

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

In the matter of

Docket No. 2001-614

**Bureau of Commercial Services,
Complainant**

Agency No. 34-00-6053-00

v

Agency: Bureau of Commercial Services

**Balbirnie-Apostle Mortuary,
Respondent**

Case Type: Sanction

**Issued and entered
this 18th day of July, 2001
by Lauren G. Van Steel
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY

Appearances: Michael A. Lockman, Assistant Attorney General, appeared on behalf of Complainant Bureau of Commercial Services. No one, either attorney or representative, appeared on behalf of Respondent

This proceeding commenced with the filing of a Notice of Hearing dated May 9, 2001, scheduling a hearing for June 22, 2001. The Notice of Hearing was mailed to the parties' last known addresses. Further, the Notice of Hearing informed the parties that if either party failed to appear at the scheduled hearing, a default judgment might be entered pursuant to Sections 72 and 78 of the Michigan Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.* (APA).

The Notice of Hearing was issued pursuant to a Formal Complaint filed on January 5, 2001, which alleged noncompliance with the Prepaid Funeral Contract Funding Act, 1986 PA 255, as amended, MCL 328.211 *et seq.*; MSA 14.525(21) *et seq.* (Act), specifically Sections 6(1); 10; 18(1)(d); and 18(1)(e).

At the outset of the hearing held on June 22, 2001, Mr. Lockman moved that the Bureau of Commercial Services continue to be designated as “Complainant” (as on the Formal Complaint), rather than “Petitioner”; the motion was granted. Mr. Lockman further requested to be allowed to proceed in Respondent’s absence pursuant to Section 72 of the APA and that a default be granted for Complainant pursuant to Section 78 of the APA.

Section 72 of the APA states in pertinent part:

(1) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

Further, Section 78 of the APA states in pertinent part:

(2) Except as otherwise provided by law, disposition may be made of a contested case by...default....

Complainant’s motion for default was granted. As a result of the default judgment, the factual allegations contained in Complainant’s Formal Complaint are deemed proven to be true.

ISSUES AND APPLICABLE LAW

The issues in this matter are whether Respondent has violated the following Act sections: 6(1); 10; 18(1)(d); and 18(1)(e), which provide in pertinent part as follows:

Sec. 6(1) A person shall not sell, provide, or agree to provide funeral goods or funeral services pursuant to a prepaid funeral contract unless that person is registered with the department as provided in this section and has received a certificate of registration.

Sec. 10 All prepaid funeral contracts provided for under this act shall be either a nonguaranteed price contract or a guaranteed price contract and shall be made and executed pursuant only to this act.

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 of this act.

(e) Violate this act or rules promulgated under this act.

SUMMARY OF THE EVIDENCE

During the hearing, the following three exhibits were accepted into the record:

Complainant's Exhibit 1	Copy of contract for prepaid funeral services for Julia Achenbach
Complainant's Exhibit 2	Copy of canceled check, dated October 27, 1996, made payable to Balbirnie-Apostle Mortuary in the amount of \$2,000.00
Complainant's Exhibit 3	Affidavit of Vito J. Danzo, Assistant Licensing Administrator

In addition, Richard H. Olson and Timothy L. Teague testified for Complainant.

Mr. Olson is the son of Julia Achenbach, who died on December 10, 1999. He confirmed that

Complainant's Exhibit 1 is a copy of the contract he executed on his mother's behalf with Respondent in November 1996 for prepaid funeral services. Complainant's Exhibit 2 is a copy of a check in the amount of \$2,000.00, which Mr. Olson signed and gave to Respondent on his mother's behalf for funeral services.

At the time of Mrs. Achenbach's death, no funeral services were in fact rendered by Respondent. Mr. Olson was unable to find George Apostle, the mortician in charge for Respondent. After multiple unanswered telephone calls, it was found that Respondent's address at 875 West Broadway in Muskegon, Michigan had been locked and boarded up. Mr. Olson was never provided any information from Respondent regarding either transfer of the prepaid funeral services contract or a bank/repository holding the prepaid funds.

Mr. Teague also testified for Complainant. He is an auditor with the Department of Consumer and Industry Services. In September 2000, Mr. Teague attempted to conduct an audit of Respondent Mortuary in connection with prepaid funeral contracts. During the audit, Mr. Teague determined that Mr. Apostle was the mortician in charge and the acting agent for Respondent in the sale of prepaid funeral contracts.

According to Mr. Teague, the Act requires that in the event that a prepaid funeral services contractor discontinues business operations, the contractor must 1) transfer all existing contracts to another registered prepaid funeral contractor; 2) notify the State of Michigan; and 3) notify contract holders. (See Section 9 of the Act.) Mr. Teague testified that none of these three requirements were satisfied by Respondent regarding the Achenbach prepaid funeral services contract. Mr. Teague also confirmed that Respondent's prepaid

funeral registration had lapsed on September 30, 1994, prior to it entering into the 1996 Achenbach contract.

Further, Mr. Teague stated that the executed contract, entered as Complainant's Exhibit 1, does not conform to the requirements of the Act. Specifically, the Achenbach contract fails to include statutory language as to the right of the buyer to revoke within 10 business days; the amount of refund upon cancellation; or notice that the contract buyer may name a new beneficiary. (See Section 15 of the Act.)

In addition, Mr. Teague testified that Respondent failed to show that it had deposited the amount received in a proper escrow account where it would earn interest. Mr. Teague testified that when he questioned Mr. Apostle during the audit as to the whereabouts of the \$2,000.00 paid on the Achenbach contract, Mr. Apostle stated that he had used \$1,400.00 for his own benefit in 1998 as a security deposit on real estate (no address given); Mr. Apostle gave no explanation as to the \$600.00 remainder.

FINDINGS OF FACT

Based on the record and the default judgment granted for Complainant, the undersigned makes the following findings of fact:

1. In or around November 1996, Respondent received monies for prepaid funeral arrangements for Julia Achenbach.
2. Respondent's prepaid funeral contract registration lapsed on September 30, 1994.

3. Respondent sold or agreed to provide funeral goods and services pursuant to a prepaid funeral contract without being registered with the Department of Consumer & Industry Services.

4. Respondent has failed to make and execute a nonguaranteed or guaranteed price contract.

5. Respondent failed to refund principal and income paid for the prepaid funeral contract of Julia Achenbach.

6. Respondent violated provisions of the Act, 1986 PA 255, as amended.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings [8 Callaghan's Michigan Pleading and Practice, §60.48, at 230 (2d ed. 1994)]. The burden of proof in this matter is upon Complainant to prove, by a preponderance of the evidence, that grounds exist for the imposition of sanctions upon Respondent. Under Section 72 of the APA, there is no requirement to provide a full evidentiary hearing when all alleged facts are taken as true. Smith v Lansing School Dist., 428 Mich 248; 406 NW2d 825 (1987).

Based upon the above findings of fact and the default judgment granted against Respondent, Complainant has proven by a preponderance of the evidence that Respondent violated the Act as follows:

1. Respondent's prepaid funeral contract registration lapsed on September 30, 1994.
2. Respondent sold or agreed to provide funeral goods and services pursuant to a prepaid funeral contract without being registered at the time with the Department of Consumer & Industry Services, in violation of Section 6(1) of the Act.
3. Respondent has failed to make and execute a nonguaranteed or guaranteed price contract, in violation of Section 10 of the Act.
4. Respondent failed to refund principal and income paid for the prepaid funeral contract of Julia Achenbach, in violation of Section 18(1)(d) of the Act.
5. Respondent violated provisions of 1986 PA 255, as amended, in violation of Section 18(1)(e) of the Act.

RECOMMENDATIONS

Based upon the above findings of fact and conclusions of law, the following recommendations are made by the undersigned to the Department of Consumer and Industry Services, pursuant to Section 20(2) of the Act:

1. **Restitution** be ordered in the total amount of **\$2,000.00**, plus interest as allowed under law, to be paid to Julia Bartlett, for the amount tendered to Respondent.
2. A **civil fine** in the amount of **\$2,500.00** be assessed against Respondent.

3. Suspension of Respondent's lapsed registration under the Act until the above fine and restitution are paid as set forth in the Final Order in this matter.

Lauren G. Van Steel
Administrative Law Judge

STATE OF MICHIGAN
DEPARTMENT OF CONSUMER & INDUSTRY SERVICES
BUREAU OF COMMERCIAL SERVICES

In the matter of :

BALBIRNIE-APOSTLE MORTUARY
Registration No. 34-01-000552 (Lapsed)

Docket No. 2001-614
Complaint No. 34-00-6053-00

FINAL ORDER

WHEREAS, this matter having come before Andrew L. Metcalf, Jr., as the Director, Bureau of Commercial Services, Department of Consumer & Industry Services, hereafter the "Director"; and

WHEREAS, the Director having considered the Findings of Fact and Conclusions of Law in the Hearing Report of Lauren G. Van Steel, Administrative Law Judge, dated May 31, 2002;

WHEREAS, the Director having received the Hearing Report under MCL 339.514(2), and Balbirnie-Apostle Mortuary, Licensed Funeral Establishment, License No. 34-01-000552 (Lapsed), hereafter "Respondent", having been found in violation of Sections 6(1), 10 and 18(1)(d) & (e) of the Prepaid Funeral Contract Funding Act, 1986 P.A. 255, *as amended*, hereafter the "Act", MCL 328.216(1); MCL 328.220; MCL 328.228(1)(d); MCL 328.228(1)(e) and

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

IT IS HEREBY ORDERED, that the following penalties authorized by Section 20(2) of the Act are hereby imposed:

1. Respondent shall pay a FINE in the amount of Five Thousand Dollars and 00/100 Cents (\$5,000.00), said fine to be paid to the Department of Consumer & Industry Services within sixty (60) days from the date of mailing of this Final Order. Said fine shall be paid by cashier's check or money order, with Complaint No. 34-00-6053-00 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 to Julia Bartlett in the amount of Two Thousand Dollars and 00/100 Cents (\$2,000.00), plus interest, by certified check made payable to Julia Bartlett and mailed to 10507 S. E. 30th Street, Bellevue, WA 98004. Restitution shall be paid not later than sixty (60) days from the date of mailing of this Final Order.
3. No application for licensure, relicensure or reinstatement shall be considered until fine and restitution are paid-in-full. Failure of Respondent to comply with any term of this Final Order shall revoke any/all current licenses or registrations of Respondent and result in denial of future applications for licensure, relicensure, renewal or reinstatement until such time as all of the terms of this Final Order have been complied with.