

**Order No.2014-005
Docket No. BE-13-10-039**

IN THE MATTER OF	§	BEFORE THE BANKING
GONZALEZ FUNERAL HOME;	§	
	§	
GONZALEZ FAMILY FUNERAL HOME,	§	
LLC;	§	
	§	
GONZALEZ-RIVERA FUNERAL HOME	§	
OF EDINBURG, LLC;	§	
	§	
ADAN N. GONZALEZ, Jr.;	§	COMMISSIONER OF TEXAS
	§	
MYRNA DORIS GONZALEZ;	§	
	§	
MARC ANTHONY GONZALEZ; and,	§	
	§	
AARON RIVERA;	§	
	§	
EDINBURG, TEXAS	§	AUSTIN, TRAVIS COUNTY, TEXAS

FINAL ORDER

On this 22nd day of May, 2014, came on to be considered Docket No. BE-13-10-039. After reviewing the administrative record and the Proposal for Decision Following Exceptions issued by the Administrative Law Judge on March 28, 2014 (the "PFD"), I have determined that the Findings of Fact and Conclusions of Law are supported by the evidence of record and applicable law, subject to the correction and clarification discussed in the following paragraphs.

The PFD, under the heading "DISCUSSION OF THE EVIDENCE AND APPLICATION OF THE LAW" and the subheading "The Commissioner Has Discretion To Determine the Amount of Penalty," contains the following paragraph:

The administrative law judge recommends the assessment of administrative penalties according to the number of days of violations that each respondent committed or is responsible for and the factors required by the Section 154.403. The number of days of violations is determined according to the following interpretations of the applicable provisions of the Finance Code. The sale of a trust-funded contract without a permit occurs only once and, thus, can constitute only one day of violation. *For a trust-funded contract, the failure to deposit the money within in a trust or other restricted account within 30 days after receipt of the money constitutes only one day of violation. There can be only one day of violation for failure to deposit each receipt of money by a particular day. The deadline to make the deposit passes only once and can be missed only once.* The act of collecting a payment in violation of Section 154.203 can

constitute only one day of violation, because one payment can be collected only once. [Emphasis added.]

Although not a formal Finding of Fact or Conclusion of Law, the emphasized portion of the quoted paragraph states a legal conclusion that cannot be permitted to stand in light of the public policy underlying the statute. The Administrative Law Judge failed to distinguish between a prohibited act and a failure to act pursuant to an affirmative duty. An action taken in violation of the statute, such as selling a trust-funded contract without a permit or collecting an insurance premium without a license as an insurance agent, constitutes a single violation with respect to each such occurrence. However, the failure to discharge an affirmative duty imposed by statute constitutes a separate violation for each day that the obligation remains outstanding.

The Administrative Law Judge concluded that the failure to deposit money received for a trust-funded contract within 30 days after receipt can only constitute a single violation because the "deadline to make the deposit passes only once and can be missed only once." This conclusion focuses on the "deadline" to make a deposit rather than the more fundamental obligation to make the deposit. Under that view, the obligation to deposit the funds effectively expires on the 31st day after receipt, permitting the business to utilize those funds indefinitely without regard to the inherent fiduciary duty imposed on a seller by Finance Code Chapter 154. Such a conclusion undermines the statutory purpose of Chapter 154, to "provide all safeguards to protect the prepaid funds and to assure that the funds will be available to pay for prearranged funeral services." Finance Code Section 154.001(3). After the deadline to make the deposit passes, each new day represents a fresh opportunity (and a new deadline) to make the required deposit, and failure to make the deposit that day constitutes an additional and separate violation.

However, notwithstanding the shortcomings in the record from failure to fully document and account for the total possible number of violations inherent in Docket No. BE-13-10-039, for which an administrative penalty may be imposed, I find in the exercise of discretion that the aggregate penalties per respondent recommended by the Administrative Law Judge are reasonable in light of the facts and circumstances reflected in the record .

ADOPTION OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Subject to the correction and clarification discussed in the preceding paragraphs, I have determined that the Findings of Fact and Conclusions of Law are supported by the evidence of record and applicable law.

I, therefore, ADOPT the Findings of Fact and Conclusions of Law that are set out in the PFD and incorporate in this Order the Findings of Fact and Conclusions of Law therein as if they were set out in full in this Order.

RESTITUTION AND PENALTIES

Based on the record and the Findings of Fact and Conclusions of Law, I determine that an order requiring restitution of \$62,024.00 from Gonzalez Funeral Home is justified and appropriate under the law.

Based on the record and the Findings of Fact and Conclusions of Law, I determine that an order requiring restitution of \$13,350.00 from Adan N. Gonzalez, Jr., jointly and severally with Gonzalez Funeral Home out of its restitution of \$62,024.00 stated above, is justified and appropriate under the law.

Based on the record and the Findings of Fact and Conclusions of Law, I determine that an order requiring restitution of \$24,602.00 from Marc A. Gonzalez, jointly and severally with Gonzalez Funeral Home out of its restitution of \$62,024.00 stated above, is justified and appropriate under the law.

Based on the record and the Findings of Fact and Conclusions of Law, I determine that an order requiring restitution of \$9,832.00 from Adan N. Gonzalez, Jr., and Myrna Doris Gonzalez, jointly and severally with Gonzalez Funeral Home out of its restitution of \$62,024.00 stated above, is justified and appropriate under the law.

Based on the record and the Findings of Fact and Conclusions of Law, I determine that an order requiring restitution of \$123.58 from Gonzalez Family Funeral Home, LLC, and Adan N. Gonzalez, Jr., jointly and severally, is justified and appropriate under the law.

Based on the record and the Findings of Fact and the Conclusions of Law, I determine that an administrative penalty against Gonzalez Funeral Home in the amount of \$48,000.00 is justified and appropriate under the factors required by law.

Based on the record and the Findings of Fact and the Conclusions of Law, I determine that an administrative penalty against Adan N. Gonzalez, Jr., in the amount of \$21,000.00 is justified and appropriate under the factors required by law.

Based on the record and the Findings of Fact and the Conclusions of Law, I determine that an administrative penalty against Marc A. Gonzalez in the amount of \$29,000.00 is justified and appropriate under the factors required by law.

Based on the record and the Findings of Fact and the Conclusions of Law, I determine that an administrative penalty against Myrna Doris Gonzalez in the amount of \$6,000.00 is justified and appropriate under the factors required by law.

Based on the record and the Findings of Fact and the Conclusions of Law, I determine that an administrative penalty against Gonzalez Family Funeral Home, LLC, in the amount of \$500.00 is justified and appropriate under the factors required by law.

ORDERS OF THE COMMISSIONER

It is, therefore, ORDERED that the respondents Gonzalez Funeral Home, Gonzalez Family Funeral Home, LLC, Adan N. Gonzalez, Jr., Marc A. Gonzalez, and Myrna Doris Gonzalez pay restitution in the amounts that are set forth above, for the Department of Banking to administer according to law.

It is further ORDERED that respondents Gonzalez Funeral Home, Gonzalez Family Funeral Home, LLC, Adan N. Gonzalez, Jr., Marc A. Gonzalez, and Myrna Doris Gonzalez, pay to the Department of Banking administrative penalties in the amounts that are set forth above.

Based on the record and the Findings of Fact and the Conclusions of Law, I determine that Marc A. Gonzalez is liable for costs of service in the amount of \$135.00 as court costs.

Based on the record and the Findings of Fact and the Conclusions of Law, I determine that Adan A. Gonzalez, Jr., is liable for costs of service in the amount of \$135.00 as court costs.

Based on the record and the Findings of Fact and the Conclusions of Law, I determine that Myrna Doris Gonzalez is liable for costs of service in the amount of \$275.00 as court costs.

Based on the record and the Findings of Fact and the Conclusions of Law, I determine that Marc A. Gonzalez, Adan N. Gonzalez, Jr., and Myrna Doris Gonzalez are liable, jointly and severally, for the cost of the hearing transcript in the amount of \$991.00 as court costs.

It is, therefore, ORDERED that respondents Marc A. Gonzalez, Adan N. Gonzalez, Jr., and Myrna Doris Gonzalez pay to the Department of Banking court costs in the amounts that are set forth above.

All relief that was requested but not otherwise disposed of herein is denied.

Signed on this 22nd day of May, 2014.

/s/Charles G. Cooper
Charles G. Cooper
Texas Banking Commissioner

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ADAN N. GONZALEZ, Jr.;	§	
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MYRNA DORIS GONZALEZ;	§	
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MARC ANTHONY GONZALEZ; and,	§	
	§	
AARON RIVERA;	§	

EDINBURG, TEXAS

§
§

AUSTIN, TRAVIS COUNTY, TEXAS

PROPOSAL FOR DECISION FOLLOWING EXCEPTIONS

This Proposal for Decision is issued following consideration of the record from the contested case hearing that was conducted on August 7, 2013; the Exceptions of Texas Department of Banking To Proposal for Decision and Final Order, filed on November 19, 2013; the Supplemental Exceptions of Texas Department of Banking To Proposal for Decision and Final Order, filed on December 19, 2013; Aaron Rivera and the Gonzalez Family Funeral Home's Response to Texas Department of Banking's Exceptions and Supplemental Exceptions, filed on January 20, 2014; and, Response of Texas Department of Banking to Administrative Law Judge Request for Legal Authority, filed on February 13, 2014.

STATEMENT OF THE CASE

This is an enforcement action concerning prepaid funeral services, which the staff of the Department of Banking initiated. The charges are set forth in the First Amended Notice of Hearing. Department staff asserts that the respondents: Gonzalez Funeral Home, Gonzalez Family Funeral Home, LLC, Gonzalez-Rivera Funeral Home of Edinburg, LLC, Adan N. Gonzalez, Jr., Myrna Doris Gonzalez, Marc Anthony Gonzalez, and Aaron Rivera, violated the Texas Finance Code by (1) selling Prepaid Funeral Benefits Contracts (PFBCs) to the public without a permit, (2) receiving funds from the sale of PFBCs without timely depositing the funds in trust or submitting the funds to a licensed insurance company as insurance premiums, and (3) for failing to honor the PFBCs that they sold. The staff seeks the imposition of administrative penalties, restitution in the amount of money paid under the PFBCs, and court costs, against the responsible persons under the law.

Appearances

Department staff, represented by Robert Giddings, presented evidence consisting of testimony from Russell Reese, Donna Potter, Marc A. Gonzalez, and Adan N. Gonzalez, Jr., and of documents consisting chiefly of records of prepaid funeral services contracts and of applications for funeral establishment licenses. Staff takes the position that the same funeral home business operated during the 18 year period between 1991 and 2008 and that ownership and responsibility for operation of the funeral home did not change during that period of time. Staff argues that the respondents should be held jointly and severally liable for restitution in the amount of \$61,175.14, administrative penalties in the amount of \$68,000.00 at a minimum, and court costs in the amount of \$910.00.

Aaron Rivera appeared, represented by attorney Chris Ferraro, and presented evidence consisting of his testimony and documents. Mr. Rivera argued that he bought the property in 2006 and established a new funeral home. He takes the position that he is not responsible for any violations committed by previous funeral establishments and other individuals. He also takes the position that no violations occurred during the time he owned and operated a funeral home at the location in question. He argued that he and his funeral home did not sell PFBCs in violation of

the law or receive or collect money for PFBCs that were sold before his ownership.

Adan N. Gonzalez, Jr., and Marc A. Gonzalez appeared and testified. Marc Gonzalez argued that he was a funeral director in charge of the establishment, but that he did not do anything wrong. He said that he has been a funeral director for 20 years and would not do anything to jeopardize his funeral director license. Adan N. Gonzalez, Jr., argued that he has been in the funeral business for 30 years and doesn't think he had any complaints with the Texas Funeral Service Commission. He said that he just did his job.

Myrna Doris Gonzalez was served with notice of hearing. She told Mr. Giddings that she had health issues and did not plan to attend the hearing.

APPLICABLE LAW FOR PREPAID FUNERAL BENEFITS CONTRACTS

Finance Code Chapter 154

Purpose

Chapter 154 of the Finance Code sets forth the law for prepaid funeral services and has the following stated purpose: (1) limit the manner in which a person may accept funds in prepayment of funeral services to be performed in the future; (2) provide a regulatory framework to give the public an opportunity to arrange and pay for funerals in advance of need; and, (3) provide all safeguards to protect the prepaid funds and to assure that the funds will be available to pay for prearranged funeral services.

Requirement To Have a Permit

A person must hold a permit issued under Section 154.101 (1) to sell or accept money for prepaid funeral benefits under any contract, or (2) to solicit an individual's designation of prepaid funeral benefits to be paid from an insurance policy. The "seller" of a PFBC means a person selling, accepting money or premiums for, or soliciting contracts for prepaid funeral benefits or contracts or insurance policies to fund prepaid funeral benefits in Texas. Finance Code §154.002(10). A "person" includes an individual and a corporation. Finance Code §154.002(8).

Requirements for Handling of Funds

The Finance Code requires a PFBC to be in one of two forms: a trust-funded contract or an insurance-funded contract. For a trust-funded contract, Section 154.253 provides that not later than the 30th day after the date of collection, the money collected on the contract shall be deposited in an account with a financial institution that meets certain requirements.

For an insurance-funded contract, Section 154.203 provides that the premiums paid on the insurance policy may only be collected by a licensed insurance agent appointed by the insurance company issuing the policy and shall be paid to the insurance company in accordance with the agency agreement between the insurance company and the agent.

Occupations Code Chapter 651

Occupations Code 651.403(b) provides that the funeral director in charge is directly responsible for the funeral directing business of the funeral establishment.

DISCUSSION OF THE EVIDENCE AND APPLICATION OF THE LAW

Overview

From 1991 to 2010, different owners operated two funeral establishments at 812 E. Cano in Edinburg, Texas. The funeral establishments were operated under four different names and two separate licenses issued by the Texas Funeral Service Commission (FSC). At various times during that 20-year period, three of the respondents and three other individuals served as funeral director in charge. DOB Exhibits 51-68 show who was the funeral director in charge at what times for each funeral home between 1991 and 2010.

The Gonzalez Edinburg Funeral Home, which became the Gonzalez Funeral Home after a name change in 1993, operated under FSC Establishment License No. 1287. From 1991 until August 1995, that funeral establishment also held Permit No. 821, which the Department of Banking issued under Finance Code Section 154.101 and authorized the sale of PFBCs.

Gonzalez Family Funeral Home, LLC, operated under Establishment License 3414, which the FSC issued on or about October 17, 2006. Mr. Rivera owned and operated the Gonzalez Family Funeral Home, LLC, until on or about November 26, 2008, when Nora Hinojosa-Rivera assumed operation of and responsibility for the Gonzalez Family Funeral Home. [DOB Exhibit 68].

Effective November 26, 2008, Ms. Nora Hinojosa-Rivera acquired ownership and assumed operations of the Gonzalez Family Funeral Home, LLC, by way of a mediation agreement in a divorce proceeding between her and Aaron Rivera. [DOB Exhibit 68] On or about April, 2009, Ms. Hinojosa-Rivera operated the establishment under the name of Gonzalez-Rivera Funeral Home of Edinburg, LLC. [DOB Exhibit 3].

The Executive Director of the FSC directed Ms. Hinojosa-Rivera by letter dated January 12, 2010, to cease and desist all unlicensed funeral business at Gonzalez Family Funeral Home after noting that funeral business was being conducted at the establishment without an establishment license. [DOB Exhibit 2].

The Commissioner of Banking issued Order No. 2010-012 on March 5, 2010, an Emergency Order To Seize Prepaid Funeral Records. [DOB Exhibit 3] Department staff seized the records under authority of the order. [TR 24] The respondents to that order did not request a hearing or challenge the validity of the order. Gonzalez-Rivera Funeral Home, LLC., closed and ceased operations on March 5, 2010. [DOB Exhibit 35]. There is no evidence that the funeral establishment sold PFBCs during the time Nora Hinojosa-Rivera owned it.

Evidence of Violations

Sale of PFBCs Without a Permit

The Gonzalez Funeral Home sold 23 trust-funded contracts between 1991 and September 2006, which are identified by DOB Exhibits 15-35, 37, and 39. It sold 18 of those contracts after August 1995, when it did not hold a permit issued under Finance Code Section 154.101. Each sale of a trust-funded contract without a permit constitutes a violation of Section 154.101.

The Gonzalez Family Funeral Home sold one trust-funded contract in 2008, which is identified by DOB Exhibit 36. That contract was written on an at-need contract form, but it was sold and paid for in full before the death of its intended beneficiary. Mr. Rivera testified that the purchaser bought the contract for his wife when he thought her death was imminent. Mr. Rivera testified that, in general, if a death did not occur within 30 days, then his practice was to have returned the purchase price to the purchaser and issue an insurance-funded contract. He said that the contract evidenced by DOB Exhibit 36 slipped through the cracks, apparently referring to a failure to convert it to an insurance-funded contract. Mr. Rivera's intentions aside, the sale of a funeral benefits contract before the death of the beneficiary meets the legal definition of the sale of a trust-funded contract. Such a sale without a permit constituted a violation of Section 154.101.

Gonzalez Funeral Home was the funeral provider on 8 insurance-funded contracts and Gonzalez Family Funeral Home was the funeral provider on 3 insurance-funded contracts. Mr. Reese testified to the effect that the sale of insurance-funded contracts did not require the funeral establishment to hold a permit under Finance Code §154.101. As a consequence, there is not a conclusion of law that a respondent violated Section 154.101 for the sale of insurance-funded contracts without a permit.

Violations Concerning Handling of Funds - Trust-Funded Contracts

The failure to deposit in a trust or other restricted account the money that was collected as a payment for a trust-funded contract constitutes a violation of Section 154.253. Mr. Reese testified in explanation of DOB Exhibit 11 that the column "Paid in" represents the amount of money that the funeral establishment received or collected when the customer made a payment on the contract that is listed on the exhibit. Marc Gonzalez testified that the Gonzalez Funeral Home did not have a trust or other restricted account. [TR 83]. Aaron Rivera testified that Gonzalez Family Funeral Home did not have a trust or other restricted account. Their testimony with Mr. Reese's testimony is sufficient to show that the amounts of money shown on DOB Exhibit 11 as "paid in" for the trust-funded contracts were collected by the funeral establishments and were not deposited in a trust or other restricted account. In addition, Mr. Rivera's testimony and DOB Exhibit 36 show that the money that Gonzalez Funeral Home collected for that contract was deposited in the funeral establishment's business account. The funeral establishment committed a violation of Finance Code Section 154.253 each time it failed to deposit in a trust or other restricted account the money it collected as payment for a trust-funded contract.

Violations Concerning Handling of Funds - Insurance-Funded Contracts

Each collection of a payment for an insurance-funded contract by a person who was not a licensed insurance agent constitutes a violation of Section 154.203. Mr. Reese's testimony that the column "Paid in" on DOB Exhibit 11 represented the amount of money that the funeral establishment collected as payment on the listed contract also applies to the insurance-funded contracts. The funeral establishments were not licensed insurance agents. Consequently, except when more specific evidence shows otherwise, Mr. Reese's testimony and DOB Exhibit 11 are considered to be adequate proof that the amounts of money that DOB Exhibit 11 shows were "paid in" for the insurance-funded contracts were collected by to the funeral establishment and not by an authorized insurance agent. The exception is shown by the receipt in DOB Exhibit 41. The receipt was signed by an insurance agent and constitutes evidence that the agent and not the funeral home collected that payment. The evidence shows that Gonzalez Funeral Home committed 7 violations of Section 154.203 concerning the handling of payments for insurance-funded contracts.

Concerning the three insurance-funded contracts that were sold when Gonzalez Family Funeral Home, LLC, operated under Aaron Rivera's ownership, Mr. Rivera testified that he did not receive any funds from the sale of the three contracts. He testified that his current practice is to have the purchaser of an insurance-funded contract make the check payable to the insurance company. But in the past, the customer would make the check payable to his funeral home when his funeral home was the funeral provider under the contract. The records related to the three insurance-funded contracts show that \$123.58 was paid in to Gonzalez Family Funeral Home. [DOB Exhibit 11]. The evidence shows that Gonzalez Family Funeral Home committed 3 violations of Section 154.203 concerning the handling of collections of payments for insurance-funded contracts.

Responsibility for the Violations

Staff argued for joint and several liability of all the respondents for all of the violations. The argument in essence, possibly akin to a conspiracy, was to the effect that all persons were jointly responsible for all violations no matter whose action constituted what violation, because there was one funeral establishment that was operated by the same people. The argument did not include a reference to legal authority that supports it. The argued position is contrary to the principles that a person whose action amounts to a violation is the person who is subject to the penalty and that one person is not responsible for the violation of another person, unless the law provides otherwise as for a funeral director in charge. For these reasons, the staff's argument about universal joint and several liability is not adopted.

The conclusions of law are intended to place the legal responsibility for each violation on the person whose action constituted the violation. The specific facts and responsibility concerning each violation are set forth in the findings of fact and conclusions of law, consistent with the following.

Concerning the sales of trust-funded contracts without a permit, the funeral establishment is responsible for each sale when it was the seller. The person who signed on behalf of the seller

of a trust-funded contract in violation of Section 154.101 also commits a violation. As the person who is responsible for the business of the funeral establishment, the funeral director in charge of the funeral establishment at the time of each sale in violation of Section 154.101 is responsible for each violation, as well.

Concerning the handling of money that was collected as payment for the trust-funded contracts, the funeral establishment commits a violation each time it fails to deposit in a trust or other restricted account the money that it collected as payment for the contract. The evidence does not sufficiently show whether the person who signed the contracts on behalf of the seller received the money or was responsible for making the required deposits. Once again, the funeral director in charge of the funeral establishment at the time each deposit was required is also responsible for each violation when the deposits were not made.

Concerning the handling of money that was collected as payment for the insurance-funded contracts, the evidence shows that the funeral establishment collected the money and was not a licensed insurance agent. The funeral establishment committed a violation each time it collected money for an insurance-funded contract. And the funeral director in charge is responsible for each such violation. The evidence is not sufficient to conclude that the persons who signed the insurance-funded contracts on behalf of the funeral provider also collected the money.

Restitution

The Finance Code provides that restitution may be required of a person who fails to deposit money in compliance with Section 154.253 or who misappropriates or converts money paid on a PFBC. In this case, an order of restitution may be required of the persons that violated or bear responsibility for the violations of Section 154.253 or Section 154.203, which includes the funeral establishments and the funeral directors in charge. As a result, joint and several liability for restitution is assigned to the funeral establishment and its funeral director in charge at the time the money was mishandled by the funeral establishment. The specific facts and liabilities for restitution are set forth in findings of fact and conclusions of law.

Because Mr. Rivera's funeral home in McAllen provided the funeral services for the intended beneficiary of the contract identified by DOB Exhibit 36, an order of restitution is not justified concerning the money that was paid for that contract.

Authority To Impose Administrative Penalties

Finance Code Section 154.406 provides, in pertinent part, that 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 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.

The evidence shows that respondents Gonzalez Funeral Home, Adan N. Gonzalez, Jr., Marc A. Gonzalez, and Myrna Doris Gonzalez committed the same violations many times over several years, which is proof that they engaged in a pattern of violations. Consequently, the Commissioner may impose administrative penalties against them.

Gonzalez Family Funeral Home, LLC, committed a violation concerning one trust-funded contract, but Mr. Rivera provided the funeral services that the contract was written to secure. His action avoided the potential harm that the violations might have caused. Gonzalez Family Funeral Home, LLC, also committed three violations of Finance Code Section 154.203 when it collected \$123.58 for payment of 3 insurance-funded contracts. The three violations arguably might amount to a pattern of violations. They occurred during two-months out of a 2-year period, involved a minimal amount of money collected, and are not accompanied by proof of harm to the purchaser. The ALJ concludes that the evidence regarding whether Gonzalez Family Funeral Home, LLC, engaged in a pattern of violations is weak, unlike the evidence about the actions of Marc A. Gonzalez and Adan N. Gonzalez, Jr., and is not adequate to support findings and conclusions that the funeral establishment engaged in a pattern of violations.

The Commissioner Has Discretion To Determine the Amount of Penalty

Assessment of an administrative penalty is discretionary. 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.

The staff presented opinion testimony that the range of penalties that may be assessed in this case can range into the millions of dollars, although the testimony did not address the actual number of days of violation. [TR 35]. The staff recommended the assessment against all of the respondents, jointly and severally, of an administrative penalty in the amount of \$68,000.00 based on a minimum of \$2,000.00 for each of 34 contracts. [TR 35].

The administrative law judge recommends the assessment of administrative penalties according to the number of days of violations that each respondent committed or is responsible for and the factors required by the Section 154.403. The number of days of violations is determined according to the following interpretations of the applicable provisions of the Finance Code. The sale of a trust-funded contract without a permit occurs only once and, thus, can constitute only one day of violation. For a trust-funded contract, the failure to deposit the money within in a trust or other restricted account within 30 days after receipt of the money constitutes only one day of violation. There can be only one day of violation for failure to deposit each

receipt of money by a particular day. The deadline to make the deposit passes only once and can be missed only once. The act of collecting a payment in violation of Section 154.203 can constitute only one day of violation, because one payment can be collected only once.

The Finance Code provides a maximum penalty of \$1,000.00 per day of violation. The repeated sale of trust-funded contracts without a permit, the failure in every instance to deposit in a trust or other restricted account the payments for the trust-funded contracts, and the collection of the payments for the insurance-funded contracts in every instance by a person who was not a licensed insurance agent, are potentially serious violations. The record contains very little evidence, however, that the beneficiaries of the contracts at issue did not receive funeral services at the time of need. There is room for discretion in determining the amount of penalty.

Court Costs

Consistent with the approach taken for restitution and administrative penalties, the proposal recommends the assessment of costs against a person according to the amount of expenditure that was directly related to the person, to the extent the evidence allows.

Based on all of the evidence of record and applicable law, the Administrative Law Judge makes the following findings of fact and conclusions of law.

Findings of Fact

1. Proper notice of hearing was timely given to all respondents.

Service of Notice Costs

2. The Department of Banking spent \$135.00 related to obtaining service of notice of hearing on Marc A. Gonzalez. DOB Exhibits 5 and 10
3. The Department of Banking spent \$275.00 related to obtaining service of notice of hearing on Myrna Doris Gonzalez. DOB Exhibits 5 and 10
4. The Department of Banking spent \$135.00 related to obtaining service of notice of hearing on Adan N. Gonzalez, Jr. DOB Exhibits 5 and 10

Hearing Transcript Cost

5. The Department of Banking incurred the expense of \$991.00 for the cost of the transcript of the hearing on August 7, 2013. DOB Exhibit A (attached to Exceptions of Texas Department of Banking to Proposal for Decision and Final Order)

Gonzalez Funeral Home

6. In 1991, Gonzalez Edinburg Funeral Home operated at 812 E. Cano in Edinburg, Texas,

under Establishment License No. 1287, which was issued by the Texas Funeral Service Commission [DOB Exhibit 51] and under Permit No. 821, which was issued by the Department of Banking under Finance Code 154.101. DOB Exhibit 3

7. A change of ownership of Gonzalez Edinburg Funeral Home, effective March 1, 1991, was reported to the Funeral Service Commission by Marc A. Gonzalez as a co-partner. DOB Exhibit 51
8. The name of the funeral establishment that operated under Establishment License 1287 and Permit 821 was changed from Gonzalez Edinburg Funeral Home to Gonzalez Funeral Home in 1993. DOB Exhibit 53
9. By 1994, the partners of Gonzalez Funeral Home were Adan N. Gonzalez, Sr., Adan N. Gonzalez, Jr., and Marc A. Gonzalez. DOB Exhibit 54
10. In 1995, Gonzalez Funeral Home was organized as a corporation, A.N.G. Investments, Inc., that was owned by Adan N. Gonzalez, Sr., Adan N. Gonzalez, Jr., and Marc A. Gonzalez. DOB Exhibit 55
11. Gonzalez Funeral Home surrendered Permit No. 821 in August, 1995. DOB Exhibit 3

Trust-Funded Contracts - Sale Without a Permit

12. Gonzalez Funeral Home sold eighteen trust-funded contracts between September 1995 and September 2006 when it did not have a permit. DOB Exhibits 20-35, 37, and 39.
13. Marc A. Gonzalez signed on behalf of Gonzalez Funeral Home as the seller of 8 trust-funded contracts when it did not have a permit, which are identified in DOB Exhibits 20, 21, 22, 24, 25, 33, 37, and 39.
14. Adan N. Gonzalez, Jr., signed on behalf of Gonzalez Funeral Home as the seller of the 3 trust-funded contracts when it did not have a permit, which are identified in DOB Exhibits 23, 26, and 27.
15. Myrna Doris Gonzalez signed on behalf of Gonzalez Funeral Home as the seller of the 4 trust-funded contracts when it did not have a permit, which are identified in DOB Exhibits 30, 31, 32, and 39.
16. Adan N. Gonzalez, Jr., was the funeral director in charge of Gonzalez Funeral Home when it sold without a permit the 3 trust-funded contracts that are identified by DOB Exhibits 20, 21, and 22. DOB Exhibits 54, 55, and 56.
17. Marc A. Gonzalez was the funeral director in charge of Gonzalez Funeral Home when it sold without a permit the 12 trust-funded contracts that are identified by DOB Exhibits 23-32, 37, and 39. DOB Exhibits 56-62.

Trust-Funded Contracts - Failure To Deposit Payments

18. Gonzalez Funeral Home collected payments on each of the 23 trust-funded contracts that it sold between 1991 and September 2006, which are identified by DOB Exhibits 15-35,

37, and 39, and did not deposit the money paid on any of the 23 contracts in a trust or other restricted account. DOB Exhibit 11.

19. Between 1991 and September 2006, Gonzalez Funeral Home did not have a trust or other restricted account in which to deposit the money that it collected as payment for the trust-funded contracts that it sold, which are identified in Finding of Fact 18. TR 83.
20. Adan N. Gonzalez, Jr., was the funeral director in charge of Gonzalez Funeral Home when it failed to deposit in a trust or other restricted account the money paid for the 7 trust-funded contracts that are identified by DOB Exhibits 16-22.
21. Marc A. Gonzalez was the funeral director in charge of Gonzalez Funeral Home when it failed to deposit in a trust or other restricted account the money paid for the 12 trust-funded contracts that are identified by DOB Exhibits 23-32, 37, and 39.

Amount Collected - Insurance-Funded Contracts

22. Gonzalez Funeral Home and its predecessor, Gonzalez Edinburg Funeral Home, collected \$21,222.00 as payment for 7 insurance-funded contracts between April 4, 1992 and August 22, 2006, which are identified in DOB Exhibits 38, 40, and 42-45. DOB Exhibits 38, 40, 42-45, and 11.
23. Gonzalez Funeral Home was not a licensed insurance agent at the time it collected the money that was paid for the 7 insurance-funded PFBCs that are identified in Finding of Fact 22.
24. Myrna Doris Gonzalez collected \$9,832.00 on behalf of Gonzalez Funeral Home as payment for the sale of the 2 insurance-funded PFBCs that are identified in DOB Exhibit 40. DOB Exhibit 40.
25. Adan N. Gonzalez, Jr., was the funeral director in charge of Gonzalez Funeral Home when it collected \$12,597.00 as payment for the 3 insurance-funded contracts that are identified in DOB Exhibits 38 and 40.

Gonzalez Family Funeral Home, LLC

26. Aaron Rivera registered Gonzalez Family Funeral Home, LLC, with the Secretary of State on September 28, 2006. DOB Exhibit 14.
27. On October 17, 2006, Aaron Rivera filed for a new establishment license with the Funeral Service Commission, which granted the application and issued Establishment License No. 3414 for Gonzalez Family Funeral Home, LLC, located at 820 E. Cano in Edinburg. DOB Exhibits 13, 65, and 66.
28. Aaron Rivera owned the Gonzalez Family Funeral Home, LLC, from September 28, 2006, until on or about November 26, 2008. DOB Exhibit 68.
29. Gonzalez Family Funeral Home, LLC, sold a trust-funded contract on August 28, 2008, for which it collected payment of \$4,050.00. DOB Exhibits 36 and 11.

30. In August, 2008, Gonzalez Family Funeral Home, LLC, did not have a permit issued under Finance Code Section 154.101.
31. Marc A. Gonzalez signed on behalf of Gonzalez Family Funeral Home, LLC, as the seller without a permit of the trust-funded contract that is identified by DOB Exhibit 36.
32. Adan N. Gonzalez, Jr., was the funeral director in charge of Gonzalez Family Funeral Home, LLC, when it sold without a permit and the trust-funded contract that is identified in DOB Exhibit 36. DOB Exhibit 66.
33. Gonzalez Family Funeral Home, LLC., deposited the \$4,050.00 that it collected as payment for the contract identified in DOB Exhibit 36 into its business account and did not deposit that money into a trust or other restricted account. TR 148.
34. Adan N. Gonzalez, Jr., was the funeral director in charge of Gonzalez Family Funeral Home, LLC, when it failed to deposit the money it collected as payment for the contract in a trust or other restricted account. DOB Exhibit 66.
35. Rivera Funeral Home in McAllen, Texas, which was owned by Aaron Rivera, honored the contract identified in DOB Exhibit 36 by performing the funeral services for the beneficiary of the contract in 2012.
36. Gonzalez Family Funeral Home, LLC, was the funeral provider on three insurance-funded contracts that were sold between September 2006 and November 26, 2008, and collected \$123.58 in payment for the contracts. DOB Exhibits 46, 47, and 48.
37. Gonzalez Family Funeral Home, LLC, was not a licensed insurance agent when it collected the money as payment for the insurance-funded contracts that are identified in Finding of Fact 36.
38. Adan N. Gonzalez, Jr., was the funeral director in charge of Gonzalez Family Funeral Home, LLC, when it sold the three contracts that are identified in Finding of Fact 36. DOB Exhibits 65 and 66.
39. Effective November 26, 2008, Ms. Nora Hinojosa-Rivera acquired ownership and assumed operations of the Gonzalez Family Funeral Home, LLC, including Establishment License 3414, by way of a mediation agreement in a divorce proceeding between her and Aaron Rivera. DOB Exhibit 68.

Gonzalez-Rivera Funeral Home of Edinburg, LLC

40. As of April, 2009, Ms. Hinojosa-Rivera operated the funeral establishment at 812 E. Cano under the name of Gonzalez-Rivera Funeral Home of Edinburg, LLC. DOB Exhibit 3.
41. By letter dated January 12, 2010, the Executive Director of the Funeral Service Commission directed Ms. Hinojosa-Rivera to cease and desist all unlicensed funeral business at Gonzalez Family Funeral Home after noting that funeral business was being conducted at the establishment without an establishment license. DOB Exhibit 2.
42. On March 5, 2010, the Commissioner issued Order No. 2010-012, an Emergency Order To Seize Prepaid Funeral Records. DOB Exhibit 3.

43. Department staff seized the records under authority of the Order No. 2010-012. TR 24.
44. The respondents to that order did not request a hearing or challenge the validity of Order No. 2010-012.
45. Gonzalez-Rivera Funeral Home of Edinburg, LLC, closed and ceased operations on March 5, 2010. DOB Exhibit 35.

Conclusions of Law

1. The Commissioner of Banking has jurisdiction to enforce provisions of the Texas Finance Code concerning the business of prepaid funeral benefits contracts with respect to the actions of the respondents in this docket.

Gonzalez Funeral Home - Trust-Funded Contracts

2. Gonzalez Funeral Home, including its predecessor in name, Gonzalez Edinburg Funeral Home, sold 18 trust-funded contracts, which are identified in DOB Exhibits 20-35, 37, and 39, without a permit, in violation of Finance Code Section 154.101.
3. Adan N. Gonzalez, Jr., is responsible for and committed 6 violations of Finance Code Section 154.101 as the person who signed the contracts on behalf of Gonzalez Funeral Home, as the funeral director in charge at the time of sale of the contracts, or as both the person who signed and the funeral director in charge, for the sale without a permit of the 6 trust-funded contracts that are identified in DOB Exhibits 20-23, 26, and 27.
4. Marc A. Gonzalez is responsible for and committed 16 violations of Finance Code Section 154.101 as the person who signed the contracts on behalf of Gonzalez Funeral Home, as the funeral director in charge at the time of sale of the contracts, or as both the person who signed and the funeral director in charge, for the sale without a permit of the 16 trust-funded contracts that are identified in DOB Exhibits 20-33, 37 and 39.
5. Myrna Doris Gonzalez is responsible for and committed 4 violations of Finance Code Section 154.101 as the person who signed the contracts on behalf of Gonzalez Funeral Home for the sale without a permit of the 4 trust-funded contracts that are identified in DOB Exhibits 30, 31, 32, and 39.
6. Gonzalez Funeral Home did not deposit in a trust or other restricted account the amount of \$40,802.00 that it collected as payment for 23 trust-funded contracts that are identified in DOB Exhibits 15-35, 37, and 39, in violation of Finance Code Section 154.253.
7. Adan N. Gonzalez, Jr., is responsible for and committed 7 violations of Finance Code Section 154.253 as the funeral director in charge of Gonzalez Funeral Home for the failure to deposit in a trust or other restricted account the amounts that Gonzalez Funeral Home collected as payment for the 7 contracts that are identified by DOB Exhibits 16-22.
8. Marc A. Gonzalez is responsible for and committed 12 violations of Finance Code Section 154.253 as the funeral director in charge of Gonzalez Funeral Home for the failure to deposit in a trust or other restricted account the amounts that Gonzalez Funeral

Home collected as payment for 12 contracts that are identified by DOB Exhibits 23-32, 37, and 39.

Gonzalez Funeral Home - Insurance-Funded Contracts

9. Gonzalez Funeral Home collected \$21,222.00 as payment for 7 insurance-funded contracts that are identified by DOB Exhibits 38, 40, and 42-45, in violation of Finance Code Section 154.203.
10. Adan N. Gonzalez, Jr., is responsible for and committed 3 violations of Finance Code Section 154.203 as the funeral director in charge of Gonzalez Funeral Home for the unauthorized collection by Gonzalez Funeral Home of the amounts of money that customers paid for the 3 contracts that are identified by DOB Exhibits 38 and 40.
11. Myrna Doris Gonzalez is responsible for and committed 2 violations of Finance Code Section 154.203 as the person who signed on behalf of Gonzalez Funeral Home for the receipt of the money it collected for the sale of the 2 contracts that are identified by DOB Exhibit 40.

Gonzalez Family Funeral Home, LLC, - Trust-Funded and Insurance-Funded Contracts

12. Gonzalez Family Funeral Home, LLC, sold the trust-funded contract that is identified by DOB Exhibit 36 without a permit, in violation of Finance Code Section 154.101.
13. Marc A. Gonzalez is responsible for and committed a violation of Finance Code Section 154.101 as the person who signed the contract on behalf of Gonzalez Family Funeral Home, LLC, for the sale without a permit of the trust-funded contract that is identified in DOB Exhibit 36.
14. Adan N. Gonzalez, Jr., is responsible for and committed a violation of Finance Code Section 154.101 as the funeral director in charge of Gonzalez Family Funeral Home, LLC, for the sale without a permit of the trust-funded contract that is identified in DOB Exhibit 36.
15. Gonzalez Family Funeral Home, LLC., did not deposit into a trust or other restricted account the \$4,050.00 that it collected for the sale of the contract that is identified by DOB Exhibit 36, in violation of Finance Code Section 154.253.
16. Adan N. Gonzalez, Jr., is responsible for and committed a violation of Finance Code Section 154.101 as the funeral director in charge of Gonzalez Family Funeral Home when it failed to deposit in a trust or other restricted account the \$4,050.00 that it collected as payment for the contract that is identified by DOB Exhibit 36.
17. Gonzalez Family Funeral Home, LLC, collected a total of \$123.58 as payment of one monthly premium for the 3 insurance-funded contracts that are identified by DOB Exhibits 46-48, in violation of Finance Code Section 154.203.
18. The four violations committed by Gonzalez Family Funeral Home, LLC, which are set out in Conclusions of Law 12, 15, and 17, do not constitute a pattern of violations under

Finance Code Section 154.406(a)(2).

19. Adan N. Gonzalez, Jr., is responsible for and committed 3 violations of Finance Code Section 154.203 as the funeral director in charge of Gonzalez Family Funeral Home, LLC, when it unlawfully collected the money that the customers paid for the 3 insurance-funded contracts that are identified by DOB Exhibits 46-48.

Restitution - Gonzalez Funeral Home - Trust-Funded Contracts

20. The Commissioner of Banking has the authority to issue an order to a person requiring restitution if the person failed to deposit money in a trust or other restricted account, or misappropriated or converted money that it collected as payment for a prepaid funeral benefits contract.
21. Under the facts of this case, the Commissioner of Banking has the authority to issue an order to Gonzalez Funeral Home requiring restitution in the amount of \$40,802.00 which Gonzalez Funeral Home failed to deposit in a trust or other restricted account, and misappropriated or converted.
22. Of the amount of \$40,802.00 in restitution that is set forth in Conclusion of Law 21, the Commissioner of Banking has the authority to issue an order to Adan N. Gonzalez, Jr., requiring restitution of \$10,585.00 jointly and severally with Gonzalez Funeral Home, for which Adan N. Gonzalez, Jr., is also responsible as funeral director in charge in connection with the contracts that are identified by DOB Exhibits 16-22.
23. Of the amount of \$40,802.00 in restitution that is set forth in Conclusion of Law 21, the Commissioner of Banking has the authority to issue an order to Marc A. Gonzalez requiring restitution of \$24,602.00 jointly and severally with Gonzalez Funeral Home, for which Marc A. Gonzalez is also responsible as funeral director in charge in connection with the contracts that are identified by DOB Exhibits 23-32, 37, and 39.

Restitution - Gonzalez Funeral Home - Insurance-Funded Contracts

24. Under the facts of this case, the Commissioner of Banking has the authority to issue an order to Gonzalez Funeral Home requiring restitution in the amount of \$21,222.00 which Gonzalez Funeral Home collected as payment for the insurance-funded contracts that are identified by DOB Exhibits 38, 40, and 41-45, in violation of Finance Code Section 154.203.
25. Of the amount of \$21,222.00 in restitution that is set forth in Conclusion of Law 24, the Commissioner of Banking has the authority to issue an order to Adan N. Gonzalez, Jr., requiring restitution of \$2,765.00 jointly and severally with Gonzalez Funeral Home, for which Adan A. Gonzalez, Jr., is also responsible as funeral director in charge in connection with the contract that is identified by DOB Exhibit 38.
26. Of the amount of \$21,222.00 in restitution that is set forth in Conclusion of Law 24, the Commissioner of Banking has the authority to issue an order to Adan N. Gonzalez, Jr., and Myrna Doris Gonzalez requiring restitution of \$9,832.00 jointly and severally with

Gonzalez Funeral Home, for which Adan N. Gonzalez, Jr., as the funeral director in charge, and Myrna Doris Gonzalez as the person who collected the money on behalf of the funeral establishment, are also responsible in connection with the contracts that are identified by DOB Exhibit 40.

Restitution - Gonzalez Family Funeral Home, LLC

27. Under the facts of this case, the Commissioner of Banking has the authority to issue an order to Gonzalez Family Funeral Home, LLC, requiring restitution in the amount of \$123.58 which Gonzalez Family Funeral Home, LLC, collected as payment for the insurance-funded contracts that are identified by DOB Exhibits 46, 47, and 48, in violation of Finance Code Section 154.203.
28. Of the amount of \$123.58 in restitution that is set forth in Conclusion of Law 27, the Commissioner of Banking has the authority to issue an order to Adan N. Gonzalez, Jr., requiring restitution of \$123.58 jointly and severally with Gonzalez Family Funeral Home, LLC, for which Adan N. Gonzalez, Jr., is also responsible as the funeral director in charge in connection with the contracts that are identified by DOB Exhibits 46-48.

Administrative Penalties

29. The Commissioner of Banking, in his discretion, has the authority to assess an administrative penalty in an amount up to \$1,000 for each day of violation of Finance Code Sections 154.101, 154.253, and 154.203.
30. An administrative penalty against Gonzalez Funeral Home of an amount up to \$48,000.00 is reasonable for the 48 violations of Texas Finance Code Sections 154.101, 154.253, and 154.203, which are set out in Conclusions of Law 2, 6, and 9.
31. An administrative penalty against Adan N. Gonzalez, Jr., of an amount up to \$21,000.00 is reasonable for the 21 violations of Texas Finance Code Sections 154.101, 154.253, and 154.203, which are set out in Conclusions of Law 3, 7, 10, 14, 16, and 19.
32. An administrative penalty against Marc A. Gonzalez of an amount up to \$29,000.00 is reasonable for the 29 violations of Texas Finance Code Sections 154.101 and 154.253, which are set out in Conclusions of Law 4, 8, and 13.
33. An administrative penalty against Myrna Doris Gonzalez of an amount up to \$6,000.00 is reasonable for the 6 violations Texas Finance Code Sections 154.101 and 154.203, which are set out in Conclusions of Law 5 and 11.
34. An administrative penalty against Gonzalez Family Funeral Home of an amount up to \$500.00 is reasonable for the five violations of Texas Finance Code Sections 154.101, 154.253, and 154.203, which are set out in Conclusions of Law 12, 15, and 17.

Court Costs

35. The evidence supports the assessment of court costs against Marc A. Gonzalez in the amount of \$135.00 for costs of service.
36. The evidence supports the assessment of court costs against Adan N. Gonzalez, Jr., in the amount of \$135.00 for costs of service.
37. The evidence supports the assessment of court costs against Myrna Doris Gonzalez in the amount of \$275.00 for costs of service.
38. The evidence supports the assessment of court costs against Marc A. Gonzalez, Adan N. Gonzalez, Jr., and Myrna Doris Gonzalez, jointly and severally, in the amount of \$991.00 for the cost of the hearing transcript.

RECOMMENDATION

The administrative law judge recommends that the Commissioner adopt the Findings of Fact and Conclusions of Law and issue an order requiring restitution, assessing administrative penalties, and assessing court costs, in the amounts or within the ranges that are stated in Conclusions of Law.

Respectfully submitted,

/s/ Donald N. Walker
Donald N. Walker
Administrative Law Judge

SIGNED: March 28, 2014