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FILE COPY

STATE OF WISCONSIN
BEFORE THE FUNERAL DIRECTORS EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
LOWELL E. STUESSY,	:	LS9704181FDR
RESPONDENT.	:	

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 1ST day of OCTOBER 1997.

D. Bruce Carlson/A.J.H.
A Member of the Board

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STATE OF WISCONSIN
BEFORE THE FUNERAL DIRECTORS EXAMINING BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

LOWELL E. STUESSY

LS9704181FDR

Respondent

PROPOSED DECISION

The parties to this proceeding for the purposes of Wis. Stats. sec. 227.53, Stats., are:

Lowell E. Steussy
921 15th Avenue
Monroe, WI 53566

State of Wisconsin Funeral Directors Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

State of Wisconsin Dept. of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

This matter was commenced by the filing of a formal Complaint on April 18, 1997. Prior to the scheduled hearing, the parties entered into a Stipulation dated February 3, 1997, incorporating Findings of Fact and Conclusions of Law and a disciplinary Order (Exh. 1). The Order provided for revocation of both respondent's license to practice as a funeral director and the establishment licenses of the Steussy Funeral homes in Monroc and Monticello, Wisconsin. The Stipulated Order also contained the following two provisions:

20. During the period of Respondent Steussy's revocation, he shall not participate either directly or indirectly in the ownership, operation or management of any Wisconsin licensed funeral establishment -- including marital property; and generally, shall not be on the premises of any previously owned Steussy funeral establishment except for a short duration (one hour or less), and then not for a purpose including funeral directing or arrangement; and he shall not be on the premises except in a capacity

as an ordained minister pursuant to family's request to present eulogies or conduct religious services only.

a. Respondent may do cremations only so long as he does not do anything that is defined as funeral directing, or funeral arrangement pursuant to sec 445.01(5), Wis. Stats., and secs. FD 2.02(1-2), Wis. Admin. Code.

The Stipulation was presented to the Funeral Directors Examining Board on two occasions, and it was rejected both times. The board communicated to the parties that the Stipulation was satisfactory with the exception of the two provisions set forth above. The board's apparent position was that respondent should not be permitted to be present in any funeral home previously owned by him for any reason, and should not be permitted to own or manage the crematory adjacent to the Steussy Funeral Home in Monroe. Respondent would not agree to these prohibitions, and the matter was remanded to the administrative law judge for further proceedings.

The hearing was held on June 4, 1997. Appearing were Gregory E. Knoke, attorney for respondent, and Henry E. Sanders, attorney for the Division of Enforcement. At hearing, the parties presented a second Stipulation similar to the one presented to the board. This Stipulation was not executed, but the parties stipulated at hearing to the Findings of Fact and Conclusions of Law set forth therein. The parties also stipulated to the disciplinary Order set forth in the unexecuted Stipulation with two exceptions. Paragraph 22 of that Stipulation states as follows:

22. During the period of Respondent Stuessy's revocation, he shall not participate either directly or indirectly in the ownership, operation or management of any Wisconsin licensed funeral establishment -- including marital property; and generally, shall not be on the premises of any previously owned Stuessy funeral establishment.

Respondent did not stipulate to the inclusion of that provision in the ALJ's Proposed Decision. Also remaining in contention was the question whether respondent would (or could) be prohibited from owning and managing the crematory adjacent to the Monroe funeral home.

At hearing, oral arguments were had as to the remaining two issues, and it was agreed that the Case Advisor, D. Bruce Carlson, who was unable to be present because of a scheduling conflict, could file his written argument setting forth the board's position on these issues. Mr. Carlson filed his argument on or about June 13, 1997, and Mr. Knoke responded on June 17, 1997.

Based upon the entire record in this case, the ALJ recommends that the Funeral Directors Examining Board adopt as its final decision in the matter, the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1 Respondent Lowell E. Stuessy, residing at 909 15th Avenue, Monroe, Wisconsin 53566, was at all times material to the complaint herein licensed as a funeral director by license # 3465, granted on July 15, 1957.

2. Respondent Stuessy Funeral Home, Inc., d/b/a Stuessy Funeral Home, at 921 15th Avenue, Monroe, Wisconsin, was at all times material to the complaint herein licensed as a funeral establishment by License # 484. Respondent Stuessy was at all times material to the complaint herein the owner and funeral director in charge of the Monroe establishment.

3. Respondent Stuessy Funeral Home, Inc., d/b/a Stuessy Funeral Home, at 512 E. Lake Street, Monticello, Wisconsin, was at all times material to the complaint herein licensed as a funeral establishment by license # 1893, issued on June 26, 1991. At all times material to the complaint herein, Respondent Stuessy was the owner and funeral director in charge of the Monticello establishment.

4. Regarding informal complaint #96 FDR 001, during the 1995 calendar year, Respondent Stuessy received from seven consumers prepaid trust fees for burial lots purchased, and was to have paid the fees to Cadiz township for burials in the Cadiz cemetery.

5. Cadiz cemetery buried the consumers and the township billed Respondent Stuessy for the prepaid lots after the burials. Respondent promised payment and initially tendered one check to the Township which was dishonored for insufficient funds. Payment was delayed but full payment was eventually made. Between burial and payment, Respondent used the funds paid to him for the funerals and burials for his own personal use.

6. Regarding informal complaint #96 FDR 005, the daughter of a consumer alleged that the consumer established a \$9,263.40 prearranged funeral trust with Respondent Stuessy. At the time of the consumer's death on about July 25, 1995, and after all of the fees for the funeral goods and services were paid to Respondent Stuessy, a refund in the amount of \$3,101.40 was owed the estate.

7. It was further alleged that upon being contacted by the daughter of the consumer on July 29, 1995, Respondent Stuessy assured her of the refund within one week. After being contacted by the consumer several times, and after falsely promising to refund the money, Respondent Stuessy ultimately admitted to the daughter that he had used the prepaid trust monies for personal expenses. At one point, Respondent tendered a check to the daughter which was dishonored for insufficient funds. The daughter has subsequently been paid all of the prepaid trust money owed the deceased's estate by Respondent Stuessy, with interest.

8. The daughter of the consumer in complaint #96 FDR 005 filed the same complaint with the Green County District Attorney's office that she had filed with the Department of Regulation and Licensing. The Green County District Attorney's office and the

Department undertook joint investigations into the matters, and personally confronted Respondent Stuessy on about February 14, 1996, regarding the allegations.

9. Respondent readily admitted the violations relating to the two complaints and upon further questioning, admitted that there were other trust situations involved, totaling approximately \$350,000.00, in which he had never set up trusts; and that he had maintained those files separate from files in which he had actually set up trusts.

10. Respondent admitted further that he had used the trust monies for the daily operation of the funeral homes and for other personal expenses; and he provided to the investigators four typed pages listing names, dates, money amounts and checkbook numbers of trusts involved, and the amounts converted to his personal use.

11. The list consists of about 90 names (ultimately adjusted to about 95 names), and involves approximately \$352,992.00, with the trust conversions commencing in about 1989 and extending through February 9, 1996. Respondent converted the trust funds received from consumers in several ways; including never setting up trusts, setting up trusts in amounts less than contracted for, and making agreements to "borrow" trust monies from consumers with promises to repay the consumers.

12. The Green County District Attorney's office interviewed 18 affected consumers, documented the violations, and drafted or caused to be drafted an eighteen (18) count criminal complaint and summons, Case No. 96-CF-82, dated June 21, 1996, and filed June 26, 1996, in Circuit Court, Green County, Wisconsin.

13. Respondent Stuessy was charged with 17 Class C felonies (Counts 1-2, 4-18), and one Class A misdemeanor (Count 3). The 17 felony counts accused Respondent as follows:

"Feloniously and intentionally, by virtue of his business, having obtained custody of monies of others, intentionally transferred and used such monies without the owners' consents, contrary to his authority, with intent to convert the same to his own use or the use of another. . . , all contrary to secs. 943.20(1)(b) and (3)(c), Wis. Stats

14. Pursuant to negotiations between Respondent, his attorney, and the Green County District Attorney's office, Respondent appeared on February 27, 1997, in case #96-CF-82, in the Green County Circuit Court, the Honorable Judge Russell J. Mittelstadt presiding, and pleaded No Contest to 17 violations of secs. 943.20(1)(b) and (3)(c), Wis. Stats., Class C felonies, and to one violation of secs. 943.20(1)(b), and (3)(a), Wis. Stats., a Class A misdemeanor. Respondent was convicted of the enumerated violations on that date.

CONCLUSIONS OF LAW

1. The Funeral Directors Examining Board has jurisdiction in this matter pursuant to sec. 445.13, Stats.

2. In having engaged in the conduct set forth above, Respondent has taken undue advantage of patrons, committed fraudulent acts in the conduct of business, and done other acts not in accord with proper business practice as applied to the business or profession of funeral directing and embalming., in violation sec 445.12(4), Stats.; has failed to retain all payments made under prepayment funeral agreements as trust funds, including interest and dividends, if any, until occurrence of the death of the potential decedent, in violation of sec. 455.125(1)(a), Stats.; has failed to deposit all trust funds with a bank or trust company within the state whose deposits are insured by the federal deposit insurance corporation, or in a savings and loan association or savings bank within the state whose deposits are insured by the federal deposit insurance corporation, or invested in a credit union within the state whose savings are insured by the national board, as defined in s. 186.01 (3m), or by the Wisconsin credit union savings insurance corporation, in violation of sec. 445.125(2), Stats.; has violated state or federal law substantially related to the practice of funeral directing; in violation of sec. FD 3.02(1), Code; has given misleading or deceptive information to families or persons involved in the arranging of funerals of final disposition, in violation of sec. FD 3.02(3), Code; has performed the services of funeral directing in a manner which falls below minimal standards established by statute, rule or practice in the profession, in violation of sec. FD 3.02(6), Code; has engaged in misleading or deceptive conduct in the conduct of business or the profession, in violation of sec. FD 3.02(9), Code; and has failed to provide to the depositor, within 15 working days of receipt of a payment, written confirmation of receipt and deposit of payment made pursuant to a funeral trust agreement in accordance with s. 445.125 (2), Stats., including the name of the bank, trust company, savings and loan association or credit union, the account number, the date of deposit, and a copy of the deposit slip or other documentary evidence of a payment deposited, in violation of sec. FD 3.02(11), Code.

3. Pursuant to sec. 445.105(4), Stats., violation by Respondent Stuessy of the statutes and rules governing funeral directors is cause for disciplinary action against Stuessy Funeral Home, Inc., d/b/a Stuessy Funeral Home, Monroe, Wisconsin, and Stuessy Funeral Home, Inc., d/b/a Stuessy Funeral Home, Monticello, Wisconsin.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license as a funeral director of Lowell E. Stuessy be, and hereby is, revoked, effective 10 days following the Final Decision and Order of the Funeral Directors Examining Board adopting the terms of this Proposed Decision. On or before the effective date of the revocation, Respondent Stuessy shall surrender to the Funeral Directors Examining Board, c/o Michelle Neverman, Division of Enforcement, P.O. Box 8935, Madison, Wisconsin 53708, all funeral director's license certificates or other indicia of licensure previously issued to him.

IT IS FURTHER ORDERED that as of the effective date of the Board's Order, Respondent Stuessy shall cease and desist from any and all conduct, activity, and services of a funeral director as defined in sec. 445.01(5), Stats. and shall not perform any "funeral arrangements" or "funeral services" as defined in secs. FD 2.02(1)-(2), Code, and 42 Fed. Reg., sec. 453.1(k).

IT IS FURTHER ORDERED that five years following the revocation of the license, Respondent Stuessy may petition the Board for reinstatement of the license. Respondent's petition, if any, must demonstrate to the satisfaction of the board that Respondent is rehabilitated and is otherwise qualified for relicensure. The board shall have sole discretion to determine whether the petition shall be granted.

IT IS FURTHER ORDERED that as of the effective date of the Board's Order, Respondent Stuessy shall not participate either directly or indirectly in the ownership, operation, or management of any Wisconsin licensed funeral establishment, including marital property. On or before the effective date of the Board's Order, Respondent Stuessy shall submit evidence satisfactory to the board that he has relinquished management of, and divested himself of any financial benefit from, the two funeral establishments in Monroe and Monticello. Further, Respondent Stuessy shall submit evidence satisfactory to the board that he and his wife have relinquished and divested themselves of ownership of the real estate and personal property assets of the two establishments, either by transfer of ownership to Family Service Group of Wisconsin, LLC, to an irrevocable trust created for the benefit of Respondent Stuessy's creditors, or to a purchaser following a mortgage foreclosure sheriff's sale.

IT IS FURTHER ORDERED that as of the effective date of the Board's Order, Respondent Stuessy shall not be on the premises of any previously owned Stuessy funeral establishment, except that he may be on the premises of such funeral establishments for the exclusive purposes of attending funerals as a mourner and of carrying out pastoral duties as an ordained minister when requested to do so by the family of a decedent.

IT IS FURTHER ORDERED that the establishment permits by which Respondent is authorized to manage and operate his funeral establishments in Monroe and Monticello are revoked. On or before the effective date of the Board's Final Decision and Order adopting the terms of this Proposed Decision, the funeral establishment permits shall be submitted to Michelle Neverman, Division of Enforcement, P.O. Box 8935, Madison, Wisconsin 53708.

OPINION

As stated above, the parties stipulated at hearing to the Findings of Fact and Conclusions of Law set forth in the parties' unexecuted Stipulation, which appears in the record as Exhibit 3. Those Findings and Conclusions are set forth above in somewhat reworded form. The terms of the disciplinary order were also largely agreed to by the parties. The Order set forth herein attempts to retain the substantive terms of that agreement in a format more consistent with conventional board orders. The one variation from the terms of the Proposed Stipulation is the provision that permits the respondent to be present on the premises of the two funeral establishments previously owned by him as a mourner or to carry out pastoral duties as an ordained minister when requested to do so by the family of a decedent. The proposed order also does not contain the provision sought by the board which would prohibit Stuessy from owning or managing the crematory located adjacent to the Monroe funeral establishment. I find that the exception for activities as a funeral attendee or a minister, and the omission of any prohibition relating to ownership and management of the crematory, are necessary for the following reasons.

At the outset, it may be said that respondent could, pursuant to a stipulated resolution of this matter, agree to both surrender his license and to refrain from activities not falling directly under the board's jurisdiction. In previous actions by the Medical Examining Board, for example, licensees have agreed to surrender their licenses and further agreed not to seek reinstatement of their license in this state or to seek initial licensure in any other state. Obviously, the medical board in this state has no jurisdiction over a former licensee's application for a license to practice medicine in another licensing jurisdiction (though the existence of the Wisconsin order would no doubt have ramifications in terms of whether another state would grant a license). Similarly, prior to the time that those practicing psychology were required to be so licensed, at least one licensed psychologist had agreed as a condition of a stipulated resolution of a disciplinary matter that he would not provide services constituting the practice of psychology, even though no license to do so was at that time required. The board thus had no jurisdiction to prevent that practice after the license was surrendered (though to do so would have obvious ramifications if the former licensee ever sought reinstatement).

So here, the respondent could agree as a condition of the stipulated resolution of this matter that he would divest himself of the crematory adjacent to his former funeral home, and would refrain from providing ministerial services within that funeral home. He has not so agreed, however, but has agreed only to the revocation of his license and to divest himself of the funeral homes. The only question to be resolved is thus whether after surrendering his license, respondent may be ordered as well to surrender his right to own and operate the crematory and to conduct pastoral services in his former funeral homes.

First, it may be said that it makes no difference whether the funeral home is one of those formerly owned by respondent or any other; and it makes no difference whether the crematory is the one owned and operated by the respondent or any other. If after loss of his license respondent may be barred from ministering in the funeral home or operating the crematorium, it is because the board retains jurisdiction to prohibit him from engaging in those activities, and if the board retains such jurisdiction, it is because a person engaged in those activities is engaged in the practice of a funeral director. Stated in the form of a question, does the Funeral Directors Examining Board have authority to prohibit an unlicensed ordained minister from conducting pastoral services in a funeral home, or to prohibit an unlicensed person from owning and operating a crematory? The answer is that it does not.

As stated in *State ex rel Farrell v. Schubert* (1971) 52 Wis. 2d 351, "Administrative agencies have only such powers as are expressly granted or necessarily implied, and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. . . . [A]ny reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority." *Farrell*, supra, at 357. The question therefore becomes whether the language of ch. 455, Stats., expressly provides or necessarily implies that the board has the authority in question.

Sec. 455.04(2), Stats., describes the general authority of the board as follows:

445.03 Powers of examining board. (1) The examining board shall:

- (a) Enforce this chapter
- (b) Make and enforce rules necessary for the administration of subch. I of ch 157.

(2) The examining board may:

(a) Make and enforce rules not inconsistent with this chapter establishing professional and business ethics for the profession of funeral directors and for the general conduct of the business of funeral directing, and for the examination and licensing of funeral directors and the registration of apprentices.

(b) Grant licenses to funeral directors, certificates of registration to apprentices, and permits to operators of funeral establishments.

(c) Conduct a school of instruction to apprise funeral directors of the most recent scientific knowledge and developments affecting their profession. Qualified lecturers and demonstrators shall be employed for this purpose, who may be selected without regard to the civil service law.

(d) Make and determine reciprocal agreements with other states.

This grant of authority to enforce ch. 445, Stats., authorizes the board to enforce sec. 445.04(2), Stats., which states in part that "No person may engage in the business of a funeral director, or make a representation as engaged in such business, in whole or in part, unless first licensed as a funeral director by the examining board." "Funeral Director," in turn is defined at sec. 445.01(5), Stats., as follows:

445.01 Definitions. As used in this chapter:

* * * *

(5) A "funeral director" means any of the following:

(a) A person engaged in or conducting, or holding himself or herself out, in whole or in part, as being engaged in embalming or otherwise preparing for the burial or disposal, or directing and supervising the burial or disposal, of dead human bodies.

(c) A person who, in connection with his or her name or funeral establishment, uses the words, "funeral director", "mortician" or any other title implying that he or she is engaged as a funeral director as defined in this subsection.

The board would argue that to operate a crematorium is "directing and supervising the burial or disposal of dead human bodies." D. Bruce Carlson, a member of the Funeral Directors Examining Board, and the board advisor on this case, in a letter to the prosecutor, states:¹

¹ Mr. Carlson was originally scheduled to testify at the hearing for the purpose of establishing the board's position relative to these issues. That rather unusual procedure, to which the respondent did not object, did not occur, apparently as a result of scheduling conflicts. The parties therefore stipulated at hearing to holding the record open for the purpose of permitting Mr. Carlson to present the board's position in writing, and to permit respondent's counsel to respond thereto. Mr. Carlson's argument was submitted by letter dated June 13, 1997, addressed to Mr. Sanders, with instructions to forward the letter to the ALJ. Mr. Knoke responded by letter dated June 16, 1997.

I am also aware of the fact that cremations are often a typical duty of a funeral director. Based on the above statutes, there is a reasonable argument that the activities related to the cremation of human bodies are a type of "disposal" within the meaning of the language defining "funeral director" in sec. 445.01(5)(a), Wis. Stats., and therefore cremations are within the control of the Funeral Directors Examining Board. In short, cremations constitute the disposal of human bodies and the disposal of human bodies falls within the definition of a funeral director.

Mr. Knoke responds,

. . . [T]he crematory business is separate and distinct from the funeral business. The funeral director engages the crematory operator in nearly 100% of the situations. This is no different than funeral directors contracting for other services such as purchase, setting and engraving of markers; purchase of vaults; purchase of caskets, etc. If Mr. Carlson's logic is extended, the Funeral Directors Examining Board would have jurisdiction over vault companies, monument companies and cemeteries.

There is nothing in this record that would demonstrate that Mr. Knoke is correct when he says that "the funeral director engages the crematory operator in nearly 100% of the situations." Nonetheless, absent any language in the board's statute which would specifically provide to the board jurisdiction over the operation of crematoria or from which such control must be necessarily implied, it must be concluded that the broad language defining the business of a funeral director as one who directs or supervises the disposal of dead human bodies, without any reference whatever to crematoria or cremation, does not confer upon the board authority to regulate the ownership or management of crematoria.

Such a conclusion is supported by other provisions of the funeral directors statute. Under 445.04(1), Stats., "the business of a funeral director must be conducted in a funeral establishment equipped for the care and preparation for burial or transportation of dead human bodies." "Funeral establishment" is defined at sec. 445.01(6), Stats., as follows:

(6) "Funeral establishment" means any building or part of a building used and held out to the public as being used in the care and preparation for burial or transportation of dead human bodies or for holding or conducting of funeral services. "Funeral establishment" does not include a building or part of a building that is erected under s. 157.11 (1) for holding or conducting funeral services if dead human bodies are not cared for or prepared for burial or transportation in the building. A funeral establishment must contain a preparation room equipped with tile, cement or composition floor, necessary drainage and ventilation and contain necessary instruments and supplies for the preparation and embalming of dead human bodies for burial, transportation or other disposition.

Under these provisions, a crematory does not fall within the definition of a funeral establishment, and the business of a funeral director, which must be carried out in a funeral establishment, is distinct from the business of a crematory owner or operator.

Moreover, sec. 445.03(1)(b), Stats., grants the board authority to make rules necessary for administration of subchapter I of ch. 157, Stats., entitled "Corpses." No reference is made in the subchapter to cremation or crematoria. Conversely, Subchapter II of chapter 157, entitled "Cemeteries," gives the Department of Commerce specific authority over the construction of crematoria and specifies that no one may operate a crematoria without a certification of approval of the crematory plans by that department. Thus, while the board has authority over practices within a funeral establishment, it has no such authority in regard to crematoria.

Finally, Sec 445.12, Stats., setting forth prohibited practices by funeral directors, states that no funeral director may "directly or indirectly, receive or accept any commission, fee, remuneration or benefit of any kind from any cemetery, mausoleum or crematory or from any owner, employe or agent thereof in connection with the sale or transfer of any cemetery lot, outer burial container, burial privilege or cremation . . .". That provision clearly anticipates ownership and management of crematoria by persons other than funeral directors. So does sec. 445.125(3m)(a)3., Stats., which defines as a "Cash advance item" "personal property or a service that is obtained by a funeral director or operator of a funeral establishment from a 3rd party and that is paid for by the funeral director or operator of the funeral establishment on behalf of, and subject to reimbursement from, a person purchasing funeral merchandise or funeral services from the funeral director or operator of the funeral establishment," including "cemetery or crematory services." Again, this provision establishes that crematory services need not be performed by a funeral director, and therefore those services do not fall under the jurisdiction of the funeral directors Examining Board.²

Addressing the question whether the board has jurisdiction to order that respondent not be on the premises of either of his previously owned funeral homes for any reason, including for the purpose of attending a funeral as a mourner or of carrying out his duties as an ordained minister, it is concluded the board would lack authority to enforce any such order. First, following surrender of his license, the board loses jurisdiction over the respondent, and therefore would have no jurisdiction or authority to interfere with his constitutional right to assemble.³

The board will, however, presumably continue to have jurisdiction over the two funeral establishments in question, and it is conceivable that the board could attempt through the exercise of that jurisdiction to prevent respondent from entering onto those premises -- even though for the purpose of attending a funeral as a mourner or of carrying out pastoral duties rather than for the purpose of carrying out the duties of a funeral director. Any such attempt

² Circuit Court Judge Mittelstadt, who presided over the criminal proceeding, reportedly ruled at sentencing that because crematoria are not regulated, respondent could, while serving probation, continue to perform cremations in order to generate funds for the purpose of making restitution. That ruling would indicate that the opinion of that court as to the board's jurisdiction over crematoria is in accord with the analysis set forth herein.

³ **Right to assemble and petition.** SECTION 4. The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged. *Wisconsin Constitution, Article I.*

would interfere with the constitutional right to freedom of religion of both respondent and those seeking his pastoral services.⁴ The extent of that freedom is described in the following excerpt from *State v Miller*, 196 Wis. 2d 238 (1995):

Until 1990, the United States Supreme Court subjected laws that burdened the free exercise of religion to the strictest level of scrutiny under which such laws had to be narrowly tailored to serve a compelling state interest. However, this test was abandoned in *Employment Div., Dep't of Human Resources v Smith*, 494 U.S. 872 (1990), where the Court determined that a law that burdens religious practices need not be justified by a compelling governmental interest if it is neutral and of general applicability.

Congress responded to *Smith* with the passage of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to bb-4, which restores the compelling state interest test . . . for controversies involving laws that substantially burden a person's religious practices. The purpose of RFRA is to guarantee the application of the compelling state interest test in all cases where the free exercise of religion is substantially burdened and to provide a statutory claim or defense to persons whose religious exercise is substantially burdened by the government. 42 U.S.C. § 2000bb(b). RFRA provides in pertinent part:

(a) **In general.** Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) **Exception.** Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

* * * *

. . . [B]y its own terms, RFRA applies to all federal and state laws and the implementation of those laws whether adopted before or after its enactment. 42 U.S.C. § 2000bb-3(a). *Miller*, 196 Wis. 2d at 246.

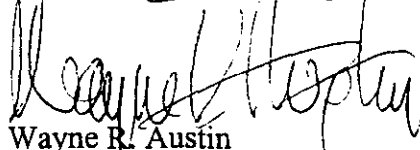
The compelling governmental interest here is to prevent respondent from practicing as a funeral director on the premises of his two former funeral establishments or any other. The least

⁴ **Freedom of worship; liberty of conscience; state religion; public funds.** SECTION 18 [As amended Nov. 1982] The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries. *Wisconsin Constitution*, Article I.

restrictive way to accomplish that is to do what respondent has agreed that the board may do: revoke his license and prohibit him from further practice as a funeral director. Respondent has in fact gone further, agreeing that the board may prohibit him from even being on the premises of the two funeral homes except for the purpose of attending a funeral as a mourner or of providing religious services.

It is concluded that the board lacks jurisdiction over the ownership and management of crematoria, and therefore lacks jurisdiction to prohibit respondent from owning and managing the crematory adjacent to the Monroe funeral establishment subsequent to the surrender of his license. It is further concluded that any attempt by the board to enforce an order prohibiting respondent from entering onto the premises of the two affected funeral establishment as a mourner or for ministerial purposes, through the board's jurisdiction over those establishments, would constitute a violation of respondent's constitutional rights of religion and assembly.

Dated this 2nd day of September, 1997.


Wayne R. Austin
Administrative Law Judge

WRA:9708191.doc

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
BEFORE THE FUNERAL DIRECTORS EXAMINING BOARD

In the Matter of Disciplinary Proceedings Against

Lowell E. Stuessy,

AFFIDAVIT OF MAILING

Respondent.


STATE OF WISCONSIN)
)
COUNTY OF DANE)

I, Kate Rotenberg, having been duly sworn on oath, state the following to be true and correct based on my personal knowledge:

1. I am employed by the Wisconsin Department of Regulation and Licensing.

2. On October 2, 1997, I served the Final Decision and Order dated October 1, 1997, LS9704181FDR, upon the Respondent Lowell E. Stuessy's attorney by enclosing a true and accurate copy of the above-described document in an envelope properly stamped and addressed to the above-named Respondent's attorney and placing the envelope in the State of Wisconsin mail system to be mailed by the United States Post Office by certified mail. The certified mail receipt number on the envelope is P 221 159 576.


Gregory E. Knoke, Attorney
1904 10th Street
P.O. Box 620
Monroe WI 53566-0620



Kate Rotenberg
Department of Regulation and Licensing
Office of Legal Counsel

Subscribed and sworn to before me

this 2nd day of October, 1997.



Notary Public, State of Wisconsin
My commission is permanent

NOTICE OF APPEAL INFORMATION

Notice Of Rights For Rehearing Or Judicial Review. The Times Allowed For Each. And The Identification Of The Party To Be Named As Respondent.

Serve Petition for Rehearing or Judicial Review on:

STATE OF WISCONSIN FUNERAL DIRECTORS EXAMINING BOARD

1400 East Washington Avenue

P.O. Box 8935

Madison, WI 53708.

The Date of Mailing this Decision is:

October 2, 1997

1. REHEARING

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in sec. 227.49 of the *Wisconsin Statutes*, a copy of which is reprinted on side two of this sheet. The 20 day period commences the day of personal service or mailing of this decision. (The date of mailing this decision is shown above.)

A petition for rehearing should name as respondent and be filed with the party identified in the box above.

A petition for rehearing is not a prerequisite for appeal or review.

2. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in sec. 227.53, *Wisconsin Statutes* a copy of which is reprinted on side two of this sheet. By law, a petition for review must be filed in circuit court and should name as the respondent the party listed in the box above. A copy of the petition for judicial review should be served upon the party listed in the box above.

A petition must be filed within 30 days after service of this decision if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30-day period for serving and filing a petition commences on the day after personal service or mailing of the decision by the agency, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing this decision is shown above.)