

2639



RECEIVED

2009 NOV 13 PM 3:20

INDEPENDENT REGULATORY  
REVIEW COMMISSION

17 North Second Street  
12th Floor  
Harrisburg, PA 17101-1601  
717-731-1970 Main  
717-731-1985 Fax  
www.postschell.com

James J. Kutz

jkutz@postschell.com  
717-612-6038 Direct  
717-731-1985 Fax

November 13, 2009

**BY FACSIMILE 717-783-2664**

**VIA E-MAIL [IRRC@IRRC.STATE.PA.US](mailto:IRRC@IRRC.STATE.PA.US); [JJEWETT@IRRC.STATE.PA.US](mailto:JJEWETT@IRRC.STATE.PA.US);  
[FWILMARTH@IRRC.STATE.PA.US](mailto:FWILMARTH@IRRC.STATE.PA.US)**

The Honorable Arthur Coccodrilli, Chairman  
The Honorable George D. Bedwick, Vice Chairman  
The Honorable Silvan B. Lutkewitte, III, Commissioner  
The Honorable John Mizner, Commissioner  
The Honorable S. David Fineman, Commissioner  
Independent Regulatory Review Commission  
333 Market Street, 14th Floor  
Harrisburg, PA 17101

Fiona E. Wilmarth, Director of Regulatory Review  
Independent Regulatory Review Commission  
333 Market Street, 14th Floor  
Harrisburg, PA 17101

John H. Jewett, Regulatory Analyst  
Independent Regulatory Review Commission  
14th Floor, Harristown 2  
333 Market Street  
Harrisburg, PA 17101

**RE: Comments in Opposition to State Board of Funeral Director Proposed Regulation # 16A-4816 (IRRC # 2639)**

Dear Chairman, Vice Chairman, Commissioners, Director Wilmarth and Mr. Jewett:

Allow this correspondence to serve as comments in opposition to State Board of Funeral Directors Regulation # 16A-4816 (IRRC # 2639). These opposition comments are tendered on behalf of my client, the Pennsylvania Cemetery Cremation and Funeral Association ("PCCFA"); they are also tendered on behalf of myself, in my capacity as the prevailing attorney of record in the federal court litigation commonly known as Walker, et al. v. Flitton, et al., 364 F. Supp. 2d 503 (M.D. PA 2005). Indeed, in the Board's "Statement of Need", it specifically notes that the subject proposed regulations flow in response to the federal court decision of Walker v. Flitton,

The Honorable Arthur Coccodrilli, Chairman  
The Honorable George D. Bedwick, Vice Chairman  
The Honorable Silvan B. Lutkewitte, III, Commissioner  
The Honorable John Mizner, Commissioner  
The Honorable S. David Fineman, Commissioner  
John H. Jewett, Regulatory Analyst  
Fiona E. Wilmarth, Director of Regulatory Review  
November 13, 2009  
Page 2

wherein it was concluded that the Funeral Board's interpretation of existing law conflicted with the United States Constitution. In short, the regulations currently pending before this Honorable Commission smack of continued unconstitutionality and they are, in no way, a reasonable response to either the reasoning or conclusion of the federal court. To the contrary, and with all due respect for the Board Members, the current schema is illustrative of a group of funeral directors which remains dissatisfied with the federal court decision, and thus has done everything within its power to render that decision meaningless. In short, this proposed regulatory scheme is facially unconstitutional; it is at odds with the rationale of the federal court decision; it presents a total absence of "need"; it is patently anti-competitive; and, in short, it will drive pre-need availability out of existence. All of this is anti-consumer and pro-protectionist of an industry which seeks to capture the entire death care industry, without regard to consumer choice and consumer cost savings.

One need look no further than the "Statement of Need" for a confirmation of the assertions set forth above. First, in subsection (14), the Board concedes that its rule-making "is not based upon any scientific data, studies or references..." Indeed, the Board is correct as there is no evidence whatsoever to support the illusory concern that the subject regulations are necessary in order to protect any Pennsylvania consumer.

As a second point, the Board disingenuously asserts that it does not "foresee any groups being adversely affected by the proposed rule-making..." This Honorable Commission need look no further than the comments that have been submitted by myriad groups, which, in every instance except one, have been condemning of this proposed regulatory scheme. Perhaps to state the point differently, if no group was "adversely affected" by this proposal, there would not be the onslaught of pleas from innumerable groups urging this Commission to disapprove the subject Regulations.

Third, the Statement of Need suggests that there is "considerable confusion in the profession", yet the Board fails to further advise that the confusion, if any, was created by the recent membership of this Board, even though, for decades, the industry functioned quite well and the consumer was fully protected.

It is difficult to point to a single component of this regulatory proposal that demonstrates "need" or "consumer protection". The simple fact remains that, as one trade organization has openly acknowledged, these Regulations are all about protecting "your [funeral director] license..." See attached Bulletin, Exhibit "A". Regulations should not be promulgated in order to protect turf - rather, the goal of Pennsylvania Regulations should be to protect the consumer and to address a legitimate "need".

The Honorable Arthur Coccodrilli, Chairman  
The Honorable George D. Bedwick, Vice Chairman  
The Honorable Silvan B. Lutkewitte, III, Commissioner  
The Honorable John Mizner, Commissioner  
The Honorable S. David Fineman, Commissioner  
John H. Jewett, Regulatory Analyst  
Fiona E. Wilmarth, Director of Regulatory Review  
November 13, 2009  
Page 3

Allow me to point out several specific provisions which underscore PCCFA's general objection to this scheme. First, the Regulations only allow the agent of the funeral director to provide a price list for the funeral home for which the agent is employed. Query: How is the Pennsylvania consumer to make an informed decision as to the viability of a particular funeral home's pre-need product and pricing if he or she cannot judge the prices of one home with those of another? Making this restriction all the more absurd is the fact that the Federal Trade Commission requires every funeral home to publish and make available its individual price list.

Second, consider the prohibition against the funeral home paying its agents commissions for their effort. Why would the Board prohibit a hard-working employee or agent from receiving a commission if he or she is successful in contacting "x" number of customers or effectuating "x" number of customers being put in touch with the funeral director? The simple answer is that prohibiting commissions will have the natural effect of making it unfeasible for funeral home owners to "get the word out" as to the benefits of pre-need arrangements through trained employees or agents – hardly a need or goal of this great Commonwealth.

Third, why prohibit the trained agent or employee from utilizing a "work sheet" when meeting with a prospective customer? Indeed, how could a customer even begin to calculate the amount of money required to be set aside for the pre-need arrangement, if he or she cannot jot down various costs and expenses as the colloquy flows between the customer and agent or the employee? For those funeral homes utilizing licensed insurance agents as their employees, how could that licensed agent begin to estimate the amount of final expense insurance that would be required for a funeral, if a work sheet or proposal cannot be prepared that details, *seriatim*, the types of merchandise and service that the customer desires? Again, this Regulation is designed to render the customer/employee encounter meaningless – hardly a desired end result for this Commonwealth.

In Walker v. Flitton, the federal court judge spoke at length regarding the absence of any legitimate consumer harm or potential consumer harm associated with employees and agents of licensed funeral directors interacting with prospective pre-need customers. The Board's current proposal continues to demonstrate a total absence of any potential for consumer harm and that is because none exists. Although this point has been made before, and indeed, was made in the federal court Opinion of Walker v Flitton, it is noteworthy that, for the past 41 years, the Funeral Director Law has allowed tentative funeral arrangements after a death has occurred to be made by an unlicensed member of the funeral home staff, if the funeral director is temporarily absent. See, 63 P.S. § 479.13(d). The Board, in response to this legislative amendment, promulgated Regulations which clarify that any ratification by the funeral director must be accomplished 48 hours after the tentative arrangements have been made. Obviously, after 48 hours have lapsed,

The Honorable Arthur Coccodrilli, Chairman  
The Honorable George D. Bedwick, Vice Chairman  
The Honorable Silvan B. Lutkewitte, III, Commissioner  
The Honorable John Mizner, Commissioner  
The Honorable S. David Fineman, Commissioner  
John H. Jewett, Regulatory Analyst  
Fiona E. Wilmarth, Director of Regulatory Review  
November 13, 2009  
Page 4

virtually all aspects of the funeral have been worked out between the next-of-kin and the "unlicensed" employee of the funeral director, yet there has been no information or other evidence presented by the Board that suggests any consumer harm or injury associated with this provision of law. PCCFA is not suggesting that § 13(d) is a bad provision of law. To the contrary, it demonstrates, and allows for, the realities of life, yet requires the funeral director to ultimately be responsible, as captain of the ship, for the implementation of the funeral service and the provision of merchandise. At the same time, it is simply illogical to believe that "at-need" arrangements can be effectively carried out by unlicensed employees of the funeral home during a time when grief and emotions are high and yet, this same Board cries "fear" and "preying tactics" when discussions are occurring pre-need and the consumer is not subject to grief or the anxiety of the death of a loved one.

Simply stated, this regulatory scheme is not a good scheme, and it is not a needed one. It conflicts with federal law, and it conflicts with the clear guidance set forth in Walker v. Flitton. This regulatory scheme was previously reviewed as late as October 25, 2006 by the Governor's Office of Administration, General Counsel and the then-appointed Board Counsel, and all three arms agreed that the subject Regulations could not be lawfully promulgated, in light of the Walker decision. See, Exhibit "B".

The Funeral Board Members should not be rewarded for their intractability and refusal to abide by federal law, common sense, consumer access, and freedom of choice. For many of the same reasons why Regulation # 4815 (relating to pre-need contract rescindability) was rejected, these Regulations too, require disapproval. On behalf of PCCFA, the undersigned regrets that the tone of these comments are so completely negative and condemning. At the same time, it would be intellectually dishonest to compliment this proposed scheme when it is patently anti-competitive and designed to protect turf. We respectfully urge disapproval.

Very truly yours,



James J. Kutz

JJK/dlh

Attachments

# EXHIBIT "A"

# **URGENT from PFDA**

## **"YOUR FD LICENSE IS UNDER ATTACK" Action Needed Now!!!!**

The State Board of Funeral Directors has proposed Regulation 16A-4816, which helps to define what an "unlicensed employee can do". This regulation has been under review, debate & discussion for the past four (4) years. There has been significant opportunities for all interested parties to participate in meetings & hearings to comment.

We anticipate that the PCCFA (PA Cemetery Cremation and Funeral Association), Ernie Heffner, and their attorney, Jim Kutz, are going to be attacking the validity of this proposed Regulation 16A-4816. Their objective --- either through their current litigation in the federal court right now or in the PA legislature --- is to overturn the current Funeral Director Law and have it re-written to their liking.

PFDA supports this current regulation (as written), as meeting the parameters of federal Judge John Jones in the Walker decision, addressing what an unlicensed employee can do as well as complying with the PA Funeral Director Law, which the Ferguson and Cornerstone court decisions have clearly set forth.

### **WHAT YOU HAVE TO DO**

#1 Write Arthur Coccodrilli, Chairman. IRRC, 333 Market St., 14th Floor, Harrisburg, PA 17101 & tell him you support Regulation 16A-4816 & that unlicensed employees should not be able to sell preneed funeral arrangements.

#2 Write or call your PA State House member & State Senator & ask them to write to IRRC & ask IRRC to pass Regulation 16A-4816.

**EXHIBIT "B"**

#2639

Kutz, James

RECEIVED

From: [REDACTED]  
Sent: Wednesday, October 25, 2006 4:43 PM  
To: Kutz, James  
Subject: Proposed Preneeds Regulations

2007 NOV -7 AM 10:44

INDEPENDENT REGULATORY  
REVIEW COMMISSION

Jim:

I just want to confirm that after consulting with our General Counsel's office and Frank Bullock, outside counsel for the Funeral Directors Board, we are all of one mind and agree that the Board cannot adopt and promulgate any regulations under Section 13(a) of the Funeral Director Law in light of the rulings in the Ferguson and Walker cases. Therefore, I have requested Frank, and he has agreed, to draft an opinion to this effect. Please call or email if you or Ernie have any further questions or comments with respect to this matter.

[REDACTED]  
[REDACTED]  
Governor's Policy Office  
506 Finance Building  
Harrisburg, PA 17120  
[REDACTED]  
[REDACTED]  
[REDACTED]

The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination, or other use of, or taking of any action in reliance upon this information by persons or entities other than the intended recipient is prohibited. If you received this information in error, please contact the sender and delete the material from any computer.