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SILVAN B. LUTKEWITTE III
JOHN F. MIZNER, ESQ.
KIM KAUFMAN, EXECUTIVE DIRECTOR
LESLIE A. LEWIS JOHNSON, CHIEF COUNSEL



PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
<http://www.irrc.state.pa.us>

INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

November 30, 2009

Michael J. Yeosock, Chair
State Board of Funeral Directors
2601 North 3rd Street
Harrisburg, PA 17110

Re: Regulation #16A-4816 (IRRC #2639)
State Board of Funeral Directors
Preneed Activities of Unlicensed Employee

Dear Chair Yeosock:

The Independent Regulatory Review Commission disapproved your regulation on November 19, 2009. Our order is enclosed and will be available on our website at www.irrc.state.pa.us.

Within 40 days of receipt of our order, Section 7(a) of the Regulatory Review Act requires you to select one of the following options: (1) proceed with promulgation under Section 7(b); (2) proceed with promulgation under Section 7(c); or (3) withdraw the regulation. If you do not take any action within this period, the regulation is deemed withdrawn.

If you or your staff have any questions, please contact Kim Kaufman, our Executive Director, at 783-5506.

Sincerely,

Kim Kaufman
Executive Director

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Enclosure

cc: Honorable Robert M. Tomlinson, Majority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Michael P. McGeehan, Majority Chairman, House Professional Licensure Committee
Honorable William F. Adolph, Jr., Minority Chairman, House Professional Licensure Committee
Honorable Pedro A. Cortes, Secretary, Department of State

INDEPENDENT REGULATORY REVIEW COMMISSION DISAPPROVAL ORDER

Commissioners Voting:

Public Meeting Held November 19, 2009

Arthur Coccodrilli, Chairman

George D. Bedwick, Vice Chairman

S. David Fineman, Esq.

Silvan B. Lutkewitte, III

John F. Mizner, Esq., by Phone, Dissenting

Regulation No. 16A-4816 (#2639)

State Board of Funeral Directors

Preneed Activities of Unlicensed Employee

On September 19, 2007, the Independent Regulatory Review Commission (Commission) received this proposed regulation from the State Board of Funeral Directors (Board). This rulemaking adds Section 13.206a to 49 Pa. Code. The proposed regulation was published in the September 29, 2007 *Pennsylvania Bulletin* with a 30-day public comment period. The final-form regulation was submitted to the Commission on October 6, 2009.

The regulation sets forth procedures and requirements for the utilization of unlicensed employees by funeral directors and funeral entities. Permissible activities for unlicensed employees would include furnishing customers with general price lists and printed materials, and communicating with customers in ways “not otherwise prohibited by the act or this chapter.” Prohibited activities are divided into seven areas. Unlicensed employees would not be allowed to communicate with customers about the “actual selection” of services or merchandise, or payment arrangements. They also may not represent more than one funeral business at a time.

This rulemaking is the Board’s response to two court decisions. First, the Pennsylvania Commonwealth Court in *Ferguson v. State Bd. of Funeral Directors*, 768 A.2d 393 (2001) (*Ferguson*) upheld the Board’s interpretation of the state Funeral Director Law as prohibiting unlicensed individuals from helping customers select and purchase preneed contracts. Subsequently, the federal court in *Walker v. Flitton*, 364 F.Supp.2d 503 (USDC, MD Pa. 2005) (*Walker*) also accepted Commonwealth Court’s interpretation that state law prohibited unlicensed individuals from selling or executing preneed funeral contracts. However, the court held that the Board’s actions to enforce the state statute infringed upon the commercial free speech rights of unlicensed employees of funeral businesses. A key distinction between the two cases was that the *Walker* plaintiffs were employees whose activities were supervised by the licensed funeral director. Accordingly, such activities can include the following:

- Interacting with consumers,
- Disseminating accurate price information, and
- Discussing preneed plans with consumers so long under the auspices, employment, direction, and control of a licensed funeral director.

364 F.Supp.2d at 526-527. The *Walker* court also cited the lack of clarifying regulations as a significant issue to be addressed by the Board.

During our review of this regulation, we received many letters from licensed funeral directors and other affected parties. Members of the General Assembly submitted letters expressing support for or opposition to the regulation as well as remaining concerns.

In determining whether a regulation is in the public interest, the Commission is directed by the Regulatory Review Act (Act) to consider criteria set forth in eight separate categories. See 71 P.S. § 745.5b. Based on these criteria, there are substantive concerns and objections that form the basis for our vote to disapprove and provide the Board with an opportunity to clarify and improve the regulation.

Need for the regulation, Fiscal impact, Compliance with the provisions of the Act or the regulations of the Commission (71 P.S. § 745.5b(b)(1), (3)(iii) and (6))

As a part of its response to our action, the Board should review page five of our comments dated November 28, 2007, on the proposed regulation. In our comments, we asked the Board to respond to the guidance provided by *Walker* that prohibitions on commercial speech should be “narrowly tailored” to achieve a governmental interest or purpose. See 364 F.Supp.2d at 525-526. We also stated that the Board should explain how each provision is “deemed necessary or proper to safeguard the interests of the public and the standards of the profession” pursuant to Section 16(a) of the Funeral Director Law (63 P.S. § 479. 16(a))(Law). The Board replied with a reiteration of the Law. This was insufficient. The federal court asked the Board to clarify the Law not repeat it. Both *Ferguson* and *Walker* indicated there was no record of consumer complaints or harm related to the activities of unlicensed individuals. See 768 A.2d at 393(note 5) and 364 F.Supp.2d at 511-513. Despite this lack of a record, a need and purpose for the regulation must still be identified. To properly respond to the court in *Walker* and the criteria of our Act, the Board needs to identify and thoroughly explain the need or harm to be resolved by each provision. The harm must be real rather than “speculative.” See 364 F.Supp.2d at 521. This work will assist the Board in developing clear, fair and reasonable provisions that are the basis of an effective regulation.

A similar concern is the lack of a substantive response to requests for fiscal impact estimates by the House Professional Licensure Committee in its letter dated November 14, 2007, and this Commission in its comments on the proposed regulation. The Board needs to provide a detailed fiscal impact analysis of the regulation.

Statutory authority, Legislative intent, Pertinent opinions of courts; Reasonableness; Clarity (71 P.S. §§ 745.5b(a) and (b)(3)(ii) and (iv))

We acknowledge that the Board is confronted by a difficult quandary. On the one hand, there is the Law and on the other, there is the *Walker* decision and the First Amendment of the United States Constitution. The rules of statutory construction at 1 Pa.C.S. § 1922(3) require the presumption that a statute was not intended to violate the Constitution of the United States or of this Commonwealth. Therefore, any interpretation of a statute must be balanced with the rights established under the First Amendment. This was the task set for the Board by the court in *Walker*.

At our public meeting, the Board’s counsel indicated that it was the Board’s intent to allow unlicensed employees to go beyond just handing out general price lists and printed materials. Their actions could include discussing or answering questions about prices for various services or combinations of services, selling funeral merchandise, handing out samples of

unsigned contracts, and arranging alternative forms of payment, especially if they are licensed insurance producers. However, the final-form regulation does not reflect the Board's intent.

The Board needs to memorialize its intent and fully develop and clarify the list of permissible actions in the final-form regulation. We urge Board members to meet with affected parties to discuss regulatory language that will address the commercial free speech concerns raised by *Walker* while maintaining the central role of licensed funeral directors as envisioned in the Law.

In the final-form regulation, the Board requires the use of a disclosure form as suggested by commentators, including this Commission, in our comments on the proposed rulemaking. However, the form serves little to no purpose if there are severe limits on unlicensed employees. The purpose is to inform the consumer of the unlicensed status of an employee and of the accessibility and responsibility of the licensed funeral director. The provisions for this form in Section 13.206a(a)(5) should be revised to clarify the role of the unlicensed employees in assisting consumers; notify consumers that they have a right to contact or meet with licensed funeral directors; provide direct contact information for the supervising funeral directors; and state that a licensed funeral director is responsible for and must review, approve and sign agreements and contracts. The Board could also require that the form include contact information for consumer complaints to it or the Bureau of Professional and Occupational Affairs, and thereby develop a record of any problems or concerns.

In the case of licensed insurance producers, the regulation should make it clear that licensed insurance producers employed by funeral entities or directors are not restrained in their work as insurance producers. The regulation should avoid interfering with any compensation or commissions received as legitimate payments for work by insurance producers who are also licensed funeral directors or work for funeral entities or directors. As noted in *Ferguson*, nothing in the state court's ruling prevents insurance licensees from selling policies to cover preneed expenses. See *Ferguson*, 768 A.2d 402 (note 14). Section 13.206a(d) is another area in need of additional clarification. Again, the need and purpose of the new language is unclear. Placing requirements on insurance producers may also be beyond the Board's authority. The last sentence of the subsection may cause unnecessary confusion in situations when the supervising funeral director is also a licensed insurance producer.

We support the Board's decision to allow a telephone call, email, fax or postal service delivery to substitute for a "face-to-face meeting" between the customer and funeral director. To further clarify this provision, the definition of "direct personal contact" in Section 13.206a(e) should be amended to include other paper delivery options beyond "postal service mail" including private delivery services (e.g., Federal Express) or hand-delivery by an unlicensed employee.

Possible conflict with other statutes (71 P.S. § 745.5b(b)(3)(i))

Finally, the regulation needs to recognize that any person may sell merchandise under Act 1059 of 1963 (63 P.S. §§ 480.1-480.11) (Act 1059), also known as the Future Interment Law. This is another issue that we raised as a question on page five of our comments. Currently, unlicensed vendors legally sell funeral merchandise in Pennsylvania. The *Walker* court also

observed that unlicensed individuals may sell funeral merchandise. 364 F.Supp.2d at 525-526. The regulation should be amended to allow unlicensed employees to sell merchandise for their employing funeral entity.

Therefore, based upon the information presented to us and after considering the criteria of the Regulatory Review Act discussed above, we find that promulgation of this regulation is not in the public interest.

BY ORDER OF THE COMMISSION:

The regulation # 16A-4816 (IRRC # 2639) from the State Board

of Funeral Directors was disapproved on 11/19/09.





Arthur Coccodrilli, Chairman