

ORDER NO. 2015-008

IN THE MATTER OF:	§	BEFORE:
	§	
MERCY/MCGOWAN FUNERAL HOME	§	THE BANKING
	§	COMMISSIONER OF TEXAS
	§	
JACKSONVILLE, TEXAS	§	AUSTIN, TRAVIS COUNTY, TEXAS

ORDER TO CEASE AND DESIST ACTIVITY

On this day, the matter of Mercy/McGowan Funeral Home, Jacksonville, Texas (Mercy/McGowan or Respondent) was submitted to me, Charles G. Cooper, Banking Commissioner (Commissioner) of the State of Texas, for consideration and action.

FINDINGS OF FACT

1. Mercy/McGowan is a funeral home located in the state of Texas. It holds restricted Permit No. 868 issued by the Department to maintain its current prepaid funeral benefits contracts.

2. On March 5, 2014, the Texas Department of Banking (Department) performed a limited scope of examination of Mercy/McGowan with analysis as of December 31, 2013 (December 2013 Limited Scope of Examination).

3. On April 7, 2014, the Department sent Mercy/McGowan a copy of the December 31, 2013 Limited Scope Report of Examination (December 2013 ROE). The December 2013 ROE noted that Mercy/McGowan was in violation of *Texas Finance Code* (Finance Code) § 154.253(a) for failing to deposit all PFC payments into trust. This failure to deposit led to a net outstanding principal shortage of \$344.16 in Mercy/McGowan's trust accounts. The December 2013 ROE stated that management must immediately deposit the principal shortage and provide evidence of the deposit as a response to the ROE to the Department.

4. The April 7th letter notified Mercy/McGowan that immediately after correcting this violation, but no later than May 12, 2014, it must forward documentation regarding its corrective efforts to the Department.

5. Additionally, the letter attached a bill for \$951.75 for examination fees related to the limited scope of examination. The bill noted that the listed amount was due upon receipt of the fee statement.

6. On May 15, 2014, the Department sent Mercy/McGowan a letter attaching the April 7, 2014 letter and informing it that the Department had not received a response to the deficiency noted in the December 2013 ROE. Further, the letter notified Mercy/McGowan that the Department had not received a payment for the examination expenses.

7. The May 15, 2014 letter also informed Mercy/McGowan that based on its violation of the Finance Code, the Department is entitled to take various actions against Mercy/McGowan under Chapter 154 of the Finance Code (Chapter 154). These actions include:

- a. imposing an administrative penalty of up to \$1,000 per day for each violation that is not corrected within thirty days of the permit holder's receipt of written notice of the violations from the Department;
- b. issuing a cease and desist order;
- c. suing for injunctive relief in district court;
- d. canceling, suspending or refusing to renew a permit; and
- e. referring the case to the Attorney General of Texas for an action to forfeit the company's charter.

The letter emphasized that if the cited violations were not corrected by June 16, 2014, the matter could be referred to the Department's Legal Division.

8. On July 1, 2014, after several unsuccessful attempts, the Department was finally able to reach Vivian McGowan, Mercy/McGowan's co-owner, by phone regarding the delinquent December 2013 ROE response and examination fee. Ms. McGowan said that she would submit the response the next day but did not do so.

9. On July 14, 2014, the Department spoke with Ms. McGowan a second time. Ms. McGowan told the Department that, due to illnesses in the family, she had not been able to respond to the December 2013 ROE. However, she told the Department that she would have the ROE response, examination fee, and proof of the shortage deposit by the end of the week. She did not complete those actions.

10. On September 10, 2014, the Department performed a full scope of examination of Mercy/McGowan with analysis as of June 30, 2014.

11. On October 8, 2014, the Department sent Mercy/McGowan a copy of the June 30, 2014 Report of Examination (June 2014 ROE). The June 2014 ROE detailed Mercy/McGowan's violations of the Finance Code and the *Texas Administrative Code* (TAC). In particular, the June

2014 ROE noted that Mercy/McGowan was in violation of Finance Code § 154.054 for failing to submit the required examination fee for the December 2013 ROE; Title 7 TAC § 25.13 for failing to file the 2014 Annual Report by the March 1, 2014 due date; and Title 7 TAC § 25.11(e)(5) for failing to maintain and reconcile the PFC control ledger as required. However, during the June 2014 examination, the Department did find that Mercy/McGowan paid the previously-cited \$344.16 shortage.

12. The October 8th letter notified Mercy/McGowan that it was required to correct the cited violations immediately and, no later than November 12, 2014, mail or otherwise submit documentation to the Department that the required corrective action had been taken. The letter also cautioned Mercy/McGowan that the various enforcement actions described in paragraph 7 above could be taken against it if the violations were not corrected.

13. On November 17, 2014, the Department sent Mercy/McGowan a letter attaching the October 8, 2014 letter and informing it that the Department had not received a response to the deficiencies noted in the June 2014 ROE. Further, the letter told Mercy/McGowan that the Department had not received a payment for the examination expenses from the December 31, 2013 limited scope examination.

14. The November 17, 2014 letter also informed Mercy/McGowan that based on its violation of the Finance Code and the TAC, the Department is entitled to take various actions against Mercy/McGowan under Chapter 154 of the Finance Code. These actions include:

- a. imposing an administrative penalty of up to \$1,000 per day for each violation that is not corrected within thirty days of the permit holder's receipt of written notice of the violations from the Department;
- b. issuing a cease and desist order;
- c. suing for injunctive relief in district court;
- d. canceling, suspending or refusing to renew a permit; and
- e. referring the case to the Attorney General of Texas for an action to forfeit the company's charter.

The letter emphasized that if the cited violations were not corrected by December 17, 2014, the matter could be referred to the Department's Legal Division. However, the letter also stated that the overdue examination fee was due immediately.

CONCLUSIONS OF LAW

1. Under Finance Code § 154.054, the Commissioner shall impose on the seller a fee for each examination conducted based on the seller's total outstanding contracts. Title 7 TAC § 25.24 mandates that the seller pay such examination fee to the Department to defray the cost of administering the examination. The rule specifies that if more than one examination is required by the Department within the same fiscal year, the permit holder must pay the fee upon receipt of the examination report. It has been over eleven months since the Department mailed the December 2013 ROE and the accompanying fee bill and over five months since the Department mailed the June 2014 ROE, which cited Mercy/McGowan for continuing non-payment of the examination fee. As Mercy/McGowan has yet to pay the examination fee, the Commissioner finds that Mercy/McGowan has violated Title 7 TAC § 25.24.

2. Pursuant to Title 7 TAC § 25.11(e)(5), a permit holder must maintain a control ledger for all purchasers, balanced at least quarterly to the principal total and contract count total of the individual ledgers and in total to the records of the trustee/depository, reflecting the net cumulative total of outstanding contracts; deposits of payments; withdrawal of payments; net amount of payments on deposit; earnings of deposit accounts; earnings withdrawn on deposit accounts; and net amount of earnings. Because Mercy/McGowan failed to incorporate the prior examination's principal and interest adjustments and failed to correctly account for interest and earning and bank fees incurred during the examination period, Mercy/McGowan violated Title 7 TAC § 25.11(e)(5).

3. Finance Code § 154.408(a) authorizes the Commissioner to issue a cease and desist order if he finds that the person has violated a law of Texas relating to the sale of prepaid funeral benefits, including a violation of Chapter 154 or a final order of the Commissioner or rule of the commission.

4. The credible evidence of the above-described violations of the Finance Code and the TAC constitute sufficient cause for issuance of a cease and desist order to Mercy/McGowan under Finance Code § 154.408.

ORDER

Based on the foregoing findings and conclusions in accordance with Finance Code § 154.408, Mercy/McGowan is **ORDERED** to cease and desist from violating Chapter 154 and the TAC. Specifically, Mercy/McGowan shall immediately:

- (1) cease violating 7 TAC § 25.24 by sending the \$951.75 it owes for the December 2013 Limited Scope of Examination fee to the Department and
- (2) cease violating Title 7 TAC § 25.11(e)(5) by providing the Department evidence that it has maintained a control ledger for all purchasers, balanced at least quarterly to the principal total and contract count total of the individual ledgers and in total to the records of the trustee/depository, reflecting the net cumulative total of outstanding contracts; deposits of payments; withdrawal of payments; net amount of payments on deposit; earnings of deposit accounts; earnings withdrawn on deposit accounts; and net amount of earnings.

Any violation by Mercy/McGowan of this Order to Cease and Desist may result in additional regulatory or enforcement actions authorized by the Finance Code. Nothing in this Order to Cease and Desist shall be deemed to diminish or restrict the regulatory or enforcement power of the Department, the Commissioner, the Finance Commission of Texas, or any other state or federal agency to take further action in this matter.

EFFECTIVE DATE AND RIGHT TO HEARING

Pursuant to Finance Code § 154.408(d), this Order to Cease and Desist will take effect on **April 6, 2015** (which is the first day that is not a Saturday, Sunday, or legal holiday after the 16th day after the date this proposed Order was mailed to Mercy/McGowan), unless on or before **April 3, 2015** (which is the 15th day after the date this Order was mailed), Mercy/McGowan requests a hearing pursuant to Finance Code § 154.408(d).

SERVICE

Pursuant to Finance Code § 154.408(c), this Order to Cease and Desist will be served on Mercy/McGowan by first class mail and certified mail, return receipt requested, sent on 19th day of March, 2015 to:

Vivian McGowan
Mercy/McGowan Funeral Home
415 North Main St.
Jacksonville, Texas 75766

Signed on this 18th day of March, 2015.

/s/Stephanie Newberg
Stephanie Newberg
Deputy Commissioner, Department of Banking