STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
DIVISION OF FINANCIAL REGULATION

In the Matter of: TIM LANCASTER, Respondent.	Agency Case No. INS 16-0290 OAH Case No. 2016-ABC-00237 FINAL ORDER TO CEASE AND DESIST AND ORDER REVOKING LICENSE **THIS IS A FINAL ORDER**

HISTORY OF THE CASE

On July 8, 2016, the Department of Consumer and Business Services, Division of Financial Regulation (Division) issued an Order to Cease and Desist, Notice of Proposed Revocation of License and Right to Administrative Hearing (Notice) to Tim Lancaster, Respondent herein. On August 3, 2016, Respondent, through counsel, requested a hearing.

On August 5, 2016, the Division referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Alison Greene Webster to preside at hearing.

On September 15, 2016, ALJ Webster convened a prehearing conference by telephone. Attorney Diane Cady appeared for Respondent. Assistant Attorney General (AAG) Tyler Anderson appeared for the Division. Ann Marie Garber participated for the Division. During the conference, AAG Anderson advised that the Division anticipated filed a Motion for Summary Determination. The parties established a briefing schedule for the Division's motion. In addition, the parties agreed to a hearing date of February 14, 2017, in the event the motion was denied or not determinative of all issues.

By letter dated November 16, 2016, Respondent's counsel withdrew from representation of Respondent. On December 2, 2016, in accordance with the schedule established during the prehearing conference, the Division, through AAG Anderson, filed a Motion for Summary Determination (Motion) along with supporting documents pursuant to OAR 137-003-0580.[1] Respondent did not file a timely response to the Motion.[2] The record closed on December 16, 2016, at which time ALJ Webster took the

[1] The Division served the Motion for Summary Determination on Respondent and notified Respondent of the requirements for filing a response as required by OAR 137-003-0580(10).

[2] Based on the schedule set during the prehearing conference and the language of OAR 137-003-0580(2),

Division of Financial Regulation
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Motion under consideration. On December 27, 2016, OAH received Respondent's response to the Motion.[3]

Now, therefore, having reviewed the entire record in the matter, the Director issues the following Findings of Fact, Conclusions of Law and Final Order, consistent with that proposed by ALJ Webster, and Notice of Right to Judicial Review.

The Director adopts ALJ Webster's recommended decision and issues this Final Order, without modification of ALJ Webster's Findings of Fact.

ISSUES

1. Whether there are genuine issues of material fact that are relevant to resolution of the legal issue on which the decision is sought, and if not, whether the Division is entitled to a favorable ruling as a matter of law. OAR 137-003-0580.

2. Whether Respondent's insurance producer license is subject to revocation pursuant to ORS 744.074(1)(j) based on the State Mortuary and Cemetery Board's revocation of Respondent's Combined Funeral Service Director and Embalmer License and determination that Respondent engaged in dishonesty, fraud or deception in the practice of funeral services.

DOCUMENTS CONSIDERED

In preparation for ruling on the motion, ALJ Webster reviewed the following documents: The Division's motion; the Division's notices; and Exhibits A and B.

FINDINGS OF FACT

1. Respondent Tim Lancaster was first issued an insurance producer license (license no. 6238515) in May 1990. His current Oregon Resident Insurance Producer license is set to expire June 30, 2017. (Ex. A.)

2. At all times pertinent to this matter, Respondent also held a Combined Funeral Service Director and Embalmer License issued by the State Mortuary and Cemetery Board (Board). Respondent also served as a corporate officer and manager of Eternal Hills Memorial Gardens & Funeral Home, Inc., a funeral establishment licensed by the Board. (Ex. B at 8.)

3. In November 2014, the Board issued a Notice of Proposed Disciplinary Action against Respondent proposing to revoke his Combined Funeral Service Director

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Respondent had 14 calendar days, or until December 16, 2016, to file a response to the Motion.

[3] Respondent's response was postmarked December 22, 2016. Because it was filed late and without explanation for its untimeliness, Respondent's response was not considered in ruling on the Motion. On December 29, 2016, OAH received from the Division an Objection to Respondent's Untimely Response to Director's Motion [for] Summary Determination.

and Embalmer License and impose civil penalties for alleged violations of various statutes and administrative rules pertaining to funeral service practice, embalming practice, and the operation of facilities for the final disposition of human remains. The Board's allegations against Respondent involved 11 individuals (Purchaser A and Decedents B through L) and Respondent's business practices with regard to facility management and recordkeeping. The Board issued similar violation notices to another individual, Robert Gordon, and two licensed funeral establishments in Oregon with which Respondent and Gordon were affiliated, Eternal Hills Memorial Gardens & Funeral Home, Inc. and Klamath Tribute Center. All four requested contested case hearings challenging the Board's notices. The four cases were consolidated and referred to the OAH in December 2014. (Ex. B.)

4. On December 8, 2015, ALJ Monica Whitaker issued a Ruling on Summary Determination and Proposed Order (Proposed Order) in Respondent's case, OAH Case No. 1403980. Effective March 30, 2016, the Board adopted the Proposed Order and issued a Final Order. *In the Matter of Tim Lancaster, CO-3224*, OAH Case No. 1403980 (Final Order). The Board revoked Respondent's Combined Funeral Service Director and Embalmer License and imposed a $63,000 civil penalty against Respondent for the multiple violations of statutes and administrative rules pertaining to the practice of funeral services. (Ex. B at 79-84.)

5. As pertinent to the present matter, the Board's Final Order found, among other things, as follows:

> Respondent misrepresented the order or placement of a granite marker to Purchaser A and the Board, in violation of ORS 692.180(1)(a) and (b).[4]
>
> Respondent made a false or misleading statement or used misrepresentation to the Board regarding the order and placement status of a marker, in violation of OAR 830-030-0090(5)(d) and (g).[5]

[4] ORS 692.180 provides, in 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.

[5] OAR 830-030-0090(5)(d) and (g) provide:

> (5) No licensee may:

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Respondent failed to follow through with contractual arrangements or engaged in misrepresentation or fraudulent or dishonest conduct related to ordering and placement of a memorial marker for Decedent E, in violation of OAR 830-030-0090, *former* OAR 830-030-0090(1)(d)(1997),[6] and OAR 830-030-0090(1)(b),[7] or ORS 692.180(a) or (b).

Respondent engaged in misleading business practices, misrepresentation and fraudulent and dishonest conduct when communicating with Decedent E's family and the Board about the marker order and the refund, in violation of ORS 692.180(1)(a) and (b) and OAR 830-030-0090(5)(d) and (g).

Respondent made false or misleading statements to Decedent G's mother and to the Board, and engaged in dishonest conduct, in violation of OAR 830-030-0090(5)(d), OAR 830-040-0010(3),[8] and ORS 692.180(1)(a) and

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* * * * *

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

(g) Fail to cooperate or answer truthfully or completely inquiries regarding matters within the Board's jurisdiction[.]

[6] *Former* OAR 830-030-0090(1)(d)(1997) provided in relevant part:

> Every licensee or agent of a licensed facility or 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[.]

[7] OAR 830-030-0090(1)(b) provides:

> (1) Every licensee or agent of a licensed facility must:
>
> * * * * *
>
> (b) Implement and follow through with contractual arrangements with the person with the legal right to control final disposition;

[8] OAR 830-040-0010(3) provides: "No licensee or employee of a licensed facility may 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."

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(b).

> Respondent engaged in misleading business practices and made misrepresentations to Decedent L's daughter in violation of ORS 682(1)(a) and (b) and OAR 830-030-0100(1).[9]

(Ex. B at 30-33, 72, 79-81.)

6. Respondent appealed the Final Order to the Oregon Court of Appeals and the matter is still pending.

CONCLUSIONS OF LAW

1. There are no genuine issues of material fact in dispute and the Division is entitled to a favorable ruling as a matter of law.

2. Respondent's insurance producer license is subject to revocation pursuant to ORS 744.074(1)(j) based on the State Mortuary and Cemetery Board's revocation of Respondent's Combined Funeral Service Director and Embalmer License and its determination that Respondent engaged in dishonesty, fraud or deception in the practice of funeral services.

OPINION OF ALJ WEBSTER

A. Summary Determination Standard

OAR 137-003-0580 is titled "Motion for Summary Determination" and provides, in relevant part:

> (6) The administrative law judge shall grant the motion for a summary determination if:
>
> (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and
>
> (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

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[9] OAR 830-030-0100 provides, in pertinent part:

> The following practices are prohibited and are considered misrepresentation in the conduct of doing business:
>
> (1) Any sales presentation or practice that conceals or misstates a material fact is considered a misrepresentation in the conduct of doing business.

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> (7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.
>
> (8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing[.]
>
> * * * * *
>
> (12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling or a final order in accordance with 137-003-0665 if the administrative law judge has authority to issue a final order without first issuing a proposed order.

In this matter, the evidence in the record consists of the two exhibits submitted by the Division, *i.e.*, Respondent's insurance producer license information and the State Mortuary and Cemetery Board's Final Order. As noted above, summary determination in favor of the Division is appropriate if the record, viewed in a light most favorable to Respondent shows there is no genuine issue of material fact relevant to the resolution of this case. For the reasons discussed below, ALJ Webster found there are no material facts in dispute and the Division is entitled to a favorable ruling as a matter of law.

B. Violation of ORS 744.074(1)(j)

The Director proposes to revoke Respondent's insurance producer license pursuant to ORS 744.074(1)(j) based on the revocation of Respondent's Combined Funeral Service Director and Embalmer License and a determination that Respondent engaged in dishonesty, fraud or deception in the practice of funeral services. The Director has the burden of proving the allegations in its Notice by a preponderance of the evidence. ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position.); *Cook v. Employment Div*., 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). In this case, the Director has met the burden.

ORS 744.074(1) authorizes the Director to revoke an insurance producer license for any one or more specifically enumerated reasons. As pertinent to this case, the statute provides as follows:

> (1) The Director of the Department of Consumer and Business Services may place a licensee on probation or suspend, revoke or refuse to issue or renew an insurance producer license and may take other actions authorized by the Insurance Code in lieu thereof or in addition thereto, for any one or more of the following causes:
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> * * * * *

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> (j) Cancellation, revocation, suspension or refusal to renew by any state or federal agency, by a Canadian province or by the government of Mexico of the authority to practice law or to practice under any other regulatory authority if the cancellation, revocation, suspension or refusal to renew was related to the business of an adjuster or an insurance producer or consultant, or if dishonesty, fraud or deception was involved. The record of the cancellation, revocation, suspension or refusal to renew shall be conclusive evidence of the action taken.

In Oregon, the State Mortuary and Cemetery Board is authorized to regulate the licensing and practice of embalming and funeral services pursuant to ORS chapter 692. An individual must have a license issued by the Board to practice as a funeral service practitioner, embalmer, death care consultant, funeral establishment operator, cemetery and/or crematory operator. ORS 692.025.

In this case, the record establishes that, pursuant to a Final Order, the Board revoked Respondent's Funeral Service Director and Embalmer License as of March 30, 2016 for multiple violations of ORS chapter 692 and rules promulgated thereunder and that certain violations involved dishonesty, fraud or deception. As set out above, the Board determined in the Final Order that on multiple occasions, Respondent made false or misleading statements in communicating with the Board in violation of OAR 830-030-0090(5)(d) and that, with regard to Purchaser A and the families of Decedents E, G and L, Respondent engaged in misrepresentation in the conduct of his business and fraudulent or dishonest conduct in his funeral service practice in violation of ORS 692.180(1)(a) and (b). *See* Exhibit B.

Pursuant to the plain language of ORS 744.074(1)(j), the Board's Final Order revoking Respondent's Combined Funeral Service Director and Embalmer License is conclusive evidence of the action taken, and as a matter of law, provides grounds for the Division to revoke Respondent's insurance producer license. The fact that the Board's revocation of Respondent's license is on appeal does not affect its finality for purposes of the Division's action under ORS 744.074(1)(j).[10] *See, e.g., Skeen v. Dept. of Human Services,* 171 Or App 557, 561, n3 (2000), *rev. den.* 332 Or 316 (2001) (an agency's final order, like a court's final judgment, has preclusive effect even while the order or judgment is on appeal); *Ron Tonkin Gran Turismo v. Wakehouse Motors,* 46 Or App 199, 207, *rev. den.* 289 Or 373 (1980) (in Oregon, a pending appeal does not affect the finality of a judgment for purposes of claim or issue preclusion).

In short, in light of the Board's Final Order revoking Respondent's embalming and funeral service license, there are no material facts in dispute and the Division is entitled to a favorable ruling as a matter of law. The revocation of Respondent's embalming and funeral service license was based, at least in part, on violations involving misrepresentation and fraudulent or dishonest conduct. The Division is therefore entitled to revoke Resident Insurance Producer License pursuant to ORS 477.074(1)(j).

[10] Furthermore, any challenge by Respondent in this forum to the validity or accuracy of the Board's Final Order would be misplaced.

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ORDER

The foregoing is incorporated. The Director issues the following Orders:

1. As authorized by ORS 731.252(1), the Director ORDERS Licensee to CEASE AND DESIST from violating any provision of the Insurance Code or the administrative rules promulgated thereunder.

2. In accordance with ORS 744.074(1)(j) the Director REVOKES Licensee's resident insurance producer license based on the cancellation, revocation, suspension or refusal to renew by any state or federal agency to practice under any other regulatory authority if the cancellation, revocation, suspension or refusal to renew was related to the business of an adjuster or an insurance producer or consultant, or if dishonesty, fraud or deception was involved.

This Order is a FINAL ORDER under ORS 183.310(6)(b). Subject to that provision, the entry of this Final Order does not limit other remedies that are available to the Director under Oregon law.

SO ORDERED this 10th day of February, 2017 in Salem, Oregon.

PATRICK M. ALLEN, Director
Department of Consumer and Business Services

/s/ David Tatman
David C. Tatman, Chief of Enforcement
Division of Financial Regulation

NOTICE OF RIGHT TO JUDICIAL APPEAL

You are entitled to judicial review of this order in accordance with ORS 183.482. You may request judicial review by filing a petition with the Court of Appeals in Salem, Oregon, within 60 days from the date this order is served.

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Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
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