

**BEFORE THE
STATE MORTUARY AND CEMETERY BOARD**

STATE OF OREGON

In the Matter of:) FINAL ORDER
)
ERIC MOTEN,)
) OAH Case No. 1202670
Applicant.) Agency Case No. 11-1063

This matter came before the Oregon Mortuary and Cemetery Board (Board) during a regularly scheduled meeting on September 25, 2012 to consider the Proposed Order issued in this case by Administrative Law Judge Joe Allen. Applicant Eric Moten did not file exceptions to the Proposed Order. After considering the matter, he 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 December 15, 2011, the State Mortuary and Cemetery Board (Board) issued a Notice of Proposed Denial of Application And Opportunity for a Hearing (Notice) to Eric Moten (Appellant) proposing to deny Appellant's application for a Preneed Salesperson Registration Certificate. On December 22, 2011, Appellant requested a hearing.

On February 7, 2012, the Board referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) A. Bernadette House to preside at hearing. A prehearing conference was convened on March 12, 2012 before Senior ALJ House. The purpose of the prehearing conference was to identify the issues for hearing as well as establish a prehearing schedule in this matter. Johanna Riemenschneider, Assistant Attorney General (AAG), appeared and represented the Board. Appellant appeared at the conference on his own behalf. On or about June 22, 2012, ALJ House became unavailable for the hearing and the OAH reassigned this matter to Senior ALJ Joe L. Allen.

ALJ Allen presided over the hearing on June 28, 2012, at the Board's offices in Portland, Oregon. Appellant appeared without counsel and testified on his own behalf. AAG Raul Ramirez represented the Board. Testifying on behalf of the Board were Nathan Goldberg, Board investigator, and Lynne Nelson, Education and Compliance Manager for the Board. Testifying on behalf of Appellant was Raymond Ortner, Sales Department Manager for Finley Sunset Hills Mortuary. The record closed at the conclusion of the hearing on June 28, 2012.

ISSUES

1. Whether Appellant made false or misleading statements in applying to the Board for a certificate of registration. ORS 692.180(1)(a), OAR 830-030-0090(5)(d), and OAR 830-050-0050(2).
2. If so, whether the Board may deny Appellant's application for a Preneed Salesperson Registration Certificate pursuant to ORS 692.180(1)(a) and OAR 830-050-0050(2).

EVIDENTIARY RULING

Exhibits A1 through A4, offered by the State Mortuary and Cemetery Board, were admitted into the record without objection.

FINDINGS OF FACT

1. In March 1997, Appellant shoplifted a can of chewing tobacco and a candy bar from a grocery store in Walla Walla, Washington. Store security personnel detained Appellant and called the police. The responding officer issued a criminal citation to Appellant for Theft III. (Test. of Appellant; Ex. A3 at 5.)
2. In response to the citation, Appellant contacted an attorney who informed Appellant that he would be required to pay a fine for the offense. Appellant paid the attorney approximately \$150 and was informed the matter would be dismissed. (Test. of Appellant.)
3. On or about November 18, 2011, Appellant completed an application for a Preneed Salesperson Registration Certificate. (Test. of Appellant; Ex. A1.)
4. Page three of the application presents several questions pertaining to an applicant's background. Question three reads as follows:

Have you **ever** been arrested, charged or cited for anything other than traffic violations? **Yes** or **No**: ____
(DUI/DUII is not a traffic violation.) If "**Yes**," you must provide your detailed, complete and accurate written account(s) of the facts and circumstances of each arrest or cite (*include any dismissals*). If possible, attach a copy of the Citation or Report.

(Ex. A1 at 3; **Bold** in the original, *italics* added.)

5. In response to question three, Appellant marked "**N**," indicating he had not been arrested, charged, or cited for anything other than traffic violations. (Ex. A1 at 3; test. of Appellant and Goldberg.)

6. As part of the application process, the Board conducted a background check on Appellant. The background check revealed Appellant was previously cited for Theft III. (Test. of Goldberg; Ex. A3 at 5.)

7. After discovering the criminal citation, the Board's investigator contacted Appellant by phone, informed him of the results of the criminal background check and asked Appellant to explain the circumstances of the citation. Appellant stated a friend had placed a candy bar in Appellant's pocket without his knowledge. Appellant further stated that was the only item in his pocket at the time he was detained. (Test. of Goldberg and Appellant.)

8. On or about January 24, 2012, Appellant attended a meeting of the Board and gave a statement about the criminal citation for theft. At that time, Appellant informed the Board that, on the date in question, he had attempted to steal a candy bar and a can of tobacco from a grocery store. Appellant acknowledged that he, and not a friend as previously stated, placed the items in his pocket without paying for them. (Test. of Goldberg and Nelson; Ex. A4.)

9. At the hearing, Appellant initially testified that the only item he took from the grocery store at the time of the citation in question was a candy bar. Upon further questioning, he admitted that he also shoplifted a can of chewing tobacco that day. (Test. of Appellant.)

10. Preneed Salespersons are responsible for selling trust-funded prearranged funeral services and products to consumers who are often vulnerable and experiencing increased emotional stress. Such salespersons are responsible for making numerous disclosures required within the funeral industry. (Test. of Goldberg.)

CONCLUSIONS OF LAW

1. Appellant made false or misleading statements in applying to the Board for a certificate of registration.

2. The Board may deny Appellant's application for a Preneed Salesperson Registration Certificate.

OPINION

The Board contends Appellant made false or misleading statements in applying for a certificate of registration. As the proponent of this position, the Board has the burden of proof. ORS 183.450(2) and (5); *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); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

1. *Appellant made false statements on his application.*

ORS 692.180(1) provides, in relevant part:

Upon complaint or upon its own motion, the State Mortuary and Cemetery Board may investigate a complaint made by any person or by the board. If the board finds any of the causes described in this section in regard to any person, licensee or applicant or the holder of a certificate of authority, the board may * * * refuse to grant or renew a license. The causes are as follows:

(a) Misrepresentation in the conduct of business or in obtaining a license.

OAR 830-030-0090(5) provides, in relevant part:

No licensee may:

* * * * *

(d) Make false or misleading statements or use fraud or misrepresentation in communications with the Board.

In November 2011, Appellant applied for a certificate of registration as a Preneed Salesperson with the Mortuary and Cemetery Board. In completing the application, Appellant informed the Board that he had never been cited for anything other than traffic violations. This was incorrect. In truth, the Walla Walla PD issued Appellant a criminal citation for Theft III in 1997.

At the hearing, Appellant provided inconsistent explanations for his failure to disclose the citation and the attendant circumstances. In fact, Appellant's explanations have been wrought with inconsistencies throughout the application and appeal processes. Initially, Appellant informed the Board that a friend had placed a single item in Appellant's pocket without his knowledge. Later, Appellant admitted that he, and not a friend, had taken the candy bar as well as an additional item. At the hearing, Appellant reverted back to his initial assertion that only a candy bar was taken. Appellant maintained this position until asked by the ALJ why he failed to

disclose the can of tobacco. While admitting to shoplifting this additional item, Appellant offered no explanation for his failure to disclose it in his testimony.

Regardless of the motivation behind Appellant's actions, his failure to disclose the criminal citation on his application constitutes misrepresentation in obtaining a license under ORS 692.180(1)(a).

2. *Denial of Appellant's application for registration.*

Based on the above misrepresentation, the Board proposes to deny Appellant's application for certification pursuant to ORS 692.180(1)(a) and OAR 830-050-0050.

OAR 830-050-0050 provides, in part:

The following circumstances may be considered grounds for reprimand, assessment of civil penalty, or refusal to grant, refusal to renew, revocation, or suspension of an applicant's or a licensee's license, certificate, or registration.

* * * * *

(2) Making false or misleading statements in applying to the Board for licensure, certificate of authority, certificate of registration, or apprenticeship.

As found above, Appellant made a false statement to the Board in applying for a certificate of registration as a Preneed Salesperson. He also made false or misleading statements to Board personnel during an investigation into the circumstances surrounding the criminal citation at issue. Pursuant to ORS 692.180(1)(a) and OAR 830-050-0050(2), the Board may deny Appellant's application for such conduct.

At the hearing, the Board's witnesses testified that Preneed Salespersons regularly deal with members of the public who are emotionally distraught and vulnerable due to the loss of a loved one. As such, they are at greater risk of being misled. For these reasons, the Board requires each such salesperson to demonstrate honesty and integrity in all dealings. The Board determined Appellant's false statements and inconsistencies undermined his honesty and integrity and warranted denial of his application.

FINAL ORDER

The State Mortuary and Cemetery Board issues the following order:

1. The Proposed Order in Agency Case No. 11-1063 is hereby adopted
2. Eric Moten's application for Preneed Salesperson Registration Certificate is denied.

____October 2, 2012_____
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 October 2, 2012, I mailed the foregoing Final Order issued on this date in OMCB Case No. 11-1063.

By: First Class Mail

Eric Moten
7445 SE 31st Avenue
Portland OR 97202

By: Email

Johanna Riemenschneider
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem OR 97301-4096

Office of Administrative Hearings
Salem, OR

____October 2, 2012_____
Date

____<s> Robert Magill_____
Robert Magill, Investigator