a Hearing (Notice) to Klamath Tribute Center, LLC (Respondent). The Notice alleged Respondent violated various statutes and administrative rules and proposed to reprimand Respondent and impose a $1,000 civil penalty per alleged violation. On November 20, 2014, Respondent requested a contested case hearing. The Board referred this matter, along with three other related cases, to the Office of Administrative Hearings (OAH) on December 4, 2014.[1] The OAH assigned the case to Senior Administrative Law Judge (ALJ) Monica A. Whitaker.

On January 12, 2015, the Board filed a Motion for Protective Order and Request for Closed Hearing. On January 20, 2015, ALJ Whitaker issued a Ruling and Order on Motion for Protective Order and Request for Closed Hearing.

ALJ Whitaker convened a telephone prehearing conference on February 12, 2015. Senior Assistant Attorney General Johanna Riemenschneider and Assistant Attorney General Tyler Anderson represented the Board. Attorney Gerald A. Martin represented Respondent. ALJ Whitaker scheduled deadlines for the Board to file a motion for summary determination, for Respondent to file a response, and for the Board to file a reply. ALJ Whitaker and the parties agreed to convene an in-person hearing from October 19 through 23, 2015.

On July 14, 2015, the Board filed a Motion for Summary Determination.[2] Also on July 14, 2015, the Board issued an Amended Notice of Proposed Disciplinary Action (Amended Notice) to Respondent.

On August 4, 2015, Respondent's attorney requested a 60-day extension of time within which to file a response. ALJ Whitaker convened a status conference on August 12, 2015 to address the request for an extension. ALJ Whitaker granted Respondent until September 28, 2015 to file a response, and the Board until October 16, 2015 to file a reply. ALJ Whitaker also rescheduled the hearing for December 7 through 11, 2015.

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[1] The four cases were consolidated for purposes of the hearing.
[2] The motion was originally due on July 13, 2015. On July 13, 2015, the Board requested a one-day extension within which to file the motion. ALJ Whitaker granted the Board's request and extended the deadline to July 14, 2015.

Respondent filed a Response to Board's Motion for Summary Determination (Response) on September 28, 2015. On October 2, 2015, ALJ Whitaker received a Motion for Withdrawal of Counsel, Affidavit of Counsel, and Order on Motion for Withdrawal of Counsel from Mr. Martin. By letter dated October 5, 2015, ALJ Whitaker acknowledged receipt of the Motion for Withdrawal of Counsel and notified the parties that in accordance with OAR 137-003-0520(7), Mr. Martin had been removed as counsel of record. Also by letter dated October 5, 2015, ALJ Whitaker notified Respondent that pursuant to OAR 137-003-0550(2), corporations and limited liability companies must be represented by an attorney, except as provided in OAR 137-003-0555 or as otherwise authorized by law. The ALJ advised that Respondent would be held in default if it was not represented by an attorney at the scheduled hearing.

The Board filed a Reply to Response to Motion for Summary Determination (Reply) on October 16, 2015.

ALJ Whitaker closed the record on October 19, 2015 and took the matter under advisement.

On November 16, 2015, Robert Gordon, Sr., requested an extension of time within which to file Respondent's witness list and hearing exhibits. Mr. Gordon also requested a postponement of the scheduled hearing.[3] ALJ Whitaker convened a telephone prehearing conference on November 16, 2015 to address the request. Mr. Anderson and Ms. Riemenschneider represented the Board. Attorney Jennifer Schade represented Respondent. ALJ Whitaker denied Ms. Schade's request to postpone the hearing, but extended the witness list and exhibit filing deadline to November 30, 2015.

On November 18, 2015, ALJ Whitaker issued a Ruling on Motion for Summary Determination granting the Board's Motion. However, because the Ruling did not resolve all issues raised in the Board's Amended Notice, the Ruling concluded that the hearing would convene as scheduled.

On November 30, 2015, the Board issued a Second Amended Notice of Proposed Disciplinary Action and Opportunity for Hearing (Second Amended Notice). The Second Amended Notice withdrew the remaining issues not resolved by way of the November 18, 2015 Ruling.

On December 7, 2015, ALJ Whitaker convened a telephone status conference. Mr. Anderson and Ms. Riemenschneider represented the Board. Attorney Diane Cady represented Respondent. In light of the Second Amended Notice, the Board renewed its Motion. Ms. Cady did not object.

On December 8, 2015, ALJ Whitaker issued a Ruling on Motion for Summary Determination and Proposed Order (Proposed Order) on the renewed Motion. On January 7, 2016, Respondent submitted a request to supplement the record and/or reopen the hearing and written exceptions to the Proposed Order to the Board. To the extent Respondent offered new

[3] Because Mr. Gordon is not an attorney licensed to practice law in Oregon, or in any other jurisdiction, he could not file such a request on Respondent's behalf.

evidence for consideration, the Board reviewed that request under the standard set forth by ORS 183.482(5). The Board found Respondent's a request to supplement the record and/or reopen the hearing and written exceptions to be without merit.

The Board adopts the Proposed Order's History of the Case, Issues, Documents Considered, Findings of Fact, Conclusions of Law, Opinion, and Ruling as set forth in the Proposed Order; and issues the following Order.

ISSUES

Whether, pursuant to OAR 137-003-0580, the Board is entitled to a favorable ruling as a matter of law on the following issues:

Decedent AAA:

a. Whether Respondent failed to keep accurate and complete records for Decedent AAA as required by the Board, in violation of OAR 830-030-0090(4)(g), OAR 830-040-0000(7) or (10)(b).

b. Whether Respondent charged for embalming Decedent AAA without explaining why on the SFGSS, in violation of 16 § CFR 453.5, which is grounds for discipline under ORS 692.180(1)(h).

Decedent G:

c. Whether Respondent failed to implement and follow through with contractual arrangements for Decedent G's final disposition, in violation of OAR 830-030-0090(1)(b).

d. Whether Respondent made false or misleading statements to Decedent G's mother and to the Board, and engaged in dishonest conduct, in violation of OAR 830-030-0090(5)(d), OAR 830-040-0010(3), and ORS 692.180(1)(a) or (b).

e. Whether Respondent failed to provide the Board with requested documents and information and failed to cooperate or answer truthfully or completely inquiries from the Board with regard to Decedent G, in violation of OAR 830-030-0090(5)(f) and (g).

Sanction

f. If so, whether the Board may reprimand Respondent and impose a $1,000 per violation civil penalty?

DOCUMENTS CONSIDERED

The following documents were considered in reaching this Final Order: the Board's Motion and its supporting Exhibits 1 through 18; Respondent's Response and its supporting Exhibits 1 through 3; the Board's Reply and its supporting Exhibits 1 through 3.

FINDINGS OF FACT

Relevant Background

1. The Board issued Respondent a funeral establishment license number FE-8725 on March 30, 2011. Respondent is currently licensed as a funeral establishment by the Board through December 31, 2016. (Ex. 17 at 3.)

2. The Board issued Robert Alan Gordon, Sr. (Gordon) an Oregon Funeral Services Practitioner License number FS-0422 on July 29, 1998, after he applied for reciprocity and passed the Funeral Service Practitioner Examination. Gordon is currently licensed by the Board through December 31, 2015. (Ex. 17 at 2.)

3. The Board issued Tim Clinton Lancaster (Lancaster) a combination funeral service practitioner and embalmer license number CO-3224 on September 10, 1979, after he completed a two-year apprenticeship and passed the embalmer and the Funeral Service Practitioner Examinations. Lancaster is currently licensed by the Board through December 31, 2015. (Ex. 17 at 2.)

4. Gordon has been Respondent's assigned manager since October 4, 2012. The Oregon Secretary of State's corporate records indicate Gordon is a member of Respondent's LLC. (Ex. 17 at 3.)

5. The Board issued Eternal Hills Memorial Gardens Crematorium license number CR-0057 on July 12, 1985. On December 22, 1986, the Board issued Eternal Hills Memorial a new license numbered CR-0131. The Board issued Eternal Hills Memorial Gardens a license numbered CE-0130 on December 22, 1986. The Board issued Eternal Hills Memorial Gardens, Inc., dba Eternal Hills Funeral Home, license number FE-8239 on September 25, 1990. On March 29, 1999, the Board reissued a license because the corporate owner's name changed from Eternal Hills Memorial Gardens, Inc. to Eternal Hills Memorial Gardens & Funeral Home, Inc. (Eternal Hills). Eternal Hills also holds a cemetery license numbered CE-0130 and a crematorium license numbered CR-0131 in Oregon. (Ex. 17 at 2.) Eternal Hill is currently licensed through December 31, 2016 for all three facility licenses. (*Id.* at 3.)

6. Gordon has been an owner, shareholder, and corporate officer of Eternal Hills since December 22, 1986. He was named 100 percent stockholder of Eternal Hills on October 18, 2000. (Ex. 17 at 2.)

7. The Board's records indicate that Lancaster has been the assigned manager for all three Eternal Hills licensed facilities since 1990. Lancaster has been a corporate officer of Eternal Hills since January 1992. (Ex. 17 at 3.)

Decedent G

8. Respondent, through Lancaster, made arrangements with Cheryl Fox (Fox) for the final disposition of the remains of her daughter, Decedent G, after Decedent G's death on April

9, 2013. (Ex. 5 at 3.) Fox signed a Statement of Funeral Goods and Services Selected (SFGSS) for Decedent G's arrangements on April 12, 2013. (Ex. 15 at 2.) Respondent gave Fox a blank Cremation Authorization and Disposition form at the time of the arrangements. (Ex. 16.)

9. Fox received a billing statement dated April 16, 2013 from Respondent. (Ex. 14.) The statement lists the beneficiary of the contract as Decedent G and the amount due as $4,524.00, the same amount listed on the SFGSS. (Exs. 14 at 2; 15 at 2.) The total due included $250 for two "Thumbies;" $145 for securing/recording vital statistics; $45 for memorial folders; $15 for a celebration of life CD; $295 for an Event by Wire;[4] approximately $145 for an urn; and other charges for embalming, cremation, and services. (Ex. 15. at 2.) Fox paid the amount due. (*See id.*)

10. On June 25, 2013, Fox emailed Respondent to address the issues and mistakes that took place during Decedent G's final arrangements and disposition. In response, Lancaster replied to each of the complaints with an explanation. On certain issues, Lancaster stated that Respondent would refund the amount charged. (Ex. 11 at 6-9.) Specifically, Lancaster agreed that Respondent would refund Fox $95 for the funeral folder that incorrected read "graveside service" rather than "chapel service;" $95 for the celebration of life CD that did not play in its entirety during the service; $195 for the Event by Wire live web stream that did not work during the service; $20 for the death certificate that contained the incorrect date of Decedent G's death and the incorrect spelling of Decedent G's father's name; and $250 for the "Thumbies" product Lancaster admitted Respondent never ordered. (*Id.*)

11. In the June 25, 2013 email, Fox also noted that Decedent G's urn was not engraved as agreed upon. (Ex. 11 at 9.) In his response, Lancaster stated that the urn distributer told him the urn could not be engraved. (*Id.*) Engraving on this type of urn is feasible. (Ex. 8 at 1.)

12. In a June 26, 2013 email to Respondent, Fox requested that Respondent let her know when she could expect the refund and an explanation regarding how the death certificate could be changed. (Ex. 11 at 5.) Respondent did not directly respond to this inquiry. (*See* Exs. 10 and 11.)

13. In a second June 26, 2013 communication, Fox inquired about obtaining Decedent G's fingerprints. Fox stated that although she did not have the Thumbies, she and her oldest daughter wanted to obtain Decedent G's fingerprints. Fox stated that Lancaster had previously told her that the fingerprints were held on file. Fox requested Lancaster let her know when she could expect the refund, when the death certificate would be corrected, and how the fingerprints could be obtained. (Ex. 11 at 5.)

14. Also on June 26, 2013, Lancaster responded to some of Fox's inquiries. Lancaster stated that "I will still get the [T]humbies for you but will refund the money that way you will have both[.]" (Ex. 11 at 4.)

15. On June 29, 2013, Fox again contacted Lancaster and asked when she could expect the refund they had discussed. Lancaster responded that same day that the refund check would

[4] Event by Wire is a live internet broadcast feed. (Ex. 9 at 1.)

be available on Monday[, July 1, 2013]. Lancaster stated he would call Fox when the check was ready to be picked up. (Ex. 11 at 4.)

16. On August 17, 2013, Fox emailed Lancaster and asked about the status of the Thumbies and whether the death certificate had been corrected. Lancaster responded on August 20, 2013 that he was "looking into it today." (Ex. 11 at 3.) Neither Lancaster nor another representative for Respondent followed-up in response to Fox's August 17, 2013 email. (*See* Ex. 11.)

17. On August 31, 2013, Fox again followed-up with Lancaster. Fox explained that she had received a refund check from Respondent that was written out for six hundred dollars but that the numeric amount had been written for $650. Fox explained that as a result, she experienced difficulty cashing the check with her bank. Fox also informed Lancaster that it had been nearly six months since Decedent G's death and that she still did not have a corrected death certificate or the Thumbies she had ordered. (Ex. 11 at 2.) Lancaster did not respond to the email. (*See id.*)

18. On September 7, 2013, Fox emailed Lancaster to notify him that it was her final attempt to contact him before she would seek legal advice. (Ex. 11 at 2.) Fox emailed Gordon on September 14 and 20, 2013 regarding the issues she had communicated to Lancaster. (Ex. 3 at 6-7.)

19. On September 21, 2013, Gordon responded, stating that he had "reviewed with Tim [Lancaster] your daughter['s] file along with the refunds he granted, also I've talked with the manufacturer of the Thumbie[s]and have been assured that your daughter['s] Thumbie[s] will be here next Friday." (Ex. 3 at 7.) When Fox responded, she noted to Gordon that she still did not have a corrected death certificate. Gordon responded, "Tim[,] get Mrs. Fox and me an answer on the correct DC Monday!" (*Id.*)

20. On October 3, 2013, Lancaster responded, stating that Fox would be refunded the entire amount owed and that the death certificate affidavit "was completed, photo copies are available to you if you desire." (*Id.*)

21. On October 9, 2013, Eternal Hills issued Fox a check in the amount of $3,924.00 "for reimbursement." (Ex. 7 at 3.) That same day, Fox went to the Respondent's office to pick up Decedent G's Thumbies. Respondent told Fox the thumbprints had not been taken. (Ex. 10 at 1.)

22. By letter dated January 9, 2014, the Board notified Respondent that it was investigating a complaint regarding Decedent G. The complaint included the following allegations:

> Incorrect obituary information
> Failing to respond to email correspondence
> Incorrect funeral folder information
> Failure to provide adequate CD operation

> Web streaming ordered but not available
> Death certificate incorrectly filled out and filed
> Urn not available and not engraved
> "Thumbies" were never ordered
> Ignoring numerous attempts to communicate either by phone or email
> Incorrect amount of refund check

(Ex. 4.) The letter requested Respondent respond to the allegations in writing no later than January 23, 2014. (*Id.*)

23. On or about January 26, 2014, the Board received Respondent's written response to the January 9, 2014 letter.[5] (Ex. 5 at 3.) In the letter, Lancaster wrote, in part:

> [Decedent G] died on April 9, 2013 * * *. Arrangements were then made by Tim Lancaster at the Klamath Tribute Center. * * * * *. We then provided her [Fox] with a complete and full payment totaling $4229.00 returned to her. This was over [a] period of several months that she continued to converse with us until a final payment was made.
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> 1) Obit – it was written by me at the time and then corrected, I explained to them that I will take the information down, go out and type it up and then have them proof it[,] [w]hich they did and then we sent it to herald and news. Her complaint was that she needed to make corrections on it. They we[re] difficult to understand since they were in the middle of their grief over a difficult loss[.]
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> 2) We did not fail to correspond by email[,] it was just not as quick as she would have wanted and many times was redundant as to what I told her[.]
>
> 3) The memorial folder said graveside rather than chapel service, this was corrected and more copies [were] given to the family corrected.
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> 4) The dvd stopped after ¾ completion during the service[.] [W]e don't know why, it worked find in [*sic*] when we tested it. Corrected copies were given to the family.
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> 5) The Event by [W]ire also did not work, so I set up an external camera but it started after the service had started but it was available.
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> 6) On the death certificate the father's name was misspelled – Maarten Fontyn we had Maartin Fountyn, however he was not listed in the obit per request of Mrs. Fox so we had no verification. The date of death was also corrected from April 9, 2012 to the correct April 9, 2013.

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[5] The letter is dated September 26, 2012, but contains a facsimile date of January 26, 2014. (*See* Ex. A5 at 3.) The date of September 26, 2012 appears to be erroneous.

> 7) The urn was one that Mrs. Fox found [online] and asked that we get it rather than one from one of our companies. I finally located the company and had it shipped to us[.] [W]e paid $140.85 including shipping and she was charged [$]145. She selected it on her own off the internet and we paid for it for her. According to the company that makes it, it was not engravable. I told this to Mrs. Fox.
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> 8) Thumbies were never ordered due to the fact it was a medical examiner case and we could not touch her [the deceased] until she was released, so we could not get finger prints. We thought we could get the finger prints from the investigating officer[;] however[,] since she had no criminal record they did not take any. I told Mrs. Fox that we could get her a thumbies but it would be a generic finger[]print but she said no.
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> 9) The [r]efund was in full, the first check was not wrong but the final check was for the complete balance so Mrs. Fox was not charged for any of the services period.

(Ex. 5 at 3.) Respondent did not provide the Board with a copy of the SFGSS, the death certificate, any amendments to the death certificate, or statements by persons with any involvement or knowledge of the matter. (*Id.*)

24. On May 15, 2014, the Board's investigator requested that Respondent provide a complete copy of Decedent G's permanent record. (Ex. 6 at 6.) The Board's investigator requested that Respondent either fax or scan the requested documents no later than May 16, 2014. (*Id.*) Lancaster sent the Board investigator some, but not all, of Decedent G's permanent record, including the corrected death certificate, a copy of an invoice for an urn, and a copy of an online photo of an urn. (Ex . 6 at 2-5.)

Decedent AAA

25. Respondent made arrangements for the final disposition of Decedent AAA in July 2014. (Exs. 1 and 2.) On July 6, 2014, a representative of Respondent, Zachary Gordon, filled out an "Authorization for Disposition with Embalming or Refrigeration" form for Decedent AAA. This form is signed by Alyandra Ruiz and contains an "x" indicating that embalming is requested. The form is sign and dated by Ruiz, but does not contain the time. The "Acceptance" section of the form is signed by Zachary Gordon.[6] The form does not contain the relationship of the person authorizing the embalming to the decedent, the authorizing person's phone number, or address. (Ex. 2.)

26. On July 6, 2014, Respondent's representative executed a Statement of Funeral Goods and Services Selected (SFGSS) with Maria R. Ochoa. The SFGSS for Decedent AAA's arrangements denotes that the price for embalming is "inc" with other charges. The SFGSS for

[6] The Board issued Zachary Gordon an Apprenticeship Embalmer (AE) certificate of registration AE-23328 on August 20, 2013, under the supervision of John Harrison. The AE was terminated on September 30, 2013. (Ex. 17 at 3.)

Decedent AAA's arrangements does not contain the reasons for embalming. (Ex. 1.) The form reads: "Reason for Embalming: Family Request Other: _____." (*Id.*) "Family request" is preprinted on the form, but it is not circled or otherwise marked. The line after "other" is left blank. (*Id.*)

CONCLUSIONS OF LAW

Pursuant to OAR 137-003-0580, the Board was entitled to a favorable ruling as a matter of law on the following issues:

Decedent AAA:

a. Respondent failed to keep accurate and complete records for Decedent AAA as required by the Board, in violation of OAR 830-030-0090(4)(g) and OAR 830-040-0000(7).

b. Respondent charged for embalming Decedent AAA without explaining why on the SFGSS, in violation of 16 § CFR 453.5, which is grounds for discipline under ORS 692.180(1)(h).

Decedent G:

c. Respondent failed to implement and follow through with contractual arrangements for Decedent G's final disposition, in violation of OAR 830-030-0090(1)(b).

d. Respondent made false or misleading statements to Decedent G's mother and to the Board, and engaged in dishonest conduct, in violation of OAR 830-030-0090(5)(d), OAR 830-040-0010(3), and ORS 692.180(1)(a) and (b).

e. Respondent failed to provide the Board with requested documents and information and failed to cooperate of answer truthfully or completely inquiries from the Board with regard to Decedent G, in violation of OAR 830-030-0090(5)(f) and (g).

Sanction

f. The Board reprimands Respondent and imposes a $14,000 civil penalty for the proven violations.

OPINION

Standard of Review for Motion for Summary Determination

OAR 137-003-0580 addresses motions for summary determination. It provides, in relevant part:

> (6) The administrative law judge shall grant the motion for a summary determination if:

> (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and
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> (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.
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> (7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.
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> (8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.
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> * * * * *
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> (12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling * * *.

The Board moved for summary determination, arguing that there were no genuine issues of material fact and that it was entitled to a favorable ruling as a matter of law that Respondent engaged in the alleged violation, should be assessed a $1,000 per violation civil penalty, and that Respondent's licenses should be revoked.

The Board bore the burden of proving its allegations by a preponderance of the evidence. ORS 183.450(2) and (5); *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991) (burden is on Commission in disciplinary action); *Cook v. Employment Div.,* 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard of proof in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp*., 303 Or 390, 402 (1987).

In considering the Board's Motion, ALJ Whitaker reviewed the Motion and Corrected Motion, the Response, the Reply and Corrected Reply, and all of the supporting exhibits. ALJ Whitaker considered the facts of the case in a light most favorable to Respondent, the non-moving party. For the reasons that follow, ALJ Whitaker found that the Board established that it was entitled to a favorable ruling as a matter of law.

Decedent AAA

a. Failure to keep accurate records and failure to explain the reason for embalming

The Board alleged that in the arrangements for Decedent AAA, Respondent failed to keep accurate and complete records as required by the Board. This, the Board contended, is a

violation of OAR 830-030-0090(4)(g) and 830-040-0000(7) and (10)(a) or (b).

OAR 830-030-0090 provides, in relevant part:

> Every licensee or agent of a licensed facility of the Oregon Mortuary and Cemetery Board (Board) must abide by the accepted standards of the Death Care Industry and the minimum standards, including but not limited to following standards of practice set forth by the Board. Violations of the following may be cause for Board action.
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> * * * * *
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> (4) Unacceptable conduct by a licensee or agent of a licensed facility includes:
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> (g) Inaccurate or incomplete record keeping as required by the Board[.]

OAR 830-040-0000 provides, in part:

> (7) All licensees and licensed facilities must keep a detailed, accurate, and permanent record of all transactions that are performed for the care, preparation and final disposition of human remains. The record must set forth as a minimum:
> (a) Name of decedent and, when applicable, the identifying metal disc number provided by the State Registrar's office;
> (b) Date of death;
> (c) Name of person arranging for delivery of goods and services and the person authorizing the final disposition;
> (d) Name of place of disposition. In cemetery records, the "name of place" means exact location of the interment of human remains by crypt, niche, or by grave, lot and plot;
> (e) The name of the funeral service practitioner, cemetery, crematory or alternative disposition facility personnel responsible for making and executing the arrangements pertaining to the delivery of goods and services;
> (f) The name of the embalmer and funeral establishment responsible for embalming (applies only to funeral establishment records); and
> (g) Written permission for embalming, final disposition and scattering services from the person who has the right to control disposition of the human remains pursuant to ORS 97.130(1) and (2). The record of such authorization must include at a minimum: printed name, signature and phone number of the authorizing agent and relationship to the deceased, date and time permission was obtained, and printed name and signature of the licensee or facility representative acquiring the authorization.
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> * * * * *
>
> (10) No license or operator of a licenses facility or a licensee's agent may:
> (a) Fail to preserve required records for inspection by the Board; or

> (b) Alter, cancel or obliterate entries in records required by law to be made, maintained or preserved.

The evidence established that Respondent's embalming authorization form for Decedent AAA does not identify the relationship of the person authorizing the embalming to the deceased, the authorizing person's phone number, or the time when Respondent obtained permission to embalm. In addition, the SFGSS for Decedent AAA's arrangements did not contain the reasons for embalming.

In its Response, Respondent did not contest the material facts regarding this allegation. Instead, Respondent's only argument was that "anyone reading the document would conclude that the reason for embalming was a family request." Response at 1. This argument is unpersuasive. OAR 830-040-0000(7) requires Respondent to keep a detailed, accurate, and permanent record of all transactions that are performed for the care, preparation, and final disposition of human remains. OAR 830-030-0090(4)(g) provides that it is unacceptable conduct for a licensee to keep inaccurate or incomplete records. Decedent AAA's embalming authorization and the SFGSS are missing material information. It is not reasonable for Respondent to argue that one could conclude or infer from reading the SFGSS that the family requested embalming. It was Respondent's duty to keep detailed and accurate records with respect to arrangements for decedents.

Based on applicable law and the facts presented, the Board established that Respondent failed to keep detailed, accurate, and permanent records of all transactions performed for the care, preparation, and final disposition for Decedent AAA, in violation of OAR 830-040-0000(7) and OAR 830-030-0090(4)(g).

b. Failure to explain charge for embalming

The Board alleged Respondent charged for embalming without explaining why on the SFGSS, in violation of 16 CFR § 453.5 which provides, in relevant part:

> (a) ***Unfair or deceptive acts or practices.*** In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for any provider to embalm a deceased human body for a fee unless:
> **(1)** State or local law or regulation requires embalming in the particular circumstances regardless of any funeral choice which the family might make; or
> **(2)** Prior approval for embalming (expressly so described) has been obtained from a family member or other authorized person; or
> **(3)** The funeral provider is unable to contact a family member or other authorized person after exercising due diligence, has no reason to believe the family does not want embalming performed, and obtains subsequent approval for embalming already performed (expressly so described). In seeking approval, the funeral provider must disclose that a fee will be charged if the family selects a funeral which requires embalming, such as a

> funeral with viewing, and that no fee will be charged if the family selects a service which does not require embalming, such as direct cremation or immediate burial.
> **(b)** ***Preventive requirement.*** To prevent these unfair or deceptive acts or practices, funeral providers must include on the itemized statement of funeral goods and services selected, required by § 453.2(b)(5), the statement: "If you selected a funeral that may require embalming, such as a funeral with viewing, you may have to pay for embalming. You do not have to pay for embalming you did not approve if you selected arrangements such as a direct cremation or immediate burial. <u>If we charged for embalming, we will explain why below."</u>

(Bold in original; underline added.)

The SFGSS for Decedent AAA does not list the reason for embalming. Respondent charged an embalming fee. In its Response, Respondent did not contest these factual allegations. Based on applicable law and the facts presented, the Board established that Respondent violated 16 CFR § 453.5.

Decedent G

c. Failure to implement and follow through with contractual arrangements for Decedent G's final disposition

The Board contended that Respondent failed to implement and follow through with its contractual arrangements for Decedent G's final disposition by incorrectly stating "graveside service" in the funeral folder; failing to play the entire tribute CD during the service; failing to broadcast on the Event by Wire; making two errors on the death certificate; never ordering the Thumbies; and failing to obtain the agreed-upon engraving on the urn. The Board contended that these failures constitute six separate violations of OAR 830-030-0090(1)(b).

OAR 830-030-0090 provides, in part:

> Every licensee or agent of a licensed facility of the Oregon Mortuary and Cemetery Board (Board) must abide by the accepted standards of the Death Care Industry and the minimum standards, including but not limited to the following standards of practice set forth by the Board. Violations of the following may be cause for Board action.
> (1) Every licensee or agent of a licensed facility must:
> (b) Implement and follow through with contractual arrangements with the person with the legal right to control final disposition[.]

In its Response, Respondent did not dispute that the CD and the Event by Wire broadcast did not work. Rather, Respondent argued that these were electronic failures that occurred for unknown reasons. Respondent did not dispute that Decedent G's funeral folder contained an error, but rather argues that "[c]orrected memorial folders were provided." Response at 2.

Finally, Respondent did not dispute that the Thumbies were never provided to Fox.

The material facts regarding these allegations are not in dispute. It is undisputed that the funeral folder incorrectly identified a graveyard service. It is undisputed that the tribute CD did not play in its entirety and that the Event by Wire broadcast never occurred. It is undisputed that the death certificate contained errors, that the Thumbies were never ordered, and that Respondent never obtained agreed-upon engraving on the urn. Respondent's argument that these were errors that were either corrected or for which Fox received reimbursement does not negate the fact that Respondent and Fox contractually arranged for Respondent to provide services which Fox never received.

Based on applicable law and the facts presented, the Board established that Respondent engaged in six separate violations of OAR 830-030-0090(1)(b).

d. Making false or misleading statements to Decedent G's mother and to the Board; engaging in dishonest conduct

The Board alleged Respondent made false or misleading statements to Decedent G's mother and to the Board, and engaged in dishonest conduct, in violation of OAR 830-030-0090(5)(d), OAR 830-040-0010(3), and ORS 692.180(1)(a) or (b).

OAR 830-030-0090 provides, in part:

> (5) No licensee may:
>
> * * * * *
>
> (d) Make false or misleading statements or use fraud or misrepresentation in communications with the Board.

OAR 830-040-0010(3) provides that:

> No licensee or employee of a licensed facility may give false or misleading information to an inspector, investigator or any other member of the Board while investigating a possible violation of law or administrative rules.

ORS 692.180 provides, in part:

> (1) Upon complaint or upon its own motion, the State Mortuary and Cemetery Board may investigate a complaint made by any person or by the board. If the board finds any of the causes described in this section in regard to any person, licensee or applicant or the holder of a certificate of authority, the board may impose a civil penalty of not more than $1,000 for each violation, suspend or revoke a license to practice or to operate under this chapter or refuse to grant or renew a license. The causes are as follows:
> (a) Misrepresentation in the conduct of business or in obtaining a license.
> (b) Fraudulent or dishonest conduct, when the conduct bears a demonstrable relationship to funeral service practice, embalming practice or the operation

of cemeteries, crematoriums or other facilities for final disposition of human remains.

The Board contended that Respondent's representative, Lancaster, misrepresented the status of the Thumbies order and the urn product to Fox. The Board also contended that Gordon's statement to Fox regarding the status of the Thumbies was fraudulent or dishonest. The Board further alleged that Respondent made false statements when Respondent told the Board that $4,229 had been returned to Fox. The Board maintained that Respondent's representation to the Board's investigator that a complete copy of Decedent G's permanent record had been faxed to the Board was also false.

Respondent argued that it "withheld nothing from the Board and acknowledged that there had been errors and malfunctions in connection with the service." Response at 3. However, the Board did not allege that Respondent did not acknowledge the errors and malfunctions in connection with the service. Rather, the Board called into question the veracity of Respondent's statements regarding the issues related to Decedent G's arrangements.

The evidence established that Respondent's representative, Lancaster, told Fox that on June 26, 2013, the Thumbies would be ordered. In August 2013, Lancaster said he would look into the Thumbies order, but did not thereafter follow-up with Fox. In September 2013, Respondent's representative, Gordon, informed Fox that the Thumbies would be arriving the following week. When Fox went to Respondent's location on October 9, 2013 to pick-up the Thumbies, she was told Decedent's thumbprints had not been taken. This evidence established that Respondent's representatives, Lancaster and Gordon, misrepresented the status of the Thumbies order to Fox.

The evidence also established that Respondent failed to have the urn for Decedent G engraved, as agreed upon and for which Fox initially paid Respondent.

The evidence also established that Respondent informed the Board that Fox had been refunded $4,229, when in fact Fox received two refunds from Respondent, one for $650 and one for $3,924, for a total of $4,574. In addition, Respondent's representative, Lancaster, advised the Board's investigator that a complete copy of Decedent G's permanent record had been faxed to the Board. However, Respondent never provided the Board with the SFGSS, records of communications with Fox, embalming or cremation records, or billing records.

Based on applicable law and the facts presented, the Board established that Respondent made false or misleading statements to Fox, in violation of ORS 690.180(1)(a) and (b). Specifically, Respondent engaged in the misrepresentation in the conduct of business and engaged in dishonest conduct which bears a demonstrable relationship to funeral service practice. Fox had a reasonable right to rely on Respondent's representations for services it would provide. Respondent repeatedly made untrue statements to Fox regarding the status of the Thumbies, the status of her refund, and whether or not the urn could be engraved. Such conduct is egregious and unreasonable.

The Board has also established that Respondent violated OAR 830-030-0090(5)(d) and

OAR 830-040-0010(3) because Respondent made false or misleading statements to the Board and gave false or misleading information to an investigator.

e. Failure to provide Board with requested documents and information and failure to cooperate or answer truthfully or completely inquiries from the Board

The Board alleged Respondent failed to provide it with requested documents and information and failed to cooperate or answer truthfully or completely inquiries from the Board.

OAR 830-030-0090(5) provides:

> No licensee may:
>
> * * * * *
>
> (f) Fail to provide the Board with requested documents or information within the Board's jurisdiction;
>
> (g) Fail to cooperate or answer truthfully or completely inquiries regarding matters within the Board's jurisdiction[.]

On January 9, 2014, the Board's investigator requested a complete copy of Decedent G's permanent file. Respondent's representative, Lancaster, sent the investigator a copy of Decedent G's funeral service folder, but did not provide the Board with the SFGSS, records of communications with Fox, embalming or cremation records, or billing records. Respondent does not address this specific allegation in its Response. Therefore, these material facts are not in dispute. The evidence establishes that Respondent failed to provide the Board with requested documents and failed to cooperate with the Board during its investigation.

Based on applicable law and the facts presented, the Board established that Respondent violated OAR 830-030-0090(5)(f) and (g).

f. Sanction

ORS 692.180 provides, in part:

> (1) Upon complaint or upon its own motion, the State Mortuary and Cemetery Board may investigate a complaint made by any person or by the board. If the board finds any of the causes described in this section in regard to any person, licensee or applicant or the holder of a certificate of authority, the board may impose a civil penalty of not more than $1,000 for each violation, suspend or revoke a license to practice or to operate under this chapter or refuse to grant or renew a license. The causes are as follows:
> (a) Misrepresentation in the conduct of business or in obtaining a license.
> (b) Fraudulent or dishonest conduct, when the conduct bears a demonstrable relationship to funeral service practice, embalming practice or the operation

> of cemeteries, crematoriums or other facilities for final disposition of human remains.
>
> * * * * *
>
> (g) Violation of any of the provisions of this chapter or any rules adopted under this chapter.
> (h) Violation of any provision of ORS 97.929 or 97.937 or regulations adopted by the Federal Trade Commission regulating funeral industry practices.

As previously discussed, the Board established that Respondent violated OAR 830-040-0000(7) by failing to keep a detailed, accurate, and permanent record of all transactions that are performed for the care, preparation, and final disposition of human remains. For this violation, the Board imposes a $1,000 civil penalty.

The Board established that Respondent violated 16 CFR § 453.5(b). Pursuant to ORS 692.180(1)(h), a violation of regulations adopted by the Federal Trade Commission regulating funeral industry practices is grounds for discipline by the Board. For this violation, the Board imposes a $1,000 civil penalty.

The Board established that Respondent engaged in six separate violations of ORS 830-030-0090(1)(b). For these six violations, the Board imposes a $6,000 civil penalty.

The Board also established that Respondent made false or misleading statements to Fox. Under ORS 692.180(1)(a), misrepresentation in the conduct of business is grounds for disciplinary action. Under ORS 692.180(1)(b), fraudulent or dishonest conduct, when the conduct bears a demonstrable relationship to funeral service practice, is grounds for discipline. Here, on numerous occasions, Lancaster misrepresented to Fox that the Thumbies had been ordered when they had not been. Gordon misrepresented to Fox that the Thumbies would be available for her to pick up, even though the Thumbies had not been ordered. Lancaster also informed Fox that the urn was not engravable when in fact it was. The overwhelming evidence establishes that these statements and representations were not only misleading, but also dishonest. Respondent's dishonest conduct bears a demonstrable relationship to funeral service practice. The Board and Respondent's customers must be able to trust that Respondent will conduct business honestly. Therefore, Respondent violated ORS 692.180(1)(a) and (b). For each of these violations, the Board imposes a $1,000 civil penalty.

As also previously discussed, the Board established that Respondent violated OAR 830-030-0090(5)(d) when Respondent made false or misleading statements to the Board. The Board also established that Respondent violated OAR 830-040-0010(3) when Respondent made a false statement to the Board's inspector regarding the submission of Decedent G's permanent file. For each of these violations, the Board imposes a $1,000 civil penalty.

The Board established that Respondent violated OAR 830-030-0090(5)(f) and (g) when Respondent failed to provide the Board with requested documents and when Respondent failed to cooperate or answer truthfully or completely inquiries from the Board. For each of these violations, the Board imposes a $1,000 civil penalty.

For the violations involving Decedents AAA and G the Board imposes a civil penalty in the amount of $14,000. In considering Respondent's conduct in this matter, the Board's proposed reprimand is appropriate.

RULING

The Motion for Summary Determination, filed by the Oregon Mortuary and Cemetery Board, is GRANTED.

ORDER

The Oregon Mortuary and Cemetery Board issues the following order:

Decedent AAA:

a. Respondent failed to keep accurate and complete records for Decedent AAA as required by the Board, in violation of OAR 830-030-0090(4)(g) and OAR 830-040-0000(7).

b. Respondent charged for embalming Decedent AAA without explaining why on the SFGSS, in violation of 16 § CFR 453.5, which is grounds for discipline under ORS 692.180(1)(h).

Decedent G:

c. Respondent failed to implement and follow through with contractual arrangements for Decedent G's final disposition, in violation of OAR 830-030-0090(1)(b).

d. Respondent made false or misleading statements to Decedent G's mother and to the Board, and engaged in dishonest conduct, in violation of OAR 830-030-0090(5)(d), OAR 830-040-0010(3), and ORS 692.180(1)(a) and (b).

e. Respondent failed to provide the Board with requested documents and information and failed to cooperate of answer truthfully or completely inquiries from the Board with regard to Decedent G, in violation of OAR 830-030-0090(5)(f) and (g).

Sanction

The Board reprimands Respondent and imposes a $14,000 civil penalty for these violations.

OREGON MORTUARY AND CEMETERY BOARD

/s/ Michelle Sigmund-Gaines
Executive Director

Notice of Right to Appeal: You are entitled to seek judicial review of this order. Judicial review may be obtained by filing a petition for review with the Oregon Court of Appeals within 60 days from the service of this Final Order. Judicial review is pursuant to ORS 183.482.