

**STATE OF MICHIGAN
DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES
BUREAU OF HEARINGS**

In the matter of

Docket No. 2001-258

Bureau of Commercial Services,
Petitioner

Agency No. 45-00-4904-00

v
George Apostle,
Respondent

Agency: Bureau of Commercial Services

Case Type: Sanction

/

**Issued and entered
this 3rd day of October, 2002
by James L. Karpen
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

Appearances: Michael A. Lockman, Assistant Attorney General, appeared on behalf of Petitioner, Bureau of Commercial Services. Respondent, George Apostle, appeared *pro se*.

The present case originated as five Formal Complaints, all dated January 5, 2001, which alleged that Respondent was licensed to practice mortuary science under the Occupational Code, 1980 PA 299, as amended, MCL 339.101 *et seq.* (Code). The Formal Complaints went on to allege that Respondent violated provisions of the Code, a rule promulgated thereunder and a provision of the Prepaid Funeral Contract Funding Act, 1986 PA 255, MCL 328.211 *et seq.* (Act). These cases appeared to be settled and Petitioner sent a memorandum requesting that the scheduled hearing be dismissed. The cases were

remanded back for hearing on April 1, 2002. At the hearing on June 12, 2002, Petitioner produced a First Amended Formal Complaint (Complaint), dated January 15, 2002, which incorporated the five separate cases into one complaint. All the cases were consolidated by order dated June 13, 2002. The June 12, 2002 hearing was continued to August 14, 2002. The record was left open until September 16, 2002 when the last post hearing brief was received.

ISSUES AND APPLICABLE LAW

Count I of the Complaint alleges that on February 17, 1981 Respondent received \$2,075.00 from Katie Walton for funeral goods and services on her own behalf and that Respondent failed to provide such goods and services. The Complaint asserts that Respondent's conduct constituted fraud, deceit or dishonesty in violation of Section 604(b) of the Code.

Count II of the Complaint avers that in 1974-75 Respondent received money from Mary V. Lyle for funeral goods and services for herself and her spouse. The Complaint further avers that while Respondent provided a funeral for Mrs. Lyle's spouse, he has failed to return to Mrs. Lyle the funds she paid for her own funeral. The foregoing allegations constitute another violation of Section 604(b) of the Code, according to the Complaint.

Count III of the Complaint alleges that on July 20, 1990 Respondent received \$2,000.00 from Matilda Olk for funeral goods and services on her behalf, but failed to provide such goods and services, contrary to Section 604(b) of the Code. Count III of the Complaint also alleges that Respondent's conduct, including his failure to return the funds to Mrs. Olk's

heirs, constituted a violation of Section 18(1)(d) of the Act (failure to return principal and income paid for a prepaid funeral contract).

Count IV of the Complaint alleges that on October 27, 1996 Respondent received \$2,000.00 from Richard Olson for funeral goods and services for Julia Achenbach and failed to provide such goods and services or return the funds to Mrs. Achenbach's heirs, contrary to Section 604(b) of the Code and Section 18(1)(d) of the Act. County IV further asserts that Respondent failed to include the name of the funeral establishment's manager on all printed matter, contrary to 1991 AACS, R 339.18941(3). Count IV of the Complaint further asserts that Respondent violated a rule of conduct in practicing his occupation, contrary to Section 604(c) of the Code.

Count V, the last count in the Complaint, alleges that between 1974 and 1998 Respondent entered into prepaid funeral contracts, some of which were sold while Respondent was not registered under the Act; that Respondent engaged in fraudulent, deceitful or dishonest conduct, as described in the preceding counts; and that on April 11, 2001 Respondent was convicted in Muskegon County Circuit Court of "Funeral Contract Conversion" based on his failure to provide funeral goods and services or to refund monies received for such goods and services under prepaid funeral contracts. Based upon the foregoing conduct, Count V of the Complaint asserts that, contrary to Section 604(d) of the Code, Respondent lacks good moral character.

The various sections of the Code, the rule and the Act, cited above, are as

follows:

Sec. 604. A person who violates 1 or more of the provisions of an article which regulates an occupation or who commits 1 or more of the following shall be subject to the penalties prescribed in section 602:

* * *

(b) Practices fraud, deceit, or dishonesty in practicing an occupation.

(c) Violates a rule of conduct of an occupation.

(d) Demonstrates a lack of good moral character.

R 339.18941

* * *

(3) The name, address, and telephone number of the funeral establishment and the name of the funeral establishment's manager, clearly identified as "manager," shall appear in all advertising and printed matter related to the funeral establishment. If the size of a novelty item makes it impossible to print the information required by this subrule, at least the name and address of the establishment shall be shown. As used in this subrule, the term and address of the establishment shall be shown. As used in this subrule, the term "advertising" does not include an identifying sign directing the public to the establishment.

Sec. 18 (1) Notwithstanding any other law to the contrary, a contract seller, provider, agent, employee, or person acting on behalf of a contract seller or provider, whether a registrant or not, shall not:

* * *

(d) Fail to refund principal or principal and income paid for a prepaid funeral contract in violation fo this act.

Good moral character is defined in MCL 338.41(1) as follows:

Sec. 1. (1) The phrase “good moral character”, or words of similar import, when used as a requirement for an occupational or professional license or when used as a requirement to establish or operate an organization or facility regulated by this state in the Michigan Compiled Laws or administrative rules promulgated under those laws shall be construed to mean the propensity on the part of the person to serve the public in the licensed area in a fair, honest, and open manner.

SUMMARY OF THE EVIDENCE

The first witness to testify at the hearing was Richard Olson, the son of Julia Achenbach. Mrs. Achenbach died on December 10, 1999. Mr. Olson testified that he contacted Respondent in 1996 and prepaid for his mother’s funeral. Mr. Olson identified Exhibit 1, a contract dated November 1996 between Respondent and Mr. Olson which shows that Olson paid Respondent \$2,000.00 for funeral goods and services for Julia Achenbach. Mr. Olson also identified Exhibit 2, his check dated October 27, 1996 in the amount of \$2,000.00 payable to Respondent. Upon the death of his mother, Mr. Olson stated he unsuccessfully attempted to contact Respondent’s mortuary. Mr. Olson testified he made arrangements with another funeral home to bury his mother.

Mary V. Lyle, an 87 year old resident of Muskegon Heights was the next witness to testify. Mrs. Lyle used to work in the neighborhood where Respondent’s mortuary was

located. Mrs. Lyle testified that in the late 1960s or early 1970s she entered into a contract with Respondent for funeral goods and services for herself and her spouse. Pursuant to the contract, Mrs. Lyle paid Respondent \$4,500.00 for the two funerals. Mrs. Lyle's spouse died in 1977 and Respondent provided the funeral. Mrs. Lyle stated that last year she saw an article in a local paper which disclosed that Respondent was not honoring his prepaid funeral contracts and she unsuccessfully tried to locate him. Mrs. Lyle said she believes Respondent owes her \$2,000.00 for her half of the prepaid funeral agreement with Respondent. Mrs. Lyle identified Exhibit 3, a complaint against Respondent that she filed with Petitioner. In her complaint, Mrs. Lyle requests the return of her money from Respondent.

Respondent George Apostle testified next. Respondent admitted he was required to register in order to sell prepaid funeral contracts after the Act was passed in 1986. He further admitted he had a duty to return money, if requested, which he had received under a prepaid funeral contract, both before and after passage of the 1986 Act.

Respondent testified it was his practice to purchase the caskets when he received money from prepaid funeral contracts. According to Respondent, after purchasing the caskets, he would set aside remaining funds in envelopes. He stated that he did not deposit funds received under prepaid funeral contracts in a trust account. Respondent testified that in September 1998 he lost the lease on his last mortuary. Respondent said the caskets he was holding under prepaid funeral contracts were placed in storage. He stated that U-Haul (the storage facility) sold the caskets in order to collect amounts they were owed. Respondent admitted he did not purchase outer burial containers (vaults) under the prepaid

agreements.

Petitioner introduced Exhibit 4, a September 18, 2001 Judgment of Sentence from Muskegon County Circuit Court which reflects Respondent's plea of *nolo contendere* to a violation of Section 22(1) of the Act. Section 22(1) of the Act provides that a person who converts funds paid pursuant to a prepaid funeral contract is guilty of a felony. Respondent was sentenced to 60 days in jail, two years probation and ordered to pay \$10.00 per month restitution. Respondent testified he agreed to pay back \$18,000.00 as part of his *nolo contendere* plea.

Petitioner also introduced Exhibit 5, a May 31, 2002 Hearing Report (Docket No. 2001-614) in the matter of Bureau of Commercial Services v Balbirnie-Apostle Mortuary (Mortuary). In this case the Administrative Law Judge found that the Mortuary had violated Sections 6(1), 10 and 18(1)(d) and (e) of the Act.

Respondent admitted he was not registered to sell prepaid funeral contracts when he accepted money from Richard Olson pursuant to a prepaid funeral contract. He stated that \$1,450.00 of the funds provided by Mr. Olson were used as a security deposit on a building rental.

Respondent identified Exhibit 6, a prepaid funeral contract dated July 26, 1990 which shows he received \$2,000.00 from Matilda Olk for funeral goods and services. Respondent admitted he did not provide a funeral for Ms. Olk. He made a partial payment of approximately \$400.00 to another mortuary which handled Ms. Olk's funeral. He acknowledged he still owed \$1,600.00 to Ms. Olk's heirs.

Exhibits 8, 9, 12 and 13 show that Respondent received a total of \$1,850.00 for the funeral of Ruby Harris, a friend of Katie Walton who paid for most of Ms. Harris' funeral which was provided by Respondent. Exhibit 11 is a February 17, 1981 receipt from Respondent showing that he received \$2,075.00 from Katie Walton, under a prepaid funeral contract, for Ms. Walton's own funeral. Respondent admitted he did not provide funeral services for Katie Walton.

Daniel Achterhoff, the manager of Achterhoff Funeral Home has a mortuary science license. Mr. Achterhoff provided funeral services for Matilda Olk. Mrs. Olk died in 2000 at a nursing home which apparently had a copy on file of Mrs. Olk's prepaid funeral contract with Respondent. When the nursing home was unable to locate Respondent, they contacted Mr. Achterhoff. Mr. Achterhoff testified he was able to locate Respondent who, on March 29, 2000, told Achterhoff that Mrs. Olk's \$2,000.00 was in an irrevocable account in a Canadian financial institution. Respondent informed Achterhoff that the account had grown to \$2,407.00. Respondent said he was unable to recall the name of the Canadian financial institution. Mr. Achterhoff said that Respondent gave him a check for the interest on Ms. Olk's funds in the amount of \$407.00. Respondent later asked Achterhoff not to cash the check because there were insufficient funds on deposit.

Soon thereafter Respondent gave Achterhoff \$407.00 in cash, but has not paid anything more. Mr. Achterhoff filed a complaint against Respondent with Petitioner.

The last witness to testify at the hearing was Timothy Teague, a commercial enforcement auditor who is employed by Petitioner, Bureau of Commercial Services, and who

investigated Respondent. Mr. Teague identified Exhibit 10, a June 11, 2002 Certification from Vito Danzo, Petitioner's Assistant Licensing Administrator, which discloses that the Balbirnie-Apostle Mortuary in Muskegon, Michigan was issued a seller-provider license under the Act on October 14, 1987 and that the license lapsed on September 30, 1994 and is not currently in effect. Mr. Teague said that by accepting funds in 1996 from Richard Olson, Respondent sold a prepaid funeral contract without being registered. Respondent acknowledged to Teague that he did not provide a funeral for Katie Walton and he never refunded her money. Respondent told Mr. Teague that he kept funds he received under prepaid funeral contracts in a filing cabinet.

Before turning to the specific findings of fact, several matters warrant comment. First, most of the relevant facts, as alleged in the Complaint, are not in dispute. In all four instances cited in the Complaint Respondent entered into prepaid funeral contracts and did not fulfill the contracts or refund the money. Respondent's criminal conviction is also not in dispute. The principal issues in this case are whether Respondent's conduct constitutes fraud, deceit or dishonesty in practicing an occupation and whether Respondent lacks good moral character.

The statute which preceded the current Act, 1954 PA 70, in Section 1 provided as follows:

Sec. 1. All payments made under an agreement providing for the final disposition of a dead human body, as consideration for the purchase of caskets or other personal property, excluding burial space in any

cemetery, or services, excluding perpetual care of burial space in any cemetery, which are only to be delivered or performed subsequent to the death of the person for whose benefit the agreement is made, shall remain intact as a fund until the death of the person for whose benefit the agreement is made: Provided, however, that any deposit made pursuant to this section shall be released upon demand of the person for whose benefit such deposit was made unless an irrevocable agreement has been made under the provisions of section 2 of this act. All such funds shall be deposited within 7 days after receipt with any bank, building and loan association or savings and loan association or members of the federal home loan bank system authorized to do business in the state of Michigan, and shall be held in an account for the person for whose benefit such fund was established as a prearranged funeral plan account. A certified copy of the certificate of death or other evidence of death satisfactory to such depository shall be furnished to such depository as evidence of death, and the depository shall forthwith pay the funds and accumulated interest, if any, to the person entitled thereto under the agreement. The payment of such funds and accumulated interest or dividends pursuant to this section shall relieve such depository of any further liability on such funds or interest.

Section 12 and 13 of the current Act imposes similar requirements, *i.e.*, that funds be held in escrow and that they be returned to the contract buyer upon 30 days notice. In the present case, two of the prepaid funeral contracts were sold under the 1954 Act and two were sold under the current Act. Respondent did not comply with either law. Moreover, Section 21 of the Act provides that a violation of the Act shall also constitute a violation of the mortuary science licensing provisions of the Code. It is also noteworthy that Respondent sold one prepaid funeral contract (Olson/Achenbach) while he was not licensed under the Act.

As counsel for Petitioner notes in his post hearing brief, when there is no

controlling legal authority defining a term, it is appropriate to use dictionary definitions. (Petitioner's post hearing brief, p 22.) The American Heritage Dictionary (1976 ed) defines "deceit," as a misrepresentation or deception (p 341). The same dictionary defines "dishonest" as someone disposed to lie, cheat, defraud or deceive (p 378). The word "fraud" is defined as a deliberate deception practiced to secure an unfair or unlawful advantage (p. 523).

In the present case, Respondent never attempted to comply with either the Act or its predecessor when he received funds from a prepaid funeral contract. In fact, not only were the funds not kept in a financial institution, but Respondent admitted using \$1,450.00 of Richard Olson's \$2,000.00 for a security deposit on office space Respondent was attempting to rent. Respondent's statement to Daniel Achterhoff that the funds provided by Matilda Olk were on deposit at a Canadian financial institution whose name Respondent had forgotten was clearly a falsehood designed to forestall a complaint by Achterhoff. Respondent's use of, and failure to safeguard, the funds he received from the sale of prepaid funeral contracts was clearly dishonest as that term is used in Section 604(b) of the Code. Respondent's statement to Mr. Achterhoff concerning the location of Mrs. Olk's funds also constituted dishonesty in practicing an occupation as proscribed by Section 604(b) of the Code.

Based upon his *nolo contendere* plea, Respondent stands convicted of a felony violation of Section 22(1) of the Act based upon the misuse of funds he received from the sale of a prepaid funeral contract. Respondent's dishonest practices under the Code coupled with his felony conviction under the Act establish Respondent's lack of good moral character as

that phrase is defined in MCL 338.41(1).

The last matter warranting comment relates to that portion of Count IV of the Complaint which alleges that Respondent violated Rule 339.1894(3), and thus Section 604(c) of the Code, by failing to disclose the name of the funeral establishment's manager on all printed matter related to the funeral establishment. The only printed matter contained in the record which issued from Respondent after 1991 (the year the rule was adopted) is Exhibit 1, the prepaid funeral contract for Julia Achenbach which is dated November 1996. Exhibit 1 omits any reference to a manager of the Balbirnie-Apostle Mortuary. Thus, Respondent violated Rule 339.1894(3) and Section 604(c) of the Code.

FINDINGS OF FACT

1. Respondent, George Apostle, is licensed to practice mortuary science under the Code.
2. Respondent was licensed under the Act to sell prepaid funeral contracts from October 14, 1987 until September 30, 1994.
3. On February 17, 1981 Respondent sold a prepaid funeral contract to Katie Walton for \$2,075.00.
4. Respondent failed to provide funeral services for Katie Walton and has failed to return the funds he received from Ms. Walton to her heirs.
5. In 1970-71 Respondent entered into a prepaid funeral contract with Mary V. Lyle which provided that Respondent would provide funerals for Mrs. Lyle and her spouse. Respondent received \$4,500.00 from Mrs. Lyle pursuant to the

prepaid funeral contract.

6. In 1977 Respondent provided funeral services for Mrs. Lyle's spouse.
7. Respondent has failed to return to Mrs. Lyle \$2,000.00, which represents her half of the prepaid funeral contract with Respondent.
8. In November 1996 Respondent sold a prepaid funeral contract to Richard Olson for \$2,000.00. The contract beneficiary was Mr. Olson's mother, Julia Achenbach.
9. Respondent used \$1,450.00 of the funds provided by Richard Olson as a security deposit on an office Respondent was attempting to rent.
10. When Mrs. Achenbach died, Respondent did not provide funeral services or return the funds he received from Richard Olson.
11. Respondent was not licensed under the Act when he sold the prepaid funeral contract to Richard Olson.
12. On July 26, 1990 Respondent sold a prepaid funeral contract to Matilda Olk for \$2,000.00.
13. When Mrs. Olk died in March 2000, Respondent did not provide funeral services, nor did he refund the money to her heirs.
14. Daniel Achterhoff, a mortuary science licensee provided funeral services for Mrs. Olk.
15. Respondent lied to Mr. Achterhoff concerning the location of funds he had

received from Mrs. Olk by stating to Mr. Achterhoff that the funds were deposited in a Canadian financial institution.

16. None of the money Respondent received from the prepaid funeral contracts Respondent sold to Ms. Walton, Mrs. Lyle, Mr. Olson or Mrs. Olk were deposited in a financial institution in a segregated account.
17. Respondent's failure to provide funeral services or to refund the money received from the sale of the prepaid funeral contracts constitutes dishonesty in the practice of mortuary science.
18. Respondent's use of \$1,450.00 funds received from Richard Olson constitutes dishonesty in the practice of Respondent's occupation.
19. Respondent's falsehood to Daniel Achterhoff concerning the location of the funds Respondent had received from Mrs. Olk also constitutes dishonesty in practicing his occupation as a mortuary science licensee.
20. On April 11, 2001 Respondent was convicted in Muskegon County Circuit Court of a violation of Section 22(1) of the Act, a felony. Respondent's conviction was based upon his conversion to his own use of funds he received pursuant to a prepaid funeral contract.
21. Based upon Respondent's dishonesty in practicing his occupation as a mortuary science licensee, as found above, and his conviction of a felony violation of the Act, Respondent lacks good moral character.

22. Respondent prepared a contract memorializing his prepaid funeral contract with Richard Olson. The contract, dated November 1996, failed to specify the manager of Respondent's funeral establishment.
23. Respondent's failure to specify the manager of his funeral establishment in printed matter related to the funeral establishment violated a rule of conduct of his occupation as a mortuary science licensee.

CONCLUSIONS OF LAW

Based upon the findings of fact, Petitioner has proven by a preponderance of the evidence that Respondent violated Section 604(b), (c), and (d) of the Code; Rule 339.18941(3) promulgated under the Code; and Section 18(1)(d) of the Act.

RECOMMENDATIONS

I recommend that Respondent make restitution in the amount of \$2,000.00 to Richard Olson, Mary V. Lyle and to the estates of Katie Walton and Matilda Olk.

Due to Respondent's blatant violation of the Code and the Act, I recommend that his mortuary science license be revoked.

James L. Karpen
Administrative Law Judge

Docket No. 2001-258
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STATE OF MICHIGAN
DEPARTMENT OF CONSUMER & INDUSTRY SERVICES
BOARD OF EXAMINERS IN MORTUARY SCIENCE

In the matter of:

GEORGE APOSTLE
Mortuary Science Licensee
License No. 45-01-004360

Docket No. 2001-258
Complaint No.s: 45-99-6885-00
45-00-1654-00
45-00-2800-00
45-00-3655-00
45-00-4904-00

FINAL ORDER

WHEREAS, this matter having come before the Board of Examiners in Mortuary Science, hereafter the "Board", on March 20, 2003 and

WHEREAS, the Board having considered the Findings of Fact and Conclusions of Law in the Hearing Report of James L. Karpen, Administrative Law Judge, dated October 3, 2002,

WHEREAS, the Board having received the Hearing Report under MCL 339.514 and George Apostle, Mortuary Science Licensee, License No. 45-01-004360, hereafter "Respondent", having been found in violation of Sections 18(1)(d); 604(b); 604(c) and 604(d) of the Michigan Occupational Code, 1980 P.A. 299, *as amended*, hereafter the "Code", MCL 328.228(1)(d); MCL 339.601(b); MCL 339.604(c) and MCL 339.604(d) and Rule 41(3) of the Board of Examiners in Mortuary Science General Rules, *promulgated hereunder*, being 1991 AACCS, R 339.18941(3) and

WHEREAS, the hearing report being hereby incorporated by reference; now, therefore,

IT IS HEREBY ORDERED, that the following penalties authorized by Section 602 of the Code are hereby imposed:

1. Respondent shall pay a FINE in the amount of Ten Thousand Dollars and 00/100 Cents (\$10,000.00), said fine to be paid to the Department of Consumer & Industry Services within sixty (60) days from the mailing date of this Final Order. Said fine shall be paid by cashier's check or money order, with Complaint No.s 45-99-6885-00; 45-00-1654-00; 45-00-2800-00; 45-00-3655-00; 45-00-4904-00 clearly indicated on the check or money order, made payable to the State of Michigan and sent to the Department of Consumer & Industry Services, Bureau of Commercial Services, Enforcement Division, P.O. Box 30185, Lansing, Michigan 48909.
2. Respondent shall make RESTITUTION in the amount of Two Thousand Dollars and 00/100 Cents (\$2,000.00) *each*, [Eight Thousand Dollars and 00/100 Cents {\$8,000.00} in total], individually and severally to:

Richard Olson, 2794 Orenda,
Commerce, MI 48382;

**Mary V. Lyle, 3012 Waalkes Street,
Muskegon Heights, MI 49444;**

**The Estate Of Katie Katherine Walton,
Vectoris Pentecost, Executor,
832 Washington Avenue
Muskegon, MI 49441;**

**The Estate Of Matilda Olk
c/o Linda Olk
58 West Chicago Street, #3
Quincy, MI 49082-1049**

by certified check made payable to the complainant-parties identified above and mailed to the addresses also identified above. Restitution shall be paid not later than sixty (60) days from the mailing date of this Final Order.

- 3. Respondent Mortuary Science Licensee George Apostle's License No. 45-01-004360 shall be and hereby is REVOKED effective the mailing date of this Final Order. Any and all application(s) by Respondent for licensure, relicensure, reinstatement or renewal shall be denied by the Department until full compliance is made by Respondent with each and every term of this Final Order.**

- 4. Respondent shall submit in writing to the Michigan Department of Consumer & Industry Services, Bureau of Commercial Services, Audit Unit, P.O. Box 30018, Lansing, Michigan 48909, proof in a form acceptable to the Department of compliance with each and every requirement of this Final Order.**