BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AFFAIRS
FOR THE CEMETERY AND FUNERAL BUREAU
STATE OF CALIFORNIA

In the Matter of the Accusation Against: Dambacher Mountain Memorial, Inc. Certificate of Authority No. COA 602; Jeffrey R. Wilson Cemetery Manager No. CEM 206, Respondent.	Case No. A1 2014 130 OAH No. 2015 060149

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of Consumer Affairs as the Decision in the above-entitled matter, except that, pursuant to Government Code section 11517(c)(2)(C), the following technical error is corrected:

On page 4 of the LEGAL CONCLUSIONS, the following sentences:

> 3. Unprofessional conduct by any licensee of the Bureau or by any agent or employee of a licensee constitutes grounds for disciplinary action. Unprofessional conduct includes, but is not limited to, the following: "[v]iolating or attempting to violate, directly or indirectly... any federal or state law or regulation governing the...operation of cemeteries..." Bus. & Prof. Code §9725.1, subd.(b).)

are corrected to read as follows:

> 3. Unprofessional conduct by any licensee of the Bureau or by any agent or employee of a licensee constitutes grounds for disciplinary action. Unprofessional conduct includes, but is not limited to, the following: "[v]iolating or attempting to violate, directly or indirectly... any federal or state law or regulation governing the...operation of cemeteries..." Bus. & Prof. Code §9725.1, subd.(a).)

This Decision shall become effective 19th October 2015

IT IS SO ORDERED this 17th day of September, 2015.

Doreathea Johnson

DOREATHEA JOHNSON
Deputy Director, Legal Affairs
Department of Consumer Affairs

BEFORE THE
CEMETERY AND FUNERAL BUREAU
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: DAMBACHER MOUNTAIN MEMORIAL, INC. Certificate of Authority No. COA 602; JEFFREY RICHARD WILSON Cemetery Manager No. CEM 206, Respondents.	Case No. A1 2014 130 OAH No. 2015060149

PROPOSED DECISION

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on August 21, 2015, in Sacramento, California.

Complainant Lisa M. Moore, Chief of the Cemetery and Funeral Bureau (Bureau), was represented by Elena L. Almanzo, Deputy Attorney General.

Respondent Dambacher Mountain Memorial, Inc. (Dambacher) was represented by James R. Dambacher, President/Treasurer.

Respondent Jeffrey R. Wilson (Wilson) was present throughout the hearing, and represented himself.

Evidence was received, the record was closed, and the matter was submitted for decision on August 21, 2015.

FACTUAL FINDINGS

1. On April 7, 2006, the Bureau issued Certificate of Authority No. COA 602 to Dambacher. The Certificate of Authority expired on April 30, 2013, and renewal is on hold due to the nonpayment of fines.

2. On September 17, 2014, the Bureau issued Cemetery Manager No. CEM 206 to Wilson. The Cemetery Manager license will expire on September 30, 2015.

3. On September 26, 2014, complainant, solely in her official capacity, caused to be filed the Accusation in this matter seeking to discipline respondents based on their failure to comply with citations issued to Dambacher.

4. The Bureau issued four citations to Dambacher between November 18, 2011, and December 5, 2013. Three of the citations are essentially identical, except for the dates of noncompliance.

On November 18, 2011, the Bureau issued Citation No. IC 2011 217, alleging that Dambacher failed to file the annual 2010 Endowment Care Fund (ECF) and Special Care Fund (SCF) Reports for the year ending December 31, 2010. The citation included a fine in the amount of $2,000, and an abatement order requiring that Dambacher file the reports and pay the fine. Dambacher did not appeal the citation and it became final. Dambacher paid the fine on an undetermined date prior to the issuance of the Accusation, but did not file the required reports until the hearing date in this matter.

On November 9, 2012, the Bureau issued Citation No. IC 2012 216, alleging that Dambacher failed to file the annual 2011 ECF and SCF Reports for the year ending December 31, 2011. The citation included a fine in the amount of $2,000, and an abatement order requiring that Dambacher file the reports and pay the fine. Dambacher did not appeal the citation and it became final. Dambacher paid the fine prior to the issuance of the Accusation with a check dated May 6, 2013, but did not file the required reports until the hearing date in this matter.

On December 5, 2013, the Bureau issued Citation No. IC 2013 256, alleging that Dambacher failed to file the annual 2012 ECF and SCF Fund Reports for the year ending December 31, 2012. The citation included a fine in the amount of $2,000, and an abatement order requiring that Dambacher file the reports and pay the fine. Dambacher did not appeal the citation and it became final. Dambacher did not pay the fine or file the required reports until the hearing date in this matter.

5. On October 24, 2013, the Bureau issued Citation No. IC 2013 210, alleging that Dambacher failed to deposit $800 collected through sales contracts into the ECF and $500 collected through sales contracts for pre-need funds into the SCF during the calendar years 2010 and 2011. The citation included a fine in the amount of $1,000 and an abatement order requiring that Dambacher deposit the funds into the ECF and SCF. Damacher did not

appeal the citation and it became final. Dambacher did not pay the $1,000 fine until the hearing date in this matter.

On April 8, 2013, Dambacher prepared a check in the amount of $1,300 for deposit in the Dambacher master trust fund, with notations on the memo line of the check indicating the intended disbursement of funds as follows: "2010 & 2011 Endowment $800" and "2010 & 2011 Special Care Fund $500". Dambacher made the check in response to an audit by the Bureau which identified the shortages in the ECF and SCF. Two days before the hearing in this matter a CPA retained by Dambacher informed Dambacher that the monies had not been distributed as indicated on the memo line. The day before the hearing in this matter Dambacher provided written instructions to the trust fund to transfer $800 into the ECF and $500 into the SCF.

Testimony of James Dambacher, President/Treasurer, Dambacher Mountain Memorial, Inc

6. Mr. Dambacher testified that an audit by a certified public accountant (CPA) necessary to file the required annual ECF and SCF Reports typically costs $5,000 per year, and that this is unaffordable because the cemetery has been operating at a loss since it opened in 2006.

7. Mr. Dambacher testified that he now understands that he has an obligation to perform an annual audit, independent of any audit that may be performed by the Bureau, and that he will either have the audits done or close his business.

Testimony of Respondent Jeffrey R. Wilson

8. Wilson was not aware of all the notices and citations as they came in from the Bureau. Correspondence from the Bureau is sent to the cemetery address, and Wilson is located at the funeral home.

9. Wilson testified that he had been unsure whether an audit conducted by the Bureau served as a substitute for an audit by a CPA retained by Dambacher.

10. The cemetery has done less than 20 funerals per year, which makes it financially difficult for Dambacher to retain a CPA to conduct the required annual audits.

11. Wilson believes that Mr. Dambacher has learned his lesson, and will pay to have the annual audits done.

12. Wilson testified that it would help him to more effectively manage the business to have the business records kept at the business office of the funeral home rather than at Mr. Dambacher's home where they are currently kept.

Costs of Investigation and Enforcement

13. Pursuant to Business and Professions Code section 125.3, complainant requested costs of investigation and enforcement in the amount of $2,780. In support of the request for costs, complainant submitted a Certified Statement of Costs signed by Elena L. Almanzo, Deputy Attorney General.

14. Mr. Dambacher and respondent Wilson testified to the effect that the business has been running at a financial loss.

15. The reasonableness of costs is addressed in Legal Conclusions 8 through 10, below.

LEGAL CONCLUSIONS

1. A licensee of the Bureau may be disciplined for failure to pay a fine within 30 days of the date of assessment, unless the citation is under appeal. (Bus. & Prof. Code, § 125.9, subd. (b)(5).)

2. Each cemetery authority licensed by the Bureau shall file with the Bureau an annual endowment care fund report on or before June 1, or within five months after close of their fiscal year provided approval has been granted by the Bureau, including the following: (1) the number of square feet of grave space and the number of crypts and niches sold or disposed of under endowment care; (2) the amount of money collected and deposited in both the general and special endowment care funds segregated as to the amounts for crypts, niches and grave space; (3) the total amount of general and special endowment care funds invested in each of the investments authorized by law and the amount of cash on hand not invested; (4) the location, description, and character of the investments in which the special endowment care funds are invested; (5) the transactions entered into between the corporation or any officer, employee or stockholder and the trustees of the endowment care funds with respect to those endowment care funds. (Bus. & Prof. Code, § 9650, subd. (a).)

The annual ECF report must be verified by the president or vice president and one other officer of the cemetery corporation, and shall be accompanied by an annual audit report of the ECF and SCF fund signed by a CPA or public accountant. (Bus. & Prof. Code, § 9650, subd. (b).)

3. Unprofessional conduct by any licensee of the Bureau or by any agent or employee of a licensee constitutes grounds for disciplinary action. Unprofessional conduct includes, but is not limited to, the following: "[v]iolating or attempting to violate, directly or indirectly . . . any federal or state law or regulation governing the . . . operation of cemeteries . . ." (Bus. & Prof. Code, § 9725.1, subd. (b).)

4. A licensed cemetery is required to at all times employ a cemetery manager to supervise and direct its operations. (Bus. & Prof. Code, § 9723.) The cemetery manager shall be responsible for direct supervision and control over the cemetery operations as necessary to ensure compliance with applicable laws and regulations. (Bus. & Prof. Code, § 9723, subd. (b).)

5. Cause exists to discipline respondent Dambacher's Certificate of Authority based on Factual Findings 4 through 7, and Legal Conclusions 1 through 3.

6. Cause exists to discipline respondent Wilson's Cemetery Manager License based on Factual Findings 4, and 8 through 12; and Legal Conclusions 2 through 4.

7. No cause exists to discipline either respondent under Business and Professions Code section 9727, subdivision (c), which provides that the Bureau may discipline a licensee who has "[w]illfully disregarded or violated any provisions of this act relating to cemetery brokerage." There is no evidence of wrongdoing relating to cemetery brokerage as governed by Business and Professions Code section 9675, et seq.

8. In determining the appropriate discipline, the central question is what level of discipline is necessary to protect the public. Based upon all of the circumstances set forth in Factual Findings 4 through 12, public protection will be ensured by imposing terms and conditions of probation on respondent Dambacher's Certificate of Authority and Wilson's Cemetery Manager license.

Costs of Investigation and Enforcement

9. Business and Professions Code section 125.3 permits the Bureau to request an administrative law judge hearing a disciplinary matter to direct a licensee to pay a sum not to exceed the reasonable costs of investigation and enforcement of the case, except as otherwise provided by the law. Complainant provided sufficient evidence to support an award of the costs of investigation and enforcement in the amount of $2,780.

10. The costs of investigation and enforcement must also be evaluated for reasonableness against the standards enunciated in *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45. *Zuckerman* requires the consideration of the following factors in determining the amount of costs to be assessed: (a) whether the respondents have used the hearing process to obtain dismissal of some of the charges or a reduction in the severity of the discipline imposed; (b) the respondents' subjective good faith belief in the merits of their respective positions; (c) whether the respondents have raised a colorable challenge to the proposed discipline; (d) whether the respondents will be financially able to make later payments; and (e) whether the Bureau has conducted a disproportionately large investigation.

11. Taking into account the factors required by *Zuckerman*, the costs of enforcement and prosecution in the amount of $2,780 are reasonable.

ORDER

Certificate of Authority license number COA 602 issued to Dambacher Mountain Memorial, Inc., and Cemetery manager license number CEM 206 issued to respondent Jeffrey R. Wilson are revoked; provided, however, the revocations are stayed and respondents are individually placed on probation for three (3) years, subject to the following terms and conditions applicable to each individual respondent:

1. Obey All Laws: Respondent shall comply with all conditions of probation and obey all federal, state and local laws, and all rules and regulations governing the programs regulated by the Bureau.

2. Quarterly Reports: Respondent shall submit quarterly declarations under penalty of perjury, in a format designated by the Bureau, stating whether or not respondent has been in compliance with all the conditions of probation. Respondent shall also submit such additional written reports and verifications of actions requested by the Bureau. Should the final probation report not be made as directed, the period of probation shall be extended until such time as the final report is made.

3. Interview with Bureau Representative: As necessary, respondent shall appear in person for scheduled interviews with the director or other designated representative for the purpose of monitoring compliance with the terms of this Decision.

4. Out – of – State Residence or Operation: Should respondent leave California to reside or operate outside this state, respondent must notify the Bureau in writing of the dates of departure and return. Reporting in person may be waived if the respondent moves out of the state. However, respondent shall continue compliance with other terms of probation to retain California licensure. Periods of residency, business operation or employment outside California shall not reduce the probationary period.

5. Completion of Probation: Upon successful completion of probation, respondent's license will be fully restored.

6. Violation of Probation: Should respondent violate probation in any respect, the chief of the Bureau, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order which was stayed. If an Accusation or Petition to Revoke Probation is filed against respondent during probation, the Bureau shall have continuing jurisdiction until the matter is final, and the probation shall be extended until the matter is final.

7. License Issued During Probation: Any license or registration issued to respondent by Bureau during the period of probation shall be issued as a probationary license or registration and is subject to all the terms and conditions set forth herein. Respondent must comply with terms and conditions herein and demonstrate no cause for disciplinary action or denial of an application.

8. Cost Recovery: Respondents Dambacher and Wilson are jointly and severally liable to pay the Bureau for all reasonable costs of investigation and enforcement of this matter in the amount of $2,780. Said amount shall be paid within 60 days of the effective date of this Decision, or according to a payment plan approved by the Bureau. Probation shall not terminate until full payment has been made. Respondents' respective licenses shall not be renewed until the cost recovery has been paid in full or respondents are otherwise in compliance with a payment plan approved by the Bureau.

Dated: September 14, 2015

TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings