

Order No. 2010-044

DOCKET NO. B-3015-09-283

IN THE MATTER OF:	§	BEFORE THE HONORABLE
	§	
ARNOLDO J. ("A.J.") RAMIREZ,	§	
INDIVIDUALLY AND AS	§	
PRESIDENT OF WALKER- MORA	§	
FUNERAL HOME INC.	§	
	§	
AND	§	CHARLES G. COOPER
	§	
DIANA L. RAMIREZ,	§	
INDIVIDUALLY AND AS	§	
SECRETARY/TREASURER FOR	§	
WALKER-MORA FUNERAL HOME, INC.	§	
	§	
AND	§	BANKING COMMISSIONER
	§	
WALKER-MORA	§	
FUNERAL HOME, INC. dba	§	
WALKER-MORA FUNERAL HOME	§	
	§	
ALICE, TEXAS	§	OF THE STATE OF TEXAS

FINAL ORDER

After fully reviewing the Amended Proposal For Decision, and the record, I hereby adopt Judge Craddock's Amended Proposal For Decision dated July 21, 2010, and the findings of fact and conclusions of law contained therein, and order Respondents, jointly and separately, to pay restitution to the Texas Department of Banking in the total amount of \$9,410.

I also order Respondents, jointly and separately, to pay a penalty of \$16,000 and costs of \$992.45.

SIGNED this 5th day of August, 2010.

/s/ Charles G. Cooper
Charles G. Cooper
Banking Commissioner
For the State of Texas

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Supplemental PROPOSAL FOR DECISION

This is in response to the Department's exceptions to the Proposal for Decision issued on June 10, 2010. That Proposal for Decision is hereby adopted by reference as part of this Supplemental Proposal for Decision. The main amendment I am making has to do with the recommendation. I am adding the cost of the transcript to the costs originally recommended.

I acknowledge that the Department's exceptions rightly point out an omission on page 2 of the June 10th Proposal for Decision. Throughout this case, the Department has sought restitution and penalties not only against Walker-Mora as a corporate entity but has also sought to impose joint and separate liability for penalties and restitution on corporate officers Mr. Arnolando ("A.J.") Ramirez and Mrs. Diana L. Ramirez. The Notice of Hearing clearly states the Department is seeking to hold Mr. Arnolando ("A.J.") Ramirez and Mrs. Diana L. Ramirez jointly and separately liable with the Walker-Mora Corporation. The statement on page 2 of the

proposal for decision that the Department seeks to impose liability on Walker-Mora as a corporation is therefore incomplete and inaccurate in failing to recognize the Department has sought throughout this case to hold Mr. Arnaldo (“A.J.”) Ramirez and Ms. Diana L. Ramirez jointly and separately liable for the restitution and penalties.

Because I have found that Mr. Arnaldo (“A.J.”) Ramirez, Mrs. Diana L. Ramirez, and Walker-Mora Funeral Home are all individually and jointly guilty of a pattern of willful disregard of the Prepaid Funeral Regulatory Act and related regulations, it is clearly within the Commissioner’s discretion to assess a \$16,000 penalty jointly and severally against all parties under §154.4061, Texas Finance Code (and, in fact, the Commissioner could assess many times the recommended \$16,000 based on each day the violation has continued).

Mr. Arnaldo (“A.J.”) Ramirez’s is clearly liable based on his misconduct in failing to comply with a Banking Commissioner’s order to reveal and surrender to the Department the prepaid funeral contracts, records, and the related funds which this case involves. In failing to comply with the Commissioner’s orders he became liable in tort for conversion of those funds and for related penalties.

As corporate treasurer, Mrs. Diana L. Ramirez had responsibility to ensure the proper deposit of all corporate and trust funds to the correct accounts. Her personal liability for conversion of the funds and related penalties is, therefore, also clear.

Without moving to reopen the evidence, the Department has attached a copy of a bill for the hearing transcript to its exceptions and seeks to add it to the costs of the hearing. The correct way to do this is to move to reopen the evidence. See Rule 270, Texas Rules of Civil Procedure. It is within my discretion to treat the Department’s tender of additional evidence by attaching it to its exceptions as a motion to reopen. I hereby do so, accept the bill of costs into evidence as

Exhibit 9 and will recommend that Commissioner Cooper order the assessment of costs in the total amount of \$992.45 (costs of service of process totaling \$240 and costs of transcript preparation in the amount of \$752.45).

On reading the Department's exceptions, I find one of the arguments made by the Department to be one that I cannot agree with. The Department argues that Mr. Arnoldo ("A.J.") Ramirez somehow became liable on one of the contracts because he accepted payments under the contracts as an agent for the Walker-Mora corporation when he was (according to the evidence) just part of the staff of Walker-Mora without management responsibilities. This argument seems based on the same mistaken understanding of the law which the Department argued in another recent prepaid funeral trust fund case. I ruled on this argument in the Elizondo proposal for decision.¹ Under agency law, an agent who accepts payment on behalf of a disclosed principal isn't liable for converting that payment unless the agent knew or should have known when he accepted the payment that his employer wasn't properly applying the payments to the prepaid funeral trust account. There is no evidence in this case that Mr. Arnoldo ("A.J.") Ramirez knew his employer wasn't properly applying the payments to the trust account at the time that he took them. Therefore, he wouldn't have become liable on the contract as a direct result of accepting one or more payments under the contract unless the Department proved other additional facts than it hasn't proved in this case.²

Revised Recommendation

¹ In the Matter of Alfredo G. Elizondo, Harlingen, Texas, and Vicente Delgado, Harlingen, Texas, No. B-2288-07-096, PFD dated August 14, 2008)

² In fact finding No. 10 of the proposal for decision, I referenced the fact that Mr. Arnoldo ("A.J.") Ramirez took payments under the contract but I intended this reference only as evidence of the fact that Mr. Arnoldo ("A.J.") Ramirez must have known of the existence of the contract on which he took the payments when he later failed to declare it after the Commissioner ordered him to disclose and surrender all prepaid funeral contracts and related funds after he took over as president of the funeral home. I don't accept the Departments theory that Mr. A.J. Ramirez became liable when he took payments on the contract as an employee of a disclosed principal.

The above premises considered, I recommend that Commissioner Cooper adopt the Original Proposal for Decision as modified herein and order Respondents jointly and severally to pay restitution to the Department in the amount of \$9,410, penalties in the amount of \$16,000 and costs in the amount of \$992.45.

The parties shall have until July 30, 2010 to file any further or additional exceptions. After that the case will be sent to Commissioner Cooper for entry of an appropriate order.

Entered at Austin, Texas, July 21, 2010.

/s/Larry J. Craddock
Larry J. Craddock
Administrative Law Judge

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PROPOSAL FOR DECISION

Representation of the Parties

The Department's Assistant General Counsel, Ms. Deborah H. Loomis, represents the Department and Banking Commissioner Charles G. Cooper in this action. Mr. Oscar San Miguel, Attorney-at-Law, Austin, Texas, represents the Respondents, Walker-Mora Funeral Home, Inc. (Walker-Mora); Mr. Arnolando J. (A.J.) Ramirez, individually and as president of Walker-Mora; and Ms. Diana L. Ramirez, individually and as secretary-treasurer of Walker-Mora.

Statement of the Case

This is an enforcement action under Texas Finance Code, Chapter 154 (regulating the sellers of prepaid funeral contracts). The Banking Department is responsible for administering Chapter 154.¹ I have jurisdiction to conduct administrative hearings for the Department under Texas Finance Code §11.202.

The Department seeks restitution on four prepaid funeral contract totaling \$9,410.00. In addition, the Department seeks penalties of \$16,000.00 and costs of \$240.00. The Department's uncontested evidence shows that Walker-Mora sold the four contracts totaling \$9,410.00 and didn't deposit the money in a trust account for the beneficiaries of the contracts as required by Texas Finance Code §154.253. Therefore, the Department is entitled to restitution for the benefit of the purchasers in the amount of \$9,410.00 pursuant to Texas Finance Code § 154.411. Further,

¹ See § 154.051 (a), Texas Finance Code.

Respondent doesn't contest the \$240.00 that the Department seeks as costs in this action to cover costs of service of process on Respondents. The only remaining issue is whether Respondents should receive mitigation of the penalties sought by the Department.

The Department seeks penalties of \$16,000.00 computed as follows: \$3,000.00 on each contract for failure to deposit the money into a trust account and \$1,000.00 on each contract for concealing the contracts from the Department when the Department seized the records and trust funds of Walker-Mora related to its prepaid funeral contracts after Commissioner Cooper cancelled Walker-Mora's permit to sell prepaid funeral contracts. The Department asserts such penalties are due under Texas Finance Code §156.4061 which covers administrative penalties in a case in which the evidence shows that the permit holder engaged in a pattern of activity showing a willful disregard for the act regulating the sale of prepaid funeral benefit contracts and the related regulations of the Finance Commission. The Respondents argue that two of the four contracts were not sold by the current owner of Walker-Mora Funeral Home, but by his father, who had the responsibility of putting the money related to those contracts into a trust fund and that the Department is unfairly punishing the son for acts of the father through this amount of penalty. The Department asserts that the penalty is assessed against Walker-Mora as a corporate entity rather than against the son or the father individually and that the death of the father isn't grounds for mitigating a penalty that the corporation incurred when the father ran it.

Previously (this happened before this action was filed and is only given as background)

Since 2007 when the son took over the operation of the funeral home (and apparently before as well) Walker-Mora committed a series of violations of the act regulating sellers of prepaid funerals. On discovering such violations through an on-site examination of Walker-Mora records, Commissioner Cooper ordered corrective action. Commissioner Cooper also brought an enforcement action against Walker-Mora in 2009 to collect restitution and penalties. I held a hearing in that enforcement action and upheld the Department's claims against Walker-Mora for restitution and a civil penalty in a proposal for decision. Commissioner Cooper then entered an order in which he approved the proposal for decision. When Walker-Mora still ignored the Commissioner's orders to take corrective action and failed to pay the restitution and penalties after the Commissioner's order to pay became final, Commissioner Cooper cancelled Walker-Mora's permit to sell prepaid funeral contracts and seized Walker-Mora's related records and trust funds. However, Walker-Mora didn't identify all the prepaid funeral contracts in force when it surrendered the records to the Department. Five more contracts have surfaced since the Department seized those records.

The facts directly related to this action

In this action, the Department now seeks to collect restitution and penalties on four of the five contracts that Walker-Mora is alleged to have withheld from the Department when the Department seized Walker-Mora's funeral contract records. The Department's evidence shows that Walker-Mora sold these four contracts; failed to place the funds from their sale into trust accounts; and failed to surrender records of the four contracts to the Department when the Department tried to seize all records and funds related to the cancelled permit.

Procedural Issue -- The 5th Contract and Respondents' Motion for Continuance

The fifth contract is not part of this action. The Department may follow up later with a separate law suit based on that contract and any other similar contracts the Department may discover in the future. The Department didn't process the complaint on the fifth contract until too late to give the Respondents ten days advance notice before the hearing of the Department's claim for restitution under the fifth contract. Respondents are entitled by statute to ten days advance notice of the factual basis for the Department's claims. The Texas Administrative Procedure Act imposes this requirement at Government Code, §2001.051 (a). Respondents sought a continuance of this case based on the ten-day advance notice requirement. The Department agreed to dismiss its suit on the fifth contract without prejudice to filing it again later but otherwise the Department opposed the continuance and asked to go forward with the hearing on the four contracts on which the Respondents had well over ten days notice.

I denied the continuance and allowed the Department to present its case on the other four contracts. The following facts and circumstances support my ruling.

First, Walker-Mora has already had one continuance in this case which the Department agreed to when Walker-Mora hired Mr. San Miguel as its attorney and Mr. San Miguel asked for additional time to prepare for the hearing so he could familiarize himself with the case.

Second, the Department has already held these and similar claims for some time and despite numerous demands by the Department, Walker-Mora has made little, if any, effort to pay or settle them.

Third, buyers of prepaid funeral contracts are usually people of limited means. The purchasers of these contracts are entitled to restitution from Walker-Mora sooner rather than later.

Fourth, last year Commissioner Cooper entered an award of \$2,673.00 in restitution and \$8,000.00 in penalties against Walker-Mora based on my proposal for decision in an enforcement action similar to this one by the Department against Walker-Mora. The Department after being unsuccessful in trying to collect the award through its own staff efforts referred it to the Texas Attorney General for collection. The Attorney General is delaying a collection action against Walker-Mora on that award because the Attorney General wants to add the recovery award expected from this action to the award from the earlier case and collect both awards in a single lawsuit.

Fifth, Walker-Mora assets are rapidly decreasing and the Department's chances of getting full recovery from Walker-Mora are reduced by any delay as claims against Walker-Mora continue to increase.²

² Mr. Ramirez testified that at the time of our hearing Walker-Mora owed an estimated \$21,000.00 to the Internal Revenue Service, \$20,000.00 in penalties for awards against it on claims under the statute administered by the Funeral Service Commission, and another \$12,000.00 to \$13,000.00 in property taxes. In addition, there are other claims pending against Walker-Mora under the legislation administered by the Funeral Service Commission which have not yet been tried and on which Walker-Mora still faces more potential liability for awards against it.

Sixth, the Funeral Service Commission has suspended both Mr. Arnaldo J. (“A.J.”) Ramirez’s funeral director’s license and Walker-Mora’s funeral establishment license based on a final order finding violations of laws the Funeral Service Commission administers. Negotiations are under way between Mr. Ramirez and the Funeral Service Commission which, if successful, will allow Mr. Ramirez to reactivate his and Walker-Mora’s licenses from the Funeral Service Commission. The Funeral Service Commission will condition reactivation of these licenses on Mr. Ramirez first paying all money he and Walker-Mora owe to the Funeral Service Commission. In addition, the Funeral Service Commission would require Mr. Ramirez to pay all money he and Walker-Mora owe to the Banking Department on claims supported by a final Banking Commissioner’s order entered after a hearing on the claims.³ It would simplify collection of the Banking Department’s claims to have a final Commissioner’s order supporting them if and when the proposed settlement agreement is reached between Mr. Ramirez and the Funeral Service Commission.⁴

I have discretion to grant or deny a continuance based on the facts and circumstances presented in each individual case. My grant or denial of a continuance will be reversed by an appellate court only if I have clearly abused my discretion.⁵ I am confident that the appellate courts will uphold my denial of the continuance motion in this hearing.

Ruling on the Penalty Issue

Finance Code § 154.406 (c) provides that in deciding the penalty amount, the Commissioner shall consider the seriousness of the violation, the “person’s” history of violations, and the “person’s” good faith in trying to comply with the applicable law.⁶ If the evidence had proved the father (and not the son) had committed all past violations of the applicable law and the son had acted in complete good faith, then there might be some merit to the Respondents’ argument that the son should not be punished for the acts of his father. However, the facts proved in this record show the son has not acted in good faith in complying with the statute and regulations governing the sale of prepaid funeral contracts since he assumed control of the funeral home after the death of his father but that the son violated the law on multiple occasions. Therefore, the argument that the son should be held blameless because of his innocence of any wrongdoing rests on a false premise. Almost certainly he knew of all four of these contracts when the Department seized the Walker-Mora prepaid funeral contracts and he didn’t turn information about the four contracts over to the Department. In fact, he personally

³ There is a written agreement between the Banking Department and the Funeral Service Commission under which the Funeral Service Commission conditions licensing on payment of claims to the Banking Department on which a hearing has been held and a final order has been entered.

⁴ The evidence about the proposed settlement came into the record without objection through Mr. Ramirez’s own testimony and through the testimony of Ms. Donna Potter, Texas Funeral Service Commission, Administrator of Consumer Affairs and Compliance:

⁵ See *Motor Infiniti Co. v. Motor Vehicle Bd.*, 918 S.W.2d 95 (Tex. App. -- Austin 1996, no subsequent appellate history); *Guerrero –Ramirez v. Texas State Bd. of Medical Examiners*, 867 S.W.2d 911, 916 (Tex. App. -- Austin 1993, no subsequent appellate history); *Gibraltar Sav. Asso. v. Franklin Sav. Assoc.*, 617 S.W.2d 322, 326-28 (Tex App--Austin 1981, writ ref. n.r.e.).

⁶ The word “person” is defined in the Act regulating the sale of prepaid funerals to include both a corporation and an individual. See Finance Code § 154.003 (8).

wrote two of these contracts after he assumed full management responsibility for the funeral home upon his father's death.

I agree with the Department that § 154.4061 of the Finance Code, provides the applicable penalty standard and adopt by reference the argument and authorities in the Department's brief dated May 18, 2010 (copy attached as "Appendix A"). Section 154.4061 provides that if in a hearing the Department establishes a pattern of "willful disregard" of Chapter 154 of the Finance Code or related rules of the Finance Commission, the trier of fact shall recommend the maximum penalty under § 154.406 of the Finance Code (\$1,000 for each day the violation occurs). Potentially, such a penalty could be many times greater than the amount Department staff has recommended in this action. However, I will limit my recommendation of a penalty to the \$16,000.00 penalty recommended by the Department staff.

Separately stated findings of fact and conclusions of law follow.

Findings of Fact

1. The Department brought an earlier enforcement action against Walker-Mora which I heard last year.⁷ As part of that case, the Department proved that Walker-Mora failed to maintain sufficient balances on deposit in its bank trust account to insure money will be available to perform the prepaid funeral contracts when the contract beneficiaries die. Because of Walker-Mora's indebtedness to the Internal Revenue Service (IRS), the IRS seized funds from Walker-Mora's bank trust funds which Walker-Mora must keep for prepaid funeral contract trust fund beneficiaries. This caused a shortage in the account and the Banking Department ordered Walker-Mora to restore the proper balance in the trust account. Walker-Mora still had not restored the proper balance in that account by December 23, 2009, after Commissioner Cooper entered an order cancelling its permit to sell prepaid funeral contracts and that order had become final.⁸

⁷ The docket number in that case is B-2902-09-283. A copy of the proposal for decision and Commissioner's order in that case is in evidence both as exhibit DOB I -E and as DOB Exhibit 2. The proposal for decision and Commissioner's order in that case are also online at <http://www.fc.state.tx.us/ALJ/DECIDE/b2902-09283.htm>.

⁸ In his testimony in our hearing, Mr. Ramirez (the son) disputed the finding in both my proposal for decision in last year's Banking Department enforcement action against Walker-Mora and in the Commissioners order canceling the permit to sell prepaid funeral contract benefits that Walker-Mora didn't deposit money in the prepaid funeral contract trust fund account to make up for the amounts seized by the IRS. Instead, Mr. Ramirez testified that he replaced the money and furnished the Department a copy of the deposit receipt but refused to furnish a copy of a bank statement showing that he deposited the money. He testified that he refused to furnish a copy of the bank statement because he didn't like the attitude of Mr. Saucillo (the Department representative who contacted him to request a copy of the bank statement). Mr. Ramirez testified further that he refused to comply because he thought Mr. Saucillo was "messaging" with him because Mr. Ramirez is a small-town man. Mr. Ramirez, of course, had an opportunity to present any evidence he had of replenishing the amount seized by the IRS in the hearing I held in the Department's enforcement action against Walker-Mora last year, but he failed to appear or send a representative to that hearing. My fact findings and conclusions of law in that case and the Commissioner's order based on those findings and the proposal for decision in which they were contained are final and not subject to collateral attack by Mr. Ramirez in this action. They are now res judicata.

2. Mr. Arnoldo J. (“A.J.”) Ramirez (the son) was in charge of the funeral home when it failed to comply with the Department’s orders and, as a consequence, had its permit to sell prepaid funeral contracts cancelled and related records and funds seized.

3. The evidence before me in the earlier enforcement action also showed that Walker-Mora failed to file an accurate 2008 annual report with the Department because the report failed to show the shortage in the bank trust account referenced in paragraph 1 above. Mr. Arnoldo J. (“A.J.”) Ramirez (the son) was in charge of the funeral home when it failed to file an accurate 2008 annual report.

4. Finance Code §154.155 provides that a purchaser of a prepaid funeral contract may cancel the contract and receive a refund at any time before maturity by giving written notice “and that the prepaid funeral contract permit holder shall refund the purchasers money within 30 days of the request.” The evidence before me in the earlier enforcement action showed that Walker-Mora failed to refund a purchaser’s funds for a period of over ten months in violation of the Finance Code § 154.155 requirement that the refund be made within 30 days of the request. In failing to make the requested refund within the 30 days, Walker-Mora and Mr. Ramirez (the son) also ignored repeated requests from both the purchaser and the Department that Walker-Mora make such refund. Moreover, Walker-Mora still had not refunded the purchaser’s funds by December 23, 2009, after Commissioner Cooper entered an order cancelling its permit to sell prepaid funeral contracts and that order had become final. Mr. Arnoldo J. (“A.J.”) Ramirez (the son) was in charge of the funeral home when it failed to refund the customer’s money as required by Finance Code § 154.155 and as requested many times by both the customer and the Department.

5. On December 4, 2009, because the Commissioner’s order based on the earlier enforcement action had become final, and because Walker-Mora had made no apparent effort to comply with either that order or the Department’s instructions to correct errors found in an onsite examination of Walker-Mora, Commissioner Cooper entered Commissioner’s Order No. 2009-065. That order cancelled Walker-Mora’s permit to sell prepaid funeral contracts, ordered Walker-Mora to cease and desist violations of Chapter 156, Texas Finance Code, and seized funds and records related to the cancelled permit. Commissioner Cooper’s order no. 2009-065 cancelling Walker-Mora’s permit and ordering the related seizures of records and trust funds became effective on December 23, 2009, after Walker-Mora failed to take advantage of its right to appeal the order.⁹ Mr. Arnoldo J. (“A.J.”) Ramirez (the son) was in charge of the funeral home at all times relevant to the cancellation of Walker-Mora’s permit (during the onsite examination of Walker-Mora, during the hearing to impose penalties and restitution at which he failed to appear or send a representative, and during the interim period in which he failed to take action pursuant to the orders issued by the Department following the onsite inspection and failed to comply with the final order issued following the administrative hearing).

6. The Banking Department received five letters of complaint in response to a press release informing holders of prepaid funeral contracts that they should notify the Department in

⁹ A copy of the Commissioner’s Order No. 2009-065, headed “Order Cancelling Permit, To Cease and Desist Activity, and to Seize Funds in Records” is in evidence as TxDOB Hearing Exhibit 1-F.

case Walker-Mora had not reported their contracts to the Department when the Department seized Walker-Mora records related to active prepaid funeral contracts.

7. Among the contracts not reported at the time the Department seized Walker-Mora records that the Department received in response to the press release was an addendum contract between B---- G---- P---- and Walker-Mora in the amount of \$220.00 for a procession to the church from graveside for P---- P---- beneficiary. A receipt issued by Walker-Mora shows that Walker-Mora received the \$220.00 on December 5, 2008. The \$220.00 was not deposited in the Walker-Mora prepaid funeral contracts trust account and was not part of the trust funds seized by the Department of Banking.¹⁰ Mr. Arnoldo J. (“A.J.”) Ramirez (the son) personally wrote both the addendum contract and the receipt. Moreover, he did both after he assumed full management responsibility for the funeral home following the death of his father.

8. Among the contracts not reported at the time the Department seized Walker-Mora records that the Department received in response to the press release was a contract between I---- G---- and Walker-Mora (contract signed by Arnoldo J. (“A.J.”) Ramirez (the son) for Walker-Mora). M-. G---- bought a prepaid funeral contract for the benefit of T---- B---- on August 12, 2008. M-. G---- produced receipts dated August 13, 2008, and August 14, 2009, totaling \$1,840.00. The \$1,840.00 was not deposited in the Walker-Mora prepaid funeral contracts trust account and was not part of the trust funds seized by the Department of Banking.¹¹ Mr. Arnoldo J. (“A.J.”) Ramirez (the son) personally signed not only the contract but also the receipts. Moreover, he sold the contract and issued the receipts after he assumed full management responsibility for the funeral home following the death of his father.

9. Among the contracts not reported at the time the Department seized Walker-Mora records that the Department received in response to the press release was a contract between J---- L---- G---- and Walker-Mora in the amount of \$3,800.00 dated August 2, 1996. M-. G---- produced a receipt showing the contract paid in full. The \$3,800.00 was not deposited in the Walker-Mora prepaid funeral contracts trust account and was not part of the trust funds seized by the Department of Banking.¹²

10. Among the contracts not reported at the time the Department seized Walker-Mora records that the Department received in response to the press release was a contract between B--- P---- and Walker-Mora in the amount of \$3,700.00 which was written on or about June 5, 1994. M-. P---- produced a payment schedule from Walker Mora that ---- paid \$3,550.00 on this contract. The \$3,550.00 was not deposited in the Walker-Mora prepaid funeral contracts trust account and was not part of the trust funds seized by the Department of Banking.¹³ Although this contract was written while Mr. Arnoldo J. (“A.J.”) Ramirez’s father was in charge of the funeral home, Mr. Ramirez (the son) was clearly aware of the contract because he and his wife took

¹⁰ Related documents are in evidence and attached to the transcript under Tab 3. See also, the testimony of Department witness, Mr. Jesse Saucillo, about this contract at Tr. 23-27.

¹¹ Related documents are in evidence and attached to the transcript under Tab 4. See also, the testimony of Department witness, Mr. Jesse Saucillo, about this contract at Tr. 27-29.

¹² Related documents are in evidence and attached to the transcript under Tab 5. See also, the testimony of Department witness, Mr. Jesse Saucillo, about this contract at Tr. 29-30.

¹³ Related documents are in evidence and attached to the transcript under Tab 6. See also, the testimony of Department witness, Mr. Jesse Saucillo, about this contract at Tr. 30-31.

many of the payments as the ledger produced by the customer clearly shows. (Mr. Ramirez acknowledged on cross-examination that he and his wife received these payments and I find that they received them.) Despite his being aware of the contract, Mr. Ramirez (the son) failed to turn it over to the Department when the Department seized the Walker-Mora prepaid funeral contract records.

11. The four unreported contracts discussed above total \$9,410.00 in restitution due the Department for the benefit of the parties listed above. The Department seeks this amount in restitution. Respondents have not contested this amount. Therefore, I find that the Commissioner should order the Respondents to pay \$9,410.00 in restitution.

12. The Department also seeks penalties of \$16,000.00 (\$3,000.00 for each undisclosed contract for which no money was deposited in the trust fund and \$4,000.00 for failing to disclose these contracts when the Department seized the Walker-Mora prepaid penalty benefit contracts and trust funds earlier this year). I find the requested penalties to be well within the amount of penalty the Commissioner is authorized to impose, and that the amount of penalty is reasonable under the facts and circumstances in this case. Therefore, I will recommend this amount of penalty to Commissioner Cooper.

13. Mr. Arnoldo J (“A.J.”) Ramirez testified, without contradiction by the Department (and I, therefore, find), that before October 2007, Arnoldo J. (“A.J.”) Ramirez’s father was president of Walker-Mora and Arnoldo J. (“A.J.”) Ramirez (the son) was employed by Walker-Mora as a funeral director and embalmer but had no management responsibilities in the business.

Conclusions of Law

The primary statutory provisions applicable to the penalties in this case are found at Texas Finance Code § 154.406 and § 154.4061 and read as follows:

§ 154.406. Administrative Penalty

(a) After notice and opportunity for hearing, the Commissioner may impose an administrative penalty on a person who:

(1) violates this chapter or a final order of the Commissioner or rule of the Commission and does not correct the violation before the 31st day after the date the person receives written notice of the violation from the Department; or

(2) engages in a pattern of violations as determined by the Commissioner.

(b) The amount of the penalty for each violation may not exceed \$1,000.00 for each day the violation occurs.

(c) In determining the amount of the penalty, the Commissioner shall consider the seriousness of the violation, the person’s history of violations, and the person’s good faith in attempting to comply with this chapter.

(d) The imposition of a penalty under this section is subject to judicial review as a contested case under Chapter 2001, Government Code.

(e) The Commissioner may collect the penalty in the same manner that a judgment is enforced in district court.

§ 154.4061. Pattern of Willful Disregard •

(a) If, after a hearing conducted as provided by Chapter 2001, Government Code, the trier of fact finds that a violation of this chapter or a rule of the Finance Commission of Texas establishes a pattern of willful disregard for the requirements of this chapter or rules of the Finance Commission, the trier of fact shall recommend to the Commissioner that the maximum penalty permitted under § 154.406 be imposed on the person committing the violation or that the Commissioner cancel or not renew the person's permit under this chapter.

(b) For the purpose of this section, violations corrected as provided by § 154.406 may be included in determining whether a pattern of willful disregard of the requirements of this chapter or rules of the Finance Commission exists.

Sections 154.406 and 154.4061 are ambiguous since they both refer to a "person" who violates the Prepaid Funeral Regulatory Act and Section 154.002 of the Prepaid Funeral Regulatory Act defines a "person" to include both an individual and a corporation. If a case were to arise in which the corporation had violated the act through its prior management but the management in charge of the corporation at the time a penalty was imposed had not violated the the Prepaid Funeral Regulatory Act, it would be necessary to resolve the issue raised by Respondents regarding whether it would be fair to current management to penalize it for the acts of its predecessors. However, that issue does not arise under the facts of the case before me. Under the facts presented in this case, both prior Walker-Mora management (Mr. Ramirez, the father) and current Walker-Mora management (Mr. Ramirez, the son) have committed multiple violations justifying the penalties recommended by staff.

I conclude that the staff recommended penalty of \$16,000.00 is within the range of penalties authorized by the Legislature and that the facts of this case justify the imposition of this penalty. I further conclude that it is within Commissioner Cooper's discretion to impose a penalty of \$16,000.¹⁴

There is no dispute with regard to the Respondents liability for restitution of \$9,410.00 for the benefit of the purchasers of the four prepaid funeral contracts or the Respondents liability for costs in the amount of \$240.00.

¹⁴ The agency head has broad discretion to impose a penalty within the range authorized by the legislature as he or she finds justified by the facts of each case. The courts will not normally interfere with the penalty the agency head chooses. See *Granek v. Tex. State Bd. of Med Exam'rs*, 172 S.W.3d 761 (Tex. App. - Austin 2005, pet. dism'd); *Sears v. Tex. State Bd. of Dental Exam'rs*, 759 S.W.2d 748, 751 (Tex. App. - Austin 1988, no pet.); *Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984).

Recommendation

For the reasons stated, I recommend that the Commissioner order Respondents to pay restitution to the Department in the amount of \$9,410.00, penalties in the amount of \$16,000.00 and costs in the amount of \$240.00.

Entered at Austin, Texas, this the 10th day of June, 2010.

/s/ Larry J. Craddock
Larry J. Craddock
Administrative Law Judge

“Appendix A”

Department of Banking brief on the “willful disregard” penalty standard (adopted by reference)

At the hearing on this matter on May 14, 2010, there was discussion of the meaning of “a pattern of willful disregard for the requirements of [Chapter 154 of the Finance Code] or a rule of the Texas Finance Commission” as stated in *Texas Finance Code* § 712.0442(a). Although I have not located a Texas case discussing the meaning of “willful disregard” in the context of imposing an administrative penalty, I have located federal cases.

In *A. J. McNulty & Company, Inc. v. Secretary of Labor*, 283 F.3d 328, 337 (D.C.Cir. 2002), the court reviewed whether the Occupational Safety and Health Administration (OSHA) correctly classified a violation as “willful,” which triggered the highest possible penalty range. *Id.* at 330. The court stated that although the statute in question did not define “willful,” courts were unanimous in holding that a willful violation is an act done voluntarily with either an intentional disregard of, or plain indifference to, the law’s requirements. *Id.* at 337. “Prior citations for identical or similar violations may sustain a violation’s classification as willful.” *Id.* at 339. In the instant case, Walker Mora Funeral Home, Inc. (Walker Mora) was cited in its March 2009 examination for failure to handle funds it had received for trust-funded prepaid funeral benefits contracts in accordance with Chapter 154 of the Finance Code. In September 2009, Walker Mora was ordered to pay restitution for such mishandled funds. Eight months later, it has paid nothing. Respondents’ continued retention of trust funds that they misappropriated supports a finding that the violations in the matter currently before the Commissioner were done in willful disregard of the requirements of Chapter 154.

In a case evaluating whether a tax preparer’s understatement of his client’s tax liability was willful, the Eighth Circuit stated as follows:

[W]illfulness does not require fraudulent intent or an evil motive; it merely requires a conscious act or omission made in the knowledge that a duty is therefore not being met.

Pickering v. United States, 691 F.2d 853, 855 (8th Cir. 1982), relied on in *United States v. Bailey*, 789 F.Supp. 788, 813 (N.D.Tex. 1992).

As you are aware, *Texas Finance Code* § 154.406 (b) states that “The amount of the penalty for each violation may not exceed \$1,000.00 for each day the violation occurs.” And, *Texas Finance Code* § 154.4061 (a) states that if, after a hearing, the trier of fact finds that a violation of this chapter or a rule establishes a pattern of willful disregard for the requirements of this chapter, the trier of fact shall recommend to the commissioner that the maximum administrative penalty permitted under §154.406 be imposed. Review Examiner Jesse Saucillo testified that the maximum administrative penalty would be in the hundreds of thousands of dollars. The Department seeks, however, only \$16,000.00. Given Respondents’ willful disregard of the laws governing prepaid funeral benefits contracts, \$16,000.00 is a very reasonable penalty.