

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN
BEFORE THE FUNERAL DIRECTORS EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
MARK S. PICHELMEYER,	:	LS0609271FDR
RESPONDENT.	:	

Division of Enforcement Case No. 05 FDR 005

The State of Wisconsin, Funeral Directors Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Funeral Directors Examining Board.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 12th day of May, 2009.

Connie Ryan
Member
Funeral Directors Examining Board

STATE OF WISCONSIN
BEFORE THE FUNERAL DIRECTORS EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST
MARK S. PICHELMEYER,
RESPONDENT.

**PROPOSED DECISION
AND ORDER**
Case No. LS-0609271-FDR

DOE Case number 05 FDR 005

PARTIES

The parties in this matter under section 227.44 of the Statutes and section RL 2.037 of the Wisconsin Administrative Code, and for purposes of review under sec. 227.53, Stats. are:

Complainant:

Division of Enforcement
Department of Regulation and Licensing
1400 East Washington Ave.
Madison, WI 53708-8935

Respondent:

Mark S. Pichelmeyer
1302 Sixth Street
Wausau, WI 54403

second address:

Mark S. Pichelmeyer
502 West Beacon Avenue
New London, WI 54961

Disciplinary Authority:

Funeral Directors Examining Board
1400 East Washington Ave.
Madison, WI 53703

PROCEDURAL HISTORY

A. A Complaint and Notice of Hearing in this matter were filed by Attorney Mark Herman of the Department's Division of Enforcement on September 27, 2006. The Notice of Hearing was mailed to Mr. Pichelmeyer at 1302 Sixth Street, Wausau, WI 54403, his last known address on file with the Department for his Funeral Director's License, as well as to 502 West Beacon Avenue, New London, WI 54961, his last known address on file with the Department for his Agent for Burial Agreements License. The Notice of Hearing informed Mr. Pichelmeyer that he was required to file an Answer to the Complaint within 20 days, failing which "you will be found to be in default and a default judgment may be entered against you on the basis of the Complaint and other evidence and the Funeral Directors Examining Board may take disciplinary action against you and impose the costs of the investigation, prosecution and decision of this matter upon you without further notice or hearing."

B. The Complaint and Notice of Hearing that were sent to Mr. Pichelmeyer at 502 West Beacon Avenue, New London, WI 54961 were returned to the Department by the U.S. Postal Service on October 17, 2006 with the notation: "UNCLAIMED". The Complaint and Notice of Hearing that were sent to Mr. Pichelmeyer at 1302 Sixth Street, Wausau, WI 54403 were delivered and signed for by "Pamala Clark" on September 29, 2006.

C. No Answer was filed by Mr. Pichelmeyer.

D. On January 9, 2007, Attorney Herman filed a Motion for Default with supporting affidavit and brief.

E. On September 24, 2007, Attorney Herman filed a Brief Re Substantial Relationship.

FINDINGS OF FACT

1. The Respondent, Mark S. Pichelmeyer, was issued license number 77-4819 as a Funeral Director on September 21, 1988. Mr. Pichelmeyer's address of record associated with that application and license is 1302 Sixth Street, Wausau, WI 54403. The license has been in expired status for over a year.

2. Under the provisions of sec. FD 1.10 (2), Wis. Admin. Code, an expired Funeral Directors license may be renewed within 5 years by the filing of an application for renewal, a renewal fee, and proof of continuing education. This is referred to as a "right to renew" that accompanies the license even when expired.

3. Mr. Pichelmeyer was issued registration number 107-99 as an Agent for Burial Agreements on December 29, 1997. Mr. Pichelmeyer's address of record associated with that application and license is 502 West Beacon Avenue, New London, WI 54961.

4. On August 9, 2004, Mr. Pichelmeyer was convicted in Winnebago County, Wisconsin, of the felony charge of Possession of a Controlled Substance (Cocaine) with Intent to Deliver.

5. On May 11, 2005, Mr. Pichelmeyer was convicted in Winnebago County, Wisconsin, of the felony charge of Possession of a Controlled Substance (Cocaine) 2nd or Subsequent Offense and the misdemeanor charge of Resisting or Obstructing an Officer.

6. Mr. Pichelmeyer was served, under the requirements of sec. RL 2.08 (1), Wis. Admin. Code, with the Complaint and Notice of Hearing in this case on September 27, 2006.

7. Mr. Pichelmeyer did not file an Answer to the Complaint within 20 days of service as required by sec. 2.09, Wis. Admin. Code, and as explained in the Notice of Hearing sent to him.

CONCLUSIONS OF LAW

I. The Funeral Directors Examining Board is the legal authority responsible for issuing licenses to Funeral Directors under sec. 445.03, Stats., and it has jurisdiction over an allegation of unprofessional conduct under sec. 445.13, Stats.

II. The Funeral Directors Examining Board is the legal authority responsible for registering Agents for Burial Agreements under sec. 445.125 (3m) (b) 2. a., Stats., and sec. FD 6.03, Wis. Admin. Code, and it has jurisdiction over an allegation of unprofessional conduct under sec. 445.13, Stats.

III. The Funeral Directors Examining Board has personal jurisdiction over the Respondent, Mark S. Pichelmeyer, based on his holding credentials issued by the Board, and based on notice under sec. 801.04 (2), Stats., and sec. RL 2.08 (1), Wis. Admin. Code. Even though Mr. Pichelmeyer's Funeral Director license is in expired status, he retains a right to renew the license under sec. FD 1.10 (2), Wis. Admin. Code.

IV. Service of the Complaint and Notice of Hearing on Mr. Pichelmeyer was sufficient under sec. 440.11 (2), Stats., and sec. RL 2.08, Wis. Admin. Code.

V. By failing to file an Answer to the Complaint in this matter within 20 days of service, Mr. Pichelmeyer is in default, under sec. RL 2.14, Wis. Admin. Code.

VI. Mr. Pichelmeyer's convictions in Facts 4 and 5 above are violations of state law that are substantially related to the practice of funeral directing; they constitute unprofessional conduct under sec. FD 3.02 (1), Wis. Admin. Code, and the Funeral Directors Examining Board is authorized to impose discipline under sec. 445.13 (1), Stats.

ORDER

THEREFORE, IT IS ORDERED that the Funeral Director's License issued to Mark S. Pichelmeyer is hereby revoked.

IT IS FURTHER ORDERED that Mr. Pichelmeyer's registration as an Agent for Burial Agreements is hereby revoked.

IT IS FURTHER ORDERED that Mark S. Pichelmeyer pay the full costs of the Department's investigation and prosecution of this matter. Payment shall be made by certified check or money order and sent to

Department Monitor

Department of Regulation and Licensing,

PO Box 8935, Madison, WI 53708-8935.

Fax (608) 266-2264

Tel. (608) 267-3817.

ANALYSIS

This is a class 2 proceeding under the authority of ch. 227, Stats. and ch. RL 2, Wis. Admin. Code. The Division of Enforcement in the Department of Regulation and Licensing filed a Complaint alleging that Mr. Pichelmeyer's felony and misdemeanor convictions constitute unprofessional conduct. The Notice of Hearing stated that Mr. Pichelmeyer could be found in default if he did not respond to the complaint by filing an Answer.

One of the mailings sent to Mr. Pichelmeyer was returned to the Department and the other was received and signed for by an unidentified person. It is not known whether Mr. Pichelmeyer received actual notice of the disciplinary complaint against him. Whether he did or not, the Administrative Rules contain provisions to permit the Funeral Directors Examining Board and other credentialing authorities to act to protect the public even in the face of a respondent's non-response, or even disappearance. Service is considered legally adequate if mailed to the last-known address.

Mr. Pichelmeyer did not file an Answer to the Complaint, but again, the rules permit credentialing authorities to act to protect the public even in the face of a respondent's non-response. When a person fails to file an answer or to appear at a hearing, the person may be found to be "in default" and the Board "may make findings and enter an order on the basis of the complaint and other evidence." This is similar to the standard in civil court cases in which allegations in a complaint that are not denied are deemed admitted, sec. 802.02 (4), Stats., and "if no issue of law or fact has been joined" a default judgment may be entered, sec. 806.02 (1), Stats. Section 806.02, Stats., requires a respondent to be served with any motion for judgment in a default situation, and this was done by Mr. Herman by sending his March 12, 2007 motion to Mr. Pichelmeyer at his Wausau address.

The default rule contains a safeguard that is especially important in a case like this where the respondent has presented neither his side of the case nor any facts or circumstances to be considered in his defense. The rule says, "The disciplinary authority may, for good cause, relieve the respondent from the effect of such findings and permit the respondent to answer and defend at any time before the disciplinary authority enters an order or within a reasonable time thereafter." There is no definition of what constitutes "a reasonable time", but if Mr. Pichelmeyer contacts the Department or the Board at any time with an explanation for his non-responsiveness, the Board may then decide whether to consider his communication. The Board will then have the option of re-opening this matter and allowing Mr. Pichelmeyer to defend himself against the Complaint. And after considering all the evidence presented, the Board would have the option of revising or modifying its order.

Based on all the procedural steps explained above, the allegations in the Complaint are deemed admitted by Mr. Pichelmeyer and therefore proven. The remaining question is whether his convictions are violations of laws substantially related to the practice of funeral directing. The meaning of "substantially related" has been defined in statutes and developed in case law. The phrase represents a balance between two goals: 1. to prevent employment discrimination against a person simply because he or she has been convicted of a crime, and 2. to protect the public from persons who violate the law, and especially in cases before this Department, from licensees who violate the law. Convictions for drug-related offenses are often difficult to classify. On the one hand, Mr. Pichelmeyer's drug use was not tied directly to his practice as a funeral director; on the other, his arrests and convictions, especially the fact that he was arrested and convicted a second time, demonstrate a troubling disregard for the law that may or may not extend to other activities. For example, though not proven or even suggested in this case, drug-related activity is not uncommonly linked to financial indiscretions.

The practice of funeral directing is defined in sec. 445.01 (5), Stats., as embalming or otherwise preparing for the burial or disposal of dead human bodies, or directing and supervising the burial or disposal of dead human bodies. However, this definition lists only those activities that are unique to the practice of funeral directing. The practice goes well beyond the definition, to encompass financial and fiduciary relationships, and personal interactions with individuals and families. If one were to be limited by the definition in sec. 445.01 (5), then even embezzlement of client funds would not be substantially related. However, the responsible practice of funeral directing involves compliance with many different areas of law. For this reason, the misdemeanor conviction for Resisting or Obstructing an Officer carries almost as much weight as the felony drug convictions, as it demonstrates a disregard for legitimate authority that cannot be overlooked. This concern is reinforced by his attitude toward the authority of the Board and his disregard for his professional credential. A Conclusion of Law is made that the convictions are violations of state law that are substantially related to the practice of funeral directing, and discipline is appropriate. Had Mr. Pichelmeyer participated in a hearing on the Complaint, and especially if he had demonstrated remorse or rehabilitation, the recommended outcome here might have been different.

Three factors make revocation the most appropriate discipline in this case:

1. the seriousness of the offenses, 2. Mr. Pichelmeyer's silence, and 3. his apparent lack of interest in his Funeral Director's license, as shown by his letting it go into expired status.

Costs should also be imposed. Under sec. 440.22, Stats., when discipline is imposed on a credential-holder, the Department has the authority to impose all or part of the costs of a proceeding on the credential-holder. The Board is directed to exercise discretion in its imposition of costs by considering certain factors, including the number of counts charged, contested, and proven; the nature of the misconduct; the level of discipline; the respondent's cooperation with the disciplinary process; prior discipline; and other relevant circumstances. In this case, the misconduct is serious, the level of discipline is high, and the respondent did not cooperate with the disciplinary process (through a total lack of communication). The record contains no ameliorating circumstances. Given this balance of positive and negative factors, the proposed order includes a provision that Mr. Pichelmeyer pay the Department's full costs of investigating and prosecuting this matter.

APPLICABLE STATUTES AND RULES

Statutes

445.13 Investigations; hearing; revocation of licenses.

(1) Subject to the rules promulgated under s. 440.03 (1), the examining board may make investigations, subpoena witnesses, conduct hearings, limit, suspend or revoke a license of a funeral director, a certificate of registration of an apprentice or a permit of an operator of a funeral establishment and reprimand a funeral director, apprentice or operator of a funeral establishment for any violation of 15 U.S.C. § 45 and 15 U.S.C. § 57, of this chapter or of any rule of the department of health and family services or the examining board, for unprofessional conduct, including misrepresentation or fraud in obtaining the license, permit or certificate of registration, or for any violation of this chapter or any rule of the examining board by an agent authorized by the funeral director or operator of the funeral establishment under s. 445.125 (3m) (b) 2. a.

440.22 Assessment of costs.

(2) In any disciplinary proceeding against a holder of a credential in which the department or an examining board, affiliated credentialing board or board in the department orders suspension, limitation or revocation of the credential or reprimands the holder, the department, examining board, affiliated credentialing board or board may, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder.

Wisconsin Administrative Code

FD 1.10 Requirements for renewal; restoration of licenses.

(2) A licensee who fails to meet the requirements of sub. (1) by the renewal date shall cease and desist from practicing as a funeral director. A licensee who fails to meet the requirements of sub. (1) and who applies for renewal less than 5 years after the expiration date of his or her license may renew by furnishing the following to the board:

- (a) An application for renewal on a form provided by the department.
- (b) Evidence that the licensee has completed at least 15 hours of continuing education during the previous 2 year licensure period as required under s. 445.06, Stats., and s. FD 4.03.
- (c) The renewal fee specified in s. 440.08 (2) (a) and (3) (a), Stats.

FD 3.02 Unprofessional conduct

Any occurrence of the following shall constitute unprofessional conduct by a licensed funeral director, registered apprentice funeral director or owner of a funeral establishment:

- (1) Violating or aiding and abetting a violation of any state or federal law substantially related to the practice of funeral directing.

RL 2.08 Service and filing of complaint, notice of hearing and other papers.

(1) The complaint, notice of hearing, all orders and other papers required to be served on a respondent may be served by mailing a copy of the paper to the respondent at the last known address of the respondent or by any procedure described in s. 801.14 (2), Stats. Service by mail is complete upon mailing.

RL 2.09 Answer.

(4) An answer to a complaint shall be filed within 20 days from the date of service of the complaint.

RL 2.14 Default.

If the respondent fails to answer as required by s. RL 2.09 or fails to appear at the hearing at the time fixed therefor, the respondent is in default and the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence. The disciplinary authority may, for good cause, relieve the respondent from the effect of such findings and permit the respondent to answer and defend at any time before the disciplinary authority enters an order or within a reasonable time thereafter.

Dated and signed: February 13, 2009

Nick Schweitzer
Administrative Law Judge
Department of Regulation and Licensing