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

In the Matter of the Accusation Against: EVERGREEN CEMETERY ASSOCIATION, aka EVERGREEN CEMETERY, Buck Kamphausen, RMO Edward Wilkes, Vice President Joshua Voss, Vice President/Secretary Certificate of Authority No. COA 103; BUCK KAMPHAUSEN Cemetery Manager License No. CEM 259, Respondents.	Case No. A1 2014 104 OAH No. 2015050852

PROPOSED DECISION

Administrative Law Judge Perry O. Johnson, Office of Administrative Hearings, State of California (OAH), heard this matter on December 16, 2015, in Oakland, California.

Deputy Attorney General Jonathan D. Cooper represented complainant Lisa M. Moore, Chief of the Cemetery and Funeral Bureau, Department of Consumer Affairs.

Attorney at Law Steven H. Gurnee of Gurnee, Mason and Forestiere, LLP, represented both respondent Evergreen Cemetery Association, also known as Evergreen Cemetery, and respondent Buck Kamphausen.

The record was held open in order to afford an opportunity to respondents to file with OAH, and to serve upon complainant, copies of digital images, which were referenced during the hearing, but were not available to be offered at the hearing of this matter. On December 22, 2015, OAH received from respondents two digital images, which were marked as exhibit "C-1," and "C-2," and were received into evidence.

On December 22, 2015, the parties submitted the matter and the record closed.

FACTUAL FINDINGS

License History

1 On May 1, 1950, Cemetery and Funeral Bureau, Department of Consumer Affairs (Bureau) issued Certificate of Authority No. COA 103 to respondent Evergreen Cemetery Association, also known as Evergreen Cemetery (respondent Evergreen), which has an address of record of 6450 Camden Street, Oakland, California 94605. The Certificate of Authority remains in force and effect, and is scheduled to expire on January 1, 2017, unless renewed, revoked, or suspended before that date.

2. On January 20, 2005, the Bureau issued Cemetery Manager License No. CEM 259 to respondent Buck Kamphausen (respondent Kamphausen). The Cemetery Manager license[1] will expire on January 31, 2016, unless renewed, revoked or suspended before that date.

On March 14, 1996, respondent Kamphausen became associated with Evergreen.

Complainant's Accusation against Respondents and Statement of the Case

3. On February 17, 2015, complainant Lisa M. Moore, solely in her official capacity as Chief of the Cemetery and Funeral Bureau (Bureau), caused to be filed the Accusation in this matter seeking to discipline respondents based on licensees' violation of regulations that pertain to cemetery maintenance standards, especially regarding the administration of a sufficient supply of water to preserve green grass over the grounds of a regulated cemetery. Also, the Accusation contemplates discipline against respondent Evergreen regarding respondent Evergreen's failure to fully and faithfully comply with abatement orders set out in citations issued to over the course of five years from October 2009 to November 2014.

Respondents were not successful in refuting any allegation advanced in complainant's Allegation. Respondents consciously formulated a misguided scheme for ending all watering of grass at Evergreen Cemetery even though the local water regulatory agency had not imposed any absolute directive for the cessation of water usage. Hence, the grounds making up the cemetery displayed brown, unsightly, and offensive appearance suggestive of a failure to maintain a minimal watering program.

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[1] At the hearing, respondent Kamphausen persuasively asserted that he holds a Funeral Director's license, an Embalmer's license and a Cemetery Broker's license. In addition, the Contractors' State License Board has issued respondent a general contractor's (classification B) license and an engineering contractor's (classification A) license. Respondent Kamphauser holds an Automobile Dealers' license issued by the Department of Motor Vehicles.

And, respondent Evergreen failed to comply with the full measure of past citations. Respondents' unprofessional acts and omissions warrant complainant's action that seeks the Bureau's execution of disciplinary action against respondents' licensure.

Causes for Disciplinary Action

FIRST CAUSE - FAILURE TO MAINTAIN CEMETERY GROUNDS

4. During approximately June 2014, the Bureau received citizen complaints stating that respondent Evergreen had failed to adequately maintain the grounds over portions of the cemetery.

Complainant called as witnesses several of the citizens who filed complaints.

a. MS. SHEILA MARIE WILLIAMS

Ms. Sheila Marie Williams is familiar with the grounds that make up Evergreen Cemetery. Her father and grandparents are buried at respondents' cemetery.

During June 2014, Ms. Williams visited Evergreen Cemetery. At the time she observed the grounds at the gravesites for her three relatives to be "brown and dry." The grounds reflected dead grass and visible areas of bare ground. And, approximately one and one-half months before the hearing of this matter (December 2015), Ms. Williams again visited Evergreen Cemetery. She again saw the cemetery's ground to be brown with dead grass.

Ms. Williams had paid money into an endowment care fund for the purpose of maintaining the grounds including green grass at the site of her father's grave. She had an expectation that the grass at the grave would be maintained.

b. MS. TAMMI MARIE GEESTON

Ms. Tammi Marie Geeston is familiar with Evergreen Cemetery because her sister, Robin Geeston, is buried there.

During June 2014, Ms. Geeston visited Evergreen Cemetery. She observed that the grounds were dry, cracked with "no grass" around the gravesite of her late sister. Ms. Geeston found the "terrible" appearance of the ground not to be "comfortable" as the final resting place for her sister.

Ms. Tammi Geeston's oldest sister signed an Endowment Care Agreement for the maintenance of the grounds at her sister's gravesite. The condition of the gravesite indicated to Ms. Geeston that the agreement had been breached.

c. MS. TAMMY R. COOPER

Ms. Tammy R. Cooper is familiar with Evergreen Cemetery as her sister is buried there.

Ms. Cooper has taken notice of the appearance of various cemeteries including Evergreen Cemetery. In June 2014, Ms. Cooper filed a complaint with the Bureau due to the appearance of the grounds of Evergreen Cemetery because its grounds had not been "maintained at all." During her visits to Evergreen Cemetery, Ms. Cooper observed hay-like organic material over the gravesite of her sister. The grounds reflected an appearance of lacking watering for many months.

In the years 2012 through 2015, when visiting Evergreen Cemetery, Ms. Cooper has seen the grounds for respondent Evergreen to be "dry and dead." She has frequently visited the cemetery over the past several years.

In addition to going into the Oakland office of the local manager for Evergreen Cemetery, Ms. Cooper telephoned respondent Kamphausen to voice her complaints regarding the unsightly appearance of the cemetery's grounds. Ms. Cooper was taken back by the attitude of respondent Kamphausen regarding her complaint as he rhetorically stated to Ms. Cooper, "Do you know the costs of water?" During her telephone call Ms. Cooper informed respondent Kamphausen that she had learned from the local water utility company that its policies permitted cemeteries to water the grounds to keep the grass green.

Ms. Cooper's older sister, Linda Howard, signed an Endowment Care Agreement in 1984 when the women's sister was buried at Evergreen. Ms. Cooper has had an expectation that respondent Evergreen would maintain green grass at her sister's gravesite.

5. In response to the citizens' complaints regarding the dire appearance of the grounds of Evergreen, the bureau sent two inspectors, who were tasked with attending to three different citizen complaints.

A. MS. AMBER LENORE WEAVER

Ms. Amber Lenore Weaver provided credible and persuasive evidence at the hearing of this matter.

Ms. Weaver is a Bureau field representative. In her position with the Bureau, Ms. Weaver is an investigator who, among other things, inspects conditions at regulated cemeteries.

Ms. Weaver persuasively outlined the Bureau's regulation that prescribes the standard of care for the maintenance of endowment care cemeteries. Such maintenance standards, which contemplate inclusion of terms into contracts between such licensed cemeteries and

families of deceased persons who have interment at the cemetery, have been promulgated to prevent offensive deterioration of grounds constituting such cemeteries.

On July 22, 2014, Ms. Weaver traveled to the Oakland, California, site of respondent Evergreen. She found the cemetery's grass to be brown and shriveled and the ground very cracked. Most of the grounds indicated a lack of watering. In the portion of the cemetery known as a Garden of Tranquility, which is the burial site for Robin Geeston, Ms. Weaver observed dead grass with mostly dirt and the ground was cracked. (But, Ms. Weaver observed that watering of green grass was occurring for the area making up the plot for the unidentified victims of the Jonestown (Guyana) mass murder.)

While on her July 2014 inspection, Ms. Weaver interviewed Ms. Stephanie Lawrence, an administrative assistant at respondent's Evergreen's office. Ms. Lawrence made admissions, as an authorized employee to respondents, whereby she reported to Ms. Weaver that no prescribed watering restrictions had been officially established by the local water utility district for respondent Evergreen; but, rather, the cemetery's personnel had been directed by respondent Evergreen's senior management to adhere to a plan for the drastic lessening of watering to save water due the ongoing state-wide drought problem.

Ms. Weaver further met with respondent Evergreen's groundskeeper, named Eric Nee. Mr. Nee made an admission that no watering restrictions, as imposed by the local water district, existed for respondent Evergreen.

And, during the July 22, 2014, inspection, Ms. Weaver spoke with Laurie Hamm, the officer manager. Ms. Hamm asserted that respondents sought to cut by one-half water usage for the cemetery.

Following her July 2014 site inspection of respondent Evergreen's cemetery grounds, Ms. Weaver telephoned respondent Kamphausen, who asserted that as cemetery manager, he had decided to cut off watering at the cemetery of respondent Evergreen, as well as two other cemeteries managed by him. Respondent Kamphausen expressed his view that "water is for the living, and not the dead." Respondent Kamphausen falsely said to Ms. Weaver that there were "water police," who imposed fines of $10,000 for water use.

Ms. Weaver was persuasive and compelling when she expressed the opinion as a Bureau field representative that the conditions existing at the ground of respondent Evergreen failed to meet the standard established by California Code of Regulations, title 16, section 2333, subdivision (b)(3).[2] In particular, Ms. Weaver established that respondents

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[2] California Code of Regulations, title 16, section 2333, subdivision (b)(3), states, in important part: "Each endowment care cemetery shall perform, at a minimum, the following maintenance on its cemetery property . . . [so as to] . . . [p]rovide a sufficient supply of water to keep cemetery grass and plants as green as seasonally possible in accordance with natural terrain, availability of water, and local or county ordinances regarding water use."

were not justified to cease, or markedly curtail, watering of the cemetery ground making up respondent Evergreen when no governmental agency restrictions existed

B. MR. RICHARD FISHER

Mr. Richard Fisher provided credible and persuasive evidence at the hearing of this matter.

Mr. Fisher was a Bureau field representative, who is now retired from state civil service. In his position with the Bureau, Mr. Fisher was an investigator and inspector of cemeteries in the Bay Area.

Based upon the Bureau's receipt of complaints from Ms. Tammy Cooper and Ms. Sheila Williams, Mr. Fisher investigated respondent Evergreen. During the investigation, Mr. Fisher during July 2014 interviewed, via telephone, respondent Kamphauser. During the telephone call, respondent Kamphausen stated to Mr. Fisher matters similar to the comments given by the licensed cemetery manager to Ms. Weaver. In particular, respondent Kamphausen stated he had directed the cessation of watering at Evergreen cemetery because of a fear of a $10,000 fine due to excessive water usage. And, respondent Kamphausen stated that "water was for the living, and not the dead."

On July 11, 2014, Mr. Fisher traveled to the Oakland site of the cemetery making up respondent Evergreen. He walked over a substantial portion of the cemetery and he took digital photographs of the grounds. Mr. Fisher observed the grounds to be covered with unwatered, brown grass and weeds that grow without watering.

Mr. Fisher was persuasive when he testified at the hearing of this matter that the conditions existing at the ground of respondent Evergreen failed to meet the standard established by California Code of Regulations, title 16, section 2333, subdivision (b)(3).

Ms. Sherri Hong, Water District Manager

6. Ms. Sherri Hong offered credible, compelling, and persuasive testimonial evidence at the hearing of this matter.

Ms. Sherri Hong is the Manager for the Customer and Community Services Department of the East Bay Municipal Utility District (EBMUD). Ms. Hong's department includes the EBMUD water conservation program, as well as several other programs such as the District's customer billing inquiry program.

During 2014, Ms. Hong held the position, which caused her to gain insight and understanding of the watering restrictions established by EBMUD for commercial as well as residential consumers in the EBMUD region, which includes all of the City of Oakland in which respondent Evergreen's cemetery is located.

On February 11, 2014, the board for EBMUD issued a policy directive consisting of broadcasting to its customers a *voluntary* water use reduction goal of 10 percent from previous usage of customers. Ten months later, on December 9, 2014, the EBMUD board directed that the customer *voluntary* water use reduction goal be increased from 10 percent to 15 percent of past average water use effective January 1, 2015. Not until April 14, 2015,[3] did the EBMUD board declare a Stage-4 drought emergency, and it established a 20 percent mandatory district-wide customer use reduction policy.

In EBMUD records, the cemetery managed by respondents is classified as a "commercial account." Occupying a commercial account status, respondent Evergreen's cemetery grounds is subject to water use reduction similar to residential water users, which in July 2014 was oriented to a voluntary 20 percent reduction in usage from past years.

Ms. Hong established that currently, that is as of late 2015, respondents were permitted to engage in watering of respondent Evergreen's cemetery grounds without being subject to any monetary fine of $10,000, as respondent Kamphausen had told Bureau investigators as well as aggrieved family members of persons having interment at the cemetery.

Inference Drawn from Evidence Provided by EBMUD Manager

7. The evidence provided by Ms. Hong leads to the inference that in July 2014, when the Bureau's investigators inspected respondents' Evergreen Cemetery grounds, there was no local governmental agency that required a lessening of watering the grass in any volume. Also, the voluntary water use reduction, existing in July 2014, did not suggest or direct respondents to reduce watering by any number of days. Hence, when respondents stopped watering the grass making up much of the grounds of respondent Evergreen's cemetery, so that the land took on an ugly appearance of hay-like, dead (gravely dormant) organic material, the decision was solely that of respondents.

Respondents' Evidence

8. Respondents' three witnesses did not provide persuasive evidence that adequately refuted or disproved the credible and compelling evidence presented through witnesses called by complainant.

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[3] Effective July 14, 2015, EBMUD's board promulgated Regulation 28-A, which is titled "Water Use During Water Shortage Emergency Condition." Included in EBMUD Regulation 28-A is a section labeled, "Potable Water Uses Prohibited During Shortage Emergency," which set out under subdivision (e), a voluntary guideline regarding "irrigating turf and ornamental landscaping" being permitted "no more than two days each week," and not on consecutive days and not during day time hours.

a. Ms. Lori Hann

Ms. Lori Hann is the Office Manager for respondent Evergreen at the premises located in Oakland, California. She has held the position for 27 years. And, she holds licenses as a Funeral Director as well as a Cemetery Salesperson.

Approximately 25 acres make up the grounds of respondent Evergreen's cemetery. The cemetery was opened in 1903, and is considered "full," as there are no active sales now occurring.

Ms. Hann attended to many administrative functions for respondent Evergreen. Ms. Hann, however, did not pay EBMUD bills for water use; rather, she dispatched the bills to the office occupied by respondent Kamphausen. And, Ms. Hann did not establish policies pertaining to water use for the grass at respondent Evergreen's cemetery grounds.

Ms. Hann established that respondent Kamphausen directed that watering of grass stop for most of the grounds making up respondent's Evergreen's cemetery ground. A sign was posted that reads, "Due to the Drought we are respectfully doing our part by not watering." But, Ms. Hann did not know the date respondent Kamphausen caused the sign to be posted near the office for respondent Evergreen.

Regarding photographic exhibits offered by respondents, Ms. Hann did not establish the dates on which the photographs were taken. And, she did not provide photographic images showing the conditions of respondent Evergreen's cemetery grounds in July 2014 when the Bureau's two inspectors found the conditions of the grass to reflect respondents' violation of the Bureau's regulation (Cal. Code Regs., tit. 16, §2333) pertaining to watering cemetery grounds' grass.

Ms. Hann was not credible when she gave an unpersuasive account regarding the supposed comments made on July 22, 2014, by Bureau Inspector Ms. Weaver. In particular, Ms. Hann was not believable when she asserted that Ms. Weaver remarked that the grave of Robin Geeston "did not look that bad." And, Ms. Hann was false in her testimony when she claimed that the Bureau's inspector did not suggest that anything had "to be done" for respondent Evergreen to comply with Bureau regulations.

On cross-examination, Ms. Hann acknowledged that during 2014 when respondent Kamphausen ordered cessation of watering by initially 50 percent so that the grass turned "brown" on the grounds of respondent Evergreen.

b. Mr. Giovanni Morgan

Mr. Giovanni Morgan is the licensed Crematory Manager for respondent Evergreen. Also, he holds the position of supervisor of the cemetery's grounds crews. Mr. Morgan has been employed by respondent Evergreen for 20 years.

Mr. Morgan credibly testified that during 2014 "upper management" for respondent Evergreen ordered the drastic reduction of watering of grass.

Since 2014, Mr. Morgan has received comments from various persons regarding the unsightly conditions of the grounds making up respondent Evergreen's cemetery grounds. He was not persuasive, however, when he claimed that the persons, who were not pleased with the appearance of the grounds and expressed their concerns, where satisfied and had no further objection when they heard Mr. Morgan state that respondent Evergreen had reduced water during the drought. Mr. Morgan established that, at least, on one occasion an individual confronted him to threaten filing a lawsuit against respondent Evergreen if the horrible appearance of respondent Evergreen's site for the persons' buried family members was not corrected by proper watering of dead-looking grass.

On cross-examination, Mr. Morgan acknowledged that during the summer of 2014 he was instructed by respondent Kamphausen to stop watering respondent Evergreen's cemetery grounds. And, Mr. Morgan agreed that the brown, dead-appearing grass as shown in complainant's photographs was due to a failure to water the grass at respondent Evergreen's cemetery grounds.

c. Respondent Kamphausen

Respondent Kamphausen offered unpersuasive testimony at the hearing of this matter that did not refute, undermine, or diminish the severity of the causes for discipline set out in complainant's Accusation.

Despite respondent Kamphausen having a career in the cemetery industry since 1963 and now being 73 years of age, he failed to adhere to the bureau's regulation regarding the application of sufficient water to cemetery grounds in order to maintain green grass during 2014, when minimum, voluntary water reduction measures were sought by the local water utility company.

Respondent Kamphausen was not believable when he asserted that in 2014 he was justified to order the cessation of watering because of the state's drought conditions because water was needed for growing farm crops and "for life." His conclusion was flawed on the matter of stopping watering in 2014 was warranted, among other reasons, because parts of respondent Evergreen's grounds were seldom visited. Respondent Kamphausen made an admission that in 2014, he directed that the three cemeteries, including Evergreen, as controlled by him had all watering of grass stopped by his directive.

And, respondent Kamphausen was not persuasive that in light of the aforementioned onset of drought conditions, the termination of watering the grass at the subject cemetery was justified because of financial considerations. Respondent Kamphausen was not believable when he claimed that the financial well-being of respondent Evergreen was a rational basis to stop watering the grounds making up the cemetery. Respondent Kamphausen was not persuasive that had he continued to water respondent Evergreen's grounds over the course of

2014, the association would have incurred an additional $93,000 loss measured against the "$150,000 and some odd loss" for that year. He was not compelling that surcharges incurred for water use in 2014 included surcharges that had been incurred in past years. And, respondent Kamphausen's decision to stop watering grass at respondent Evergreen's cemetery was affected by other maintenance costs such a $43,000 bill for the removal of dead and diseased trees.

Dispositive Factual Findings – First and Second Causes for Discipline

9. Respondent Evergreen violated applicable law by failing to perform, or cause to be performed, adequate maintenance of various sections of the grounds making up Evergreen Cemetery, by failing to provide a sufficient supply of water to keep the cemetery's grass and plants green. Respondent Evergreen's unprofessional conduct and neglect regarding the poor condition and unsightly appearance of Evergreen Cemetery's grounds resulted in undue anguish and offense to family members of deceased persons buried at Evergreen Cemetery.

10. Respondent Kamphausen, acting as responsible managing officer and president of respondent Evergreen and as the licensed cemetery manager of the holder of a Certificate of Authority, failed to exercise adequate supervision and control over cemetery operations in that he allowed respondent Evergreen to violate applicable law by the cemetery staff's failure to perform a sufficient supply of water to maintain the cemetery's grass in a green state of active growth and appearance. Respondent Kamphausen's unprofessional conduct and neglect regarding the poor condition and unsightly appearance of Evergreen Cemetery's grounds resulted in undue anguish and offense to family members of deceased persons buried at Evergreen Cemetery.

SECOND CAUSE - FAILURE TO COMPLY WITH ABATEMENT ORDERS

11. As a regulated cemetery association, respondent Evergreen is required by law to maintain general and special endowment care funds. And, the law requires the filing of annual reports regarding the condition of the funds.

12. The Bureau issued five citations to respondent Evergreen between October 2, 2009, and November 24, 2014.

a. On October 2, 2009, the Bureau issued Citation No. IC 2009 190, which alleged respondent Evergreen's failure to file the annual 2008 Endowment Care Fund (ECF) and Special Care Fund (SCF) Reports for the year ending December 31, 2008. The citation included a fine in the amount of $1,200. Respondent paid the fine and complied with the citation.

b. On October 21, 2011, the Bureau issued Citation No. IC 2011 192, alleging respondent Evergreen's failure to file the annual 2010 ECF and SCF Reports for the year

ending December 31, 2010. The citation included a fine in the amount of $2,000. Respondent paid the fine and complied with the citation.

c. On November 9, 2012, the Bureau issued Citation No. IC 2012 218, which alleged respondent Evergreen's failure to file the annual 2011 ECF and SCF Fund 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 respondent Evergreen immediately file the reports. Respondent Evergreen did not appeal the citation and it became final. Respondent Evergreen failed to comply with the Order of Abatement in that the 2011 Endowment Care Report and the 2011 Special Care Fund Report were not received by the Bureau until September 25, 2015.

d. On December 13, 2013, the Bureau issued Citation No. IC 2013 272, which alleged respondent Evergreen's failure to file the annual 2012 ECF and SCF Fund Reports. The citation included a fine in the amount of $2,000 and an abatement order requiring that respondent Evergreen immediately file the reports. Respondent Evergreen did not appeal the citation and it became final. Respondent Evergreen failed to comply with the Order of Abatement in that the 2012 Endowment Care Report and the 2012 Special Care Fund Report were not received by the Bureau until September 25, 2015.

e. On November 24, 2014, the Bureau issued Citation No. IC 2014 253, which alleged respondent Evergreen's failure to file the annual 2012 ECF and SCF Fund Reports. The citation included a fine in the amount of $2,000 and an abatement order requiring that respondent Evergreen immediately file the reports. The abatement fine was paid. Respondent Evergreen did not appeal the citation and it became final. Respondent Evergreen failed to comply with the Order of Abatement by immediately filing the reports in that the 2013 Endowment Care Report and the 2013 Special Care Fund Report were not received by the Bureau until September 25, 2015.

Respondents' Lack of Evidence

13. Respondents neither offered evidence nor made any cogent argument with regard to the acts and omissions relating to respondent Evergreen's failure to comply with the full measure of the citations described above.

14. Without legal justification, respondents did not comply with Business and Professions Code section 9560[4] that requires the annual filing of a written report on the form prescribed by the Bureau.

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[4] Business and Professions Code section 9650 sets forth:

> (a) Each cemetery authority shall file with the bureau annually, on or before June 1, or within five months after close of their fiscal year provided approval has been granted by the bureau as provided for in

Section 9650.1, a written report in a form prescribed by the bureau setting forth 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 by specific periods as set forth in the form prescribed.

(2) The amount collected and deposited in both the general and special endowment care funds segregated as to the amounts for crypts, niches and grave space by specific periods as set forth either on the accrual or cash basis at the option of the cemetery authority.

(3) A statement showing separately the total amount of the general and special endowment care funds invested in each of the investments authorized by law and the amount of cash on hand not invested, which statement shall actually show the financial condition of the funds.

(4) A statement showing separately the location, description, and character of the investments in which the special endowment care funds are invested. The statement shall show the valuations of any securities held in the endowment care fund as valued pursuant to Section 9659.

(5) A statement showing the transactions entered into between the corporation or any officer, employee or stockholder thereof and the trustees of the endowment care funds with respect to those endowment care funds. The statement shall show the dates, amounts of the transactions, and shall contain a statement of the reasons for those transactions.

(b) The report shall be verified by the president or vice president and one other officer of the cemetery corporation. The information submitted pursuant to paragraphs (2), (3), (4), and (5) shall be accompanied by an annual audit report of the endowment care fund and special care fund signed by a certified public accountant or public accountant. The scope of the audit shall include the inspection, review, and audit of the general purpose financial statements of the endowment care fund and special care fund, which shall include the balance sheet, the statement of revenues, expenditures, and changes in fund balance.

(c) If a cemetery authority files a written request prior to the date the report is due, the bureau may, in its discretion, grant an additional 30 days within which to file the report.

15. By failing to file the report required by law on the form prescribed by the Bureau, respondents violated Business and Professions Code section 9650.4.[5]

Costs of Investigation and Enforcement

16. Pursuant to Business and Professions Code section 125.3, complainant requested costs of investigation in the amount of $3,141.50. And, complainant seeks recovery of costs of prosecution by the Department of Justice in an amount of $6,967.50.

In support of the request for costs of investigation, complainant submitted a Certified Statement of Costs signed by complainant herself. And the cost of prosecution was supported by the Certification of Prosecution Costs and Declaration by Deputy Attorney General Jonathan D. Cooper.

17 Respondents challenged the reasonableness and appropriate extent of the costs of investigation. Complainant, however, presented testimony from Bureau investigators that established that: two Bureau investigators were needed to visit the grounds of respondent Evergreen's cemetery because three distinct complaints were filed by individual consumers on separate dates; the Bureau randomly assigns investigators to conduct separate and independent inquiries into consumer complaints; in July 2014 Bureau inspector Weaver was attached to the Bureau's Fairfield (Solano County) Office while Bureau inspector Fisher worked at the Bureau's South Santa Clara County Office; each investigator recorded the time spent on investigative activities in respective "Activity Log" journals. Inspector Weaver devoted 21 hours of work time to the investigation regarding respondents. Inspector Fisher performed two separate investigations and he authored two separate reports regarding

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[5] Business and Professions Code section 9650.4 provides, in pertinent part:

> (a) Any cemetery authority that does not file its report within the time prescribed by Section 9650 may be assessed a fine by the bureau in an amount not to exceed four hundred dollars ($400) per month for a maximum of five months. The amount of the fine shall be established by regulation in accordance with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code). Failure to pay the fine within 15 days after receipt of written notification of the assessment or, where a timely request for waiver or reduction of the fine has been filed, within 15 days after receipt of written notification of the bureau's decision in the matter, shall be cause for disciplinary action.

respondents so as to record approximately 20 hours of work time for each report for complainant. Despite the objections made respondents, the work by complainant's investigators was reasonable.

And, respondents dispute the reasonable nature of the costs associated with the prosecution of this matter. But, the time of the provision of services by the deputy attorneys general in this matter regarding the prosecution of respondent was reasonable. The deputy attorney general represented at the hearing a sufficient basis to warrant recovery of the costs by complainant's lawyers.

Respondent Kamphauser testimony was not persuasive that complainant's cost recovery certifications were unreasonable or not appropriate. Respondent Kamphausen is an entrepreneur, who has accomplished many significant projects both in the cemetery industry as well as a building contractor and the owner of an underwater diving company, which contributed to erecting in dams and water reservoirs. He has owned many mortuary homes and cemeteries. His accomplishments have enabled him to amass much discretionary income so as to buy and sell unique, high-performance automobiles. In 2014, through the sale of one of his expensive vehicles, respondent Kamphausen was able to make a personal loan of more than a half-million dollars to respondent Evergreen to assure the upgrades and general upkeep for respondent Evergreen. (However, respondent Kamphausen did not file any report prepared by a licensed certified accountant regards the statement statements for the cemetery association.) And, according to respondent Kamphausen, respondent Evergreen will have more than a million dollars in its endowment and special care funds.

18. The reasonable and appropriate measure of costs recoverable by the Bureau is a total sum of $10,109.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Complainant has the burden of proof in this matter to establish the causes for discipline alleged in the Accusation against respondents.

The standard of proof is preponderance of the evidence. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d 1035, 1038-1040.) A party required to prove a matter by a preponderance of the evidence need prove only that it is more likely to be true than not true. Also, a preponderance of the evidence means that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in the number of witnesses or quantity, but in the effect of the evidence on those to whom it is addressed. In order words, the term refers to "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafood, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

By a preponderance of evidence, complainant proved that causes for discipline set out in the Accusation against respondents.

Statutory Authority and Regulations

2. California Code of Regulations, title 16, section 2333, provides, in pertinent part:

> (b) Each endowment care cemetery shall perform, at a minimum, the following maintenance on its cemetery property:
>
> (3) *Provide a sufficient supply of water to keep cemetery grass and plants as green as seasonally possible in accordance with natural terrain, availability of water, and local or county ordinances regarding water use.*

(Emphasis added.)

3. Business and Professions Code section 9725.1 states that unprofessional conduct by any licensee or registrant or by any agent or employee of a licensee or registrant constitutes grounds for disciplinary action. Unprofessional conduct includes, but is not limited to, the following:

> (a) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of this chapter and any regulation adopted thereunder, or of any federal or state law or regulation governing the disposition of human remains, operation of cemeteries or crematories, the sale of cemetery property, or the sale of crematory services or commodities.
>
> (b) Negligence in performing any act related to the operation of a cemetery or crematory.

4. 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).)

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).)

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).)

Causes for Discipline

FIRST CAUSE FOR DISCIPLINE

5. Cause exists to discipline respondent Evergreen's Certificate of Authority, in accordance with California Code of Regulations, title 16, section 2333, as it interacts with Business and Professions Code section 9725.1 by reason of Factual Findings 4 through 7 and 9, along with Legal Conclusions 2 and 3. Respondent Evergreen violated the law by failing to provide a sufficient supply of water to keep cemetery grass green.

SECOND CAUSE FOR DISCIPLINE

6. Cause exists to discipline respondent Kamphausen's Cemetery Manager License based on Factual Findings 4 through 7 and 10, along with Legal Conclusions 2 and 3. Respondent Kamphausen violated the law by failing to provide a sufficient supply of water to keep cemetery grass green.

THIRD CAUSE FOR DISCIPLINE

7. Cause exists to discipline respondent Evergreen's Certificate of Authority, in accordance with Business and Professions Code sections 9650 and 9725.1, by reason of Factual Findings 11, 12, 14 and 15 along with Legal Conclusions 3 and 4. Respondent Evergreen, through its officers, directors and employees, failed to fully comply with abatement orders set out in citations issued by the Bureau.

FOURTH CAUSE FOR DISCIPLINE

8. Cause exists to discipline respondent Kamphausen's Cemetery Manager License in accordance with Business and Professions Code sections 9650 and 9725.1, by reason of Factual Findings 11, 12, 14 and 15 along with Legal Conclusions 3 and 4. Respondent failed to exercise adequate supervision and control over cemetery operations of respondent Evergreen in that respondent Kamphausen allowed the cemetery association to not fully comply with abatement orders set out in citations issued by the Bureau.

Dispositive Determinations

9. 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 7 through 15, public protection will be ensured by imposing terms and

conditions of probation on respondent Evergreen's Certificate of Authority and Kamphausen's Cemetery Manager license.

Costs of Investigation and Enforcement

10. 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. Complainant provided sufficient evidence to support an award of the costs of investigation and enforcement in the amount of $10,109.

11. 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.

Respondents object to the reasonableness of the costs of investigation and prosecution. First, respondents argue that complainant unreasonably sent two inspectors from the Bureau's Sacramento offices to examine the grounds comprising Evergreen Cemetery in Oakland. And, respondents argue that the deputy attorney general manufactured inflated billings.

The factors expressed in the *Zuckerman* decision are addressed as follows: The hearing process did not result in respondents providing competent, duly authenticated evidence so as cause dismissal or reduction of the allegations in the Accusation. Rather, the evidence underscored respondents' neglect and unprofessional conduct. Respondents were not persuasive or credible so as to determine a good faith belief in the merits of the positions taken in defense to the allegations in the Accusation. Respondents did not raise a colorable challenge to the discipline proposed in the Accusation. Even though respondent Evergreen may have some financial limitations, respondent Kamphauser cannot be determined to be financially unable to make payments to reimburse the Bureau of its costs of investigation and prosecution. And, the Bureau's investigators were thorough and responsive to complainant made by citizen-consumers; and, hence, the Bureau did not conduct a disproportionately large investigation.

An order requiring respondent Kamphauser to pay the Bureau's costs of investigation and prosecution will not impose a grave financial hardship upon either respondent.

12. Taking into account the factors required by *Zuckerman*, the costs of enforcement and prosecution in the amount of $10,109 are reasonable and appropriate.

ORDER

Certificate of Authority license number COA 103 issued to Evergreen Cemetery Association also known as Evergreen Cemetery as well as Cemetery Manager license number CEM 259 issued to respondent Buck Kamphausen are revoked; provided, however,

the licensure revocations are stayed and respondents are individually placed on probation for four (4) years, subject to the following terms and conditions applicable to each individual respondent:

1. Obey All Laws:

   Respondents 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:

   Respondents, jointly, 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. Respondents 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. Failure to submit timely reports in a form as directed shall be considered a violation of probation.

3. Interview with Bureau Representative:

   As necessary, respondent Evergreen, through an officer or director, as well as respondent Kamphausen, shall appear in person for scheduled interviews with the Bureau's executive director or other designated representative for the purpose of monitoring compliance with the terms of this Decision. Failure to appear for any scheduled interview without prior notification to Bureau staff, or failure to appear for two (2) or more scheduled interviews with the board or its designee during the period of probation, shall be considered a violation of probation.

4. Cooperate with Bureau Staff

   Respondent Evergreen, through its officers, directors and employees, as well as respondent Kamphausen, shall cooperate with the Bureau's inspection program and with the Bureau's monitoring and investigation of respondents' compliance with the terms and conditions of probation. Failure to cooperate shall be considered a violation of probation.

5. Probation Monitoring Costs

   Respondent Evergreen or respondent Kamphausen shall pay any costs associated with Bureau's probation monitoring and inspections as determined by the Bureau each and every year of probation. Such costs shall be payable

to the Bureau, or the department, on a schedule as directed by the Bureau or its designee. Failure to pay such costs by the deadline(s) as directed shall be considered a violation of probation.

6. Reimbursement of Bureau Costs of Investigation and Prosecution

Evergreen Cemetery Association is jointly and severally liable with respondent Buck Kamphausen for the costs incurred by complainant. And both or either respondent shall pay to the Department of Consumer Affairs, on behalf of the Cemetery and Funeral Bureau, the costs of investigation and enforcement in the total amount of $10,109.

Both or either respondent shall make payment of the full measure of the costs within 60 days of the effective date of this Decision, unless within that period of time respondents enter into an installment payment plan that is satisfactory to the Bureau's Executive Officer. There shall be no deviation from any executed schedule, absent prior written approval by the board or its designee. Failure to pay costs by the deadline as directed shall be considered a violation of probation.

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.

The filing of bankruptcy by either respondent, or the liquidation of the Evergreen Cemetery Association, shall not relieve respondents of the responsibility to reimburse the bureau of its costs of investigation and prosecution.

7. Out-of-State Residence or Operation:

Should respondent Kamphausen 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 Kamphausen 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.

8. Posted Notice of Probation

Respondent Evergreen, through its officers, agents or employees, shall prominently post a probation notice provided by the Bureau in a place conspicuous and readable to the public. The probation notice shall remain posted during the entire period of probation.

Respondents shall not, directly or indirectly, engage in any conduct or make any statement which is intended to mislead or is likely to have the effect of misleading any customer, member of the public, or other person(s) as to the nature of and reason for the probation of the licensed entity.

Failure to post such notice shall be considered a violation of probation.

9. Completion of Probation:

Upon successful completion of probation, respondents' respective license will be fully restored.

10. Violation of Probation:

Should either respondent violate probation in any respect, the chief of the Bureau, after giving respondents 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 both or either 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.

11. License Issued During Probation:

Any license or registration issued to either respondent by the 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. Both respondents must comply with terms and conditions herein and demonstrate no cause for disciplinary action or denial of an application.

Dated: January 21, 2016

DocuSigned by:

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PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings