



## **ISSUES AND APPLICABLE STATUTES AND RULES**

1. Does Petitioner Board have a sufficient factual basis under N.C. Gen. Stat. §§ 150B-38, 90-210.25(e) and the attendant rules to suspend, revoke, or otherwise discipline the licenses of Respondents?
2. If Petitioner Board has a sufficient factual basis to suspend, revoke, or otherwise discipline the licenses of Respondents, is revocation or suspension the appropriate discipline to be imposed?

## **FINDINGS OF FACT**

1. There is no disagreement as to the pertinent and relevant facts of this contested case.
2. Respondent McClure Funeral Service, Inc. (“McClure FS”) is a North Carolina corporation that offers a full range of funeral and cremation services and allows clients to plan their funeral arrangements through preneed insurance policies.
3. McClure FS has a location in Graham, North Carolina, which is licensed as Funeral Establishment No. 344 and Preneed Establishment No. 055.
4. McClure FS also has a location in Mebane, North Carolina, which is licensed as Funeral Establishment No. 345 and Preneed Establishment No. 695.
5. Since 1975, Respondent Stephen Ray Smith (“Smith”) has been licensed by Petitioner Board as Funeral Service No. 984 and, until December 2015, held a preneed sales license on behalf of McClure FS.
6. In 2004, Smith along with Kenneth Stainback (Stainback), and William Vanderburg, purchased McClure FS.
7. Since 2004, Smith has served as President of McClure FS.
8. Since 2004, Stainback has served as Secretary of McClure FS.
9. During his tenure with McClure FS, Smith has assisted with the day-to-day operations of the funeral establishment.
10. During his tenure with McClure FS, Stainback has managed the day-to-day operations of the funeral establishment and has exercised more control over McClure FS than have Smith and Vanderburg.
11. On November 23 and November 24, 2015, Smith and Stainback, respectively, entered into a plea agreement to resolve the criminal charge of conspiracy to defraud the Internal Revenue Service (“I.R.S.”), which the Tax Division of the United States Department of

Justice filed against them on behalf of the United States of America (*see* Case No. 1:15CR390-1, U.S. District Court for the Middle District of North Carolina).

12. In that plea agreement, Smith and Stainback each agreed to plead guilty to one felony count of conspiracy to defraud the I.R.S., in violation of 18 U.S.C. § 371.
13. Smith and Stainback acknowledged that they agreed to plead guilty because they are, in fact, guilty of crimes for which they were charged.
14. Smith's and Stainback's convictions of conspiracy to defraud the I.R.S., in violation of 18 U.S.C. § 371 arises from the following facts:
  - a. In 2004, while managing the day-to-day operations of McClure FS, Stainback and Smith began diverting gross receipts from McClure FS, including commission checks from insurance providers and checks from clients for payment of services.
  - b. Specifically, in April 2004, Stainback and Smith opened a checking account at Mid-Carolina Bank for the purpose of diverting funds from McClure FS.
  - c. In July 2004, Stainback and Smith added William Vanderburg as a signatory on the checking account at Mid-Carolina Bank.
  - d. Between 2004 and 2012, Stainback and Smith, along with Vanderburg, deposited commission checks from insurance providers and checks for payment of services into the account at Mid-Carolina Bank.
  - e. Between 2004 and 2012, Stainback and Smith wrote checks payable to themselves from the account at Mid-Carolina Bank and used those funds for their own personal benefit.
  - f. Stainback and Smith intentionally omitted this diverted income from McClure FS's tax returns.
  - g. In addition to diverting funds to the checking account at Mid-Carolina Bank, Stainback and Smith also took cash payments from clients of McClure between 2004 and 2012, which they kept for their personal use and did not report on McClure's corporate tax returns.
  - h. Furthermore, unbeknownst to Smith and Vanderburg, Stainback opened a checking account at SunTrust Bank, into which he diverted additional funds from McClure FS.
  - i. To avoid detection by anyone at McClure FS, Stainback arranged for SunTrust Bank to mail bank statements from this checking account to his personal residence.
  - j. In order to conceal discovery of his actions, Stainback and Smith deleted and altered invoices in McClure FS's accounting system.
15. Between fiscal years 2009 and 2012, Stainback and Smith diverted more than \$419,000.00 from McClure FS.
16. The amount of tax loss resulting from Stainback's and Smith's conspiracy to defraud the I.R.S. in the ascertainment of corporate taxes totaled at least \$158,530.11 for tax years 2009-2012.

17. On March 29, 2016, Smith was sentenced to six (6) months' imprisonment and thirty-six (36) months supervised release. Currently, Smith is scheduled for release from federal prison in November 2016.
18. Smith was ordered to pay (i) \$158,530.11 in restitution to the IRS for the corporate tax loss jointly and severally with Stainback, and (ii) \$116.00 individually in restitution to the IRS for his individual tax loss. Smith also was ordered to pay \$8,000.00 in fines.

Based on the foregoing Findings of Facts, the undersigned ALJ makes the following:

### **CONCLUSIONS OF LAW**

1. Pursuant to N.C. Gen. Stat. §§ 90-210.23, 90-210.69, and 90-210.80, the Board has the power and responsibility to administer Articles 13A, 13D, 13E and 13F of Chapter 90 of the North Carolina General Statutes and their promulgated rules.
2. This Court has jurisdiction both over the subject matter of this action and over the parties. Venue is proper.
3. Pursuant to N.C. Gen. Stat. § 90-210.25(e), Petitioner Board may take disciplinary action against a licensee who is convicted of a felony or a crime involving fraud or moral turpitude. Petitioner Board also may take disciplinary action against a licensee who exhibits gross immorality and who engages in fraud or misrepresentation in the practice of funeral service. Upon a finding that the licensee has become unfit to practice, suspension or revocation of licensure is appropriate.
4. Smith's activities in his capacity as President of McClure FS have a significant bearing on his character and fitness to practice.
5. Smith does not remain fit to practice funeral service. Pursuant to N.C. Gen. Stat. § 90-210.25(e)(1) and 90-210.69(c)(3), Smith's funeral service license should be actively suspended and Smith should not hold a preneed sales license in the future.

### **PROPOSED DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby proposes the following as appropriate discipline according to the facts of this contested case:

1. The funeral service license of Respondent Smith is hereby actively suspended for a period of six (6) months, beginning upon the conclusion of Respondent Smith's active sentence of incarceration with the federal Bureau of Prisons. During the period of active suspension, Respondent Smith shall not practice funeral service nor make any representations of practicing funeral service in any capacity. Upon the expiration of the active suspension, Respondent Smith's funeral director license shall be placed on a stayed suspension for a period of thirty-six (36) months.

2. Petitioner Board shall refuse to license Respondent Smith for preneed sales in the event that said Respondent applies for such licensure in the future.
3. During the period of suspension, Respondent Smith must remain current with continuing education requirements with which he must comply to retain active licensure. Upon conclusion of the active suspension, Respondent Smith must remit payment for the total amount of renewal payments that he would have paid to the Board had the licenses/permits not been suspended. Should Respondent Smith fail to meet requirements or allow the licensure to expire, the licensure will not be renewed and may be publicly reported as noncompliance with a Board order. In that event, any future application for licensure must meet the licensure requirements in place at the time of application, in addition to the requirements specified in the Board's Final Agency Decision.
4. During the term of the suspension, Respondent Smith must comply with the following provisions:
  - a. Respondent Smith shall not be involved with the financial management of any funeral establishment.
  - b. Respondent Smith shall comply with all provisions of Articles 13A, 13D, 13E and 13F of Chapter 90 of the North Carolina General Statutes and their promulgated rules;
  - c. Respondent Smith must retrieve any mail sent by the Board at least weekly from his address of record;
  - d. Respondent Smith must respond to the Board's written requests within one week of receipt, unless otherwise specified;
  - e. Respondent Smith must ensure that all correspondence relevant to compliance with the Board's Final Agency Decision is sent via U.S. Mail;
  - f. Any interruption or period of noncompliance with the Board's Final Agency Decision will not accrue toward fulfillment of the period of active suspension. Should any circumstances arise that affect his ability to remain in compliance, Respondent Smith shall immediately notify the Board in writing by certified mail, fully describing the situation along with any attendant request for Board consideration.
5. All evidence of licensure of Smith shall be surrendered to the Board within ten (10) days following the issuance of the Board's Final Agency Decision. Respondent Smith shall remove all advertising, written materials, and signage using the name or photograph of Respondent Smith within ten (10) days following the issuance of the Board's Final Agency Decision. Upon the termination of the active suspension period, all evidence of licensure shall be returned to Respondent Smith.
6. If Respondent Smith fulfills all requirements contained in the Board's Final Agency Decision, Respondent Smith may make a written request to the Board to restore his respective license and permit to good standing upon the completion of the probationary period. At the time Respondent requests restoration of his license and permit, Respondent must not be on probation or serving an active criminal sentence with the federal Bureau

of Prisons.

7. The North Carolina Office of Administrative Hearings (“OAH”) shall retain jurisdiction for, and limited to, the purposes of enforcing the Board’s Final Agency Decision and Respondent Smith shall therefore submit to the jurisdiction of OAH if future issues of compliance with the Board’s Final Agency Decision arise. If the Board receives evidence that a violation of the Final Agency Decision or any law or rule of the Board has occurred, the Board may take any disciplinary action it deems appropriate, as authorized by Chapter 90 of the North Carolina General Statutes and any action, including but not limited to a show cause hearing, that it deems appropriate in OAH to enforce this order.
8. In the event that Respondent Smith violates the Board’s Final Agency Decision, the Board may avail itself of all remedies provided by law or equity. In the event of a motion to enforce the Board’s Final Agency Decision, and the Board being the prevailing party, the Board shall be entitled to an award for court costs and attorney’s fees as awarded by the Court.

### **NOTICE**

The undersigned’s Proposal for Decision in this contested case will be reviewed by the agency making the final decision. Pursuant to N.C. Gen. Stat. §150B-40(e), the agency may make its final decision only after the administrative law judge's proposal for decision is served on the parties, and an opportunity is given to each party to file exceptions and proposed findings of fact and to present oral and written arguments to the agency. The North Carolina Board of Funeral Service will make the final decision in this contested case, pursuant to N.C. Gen. Stat. § 150B-42.

This the 8th day of August, 2016.

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Donald W Overby  
Administrative Law Judge