

**BEFORE THE STATE of OREGON  
OREGON MORTUARY AND CEMETERY BOARD**

IN THE MATTER OF: ) **FINAL ORDER**  
 )  
**DAVID PERLMAN,** ) OAH Case Nos. 901331, 901332  
**Respondent.** ) Agency Case Nos: 08-1013B, 08-1064B

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 Dove Gutman. Respondent David A. Perlman (Respondent) did not file exceptions to the Proposed Order. On December 20, 2010 and on December 28, 2010 Respondent submitted to the Board his written intent to surrender his preneed salesperson registration certificate. After considering the matter, the Board now issues this Final Order.

The Board does not accept the voluntary surrender of Respondent's preneed salesperson registration certificate as it is in the public interest to proceed with discipline in this matter. See *Pahl v. Board of Chiropractic Examiners*, 164 Or App 378, 993 P2d 149 (1999). The Board adopts the ALJ's proposed order, including the Findings of Fact, Conclusions of Law, Opinion and proposed sanctions. The proposed order has been modified to correct typographical errors, and to protect the confidentiality of information under ORS 676.175. The Board uses designations for the alleged victims that are consistent with the designations used in the Amended Notice of Proposed Disciplinary Action of August 6, 2010 in Case No. 08-1013B and in the Notice of Proposed Disciplinary Action of July 21, 2009 in Case No. 08-1064B.

**HISTORY OF THE CASE**

On July 21, 2009, the State Mortuary and Cemetery Board (Board) issued a Notice of Proposed Disciplinary Action and Opportunity for a Hearing in Agency Case No. 08-1064B to David Perlman (Respondent). On August 10, 2009, Respondent requested a hearing. On September 4, 2009, the Board issued a Notice of Proposed Disciplinary Action (Revocation of Preneed Salesperson Registration and Civil Penalty) and Opportunity for a Hearing in Agency Case No. 08-1013B to Respondent. On September 23, 2009, Respondent requested a hearing.

On October 9, 2009, the Board referred the consolidated hearing requests to the Office of Administrative Hearings (OAH). Senior Administrative Law Judge (ALJ) Dove L. Gutman was assigned to preside at hearing. On August 6, 2010, the Board issued an Amended Notice of Proposed Disciplinary Action (Revocation of Preneed Salesperson Registration and Civil Penalty) and Opportunity for a Hearing in Agency Case No. 08-1013B to Respondent.

On March 8, 2010, a pre-hearing telephone conference was held. ALJ Gutman presided. Dean Alterman, Attorney at Law, represented Respondent. Senior Assistant Attorney General (AAG) Johanna Riemenschneider represented the Board. On March 8, 2010, ALJ Gutman issued a Pre-Hearing Order that set forth the dates for hearing.

On June 28, 2010, the Board requested a postponement of the hearing. Respondent had no objection. On June 29, 2010, ALJ Gutman granted the request.

On October 5, 2010, a hearing was held at the Board's offices in Portland, Oregon. ALJ Gutman presided. Mr. Alterman represented Respondent. Ms. Riemenschneider represented the Board. Respondent, Deanna Hare, Elaine Garley, David McJannet, Betty T., Keith T., Shayla Bayne, and Cameron Stewart all provided testimony.

On October 6, 2010, the hearing continued. ALJ Gutman presided. Mr. Alterman represented Respondent. Ms. Riemenschneider represented the Board. Robert Diaz, Joy Robinson, Sandy Dane, Doug W., Linda W., Merrill Creagh, and Lynne Nelson all provided testimony. The record closed on October 6, 2010.

## ISSUES

### **Keith T. and Betty T. (08-1013B)**

1. Whether, by overcharging Keith and Betty T. for two opening/closings and by charging a processing fee, Respondent:
  - a. Engaged in fraudulent or dishonest conduct in violation of ORS 692.180(1)(b) and OAR 830-050-0050(9);
  - b. Engaged in a sales practice that concealed or misstated material facts in violation of OAR 830-030-0100(9) and made misrepresentations in the conduct of business in violation of ORS 692.180(1)(a).
2. Whether, by telling Keith T. and Betty T. that a change in state law required them to make their purchase, Respondent:
  - a. Made a statement that was dishonest and fraudulent in violation of ORS 692.180(1)(b);
  - b. Engaged in a sales practice that concealed or misstated material facts in violation of OAR 830-030-0100(9) and made misrepresentations in the conduct of business in violation of ORS 692.180(1)(a).
3. Whether Respondent failed to respect the dignity and rights of Keith T. and Betty T., regardless of age, in violation of OAR 830-030-0090(1)(h).
4. Whether Respondent aided, abetted, or assisted Diaz and Stewart in the violation of a law, rule or regulation intended to guide the conduct of the death care industry in violation OAR 830-030-0090(2)(a)(F).
5. Whether Respondent failed to cooperate or answer truthfully and completely the

Board's inquiries regarding matters within its jurisdiction in violation of OAR 830-030-0090(2)(d)(B), or gave false or misleading information to an investigator in violation of OAR 830-040-0010(3).

**G. Bennett (08-1064B)**

6. Whether, by failing to inspect the prearrangement files of G. Bennett and calling his home to review or discuss making prearrangements for funeral goods and services, Respondent:

- a. Failed to respect the dignity and rights of G. Bennett, regardless of age, in violation of OAR 830-030-0090(1)(h);
- b. Failed to abide by the minimum accepted standards of the death care industry. OAR 830-030-0090(1); and
- c. Abused G. Bennett through intimidation or harassment in violation of OAR 830-030-0090(2)(a)(B).

**DW and LW (08-1013B)**

7. Whether, by failing to enter the space number on DW and LW's contract, Respondent:

- a. Failed to name the place where remains are to be interred in violation of OAR 830-040-0000(6)(d); and
- b. Failed to abide by the minimum accepted standards of the death care industry in violation of OAR 830-030-0090(1).

8. Whether, by failing to confirm that the space chosen by DW and LW was available for purchase, Respondent:

- a. Engaged in sales practices that concealed or misstated material facts in violation of OAR 830-030-0100(9) and made misrepresentations in the conduct of business in violation of ORS 692.180(1)(a);
- b. Failed to abide by the accepted minimum standards of the death care industry in violation of OAR 830-030-0090(1); or
- c. Failed to implement agreed-upon arrangements with the clients in violation of OAR 830-030-0090(1)(d).

9. Whether, by selling DW and LW a space that had already been sold to another client, Respondent caused cemetery records to be inaccurate in violation of OAR 830-040-0000(6).

10. Whether, by failing to confirm that "emerald green" was an available color choice for a granite park bench prior to the sale, Respondent:

- a. Engaged in sales practices that concealed or misstated material facts in violation of OAR 830-030-0100(9) and made misrepresentations in the conduct of business in violation of ORS 692.180(1)(a);
- b. Failed to abide by the accepted minimum standards of the death care industry in violation of OAR 830-030-0090(1); or
- c. Failed to implement agreed-upon arrangements with the clients in violation of OAR 830-030-0090(1)(d).

## **Sanction**

- 11. Whether Respondent's Preneed Salesperson Registration shall be revoked.
- 12. Whether Respondent shall pay civil penalties of \$1,000 per violation.

## **EVIDENTIARY RULING**

Exhibits A1 through A36, and Exhibit A8-A, offered by the Board, were admitted into the record without objection. Exhibits R1 through R18, offered by Respondent, were admitted into the record over the Board's objection.

## **CREDIBILITY DETERMINATION**

A witness testifying under oath or affirmation is presumed to be truthful unless it can be demonstrated otherwise. ORS 44.370 provides, in relevant part:

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

A determination of a witness' credibility can be based on a number of factors other than the manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience demonstrates that the evidence is logically incredible. *Tew v. DMV*, 179 Or App 443 (2002).

Respondent initially testified that he did not go to Keith and Betty T.'s home to train Stewart and Diaz, but later testified that he was at Keith and Betty T. home for training purposes. A witness false in part of his testimony may be distrusted in others. *See* ORS 10.095(3).

Respondent testified that he did not make the sales presentation to Keith and Betty T.. However, Stewart and Diaz both testified to the contrary, which was corroborated by Keith T. and Betty T.. (Exs. A19, A20.)

Respondent testified that he did not tell Keith and Betty T. that a change in state law required them to make the purchase. However, Diaz testified to the contrary, which was corroborated by Keith and Betty T.. (Exs. A18 at 5, A20.)

Respondent testified that he did not review Keith and Betty T.'s contract. However, Stewart testified to the contrary, which was corroborated by Diaz.

Respondent testified that he was not advised by other employees at Restlawn to not use the "white cards." However, Garley testified to the contrary, which was corroborated by Robinson.

Respondent testified that he sold space number "92" to the DW and LW. However, DW and LW testified that Respondent sold them space number "9," which was corroborated by Ms. Dane and the "yellow copy" of DW and LW's contract, Exhibit A25 at 2, and Exhibit A27 at 3.

Respondent testified that "emerald green" was available and on display at Restlawn. However, Ms. Robinson testified to the contrary, which was corroborated by Mr. McJannet.

In addition, Respondent refused to answer a question posed on direct examination by the Board. Therefore, I find that Respondent's testimony was inconsistent, illogical, and evasive, and was impeached by the testimony of others. Accordingly, the testimony provided by Respondent will not be relied upon when it contradicts the evidence submitted by the Board.

## **FINDINGS OF FACT**

1. Respondent is currently registered with the Board as a Preneed Salesperson.<sup>1</sup> He initially registered in 1994, let his registration expire in 2004, and then registered again in 2005. (Test. of Perlman; Ex. A1 at 1.)

2. Stonemor Oregon Subsidiary LLC (Stonemor) owns several cemeteries in Oregon, including Restlawn Memory Gardens and Mausoleum (Restlawn) in Salem, Oregon, and Memory Gardens Memorial Park (Memory Gardens) in Medford, Oregon. (Test. of Nelson; Exs. A1 at 2, A10 at 1.)

3. Restlawn and Memory Gardens are licensed facilities. (Ex. A1 at 2, A10 at 1.)

### **Keith T. and Betty T. incident**

4. In 1991, Keith and Betty T. purchased interment rights in the Savior Scatter Garden at Memory Gardens. (Ex. A12.)

5. In August 2007, Respondent worked for Stonemor as a Preneed Area Sales Manager. (Test. of Bayne; test. of Hare; Ex. A18 at 4.) Respondent's main base of operations was at Restlawn. (Test. of Perlman.) Respondent periodically traveled to Memory Gardens to train the

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<sup>1</sup> Respondent is considered a Licensee under the Board's rules. *Former OAR 830-011-0000(26).*

Preneed salespersons in cold calling and sales. (Test. of Stewart; test. of Diaz; test. of Hare.)

6. In August 2007, Robert Diaz was registered with the Board as a Preneed Salesperson. He was employed at Memory Gardens as a family services counselor. He was trained by Respondent and Mr. Stewart. (Test. of Diaz.)

7. In August 2007, Cameron Stewart was registered with the Board as a Preneed Salesperson. He was employed at Memory Gardens as a sales manager. He was trained by Respondent. (Test. of Stewart.)

8. In August 2007, Deanna Hare was registered with the Board as a Preneed Salesperson. She was employed at Memory Gardens as a family services counselor. She was trained by Respondent. (Test. of Hare.)

9. In August 2007, Shayla Bayne was employed at Memory Gardens as the administrative manager. She was responsible for processing the sales contracts. If a contract contained an error, Ms. Bayne returned the contract to the salesperson for correction. (Test. of Bayne; Ex. A18 at 2.)

10. In August 2007, Memory Gardens had a price book with price lists in effect for Preneed and at need sales and services in different locations within its park. Each Preneed salesperson had a price book. Respondent, Mr. Stewart, Mr. Diaz, Ms. Hare, and Ms. Bayne were aware of the price lists. Memory Gardens charged \$95 per person for an opening and closing service in its Scatter Gardens (Memory Scatter Garden and Savior Scatter Garden). Memory Gardens did not charge a processing fee for purchases that totaled less than \$500. (Test. of Bayne; test. of Hare; test. of Creagh; Exs. A11 at 1, A14 at 1, A16 at 1.)

11. Sometime prior to August 10, 2007, Respondent contacted Keith and Betty T., identified himself as "Robert Diaz," and made an appointment to meet with Keith and Betty T. to review their cemetery arrangements. (Test. of Diaz; Exs. A13, A19.)

12. On August 10, 2007, Respondent, Mr. Stewart, and Mr. Diaz met with Keith and Betty T. at their residence. Keith T. was 86 years old and Betty T. was 81 years old. Respondent made a sales presentation to Keith and Betty T. for the purchase of two opening and closing services in the Savior Scatter Garden. Respondent took the lead because he was training Mr. Stewart and Mr. Diaz. Respondent told Keith and Betty T. that a change in state law required them to make the purchase. Respondent also confirmed that the price for an opening and closing service was \$495 per person, and the processing fee for the contract was \$75. Mr. Stewart was sick and did not take an active role in the conversation. (Test. of Diaz; test. of Stewart; Exs. A13, A14 at 4-5, A18 at 5, A19 at 2, A20 at 1, A30.)

13. Oregon law does not require a cemetery to charge for opening and closing services. Oregon law does not require a cemetery to charge consumers a processing fee. (Pleading 12.)

14. On August 10, 2007, Mr. Stewart and Mr. Diaz drafted a sales contract for the purchase of two opening and closing services in the Savior Scatter Garden at \$495 per person

with a processing fee of \$75. Mr. Diaz had been with the Memory Gardens for one month. It was his first sale. Respondent reviewed the contract to make sure that Mr. Stewart and Mr. Diaz filled it out properly. Respondent had Mr. Stewart make a line through an amount that was in the wrong place on the contract. Mr. Stewart put his initials near the crossed out amount. Mr. Diaz, Keith T., and Betty T. signed the contract. Betty T. wrote a check for the total amount of \$1,065. (Test. of Stewart; test. of Diaz; Exs. A13 at 1, A18 at 4, A30 at 1.)

15. On August 10, 2007, upon returning to Memory Gardens, Respondent gave the Keith and Betty T. contract to Ms. Bayne for processing. Ms. Bayne reviewed the contract and told Respondent that the prices were incorrect. Respondent shrugged his shoulders, told Ms. Bayne “we don’t sell it for that cheap,” and walked away. Ms. Bayne contacted her supervisor, Gail Webb, and informed her of the overcharge. Ms. Webb asked if the contract was paid in full, and Mr. Bayne said “Yes.” Ms. Webb said she would get back to Ms. Bayne. Ms. Webb subsequently told Ms. Bayne to “go ahead and run it.” Ms. Bayne signed the contract and wrote “ok per Gail Webb” beside her signature. Ms. Bayne did not believe that the contract was correct. (Test. of Bayne; Exs. A13 at 1, A15 at 2, A18 at 2.)

16. On August 10, 2007, Ms. Hare was present when the Keith and Betty T. contract was turned in for processing. Ms. Hare told Respondent that the price for an opening and closing service in the Scatter Gardens was \$95. Respondent told Ms. Hare that the price was going to be \$495.<sup>2</sup> Ms. Hare told Respondent that he could not do that. Respondent stated “I just did.” (Test. of Hare.)

17. Respondent, Mr. Stewart, and Mr. Diaz all received a commission on Keith and Betty T. sale. (Test. of Perlman.)

18. In August 2008, Stonemor admitted to the Board that Keith and Betty T. were overcharged for the opening and closing services. Stonemor also admitted that Keith and Betty T. should not have been charged a processing fee. Stonemor refunded Keith and Betty T. \$1,065. (Exs. A14 at 1-2, A17 at 1, 4.)

19. On September 19, 2008, Merrill Creagh, Board Investigator, interviewed Respondent by telephone regarding the Keith and Betty T. matter. Ms. Creagh faxed Respondent a copy of the Keith and Betty T. contract to review. When questioned, Respondent stated the following, in pertinent part:

- He did not recall the Keith and Betty T. contract.
- This was the first time he had looked at it.
- He was not tied to the contract. He did not complete it and was not responsible for it.
- If Diaz signed for it, then Diaz and his supervisor, Stewart, were responsible for the contents.
- He did not review the contract.
- He only accompanied them to Keith and Betty T.’s home because it was

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<sup>2</sup> Ms. Hare originally said “\$595,” but later corrected herself and said “\$495.” (Test. of Hare.)

more fun when they go out together and can help each other.

- He did not submit the Keith and Betty T. contract to Ms. Bayne.
- He did not remember discussing any possible overcharges on the Keith and Betty T. contract with Ms. Bayne or any other Preneed salesperson.

(Test. of Creagh; Ex. A18 at 4-5.) Respondent later advised Ms. Creagh that there might have been some training involved, but only because he had more experience. (Ex. A18 at 5.)

20. In 2010, Mr. Stewart and Mr. Diaz signed Consent Orders with the Board for their conduct in the Keith and Betty T. matter. They admitted to overcharging Keith and Betty T.. They were reprimanded for violating ORS 692.180(a) and (g), and OAR 830-030-0100(9). (Test. of Stewart; test. of Diaz.)

### **BENNETT incident**

21. In July 2007, Elaine Garley was registered with the Board as a Preneed Salesperson. Ms. Garley was employed at Restlawn as a family services counselor. Restlawn had a master filing system in place for its clients. Restlawn's counselors used the master files to contact clients. They also used a client list from corporate offices for cold calling. (Test. of Garley; Ex. A4 at 9.)

22. In July 2007, Ms. Garley's clients included Linda and William Lange, and Mr. G. Bennett, Ms. Lange's father. Mr. G. Bennett was 87-years-old and disabled. (Test. of Garley; Exs. A4 at 9, A9 at 1.)

23. On July 17, 2007, Ms. Garley met with Ms. Lange to discuss Mr. G. Bennett's arrangements. At that time, Ms. Lange requested that no one from Restlawn contact her father. Ms. Garley made the following note on the inside of Mr. G. Bennett's file:

7/17/07 Do Not Call [G.] Bennett per Daughter Linda Lange  
503-364-9668  
Elaine

(Exs. A4 at 9, A5 at 2, A8 at 3.)

24. On or about October 10, 2007, Ms. Garley made the following note on the inside of Ms. Lange's file:

DO NOT CALL [G.] Bennett!

(Ex. A7 at 2.)

25. On July 5, 2008, Ms. Lange informed Ms. Garley that her father's health was failing. Ms. Garley made notes to that effect in Mr. G. Bennett's file and Ms. Lange's file. (Exs. A5 at 2, A7 at 2.)

26. On July 29, 2008, Ms. Lange informed Ms. Garley that the family had decided not to advance plan for Mr. Bennett. Ms. Garley made the following note on the inside of Mr. Bennett's file:

7/29/8 Everything is done for Cem. Needs funeral.

DO  
NOT  
CALL

(Exs. A4 at 9, A5 at 2, A8 at 2.)

27. On September 30, 2008, Ms. Garley met with D. Bennett, Mr. G. Bennett's son. Ms. Garley assured D. Bennett that there were comments inside his father's file indicating that no one should contact him. (Ex. A4 at 9.)

28. In October 2008, there were four individuals named "David" that worked at Restlawn. David McJannett was employed at Restlawn as the Sales Manager. Mr. McJannett did not call clients. David Bone was employed at Restlawn as the Funeral Director. Mr. Bone did not call clients. David Jones was employed at Restlawn as the grounds person. Mr. Jones did not call clients. Respondent was employed at Restlawn as a family services counselor. Respondent made calls to clients. (Test. of McJannet; test. of Garley; Ex. A8 at 2.)

29. In October 2008, Respondent was the only counselor that used "white cards" to contact clients for potential sales. The white cards were the old filing system. They were stored in Restlawn's garage. The white cards were not updated. Respondent had been told not to use the white cards by other counselors at Restlawn. (Test. of Garley; test. of McJannet; test. of Robinson.)

30. On October 13, 2008, Ms. Garley observed Respondent working off white cards. (Ex. A8 at 3.)

31. On October 13, 2008, a Restlawn representative named "David" called Mr. G. Bennett at his home. D. Bennett was visiting his father when the call came in. D. Bennett got on the phone. David asked to schedule a meeting with G. Bennett for the purpose of updating his file. David stated that G. Bennett had not completed all of his funeral arrangements. D. Bennett told David that he had spoken with Ms. Garley and been assured that his father would not receive any more calls. David excused his behavior and said he was "working from a temporary file." David made the call without checking G. Bennett prearrangement or master file. (Test. of Garley; Exs. A2 at 1, A8 at 2-3.)

32. On October 23, 2008, D. Bennett wrote a letter to Ms. Garley, informing her of the phone call that his father received from a Restlawn representative named "David" and indicating that he would be filing a complaint with the Board. (Ex. A2.)

33. Sometime after October 23, 2008, Ms. Garley made the following note on the inside

of Ms. Lange's file:

DO NOT CALL – Issue  
with family going to Mortuary Board –  
DAP called off white cards.

(Ex. A7 at 2.) DAP stands for David A. Perlman. (Test. of Garley.)

34. On October 24, 2008, D. Bennett wrote a letter to Kevin Mueller, Manager of Restlawn, regarding the “repeated harassing telephone calls” that were made by Restlawn staff to his father, G. Bennett. D. Bennett notified Mr. Mueller that he was filing a complaint with the Board and that the purpose of the complaint was to “establish a record that your organization and its agents continue to contact an individual who does not have the capacity or ability to clearly understand what is being presented to him or to enter into a contract.” (Ex. A3.)

35. On May 27, 2009, Stonemor signed a Consent Order with the Board, stipulating that G. Bennett's prearrangement file contained notes prohibiting contact to discuss or attempt to sell funeral prearrangements; and that on or about October 13, 2008, Respondent failed to inspect the prearrangement file of G. Bennett and called his home to make an appointment to discuss making prearrangements for funeral goods and services.<sup>3</sup> (Ex. A9.)

36. On July 30, 2009, Stonemor implemented a policy that required a tracking sheet be kept in each master file to show the contacts that have been made with the client. (Test. of McJannet; Ex. A35.)

### **Doug W & Linda W incident**

37. In June 2009, Respondent was employed at Restlawn as a family services counselor. (Test. of Perlman.)

38. In June 2009, Tisha Fennell was employed at Restlawn as the administrator. (Test. of Dane; Ex. A22 at 9.)

39. In June 2009, Sandy Dane was employed at Restlawn as the administrative assistant. Ms. Dane assisted Ms. Fennell in processing the sales contracts. (Test. of Dane; Exs. A22 at 9, A25 at 2.)

40. In June 2009, Jim Smith was the grounds superintendent at Restlawn. He was responsible for surveying the land for burials. He was also responsible for determining where benches could be placed in the cemetery, and assigning pin numbers to the bench locations. (Test. of McJannet; test. of Robinson.)

41. If a client wants to place a bench in an area that is not surveyed or pinned, the Preneed salesperson is required to check with Mr. Smith and obtain his approval for the bench

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<sup>3</sup> Prior to signing the consent order, Stonemor confirmed that no one at its corporate offices had made the phone call to G. Bennett. (Ex. A4 at 1-2.)

location. (Test. of Robinson.)

42. On June 18, 2009, Doug and Linda W. met with Respondent to purchase burial rights for themselves. Mr. W.'s mother had recently passed away and been buried in the Prayer Garden at Restlawn. Mr. W. wanted to be buried near his mother. After discussing the matter with Respondent, Doug and Linda W. decided to purchase a granite bench with burial rights in the Prayer Garden across from Doug W.'s mother. Respondent assured Doug W. that the bench could be placed directly across from his mother's gravesite. Respondent showed Doug and Linda W. a map of the Prayer Garden and pointed out a potential space and bench location that he identified as space number "9" on the map.<sup>4</sup> Doug and Linda W. were happy because "9" was Linda W.'s favorite number. Doug and Linda W. told Respondent that they would take space number "9." Respondent then showed Doug and Linda W. several color options for the granite bench, including a color called "emerald green." Doug and Linda W. chose emerald green because Linda W. liked the movie "The Wizard of Oz," and because there were no other emerald green benches at Restlawn. Doug and Linda W. asked to view the location they were purchasing. Respondent took them to the Prayer Garden. Doug W. showed Respondent where his mother was buried and then stood where he wanted the bench placed. Respondent flagged the bench location for Doug and Linda W. Respondent then drafted a sales contract for the purchase of an emerald green park bench with burial rights for two individuals in the Prayer Garden for the price of \$6,115. Respondent left the space number blank on the sales contract that he and Doug and Linda W. signed.<sup>5</sup> Respondent gave Doug W. a copy of the contract. (Test. of Mr. W.; test. of Mrs. W.; Exs. A22 at 1, A23 at 1-2, A25.)

43. Prior to selling a bench location, the Preneed salesperson is required to check Restlawn's log book to determine if the site is available. If a client's name is listed next to the location in the log book, then the site is unavailable. (Test. of Robinson.)

44. If a bench location in Restlawn is sold, the Preneed salesperson is required to identify the bench location on the sales contract and indicate in the log book that the location has been sold. (*Id.*)

45. On June 18, 2009, Respondent turned the Doug and Linda W. contract in for processing. (Test. of Perlman.) When Respondent submitted the Doug and Linda W. contract to Ms. Dane, space number "9" was written on sales contract as the bench location that was sold to Doug and Linda W.. (Test. of Dane; ExA22 at 9.)

46. On June 18, 2009, Ms. Dane processed Doug and Linda W. contract. Ms. Dane assigned a contract number to the purchase, listed the purchase in the cemetery contract book, and identified the location sold as space number "9." Ms. Dane then distributed the copies of the Doug and Linda W. contract. The "white copy" of the contract was placed in the Doug and Linda W.'s master file. The "yellow copy" of the contract was locked in Restlawn's office files.

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<sup>4</sup> The bench locations at Restlawn are listed on a map of the cemetery. (Test. of McJannet.)

<sup>5</sup> Respondent testified that the reason he did not put a space number on the Doug and Linda W. contract was because the location was in the process of being surveyed by Mr. Smith. However, Respondent also testified that he thought he wrote space number "92" on the Doug and Linda W. contract. (Test. of Perlman.)

(Test. of Dane; Ex. A22 at 1, 9.)

47. Space number “9” had been sold to another client in 2003. It was listed in the log book with the client’s name next to the location. (Test. of Dane; Ex. A27 at 1.)

48. Respondent received a commission on the Doug and Linda W. sale. (Test. of Perlman.)

49. Sometime after June 18, 2009, Doug W. met with Respondent two more times to check on his bench location. On the second visit, Doug W. noted that there were two silver pins in the ground to the right of his bench location. Respondent told Doug W. that the two silver pins were not his. On the third visit, Respondent assured Doug W. that he had nothing to worry about. (Test. of Doug W..)

50. On October 13, 2009, Ms. Dane issued a Certificate of Ownership (Certificate) to Doug and Linda W. for space number “9.” Prior to issuing the Certificate, Ms. Dane pulled the Doug and Linda W. master file and reviewed the “white copy” of the contract. The “white copy” had space number “9” written in the space location. (Test. of Dane; Exs. A25 at 2, A27 at 3.)

51. Sometime between October 13, 2009 and June 1, 2010, a Restlawn employee pulled the Doug and Linda W. master file and changed space number “9” on the “white copy” of the Doug and Linda W. contract to space number “92.” Ms. Dane did not change the contract. Ms. Fennell did not change the contract. Mr. McJannet did not change the contract. Respondent was the only person at Restlawn who had a reason to change the contract. (Test. of Dane; test. of McJannet; Exs. A22 at 1, 9, A24 at 1.)

52. In June 2010, Joy Robinson was registered with the Board as a Preneed Salesperson. She was employed at Restlawn as a family services counselor. (Test. of Robinson.)

53. On June 1, 2010, Mr. Doug W. met with Ms. Robinson to review his contract. Ms. Robinson pulled the “white copy” of the Doug and Linda W. contract. The “white copy” had space number “92” written on it as the bench location. The number “9” was written in a different ink than the number “2.” Ms. Robinson did not add the number “2” to the Doug and Linda W. contract. Ms. Robinson took Doug W. to the location for space number “92.” The location was not the spot that Doug W. had chosen with Respondent. Mr. W. became upset. Mr. W. pointed out that he had purchased space number “9” from Respondent, not space number “92.” Ms. Robinson got approval from Mr. Smith to move space number “92” to almost the same spot that Mr. W. had previously chosen as space number “9.”<sup>6</sup> Ms. Robinson told Doug W. that “emerald green” was not a color that was available for purchase at Restlawn. Doug and Linda W. were forced to choose a different color for their granite bench. They initially chose “elite green” and then changed the color to “paradiso.” Ms. Robinson made the changes on the Doug and Linda W. contract. Doug and Linda W. initialed the changes. (Test. of Mr. W.; test. of Robinson; Ex. A24.)

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<sup>6</sup> A bench location that has been pinned but not surveyed can be moved with Mr. Smith’s approval. (Test. of Robinson.)

54. Sometime after June 1, 2010, Ms. Dane issued a Certificate to Doug and Linda W. for space number “92.” (Test. of Dane; Ex. A26.)

55. Oregon Memorials is the company that supplies the granite benches to Restlawn and has since 2008. Restlawn has granite samples from Oregon Memorials in its offices. Oregon Memorials does not have a granite color called “emerald green.” Ms. Robinson looked everywhere at Restlawn and could not locate a granite color called “emerald green.”<sup>7</sup> (Test. of McJannet; test. of Robinson.)

56. Subsequently a complaint was filed with the Board. (Ex. A22.)

57. On July 8, 2010, in response to the complaint, Gail Webb, Regional Administrator of Stonemor, wrote a letter to the Board that stated, in pertinent part:

Re: [Doug and Linda W.] Complaint – Restlawn Memory Gardens  
& Mausoleum

Regarding the above complaint, we provide the following explanation of the events surrounding the space and bench purchase by Douglas and Linda [W.].

A copy of the contract for their purchase is included with this response. When the contract was first negotiated, Mr. Perlman pointed out a particular potential space and bench location and identified it as space #9 on the map. In reality, the space was not #9, but was actually space #92. When the contract was processed and the subsequent Certificate for Interment Rights was issued, it was also mis-identified [sic] as space #9, following the information on the contract. At some point after the Certificate was issued, the error was realized and the space location on the contract was changed to #92. It is not clear who changed the space number, but it appears Mr. Perlman may have changed it when he realized the error. We believe the original space identification was an error by Mr. Perlman because space #92 is a closer available space to their mother’s grave spaces than space #9 appears to be.

As for the color of the bench, it was originally described as “emerald green” on the contract. It appears that this color name was more a descriptive color selected by [Doug and Linda W.], as it does not correspond directly to the name of any color offered by Restlawn.

(Ex. A22 at 1.)

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<sup>7</sup> Ms. Robinson also checked the sample books and granite boards at Restlawn. She could not locate a color called “emerald green.” (Test. of Robinson.)

## **Previous warnings by the Board**

58. On July 29, 2005, the Board issued a Letter of Warning to Respondent in Case No. 05-1020ABCDEF for selling trusted prearrangements while not properly licensed to do so, and failing to notify the Board of a change of address within 30 days of moving. (Ex. A29.)

59. On October 12, 2006, the Board issued a Letter of Warning to Respondent in Case No. 04-1042B that stated, in relevant part:

The Board warns you that it may be considered concealing or misstating a material fact to fail to verify the availability of a gravesite prior to offering the gravesite to a consumer. In addition the Board warns you that it may be considered misstating a material fact by misrepresenting the features of a lawn crypt.

The foregoing practices are violations of OAR 830-030-0100(9) or OAR 830-030-0090(1)(d), which is cause for disciplinary action under ORS 692.180(1)(g).

(Ex. A31.)

60. On June 12, 2008, the Board issued a Letter of Warning to Respondent in Case No. 07-1024D that stated, in pertinent part:

Please be advised that failing to answer truthfully and completely inquires regarding matters within the Board's jurisdiction is a violation of OAR 830-030-0090(2)(d)(A) which is cause for disciplinary action under ORS 692.180(1)(g); and ORS 692.180(1)(b).

Additionally, aiding or abetting preneed salesperson to engage in misrepresentation for any reason is a violation of OAR 830-050-0000(2) which is cause for discipline under ORS 692.180(1)(g). An example would be requiring a client to meet with an employee for any reason, such as updating a file because the facility changed hands, when a personal meeting is not necessary.

(Ex. A32.)

## **CONCLUSIONS OF LAW**

### **Keith and Betty T. (08-1013B)**

1. By overcharging Keith and Betty T. for two opening/closings and by charging a processing fee, Respondent:

a. Engaged in fraudulent or dishonest conduct in violation of ORS 692.180(1)(b) and OAR 830-050-0050(9);

b. Engaged in a sales practice that concealed or misstated material facts in violation of OAR 830-030-0100(9) and made misrepresentations in the conduct of business in violation of ORS 692.180(1)(a).

2. By telling Keith and Betty T. that a change in state law required them to make their purchase, Respondent:

a. Made a statement that was dishonest and fraudulent in violation of ORS 692.180(1)(b);

b. Engaged in a sales practice that concealed or misstated material facts in violation of OAR 830-030-0100(9) and made misrepresentations in the conduct of business in violation of ORS 692.180(1)(a).

3. Respondent failed to respect the dignity and rights of Keith and Betty T., regardless of age, in violation of OAR 830-030-0090(1)(h).

4. Respondent aided, abetted, or assisted Diaz and Stewart in the violation of a law, rule or regulation intended to guide the conduct of the death care industry in violation OAR 830-030-0090(2)(a)(F).

5. Respondent failed to cooperate or answer truthfully and completely the Board's inquiries regarding matters within its jurisdiction in violation of OAR 830-030-0090(2)(d)(B), and gave false or misleading information to an investigator in violation of OAR 830-040-0010(3).

#### **G. Bennett (08-1064B)**

6. By failing to inspect the prearrangement files of G. Bennett and calling his home to review or discuss making prearrangements for funeral goods and services, Respondent:

a. Failed to respect the dignity and rights of Mr. Bennett, regardless of age, in violation of OAR 830-030-0090(1)(h); and

b. Failed to abide by the minimum accepted standards of the death care industry. OAR 830-030-0090(1).

c. Did not abuse Mr. Bennett through intimidation or harassment in violation of OAR 830-030-0090(2)(a)(B).

#### **Doug and Linda W. (08-1013B)**

7. By failing to enter the space number on Doug and Linda W.'s contract, Respondent:

a. Failed to name the place where remains are to be interred in violation of OAR 830-040-0000(6)(d); and

b. Failed to abide by the minimum accepted standards of the death care industry in violation of OAR 830-030-0090(1).

8. By failing to confirm that the space chosen by Doug and Linda W. was available for purchase, Respondent:

a. Engaged in sales practices that concealed or misstated material facts in violation of OAR 830-030-0100(9) and made misrepresentations in the conduct of business in violation of ORS 692.180(1)(a);

b. Failed to abide by the accepted minimum standards of the death care industry in violation of OAR 830-030-0090(1); and

c. Failed to implement agreed-upon arrangements with the clients in violation of OAR 830-030-0090(1)(d).

9. By selling the Doug and Linda W. a space that had already been sold to another client, Respondent caused cemetery records to be inaccurate in violation of OAR 830-040-0000(6).

10. By failing to confirm that “emerald green” was an available color choice for a granite park bench prior to the sale, Respondent:

a. Engaged in sales practices that concealed or misstated material facts in violation of OAR 830-030-0100(9) and made misrepresentations in the conduct of business in violation of ORS 692.180(1)(a);

b. Failed to abide by the accepted minimum standards of the death care industry in violation of OAR 830-030-0090(1); and

c. Failed to implement agreed-upon arrangements with the clients in violation of OAR 830-030-0090(1)(d).

## **Sanction**

11. Respondent’s Preneed Salesperson Registration shall be revoked.

12. Respondent shall pay civil penalties of \$1,000 per violation.

## **OPINION**

The Board bears the burden of establishing by a preponderance of the evidence that the violations alleged in the Notices occurred, and that the proposed penalty is warranted. 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 true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987). As modified below, the Board has met its burden.

### **Keith and Betty T. incident**

#### **1. Whether, by overcharging Keith and Betty T. for two opening/closings and by charging a processing fee, Respondent engaged in fraudulent or dishonest conduct in violation of ORS 692.180(1)(b) and OAR 830-050-0050(9).**

ORS 692.180 provides, in pertinent part:

(1) 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 impose a civil penalty of not more than \$1,000 for each violation, suspend or revoke a license to practice or to operate under this chapter or refuse to grant or renew a license. The causes are as follows:

\*\*\*\*\*

(b) Fraudulent or dishonest conduct, when the conduct 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.

OAR 830-050-0050 is titled “Cause for Disciplinary Action” and provides, in material 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.

\*\*\*\*\*

(9) Fraudulent or dishonest conduct where such conduct bears a

demonstrable relationship to sales and/or business practices.

“Fraudulent” is defined as “engaging in fraud; deceitful.” *Webster’s II New College Dictionary* 454 (3<sup>rd</sup> ed 2005). “Dishonest” is defined as “tending to lie, cheat, or deceive.” *Id.* at 332.

On August 10, 2007, Respondent, Mr. Stewart and Mr. Diaz met with the Keith and Betty T. at their residence to discuss cemetery arrangements. Respondent made a sales presentation to Keith and Betty T. for the purchase of two opening and closing services in the Savior Scatter Garden at Memory Gardens. Respondent took the lead because he was training Mr. Stewart and Mr. Diaz. Respondent told Keith and Betty T. that a change in state law required them to make the purchase. Respondent also confirmed that the price for an opening and closing service was \$495 per person with a processing fee of \$75.

Respondent knew that there was no change in state law that required Keith and Betty T. to make such a purchase. Respondent also knew that Memory Gardens charged \$95 per person for an opening and closing service in its Scatter Gardens, and that a processing fee was not charged for purchases totaling less than \$500.

Despite this knowledge, Respondent allowed Mr. Stewart and Mr. Diaz to draft a sales contract that overcharged Keith and Betty T. in the amount of \$875. Respondent reviewed the contract for errors and then submitted the contract to Ms. Bayne for processing. After being told by Ms. Bayne and Ms. Hare that he had overcharged Keith and Betty T., Respondent refused to change the sale contract to reflect the correct prices that were in effect at that time.

I find, by a preponderance of the evidence that Respondent overcharged Keith and Betty T. \$875 for two opening and closing services and for a processing fee. I further find that Respondent’s conduct with Keith and Betty T. was characterized by fraud and dishonesty. Therefore, Respondent violated ORS 692.180(1)(b) and OAR 830-050-0050(9).

**2. Whether, by overcharging Keith and Betty T. for two opening/closings and by charging a processing fee, Respondent engaged in a sales practice that concealed or misstated material facts in violation of OAR 830-030-0100(9) and made misrepresentations in the conduct of business in violation of ORS 692.180(1)(a).**

ORS 692.180 provides, in pertinent part:

(1) 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 impose a civil penalty of not more than \$1,000 for each violation, suspend or revoke a license to practice or to operate under this chapter or 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 830-030-0100 is titled “Misleading Business Practices” and provides, in relevant part:

The following practices are prohibited and shall be considered misrepresentation in the conduct of doing business:

\*\*\*\*\*

(9) Any sales presentation or practice which conceals or misstates a material fact shall be considered a misrepresentation in the conduct of doing business.

“Misrepresent” means “to give a misleading or incorrect representation of.” *Webster’s* at 718.

As stated above, on August 10, 2007, Respondent made a sales presentation to Keith and Betty T. for the purchase of two opening and closing services in the Savior Scatter Garden at Memory Gardens. Respondent confirmed that the price for an opening and closing service was \$495 per person with a processing fee of \$75, and subsequently approved the Keith and Betty T. contract reflecting those charges.

However, Respondent knew that Memory Gardens charged \$95 per person for an opening and closing service in its Scatter Gardens, and that a processing fee was not charged for purchases totaling less than \$500. As such, Respondent misrepresented Memory Gardens’ prices both in his sales presentation and in the Keith and Betty T. contract. Therefore, Respondent engaged in a sales presentation or practice that concealed or misstated a material fact. Consequently, Respondent made a misrepresentation in the conduct of business. Accordingly, Respondent violated OAR 830-030-0100(9) and ORS 692.180(1)(a).

**3. Whether, by telling Keith and Betty T. that a change in state law required them to make their purchase, Respondent made a statement that was dishonest and fraudulent in violation of ORS 692.180(1)(b).**

ORS 692.180(1) provides:

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 impose a civil penalty of not more than \$1,000 for each violation, suspend or revoke a license to practice or to operate under this chapter or

refuse to grant or renew a license. The causes are as follows:

\*\*\*\*\*

(b) Fraudulent or dishonest conduct, when the conduct 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.

As indicated previously, on August 10, 2007, Respondent made a sales presentation to Keith and Betty T. for the purchase of two opening and closing services in the Savior Scatter Garden at Memory Gardens. Respondent told Keith and Betty T. that a change in state law required them to make the purchase.

However, Respondent knew that there was no change in law that required Keith and Betty T. to make such a purchase. As such, Respondent made a false statement to Keith and Betty T. during his sales presentation. Therefore, Respondent engaged in fraudulent and dishonest conduct in violation of ORS 692.180(1)(b).

**4. Whether, by telling Keith and Betty T. that a change in state law required them to make their purchase, Respondent engaged in a sales practice that concealed or misstated material facts in violation of OAR 830-030-0100(9) and made misrepresentations in the conduct of business in violation of ORS 692.180(1)(a).**

ORS 692.180 provides, in pertinent part:

(1) 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 impose a civil penalty of not more than \$1,000 for each violation, suspend or revoke a license to practice or to operate under this chapter or 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 830-030-0100 provides, in pertinent part:

The following practices are prohibited and shall be considered misrepresentation in the conduct of doing business:

\*\*\*\*\*

(9) Any sales presentation or practice which conceals or misstates a material fact shall be considered a misrepresentation in the conduct of doing business.

As stated above, on August 10, 2007, Respondent made a sales presentation to Keith and Betty T. for the purchase of two opening and closing services in the Savior Scatter Garden at Memory Gardens. Respondent told Keith and Betty T. that a change in state law required them to make the purchase.

However, Respondent knew that there was no change in law that required Keith and Betty T. to make such a purchase. As such, Respondent misstated a material fact during his sales presentation to Keith and Betty T. Therefore, Respondent made a misrepresentation in the conduct of business. Consequently, Respondent violated OAR 830-030-0100(9) and ORS 692.180(1)(a).

**5. Whether Respondent failed to respect the dignity and rights of clients, regardless of age, in violation of OAR 830-030-0090(1)(h).**

OAR 830-030-0090 is titled “Standards of Practice” and provides, in material part:

Every licensee or agent of a licensed facility of the Oregon State Mortuary and Cemetery Board (Board) shall abide by the accepted standards of the Death Care Industry and the minimum standards, including but not limited to the following standards of practice set forth by the Board. Violations of the following may be cause for Board action.

(1) Required conduct related to safety and integrity[.]

\*\*\*\*\*

(h) Respect the dignity and rights of clients, regardless of social or economic status, age, race, religion, sex, sexual preference, national origin, or disability[.]

As stated previously, on August 10, 2007, Respondent made a sales presentation to Keith and Betty T., both elderly individuals, for the purchase of two opening and closing services in the Savior Scatter Garden. Respondent told Keith and Betty T. that a change in state law required them to make the purchase. Respondent also confirmed that the price for an opening and closing service was \$495 per person with a processing fee of \$75.

Respondent knew that there was no change in state law that required Keith and Betty T. to make such a purchase. Respondent also knew that Memory Gardens charged \$95 per person for an opening and closing service in its Scatter Gardens, and that a processing fee was not charged for purchases totaling less than \$500.

Despite this knowledge, Respondent allowed Mr. Stewart and Mr. Diaz to draft a sales contract that overcharged Keith and Betty T. in the amount of \$875. Respondent reviewed the contract for errors and then submitted the contract to Ms. Bayne for processing. After being told by Ms. Bayne and Ms. Hare that he had overcharged Keith and Betty T., Respondent refused to change the sale contract to reflect the correct prices that were in effect at that time.

I find that Respondent engaged in fraudulent and dishonest conduct in order to obtain a sale from Keith and Betty T. I further find that Respondent failed to respect the dignity and rights of Keith T. and Betty T., regardless of age. As such, Respondent violated OAR 830-030-0090(1)(h).

**6. Whether Respondent aided, abetted, or assisted Stewart and Diaz in the violation of a law, rule or regulation intended to guide the conduct of the death care industry in violation of OAR 830-030-0090(2)(a)(F).**

OAR 830-030-0090 provides, in relevant part:

Every licensee or agent of a licensed facility of the Oregon State Mortuary and Cemetery Board (Board) shall abide by the accepted standards of the Death Care Industry and the minimum standards, including but not limited to the following standards of practice set forth by the Board. Violations of the following may be cause for Board action.

\*\*\*\*\*

(2) Conduct unacceptable under the Board's "Standards of Practice."

(a) Conduct generally:

\*\*\*\*\*

(F) Aiding, abetting, or assisting any individual to violate or circumvent any law, rule or regulation intended to guide the conduct of the death care industry.

As indicated above, on August 10, 2007, Respondent made a sales presentation to Keith T. and Betty T. for the purchase of two opening and closing services in the Savior Scatter Garden at Memory Gardens. Respondent was training Mr. Stewart and Mr. Diaz when he made the presentation. Respondent told Keith and Betty T. that a change in state law required them to make the purchase. Respondent also confirmed that the price for an opening and closing service was \$495 per person with a processing fee of \$75.

Respondent knew that there was no change in state law that required Keith and Betty T. to make such a purchase. Respondent also knew that Memory Gardens charged \$95 per person for an opening and closing service in its Scatter Gardens, and that a processing fee was not charged for purchases totaling less than \$500.

Despite this knowledge, Respondent allowed Mr. Stewart and Mr. Diaz to draft a sales contract that overcharged Keith and Betty T. in the amount of \$875. By doing so, Respondent aided, abetted or assisted Mr. Stewart and Mr. Diaz in violating ORS 692.180(1)(a) and (g), and OAR 830-030-0100(9). Accordingly, Respondent violated OAR 830-030-0090(2)(a)(F).

**7. Whether Respondent failed to cooperate or answer truthfully and completely the Board’s inquiries regarding matters within its jurisdiction in violation of OAR 830-030-0090(2)(d)(B), or gave false or misleading information to an investigator in violation of OAR 830-040-0010(3).**

OAR 830-030-0090 provides, in pertinent part:

Every licensee or agent of a licensed facility of the Oregon State Mortuary and Cemetery Board (Board) shall abide by the accepted standards of the Death Care Industry and the minimum standards, including but not limited to the following standards of practice set forth by the Board. Violations of the following may be cause for Board action.

\*\*\*\*\*

(2) Conduct unacceptable under the Board’s “Standards of Practice.”

\*\*\*\*\*

(d) Conduct related to the licensee’s relationship with the Board:

\*\*\*\*\*

(B) Failing to cooperate or answer truthfully and completely inquiries regarding matters within the Board’s jurisdiction.

OAR 830-040-0010(3) provides:

No licensee or employee of a licensed facility shall give false or misleading information to an inspector, investigator or any other member of the Board while investigating a possible violation of law or administrative rules.

On August 10, 2007, Respondent allowed Mr. Stewart and Mr. Diaz to draft a sales contract that overcharged Keith and Betty T. in the amount of \$875. Respondent reviewed the contract for errors and then submitted the contract to Ms. Bayne for processing. After being told by Ms. Bayne and Ms. Hare that he had overcharged Keith and Betty T., Respondent refused to change the sale contract to reflect the correct prices that were in effect at that time.

However, when interviewed by Ms. Creagh, the Board investigator, regarding the Keith T. and Betty T. contract, Respondent claimed that he did not recall the contract. After Ms. Creagh faxed Respondent a copy of Keith and Betty T. contract to review, Respondent stated that it was the first time he had looked at the contract, he was not tied to the contract, he was not responsible for the contract, he did not review the contract, and he did not submit the contract to Ms. Bayne. Respondent also stated that he did not remember discussing any possible overcharges on Keith and Betty T. contract with Ms. Bayne or any other Preened salesperson.

I find by a preponderance of the evidence that Respondent failed to answer truthfully and completely inquiries regarding matters within the Board's jurisdiction. I further find that Respondent gave false or misleading information to the Board investigator. Therefore, Respondent violated OAR 830-030-0090(2)(d)(B) and OAR 830-040-0010(3).

### **Bennett incident**

**8. Whether, by failing to inspect the prearrangement files of G. Bennett and calling his home to review or discuss making prearrangements for funeral goods and services, Respondent failed to respect the dignity and rights of Mr. Bennett, regardless of age, in violation of OAR 830-030-0090(1)(h).**

OAR 830-030-0090 provides, in material part:

Every licensee or agent of a licensed facility of the Oregon State Mortuary and Cemetery Board (Board) shall abide by the accepted standards of the Death Care Industry and the minimum standards, including but not limited to the following standards of practice set forth by the Board. Violations of the following may be cause for Board action.

(1) Required conduct related to safety and integrity;

\*\*\*\*\*

(h) Respect the dignity and rights of clients, regardless of social or economic status, age, race, religion, sex, sexual preference, national origin, or disability[.]

On October 13, 2008, a Restlawn employee named "David" called G. Bennett at his home to discuss funeral arrangements despite the "Do not call" instructions that were written in

Mr. Bennett's master file. At that time, there were four individuals named "David" that worked at Restlawn: Respondent, David McJannet, David Bone, and David Jones. Respondent was the only "David" at Restlawn that made calls to clients to discuss funeral arrangements. In addition, Respondent was the only salesperson that used "white cards" to contact clients for potential sales.

I find, by a preponderance of the evidence that on October 13, 2008, Respondent called G. Bennett at his home to discuss funeral arrangements. I further find that Respondent made the call without checking G. Bennett's master file.

Consequently, by contacting an elderly client who did not wish to be contacted, Respondent failed to respect the dignity and rights of a client, regardless of age. Thus, Respondent violated OAR 830-030-0090(1)(h).

**9. Whether, by failing to inspect the prearrangement files of G. Bennett and calling his home to review or discuss making prearrangements for funeral goods and services, Respondent failed to abide by the minimum accepted standards of the death care industry. OAR 830-030-0090(1).**

OAR 830-030-0090 provides, in pertinent part:

Every licensee or agent of a licensed facility of the Oregon State Mortuary and Cemetery Board (Board) shall abide by the accepted standards of the Death Care Industry and the minimum standards, including but not limited to the following standards of practice set forth by the Board. Violations of the following may be cause for Board action.

(1) Required conduct related to safety and integrity[.]

On at least three occasions during the period of July 2007 through September 2008, Ms. Garley assured G. Bennett's family that he would not be contacted by Restlawn employees to discuss funeral arrangements. Ms. Garley made notes in Mr. Bennett's master file to reflect the client's wishes.

On October 13, 2008, Respondent contacted G. Bennett at his home to discuss his funeral arrangements despite the instructions in Mr. Bennett's master file not to do so. As a Restlawn employee, Respondent was required to abide by and uphold the client's wishes, including the instructions not to contact G. Bennett. Respondent failed to do so.

I find, by a preponderance of the evidence that Respondent engaged in conduct that was lacking in integrity. As such, Respondent failed to abide by the minimum accepted standards of the death care industry. Consequently, Respondent violated OAR 830-030-0090(1).

**10. Whether, by failing to inspect the prearrangement files of G. Bennett and calling his home to review or discuss making prearrangements for funeral goods and**

**services, Respondent abused Mr. Bennett through intimidation or harassment in violation of OAR 830-030-0090(2)(a)(B).**

OAR 830-030-0090 provides, in relevant part:

Every licensee or agent of a licensed facility of the Oregon State Mortuary and Cemetery Board (Board) shall abide by the accepted standards of the Death Care Industry and the minimum standards, including but not limited to the following standards of practice set forth by the Board. Violations of the following may be cause for Board action.

\*\*\*\*\*

(2) Conduct unacceptable under the Board's "Standards of Practice."

(a) Conduct generally:

\*\*\*\*\*

(B) Abusing a client. The definition of abuse includes but is not limited to causing physical or emotional discomfort or intimidating, threatening or harassing a client.

"Harass" is defined as "to annoy or torment repeatedly or persistently. *Webster's* at 516. "Intimidate" is defined as "to make timid; frighten." *Id.* at 595.

On October 13, 2008, Respondent telephoned G. Bennett, an elderly client, at his home to discuss funeral arrangements. Respondent made the call despite explicit instructions on Mr. Bennett's master file not to do so. As such, the evidence clearly establishes that Respondent made an unwanted phone call to G. Bennett.

However, there is no evidence in the record to establish that Respondent repeatedly or persistently annoyed or tormented G. Bennett. Nor is there any evidence to establish that G. Bennett was frightened or intimidated by the single phone call that Respondent made.

Accordingly, the Board failed to meet its burden of proof regarding this matter. Therefore, Respondent did not violate OAR 830-030-0090(2)(a)(B).

**Doug and Linda W. incident**

**11. Whether, by failing to enter the space number on Douglas and Linda W.'s contract, Respondent failed to name the place where remains are to be interred in violation of OAR 830-040-0000(6)(d).**

OAR 830-040-0000 provides, in relevant part:

(6) All licensees, licensed facilities and funeral service practitioners shall keep a detailed, accurate, and permanent record of all transactions that are performed for the care and preparation and final disposition of human remains. The record shall set forth as a minimum:

\*\*\*\*\*

(d) Name of place wherein remains are to be interred or cremated (in cemetery records the exact location of the interment of remains by crypt, niche, or by grave, lot and plot);

On June 18, 2009, Respondent met with Doug and Linda W. to discuss their burial rights. Mr. W. wanted to be buried near his mother in the Prayer Garden. After discussing the matter with Respondent, Doug and Linda W. decided to purchase a granite bench with burial rights in the Prayer Garden across from Doug W.'s mother. Respondent assured Doug W. that the bench could be placed directly across from his mother's gravesite. Respondent showed Doug and Linda W. a map of the Prayer Garden and pointed out a potential space and bench location that he identified as space number "9" on the map. Doug and Linda W. were happy because the number "9" was Linda's W.'s favorite number. Doug and Linda W. told Respondent that they would take space number "9."

Respondent showed Doug and Linda W. several color options for the granite bench, including a color called "emerald green." Doug and Linda W. chose emerald green because Linda W. liked the movie "The Wizard of Oz," and because there were no other emerald green benches at Restlawn.

Respondent took Doug and Linda W. to the Prayer Garden to view the location they were purchasing. While Doug and Linda W. watched, Respondent flagged the bench location. Respondent then drafted a sales contract for the purchase of an emerald green park bench with burial rights for two individuals in the Prayer Garden for the price of \$6,115. Respondent left the space number blank on the sales contract that he and Doug and Linda W. signed. Respondent gave Doug and Linda W. a copy of the contract.

On June 18, 2009, Respondent turned the Doug and Linda W. contract in for processing. When Respondent submitted the contract to Ms. Dane, space number "9" was written on the sales contract as the bench location that was sold to Doug and Linda W.. The reasonable inference is that Respondent wrote space number "9" on the sales contract after he obtained Doug and Linda W. signatures but before he turned the contract in for processing.

I find, by a preponderance of the evidence that Respondent failed to write the space number on the sales contract prior to obtaining Doug and Linda W.' signatures. Thus,

Respondent failed to name the place where remains are to be interred. Therefore, Respondent violated OAR 830-040-0000(6)(d).

**12. Whether, by failing to enter the space number on Doug and Linda W.'s contract, Respondent failed to abide by the minimum accepted standards of the death care industry in violation of OAR 830-030-0090(1).**

OAR 830-030-0090 provides, in material part:

Every licensee or agent of a licensed facility of the Oregon State Mortuary and Cemetery Board (Board) shall abide by the accepted standards of the Death Care Industry and the minimum standards, including but not limited to the following standards of practice set forth by the Board. Violations of the following may be cause for Board action.

(1) Required conduct related to safety and integrity[.]

As indicated above, on June 18, 2009, Respondent sold Doug and Linda W. space number "9." However, Respondent failed to write the space number on the sales contract prior to obtaining Doug and Linda W.'s signatures. As such, Respondent engaged in conduct that was lacking in integrity. Consequently, Respondent violated OAR 830-030-0090(1).

**13. Whether, by failing to confirm that the space chosen by Doug and Linda W. was available for purchase, Respondent engaged in sales practices that concealed or misstated material facts in violation of OAR 830-030-0100(9) and made misrepresentations in the conduct of business in violation of ORS 692.180(1)(a).**

ORS 692.180 provides, in pertinent part:

(1) 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 impose a civil penalty of not more than \$1,000 for each violation, suspend or revoke a license to practice or to operate under this chapter or 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 830-030-0100 provides, in pertinent part:

The following practices are prohibited and shall be considered

misrepresentation in the conduct of doing business:

\*\*\*\*\*

(9) Any sales presentation or practice which conceals or misstates a material fact shall be considered a misrepresentation in the conduct of doing business.

As stated previously, on June 18, 2009, Respondent sold Doug and Linda W. space number "9." However, space number "9" had already been sold to another client in 2003. The clients name was listed next to the bench location in Restlawn's log book. Had Respondent checked the log book prior to the sale, he would have known that space number "9" was not available for purchase. The reasonable inference is that Respondent failed to do so.

I find, by a preponderance of the evidence that Respondent failed to confirm that space number "9" was available for purchase prior to selling that bench location to Doug and Linda W. Thus, Respondent engaged in a sales practice that misstated a material fact. Therefore, Respondent made a misrepresentation in the conduct of business. Accordingly, Respondent violated OAR 830-030-0100(9) and ORS 692.180(1)(a).

**14. Whether, by failing to confirm that the space chosen by Doug and Linda W. was available for purchase, Respondent failed to abide by the accepted minimum standards of the death care industry in violation of OAR 830-030-0090(1).**

OAR 830-030-0090 provides, in material part:

Every licensee or agent of a licensed facility of the Oregon State Mortuary and Cemetery Board (Board) shall abide by the accepted standards of the Death Care Industry and the minimum standards, including but not limited to the following standards of practice set forth by the Board. Violations of the following may be cause for Board action.

(1) Required conduct related to safety and integrity[.]

As indicated above, on June 18, 2009, Respondent sold Doug and Linda W. space number "9." However, space number "9" had already been sold to another client in 2003. In addition, Respondent failed to confirm that space number "9" was available for purchase prior to selling that bench location to Doug and Linda W.

I find that by failing to confirm that the space chosen by Doug and Linda W. was available for purchase, Respondent engaged in conduct that was lacking in integrity. Consequently, Respondent violated OAR 830-030-0090(1).

**15. Whether, by failing to confirm that the space chosen by Doug and Linda W. was available for purchase, Respondent failed to implement agreed-upon arrangements with**

**the clients in violation of OAR 830-030-0090(1)(d).**

OAR 830-030-0090 provides, in relevant part:

Every licensee or agent of a licensed facility of the Oregon State Mortuary and Cemetery Board (Board) shall abide by the accepted standards of the Death Care Industry and the minimum standards, including but not limited to the following standards of practice set forth by the Board. Violations of the following may be cause for Board action.

(1) Required conduct related to safety and integrity[.]

\*\*\*\*\*

(d) Implementation and/or follow through of agreed upon arrangements as designated by the responsible party[.]

As stated previously, on June 18, 2009, Respondent sold Doug and Linda W. space number "9." However, space number "9" had already been sold to another client in 2003. Because space number "9" was not available, Doug and Linda W. were subsequently forced to purchase space number "92."

I find that by failing to confirm that the space chosen by Doug and Linda W. was available for purchase, Respondent failed to implement the agreed-upon arrangements with the clients. Therefore, Respondent violated OAR 830-030-0090(1)(d).

**16. Whether, by selling Doug and Linda W. a space that had already been sold to another client, Respondent caused cemetery records to be inaccurate in violation of OAR 830-040-0000(6).**

OAR 830-040-0000 provides, in material part:

(6) All licensees, licensed facilities and funeral service practitioners shall keep a detailed, accurate, and permanent record of all transactions that are performed for the care and preparation and final disposition of human remains.

As indicated above, on June 18, 2009, Respondent sold Doug and Linda W. space number "9." Ms. Dane processed the Doug and Linda W. contract and listed the purchase in the cemetery's contract book. Ms. Dane also issued a Certificate of Ownership to Doug and Linda W. for that bench location. However, space number "9" had already been sold to another client in 2003 and was listed in Restlawn's log book.

I find that by selling Doug and Linda W. a space that had already been sold to another client, Respondent caused the cemetery records and deeds to be inaccurate. Consequently,

Respondent violated OAR 830-040-0000(6).

**17. Whether, by failing to confirm that “emerald green” was an available color choice for a granite park bench prior to the sale, Respondent engaged in sales practices that concealed or misstated material facts in violation of OAR 830-030-0100(9) and made misrepresentations in the conduct of business in violation of ORS 692.180(1)(a).**

ORS 692.180 provides, in pertinent part:

(1) 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 impose a civil penalty of not more than \$1,000 for each violation, suspend or revoke a license to practice or to operate under this chapter or 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 830-030-0100 provides, in pertinent part:

The following practices are prohibited and shall be considered misrepresentation in the conduct of doing business:

\*\*\*\*\*

(9) Any sales presentation or practice which conceals or misstates a material fact shall be considered a misrepresentation in the conduct of doing business.

On June 18, 2009, Respondent sold Doug and Linda W. an “emerald green” granite bench. However, “emerald green” was not an available color choice at Restlawn for a granite bench. Had Respondent reviewed the granite samples from Oregon Memorials, he would have known that “emerald green” was not available. The reasonable inference is that Respondent failed to do so.

I find, by a preponderance of the evidence that Respondent failed to confirm that “emerald green” was an available color choice for a granite bench prior to the Doug and Linda W. sale. As such, Respondent engaged in a sales practice that misstated material facts. Therefore, Respondent made a misrepresentation in the conduct of business. Accordingly, Respondent violated OAR 830-030-0100(9) and ORS 692.180(1)(a).

**18. Whether, by failing to confirm that “emerald green” was an available color**

**choice for a granite park bench prior to the sale, Respondent failed to abide by the accepted minimum standards of the death care industry in violation of OAR 830-030-0090(1).**

OAR 830-030-0090 provides, in material part:

Every licensee or agent of a licensed facility of the Oregon State Mortuary and Cemetery Board (Board) shall abide by the accepted standards of the Death Care Industry and the minimum standards, including but not limited to the following standards of practice set forth by the Board. Violations of the following may be cause for Board action.

(1) Required conduct related to safety and integrity[.]

As stated above, on June 18, 2009, Respondent sold Doug and Linda W. an “emerald green” granite bench. However, “emerald green” was not an available color choice at Restlawn for a granite bench. In addition, Respondent failed to confirm that the color chosen by Doug and Linda W. was available for purchase.

I find that by failing to confirm that “emerald green” was an available color choice for a granite bench prior to the Doug and Linda W. sale, Respondent engaged in conduct that was lacking in integrity. Consequently, Respondent violated OAR 830-030-0090(1).

**19. Whether, by failing to confirm that “emerald green” was an available color choice for a granite park bench prior to the sale, Respondent failed to implement agreed-upon arrangements with the clients in violation of OAR 830-030-0090(1)(d).**

OAR 830-030-0090 provides, in relevant part:

Every licensee or agent of a licensed facility of the Oregon State Mortuary and Cemetery Board (Board) shall abide by the accepted standards of the Death Care Industry and the minimum standards, including but not limited to the following standards of practice set forth by the Board. Violations of the following may be cause for Board action.

(1) Required conduct related to safety and integrity[.]

\*\*\*\*\*

(d) Implementation and/or follow through of agreed upon arrangements as designated by the responsible party[.]

As indicated previously, on June 18, 2009, Respondent sold Doug and Linda W. an “emerald green” granite bench. However, “emerald green” was not an available color choice at

Restlawn for a granite bench. Because “emerald green” was not available, Doug and Linda W. were subsequently forced to pick a different color for their bench.

I find that by failing to confirm that “emerald green” was an available color choice for a granite bench prior to the Doug and Linda W. sale, Respondent failed to implement the agreed-upon arrangements with the clients. Therefore, Respondent violated OAR 830-030-0090(1)(d).

### **Affirmative Defenses**

Respondent contends that the Board does not have the authority to apply its rules of conduct to a Preneed salesperson and that ORS 692.180 does not apply to the Doug and Linda W. purchase. Respondent, as the proponent of the affirmative defenses, has the burden of proof. ORS 183.450(2). Respondent has failed to meet his burden.

#### **1. No authority to apply rules to a Preneed salesperson**

Respondent first contends that the Board does not have the authority to apply its rules of conduct to a Preneed salesperson because a Preneed salesperson is not a licensee. The Board contends to the contrary. I agree with the Board.

ORS 97.931 is titled “Registration of salesperson for endowment care cemeteries, preconstruction sales and prearrangement sales; rules; background check; civil penalties” and provides, in material part:

**(1) A salesperson may not engage in prearrangement sales made by endowment care cemeteries under ORS 97.929 or in preconstruction sales or prearrangement sales unless the salesperson is registered with the State Mortuary and Cemetery Board** or holds a current funeral service practitioner license, embalmer license, funeral service practitioner apprentice registration or embalmer apprentice registration. The board by rule shall:

- (a) Establish procedures for issuing salesperson registrations under this subsection;
- (b) Establish standards for determining whether a salesperson registration should be issued;
- (c) Set renewal and salesperson registration fees; and
- (d) Require biennial renewal of salesperson registrations.

(2) The board may conduct a background check of any salesperson applying for registration under subsection (1) of this section. The background check may include information solicited from the

Department of State Police. After consideration of information obtained from any background check and any other information in its possession, the board shall determine whether to register the salesperson.

**(3)(a) The board may impose a civil penalty of up to \$1,000 per violation or suspend, revoke or refuse to issue or renew the registration of a salesperson described in subsection (1) of this section upon a determination that the applicant or holder has not complied with the provisions of ORS 97.923 to 97.949 or ORS chapter 692, or any rules adopted thereunder.** When the board proposes to take such action, the person affected by the action shall be accorded notice and an opportunity for hearing as provided by ORS chapter 183. The board shall notify the Director of the Department of Consumer and Business Services of its intent to take action against a salesperson or person acting as a salesperson.

(Emphasis added.)

ORS 183.310 (5) provides:

“License” includes the whole or part of any agency permit, certificate, approval, *registration* or similar form of permission required by law to pursue any commercial activity, trade, occupation or profession.

(Emphasis added.)

*Former* OAR 830-011-0000(26) provides:

“Licensee” Licensee means any funeral establishment, immediate disposition company, funeral service practitioner, embalmer, apprentice, cemetery authority or crematory authority licensed under ORS Chapter 692 and any preneed salesperson registered under ORS 97.931.

Preneed salespersons must be registered with the Board to engage in prearrangement or preconstruction sales. ORS 97.931(1). Registration is a professional license. ORS 183.310(5). A Preneed salesperson registered under ORS 97.931 is a licensee. *Former* OAR 830-011-0000(26). Therefore, Respondent is a licensee.

The Board is required to adopt certain rules for the registration of Preneed salespersons under ORS 97.931(1). The Board also has general rulemaking authority under ORS 692.320 to adopt rules for the protection of the public health, safety and welfare relating to the operation of cemeteries and funeral establishments and any other matters necessary to carry out ORS Chapter

692. ORS 692.320. The Legislature expressly subjects Preneed salespersons to the Board's rules adopted under ORS Chapter 692. ORS 97.931(3). Accordingly, the Board has authority to impose discipline on Respondent for violation of ORS Chapter 692 or any rules adopted thereunder.

Respondent's first affirmative defense fails.

## **2. No application to the Doug and Linda W. purchase**

Respondent next contends that ORS 692.180 does not apply to the Doug and Linda W. purchase because Restlawn is an endowment care cemetery and Doug and Linda W. purchased interment rights and a bench memorial under ORS 97.929. The Board contends that while the agreement itself is not subject to the listed regulations, Respondent must comply with ORS Chapter 692 and any rules adopted thereunder. I agree with the Board.

ORS 97.929 is titled "Exceptions to ORS 97.923 to 97.949" and provides:

(1) The provisions of ORS 97.923 to 97.949, 97.992, 97.994 and 692.180 do not apply to:

(a) Agreements to sell or sales of graves, crypts or niches where such graves, crypts or niches are in existence at the time of the sale or agreement to sell and are located in an endowment care cemetery as defined in ORS 97.810.

(b) Agreements to sell or sales of crypts or niches where such crypts or niches are not in existence at the time of the sale or agreement to sell and are to be located in an endowment care cemetery, provided that:

(A) Thirty-five percent of the sales price of each crypt or niche described in this paragraph is deposited in accordance with the provisions of ORS 97.937; or

(B) Such endowment care cemetery deposits a bond with a corporate surety authorized to do business in this state, or an irrevocable letter of credit issued by an insured institution, as defined in ORS 706.008. The bond or letter of credit shall be in an amount equal to 35 percent of the total sales price of all crypts or niches described in this paragraph that have been sold by the endowment care cemetery and that have not yet been completed.

(c) Agreements to sell or sales of burial vaults or markers

for installation in an endowment care cemetery, provided that:

(A) Sixty-six and two-thirds percent of the sale price of such vaults or markers is deposited in accordance with the provisions of ORS 97.937;

(B) Such endowment care cemetery is at the time of the sale or agreement to sell and for not less than 24 months before such sale or agreement has been in continuous operation as an endowment care cemetery and has assumed the obligation to supply and install the vault or marker and maintain it as part of its endowment care program; and

(C) Such endowment care cemetery deposits with the Director of the Department of Consumer and Business Services:

(i) A bond in a form approved by the director in the amount of \$10,000 issued by a corporate surety authorized to do business in this state; or

(ii) An irrevocable letter of credit in a form approved by the director in the amount of \$10,000 issued by an insured institution, as defined in ORS 706.008.

ORS 97.927 is titled “Applicability of ORS 97.923 to 97.949” and provides, in relevant part:

(1) Except as provided in this section, ORS 97.923 to 97.949, 97.992, 97.994 and 692.180 apply to all certified providers, master trustees and salespersons who sell or offer for sale prearrangement sales contracts or preconstruction sales contracts.

ORS 97.931 provides, in pertinent part:

(1) A salesperson may not engage in prearrangement sales made by endowment care cemeteries under ORS 97.929 or in preconstruction sales or prearrangement sales unless the salesperson is registered with the State Mortuary and Cemetery Board or holds a current funeral service practitioner license, embalmer license, funeral service practitioner apprentice registration or embalmer apprentice registration.

\*\*\*\*\*

(3)(a) The board may impose a civil penalty of up to \$1,000 per violation or suspend, revoke or refuse to issue or renew the registration of a salesperson described in subsection (1) of this section upon a determination that the applicant or holder has not complied with the provisions of ORS 97.923 to 97.949 or ORS chapter 692, or any rules adopted thereunder. When the board proposes to take such action, the person affected by the action shall be accorded notice and an opportunity for hearing as provided by ORS chapter 183. The board shall notify the Director of the Department of Consumer and Business Services of its intent to take action against a salesperson or person acting as a salesperson.

As indicated above, ORS 97.929(1) exempts certain agreements from ORS 692.180.

However, ORS 97.927(1) provides that ORS 97.923 to 97.949 and ORS 692.180 apply to any sales person who engages in prearrangement sale contracts. In addition, ORS 97.931(1) provides that a salesperson may not engage in prearrangement sales made by endowment care cemeteries under ORS 97.929 unless the salesperson is registered with the Board. As a registrant, the salesperson must comply with ORS Chapter 692 and any rules adopted thereunder. ORS 97.931(3). Therefore, Respondent's conduct in the Doug and Linda W. matter is subject to the Board's authority and ORS 692.180.

Respondent's second affirmative defense fails.

## **Sanction**

### **1. Whether Respondent's Preneed Salesperson Registration shall be revoked.**

ORS 692.180 provides, in relevant part:

(1) 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 impose a civil penalty of not more than \$1,000 for each violation, suspend or revoke a license to practice or to operate under this chapter or refuse to grant or renew a license. The causes are as follows:

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

(b) Fraudulent or dishonest conduct, when the conduct 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.

\*\*\*\*\*

(g) Violation of any of the provisions of this chapter or any rules adopted under this chapter.

Pursuant to ORS 692.180, the Board may revoke a license for various causes including misrepresentation in the conduct of business, and fraudulent or dishonest conduct, when the conduct bears a demonstrable relationship to funeral service practice.

In this matter, Respondent engaged in misrepresentation in the conduct of business, and fraudulent and dishonest conduct with Keith T. and Betty T. and Doug W. and Linda W.. In addition, Respondent failed to respect the dignity and rights of Keith T. and Betty T. and Mr. Bennett. Furthermore, Respondent aided and abetted Mr. Stewart and Mr. Diaz in violating the laws and rules that are intended to guide the conduct of the death care industry. Moreover, Respondent failed to cooperate or answer truthfully inquiries within the Board's jurisdiction, and gave false or misleading information to a Board investigator. In addition, Respondent caused cemetery records to be inaccurate. Furthermore, Respondent failed to implement the agreed-upon arrangements of his clients. Finally, Respondent received three previous warnings from the Board for violations of conduct in the death care industry.

Therefore, after review of the entire record, I find that revocation of Respondent's Preneed salesperson registration is appropriate.

Respondent argued that he should receive a reprimand, the same sanction that Mr. Stewart and Mr. Diaz received. However, Respondent committed more violations than Mr. Stewart and Mr. Diaz. Thus, Respondent's argument is unpersuasive.

## **2. Whether Respondent shall pay civil penalties of \$1,000 per violation.**

Pursuant to ORS 692.180, the Board may impose a civil penalty of not more than \$1,000 for each violation. I ALJ find that \$1,000 per violation is appropriate in this case.

Respondent argued that the civil penalty should be waived. However, Respondent's behavior with Keith T. and Betty T., Mr. Bennett, and Doug and Linda W. does not support a waiver. As such, Respondent's argument is unpersuasive.

## **FINAL ORDER**

The State Mortuary and Cemetery Board issues the following order:

1. The Proposed Order in Agency Case Nos. 08-1013B and 08-1064B is adopted as modified.

2. Respondent's Preneed Salesperson Registration is hereby revoked effective the date of this Final Order.

3. Respondent shall pay civil penalties in the amount of \$13,000 within ten days of the effective date of this Final Order.

13 January 2011  
Date

<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.

<b>CERTIFICATE OF MAILING</b>
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On January 13, 2011, I mailed the foregoing Final Order issued on this date in OMCB Case No.'s 08-1013B and 08-1064B

By: First Class Mail

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Department of Consumer & Business Services  
Mary McCarron, Financial Auditor  
350 Winter street NE, Rm 410  
Salem OR 97301-3881

\_\_\_\_ January 13, 2011 \_\_\_\_\_  
Date

\_\_\_\_ <Lynne Nelson> \_\_\_\_\_  
Lynne Nelson, OMCB Compliance Manager