

**BEFORE THE
STATE MORTUARY AND CEMETERY BOARD**

In the Matter of:) FINAL ORDER
)
ANA MARIE JONES,)
) OAH Case No. 1001658
Applicant.) Agency Case No. 10-1003

This matter came before the Oregon Mortuary and Cemetery Board (Board) during a special meeting on January 11, 2011 to consider the Proposed Order issued in this case by Administrative Law Judge Rackstraw. Applicant Ana Marie Jones (Applicant) did not file exceptions to the Proposed Order. After considering the matter, the Board adopts the ALJ's proposed order including the Findings of Fact, Conclusions of Law, Opinion and proposed sanctions the Board now issues this Final Order.

HISTORY OF THE CASE

On April 19, 2010, the State Mortuary and Cemetery Board (Board) issued a Notice of Proposed Denial of Application and Opportunity for a Hearing (Notice) to Ana Marie Jones, denying Ms. Jones' application for an Embalmer Apprenticeship Certificate and a Funeral Service Practitioner Apprenticeship Certificate. On April 21, 2010, Ms. Jones requested an administrative hearing. On April 23, 2010, the Board referred the request for hearing to the Office of Administrative Hearings (OAH).

On July 6, 2010, a telephone pre-hearing conference was held, with Senior Administrative Law Judge (ALJ) Jennifer H. Rackstraw of the OAH presiding. Ms. Jones did not attend the conference. Senior Assistant Attorney General (AAG) Johanna Riemenschneider attended the conference and represented the Board.

On October 18, 2010, a hearing was held in Portland, Oregon, with ALJ Rackstraw presiding. Ms. Jones represented herself and testified as a witness. Glen Scott Macy also testified on Ms. Jones' behalf. AAG Riemenschneider represented the Board. Former Board investigator Merrill Creagh and Board compliance manager Lynne Nelson testified on the Board's behalf. The record closed at the conclusion of the hearing.

ISSUE

Whether the Board may deny Ms. Jones' application for an Embalmer Apprenticeship Certificate and a Funeral Services Practitioner Apprenticeship Certificate on the ground that Ms. Jones violated ORS 692.180(1) and OAR 830-050-0050(2) and 830-030-0090(2)(c)(D).

EVIDENTIARY RULINGS

The Board's Exhibits A1 through A7 and Ms. Jones' Exhibits C1 through C3 were admitted into the record without objection. The Board objected to Ms. Jones' Exhibit C4 on the ground that the exhibit contained documents subject to a sealing order. The objection was sustained and Exhibit C4 was not admitted into the record.

FINDINGS OF FACT

1. On May 5, 2003, Ms. Jones was arrested on the suspicion that she stole approximately \$10,000 in cash from her ex-boyfriend's place of business. Ms. Jones told Newberg police that she did not commit the theft and that she had gotten the money from cashing in a coin collection. She subsequently confessed to taking the cash, but told police that she had planned to return it. She told police that the cash could be found in a binder under her new boyfriend's bed. The police then located the binder, but did not find the cash. Ms. Jones was charged with Theft I (a felony) and Burglary II (a felony). In December 2003, Ms. Jones was convicted of Theft I. The Burglary II charge was dismissed. Ms. Jones was ordered to pay fines and restitution, complete 24 hours of community service, and complete four days of work crew. (Exs. A3 at 1-2, A5 at 1-2, R3; test. of Creagh.)

2. On September 2, 2003, a felony bench warrant was issued against Ms. Jones for failure to appear in court and for a probation violation. Ms. Jones was taken into custody on that date and booked in the Yamhill County jail. (Exs. A4 at 1, A5 at 2.)

3. In December 2009, Ms. Jones received a copy of her arrest and conviction record. (Test. of Jones.)

4. On January 13, 2010, Ms. Jones submitted an Application for Embalmer Apprenticeship Certificate & Funeral Service Practitioner (FSP) Apprenticeship Certificate (the application) to the Board. (Ex. A1.) On page two of the application, question three asks, "Have you **ever** been arrested, charged or cited for anything other than traffic violations? **Yes or No** * * *. If "**Yes**," you must provide your detailed, complete and accurate written account(s) of the facts or circumstances of each arrest or cite (include any dismissals)." (*Id.* at 2; emphasis in original.) Ms. Jones initially wrote "No" in response to question three. (Test. of Jones; *see* Ex. A1 at 2.) She then changed her response to "Yes" and wrote on the back of the application, "Theft II October of 2002 ex-boyfriend pressed charges in Yamhill County." (Ex. A1 at 2-3.)

5. On page two of the application, question four asks, "Have you **ever** been convicted of, or are you currently charged with, committing a crime whether or not adjudication was withheld? **Yes or No**["]" (*Id.* at 2; emphasis in original.) The application defines "crime" as including "a misdemeanor, felony, or military offense" and "convicted" as including, "but not limited to, having been found guilty by verdict of a judge or a jury, having entered a plea of guilty or nolo contendere, or having been given probation, a suspended sentence, or a fine." (*Id.*) Ms. Jones answered "No" to question four. (*Id.*)

6. The Board processed the application and conducted a background check on Ms. Jones. The background check revealed that Ms. Jones was arrested in May 2003 on charges of Theft I (a felony) and Burglary II (a felony), and that she was subsequently convicted of Theft I. (Exs. A3 at 1-2, A5 at 1; test. of Creagh.)

7. On January 13 and 14, 2010, Board investigator Merrill Creagh spoke with Ms. Jones via telephone. Ms. Jones told Ms. Creagh that she did not steal money from her ex-boyfriend's business. Ms. Jones stated that she pled guilty to stealing the money to stop her ex-boyfriend from harassing her family. She also stated that she told the police that the money was in a binder because she thought such detail would bolster her story that she stole the money. She also stated that she did not know she had been charged with Burglary II. She told Ms. Creagh that she planned to have the Theft conviction expunged. (Test. of Creagh; Exs. A4 at 1-2, A5 at 1-2.)

8. On January 13, 2010, at Ms. Creagh's request, Ms. Jones submitted a more detailed explanation of her criminal history to the Board. (Ex. A2; test. of Creagh.) The written explanation provided, in part:

October of 2002 I was charged with Theft II.

My ex-boyfriend had told the police I stole money from him.

I was pregnant [and] he paid ½ of the doctor bills and wanted his money back and I had been unemployed[.] [T]his was his way of getting his money back[.]

I went into the police station and turned myself in[.] [A]t the court hearing I was ordered to pay restitution and three years probation[.] I completed everything in July of 2005.

That is all I can think of. I hope that is what you needed[.]

(Ex. A2 at 2.)

9. The Board subsequently reviewed Ms. Jones' application and the information gathered during the background investigation and concluded that Ms. Jones provided false information to the Board. (Test. of Nelson.)

10. Pursuant to a notice from Yamhill County Circuit Court dated January 19, 2010, a motion hearing was scheduled for February 23, 2010 for the purpose of setting aside Ms. Jones' Theft I conviction. (Ex. R2.) On February 24, 2010, an Order to Set Aside Conviction and Seal Records of Arrest (the order) was filed in Yamhill County. The order set aside the Theft I conviction and sealed all conviction and arrest records relating to the case. (Ex. R3 at 1-2.)

11. In a letter to ALJ Rackstraw dated September 29, 2010, Ms. Jones wrote, in part:

On my original application I inadvertently failed to mark the appropriate reply to question #4 with regards to my conviction of a crime. My reply stated that I had no criminal record, assuming that it had been expunged and changed to a misdemeanor crime. I in no way intended to mislead or misrepresent my background.

(Ex. R1.)

12. An apprentice embalmer and apprentice funeral services practitioner meets with vulnerable and grieving families, fills out contracts and other documents, collects payment for services, receives bodies, and has access to valuables that might arrive with a body or be received from family members to be placed with a body. Honesty is a requirement for an apprentice license. (Test. of Nelson.)

CONCLUSION OF LAW

The Board may deny Ms. Jones' application for an Embalmer Apprenticeship Certificate and a Funeral Services Practitioner Apprenticeship Certificate on the ground that Ms. Jones violated ORS 692.180(1) and OAR 830-050-0050(2) and 830-030-0090(2)(c)(D).

OPINION

To serve an apprenticeship as an embalmer or funeral services practitioner in Oregon, a person must apply for a certificate of apprenticeship from the Board. ORS 692.190(1).¹ The Board has proposed denial of Ms. Jones' application for an Embalmer Apprenticeship Certificate and a Funeral Services Practitioner Apprenticeship Certificate based on alleged violations of ORS 692.180(1) and OAR 830-050-0050(2) and 830-030-0090(2)(c)(D). The Board has the burden of establishing its allegations by a preponderance of the evidence. ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

1. Credibility

One of my chief responsibilities in a contested case is to assess the credibility of witnesses. ORS 44.370 provides, in part:

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testifies, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence.

¹ ORS 692.190(1) states, in part:

An individual who wishes to engage as an apprentice shall apply to the State Mortuary and Cemetery Board for registration as a funeral service practitioner apprentice or an embalmer apprentice upon a form provided by the board. The individual must consent to a background check, including information solicited from the Department of State Police[.]

Moreover, a determination of a witness' credibility can be based on a number of factors, other than the manner of testifying. These factors include the inherent probability of the evidence, whether or not the evidence is corroborated, whether the evidence is contradicted by other testimony or evidence, whether there are internal inconsistencies, and "whether human experience demonstrates that the evidence is logically incredible." *Tew v. DMV*, 179 Or App 443, 449 (2002), citing *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245, 256 (1979) *rev den* 288 Or 667 (1980) (Richardson, J., concurring in part, dissenting in part).

Ms. Jones gave conflicting testimony at hearing. For example, when questioned as to whether she changed her response to question three on page two of the application, she initially testified that she did not change her response and that her "pen bled" on the application. However, after AAG Riemenschneider presented her with the original application, which clearly showed that Ms. Jones had changed her response to the question from "No" to "Yes," Ms. Jones admitted that she changed the response. Also, she gave confusing and contradictory testimony regarding whether she believed her Theft I conviction had already been expunged at the time she filled out her application. Also, she told a Board investigator prior to the hearing that she lied to police when she confessed to stealing money from her ex-boyfriend and that she fabricated a story to police regarding where the money was hidden, in an attempt to bolster her lie. In addition, she admitted at hearing that she had not been honest with the Board during the application process. For these reasons, I do not find Ms. Jones to be a credible witness. Where her testimony conflicts with other, more reliable evidence, I have accorded greater weight to the other evidence.

2. False or misleading statement or fraud, misrepresentation, or deceit during application process

ORS 692.180(1)(a) provides that the Board may refuse to grant a license for "[m]isrepresentation * * * in obtaining a license." Similarly, OAR 830-050-0050(2) provides that the Board may refuse to grant a license, certificate, or registration to an applicant if the applicant makes "false or misleading statements in applying to the Board for licensure, certificate of authority, certificate of registration, or apprenticeship." Finally, OAR 830-030-0090(2)(c)(D) provides that "[u]sing fraud, misrepresentation, or deceit during the application process for licensure, certification or registration" may be cause for Board action.

A "misrepresentation" is defined as "an untrue, incorrect or misleading representation" and also as "a representation by words or other means that under the existing circumstances amounts to an assertion not in accordance with the facts." *Webster's Third New Int'l Dictionary* 1445 (unabridged ed 2002). The record establishes that Ms. Jones made untrue assertions on her application when she wrote that her only arrest was for Theft II (when, in fact, she was arrested for Theft I and Burglary II, as well as for failure to appear in court and a probation violation) and when she wrote that she had not been convicted of any crimes (when, in fact, she was convicted of Theft I).² Because ORS 692.180(1)(a) and OAR 830-050-0050(2) and 830-030-0090(2)(c)(D)

² Although Ms. Jones obtained an order setting aside the Theft I conviction and sealing all official records relating to the case, the Board may consider evidence of the arrest and conviction that is not part of the official records, including the Board's application form, Board investigation notes, and Board

do not expressly require that the Board prove that the person making the statements acted with any specific mental state, the Board need not establish that Ms. Jones made the assertions with the intent to deceive or mislead the Board. *See Pierce v. DPSST*, 196 Or App 190, 194 (2004). Even so, the record reflects that, more likely than not, Ms. Jones misrepresented her criminal history on her application and during the application process in an attempt to deceive or mislead the Board. The Board has proven violations of ORS 692.180(1)(a) and OAR 830-050-0050(2) and 830-030-0090(2)(c)(D), and the Board may deny Ms. Jones' application under those provisions.

3. Lack of fitness based on past conduct

ORS 692.180(1)(b) and (i) allow the Board to refuse to grant a license for fraudulent or dishonest conduct or the conviction of a crime when the conduct or the crime "bears a demonstrable relationship to funeral service practice, embalming practice or the operation of cemeteries, crematoriums or other facilities for final disposition of human remains." Moreover, ORS 670.280(3) allows a licensing board to deny a professional license "based on conduct * * * that is substantially related to the fitness and ability of the applicant * * * to engage in the activity for which the license is required." Similarly, OAR 830-050-0050(3) allows the Board to refuse to grant a license, certificate, or registration if an applicant has been convicted of a crime "whose facts and circumstances have a demonstrable bearing upon the standards of the profession."

As previously stated, the preponderance of the evidence establishes that Ms. Jones was dishonest on her application, in her communications with the Board, and in the contested case hearing. Moreover, she was convicted of a crime based on theft. The Board contends that her conduct and her criminal conviction create a risk of harm to consumers in the death care industry and render her unfit to practice as an apprentice. I agree. Honesty is required of an apprentice. As an apprentice, Ms. Jones would be responsible for communicating honestly with grieving families, accurately filling out paperwork, accepting payments, and potentially handling valuable personal possessions. Ms. Jones' written and verbal misrepresentations during the Board's application process, her untruthfulness at hearing, and her conviction based on theft of property all demonstrate that Ms. Jones lacks the honesty required to safely carry out the duties of an apprentice. Thus, the Board may deny Ms. Jones' application under ORS 692.180(1)(b) and (i), ORS 670.280(3), and OAR 830-050-0050(3).

FINAL ORDER

The State Mortuary and Cemetery Board issues the following order:

1. The Proposed Order in Agency Case No. 10-1003 is hereby adopted
2. Ana Marie Jones' application for an Embalmer Apprenticeship Certificate and a Funeral Services Practitioner Apprenticeship Certificate is denied.

investigation reports. *See Delahunt v. BPST*, 317 Or 273, 280-81 (1993); *Leong's Inc. v. Oregon State Lottery Comm.*, 142 Or App 460, 466-67 (1996).

____January 24, 2011_____
Date

<s> Michelle Gaines

Michelle Gaines
Executive Director

NOTICE OF OPPORTUNITY FOR JUDICIAL REVIEW (COURT OF APPEALS)

You are entitled to judicial review of this Final Order pursuant to ORS 183.482. Judicial Review may be initiated by filing a petition for review with the Oregon Court of Appeals within 60 days from the date this Final Order was mailed to you.

CERTIFICATE OF MAILING

On January 27, 2011, I mailed the foregoing Final Order issued on this date in OMCB Case No. 10-1003.

By: First Class Mail

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____Jan 27, 2011_____
Date

____<Lynne Nelson>_____
Lynne Nelson, OMCB Compliance Manager