

STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH
PUBLIC HEALTH HEARING OFFICE

In Re: James Sanders,
Petition No. 2000-0404-030-004

December 19, 2000

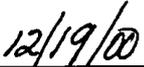
FINAL MEMORANDUM OF DECISION

On November 8, 2000, a Proposed Memorandum of Decision was issued in this matter pursuant to §4-179 of the Connecticut General Statutes. On November 30, 2000, the Commissioner of the Department of Public Health designated the undersigned to hear oral argument, to determine findings of fact and conclusions of law, and to issue a final decision in this matter. On December 13, 2000, oral argument was heard.

After full consideration of the oral arguments, the written brief, and the complete record, and in accordance with Connecticut General Statutes §4-180, the undersigned hereby adopts the Proposed Memorandum of Decision issued by Hearing Officer Donald Levenson as the Final Memorandum of Decision in this matter. A true copy of the Proposed Memorandum of Decision is attached hereto and incorporated herein by reference as the Final Memorandum of Decision in this matter.



Olinda Morales
Hearing Officer



Date

**STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH
PUBLIC HEALTH HEARING OFFICE**

James Sanders
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P.O. Box 6
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Petition No. 2000-0404-030-004

November 8, 2000

PROPOSED MEMORANDUM OF DECISION

Procedural History

On February 29, 2000, the Department of Public Health ("the Department") filed a Statement of Charges ("the Charges") against James Sanders ("the applicant") notifying him that the Department was proposing to deny his application for reinstatement of his embalmer's license ("license") and informing him that he had the right to request a hearing on the Charges. The Charges were sent to applicant by certified mail, return receipt requested, and first class mail on February 29, 2000. On June 13, 2000, applicant filed a request for public hearing with the Department. H.O. Exh. 1.¹

On July 17, 2000, the Department issued a Notice of Hearing in which the Commissioner of the Department appointed this Hearing Officer to rule on all motions and to recommend findings of fact and conclusions of law. H.O. Exh. 1.

On July 25, 2000, applicant filed an answer to the Charges wherein he admitted the factual allegations but denied responsibility for the misconduct described therein. H.O. Exh. 2

On July 26, 2000 and August 30, 2000, an administrative hearing was held to adjudicate applicant's case. The hearing was conducted in accordance with Chapter 54 of the Connecticut General Statutes (the Uniform Administrative Procedure Act) and *Conn. Agencies Regs.* §§19a-9-1, et seq. Attorney John L. Calvocoressi represented applicant and Attorney Joelle C. Newton represented the Department.

¹ The Department originally denied applicant's request for reinstatement on November 23, 1998. After repeated requests from applicant for reconsideration, the Department vacated its denial on July 16, 1999. Applicant's request for reinstatement was then erroneously referred to the Connecticut Board of Examiners for Embalmer's and Funeral Directors before the Department issued the current charges. Dept. Exhs. 2-6, 8.

On July 26, 2000, the Department moved to dismiss applicant's request for reinstatement at the end of applicant's case in chief. The Department's request was denied and the Department was directed to proceed with its case against applicant's reinstatement.

This Proposed Memorandum of Decision is based entirely on the record and sets forth this Hearing Officer's proposed findings of fact, conclusions of law, and order.

Allegations

1. In paragraph 1 of the Charges, the Department alleges that applicant took charge of the corpse ("the corpse") of decedent Nathaniel Ervin ("decedent") without proper authorization from decedent's next of kin or qualified person or source. The foregoing happened in Connecticut.
2. In paragraph 2 of the Charges, the Department alleges that, having taken charge of the corpse, applicant retained the corpse from approximately June of 1996 to March 11, 1997. The foregoing occurred in Connecticut.
3. In paragraph 3 of the Charges, the Department alleges that, having taken charge of the corpse, applicant either (a) retained the un-embalmed or un-disinfected corpse for an extended period of time; and/or (b) had the corpse embalmed or disinfected without proper authorization. The foregoing occurred in Connecticut.
4. In paragraph 4 of the Charges, the Department alleges that on November 12, 1998, the Connecticut Board of Examiners for Embalmer's and Funeral Directors ("the Board") issued a Memorandum of Decision ("MOD") in Petition No. 970812-000-068 that ordered applicant to provide a list of persons who had pre-arranged any type of funeral service with applicant to the Board within sixty days. Said list was to include, additionally, the amounts of money being returned to said persons. Said list was to be provided to the Board via the Department's Board Liaison within sixty days of the MOD. Applicant failed to comply with this order.
5. In paragraph 5 of the Charges, the Department alleges that on September 18, 1995, the Board ordered and accepted a Consent Order in Petition No. 940519-30-003 that placed applicant's license on probation for a period of two years, accompanied by a civil penalty. The allegations included applicant's falsification of information on Certificates of Death and on Removal, Transit and Burial Permits, and his failure to comply with the Board's MOD of May 26, 1993.
6. In paragraph 6 of the Charges, the Department alleges that on May 26, 1993, the Board issued a MOD in Petition No. 910606-30-003 that suspended applicant's license for one year and stayed the suspension after three months and further

placed applicant's license on probation for a period of nine months under various terms and conditions. Such disciplinary action was based upon applicant's failure to prepare or maintain funeral goods and services contracts for funerals, applicant's diversion of funds due a funeral home where he worked, and applicant's misappropriation of funds due the owner of a funeral home where he worked.

Findings of Fact

1. Applicant previously held Connecticut embalmers license number 2055. Dept. Exh. 13; Tr. 7/26/00, p. 4 (stipulation of the parties).
2. On June 3, 1992, applicant was ordered by a decision of the Superior Court to pay \$718,848.41 in damages to a former employer because of his diversion and misappropriation of funds due a funeral home where he worked. Dept. Exh. 15.
3. On May 26, 1993, the Board issued an MOD in Petition No. 910606-30-003 that suspended applicant's license for one year with the suspension stayed after three months and further placed applicant's license on probation for a period of nine months under various terms and conditions. Such disciplinary action was based upon applicant's failure to prepare or maintain funeral goods and services contracts for funerals, and applicant's diversion and misappropriation of funds due a funeral home where he worked. Dept. Exh. 11.
4. On or about May 31, 1995, applicant's license lapsed because he failed to renew it in a timely fashion.² Tr. 7/26/00, p. 4 (stipulation of the parties).
5. On September 18, 1995, the Board ordered and accepted a Consent Order ("the Consent Order") in Petition No. 940519-30-003 that placed applicant's license on probation for a period of two years under various terms and conditions, accompanied by a civil penalty. The violations addressed by the Consent Order included applicant's falsification of information on Certificates of Death and on Removal, Transit and Burial Permits, and his failure to comply with the Board's MOD of May 26, 1993. Dept. Exh. 12.
6. On or about June 27, 1996, applicant received a telephone call from an individual ("decedent's 'fiancée'") requesting that applicant remove the corpse from the Veteran's Hospital in West Haven, Connecticut ("the VA Hospital") where decedent had recently expired, and arrange for his burial. Tr. 7/26/00, p. 40.
7. On or about June 27, 1996, applicant arranged to have the corpse picked up from the VA Hospital and delivered to his funeral home in Waterbury, Connecticut. Dept. Exhs. 17; App. Exhs. C, D; 21; Tr. 7/26/00, pp. 41; Tr. 8/30/00, p. 71.

² Subsection (e) of Section 19a-88 provides that each person holding an embalmer's license in Connecticut shall annually apply for renewal of such license. Subsection (f) of that Section provides that the license of any person who fails to comply with that provision shall become void ninety days after the time for its renewal.

8. Within a few days of taking custody of the corpse, applicant met with decedent's "fiancée" and learned that she was unrelated to decedent. Tr. 7/26/00, p. 42.
9. Applicant obtained the name of decedent's next of kin, decedent's niece, from decedent's "fiancée" and contacted her by telephone. Decedent's niece initially told applicant that she would make arrangements for decedent's burial, but later proved unwilling to do so. Tr. 7/26/00, p. 42.
10. Applicant either had the corpse embalmed without proper authorization, or embalmed the corpse himself, although he was not a licensed embalmer in Connecticut at the time. Dept. Exh. 16; Tr. 7/26/00, pp. 40, 42; Tr. 8/31/00, pp. 29, 71, 107.
11. From approximately June 27, 1996 to March 11, 1997, applicant retained the corpse without proper authorization from decedent's next of kin or qualified person or source.³ Tr. 7/26/00, pp. 41, 45, 83, 95.
12. Applicant violated the standards of practice applicable to licensed embalmers and funeral directors in Connecticut in 1996 and 1997 when he failed to obtain, or arrange for someone else to obtain, legal custody of the corpse. Tr. 7/26/00, pp. 119, 123; Tr. 8/31/00, pp. 34, 36.
13. Applicant violated the standards of practice applicable to licensed embalmers and funeral directors in Connecticut in 1996 and 1997 when he failed to bury the corpse within a reasonable period of time.⁴ Tr. 7/26/00, pp. 119, 123, 126; Tr. pp. 34, 36.
14. On or about March 11, 1997, the corpse was discovered in a body bag in the garage/storage area of applicant's funeral home by movers who were evicting applicant from his funeral home for non-payment of rent. App. Exh. A; Tr. 7/26/2000, p.143.
15. On or about February 19, 1997, applicant filed an application with the Department requesting that his license be reinstated. The application was incomplete and

³ Section 45a-318 of the General Statutes provides that "[the] custody and control of the remains of deceased residents of this state shall belong to . . . the next of kin If . . . the . . . next of kin . . . refuses to assume such custody and control, the court of probate . . . may, upon the petition of a selectman or chief officer of such town, a licensed funeral director or the director of health of such town, grant such custody and control to some suitable person."

⁴ Section 7-64 of the General Statutes requires that the body of any person who dies in Connecticut be buried, cremated, or removed "within a reasonable time after death." Applicant's own expert testified that the standards of practice for Connecticut licensees is to bury a deceased within two weeks of death absent exceptional circumstances. An expert witness called by the Department testified that it is customary to bury a deceased within a month of death absent exceptional circumstances. Applicant's retention of decedent's corpse for over *eight months* is, therefore, clearly below the standards of practice for Connecticut licensees. Tr. 7/26/00, pp. 101, 118, 119, 123, 126; Tr. 8/31/00, pp. 34, 36.

- unsigned. Applicant also provided false and/or misleading information regarding his licensure history on his application.⁵ Dept. Exh. 1.
16. On or about March 3, 1997, applicant filed a revised application for reinstatement of his license. The revised application contained the same false and/or misleading information regarding applicant's licensure history as his application of February 19, 1997. Dept. Exh. 1.B.
 17. On April 15, 1997, the Department temporarily denied applicant's request for reinstatement because of disciplinary proceedings then pending against him at the Department. Dept. Exh. 1.A.
 18. On November 12, 1998, the Board issued an MOD in Petition No. 970812-000-068 that ordered applicant to provide the Board, within sixty days of the MOD, certain information regarding persons who had pre-arranged funeral services with him. The violations underlying the MOD included performing funerals after his license had expired, and caring for a dead human body (decedent's) in violation of state law.⁶ Dept. Exh. 13.
 19. Although Applicant had somewhere between ten and twenty pre-arranged funeral accounts⁷ when the November 12, 1998 MOD was issued, he failed to provide a list of those accounts to the Department.⁸ H.O. Exh. 2; Tr.723/00, pp. 49, 54, 82, 87; Tr. 8/31/00, p. 167.

⁵ Applicant's explanation for providing false and/or misleading information to the Department regarding his licensure history was disingenuous at best. He claimed that he interpreted the phrase "any state" in the three questions at issue to refer to any state *but* Connecticut. Applicant admitted, however, that he never attempted to contact the Department to clarify any ambiguity he might have had regarding how to respond to these questions properly. Tr. 7/26/00, pp. 74-76.

⁶ The Board found applicant's conduct so disturbing that it stated that it would have revoked his license for these offenses had he held one at the time. Dept. Exh. 13.

⁷ In a pre-arranged funeral, an individual's funeral expenses are pre-paid by themselves or someone acting on their behalf. A bank or other financial institution holds the pre-paid funds in trust on behalf of the beneficiary of the trust. If the trust is irrevocable, the funds cannot be released until a funeral director provides proof to the financial institution that the beneficiary of the trust is deceased (usually by producing a death certificate) and that the funeral director has incurred funeral-related expenses on the beneficiary's behalf. Although the trust may designate a specific funeral home or director to perform the funeral, that designation can be changed by the person or persons establishing the trust at any time prior to the release of the funds. Tr. 7/23/00, pp. 50, 127, 128, 130; Tr. 8/31/00, pp. 40, 83, 84.

⁸ Applicant claimed that he was unable to provide such a list because all of his records had been lost when he was evicted from his funeral home. He admitted, however, that he made minimal efforts to retrieve those records and never tried to recreate those records by contacting the bank that held those accounts in trust. He also admitted that he never contacted the Department to explain why he was "unable" to supply the required information. Applicant's excuse also begs the question of why he allowed such important records to fall into the hands of persons not associated with his funeral business to begin with. Tr. 7/26/00, pp. 54, 61, 82; Tr. 8/31/00, p. 167.

Discussion and Conclusions of Law

Applicant's license became void because he failed to renew it in a timely fashion as required by *Conn. Gen. Stat.* §19a-88(f). Section 19a-14(a)(6)(E) of the Connecticut General Statutes provides in pertinent part, that:

[t]he Department may deny the eligibility of an applicant . . . for reinstatement of a license voided pursuant to subsection (f) of section 19a-88 . . . if the department determines that the applicant: . . . (E) Has committed an act which, if the applicant were licensed, would not conform to the accepted standards of practice of the profession

As the person applying for a license, applicant bears the burdens of production and persuasion to establish that he is qualified to be a licensed embalmer in Connecticut. The burden of proof required in this matter and applied in this decision is by a preponderance of the evidence. *Steadman v. Securities and Exchange Commission*, 450 U.S. 91, 101 S. Ct. 999, reh'g denied, 451 U.S. 933 (1981); *Bender v. Clark*, 744 F. 2d 1424 (10th Cir. 1984); *Sea Island Broadcasting Corp. v. F.C.C.*, 627 F. 2d 240, 243 (D.C. Cir. 1980); all as cited in *Bridgeport Ambulance Service, Inc., v. Connecticut Dept. of Health Services*, No. CV 88-0349673-S (Sup. Court, J.D. Hartford/New Britain at Hartford, July 6, 1989); *Swiller v. Commissioner of Public Health*, No. CV 95-0705601 (Sup. Court, J.D. Hartford/New Britain at Hartford, October 10, 1995).

Applicant's technical competence as an embalmer, and his ability to conduct a funeral service in a humane and sensitive nature, have never been questioned by the Department and are not at issue here. What the Department has questioned, and what is at issue in these proceedings, is applicant's ability to comply with the standards of practice required of his profession.

Embalmers and funeral directors provide a critical public service. Their conduct can have a significant impact on the public health and safety as well as a profound effect on the individuals who engage their services. The profession is, therefore, highly regulated by the state. Unfortunately, applicant has demonstrated by his actions over the previous decade a repeated and continuing inability or unwillingness to comply with the standards of practice required of his profession and nothing in applicant's testimony or demeanor at the hearing demonstrated that he would behave otherwise if his license were reinstated. Accordingly, his request for reinstatement of his license should be denied.

Applicant's professional shortcomings are nowhere more obvious than in his treatment of Mr. Ervin's corpse, a treatment that was both outrageous and inexcusable. Applicant took custody of the corpse although he had no license to do so. He retained custody of the corpse and had it embalmed, or embalmed it himself, without legal authority to do so. He failed to see that the body was properly disposed of within a reasonable period of time as required by state law. Finally, demonstrating a total disregard for his responsibility to retain the corpse in a dignified and secure manner, he allowed the corpse to fall into the hands of movers who were in the process of evicting him.

Applicant now expresses regret for his treatment of Mr. Ervin's corpse. Yet, despite repeated questioning at hearing, he failed to provide a plausible explanation for retaining custody of the corpse for such a long period of time. He also failed to adequately explain what he ultimately intended to do with the corpse. It was, therefore, apparent that applicant had no plan for properly disposing of Mr. Ervin's corpse. In his treatment of Mr. Ervin's corpse, applicant demonstrated a bewildering lack of judgement and a total failure to comply with the standards of practice required of his profession. In fact, the Board found applicant's conduct in this regard so disturbing that it stated that, had he been licensed at the time, his license would have been revoked.

Applicant's inability to conform his conduct to the requirements of his profession is underscored by his licensure history. In 1993, the Board suspended his license for a year because he diverted and misappropriated funds and committed other regulatory violations. In 1995, applicant voluntarily agreed to have his license placed on probation for two years because he falsified important documents and failed to comply with the Board's 1993 MOD. In 1998, the Board imposed certain terms and conditions on applicant's license when it found that he had performed funerals without a license and had violated state law in his treatment of Mr. Ervin's corpse. One of the things the Board ordered applicant to do was to provide certain information to the Department regarding pre-arranged funeral accounts he had established for various clients. To date, applicant has failed to provide this information to the Department. Not only has he failed to provide this information, he has made little attempt to do so and has offered only the thinnest of excuses for this failure.

Applicant's licensure history evidences a cavalier, if not disdainful, attitude towards the regulatory requirements of his profession and the duly issued orders of the Board. The violations he has committed relate directly to significant issues of public health and safety and to the integrity of the profession.

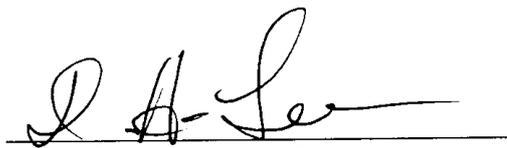
Applicant's failure to renew his license in a timely manner is further evidence of his disregard for, or inability to comply with, important regulatory requirements. Applicant held a license from the Department for several years and, therefore, knew, or should have known, of his statutory obligation to renew his license on an annual basis. Yet, in 1995, he failed to do so and his license became void. It then took applicant almost two years to apply for reinstatement of that license. When he finally got around to requesting reinstatement, he filed an incomplete, unsigned and false and/or misleading application.

While applicant has expressed some regret for his past misconduct, particularly for his treatment of Mr. Ervin's corpse, he continues to deny or accept full responsibility for his past misdeeds. Instead, he denies conduct he previously acknowledged, and questions issues which have already been determined by the Board after a public hearing and a full opportunity for him to be heard. He is evasive when he should be forthcoming, and argumentative when he should be contrite. In his testimony, applicant demonstrated a disturbing predilection for obfuscation and a lack of commitment to the truth.

Applicant has committed acts which, if he were licensed, do not conform to the standards of practice of his profession. Accordingly, pursuant to *Conn. Gen. Stat.* §19a-14(a)(6)(E), his request for reinstatement should be denied.

Proposed Order

Based on the record in this case, the above Findings of Fact and Conclusions of Law, this Hearing Officer respectfully recommends to the Commissioner that James Sander's request to have his former license number 2055 reinstated be DENIED.



Donald H. Levenson, Esq.
Hearing Officer

11-8-00

Date