

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

NORTH CAROLINA BOARD OF)
FUNERAL SERVICE)
Petitioner,)
v.)
KENNETH DALE STAINBACK and MCCLURE)
FUNERAL SERVICE, INC.)
Respondents,)

15 BMS 09598

PROPOSAL FOR DECISION

Having presided over a hearing in the above-captioned contested case on July 20, 2016, the undersigned Administrative Law Judge issues the following Proposal for Decision against Respondent Kenneth Dale Stainback, and McClure Funeral Service, Inc. (collectively “Respondents”), pursuant to N.C. Gen. Stat. § 150B-40.

APPEARANCES

For Petitioner: Catherine E. Lee, Esq.
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4700 Homewood Court, Ste. 320
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For Respondent: Robert O. Crawford III
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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 Kenneth Dale Stainback (“Stainback”) has been licensed by Petitioner Board as Funeral Director No. 2955 and, until December 2015, held a preneed sales license on behalf of McClure FS.
6. In 2004, Stainback, along with Stephen Ray Smith (“Smith”) and William Vanderburg, purchased McClure FS.
7. Since 2004, Stainback has served as Secretary of McClure FS.
8. Since 2004, Smith has served as President of McClure FS.
9. 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.
10. Between approximately February 2011 and November 25, 2015, Stainback served as a member of the Petitioner Board of Funeral Services.
11. Between January 1, 2015 and November 25, 2015, Stainback served as President of Petitioner Board.

12. 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).
13. 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.
14. Smith and Stainback acknowledged that they agreed to plead guilty because they are, in fact, guilty of crimes for which they were charged.
15. 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.
 - k. The IRS began an investigation of Respondents’ activities. While the IRS was conducting this examination, Stainback made false statements during an interview with an IRS special agent. Specifically, he told the IRS special agent that he had closed the SunTrust Bank account prior to being interviewed by that agent.

However, in actuality, Stainback did not close the SunTrust Bank account until after he completed his interview with the IRS special agent.

1. Stainback admits that he closed this bank account in an effort to conceal his criminal actions.
16. Between fiscal years 2009 and 2012, Stainback and Smith diverted more than \$419,000.00 from McClure FS.
17. 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.
18. On March 29, 2016, Stainback was sentenced to fourteen (14) months imprisonment and thirty-six (36) months supervised release. Currently, Stainback is scheduled for release from federal prison in April 2017.
19. Stainback was ordered to pay (i) \$158,530.11 in restitution to the IRS for the corporate tax loss jointly and severally with Smith, and (ii) \$12,213.00 individually in restitution to the IRS for his individual tax loss. Stainback 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. Stainback's activities in his capacity as Secretary of McClure FS, have a significant bearing on his character and fitness to practice.
5. Stainback does not remain fit to practice funeral directing. Pursuant to N.C. Gen. Stat. § 90-210.25(e)(1) and 90-210.69(c)(3), Stainback's funeral directing license should be actively suspended and Stainback 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 director license of Respondent Stainback is hereby actively suspended for a period of six (6) months, beginning upon the conclusion of Respondent Stainback's active sentence of incarceration with the federal Bureau of Prisons. During the period of active suspension, Respondent Stainback shall not practice funeral directing nor make any representations of practicing funeral directing in any capacity. Upon the expiration of the active suspension, Respondent Stainback'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 Respondents Smith and Stainback for preneed sales in the event that said Respondents apply for such licensure in the future.
3. During the period of suspension, Respondent Stainback must remain current with continuing education requirements with which he must comply to retain active licensure. Upon conclusion of the active suspension, Respondent Stainback 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 Stainback 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 Stainback must comply with the following provisions:
 - a. Respondent Stainback shall not be involved with the financial management of any funeral establishment.
 - b. Respondent Stainback 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 Stainback must retrieve any mail sent by the Board at least weekly from their address of record;
 - d. Respondent Stainback must respond to the Board's written requests within one week of receipt, unless otherwise specified;
 - e. Respondent Stainback 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 Stainback 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 Stainback shall be surrendered to the Board within ten (10) days following the issuance of the Board's Final Agency Decision. Respondent Stainback shall remove all advertising, written materials, and signage using the name or photograph of Respondent Stainback 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 Stainback.
6. If Respondent Stainback fulfills all requirements contained in the Board's Final Agency Decision, Respondent Stainback may make a written request to the Board to restore his 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 Stainback 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 Stainback 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.

Donald W Overby
Administrative Law Judge