

FILED
Court of Appeals
Division II
Supreme Court No. _____
State of Washington
11/9/2017 4:58 PM
THE SUPREME COURT OF THE STATE OF WASHINGTON

SOUTHWICK, INC., a Washington Corporation,

APPELLANT,

v.

WASHINGTON STATE, AND ITS DEPARTMENT OF LICENSING BUSINESS AND
PROFESSIONS DIVISION, WASHINGTON STATE FUNERAL AND CEMETERY BOARD,

RESPONDENTS.

APPELLANT SOUTHWICK, INC.'S PETITION FOR REVIEW

OWENS DAVIES, P.S.
Matthew B. Edwards
1115 West Bay Drive, Suite 302
Olympia, Washington 98502
(360) 943-8320
WSBA No. 18332

TABLE OF CONTENTS

- I. IDENTITY OF PETITIONER/CITATION TO COURT OF APPEALS DECISION..... 1**

- II. ISSUES PRESENTED FOR REVIEW..... 1**
 - Due Process Issues 1
 - Statutory Interpretation Issue 3

- III. STATEMENT OF FACTS..... 4**
 - A. In order to prevent the state's oldest and most historic cemetery from becoming derelict, Southwick volunteers to take over operation of Forest Memorial Cemetery. 4
 - B. The City of Olympia demands that Southwick remove all obstructions that might interfere with the City's emergency repair of the City's aging waterline. In response to this lawful demand, and acting under the authority of its rules, Southwick moves the Devotion Urn Garden the minimum distance necessary to relocate it outside of the easement area. 6
 - C. The agency initiates a disciplinary proceeding against Southwick by filing a statement of charges. 8
 - D. On summary judgment, the agency determines that Southwick did not violate the statutes pled in the statement of charges. 9
 - E. The agency purports to find that Southwick violated a statute whose violation had not been charged. 10
 - F. Just a few days before the Board hears Southwick's motion arguing that the Board had entered summary judgment in violation of Southwick's right to due process, the Board serves Southwick with an amended statement of charges which does NOT allege a violation of RCW 68.50.140. 10
 - G. The agency enters a final order which adopts and incorporates by reference the summary judgment order..... 11

H. The Court of Appeals holds that the agency entered the summary judgment decision in violation of Southwick's due process rights. But the Court of Appeals affirms the final order which adopted and incorporated by reference that summary judgment decision. 12

IV. ARGUMENT 13

A. The Court of Appeals decision eviscerates due process. 13

B. Southwick acted "with authority of law." 18

V. CONCLUSION 20

VI. APPENDIX..... 21

TABLE OF AUTHORITIES

Cases

<i>Armstrong v. Manzo</i> , 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)	17
<i>Braun v. Selig</i> , 194 Wn.App. 42, 376 P.3d 447 (2016)	20
<i>Coe v. Armour Fertilizer Works</i> , 237 U.S. 413, 424, 35 S.Ct. 625, 629, 59 L.Ed. 1027 (1950).....	17
<i>Esmieu v. Schrag</i> , 88 Wn.2d 490, 497, 563 P.2d 203 (1977).....	14, 15, 16
<i>Peralta v. Heights Medical Center, Inc.</i> , 485 U.S. 80, 86-87, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988).....	17
<i>Sheldon v. Sheldon</i> , 47 Wn.2d 699, 702, 289 P.2d 335 (1955)	14
<i>Southwick, Inc. v. Washington State, and its Department of Licensing Business and Professions Division, Washington State Funeral and Cemetery Board</i> , Court of Appeals Cause No. 49691-7-2 (published decision issued October 17, 2017).....	1
<i>State v. Gunwall</i> , 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986).....	19
<i>State v. Rogers</i> , 127 Wn.2d 270, 275, 898 P.2d 294 (1995).....	14
<i>Washington Med. Disciplinary Bd. v. Johnston</i> , 98 Wn.2d 466, 474, 663 P.2d 457 (1983).....	8

Statutes

RCW 18.235.050	8
RCW 18.235.060	8
RCW 34.05.434(g).....	8, 15
RCW 68.20.060	5, 8, 18, 19, 20
RCW 68.24.060	9, 12, 13
RCW 68.24.110	5, 8, 18, 19, 20
RCW 68.50.140.....	3, 4, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20
RCW 68.50.200	9, 13, 20
RCW 68.50.210	20
RCW 68.50.220	8, 20
U.S. Const., Amendment 14, §1.....	13
Wash. Const., Art. 1, §3.....	13

Rules

RAP 13.4(b)(1) 17
RAP 13.4(b)(3) 17
RAP 13.4(b)(4) 17, 20

I. IDENTITY OF PETITIONER/CITATION TO COURT OF APPEALS DECISION

Southwick, Inc. (hereinafter "Southwick"), the operator of Forest Memorial Cemetery in Olympia, the oldest continuously operating cemetery in the state, and the Defendant in the administrative proceedings below, files this petition for discretionary review asking the Supreme Court to review the Court of Appeals' published decision, *Southwick, Inc. v. Washington State, and its Department of Licensing Business and Professions Division, Washington State Funeral and Cemetery Board*, Court of Appeals Cause No. 49691-7-2 (published decision issued October 17, 2017). Appendix E.

II. ISSUES PRESENTED FOR REVIEW

Due Process Issues

1. Whether an agency initiating a quasi-criminal disciplinary proceeding by filing a statement of charges may find the defendant to have violated a statute when the alleged violation was not charged?

Short Answer: An agency may not, consistent with due process, find a defendant in violation of a statute when the alleged violation was not charged.

2. After discovery has closed, an agency, in a summary judgment proceeding, determines that the defendant did not violate any statute whose violation was alleged in the statement of charges. However, rather than enter an order of dismissal, the agency determines the defendant

to have violated a third statute. Until the entry of the summary judgment decision, this statute had never been mentioned. To the extent it addresses the uncharged statute, is the summary judgment decision void?

Short Answer: A summary judgment determining the defendant to have violated a statute, without giving the defendant any prior notice that the defendant was charged with violating the statute, or any opportunity to be heard as to whether it violated the statute, violates due process and is therefore void.

3. The agency files an amended statement of charges a few days before hearing defendant's motion challenging the void summary judgment decision. The agency's amended statement of charges does **not** allege a violation of the statute raised for the first time in the void summary judgment decision. After hearing the motion challenging the void summary judgment decision, the agency issues a final order which expressly incorporates the findings and conclusions of the void summary judgment decision. Is the final order also void?

Short Answer: Because the void summary judgment was entered in violation of the defendant's due process rights, it is without *any* effect. Because it relied on and incorporated a void decision, the agency's final order imposing penalties is also void.

Statutory Interpretation Issue

4. The Legislature has specifically authorized cemetery operators to adopt and enforce rules governing the interment of human remains within a cemetery. The cemetery operator adopts rules that specifically grant it the authority, not conditioned on prior notice, to remove and re-inter the remains in the event of an error in the interment of the remains. The cemetery operator enters into a contract with each deceased person or the legal representative of each deceased person whose cremated, encased remains are buried in an urn garden in the cemetery which incorporates the cemetery's rules.

RCW 68.50.140 forbids the disinterment of interred remains "without authority of law." Does the cemetery operator act with "authority of law" when, in response to the lawful demand of a city utility to remove all obstructions from an easement which runs through the cemetery, the cemetery operator, acting under the authority of its rules, moves the cremated, encased remains in the urn garden the minimum distance necessary to relocate the urn garden outside the easement area?

Short Answer: A cemetery operator who relocates cremated, encased human remains under the authority expressly reserved to it by rules

made part of the contract pursuant to which it accepted the remains for burial acts "with authority of law," and therefore does not violate RCW 68.50.140.

III. STATEMENT OF FACTS

A. In order to prevent the state's oldest and most historic cemetery from becoming derelict, Southwick volunteers to take over operation of Forest Memorial Cemetery.

Forest Memorial Cemetery, the only cemetery located within the city limits of Olympia, Washington, is the oldest continuously operating cemetery in this state. AR 134, 279. Originally established in 1857, Forest Memorial Cemetery was operated for many years by the Forest Cemetery Association. *Id.*

In 1947, the Forest Cemetery Association granted the City of Olympia a waterline easement. AR 134, 141-42. The City of Olympia installed a large water line in the easement, which provides the City with its main supply of water. AR 134-35.

By the late 1980s, the Forest Cemetery Association had become moribund. There was no one running the cemetery. The cemetery was not being maintained. AR 135.

In order to prevent this historic cemetery from becoming derelict, Southwick (whose owners operated a cemetery in the City of Lacey) volunteered to take over the operation of this cemetery. AR 135. Southwick entered into a written agreement providing for this with the

state Cemetery Board. AR 135, 144-45. As part of its agreement with the Cemetery Board, Southwick agreed to honor contracts for pre-arranged funeral services entered into by the former owners and operators of the cemetery, even though there were no funds available to pay for the cost of these services. *Id.* As a result, Southwick has never made a profit on account of its operation of the cemetery. AR 136. See also AR 6 (Finding of Fact 3.7).

Because there was no one associated with the Forest Cemetery Association remaining at the time Southwick took over operation of the cemetery, Southwick simply began operating the cemetery without any formal conveyance of title. As a result, Southwick never learned of the existence of the City of Olympia's waterline easement. AR 136. See also AR 6 (Finding of Fact 3.7).

As authorized by RCW 68.20.060 and 68.24.110, Southwick adopted rules and regulations modeled after those adopted by Evergreen Washelli Cemetery in Seattle. AR 136, 147-172. The rules specifically provided Southwick with the right, upon discovering that there had been an error in the placement of remains, to remove and reinter the remains:

The Corporation reserves the right to correct errors made by it in making interments, disinterments or removals . . .
In the event the error shall involve the interment of the remains of any person in such property, the Corporation reserves and shall have the right to

remove and reinter the remains in the property conveyed in lieu thereof.

AR 163 (emphasis added).

Nothing in its rules purported to condition Southwick's right to remove and reinter remains on prior notice to any party. AR 137, 174. Each of the contracts pursuant to which Southwick sold the right to be interred in the urn garden incorporated these rules. *Id.*

Southwick established the Devotion Urn Garden in an area immediately adjacent to a large monument that had been constructed by the previous owner/operator of the cemetery. AR 136-37, 280. Prior to 2011, Southwick entered into contracts pursuant to which the cremated remains of 37 persons, encased in burial urns, were located within small plots within the urn garden. AR 137, 280.

B. The City of Olympia demands that Southwick remove all obstructions that might interfere with the City's emergency repair of the City's aging waterline. In response to this lawful demand, and acting under the authority of its rules, Southwick moves the Devotion Urn Garden the minimum distance necessary to relocate it outside of the easement area.

In August, 2011, concerned that it might need quick access to its aging waterline in the event of its failure, the City of Olympia advised Southwick that it possessed an easement for the waterline that ran through the cemetery and demanded that Southwick remove any obstructions located within the easement area. AR 137, 179-85, 280-81. After the City

performed a survey, Southwick realized that it had unknowingly established the Devotion Urn Garden within the easement area. AR 136-37. See also AR 6 (Finding of Fact 3.7).

Acting on the authority of its rules, Southwick relocated the Devotion Urn Garden by moving it approximately eight or nine feet, the minimum distance necessary, to relocate it outside the easement area. AR 137-38. It also improved the garden, the adjoining monument, and nearby areas. *Id.* Each of the urns remained in the same plot, retaining the same relationship to each other plot, as before. *Id.* See also AR 6 (Finding of Fact 3.7).

No one with a legal interest in the cremated remains was confused about, or concerned by, the slight shift in location of the urn garden. AR 138. Southwick received comments uniformly appreciative of the upgrades Southwick had made to the appearance of the urn garden and cemetery. *Id.* In particular, by letter received on May 27, 2014, Connie Thompson, the surviving child of Orville and Louise Thompson, whose cremated remains were in the urn garden, complimented Southwick on what it had done. AR 138, 193.

Subsequently, Orville and Louise Thompson's granddaughter, a person with no legal right with respect to any of the remains located in the

urn garden, complained that Southwick had failed to provide advance notice of the relocation of the garden. AR 138-39.

C. The agency initiates a disciplinary proceeding against Southwick by filing a statement of charges.

The Washington State Cemetery Board (hereinafter "agency") initiated a quasi-criminal¹ license revocation proceeding against Southwick. As required by the Administrative Procedure Act,² the agency filed a statement of charges identifying two³ statutes which the agency alleged Southwick to have violated. AR 15-17 (Appendix A).

By RCW 68.20.060, the Legislature has authorized cemetery authorities to "make, adopt, . . . and enforce rules" By RCW 68.24.110, the Legislature has authorized cemetery authorities to "sell and convey plots or rights of interment subject to [such] rules." Prior to the filing of the statement of charges, Southwick advised the agency that it had relocated the Devotion Urn Garden using the authority to remove and reinter remains under its rules. AR 56.

¹ *Washington Med. Disciplinary Bd. v. Johnston*, 98 Wn.2d 466, 474, 663 P.2d 457 (1983) (citing cases).

² See RCW 18.235.050 (providing disciplinary authority shall initiate such proceedings by filing statement of charges); RCW 18.235.060 (incorporating procedures set forth in Administrative Procedure Act as rules governing such proceedings); RCW 34.05.434(g) (notice initiating proceeding must include "a reference to the particular sections of the statutes . . . involved").

³ The agency's original statement of charges alleged a violation of RCW 68.50.220. AR 16 (Appendix A). The agency filed an amended statement of charges which withdrew the allegation that Southwick violated this statute. AR 379-81 (Appendix B).

The agency's statement of charges did not address the authority pursuant to which Southwick had advised the agency it acted. Instead, the agency alleged that Southwick had violated two statutes, RCW 68.24.060 and RCW 68.50.200. AR 16 (Appendix A).

RCW 68.24.060 provides:

Any part or subdivision of the property so mapped and plotted **may**, by order of the directors, be resurveyed and altered in shape and size and an amended map or plat filed, so long as such change does not disturb the interred remains of any deceased person.

(Emphasis added). RCW 68.50.200 provides:

Human remains **may** be removed from a plot in a cemetery with the consent of the cemetery authority and the written consent of one of the following in the order named . . .

(Emphasis added). Because the statement of charges did not address the authority pursuant to which Southwick had advised the agency that it acted, and because both the statutes the agency charged Southwick with violating are phrased permissively, and do not actually forbid any conduct, Southwick contested this matter.

D. On summary judgment, the agency determines that Southwick did not violate the statutes pled in the statement of charges.

After conducting discovery, AR 363-73, Southwick filed a motion for summary judgment. AR 122-133. The agency's prosecuting authority filed a cross-motion for summary judgment. AR 49-53. Both motions

addressed the issue of whether Southwick had violated either of the statutes identified in the agency's statement of charges.

Cemetery Board member Jim Letson heard the summary judgment motion. AR 241. Board member Letson entered a written decision. AR 278-283 (Appendix C). Board member Letson characterized the two statutes which Southwick had been charged with violating as "authorizing statutes" and held that neither of them forbade Southwick from relocating the urn garden. AR 282 (Conclusion of Law 5).

E. The agency purports to find that Southwick violated a statute whose violation had not been charged.

These determinations should have resulted in the entry of an order terminating the administrative proceedings. However, Board member Letson, without first having given Southwick any notice or opportunity to be heard, went on to hold that Southwick had violated RCW 68.50.140—a statute which criminalizes what is commonly referred to as grave robbery. AR 282 (Conclusion of Law 6).

F. Just a few days before the Board hears Southwick's motion arguing that the Board had entered summary judgment in violation of Southwick's right to due process, the Board serves Southwick with an amended statement of charges which does NOT allege a violation of RCW 68.50.140.

Southwick filed a motion attacking the validity of that portion of the summary judgment ruling on the grounds that the entry of the

summary judgment decision against it violated Southwick's due process rights. AR 382-96.

On November 9, 2015, just a few days before the hearing on this motion, the agency served Southwick with an amended statement of charges. AR 379-81 (Appendix B). This amended statement of charges did **not** allege that Southwick had violated RCW 68.50.140, or describe any penalties that the agency was seeking to impose as a result of the violation of that statute. *Id.*

G. The agency enters a final order which adopts and incorporates by reference the summary judgment order.

On November 18, 2015, in a proceeding presided over by Board Member Letson in which Southwick was prohibited from introducing evidence, AR 401, 407, 415, the agency heard Southwick's motion directed at the validity of Board Member Letson's summary judgment order. AR 407 *et seq.* Over Southwick's objection, AR 439-40, the agency also conducted a hearing at which it permitted the introduction of evidence to determine the penalty the Board should impose based on Board member Letson's summary judgment determination that Southwick had violated RCW 68.50.140. AR 415-16 (describing procedure), AR 440 *et seq.*

On January 6, 2016, the agency entered a final order. AR 2-11 (Appendix D). The final order explicitly affirmed the summary judgment decision, incorporating its findings and conclusions by reference.⁴ AR 5 (Finding of Fact 3.2). The final order imposed penalties on Southwick. AR 8-9.

H. The Court of Appeals holds that the agency entered the summary judgment decision in violation of Southwick's due process rights. But the Court of Appeals affirms the final order which adopted and incorporated by reference that summary judgment decision.

Southwick appealed the final agency order. The Court of Appeals issued a published decision. Appendix E.

In its decision, the Court of Appeals agreed that the entry of the summary judgment decision purporting to find Southwick in violation of RCW 68.50.140 occurred in violation of Southwick's right to due process of law. Slip Opinion at p. 7.

In its briefing to the Court of Appeals, Southwick had pointed out that a decision entered in a manner inconsistent with due process is void. Southwick Opening Brief to Court of Appeals, at p. 18; Reply Brief at p. 8. However, the Court of Appeals did not treat the summary judgment decision as void. Instead, the Court of Appeals held that "Southwick's

⁴ In the final order, the Board purported to find that Southwick had also "violated" RCW 68.24.060. Because the agency's findings of fact "[did] not support the [agency's] conclusion that Southwick violated RCW 68.24.060," suggesting that Southwick had violated this statute, the Court of Appeals reversed the final order on this issue. Slip Opinion at p. 12.

opportunity to argue the applicability of RCW 68.50.140 by its Motion for Reconsideration ultimately satisfied the requirements of procedural due process." Slip Opinion at 2, 6-8.

On the merits, the Court of Appeals noted that RCW 68.50.140 prohibits disinterment of interred human remains "without authority of law." Slip Opinion at p. 9. Adopting a rationale the agency itself had never advanced, the Court of Appeals held that the phrase "without authority of law" contained in RCW 68.50.140 referred only to "specific statutory exceptions," such as RCW 68.24.060 and RCW 68.50.200, in which the Legislature had authorized the disinterment of human remains. *Id.*

Southwick timely filed this Petition for Discretionary Review.

IV. ARGUMENT

A. The Court of Appeals decision eviscerates due process.

The right to due process of law is the oldest and most hallowed of constitutional rights. Originally enacted as part of the Great Charter issued by King John in 1215, it was expressly made part of both the United States and State of Washington constitutions. U.S. Const., Amendment 14, §1; Wash. Const., Art. 1, §3. They each provide that no person shall be deprived of life, liberty, or property without due process of law. *Id.* Due process

requires notice and a prior opportunity to be heard. *State v. Rogers*, 127 Wn.2d 270, 275, 898 P.2d 294 (1995).

This Court has repeatedly held that an order or judgment entered without prior notice or opportunity to be heard is void. See, e.g., *Esmieu v. Schrag*, 88 Wn.2d 490, 497, 563 P.2d 203 (1977); *Sheldon v. Sheldon*, 47 Wn.2d 699, 702, 289 P.2d 335 (1955). The word "void" means "of no legal effect; null." Black's Law Dictionary (9th Ed. 2009) at p. 1709. An order which relies on a void decision is itself void. *Esmieu*, 88 Wn.2d at 497 ("[A] subsequent order based on the faulty hearing is void.").

Here, the agency had charged Southwick with violating two statutes. In its summary judgment decision, the agency expressly held that these statutes, each of which use the word "may," were "authorizing" statutes which Southwick did not violate. AR 282. Because these were the only two statutes which the agency had charged Southwick with violating, that determination should have ended these adjudicative proceedings.

However, taking an action which the Court of Appeals recognized as violating due process (Slip Opinion at 7), the agency held Southwick to have violated RCW 68.50.140. To the extent that the agency, in violation of Southwick's due process rights, addressed that statute in the summary judgment decision, that decision was **void**.

Because that portion of the agency's summary judgment order was void, it had no effect. It was a nullity. Subsequent orders based in any way on that void order are themselves void. See Esmieu, 88 Wn.2d at 497 (citing cases).

Ignoring this Court's directly on-point cases, the Court of Appeals asserted that the void summary judgment order had the effect of providing Southwick notice of the potential violation of RCW 68.50.140. Slip Opinion at 7. But because the summary judgment order was void, and a legal nullity, it could not have this, or any, effect.

To the extent that the agency intended to charge Southwick with violating RCW 68.50.140, the agency had the obligation to provide notice by amending the statement of charges. RCW 34.05.434(g). While the agency did in fact serve Southwick with an amended statement of charges just a few days before the final hearing, the amended statement of charges did not allege a violation of RCW 68.50.140. AR 379-81 (Appendix B).

The Court of Appeals attempted to justify its decision to give effect to a void decision by asserting that there were "no disputed facts," and that "Southwick was entitled to fully present its case to the Board." Slip Opinion at 78. Those claims simply are not true.

The agency entered its summary judgment decision after the opportunity to conduct discovery had closed. AR 32, 241. Southwick had

conducted discovery, but only directed at issues raised by the statutes mentioned in the statement of charges. AR 363-74. Southwick was never provided an opportunity to conduct discovery into the issues arising out of the claimed violation of RCW 68.50.140, because Southwick was never provided notice prior to discovery cutoff that it was charged with violating that statute.

In addition, Southwick had no opportunity to present any evidence. The agency allowed only oral argument in connection with Southwick's motion. AR 415. Compare *Esmieu*, 88 Wn.2d at 497 (After court held an evidentiary hearing without notice to defendant in violation of the defendant's procedural due process rights, court held a second hearing in which it addressed the same issues, but only permitted argument of counsel. Order entered after second hearing held void).

Finally, the agency "procedure" reversed the burden of proof. The agency considered Southwick's Motion for Reconsideration knowing that **its presiding board member had already adjudged Southwick guilty of violating RCW 68.50.140**. AR 412. This improperly put the burden on Southwick to prove its innocence—with respect to the violation of a statute with which Southwick had never been charged!

The summary judgment decision was void. It was a legal nullity. As a legal nullity, it could not function to continue the administrative

proceeding. As a legal nullity, it could not function to amend the agency's statement of charges. As a legal nullity, the agency could not incorporate it, or its findings and conclusions, into its final order.

Where a judgment is entered in a manner contrary to the most basic tenets of due process, "it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86-87, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988), citing *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424, 35 S.Ct. 625, 629, 59 L.Ed. 1027 (1950). Instead, only "wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." *Id.*, citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

The decision of the Court of Appeals is in conflict with prior decisions of this Court. RAP 13.4(b)(1). The Court of Appeals' cavalier dismissal of Southwick's due process right presents a significant question of law under the constitution of the State of Washington and the United States. RAP 13.4(b)(3). By purporting to authorize agencies to act in violation of due process with impunity, it involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). This Court should accept discretionary review.

B. Southwick acted "with authority of law."

This Court should also grant review of the important statutory interpretation issue presented by the Court of Appeals decision.

Even before the initiation of these administrative proceedings, Southwick made the authority pursuant to which it had acted to relocate the Devotion Urn Garden clear. AR 56. In RCW 68.20.060, the Legislature has authorized Southwick, as a cemetery operator, to adopt and enforce rules governing the interment of remains in the cemetery, and by RCW 68.24.110, the Legislature has authorized "cemetery authorit[ies] [to] sell and convey plots or rights of interment subject to the rules in effect or thereafter adopted by the cemetery authority." Southwick had adopted such rules, and they specifically authorized it, in the event of an error in the interment of remains, to relocate and reinter the remains. AR 163.

The agency never directly addressed Southwick's assertion that it had relocated the Devotion Urn Garden pursuant to the Legislatively-sanctioned authority of its rules. In particular, the agency never purported to address why Southwick, in relocating the urn garden under the authority specifically reserved to it by its rules, did not act with "authority of law" under RCW 68.50.140. AR 5 (Findings of Fact 4.4-4.6).

Addressing an issue that the agency itself had not addressed, the Court of Appeals held that, for purposes of RCW 68.50.140, Southwick acted "without authority of law" in relocating the Devotion Urn Garden:

Although Southwick may have statutory authority to enact its own internal rules and regulations, the rules and regulations themselves are not the law. Accordingly, Southwick's internal rules and regulations did not provide the "authority of law" required by RCW 68.50.140.

The Court of Appeals' cursory analysis and dismissal of this important statutory issue is plainly in error.

The phrase "authority of law" refers to any authority granted by a valid statute, common law, or rule of the court. *State v. Gunwall*, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986). Because Southwick was acting pursuant to the authority of rules which the Legislature had specifically authorized it to adopt and enforce, and pursuant to its common law contract rights, Southwick acted "with authority of law."

This belies the Court of Appeals' peremptory dismissal of Southwick's rules as being purely "internal." The Legislature specifically authorized cemetery operators like Southwick to adopt and enforce rules. RCW 68.20.060; 68.24.110. Southwick sold the interment rights pursuant to contracts which incorporated these rules. AR 174. The rules which Southwick adopted cannot fairly be characterized as purely "internal."

Further, Southwick's construction of the relevant statutes harmonizes them:

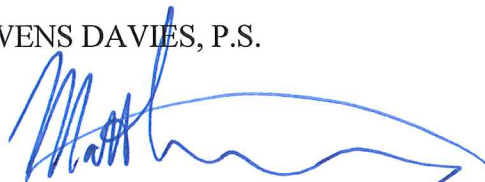
Statute	Effect
RCW 68.20.060; 68.24.110	Authorizes cemetery operators to make and enforce rules governing disinterment of remains in cemetery.
RCW 68.50.200	Describes circumstances under which relatives may disinter remains. See <i>Braun v. Selig</i> , 194 Wn.App. 42, 51 ¶¶18, 54 ¶¶25-27, 376 P.3d 447 (2016).
RCW 68.50.210-.220	Describes circumstances in which public officials may seek to disinter human remains. <i>Id.</i> at 58, ¶33.
RCW 68.50.140	Prohibits all other persons from disinterring human remains.

The Court of Appeals' interpretation of RCW 68.50.140 threatens to undermine the efficacy of the rules governing cemeteries issued by every cemetery operator in this state. This is an issue of substantial public interest over which the Court should accept review. RAP 13.4(b)(4). The Court should also accept review of this aspect of the Court of Appeals decision.

V. CONCLUSION

The Washington State Supreme Court should accept review of, and reverse, the Court of Appeals decision.

OWENS DAVIES, P.S.



Matthew B. Edwards, WSBA No. 18332
Attorney for Appellant Southwick, Inc.

VI. APPENDIX

Appendix A	Statement of Charges	AR 15-17
Appendix B	Amended Statement of Charges	AR 379-381
Appendix C	Findings of Fact, Conclusions of Law and Order on Motions for Summary Judgment	AR 278-283
Appendix D	Final Order	AR 2-9
Appendix E	Published Opinion: <i>Southwick, Inc. v. Washington State, and its Department of Licensing Business and Professions Division, Washington State Funeral and Cemetery Board</i> , Court of Appeals Division Two, No. 49691-7-II, October 17, 2017	

APPENDIX A

CERTIFICATE OF MAILING

I, Southwick Inc. certify that I mailed a copy of this document, postage prepaid, to Southwick Inc., DBA Forest Memorial Gardens, PO Box 3276, Lacey, WA 98509. I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

Dated: 8/26/14 at Olympia, Washington.

By: [Signature]

**STATE OF WASHINGTON
DEPARTMENT OF LICENSING
BUSINESS AND PROFESSIONS DIVISION
WASHINGTON STATE FUNERAL AND CEMETERY BOARD**

In the Matter of the Licenses to Practice
the Cemetery Professions of:

**Southwick Inc., DBA Forest Memorial
Gardens, Cemetery Certificate Authority
Number 90,**

Respondent.

No. 2014-05-2605-00FDE

STATEMENT OF CHARGES

Jurisdiction of the Washington State Funeral and Cemetery Board (Board) in this proceeding is based on Chapter 18.235 Revised Code of Washington (RCW) Uniform Regulation of Business Professions; Chapter 18.39 RCW Embalmers – Funeral Directors; Chapter 68.05 RCW Funeral and Cemetery Board; Chapter 308-48 Washington Administrative Code (WAC) Funeral Directors and Embalmers; Chapter 34.05 RCW the Administrative Procedure Act. Rules applicable to this proceeding are in Chapter 10-08 WAC the Model Rules of Procedure.

1. LICENSE HISTORY

1.1 Southwick Inc., DBA Forest Memorial Gardens, (Respondent) is registered with the Board through a Cemetery Certificate of Authority under certificate number 90, issued September 1, 1998.

1.2 Timothy G. Burgman (Respondent’s Principle) is the President of Southwick Inc. and is the Respondent’s current owner and operator.

2. ALLEGED FACTS

2.1 On May 26, 2014, the Respondent completed multi-year restoration work at Forest Memorial Gardens in response to general disrepair and a City of Olympia water main easement agreement.

2.1.1 Respondent moved approximately 47 sets of cremated remains as part of this restoration work.

2.2 On July 21, 2014, Respondent's Principle stated to the board's investigators the next-of-kin had not been notified before the cremated remains were moved. This conduct constitutes a violation of RCW 68.24.060, 68.50.200 and 68.50.220.

3. ALLEGED VIOLATIONS

3.1 RCW 68.24.060 Maps and plats --- Amendment. Any part or subdivision of the property so mapped and plotted may, by order of the directors, be resurveyed and altered in shape and size and an amended map or plat filed, so long as such change does not disturb the interred remains of any deceased person.


3.2 RCW 68.50.200 Permission to remove human remains. Human remains may be removed from a plot in a cemetery with the consent of the cemetery authority and the written consent of one of the following in the order named: (1) The surviving spouse or state registered domestic partner. (2) The surviving children of the decedent. (3) The surviving parents of the decedent. (4) The surviving brothers or sisters of the decedent. If the required consent cannot be obtained, permission by the superior court of the county where the cemetery is situated is sufficient: PROVIDED, That the permission shall not violate the terms of a written contract or the rules and regulations of the cemetery authority.

3.3 RCW 68.50.220 Exceptions. RCW 68.50.200 and 68.50.210 do not apply to or prohibit the removal of any human remains from one plot to another in the same cemetery or the removal of [human] remains by a cemetery authority from a plot for which the purchase price is past due and unpaid, to some other suitable place; nor do they apply to the disinterment of human remains upon order of court or coroner. However, a cemetery authority shall provide notification to the person cited in RCW 68.50.200 before moving human remains.

4. REQUEST FOR SANCTIONS

Based upon the conduct of the Respondent, the Department requests the Cemetery Certificate of Authority of Southwick Inc. dba Forest Memorial Gardens be suspended or revoked and/or other disciplinary measures be taken pursuant to RCW 18.235.110.

DATED this 26th day of August, 2014.



Lorin Doyle, Administrator
Washington State Funeral and Cemetery Board
Business & Professions Division
Department of Licensing

We are committed to providing equal access to our services.
If you need accommodation, please call (360) 664-6597 or TTY (360) 664-0116.

APPENDIX B

CERTIFICATE OF MAILING

I, Rick Stovick certify that I mailed a copy of this document, postage prepaid, to Southwick Inc., DBA Forest Memorial Gardens, PO Box 3276, Lacey, WA 98509. I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

Dated: Nov. 9, 2015 at Olympia, Washington.

By: 

RECEIVED

NOV - 9 2015

BOARD CLERK
REGULATORY BOARDS SECTION

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
BUSINESS AND PROFESSIONS DIVISION
WASHINGTON STATE FUNERAL AND CEMETERY BOARD

In the Matter of the Licenses to Practice
the Cemetery Professions of:

**Southwick Inc., DBA Forest Memorial
Gardens**, Cemetery Certificate Authority
Number 90,

Respondent.

No. 2014-05-2605-00FDE

AMENDED
STATEMENT OF CHARGES

Jurisdiction of the Washington State Funeral and Cemetery Board (Board) in this proceeding is based on Chapter 18.235 Revised Code of Washington (RCW) Uniform Regulation of Business Professions; Chapter 18.39 RCW Embalmers – Funeral Directors; Chapter 68.05 RCW Funeral and Cemetery Board; Chapter 308-48 Washington Administrative Code (WAC) Funeral Directors and Embalmers; Chapter 34.05 RCW the Administrative Procedure Act. Rules applicable to this proceeding are in Chapter 10-08 WAC the Model Rules of Procedure.

1. LICENSE HISTORY

1.1 Southwick Inc., DBA Forest Memorial Gardens, (Respondent) is registered with the Board through a Cemetery Certificate of Authority under certificate number 90, issued September 1, 1998.

1.2 Timothy G. Burgman (Respondent's Principle) is the President of Southwick Inc. and is the Respondent's current owner and operator.

2. ALLEGED FACTS

2.1 On May 26, 2014, the Respondent completed multi-year restoration work at Forest Memorial Gardens in response to general disrepair and a City of Olympia water main easement agreement.

2.1.1 Respondent moved approximately 37 sets of cremated remains as part of this restoration work.

2.2 On July 21, 2014, Respondent's Principle stated to the board's investigators the next-of-kin had not been notified before the cremated remains were moved. This conduct constitutes two violations of RCW 18.235.130(8) for violations of RCW 68.24.060 and RCW 68.50.220.

3. ALLEGED VIOLATIONS

3.1 RCW 18.235.0130(8) Unprofessional Conduct —The following conduct, acts, or conditions constitute unprofessional conduct for any license holder or applicant under the jurisdiction of this chapter: . . .(8) Violating any of the provisions of this chapter or the chapters specified in RCW 18.235.020(2) or any rules made by the disciplinary authority under the chapters specified in RCW 18.235.020(2).

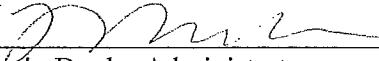
3.2 RCW 68.24.060 Maps and plats — Amendment. Any part or subdivision of the property so mapped and plotted may, by order of the directors, be resurveyed and altered in shape and size and an amended map or plat filed, so long as such change does not disturb the interred remains of any deceased person.

3.3 RCW 68.50.220 Exceptions. RCW 68.50.200 and 68.50.210 do not apply to or prohibit the removal of any human remains from one plot to another in the same cemetery or the removal of [human] remains by a cemetery authority from a plot for which the purchase price is past due and unpaid, to some other suitable place; nor do they apply to the disinterment of human remains upon order of court or coroner. However, a cemetery authority shall provide notification to the person cited in RCW 68.50.200 before moving human remains.

4. REQUEST FOR SANCTIONS

Based upon the conduct of the Respondent, the Department requests the Cemetery Certificate of Authority of Southwick Inc. dba Forest Memorial Gardens be suspended or revoked and/or other disciplinary measures be taken pursuant to RCW 18.235.110.

DATED this 9th day of November, 2015.



Lorin Doyle, Administrator
Washington State Funeral and Cemetery Board
Business & Professions Division
Department of Licensing

We are committed to providing equal access to our services.
If you need accommodation, please call (360) 664-6597 or TTY (360) 664-0116.

APPENDIX C

RECEIVED

OCT 29 2015

BOARD CLERK
REGULATORY BOARDS SECTION

**STATE OF WASHINGTON
DEPARTMENT OF LICENSING
BUSINESS AND PROFESSIONS DIVISION
WASHINGTON STATE FUNERAL AND CEMETERY BOARD**

In the Matter of the Licenses to Practice
the Cemetery Profession of:

**Southwick Inc., DBA Forest Memorial
Gardens**, Cemetery Certificate Authority
Number 90,

Respondent.

No. 2014-05-2605-00FDE

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER ON MOTIONS FOR
SUMMARY JUDGEMENT**

I. INTRODUCTION

The Department of Licensing, Washington State Funeral and Cemetery Board (the "Board") Enforcement Program (the "Department") filed a Motion for Partial Summary Judgment on September 14, 2015. In addition, the Respondent filed a Motion for Summary Judgment in this matter on September 18, 2015. The deadline set for dispositive motions was set as September 18, 2015. Both motions were timely filed.

The parties agreed to a hearing on the motions to be scheduled on October 21, 2015. The Board set this matter for telephonic hearing before Presiding Officer Jim Letson, Vice-Chair of the Board. The Respondent filed Objections to the Notice of Hearing and Request for In-Person Argument. The Presiding Officer overruled the Objection finding that the parties received adequate notice of the hearing, given the dispositive motion deadline set at the first prehearing conference and that both parties requested a hearing on the motions as soon as possible; and that

the Presiding Officer has the authority to hear Summary Judgment motions by telephonic conference and to rule on the same under WAC 10-08-180 and WAC 10-08-200.

The Presiding Officer Jim Letson heard and considered oral argument by both parties by telephone on October 21, 2015. The Presiding Officer has considered the pleadings presented by both Parties as follows:

The Department's Motion for Partial Summary Judgment; Declaration of Sharon Palko in Support of Motion for Partial Summary Judgment; Department's Reply in Support of Partial Summary Judgment.

The Respondent's Motion for Summary Judgment; Declaration of Tim Burgman in Support of Motion for Summary Judgment; Response to Prosecuting Authority's Motion for Partial Summary Judgment; Reply Brief in Support of Southwick's Motion for Summary Judgment.

Based upon the oral arguments and pleadings presented by the parties, the Presiding Officer hereby enters the following findings of fact, conclusions of law and order:

II. FINDINGS OF FACT

1. Forest Memorial Cemetery (Cemetery) was founded in 1857 and was operated by Forest Cemetery Association until approximately 1989.
2. In 1947, the Cemetery granted an easement to the City of Olympia to construct, operate and maintain a water main through the Cemetery.
3. In 1956, the Cemetery constructed a monument featuring the Lord's Prayer over the City of Olympia's easement.
4. In 1989, the Board granted authority to Forest Funeral Home, Inc., now Southwick, to operate the Cemetery as Forest Memorial Gardens. Southwick continues to operate Forest Memorial Gardens under Cemetery Certificate of Authority No. 90.

5. At some point prior to 2002, the Cemetery established an urn garden next to the Lord's Prayer monument and sold small plots for inurnment or the burial of cremated remains in an urn, including a 2 foot by 2 foot plot sold to Orville and Louise Thompson. By 2011, the Cemetery states they had 37 urns within the urn garden.
6. In a letter dated August 25, 2011, the City of Olympia notified Southwick that the Cemetery was in violation of the terms of its easement with the City of Olympia because the Cemetery had allowed monuments or other permanent improvements (encroachments) to be placed over the easement. The City gave the Cemetery 30 days to inventory the encroachments within the easement and 90 days to remove the encroachments or provide a plan for removal.
7. In a letter dated August 26, 2011, the Cemetery sent a letter to the City outlining a meeting that had just occurred in which the Cemetery had asked for a survey and a centerline monumentation so that the Cemetery would know where the easement and encroachments were located.
8. In a letter dated October 14, 2011, the City sent the Cemetery a letter stating that the survey and monumentation was complete and the Cemetery had 30 days to provide an inventory of encroachments and removal or plan for removal of the encroachments was to be completed by December 31, 2011.
9. Included within the easement were the Lord's Prayer Monument and the Cemetery's urn garden.
10. In a letter dated August 15, 2012, the Cemetery stated that it was working on moving "two people" and had obtained permission. The letter also stated it was working on cremains,

“exploring the opportunity to open up a new urn garden within our cemetery.” The letter also thanked the City for allowing the Cemetery’s families’ time to relocate their loved ones.

11. During 2013 and 2014, the Cemetery removed the encroachments from the easement as demanded by the City. This included relocating the Lord’s Prayer Monument and the contents of the urn garden to a new location approximately nine (9) feet from their prior locations.
12. The Cemetery includes in it Exhibits its Amended Cemetery Rules and Regulations. In Section 10(j) the Cemetery states it is not liable for its mistakes that lead to the necessity for removal and reinterment of human remains.
13. As part of moving the urn garden to a new location, the Cemetery removed approximately 37 urns from their burial plots and reburied them in new plots within the new urn garden.
14. The Cemetery did not notify the families of the removal and reburial of the urns into new plots.
15. The Cemetery did make an effort to keep the urn locations in the same juxtaposition with the Lord’s Prayer Monument in its new location.

III. CONCLUSIONS OF LAW

1. The Cemetery states in the Declaration of Tim Burgman, paragraph 19, 22 and 24, that it moved the location of the plots in the Urn Garden by 9 feet to the north and east. Under chapter 68.24 RCW (Cemetery Property) and chapter 68.32 RCW (Title and Rights to Cemetery Plots) the sale of cemetery plots are permanent indivisible conveyances of real property.
2. In response to the City’s order to remove encroachments from the easement, the Cemetery was surveyed by the City. Pursuant to the survey, the Cemetery was forced to alter the location of the Urn Garden which is contemplated under RCW 68.24.060 moving all the

inurnment plots from one location to another. In doing so, the Cemetery was also forced to disturb human remains, so the action was not authorized under RCW 68.24.060.

3. Alternatively, human remains may be removed and moved to a new location within the cemetery so long as notice and permission is granted by a surviving relative, or if there is a court order and the surviving relative is notified. RCW 68.50.200; RCW 68.50.210; RCW 68.50.220.

4. In this case, there was a potential for the City of Olympia to obtain a court order, but no order was obtained. Had the City obtained a court order, the Cemetery would still be required to provide notice to a surviving relative under RCW 68.50.220. Without a court order, the Cemetery was required to not only notify, but also to obtain consent, from a surviving relative or the Thurston County Superior Court.

5. Therefore, the Cemetery did not comply with any of the authorizing statutes listed above.

6. The Cemetery is in direct violation of RCW 68.50.140 for unlawful disturbance, removal or sale of human remains.

7. Under 68.05.173, the violation of any provisions of Title 68 RCW is grounds for the Funeral and Cemetery Board to revoke or suspend a certificate of authority or any other license issued by the Board.

8. Furthermore, under 68.05.430, the Uniform regulation of business and professions act, chapter 18.235 RCW governs unlicensed practice, the issuance and denial of licenses, and the discipline of licensees. The act of disturbing human remains without obtaining consent or even notifying the families of the deceased constitutes unprofessional conduct under RCW 18.235.130.

9. The statutes listed above which were violated by the Cemetery cannot be overridden by a rule adopted by the Cemetery on the Correction of Errors. This is a limitation of liability clause. It applies to contract enforcement. The instant action is for unprofessional conduct rather than liability. The clause does not apply to this situation.

10. The findings and conclusions contained in this order constitute violations of statute and unprofessional conduct. However the circumstances with the City of Olympia and the attempt to improve the urn garden grounds may constitute mitigating factors which could be relevant to the full Board's determination of the appropriate sanction for the violations listed herein.

IV. ORDER

1. The Program's Motion for Partial Summary Judgment is GRANTED.
2. This matter will proceed to hearing only on the question of what is an appropriate sanction with respect to Respondent's violations.
3. The Respondent's Motion for Summary Judgment is denied.
4. All dates, deadlines and obligations contained in the Prehearing Order of this matter remain in place.

DATED this 29 day of OCTOBER, 2015.



Jira Letson
Presiding Officer
Funeral and Cemetery Board

APPENDIX D

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
BUSINESS AND PROFESSIONS DIVISION
WASHINGTON STATE FUNERAL AND CEMETERY BOARD

In the Matter of the Licenses to Practice
the Cemetery Profession of:

**Southwick Inc., DBA Forest Memorial
Gardens, Cemetery Certificate Authority
Number 90,**

Respondent.

No. 2014-05-2605-00FDE

FINAL ORDER

I. BACKGROUND

- 1.1 A formal hearing was held on November 18, 2015 before the Washington State Funeral and Cemetery Board (Board) at Respondent's timely request for a hearing on the August 26, 2014, Statement of Charges which was amended by Order on November 4, 2015.
- 1.2 Present for the Board were Jim Letson, Cameron Smock, Jeffrey Wilson, Pete Cameron, Todd Shifflett, and Charles Chaplin. Jim Letson acted as presiding officer.
- 1.3 The hearing was conducted under the authority of Title 68 RCW (Cemeteries, Morgues and Human Remains), and in accordance with Chapter 18.235 RCW, the Uniform Regulation of Business and Professions Act; Title 98 WAC (Cemeteries,

Morgues and Human Remains); Chapter 34.05 RCW, the Administrative Procedure Act, and Chapter 10-08 WAC, the Model Rules of Procedure.

- 1.4 Appearing as counsel for the Department of Licensing (Department) was R. July Simpson, Assistant Attorney General, and for the Respondent was Attorney Matt Edwards.
- 1.5 Witnesses appearing for the Department of Licensing were Consulting Board Member, Ron Messenger and Department Administrator, Lorin Doyle.
- 1.6 Called as witness for the Respondent was Theresa Burgman, Secretary Treasurer of Southwick Inc., DBA Forest Memorial Gardens, Respondent.
- 1.7 Department's Exhibit 1 and Respondent's Exhibits 101-109 were admitted at the outset of the hearing. Respondent's Exhibit 110 was admitted during the examination of Respondent's witness, Theresa Burgman.
- 1.8 Also before the Board for consideration were the Exhibits submitted as part of each Party's Summary Judgment Motion.

II. MOTIONS

- 2.1 The Department filed a Motion for Partial Summary Judgment on September 14, 2015. In addition, the Respondent filed a Motion for Summary Judgment in the matter on September 18, 2015. Both motions were timely filed. A hearing on the motions was held on October 21, 2015. On October 29, 2015, an Order was

issued that granted the Department's Motion for Partial Summary Judgment, and denied Respondent's Motion for Summary Judgment.

- 2.2 The Department also filed a Motion to Amend the Statement of Charges on September 10, 2015. The Motion proposed to add another applicable statute to the Charges and to remove the allegation related to RCW 68.50.200. The Motion was granted in an Order on Motion to Amend Statement of Charges entered November 4, 2015 and the Amended Statement of Charges was served on November 9, 2015.
- 2.3 The Respondent filed a Motion for Reconsideration or Revision of the Order on Granting Partial Summary Judgment on November 10, 2015. The Department filed an Objection and Response to Southwick's Motion for Reconsideration on November 13, 2015. The Board heard oral arguments from both parties on Motion at the outset of the Formal Hearing on November 18, 2015.

III. FINDINGS OF FACT

- 3.1 On August 26, 2014, the Department issued Statement of Charges No. 2014-05-2605-00FDE to Respondent which was amended on November 9, 2015. The Amended Statement of Charges alleged: first that Respondent committed unprofessional conduct under RCW 18.235.130(8) by violating statutes governing cemetery conduct under chapter 68.50 RCW; second that the Respondent violated RCW 68.24.060 by effectively altering its map or plat to change the location of 37

inurement plots for cremated remains, and in doing so disturbed inured remains, which is not allowed under the law; and finally that the exceptions which would authorize the disturbance of interred remains under certain circumstances do not apply in this case.

- 3.2 The Board incorporates by this reference the Findings of Fact and Conclusions of Law contained in the Order on Motions for Summary Judgment issued in this case on October 29, 2015 except when in conflict with the Findings of Fact and Conclusions of Law contained within this Final Order.
- 3.3 The Respondent filed a Motion for Reconsideration or Revision of the Order Granting Partial Summary Judgment on November 10, 2015.
- 3.4 Ron Messenger, a member of the Board, acted as a consulting Board member in this case. As such, he worked with the Board staff including Program Administrator Lorin Doyle in making charging and penalty decisions. He and the Board staff considered the severity of the violations, the type of harm and the mitigating circumstances in making a recommendation to the Board regarding the sanctions proposed by the Department.
- 3.5 Mr. Messenger recused himself from the Board in hearing this case.
- 3.6 Aggravating circumstances are: first that there were 37 cases where human remains were moved with no regard to families of the deceased persons; second, that the plots purchased and assigned for burial were moved showing a disregard for property rights; and third, the Respondent made no arrangements either before

or after the movement of the plots and human remains to create an updated map of the plots in the cemetery.

- 3.7 Mitigating circumstances are: first, that the Respondent took over management and care of an essentially abandoned cemetery improving the condition of the cemetery grounds and honoring many unfunded burial contracts; second, the necessity to move the cremains was no fault of the Respondent; and third, the Respondent took care to move the plots as short of a distance as possible and to maintain the configuration of the plots.
- 3.8 The Board staff and consulting Board member reviewed all of the facts and circumstances regarding the Respondent's violations in addition to the aggravating and mitigating circumstances and determined that the appropriate sanction was a fine of \$10,000, a requirement to attempt notification of next of kin, and placement of an appropriate notice in the local newspaper for three (3) days.

IV. CONCLUSIONS OF LAW

- 4.1 The Board has jurisdiction over the parties, the adjudicative hearing and the subject matter under Chapter 68.05 RCW, Chapter 18.235 RCW and Chapter 34.05 RCW.
- 4.2 The Board has the authority to discipline licensees for violation of any provisions of Title 68 RCW and for committing unprofessional conduct under RCW18.235.130.

- 4.3 The Respondent's Motion for Reconsideration was not timely filed under RCW 34.05.470. However, since the Summary Judgment Order contained conclusions of law to be incorporated into this Final Order, this tribunal grants the Motion and reconsiders the Order on Motions for Summary Judgment dated October 29, 2015.
- 4.4 On reconsideration, this tribunal finds that RCW 68.50.140 provides a general prohibition against removal of interred human remains. The respondent removed the interred human remains of 37 people and so has violated RCW 68.50.140, unless one of two potentially applicable exceptions applies.
- 4.5 One potential exception to the general prohibition is codified in RCW 68.50.200, which allows interred remains to be moved so long as consent for removal is obtained from next of kin. In this case, the Respondent failed to get consent of next of kin prior to removing the interred human remains and so did not meet the requirements of this exception.
- 4.6 The other potential exception to the general prohibition is codified in RCW 68.50.220, which provides that a cemetery authority may move interred remains in response to a court order. However, even when a court order is obtained, the next of kin must be notified. In this case, there was no court order requiring Respondent to remove the interred remains. Further, Respondent did nothing to notify the next of kin. Therefore, this exception does not apply.

- 4.7 Respondent also violated RCW 68.24.060 because it moved plot locations but failed to amend the plot map associated with that move. Respondent constructively amended the plot map by moving the plot locations and further violated RCW 68.24.060 when it moved human remains in the process of altering the plot locations.
- 4.8 Licensed Cemeteries are governed by Title 68 RCW Cemeteries, Morgues and Human Remains, and Chapter 18.235 RCW, the Uniform Regulation of Business and Professions Act. Under RCW 18.235.110, when a licensee has violated statutes and committed unprofessional conduct, the Board has the discretion to choose a range of penalties including revocation, suspension, restriction or limits on practice, remedial measures, monitoring, payment of a fine, or other corrective action.
- 4.9 By violating RCW 18.50.140 and without fitting into any applicable exception to this statute, and by violating RCW 68.24.060, the Respondent has engaged in unprofessional conduct pursuant to RCW 18.235.130(8). Under RCW 18.235.110 the Board may impose discipline.

V. FINAL ORDER

IT IS HEREBY ORDERED THAT

- 5.1 The Respondent's Motion for Reconsideration is granted.
- 5.2 Respondent violated statutes pertaining to its licensure and thereby engaged in unprofessional conduct as alleged in the Amended Statement of Charges.

5.3 The Board imposes a sanction of \$7,500; a requirement to attempt notification of next of kin, and placement of an appropriate notice in the local newspaper for three (3) days.

Dated this 6th day of January 2016.



Jim Letson, Presiding Officer
Washington State Funeral and Cemetery Board

APPENDIX E

October 17, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SOUTHWICK, INC., a Washington
corporation,

Petitioner,

v.

WASHINGTON STATE, AND ITS
DEPARTMENT OF LICENSING BUSINESS
AND PROFESSIONS DIVISION,
WASHINGTON STATE FUNERAL AND
CEMETERY BOARD.

Respondent.

No. 49691-7-II

PUBLISHED OPINION

SUTTON, J. — Southwick, Inc. appeals from the superior court's order affirming the Washington State Funeral and Cemetery Board's (Board) decision sanctioning Southwick for moving cremains¹ to new cemetery plots without notifying the families. Southwick argues that its procedural due process rights were violated when the presiding officer originally granted summary judgment in favor of the Department of Licensing (Department) based on RCW 68.50.140 when that statute was not cited in the original notice of violation or argued at the summary judgment hearing. Southwick also argues that (1) Southwick was authorized to move the cremains based on

¹ Cremains are human remains that have been cremated.

its own operating rules and (2) the Board incorrectly interpreted and applied the statutes governing plotting cemeteries and moving human remains.²

We hold that Southwick's opportunity to argue the applicability of RCW 68.50.140 at a hearing before the Board ultimately satisfied the requirements of procedural due process in this case. And we hold that the Board properly concluded that Southwick violated RCW 68.50.140 but that the Board erred by concluding that Southwick violated RCW 68.24.060. Because the Board did not specify how it reached its determination on sanctions, we remand to the Board to reconsider the appropriate discipline for Southwick's violation of RCW 68.50.140.

FACTS

From 1857 to 1989, Forest Cemetery Association operated Forest Memorial Cemetery (Cemetery) within the City of Olympia (City). In 1947, the Cemetery granted an easement to the City to construct, operate, and maintain a water main. In 1989, the Board granted Southwick authority to operate the Cemetery. Southwick was unaware of the City's easement. Around 2002, Southwick established an urn garden over the City's easement. By 2011, 37 urns containing human remains were interred within the urn garden.

In 2011, the City notified Southwick that it had violated the terms of the easement by installing encroachments over the easement. The City demanded that any encroachments be

² Southwick also argues that the Board's order is not supported by substantial evidence. But a challenge based on substantial evidence is a challenge to the findings of fact. And Southwick has never challenged the underlying facts and did not assign error to the Board's findings of fact. Southwick is actually arguing that the uncontested facts do not satisfy the statutes in question. Accordingly, Southwick's challenge is actually a challenge to the Board's application of the law, not to the sufficiency of the evidence supporting the order, and will be addressed as such. Southwick's "substantial evidence" challenge will not be discussed further.

No. 49691-7-II

removed from the easement. Between 2013 and 2014, Southwick worked to remove the encroachments from the City's easement. In order to do so, Southwick relocated the urn garden approximately 9 feet from its original location. When relocating the urn garden, Southwick removed 37 urns from their burial place and reburied them in new plot locations. Southwick kept the urns in the same juxtaposition as the original plots. Southwick did not notify the families of the removal, relocation, and reburial of the urns.

The Department served Southwick with a statement of charges alleging unprofessional conduct under RCW 18.235.130.³ The Department alleged that Southwick violated RCW 68.24.060—amendment of cemetery maps and plats—by replotting the cemetery which resulted in disturbing human remains. The statement of charges also alleged that Southwick moved human remains in violation of RCW 68.50.200, which requires obtaining permission from next of kin to move human remains, and RCW 68.50.220, which provides exceptions to the consent requirement but requires notification to next of kin prior to moving human remains.

Neither party disputed any of the underlying facts. The Department filed a motion for partial summary judgment of all issues except sanctions. Southwick filed its own motion for summary judgment. A presiding officer heard both motions. The presiding officer granted partial summary in favor of the Department based on the following conclusions of law:

³ RCW 18.235.130 defines unprofessional conduct that may be sanctioned including: "Violating any of the provisions of this chapter or the chapters specified in RCW 18.235.020(2) or any rules made by the disciplinary authority under the chapters specified in RCW 18.235.020(2)." RCW 18.235.130(8). Under RCW 18.235.020, cemeteries and funeral homes may be sanctioned for failing to comply with the statutes governing funeral homes and cemeteries in Title 68 RCW.

2. In response to the City's order to remove encroachments from the easement, the Cemetery was surveyed by the City. Pursuant to the survey, the Cemetery was forced to alter the location of the Urn Garden which is contemplated under RCW 68.24.060 moving all the inurnment plots from one location to another. "In doing so, the Cemetery was also forced to disturb human remains, so the action was not authorized under RCW 68.24.060.

3. Alternatively, human remains may be removed and moved to a new location within the [C]emetery so long as notice and permission is granted by a surviving relative, or if there is a court order and the surviving relative is notified. RCW 68.50.200; RCW 68.50.210; RCW 68.50.220.

4. In this case, there was a potential for the City of Olympia to obtain a court order, but no order was obtained. Had the City obtained a court order, the Cemetery would still be required to provide notice to a surviving relative under RCW 68.50.220. Without a court order, the Cemetery was required to not only notify, but also to obtain consent, from a surviving relative or the Thurston County Superior Court.

5. Therefore, the Cemetery did not comply with any of the authorizing statutes listed above.

6. The Cemetery is in direct violation of RCW 68.50.140 for unlawful disturbance, removal or sale of human remains.

Administrative Record (AR) at 298-99. The presiding officer concluded that the "act of disturbing human remains without obtaining consent or even notifying the families of the deceased" constituted unprofessional conduct for the purposes of RCW 18.235.130. AR at 299. The presiding officer referred the case to the Board for a hearing on appropriate sanctions.

Before the hearing, Southwick filed a motion for reconsideration of the presiding officer's decision with the Board. In both the motion and argument, Southwick addressed the application of RCW 68.50.140. In its final order, the Board considered Southwick's motion for reconsideration.

The Board then made the following conclusions of law:

4.4 On reconsideration, this tribunal finds that RCW 68.50.140 provides a general prohibition against removal of interred human remains. The respondent removed the interred human remains of 37 people and so has violated RCW 68.50.140, unless one of two potentially applicable exceptions applies.

4.5 One potential exception to the general prohibition is codified in RCW 68.50.200, which allows interred remains to be moved so long as consent for removal is obtained from next of kin. In this case, the Respondent failed to get consent of next of kin prior to removing the interred human remains and so did not meet the requirements of this exception.

4.6 The other potential exception to the general prohibition is codified in RCW 68.50.220, which provides that a cemetery authority may move interred remains in response to a court order. However, even when a court order is obtained, the next of kin must be notified. In this case, there was no court order requiring Respondent to remove the interred remains. Further, Respondent did nothing to notify the next of kin. Therefore, this exception does not apply.

4.7 Respondent also violated RCW 68.24.060 because it moved plot locations but failed to amend the plot map associated with that move. Respondent constructively amended the plot map by moving the plot locations and further violated RCW 68.24.060 when it moved human remains in the process of altering the plot locations.

AR at 7-8. Based on Southwick's violations, the Board concluded that Southwick had engaged in unprofessional conduct under RCW 18.235.130(8). The Board sanctioned Southwick \$7,500, required Southwick to attempt notification of all next of kin, and required Southwick to place an appropriate notice in the local newspaper for three days.

Southwick appealed the Board's final order to the Thurston County Superior Court. The superior court affirmed the Board's final order. Southwick appeals.

ANALYSIS

I. STANDARD OF REVIEW

Our review of agency action is governed by the Administrative Procedure Act, chapter 34.05 RCW. We review the Board's final order, not the presiding officer's decision or the superior

No. 49691-7-II

court's order. *Olympic Healthcare Servs. II, LLC v. Dep't. of Soc. & Health Servs.*, 175 Wn. App. 174, 181, 304 P.3d 491 (2013). We will grant relief from an agency action order if the order is unconstitutional, the agency erroneously interpreted or applied the law, or the order is not supported by substantial evidence. RCW 34.05.570(3)(a), (d), (e). The party challenging an agency action bears the burden of demonstrating the invalidity of the agency action. RCW 34.05.570(1)(a).

We review the Board's findings of fact for substantial evidence and review the Board's conclusions of law de novo. *Steven Klein, Inc. v. Dep't of Revenue*, 183 Wn.2d 889, 895-96, 357 P.3d 59 (2015). Unchallenged findings of fact are verities on appeal. *Porter Law Ctr., LLC v. Dep't of Fin. Insts., Div. of Consumer Servs.*, 196 Wn. App. 1, 13, 385 P.3d 146 (2016). Southwick has never challenged or disputed any of the Board's findings of fact. Accordingly, we treat the Board's findings of fact as verities on appeal.

II. PROCEDURAL DUE PROCESS

Southwick argues that the Board's order is unconstitutional because it violates Southwick's right to procedural due process. We hold that Southwick's opportunity to argue the issue at a hearing before the Board ultimately satisfied the requirements of procedural due process in this case.

Both the federal and state constitutions guarantee an individual procedural due process when the State deprives an individual of life, liberty, or property. *Alvarado v. Dep't of Licensing*, 193 Wn. App. 171, 176-77, 371 P.3d 549 (2016). Fundamentally, procedural due process requires notice and an opportunity to be heard. *Alvarado*, 193 Wn. App. at 177. More than mere formalities, "[d]ue process must be 'meaningful and appropriate to the nature of the case.'"

No. 49691-7-II

Alvarado, 193 Wn. App. at 177 (quoting *Svengard v. Dep't of Licensing*, 122 Wn. App. 670, 681, 95 P.3d 364 (2004)).

It is undisputed that the Department did not allege a violation of RCW 68.50.140 in the statement of charges against Southwick and that Southwick did not have notice or the opportunity to present argument regarding RCW 68.50.140 before the presiding officer. Therefore, the presiding officer's order, standing alone, would violate the fundamental requirements of procedural due process.

However, we review the Board's final order, not the presiding officer's order. The Board considered Southwick's motion for reconsideration and allowed full briefing and argument regarding RCW 68.50.140. Thus, as it relates to the Board's order, Southwick received notice of the potential violation of RCW 68.50.140 from the presiding officer's order. And Southwick had a meaningful opportunity to be heard on the issue before the Board because it was able to brief and argue the applicability of RCW 68.50.140 to the undisputed facts. Accordingly, the fundamental requirements of procedural due process have been satisfied with the Board's final order.

Southwick argues that the opportunity to be heard before the Board does not satisfy the requirements of procedural due process because the hearing before the Board was a motion to reconsider, which shifts the burden to Southwick. But procedural due process considers whether the process is meaningful and appropriate within the context of the case. *Alvarado*, 193 Wn. App. at 177. Within the context of this case, where there were no disputed facts, the opportunity to brief and argue a purely legal issue is a meaningful and appropriate opportunity to be heard because

Southwick was able to fully present its case before the Board. Therefore, the Board's final order complies with the requirements of procedural due process and is not unconstitutional.

III. STATUTORY VIOLATIONS

Southwick argues that the Board erred when it concluded that Southwick violated RCW 68.50.140 and RCW 68.24.060. We hold that the Board did not err by concluding that Southwick violated RCW 68.50.140 by unlawfully disturbing human remains. However, we hold that the Board did err by concluding that Southwick violated RCW 68.24.060 by amending the cemetery plat map.

The Board's conclusions are based on its interpretation of the applicable statutes. Statutory interpretation is a matter of law that we review *de novo*. *Jametsky v. Olsen*, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014). The purpose of statutory interpretation is to determine and give effect to the legislature's intent. *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 339, 334 P.3d 14 (2014). To determine legislative intent, we first look to the plain language of the statute, considering the text of the provision, the context of the statute, related provisions, and the statutory scheme as a whole. *Gray*, 181 Wn.2d at 339.

A. RCW 68.50.140—Unlawful disturbance, removal, or sale of human remains

RCW 68.50.140 states, in relevant part:

(4) Every person who removes, disinters, or mutilates human remains from a place of interment, without authority of law, is guilty of a class C felony.

The Board concluded that RCW 68.50.140 "provides a general prohibition against removal of interred human remains . . . unless one of two potentially applicable exceptions applies." AR at 7.

Southwick argues that the Board erred by interpreting RCW 68.50.140 as a general prohibition against removal of human remains.

But the Board did not conclude that RCW 68.50.140 was a general prohibition against removal of human remains: the Board concluded that RCW 68.50.140 is a general prohibition against removal of human remain *subject to certain exceptions*. This is exactly what the plain language of the statute provides. RCW 68.50.140(4) prohibits removal, disinterment, and mutilation of human remains without authority of law. Therefore, the plain language of the statute establishes that removal of human remains is generally prohibited unless a person has authority of law. Specific statutes that permit removal of human remains provide the authority of law. Accordingly, “authority of law” is the exception to the general prohibition against removal of human remains. The Board correctly interpreted RCW 68.50.140 to prohibit removal of human remains unless a specific statutory exception applied which provided the authority of law to remove the remains.

There is no dispute that Southwick disinterred human remains. However, Southwick argues that (1) it did not disinter human remains from “a place of interment” and (2) it acted with the authority of law. Br. of App. at 21.

Southwick argues that it did not disinter human remains from a place of interment because RCW 68.04.100 defines “interment” as “the placement of human remains in a cemetery.” Br. of App. at 21. Based on this definition, Southwick argues that to remove human remains from the “place of interment” means removing the human remains from the cemetery boundaries rather than moving human remains from a specific plot in a cemetery to a different plot. Southwick’s argument is unpersuasive because “place of interment” is more specific than interment and because

when read together with RCW 68.50.220, it is clear that the legislature intended “place of interment” to refer to the plot in which human remains were interred rather than the cemetery.

The definition of interment in RCW 68.04.100 is essentially defining an action—what it means to inter remains (although it obscures this concept by nominalizing a verb). But RCW 68.50.140 uses the whole phrase “place of interment,” the plain language of which means the place where human remains are interred or placed in a cemetery. Therefore, “place of interment” refers to the specific plot or place where the human remains were placed. Because Southwick removed human remains from one plot and reinterred them to a different plot, Southwick removed the human remains from a “place of interment.”

Even if Southwick’s interpretation of “place of interment” based on RCW 68.04.100 is correct, RCW 68.04.100 provides a general definition of interment which conflicts with the more specific application of the concept in RCW 68.50.220. RCW 68.50.220 states:

RCW 68.50.200 and RCW 68.50.210 do not apply to or prohibit the removal of any human remains from one plot to another in the same cemetery or the removal of [human] remains by a cemetery authority from a plot for which the purchase price is past due and unpaid, to some other suitable place; nor do they apply to the disinterment of human remains upon order of court or coroner. However, a cemetery authority shall provide notification to the person cited in RCW 68.50.200 before moving human remains.

As the Board concluded, RCW 68.50.220 is one statute which provides the authority of law authorizing the removal or disinterment of human remains. And RCW 68.50.220 directly addresses moving human remains from one plot to another in the same cemetery.

We read statutes relating to the same subject together. *Lenander v. Dep’t of Ret. Sys.*, 186 Wn.2d 393, 412, 377 P.3d 199 (2016). Statutes should be read to complement each other but where there appears to be a conflict, we give preference to the more specific statute. *Lenander*,

186 Wn.2d at 412. Because RCW 68.50.220 is a very specific statute governing the legal authority and requirements for moving human remains from one plot to another within the same cemetery, it must control over a general definition of interment. Therefore, to the extent RCW 68.50.140 refers to the authority of law to remove human remains from a place of interment, it must be read to include moving remains from one plot to another as addressed in RCW 68.50.220.

Southwick also argues that it did not act “without authority of law” because RCW 68.24.110 authorized Southwick to create its own rules and gave it the right to correct errors in making interments. Although Southwick may have statutory authority to enact its own internal rules and regulations, the rules and regulations themselves are not the law. Accordingly, Southwick’s internal rules and regulations do not provide the “authority of law” required by RCW 68.50.140.⁴

Here, the Board properly interpreted RCW 68.50.140 as a general prohibition against disturbing human remains unless certain exceptions provided the cemetery with the authority of law. And the Board properly applied RCW 68.50.140 to conclude that Southwick improperly removed human remains. Therefore, the Board did not erroneously interpret or apply RCW 68.50.140. Because the Board correctly interpreted and applied RCW 68.50.140, it properly concluded that Southwick violated RCW 68.50.140.

B. RCW 68.24.060—Maps and Plats

⁴ In its final order, the Board recognized that there were two statutory exceptions to RCW 68.50.140 which provide the authority of law to remove human remains: RCW 68.50.200 and RCW 68.50.220. And the Board concluded that Southwick did not meet the requirements of either statute, and therefore, Southwick acted without authority of law. Southwick does not address the Board’s application of either statute.

RCW 68.24.060 states:

Any part or subdivision of the property so mapped and plotted may, by order of the directors, be resurveyed and altered in shape and size and an amended map or plat filed, so long as such change does not disturb the interred remains of any deceased person.

Southwick argues that the Board erred because the findings of fact do not support its conclusion that Southwick violated RCW 68.24.060. Based on the plain language of the statute, RCW 68.24.060 applies to resurveying a mapped and plotted part or subdivision, altering in size and shape, and amending the map or plat. Southwick did not take any of these actions and there are no findings of fact relating to this issue. Moreover, the record does not establish that the Cemetery was mapped and plotted for the purposes of the statute. Accordingly, the findings of fact do not support the Board's conclusion that Southwick violated RCW 68.24.060.

ATTORNEY FEES

Southwick requests an award of attorney fees and costs under RCW 4.84.350. Under RCW 4.84.350(1), a court awards attorney fees and other expenses to a qualified party that prevails on judicial review of an agency action, unless we find that the agency action was substantially justified or that circumstances make an award unjust. *ZDI Gaming, Inc. v. State ex rel. Wash. State Gambling Comm'n*, 151 Wn. App. 788, 812, 214 P.3d 938 (2009), *aff'd*, 173 Wn.2d 608 (2012). Here, Southwick is not the substantially prevailing party. Accordingly, Southwick is not entitled to attorney fees and costs on appeal.

CONCLUSION

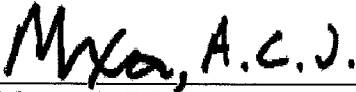
We hold that Southwick's opportunity to argue the issue at a hearing before the Board ultimately satisfied the requirements of procedural due process in this case. And we hold that the Board properly concluded that Southwick violated RCW 68.50.140 but that the Board erred by concluding that Southwick violated RCW 68.24.060. Because the Board did not specify how it reached its determination on sanctions, we remand to the Board to reconsider the appropriate discipline for Southwick's violation of RCW 68.50.140.

We affirm the Board's order in part, reverse in part, and remand to the Board to reconsider sanctions.

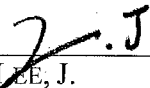


SUTTON, J.

We concur:



MAXA, A.C.J.



LEE, J.

I certify that on the 9th day of November, 2017, I caused a true and correct copy of Appellant Southwick, Inc.'s Petition for Review to be served in the manner indicated below:

via email through Washington State Appellate Court's upload portal; and via U.S. mail

By:


Matthew B. Edwards

OWENS DAVIES P. S.

November 09, 2017 - 4:58 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49691-7
Appellate Court Case Title: Southwick, Inc., Appellant v State Dept of Licensing Business & Professions Div, et al, Respondents
Superior Court Case Number: 16-2-00102-2

The following documents have been uploaded:

- 2-496917_Petition_for_Review_20171109155654D2237324_5292.pdf
This File Contains:
Petition for Review
The Original File Name was Southwick v Cemetery Board No 49691 7 Appellant Southwicks Petition for Review.pdf

A copy of the uploaded files will be sent to:

- LALOLyEF@ATG.WA.GOV
- rjulys@atg.wa.gov

Comments:

Includes proof of service

Sender Name: Matthew Edwards - Email: medwards@owensdavies.com
Address:
1115 W BAY DR NW STE 302
OLYMPIA, WA, 98502-4658
Phone: 360-943-8320

Note: The Filing Id is 20171109155654D2237324