

Re: In the Matter of an Appeal pursuant to Section 16 of the Funeral Services Act, RSA 2000, Chapter F-29 Arising From a Decision of the Alberta Funeral Services Regulatory Board Not to Issue a Funeral Director License to Harvey Giesbrecht

August 2, 2016

Appeal Board: Paul Alpern (Chair), Hilda Lupul, Caren Mueller

Representing the Applicant, Harvey Giesbrecht: Nathan Whitling, Liberty Law

Representing the Respondent, the Alberta Funeral Services Regulatory Board: Gwendolyn J. Stewart-Palmer, Shores Jardine LLP

Appeal Heard: June 23, 2016 at Service Alberta offices located at Commerce Place, 10155 – 102 Street, Edmonton, Alberta.

An Appeal Board constituted pursuant to section 16 of the Funeral Services Act, RSA 2000, c. F-29, met to hear an appeal by Harvey Giesbrecht (“HG”) of the March 17, 2016 decision of the Alberta Funeral Services Regulatory Board (the “AFSRB”) not to issue a Funeral Director License to HG.

THE ISSUES

1. Should this Appeal Board vary, confirm or quash the decision of the AFSRB not to issue a Funeral Director License to HG, given HG’s conviction of 21 counts of fraud arising from HG’s funeral services business in Manitoba from 2002 through 2009?
2. Whatever penalty this Appeal Board may choose to impose upon HG, should that penalty include a prohibition from applying for a renewal or issuance of a Funeral Director License for any set term of months or years?

RELEVANT LEGISLATION

Funeral Services Act, RSA 2000, c. F-29
Funeral Services Act General Regulation, Alberta Regulation 226/1998

BACKGROUND AND EVIDENCE

HG is 56 years old. After completing secondary school, HG attended Western School at the University of Manitoba, where he completed a two-year condensed Mortuary Practice course, graduating in 1984. In July, 1990, HG began working at Russel Funeral Homes in Beausejour, Manitoba. In August of 2002, HG and his then wife, June, took over Russel Funeral Homes, which business they operated until June 2009. HG served as Mayor of Beausejour from 2002 through 2006. HG’s funeral business had slowed in 2008, Russel Funeral Homes was failing and HG attempted to sell the operation to a competitor. Following due diligence on Russel Funeral Homes, the prospective buyer identified irregularities in the company’s accounting for prearranged funerals. The sale of Russel Funeral Homes did not proceed.

On July 23, 2009, the prospective buyer/competitor made a complaint to the Beausejour RCMP alleging funds collected by HG for prearranged funeral contracts were not placed into trust as required by Manitoba's Prearranged Funeral Services Act.

In the Fall of 2009, the Public Utilities Board in Manitoba ("PUB") suspended HG's license to sell pre-need funeral services in Manitoba. The PUB did not suspend HG's funeral director or embalmer licenses.

In October, 2009, HG moved to Alberta and acquired work as an embalmer at Serenity Funeral Services ("Serenity"), in Leduc. HG wrote his AFSRB licensing examination in December, 2009 and obtained an Alberta license to serve as a funeral director and embalmer. HG worked at Serenity as a funeral director and embalmer until August, 2012.

In October 2010, HG went through personal bankruptcy proceedings. His bankruptcy was discharged in February, 2012.

In September of 2012, HG joined the management team at Drayton Valley Funeral Services in Drayton Valley, Alberta ("DVFS") where he continues to work to this date.

After a lengthy investigation, in August, 2013 the Crown authorized 21 charges of fraud against HG (some charges over \$5,000 and some charges under \$5,000) pursuant to section 380 of the Criminal Code of Canada. The Crown alleged that between October 2003 and July 2009, HG received funds from 21 different clients of Russel Funeral Homes for prearranged funerals but did not deposit those funds in trust nor record the receipt of those funds with the Manitoba Public Utilities Board as required by law. A total of \$85,567.72 was allegedly deposited by HG into his general account instead of his trust account, with such funds allegedly used by HG to cover personal and business expenses, including gasoline, credit card bills, phone bills, hydro bills, auto repairs, funeral arrangements for other clients, etc..

On March 24, 2015, HG pleaded guilty to all 21 counts of fraud in Manitoba Provincial Court before the Hon. Judge Stewart.

HG returned before Judge Stewart for sentencing on July 7, 2015. Crown and defence counsel jointly recommended that HG receive a conditional sentence of two-years-less-a-day followed by a term of probation throughout which HG would be subject to house arrest and required to make monthly restitution payments of \$600 until the \$85,567.72 was repaid in full. In making their joint submission, Crown and defence counsel acknowledged the lengthy period of time required (51 months) to bring the matter to court after charges were first laid. Delays were attributed to inexperience in the local RCMP detachment with investigating commercial crimes, police turnover and multiple transitions in the Crown's office. At sentencing, defence counsel emphasized that HG had never attempted to gloss over or challenge the allegations against him and that HG had not been responsible for the delays in prosecution. Further, HG had apparently instructed defence counsel to enter into discussions with the RCMP even before the charges were laid in order to deal with the matters promptly. The guilty pleas were entered into by HG at his first opportunity following his lawyer's receipt of the Crown's disclosure.

Judge Stewart did not agree with the joint sentencing proposal. The sentencing hearing was adjourned to August 18, 2015 to allow for additional submissions and argument by both Crown and defence counsel, following which HG was sentenced to 9 months in jail to be followed by a term of probation together with a restitution order.

HG was taken into custody and spent the next 42 days in the Winnipeg Remand Centre.

On or about September 28, 2015, HG was released on bail pending the appeal of his sentence to the Manitoba Court of Appeal. The Appeal had been filed with the assistance of new counsel retained by HG.

Prior to the hearing of HG's appeal before the Manitoba Court of Appeal, HG arranged a loan from his current employer, DVFS, to repay the balance of the restitution order made against him by the Manitoba Provincial Court in relation to the fraud convictions. HG had paid \$10,000 of restitution in the fall of 2009 at the time of the PUB's review. HG paid a further \$4,000 in August, 2015 prior to sentencing. HG paid a further \$71,500 in or about February 2016 (\$7,000 of his own money and \$64,500 borrowed from DVFS) prior to the Manitoba Court of Appeal hearing.

On March 1, 2016, the Manitoba Court of Appeal allowed HG's appeal and overturned the 9 month jail sentence imposed by Judge Stewart and imposed the sentence that had been jointly recommended by Crown and defence counsel on July 7, 2015 (excepting the restitution order, given full restitution had been made).

HG is now serving his 2-year conditional sentence under the supervision of a probation officer. He is on 24-hour per day house arrest, except when required to be out of his residence for the purposes of working at DVFS or otherwise as authorized by his probation officer. He also has to do 200 hours of community service work within a prescribed period of time.

HG had been licensed by the AFSRB as a funeral director and embalmer from 2009 through March 17, 2016, completing renewal applications annually through 2016. HG advises that the AFSRB, Serenity and DVFS were well aware of his legal issues in Manitoba, and that he "had several frank conversations with [the AFSRB] regarding the events in Beausejour and I made no attempt to hide or otherwise minimize their nature or significance" (Witness Statement of HG prepared for this Appeal dated June 16, 2016).

Given the fraud charges/convictions, HG advises that since 2009 he has had no involvement with prearrangements nor with trust accounts either while working at Serenity or at DVFS. HG's current work at DVFS focuses on embalming, maintenance and client service. Pre-needs arrangements, including the handling of all trust funds and accounts, are handled by others.

On March 17, 2016, the AFSRB, following the Manitoba Court of Appeal decision respecting sentencing HG on the 21 fraud charges, issued a decision not to issue a Funeral Director License to HG for 2015-2016 (the "AFSRB Decision"). In its decision, the AFSRB also ruled that HG is prohibited from applying for or submitting an application for a renewal or issuance of a Funeral Director License in Alberta for two years (through April 1, 2018). The AFSRB Decision did not affect HG's Embalmer License or his ability to apply for a renewal of his Embalmer License.

In its decision not to issue a Funeral Director License to HG, the AFSRB wrote:

"[22] Mr. Giesbrecht has been convicted of offences of fraud under the Criminal Code of Canada. The offences relate to the misappropriation of trust monies paid by members of the public for pre-need contracts. The significance of the fraud charges and the

relationship of those charges to the role and function of a funeral director along with the extended delay in restitution are central to the Board's decision.

[23] While restitution was fully paid in March, 2016, before the Court of Appeal dealt with the sentencing appeal, this was at least 7 years after the last of the funds had been paid to Mr. Giesbrecht, which is a substantial length of time. While the fact that the funds have been paid back is important, it is of greater concern to the Board that the monies were not deposited in a trust account as required, that the monies were used for other purposes, and that this occurred over a lengthy period of time. The Board finds these actions to be a breach of trust which is unacceptable from a funeral service professional who deals with vulnerable customers.

[24] Although Mr. Giesbrecht has acknowledged his conduct and admitted that it resulted from his poor decisions, the Board notes that the inappropriate handling of such funds is a very serious matter for the Board and for the industry which must keep the confidence of the public in dealing with such funds. The 2-year ban on Mr. Giesbrecht's ability to have a Funeral Director License should serve as a denouncement by this Board of the failure by Mr. Giesbrecht to put pre-needs funds in a trust account and should serve as general deterrent to the industry.

[25] It was noted that Mr. Giesbrecht was not a newly licensed funeral professional when the fraudulent activity occurred, and he would have been well aware that his actions were inappropriate, unethical and criminal.

[26] the handling of trust money for pre-need contracts is fundamental to the role of a Funeral Director. Mr. Giesbrecht has breached the trust both of the public, as well as the industry. The public must have confidence in those who have a Funeral Director License. The public must be able to trust that when money is paid to a Funeral Director it is appropriately handled. The Board is of the view that the conduct here poses a considerable risk to the reputation of the profession."

On March 30, 2016, HG appealed the AFSRB Decision.

Under S. 16(7) of the Funeral Services Act, where an application for a license is refused and such refusal is appealed, an Appeal Board may do any one or more of the following:

- (a) vary, confirm or quash the decision;
- (b) direct that a licence be issued or that a licence be renewed;
- (c) reinstate a suspended or cancelled licence;
- (d) substitute a suspension for a cancellation or a cancellation for a suspension;
- (e) add, vary or delete conditions on a licence;
- (f) order the appellant to pay all or part of the investigation costs;

and may make the order subject to any terms and conditions that it considers appropriate.

HG'S ARGUMENTS

To determine the appropriate sanction for HG's conduct, Mr. Whitling argued:

1. This Appeal Board should consider the risk HG presents today to the public;

2. If a license were granted, what is the risk that the events in Beausejour would reoccur?
3. Any sanction should be focused on eliminating the risk;
4. The AFSRB did not fully consider/determine those issues in its March 17, 2016 decision;
5. Any risk that HG presents can be handled by conditions on his license;
6. The same conduct that is the subject of this appeal has already been the subject of a criminal prosecution/conviction/sentence. Accordingly, the objectives of denunciation and deterrence have already been carried out. Under these circumstances, the imposition of a second set of sanctions designed to denounce and deter the same conduct serves no rational purpose and constitutes double punishment;
7. This Appeal Board has the benefit of approximately 6.5 years' worth of evidence of good conduct by HG following the events in Beausejour;
8. The AFSRB Decision focused on: (i) denouncing HG's conduct; (ii) sending a message of condemnation of such conduct to HG, to the public and to the industry; and (iii) deterring HG and others from engaging in such conduct;
9. The AFSRB Decision focused on punishment, not on protecting the public;
10. This Appeal Board ought not impose a sanction for the purpose of "sending a message". That message has already been sent by the criminal proceedings in Manitoba;
11. It is the task of this Appeal Board to ensure that HG does not repeat the conduct that he committed in Beausejour;
12. In other words, this Appeal Board ought to impose a sanction upon HG crafted to protect the public, and not a sanction crafted to inflict additional punishment on HG;
13. To the extent HG presents any risk to the public, that risk may be eliminated by the imposition of appropriate terms and conditions upon HG's license as contemplated by s. 15(4) of the Funeral Services Act;
14. Whatever penalty this Appeal Board may choose to impose upon HG, that penalty cannot include a prohibition from applying for a renewal or issuance of a Funeral Director License for any set term of months or years. The Act does not provide the AFSRB or this Appeal Board with the legal authority to impose such sanction. A law that takes away someone's right to practice their profession needs to be clear and specific;
15. HG asks this Appeal Board to direct the renewal or re-issuance of his license to practice as a Funeral Director in Alberta on such terms and conditions as this Appeal Board may deem to be just and appropriate.

AFSRB'S ARGUMENTS

In summarizing AFSRB's position, Ms. Stewart-Palmer argued:

1. Funeral Directors in Alberta are self-regulated;
2. Licensing years for Funeral Directors in Alberta go from April 1 to March 31;
3. The AFSRB was fully aware of the charges facing HG in Manitoba;
4. The AFSRB hearing into HG's licensing status waited until after HG's criminal proceedings (including his sentencing appeal) in Manitoba concluded. Thereafter, the AFSRB conducted its hearing;
5. The AFSRB Decision speaks for itself;
6. 21 convictions of fraud arising from a licensee's practice in the funeral services industry are grounds for the AFSRB refusing to issue or renew a license pursuant to s. 15(4)(b)(ix) of the Funeral Services Act;
7. The AFSRB also relies on s. 15(4)(c) of the Funeral Services Act, that it is in the public interest to deny HG a Funeral Director License at this time;

8. The Supreme Court of Canada in *R. v. Wigglesworth* [1987] 2 SCR 541 found that disciplinary sanctions for conduct for which there have been criminal charges do not offend the rule against double jeopardy. This case confirms that the same conduct may result in both criminal and professional regulatory consequences.
9. The AFSRB will abide by any decision of this Appeal Board respecting HG's Funeral Director License;
10. That said, the AFSRB needs some guidance on the issue of the authority of the AFSRB to prohibit a person from applying for a renewal or issuance of a Funeral Director License for any set term of months or years. The legislation must be interpreted in a broad and purposive way.
11. The interpretation urged upon the Appeal Board by HG suggests that the AFSRB cannot prohibit a person from applying for a renewal or for issuance of a Funeral Director License. To interpret s. 15(4) of the Funeral Services Act in the manner proposed would lead to an absurdity. Such an interpretation would mean that the maximum penalty which could be imposed by the AFSRB is a 1 year suspension. This would mean that no matter how egregious the conduct, including significant criminal conduct, the AFSRB would be limited to a cancellation for one year, or a one year suspension, depending on whether the person had a license or was applying for one.
12. Taken to its extreme, if the period of cancellation or suspension ends as of March 31, there may be situations where the suspension is significantly less than one year. For example, in HG's case, the appeal hearing was March 4, 2016. The decision was issued March 17, 2016. If HG's position is correct, the maximum suspension which could be imposed by the AFSRB would be 2 weeks (from March 17, 2016 – April 1, 2016);
13. The AFSRB submits that its mandate to regulate the professionals governed by the Funeral Services Act and its regulations must, on a broad and purposive interpretation, provide for the authority to prevent an applicant from re-applying, particularly when the conduct falls entirely within the scope of the regulated professional's regulated functions.

ANALYSIS AND CONCLUSIONS

HG's misuse of funds entrusted to him for funeral pre-arrangements between 2002 and 2009 is conduct deserving of sanction.

Aggravating factors include:

1. the misconduct occurred over a long period of time;
2. the misconduct arose from the practice of HG's profession as a Funeral Director;
3. the misconduct occurred repeatedly, impacting some 21 clients;
4. HG was not a newly licensed funeral professional when the fraudulent activity occurred and he would have been well aware that his actions were inappropriate, unethical and illegal.

Mitigating factors include:

1. early guilty pleas to all 21 counts of fraud;
2. payment of restitution in full;
3. good behavior for the past approximately 6.5 years while practicing as a licensed Funeral Director in Alberta;

4. HG has voluntarily chosen not to be involved with pre-need arrangements or trust accounts since 2009.

While HG has been prosecuted, convicted and sentenced criminally in respect to his misuse of pre-arrangement funds in Manitoba and is presently fulfilling the obligations of his sentence, it is certainly part of the responsibility of the AFSRB to assess the qualifications, conduct/misconduct and integrity of an applicant for a Funeral Director License prior to the issuance of any such license.

S. 15 of the Funeral Services Act provides, in part (emphasis added):

- (2) The Director may issue a licence if the applicant meets all the requirements for that licence set out in the regulations and may issue the licence subject to any terms and conditions the Director considers appropriate.
 - (3) The Director may renew a licence if the applicant meets all the requirements for renewal of that licence set out in the regulations and may renew the licence subject to any terms and conditions the Director considers appropriate.
 - (4) The Director may refuse to issue or renew a licence, may cancel or suspend a licence or may impose terms and conditions on a licence if
 - (a) the applicant or licensee does not meet the requirements of this Act and the regulations with respect to the class of licence applied for or held;
 - (b) the applicant or licensee or any of its employee
 - (i) fails to comply with an order of the Director under this Act or the regulations,
 - (ii) provides false information or misrepresents any fact or circumstance to the Director or an inspector,
 - (iii) fails to comply with an agreement under section 19,
 - (iv) fails to pay an administrative penalty in accordance with a notice under section 34.1,
 - (v) in the Director's opinion, has contravened or is contravening this Act or the regulations,
 - (vi) fails to comply with any other legislation that may be applicable,
 - (vii) fails to pay a fine in respect of a conviction for an offence under this Act or under any criminal or other law in force in Alberta or elsewhere,
 - (viii) fails to comply with an order made in relation to a conviction for an offence under this Act or under any criminal or other law in force in Alberta or elsewhere, or
 - (ix) is convicted of an offence or is serving a sentence imposed in respect of a conviction for an offence under this Act or under any criminal or other law in force in Alberta or elsewhere.
- or
- (c) in the Director's opinion, it is in the public interest to do so.

In short, the AFSRB has the authority to:

1. refuse to renew a Funeral Director License if an applicant is convicted of a criminal offence (s. 15(4)(b)(ix)) or, in the AFSRB's opinion, it is in the public interest to do so (s. 14(4)(c));
2. impose any terms and conditions it considers appropriate on the issuance, renewal or refusal to issue or renew a license (s. 15(2), (3) and (4)).

With respect to issue 1,

1. Should this Appeal Board vary, confirm or quash the decision of the AFSRB not to issue a Funeral Director License to HG, given HG's conviction of 21 counts of fraud arising from HG's funeral services business in Manitoba from 2002 through 2009?

while this Appeal Board concludes that the AFSRB had the authority to not renew HG's Funeral Director License effective April 1, 2016, in all of the circumstances (including the mitigating factors described above, the very minimal risk of HG repeating his misconduct, especially with the conditions prescribed below and the very public criminal and AFSRB proceedings to date), we find that the interests of protecting the public and deterrence, both general and specific, could have been served by renewing HG's license with certain specific conditions as described in the Decision section below.

With respect to issue 2 (which is moot in the present case given our decision below to renew HG's Funeral Director License with conditions),

2. Whatever penalty this Appeal Board may choose to impose upon HG, should that penalty include a prohibition from applying for a renewal or issuance of a Funeral Director License for any set term of months or years?

we find that it is within the discretion of the AFSRB to impose any terms and conditions it considers appropriate on the issuance, renewal or refusal to issue or renew a license (s. 15(2), (3) and (4) of the Funeral Services Act), including imposing restrictions on when a prospective licensee can apply or reapply for a license. This conclusion is reinforced by the provisions of s. 15(6)(b) of the Funeral Services Act, which provides as follows (emphasis added):

- (6) When the Director refuses to renew a licence or makes a decision to suspend or cancel a licence, the Director may also, by written order, do any or all of the following:
 - (a) if the licensee is a funeral services business, assign to another licensee any funeral services contracts entered into by the licensee;
 - (b) prohibit the licensee from continuing to carry on the activities authorized by the licence, subject to any terms and conditions set out in the order;
 - (c) direct any person to cease any act or omission that contravenes this Act or the regulations;
 - (d) prohibit the licensee who committed any act or omission that resulted in the suspension or cancellation or who directed, authorized, assented to, acquiesced in or participated in the act or omission from so acting, subject to any terms and conditions set out in the order.

DECISION

Based on our conclusions on the above issues, this Appeal Board quashes the March 17, 2016 decision of the Alberta Funeral Services Regulatory Board not to renew HG's Funeral Director

License and directs that a Funeral Director License be issued to HG immediately with the following conditions:

1. HG shall not negotiate, enter into or otherwise deal with any pre-arranged funeral contracts;
2. HG shall not deal with, or have signing authority with respect to, any trust moneys held for the benefit of any members of the public;
3. HG may practice as a Funeral Director only while employed with DVFS, unless otherwise authorized by the AFSRB;
4. HG shall provide full and unfettered access to the books, records and business premises of DVFS to representatives of AFSRB, including scheduled and unscheduled inspections.

The above conditions shall remain in place until such time as the AFSRB, in its discretion, determines otherwise.

As discussed above, with respect to Issue 2, we find that it is within the discretion of the AFSRB to impose any terms and conditions it considers appropriate on the issuance, renewal or refusal to issue or renew a license, including imposing restrictions on when a prospective licensee can apply or reapply for a license.

No order is made as to costs.

ISSUED and DATED at the City of Edmonton in the Province of Alberta this 2nd day of August, 2016 by the Appeal Board constituted to hear the above referenced matter pursuant to section 16 of the Funeral Services Act.

Paul Alpern (Chair)
Hilda Lupul
Caren Mueller