

Order No. 2012-023
Docket No. BE-12-12-036

IN THE MATTER OF:

**MARQUIS DEMON JOHNSON,
INDIVIDUALLY AND AS OWNER OF
OSCAR JOHNSON FUNERAL
HOME**

HOUSTON, TEXAS

§ **BEFORE THE BANKING**
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§ **COMMISSIONER OF TEXAS**
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§ **AUSTIN, TRAVIS COUNTY, TEXAS**

FINAL ORDER

On this 10th day of August, 2012, came onto be considered Docket No. BE-12-12-036, In the Matter of Marquis Demon Johnson, Individually and as Owner of Oscar Johnson Funeral Home, Houston, Texas. After reviewing the administrative record and the Proposal for Decision issued by the Administrative Law Judge on June 15, 2012, 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 Proposal for Decision, including specifically the findings of fact and conclusions of law that are set forth in the Proposal for Decision and incorporate in this order the findings of fact and conclusions of law therein as if set out in full in this Order.

Based on the record and the findings of fact and conclusions of law, I conclude that an administrative penalty in the amount of \$12,000.00 is justified and appropriate under the factors required by law.

It is, therefore, ORDERED that an administrative penalty in the amount of \$12,000.00 be and is hereby ASSESSED against respondent Marquis Demon Johnson, Individually and as Owner of Oscar Johnson Funeral Home, Houston, Texas.

Respondent is ORDERED to pay an administrative penalty of \$12,000.00 to the Texas Department of Banking.

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

SIGNED and ENTERED this 10th day of August, 2012.

/s/ Charles G. Cooper
Charles G. Cooper, Commissioner
Texas Department of Banking

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PROPOSAL FOR DECISION

This Proposal for Decision is issued following consideration of the record consisting of testimony and documentary evidence that were received at hearing on May 24, 2012.

STATEMENT OF THE CASE

This is an enforcement action concerning prepaid funeral services, which the staff of the Department of Banking initiated. Department staff alleges the respondent Marquis Demon Johnson, Individually and as Owner of the Oscar Johnson Funeral Home in Houston, Texas, violated the Texas Finance Code by (1) not timely depositing funds received from the sale of prepaid funeral benefits contracts, (2) failure to reconcile the control ledger to the depository and to the individual ledger principal on a quarterly basis, and (3) failure to reconcile the purchaser's individual ledgers.

DISCUSSION

SUMMARY

Department staff, represented by Robert Giddings, presented evidence of violations consisting of testimony from Jesse Saucillo and documents consisting chiefly of seven Reports of Examination of Oscar Johnson Funeral Home and correspondence between department staff and Mr. Johnson. Mr. Marquis Johnson, Respondent, appeared and did not present evidence. Mr. Johnson in his statements talked about his assuming ownership of and responsibility for the operation of Oscar Johnson Funeral Home. He admitted the truth of the responsibility for the operation of Oscar Johnson Funeral Home. He admitted the truth of the evidence that Mr. Giddings presented and the occurrence of violations of the law. Mr. Johnson pleaded for mercy in the assessment of an administrative penalty.

The Administrative Law Judge concludes that the respondent committed violations of the law and recommends assessment of an administrative penalty.

APPLICABLE LAW

Statutory Law - Finance Code Chapter 154 - Prepaid Funeral Services

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.

Specifically pertinent to this case, Section 154.253 requires that, not later than the 30th day after the date of collection, funds received from the sale of prepaid funeral benefits contracts to the public must be deposited in trust or submitted to a licensed insurance company as insurance premiums.

Rule 7 Texas Administrative Code Sections 25.11(d)(4) and 25.11(d)(5)

Department of Banking Rule 25.11 prescribes the record keeping requirements for trust-funded contracts for prepaid funeral benefits.

Rule 25(d)(4) (4) requires the funeral home owner to retain for the period since the last examination each file pertaining to a matured-contract file for which services were provided by a funeral provider other than the permit holder or a permit holder related by common ownership. The file must contain copies of all documents required for an outstanding prepaid contract and (A) a signed statement from the purchaser or purchaser's representative requesting the delivery of funds to the servicing funeral provider; (B) evidence of payment to the servicing funeral provider; and, (C) a copy of a Texas certified death certificate or a death certificate from the state in which death occurred.

Rule 25.11(d)(5) requires the owner of a funeral home to retain, for the period since the last examination, each file pertaining to a canceled prepaid contract. The file must contain copies of all documents required for an outstanding contract, a completed departmental withdrawal form or evidence of departmental withdrawal approval, and evidence of payment of the cancellation benefit.

Statutory Law - Finance Code Section 154.406

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.

OVERVIEW OF THE FACTS

Staff presented evidence of violations of three provisions of law during each of the past four years. Reports of Examination dated May 19, 2008; May 31, 2009; September 30, 2009; March 18, 2010, April 30, 2010; June 30, 2011; and, October 31, 2011, were admitted as Exhibits 24, 21, 19, 15, 13, 10, and 8, respectively. Each report documents the three violations during the year the report covers. The respondent admitted that the reports accurately portray the facts that show the violations of the Finance Code and Department rules.

Each year, the reports and correspondence addressed the same type of problems and the respondent continued to violate the same provisions of law regarding prepaid funeral benefits contracts. There is no evidence that the correct amount of funds were not eventually deposited into the proper amounts or that the record keeping was not eventually brought up to snuff.

PETITIONER'S ARGUMENT REGARDING AMOUNT OF PENALTY

Mr. Giddings argued that a penalty of \$12,000.00 is warranted, on the record of 12 violations: one violation of each of the three counts in each of the 4 years, 2008 through 2011. He noted that the statute

provides for a penalty of up to \$1,000.00 for each day a violation occurs and that the evidence proves there are many days that the 12 violations occurred in this case. Mr. Giddings argued that the purpose of seeking an administrative penalty in this case is to achieve compliance, not to punish the respondent or to put him out of business.

RESPONDENT'S ARGUMENT REGARDING AMOUNT OF PENALTY

Mr. Johnson pleaded for mercy. He noted the rating for the funeral home had improved at one time after he assumed ownership and said he has hired someone to help make and maintain proper records regarding sales of prepaid funeral services and to deposit the funds in an appropriate account within the required time limits.

ANALYSIS BY THE ADMINISTRATIVE LAW JUDGE

Assessment of An Administrative Penalty Is Authorized Under the Law Applied to the Facts

The evidence proves the occurrence of violations of the laws regulating the sale of prepaid funeral services, as charged by the staff.

The amount of penalty is the next consideration. Assessment of an administrative penalty is discretionary. Under Finance Code 154.406, a penalty maybe assessed against a person who engages in a pattern of violations. In this case, a pattern of violations has been established. The evidence shows the recurrence of the same violations for a period of four years, with the staff notifying the respondent of the violations each year.

The Commissioner Has Discretion To Determine the Amount of Penalty

Section 154.406(c) provides that, in determining the amount of the penalty, the commissioner shall consider the seriousness of the violation, the person's history of violations, and the persons good faith in attempting to comply with this chapter.

Seriousness of Violations

The violations involve the proper and timely deposit of money received for prepaid funeral services contracts and the proper keeping of records concerning those receipts and contracts. These activities are critical for providing safeguards to protect the prepaid funds and to assure that the funds will be available to pay for prearranged funeral services. The evidence does not show that funds were not available to pay for prearranged

funeral services, however, the potential for such a problem is a serious matter when the funds are not timely deposited and the record keeping of the funds and contracts is not done properly.

Good Faith of Respondent

The evidence shows the respondent has failed to take action that resulted in compliance during a period of four years, after training in 2008 and notification of problems with compliance in seven Reports of Examination during the four-year period.

Compliance History

There are no outstanding cease and desist orders against the respondent.

Based on 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 respondent.
2. Respondent, Marquis Demon Johnson, is the owner and operator of Oscar Johnson Funeral Home, 415 Berry Road, Houston, Texas 77022.
3. Mr. Johnson appeared at the hearing individually and as owner of the Oscar Johnson Funeral Home.
4. Oscar Johnson Funeral Home operates under Permit No. 1079.
5. As of close of business May 19, 2008, Respondent failed to deposit in trust or submit to a licensed insurance company as insurance premiums funds received from the sale of prepaid funeral benefits contracts, not later than the 30th day after the date of receipt of the funds.
5. As of close of business May 19, 2008, Respondent failed to retain for the period since the last examination each file pertaining to a matured-contract file for which services were provided by a funeral provider other than the permit holder or a permit holder related by common ownership, with each file containing copies of all documents required for an outstanding prepaid contract and a signed statement from the purchaser or purchaser's representative requesting the delivery of funds to the servicing funeral provider;

evidence of payment to the servicing funeral provider; and, a copy of a Texas certified death certificate or a death certificate from the state in which death occurred

6. As of close of business May 19, 2008, Respondent failed to retain for the period since the last examination each file pertaining to a canceled prepaid contract, with each file containing copies of all documents required for an outstanding contract, a completed departmental withdrawal form or evidence of departmental withdrawal approval, and evidence of payment of the cancellation benefit.

7. As of close of business May 31, 2009, Respondent failed to deposit in trust or submit to a licensed insurance company as insurance premiums funds received from the sale of prepaid funeral benefits contracts, not later than the 30th day after the date of receipt of the funds.

8. As of close of business May 31, 2009, Respondent failed to retain for the period since the last examination each file pertaining to a matured-contract file for which services were provided by a funeral provider other than the permit holder or a permit holder related by common ownership, with each file containing copies of all documents required for an outstanding prepaid contract and a signed statement from the purchaser or purchaser's representative requesting the delivery of funds to the servicing funeral provider; evidence of payment to the servicing funeral provider; and, a copy of a Texas certified death certificate or a death certificate from the state in which death occurred

9. As of close of business May 31, 2009, Respondent failed to retain for the period since the last examination each file pertaining to a canceled prepaid contract, with each file containing copies of all documents required for an outstanding contract, a completed departmental withdrawal form or evidence of departmental withdrawal approval, and evidence of payment of the cancellation benefit.

10. As of close of business April 30, 2010, Respondent failed to deposit in trust or submit to a licensed insurance company as insurance premiums funds received from the sale of prepaid funeral benefits contracts, not later than the 30th day after the date of receipt of the funds.

11. As of close of business April 30, 2010, Respondent failed to retain for the period since the last examination each file pertaining to a matured-contract file for which services were provided by a funeral provider other than the permit holder or a permit holder related by common ownership, with each file

containing copies of all documents required for an outstanding prepaid contract and a signed statement from the purchaser or purchaser's representative requesting the delivery of funds to the servicing funeral provider; evidence of payment to the servicing funeral provider; and, a copy of a Texas certified death certificate or a death certificate from the state in which death occurred

12. As of close of business April 30, 2010, Respondent failed to retain for the period since the last examination each file pertaining to a canceled prepaid contract, with each file containing copies of all documents required for an outstanding contract, a completed departmental withdrawal form or evidence of departmental withdrawal approval, and evidence of payment of the cancellation benefit.

13. As of close of business October 31, 2011, Respondent failed to deposit in trust or submit to a licensed insurance company as insurance premiums funds received from the sale of prepaid funeral benefits contracts, not later than the 30th day after the date of receipt of the funds.

14. As of close of business October 31, 2011, Respondent failed to retain for the period since the last examination each file pertaining to a matured-contract file for which services were provided by a funeral provider other than the permit holder or a permit holder related by common ownership, with each file containing copies of all documents required for an outstanding prepaid contract and a signed statement from the purchaser or purchaser's representative requesting the delivery of funds to the servicing funeral provider; evidence of payment to the servicing funeral provider; and, a copy of a Texas certified death certificate or a death certificate from the state in which death occurred

15. As of close of business October 31, 2011, Respondent failed to retain for the period since the last examination each file pertaining to a canceled prepaid contract, with each file containing copies of all documents required for an outstanding contract, a completed departmental withdrawal form or evidence of departmental withdrawal approval, and evidence of payment of the cancellation benefit.

CONCLUSIONS OF LAW

1. The Commissioner of Banking has jurisdiction to enforce provisions of the Texas Finance Code concerning the business prepaid funeral benefits contracts and, specifically, with respect to the actions of

Marquis Demon Johnson, Individually and as Owner of Oscar Johnson Funeral Home under Permit No. 1079, which are charged in this docket.

2. Marquis Demon Johnson, Individually and as Owner of the Oscar Johnson Funeral Home, violated the Texas Finance Code by failing to timely deposit funds received from the sale of prepaid funeral benefits contracts for many days during the years 2008, 2009, 2010 and 2011.

3. Marquis Demon Johnson, Individually and as Owner of the Oscar Johnson Funeral Home, violated the Texas Finance Code by failing to reconcile the control ledger to the depository and to the individual ledger principal on a quarterly basis for many days throughout the years 2008, 2009, 2010 and 2011.

4. Marquis Demon Johnson, Individually and as Owner of the Oscar Johnson Funeral Home, violated the Texas Finance Code by failing to reconcile multiple purchaser's individual ledgers for many days during the years 2008, 2009, 2010 and 2011.

5. The repeated violations of the same provisions of the Finance Code over a period of four years constitutes a pattern of violations.

4. The Commissioner of Banking, in his discretion, has the authority to assess an administrative penalty against Marquis Demon Johnson in an amount up to \$1,000 for each day of violation.

5. An administrative penalty of an amount up to \$12,000.00 is reasonable under the provisions of Texas Finance Code Section 154.

RECOMMENDATION

Based on the evidence and Finance Code Section 154.406, a penalty up to \$12,000.00 is supported by the evidence.

Respectfully submitted,

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

SIGNED: June 15, 2012