No. 95237-0

No. 49691-7

Court of Appeals
DIVISION II
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,

RESPONDENT.

APPELLANT SOUTHWICK'S OPENING BRIEF

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I. INTRODUCTION

Southwick, Inc. ("Southwick") submits this opening brief in its appeal from a decision of the Washington State Funeral and Cemetery Board ("the Board") imposing sanctions upon Southwick.

In a gross violation of Southwick's due process rights, the Board imposed a penalty upon Southwick based upon Southwick's purported violation of an uncharged statute. In addition, Southwick did not violate either statute which the Board claimed it violated. For either or both of these two separate reasons, this Court should reverse the Board's decision.

II. ASSIGNMENTS OF ERROR

1. The Board initiated this proceeding by the filing of a statement of charges specifically identifying the statutes which the Board alleged Southwick to have violated. The Board violated Southwick's constitutional right to due process of law by purporting, in a summary judgment order, without first giving Southwick prior notice or opportunity to be heard, to find that Southwick violated an uncharged statute, and by imposing penalties upon Southwick based on that violation.

2. The Board erred in finding on summary judgment that Southwick violated RCW 68.50.140.

3. The Board erred in finding on summary judgment that Southwick violated RCW 68.24.060.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Board violate Southwick's right to due process of law by holding in a summary judgment order, without giving any prior notice to Southwick or affording Southwick opportunity to be heard, that Southwick had violated RCW 68.50.140, a statute which the Board had not charged Southwick with violating?

2. RCW 68.50.140 provides:

> (1) Every person who shall remove human remains, or any part thereof, from a grave, vault, or other place where the same has been buried or deposited awaiting burial or cremation, without authority of law, with intent to sell the same, or for the purpose of securing an award for its return, or for dissection, or for malice or wantonness, is guilty of a Class C felony.
>
> (2) Every person who shall purchase or receive, except for burial or cremation, human remains or any part thereof, knowing that the same has been removed contrary to the foregoing provisions, is guilty of a Class C felony.
>
> (3) Every person who shall open a grave or other place of interment, temporary or otherwise, or a building where human remains are placed, with intent to sell or remove the casket, urn or any part thereof, or anything attached thereto, or any vestment, or other article interred, or intended to be interred with the human remains, is guilty of a Class C felony.
>
> (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.

a. Does RCW 68.50.140 "generally prohibit the removal of interred remains," as the Board concluded? See AR 6 (Conclusion of Law ¶ 4.4).

b. Is there any evidence in this record that Southwick engaged in conduct actually prohibited by RCW 68.50.140?

3. RCW 68.24.060, part of a chapter of the Cemetery Code addressing the effect of the dedication of land to cemetery purposes, provides what a cemetery's directors **may** do:

> 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).

a. Does this statute, which only purports to describe what the directors of a cemetery **may** do, prohibit any conduct?

b. Is there any evidence in the record establishing that Southwick violated this statute?

IV. STATEMENT OF THE CASE

A. Basic Facts.

Forest Memorial Cemetery, located in Olympia, was founded in 1857. Forest Memorial Cemetery was operated by the Forest Cemetery

Association until approximately 1989. AR 279 (Order on Motions for Summary Judgment, Finding of Fact 1).

In 1947, the Forest Cemetery Association granted an easement to the City of Olympia to construct, operate and maintain a large water main through the cemetery. *Id.* (Finding of Fact 2).

In 1956, the Forest Cemetery Association constructed a monument featuring the Lord's Prayer over the City of Olympia's waterline easement. *Id.* (Finding of Fact 3).

By the late 1980s, the Forest Cemetery Association had become moribund. The cemetery was not being maintained. The cemetery was in danger of becoming dilapidated. AR 135 (Declaration of Tim Burgman, ¶ 7).

Southwick agreed to take over operation of the cemetery. *Id.* (¶ 8). In taking over operation of the cemetery, no one informed Southwick of the existence of the City of Olympia's waterline or easement. AR 136 (Burgman Declaration, ¶ 13-14).

In 1989, the Board granted Southwick authority to operate the cemetery. AR 279 (Order on Motions for Summary Judgment, Finding of Fact 4).

Southwick adopted rules for Forest Memorial Cemetery. AR 136 (Burgman Dec., ¶ 12), AR 152-72 (Southwick rules). Southwick's rules

are modeled on those adopted by Evergreen-Washelli Memorial Park, and were reviewed and approved by an experienced cemetery law attorney before their adoption. AR 136.

Southwick established the Devotion Urn Garden next to the Lord's Prayer Monument and sold small plots in the Devotion Urn Garden for inurnment (the burial of cremated remains in a sealed urn). By 2011, there were thirty-seven urns located within the Devotion Urn Garden. AR 280 (Finding of Fact 5).

On August 25, 2011, the City of Olympia notified Southwick of the existence of the City's waterline and easement, and demanded that the cemetery remove any encroachments that might interfere with access to the waterline and easement in the event the waterline needed repair. *Id.* (Finding of Fact 6).

On August 26, 2011, Southwick sent a letter to the City outlining a meeting that had just occurred in which Southwick had asked for a survey and a centerline monumentation so the cemetery would know where the easement and encroachments were located. *Id.* (Finding of Fact 7).

In a letter dated October 14, 2011, the City sent Southwick a letter stating that the survey and monumentation was complete. *Id.* (Finding of Fact 8). The survey showed that the cemetery's urn garden was located within the City of Olympia's waterline easement. *Id.* (Finding of Fact 9).

During 2013 and 2014, the cemetery removed encroachments from the easement as demanded by the City. This included shifting the entire Devotion Urn Garden, including the unopened, sealed urns, to a new location approximately nine feet from its prior location. AR 281 (Order on Motions for Summary Judgment, Finding of Fact 11).

Southwick moved the Devotion Urn Garden, and the sealed urns it contained, the minimum distance necessary to relocate it outside the easement. AR 138 (Declaration of Tim Burgman, ¶ 24). After the move, all the plots in the Devotion Urn Garden retained the same plot numbers, which remained in the same relative location to one another. *Id.* (¶ 25).

B. Statement of Charges.

On August 26, 2014, the Board filed a Statement of Charges directed at Southwick. AR 15-17. The Statement of Charges alleged that in moving the urn garden outside the City of Olympia's waterline easement, Southwick violated RCW 68.24.060 and RCW 68.50.220. *Id.* (¶ 3.1 and ¶ 3.8).[1] The Statement of Charges did not allege that Southwick violated any other statute. *Id.* Based on Southwick's alleged violation of these statutes, the Statement of Charges requested that Southwick's Certificate of Authority to operate Forest Memorial Cemetery "be

[1] The original Statement of Charges also alleged that Southwick violated RCW 68.50.200. However, the Board subsequently filed an Amended Statement of Charges that struck this allegation. AR 379-381.

suspended or revoked and/or other disciplinary measures be taken pursuant to RCW 18.235.110." AR 17.

C. Motions for Summary Judgment.

The Board's prosecuting authority and Southwick filed Cross-Motions for Summary Judgment. AR 49-121; 122-195. Those motions addressed the statutes identified in the Statement of Charges. *Id.* They did not address or mention RCW 68.50.140. *Id.*

On October 29, 2015, the Board's Presiding Officer entered Findings of Fact, Conclusions of Law, and Order on Summary Judgment. AR 278-283. In his Conclusions of Law, and without having been asked by anyone to address this statute, the Board's Presiding Officer found that Southwick violated RCW 68.50.140:

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

AR 282 (Conclusion of Law ¶ 6).

This marked the first time anyone had ever mentioned RCW 68.50.140 in this matter. Moreover, this was also the only statute which the Board's Presiding Officer found, on summary judgment, Southwick to have violated.

In the Order on Summary Judgment, the Presiding Officer characterized RCW 68.24.060 as a statute that might, despite RCW

68.50.140's purported prohibition against the disturbance, removal or sale of human remains, authorize the movement of the cremated remains in the Devotion Urn Garden. *Id.* (Conclusion of Law ¶ 5). The Presiding Officer found that Southwick was not "authorized under RCW 68.24.060" to move the cremated remains. *Id.* (Conclusion of Law ¶ 2).

In sum, the Presiding Officer concluded: (1) that Southwick was "in direct violation of RCW 68.50.140 for unlawful disturbance, removal or sale of human remains;" and (2) that RCW 68.24.060 potentially "authorized" the movement of the cremated remains despite RCW 68.50.140's prohibition, but that Southwick had not shown that its actions met the requirements of that "authorizing statute." The Presiding Officer left it to the full Board to determine the penalty to be imposed on Southwick.

D. Motion for Revision and Penalty Hearing.

Southwick filed a motion in which it asked either that the Presiding Officer reconsider his summary judgment decision, or that the whole Board revise it. AR 382-396. Southwick pointed out that RCW 68.50.140, on its face, does NOT generally prohibit the disturbance of human remains, and that Southwick had not violated any of the four specific subsections contained in that statute. AR 389-391. Southwick also pointed out that by providing it absolutely no notice that he was

considering finding Southwick in violation of RCW 68.50.140 before so holding, the Presiding Officer had acted without providing Southwick prior notice or an opportunity to be heard, and had therefore acted in blatant violation of Southwick's due process rights. AR 388-389.

The Board held a hearing on November 18, 2015 for the purpose of hearing argument on this motion. AR 401. Southwick was not allowed to present evidence addressed to the issue of whether it violated the statutes which the Presiding Officer found Southwick to have violated. *Id.*

After hearing argument on this motion, and without ruling on it, the Board, over Southwick's objection, immediately proceeded to a hearing for the purpose of determining the penalty to impose upon Southwick. AR 439-40.

E. The Final Order.

On January 6, 2016, the Board entered its Final Order. AR 1-9. The Board's Final Order states that:

> 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 29th, 2015 . . .

AR 5 (Final Order, Finding of Fact ¶ 3.2). The Final Order goes on to state:

> [T]his tribunal finds that RCW 68.50.140 provides a general prohibition against removal of interred human remains.

AR 6 (Final Order, Conclusion of Law ¶ 4.4).

Even though no one had asked it to revisit this issue, the Board changed the Presiding Officer's determination with respect to RCW 68.24.060, finding that Southwick had affirmatively violated this statute (in place of the Presiding Officer's determination that Southwick's movement of the urn garden in purported violation of RCW 68.50.140 was not "authorized" by this statute):

> 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 68.24.060 when it moved the human remains in the process of altering plot locations.

AR 8 (Final Order, Conclusion of Law ¶ 4.7).

Based upon its conclusions that Southwick had violated RCW 68.50.140, and that Southwick had violated RCW 68.24.060, the Board concluded it had the right to impose discipline:

> By violating RCW 68.50.140 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.

AR 8 (Final Order, ¶ 4.9).

Based upon these conclusions, the Board imposed 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 days." AR 9 (Final Order, ¶ 5.3).

F. Trial Court proceedings.

Southwick timely filed a petition for review under the Administrative Procedure Act. RP 4-29. Southwick and the Board stipulated to the entry of an order staying the Board's decision until the conclusion of all review proceedings. RP 31-34. The parties submitted briefing. RP 35-140. Significantly, in its briefing, **the Board's prosecuting authority did not attempt to defend the Board's holding that Southwick had violated RCW 68.50.140. RP 90-108.**

Despite this, the Superior Court entered an order affirming the Board's decision in its entirety. RP 149-51. Southwick timely filed a Notice of Appeal. RP 147-51.

V. STANDARD OF REVIEW

A. General standards for review and reversal of agency decision.

The Court of Appeals has exactly the same administrative record before it as was presented to the trial court. Because the Court of Appeals sits in the same position as the trial court, this Court applies the standards for review set forth in RCW 34.05.570 directly to the agency record, and

without considering or reviewing the trial court's decision. *Teamsters Local Union No. 117 v. Department of Corrections*, 179 Wn.App 110, 118 ¶ 11 and Fn. 8, 317 P. 3d 511 (2014); *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 77, 11 P. 3d 726 (2000).

RCW 34.05.570(3) sets forth the standards for review of an agency order:

> Review of agency orders in adjudicative proceedings. The Court shall grant relief from an agency order in an adjudicative proceeding only if it determines that: (a) the order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
>
> . . .
>
> (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
>
> (d) The agency has erroneously interpreted or applied the law;
>
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, . . .

Here, the Board failed to provide Southwick with notice and an opportunity to be heard before holding that Southwick violated RCW 68.50.140. This failure constitutes "an unlawful procedure or decision making process" within the meaning of RCW 34.05.570(3)(c). It also flagrantly violated Southwick's constitutional right to due process of law, justifying relief under RCW 34.05.570(3)(a).

In addition, the Board misapplied RCW 68.50.140 and RCW 68.24.060. Therefore, the Board erroneously interpreted or applied the law within the meaning of RCW 34.05.570(d). In addition, the Board's determination that Southwick violated these statutes is not supported by evidence that is substantial in view of the light of the whole record before the Court. RCW 34.05.570(e).

B. Standard of evidentiary review.

The Board based its decision upon an order entered by its Presiding Officer in response to motions for summary judgment. The Board's decision to grant summary judgment is subject to *de novo* review. *Verizon Northwest, Inc. v. Washington Employment Security Department*, 164 Wn.2d 909, 915-16 ¶ 15, 194 P. 3d 255 (2008). The Court is required to construe the facts, and all inferences drawn from the facts, in favor of Southwick. *Id.*

Moreover, the Court should not defer to the Board's interpretation of the statutes at issue. The Court gives substantial weight to the agency's interpretation of law only when the subject area falls within the agency's area of expertise. *Campbell v. Board for Volunteer Firefighters*, 111 Wn.App. 413, 45 P. 3d 216 (2002), *review denied* 148 Wn.2d 1016, 64 P. 3d 650 (2003). Here, Board Member Messenger, in his testimony at the penalty hearing, candidly acknowledged that the Board was dealing with

an issue, and with statutes, that it had never been called on to apply before. AR 459. It is for the Court ultimately to determine the meaning and purpose of these statutes. *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 11 P. 3d 726 (2000).

VI. ARGUMENT

Southwick's rules specifically authorize Southwick to correct errors in the placement of remains. Southwick lawfully moved the remains pursuant to these rules. The Board flagrantly violated Southwick's due process rights. Southwick did not violate RCW 68.50.140. And, Southwick did not violate RCW 68.24.060.

A. Southwick's rules specifically authorized Southwick to correct errors in the placement of remains. Southwick lawfully moved the remains pursuant to those rules.

The Legislature has specifically authorized cemetery authorities, such as Southwick, to adopt rules:

> [A] cemetery authority may sell and convey plots or rights of interment subject to the rules in effect or thereafter adopted by the cemetery authority.

RCW 68.24.110. See also RCW 68.20.050 *et seq.*

Southwick has adopted such rules. AR 152-172. Paragraph 10(j) of those rules explicitly gave to Southwick, in the event of an error in interring remains, the right to remove and reinter the remains:

> The Corporation reserves the right to correct errors made by it in making interments, disinterments or removals, or

> errors in the description, transfer or conveyance of any interment property, either by cancelling such conveyance and conveying in lieu thereof other reasonably equivalent property selected by the corporation, or, in its discretion, by refunding the amount of money paid on account of the purchase. **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.** The Corporation shall have the right to correct any errors involved in placing an improper inscription, including incorrect name or date, either on a memorial or on a container for cremated remains. The corporation shall not be liable in damages to any person for any such inadvertent error committed by it.

AR 163 (emphasis added).

Here, Southwick acted pursuant to this authority when, in response to the City of Olympia's lawful demand that Southwick remove all obstructions located within the city's waterline easement, Southwick shifted the location of the entire Devotion Urn Garden the minimum distance necessary to relocate the entire urn garden, in its identical configuration, outside of the waterline easement area.

Southwick acted lawfully in moving these unopened urns in order to re-establish the Devotion Urn Garden outside of the City of Olympia's waterline easement. The Board made no finding to the contrary.

B. Because the Board found Southwick to have violated a statute which Southwick had not been charged with violating, and without first giving Southwick even the slightest notice or opportunity to be heard, the Board violated Southwick's constitutionally-guaranteed right to due process of law.

The Board initiated this proceeding by filing a Statement of Charges against Southwick. In that Statement, the Board alleged that Southwick had violated two specific statutes. AR 15-17.[2] But the Board's Presiding Officer, in response to summary judgment motions in which neither party had raised, briefed or argued the issue, found that Southwick had violated a different statute, RCW 68.50.140. AR 282 (Conclusion of Law ¶ 6). Because the Board found Southwick to have violated a statute which the Board had not charged Southwick with violating, and entered a summary judgment order without giving Southwick even the slightest prior notice or opportunity to be heard, the Board violated Southwick's constitutionally-guaranteed right to due process of law.

Both the 14th Amendment to the U.S. Constitution and Article 1, § 3 of the Washington Constitution provide that no person shall be deprived of life, liberty or property without due process of law. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the

[2] The original Statement of Charges alleged that Southwick violated RCW 68.50.200. However, the Board subsequently filed an Amended Statement of Charges that struck this allegation. AR 379-381.

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 617, 70 P.3d 947 (2003), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

An administrative proceeding to revoke a professional license is quasi-criminal in nature and gives rise to the due process rights of prior notice and opportunity to be heard. *Hickethier v. Department of Licensing*, 159 Wn.App. 203, 217-18 at ¶ 30, 244 P.3d 1010 (2011), citing *Wash. Med. Disciplinary Board v. Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983). A person[3] against whom the government seeks to impose penalties in such a proceeding is entitled to notice of the specific charges against which he or she must defend. *Mansour v. King County*, 131 Wn.App. 255, 270 ¶ 24 to 272 ¶ 26, 128 P.3d 1241 (2006). Among other things, the government must provide notice of the specific statute(s) allegedly violated, the specific penalty the government seeks to impose, and the specific statute(s) authorizing the government to impose the penalty sought. *Id.*, 272 at ¶ 26.

Here, the Statement of Charges filed to initiate this administrative proceeding did not reference RCW 68.50.140 or allege that Southwick

[3] A corporation is a "person" for purposes of the federal and state due process clauses. *Olympic Forest Products, Inc. v. Chausee Corp.*, 82 Wn.2d 418, 511 P.2d 1082 (1973).

violated that statute. AR 15-17. The summary judgment motions the parties filed did not reference RCW 68.50.140 or allege that Southwick had violated that statute. AR 49-121; 122-195. The parties never mentioned, much less addressed, this statute in their summary judgment argument. AR 241-272. The first time that any person connected to this case mentioned RCW 68.50.140 was when the Board's Presiding Officer, completely out of the blue, concluded in his Summary Judgment Order that Southwick had violated the statute. AR 282 (Order on Summary Judgment, Conclusion of Law ¶ 6).

The Board subsequently incorporated that decision into its Final Order. AR 5 (Finding ¶ 3.2). And it imposed penalties upon Southwick based upon the determination that Southwick violated it. AR 8 (Conclusions ¶ 4-9).

A decision made without first affording notice and an opportunity to be heard is void. *Sheldon v. Sheldon*, 47 Wn.2d 699, 722, 289 P.2d 335 (1995). Prior to issuing this order, the Board's Presiding Officer did not provide Southwick notice that Southwick was being charged with a violation of this statute. Southwick therefore did not present evidence addressed to this statute. The Board's Presiding Officer did not give Southwick any opportunity to explain why Southwick had not violated RCW 68.50.140 before the Board's Presiding Officer determined that

Southwick violated it. The Presiding Officer's out-of-the-blue decision finding that Southwick violated this statute occurred in flagrant violation of Southwick's due process rights.

In sum, the Board violated Southwick's right to due process in holding that Southwick violated RCW 68.50.140. The Court should so hold.

C. RCW 68.50.140 does not generally prohibit the disturbance of human remains, and Southwick did not violate any of the specific provisions of this statute.

In both its Order on Summary Judgment, and its Final Order, the Board purported to determine that Southwick, Inc. had in fact violated RCW 68.50.140. *See* AR 282 (Order on Summary Judgment, Conclusion of Law ¶ 6). ("The Cemetery is in direct violation of RCW 68.50.140 for unlawful disturbance, removal or sale of human remains"). *See also* AR 7 (Final Order, Conclusion 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, . . .

The Board grossly mischaracterized this statute. RCW 68.50.140 does not generally prohibit the removal of interred human remains.

RCW 68.50.140 in fact contains four separate, quite specific prohibitions:

> (1) Every person who shall remove human remains, or any part thereof, from a grave, vault, or other place where the same has been buried or deposited awaiting burial or cremation, without authority of law, with intent to sell the same, or for the purpose of securing an award for its return, or for dissection, or for malice or wantonness, is guilty of a Class C felony.
>
> (2) Every person who shall purchase or receive, except for burial or cremation, human remains or any part thereof, knowing that the same has been removed contrary to the foregoing provisions, is guilty of a Class C felony.
>
> (3) Every person who shall open a grave or other place of interment, temporary or otherwise, or a building where human remains are placed, with intent to sell or remove the casket, urn or any part thereof, or anything attached thereto, or any vestment, or other article interred, or intended to be interred with the human remains, is guilty of a Class C felony.
>
> (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.

If the Legislature had intended this statute to "generally prohibit the removal of interred human remains," the Legislature could have easily and plainly said so. The Legislature could have enacted a statute that said "No person shall move or disturb interred human remains." But the Legislature plainly chose not to enact such a statute. Instead, in RCW 68.50.140, the Legislature prohibited only the four specific kinds of conduct set out in the four subsections.

Here, Southwick did not violate subsection (1). The Board did not purport to find, and Southwick in fact did not, remove any human remains with the intent to sell, obtain a reward for, dissect, or otherwise improperly dispose of them. Southwick acted to comply with the City of Olympia's lawful demand that Southwick act to remove encroachments from the City's waterline easement. Southwick did not act out of malice or wantonness.

Southwick also did not violate subsection (2). It did not receive remains removed in violation of the provisions of the subsection (1).

Southwick did not violate subsection (3). This subsection criminalizes the opening of graves or buildings housing human remains with the intent to sell or remove things buried with the remains. Southwick did not intend to sell or remove any remains or any things buried with the remains here.

Finally, Southwick did not violate Subsection (4). Southwick did not: (a) remove human remains "from a place of interment," or (b) act "without authority of law."

RCW 68.04.100 defines "interment" as "the placement of human remains in a cemetery." Under this definition, these cremated remains' "place of interment" is Forest Memorial Cemetery. The remains at issue in this case at all times remained sealed within unopened urns within the

Devotion Urn Garden within Forest Memorial Cemetery. Therefore, Southwick did not remove remains from "a place of interment."

In addition, Southwick acted "with authority of law." As set out above, RCW 68.24.110 gave Southwick the right to adopt rules, and Southwick's rules expressly gave Southwick the right to correct errors in making interments. That is exactly what Southwick did here.

In sum, RCW 68.50.140 very plainly does not, as the Board purported to claim, "generally prohibit the removal of interred of human remains." That statute contains prohibitions of four very specifically-defined kinds of conduct. The Board did not purport to conclude that Southwick had violated any one of these specific subsections. The Board did not enter findings that would support a conclusion that Southwick had violated any one of these specific subsections. There is no evidence in this record suggesting that Southwick violated this statute.

In its brief to the trial court, the Board's prosecuting authority did not even attempt to defend the Board's conclusion that Southwick violated RCW 68.50.140. RP 90-108.

The Court should find that the Board erroneously interpreted or applied RCW 68.50.140. The Court should also find the substantial evidence does not support the Board's conclusion that Southwick violated

RCW 68.50.140. On this basis, the Court should reverse the Board's Final Order.

D. Southwick could not, and did not, violate 68.24.060, a statute which only describes what the directors of a cemetery "may" do.

In addition, in its Final Order, the Board (in sharp contrast to its Presiding Officer) purported to find that Southwick had also violated RCW 68.24.060. Southwick did not, and indeed could not, violate this statute, which only purports to describe what the directors of a cemetery "may" do.

RCW 68.24.060 was enacted in 1943 as part of a chapter entitled "Cemetery Property." That chapter authorizes the dedication, and describes the effect of dedication, of cemetery property.

RCW 68.24.010 generally authorizes cemeteries to own property. RCW 68.24.020 authorizes a cemetery authority to survey and to map or plat cemetery property. RCW 68.24.030 authorizes a cemetery authority to file the map or plat in the office of the recorder of the County in which the property is situated for the purpose of dedicating the property exclusively to cemetery purposes. RCW 68.24.040 provides that upon such filing, the dedication of cemetery property to cemetery purposes shall be deemed complete. RCW 68.24.050 provides that such filing shall

constitute constructive notice of the property's dedication to cemetery purposes to the world.

RCW 68.24.060 authorizes the cemetery authority freely to re-subdivide or re-map cemetery property in which no burials have occurred. RCW 68.24.070 provides that a dedication of property by a cemetery authority to cemetery purpose is generally permanent. RCW 68.24.080 provides that such a dedication is exempt from the operation of the rule of perpetuities. RCW 68.24.090 and .100 set forth the procedure for removal of a property dedicated to cemetery purposes. RCW 68.24.110 provides that a cemetery authority may sell and convey plots or rights of internment subject to the rules in effect or thereafter adopted by the cemetery authority.

Chapter 68.24 RCW, and each of its particular sections, addresses the method by which property is dedicated to cemetery purposes, and the effect of such dedication. The Legislature did not intend, by these statutes, to address or regulate a cemetery authority's ability to relocate human remains. The Legislature has addressed the issue of whether, how, and when a cemetery authority can move the location of human remains in Chapter 68.50 RCW.

In particular, RCW 68.24.060 describes what the directors of a cemetery **"may"** do:

> 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.

RCW 68.24.060 (emphasis added).

This statute thus neither requires nor forbids any conduct. As a matter of law, it is therefore impossible to violate this statute.

Southwick never invoked the "safe harbor" described by this statute. Instead, Southwick's position has always been that it acted pursuant to its Legislatively-authorized rules in correcting an error it had made in the interment of these urns by placing them within the City of Olympia's waterline easement.

In the Order on Summary Judgment, the Board's Presiding Officer characterized RCW 68.24.060 as an "authorizing statute"—that is, one that might "authorize" Southwick's conduct despite RCW 68.50.140's purported "general prohibition on the removal of interred human remains:"

> In [moving all the inurnment plots from one location to another] the cemetery was also forced to disturb human remains, so the action was not authorized under RCW 68.24.060.

AR 281-282 (Order on Motion for Summary Judgment, Conclusion of Law ¶ 2). To the extent the Presiding Officer characterized this statute as not itself prohibiting any conduct, he was correct.

Without hearing any new facts, and even though no one had sought a revision of the Presiding Officer's determination, in its Final Order the Board changed position. It determined that Southwick had positively violated RCW 68.24.060:

> 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 8 (Final Order, Conclusion of Law ¶ 4.7).

In addition to erroneously holding that Southwick violated a statute which on its face neither requires nor forbids any conduct, the Board's conclusion assumes the existence of a "plot map." There is a complete failure of evidence in this record with respect to the existence of a "plot map" of the kind referenced in this statute.

Forest Memorial Cemetery was established in 1857, well before the enactment of any portion of Title 68.24 RCW which provides for the recording of a "plot map." There was no evidence produced by the Board that the Forest Cemetery Association had ever recorded a "plot map." Thus, there was no evidence produced that there was any "plot map" available for Southwick to amend, constructively or otherwise. The Board's *sua sponte* conclusion that Southwick "constructively amended" a

non-existent plot map thus is utterly unconnected to, and unsupported by, anything in the record.

In sum, this statute describes what the directors of a cemetery **may** do. The statute does not require any conduct. And it does not forbid any conduct. Therefore, as a matter of law, it is impossible to violate this statute. It follows, therefore, that Southwick did not violate this statute.

The Court should reverse the Board's conclusion that Southwick violated RCW 68.24.060.

E. On this record, the Court should remand with instructions for the Superior Court to enter a declaratory judgment that Southwick did not violate either RCW 68.50.140 or RCW 68.24.060.

On this record, the Court should remand with instructions for the Superior Court to enter a declaratory judgment that Southwick did not violate either RCW 68.50.140 or RCW 68.24.060.

RCW 34.05.574 describes the type of relief a court may grant in response to a petition for review of an administrative action. That statute provides:

> In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, **set aside agency action**, enjoin or stay the agency action, remand the matter for further proceedings, or **enter a declaratory judgment order**. The court shall set out in its findings and conclusions, as appropriate, each violation or error by the agency under the standards for

> review set out in this chapter on which the court bases its decision and order.

(emphasis added).

Here, Southwick plainly did not violate either RCW 68.50.140, or 68.24.060. Despite this, the Board has already subjected Southwick to two years of expensive administrative proceedings. The Board has acted with utterly no respect for Southwick's right to be treated according to due process of law. It is time for this conduct to end.

The Court should remand with instructions for the Superior Court to enter a declaratory judgment that Southwick did not violate either RCW 68.50.140 or RCW 68.24.060.

F. The Court should award Southwick its reasonable attorney's fees under the Washington Equal Access to Justice Act.

Finally, assuming that the Court grants relief to Southwick, the Court should award Southwick attorney's fees under the Washington Equal Access to Justice Act, codified at RCW 4.84.340-350.

The Washington State Legislature adopted this statute in 1995. In enacting this statute, the Legislature recognized that certain private parties who obtain relief on judicial review of agency action with respect to a significant issue should be entitled to recover their reasonable attorney's fees:

> The legislature finds that certain individuals, smaller partnerships, smaller corporations, and other organizations

> may be deterred from seeking review of or defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings. The legislature further finds that because of the greater resources and expertise of the state of Washington, individuals, smaller partnerships, smaller corporations, and other organizations are often deterred from seeking review of or defending against state agency actions because of the costs for attorneys, expert witnesses, and other costs. The legislature therefore adopts this equal access to justice act to ensure that these parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights.

1995 Wash. Laws, Ch. 403, § 901.

Under this statute, a "qualified party" that obtains relief on a significant issue by judicial review of agency action is entitled to an award of its fees and expenses, including reasonable attorney's fees:

> Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 4.84.350(1). Under this statute, a "qualified party" includes a corporation whose net worth did not exceed $5,000,000 at the time the initial petition for judicial review was filed. RCW 4.84.340(5).

A court awarding attorney's fees under the Equal Access to Justice Act may award fees at a rate of no greater than $150 per hour unless the

court determines that an increase to the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. RCW 4.84.340(3). The total fee that a court can award is capped at a maximum of $25,000. RCW 4.84.350(2).

Here, Southwick is prepared to certify, under penalty of perjury, that its net worth at the time of its filing of this petition for judicial review is under $5,000,000. Therefore, Southwick is a "qualified party" within the meaning of the Act.

Assuming Southwick prevails on review, the Court should therefore enter an order awarding Southwick its attorney's fees. Assuming it prevails on review, Southwick is entitled to recover both the time it invested in litigating this matter before the Superior Court, and before the Court of Appeals. Therefore, in the event Southwick prevails, the Court should enter an order determining that Southwick is entitled to an award of attorney's fees, permit Southwick to submit an application making the necessary certification as to its net worth, and directing this Court's Commissioner to determine the fee to be awarded. In the alternative, the Court may direct the Superior Court to address this issue on remand.

The Board may resist the request for fees on the grounds that the agency action was substantially justified or that circumstances make an award unjust. RCW 4.84.350(1). If the Board makes this claim, it bears

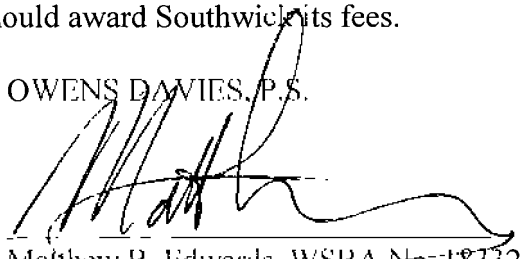
the burden of showing that fees should be denied because its action was substantially justified or that circumstances make an award unjust. *The Language Connection, LLC v. Employment Sec. Dept. of State*, 149 Wn.App 575, 587 ¶ 19, 205 P. 3d 924 (2009). For the reasons set forth earlier in this brief, including the fact that the Board violated Southwick's constitutionally-guaranteed right to due process of law by purporting to find Southwick had violated RCW 68.50.140 without giving Southwick any prior notice or opportunity to be heard, because Southwick plainly did not violate RCW 68.50.140, and because Southwick plainly did not violate 68.24.060, the Court should expressly find that the Board's actions were not reasonably justified.

In sum, assuming Southwick prevails, the Court should find that Southwick is entitled to an award of fees under the Washington Equal Access to Justice Act.

VII. CONCLUSION

The Court should remand to the Superior Court for entry of a Declaratory Judgment declaring that Southwick lawfully relocated the urn garden so that it lay outside the City of Olympia waterline easement, and that Southwick, in doing so, did not violate RCW 68.50.140, 68.50.220, or 68.24.060. And, the Court should award Southwick its fees.

OWENS DAVIES, P.S.



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

VIII. APPENDIX

A.	RCW 68.50.140	1
B.	RCW 68.24.060	2
C.	Statement of Charges - AR 15-17	3-5
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G.	Notice of Appeal - RP 147-51	24-28

RCW 68.50.140

Unlawful disturbance, removal, or sale of human remains—Penalty.

(1) Every person who shall remove human remains, or any part thereof, from a grave, vault, or other place where the same has been buried or deposited awaiting burial or cremation, without authority of law, with intent to sell the same, or for the purpose of securing a reward for its return, or for dissection, or from malice or wantonness, is guilty of a class C felony.

(2) Every person who shall purchase or receive, except for burial or cremation, human remains or any part thereof, knowing that the same has been removed contrary to the foregoing provisions, is guilty of a class C felony.

(3) Every person who shall open a grave or other place of interment, temporary or otherwise, or a building where human remains are placed, with intent to sell or remove the casket, urn, or of any part thereof, or anything attached thereto, or any vestment, or other article interred, or intended to be interred with the human remains, is guilty of a class C felony.

(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.

[**2005 c 365 § 140; 2003 c 53 § 308; 1992 c 7 § 44; 1909 c 249 § 239;** RRS § 2491. FORMER PART OF SECTION: 1943 c 247 § 25 now codified as RCW **68.50.145**. Formerly RCW **68.08.140**.]

NOTES:

Intent—Effective date—2003 c 53: See notes following RCW **2.48.180**.

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.

[**1943 c 247 § 65;** Rem. Supp. 1943 § 3778-65.]

CERTIFICATE OF MAILING

I, _ _ certify that I mailed a copy of this document, postage prepaid, to Southwick Inc., DBA Forest Memorial Gardens, PO Box 1216, 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: at Olympia, Washington.

By: _ _

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 _____ day of _____, 2014.

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

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If you need accommodation, please call (360) 664-6597 or TTY (360) 664-0116.

CERTIFICATE OF MAILING

I, [illegible] certify that I mailed a copy of this document, postage prepaid, to Southwick Inc., DBA Forest Memorial Gardens, PO Box 32[illegible], [illegible], WA 98[illegible]. 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: [illegible]

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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 1 day of November, 2015.

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

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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 Judgement; 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 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.

Jim Ketson
Presiding Officer
Funeral and Cemetery Board

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
PO Box 9045 • Olympia, Washington 98507

January 6, 2016

Matthew B. Edwards
Owens Davies, P.S.
1115 West Bay Dr., Ste 302
Olympia, WA 98502

Reference: Board Case No. 2014-05-2605-00FDE

Dear Mr. Edwards:

Please find enclosed a copy of the FINAL ORDER in the above-referenced case.

If you have any questions regarding the delivery of the enclosed documents, please contact me at the number or email address undersigned.

Sincerely,

Lily A. Reinecke, Court Clerk
Washington State Funeral and Cemetery Board
(360) 664-6597

Enclosures (1)

Cc: Department of Licensing Funeral and Cemetery Program
July Simpson, AAG
Elizabeth Lagerberg, AAG

CERTIFICATE OF MAILING

I, Lily A. Reinecke certify that I mailed a copy of the referenced document, postage prepaid, to Matthew B. Edwards, Owens Davies, P.S., 1115 West Bay Dr., Ste 302, Olympia, WA 98502 on January 6, 2016. I certify under penalty of perjury, under the laws of Washington, that the foregoing is true and correct.

Dated: January 6, 2016 at Olympia, Washington.

By: _____

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If you need special accommodation, please call (360) 664-6597 or TTY (360) 664-8885.

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

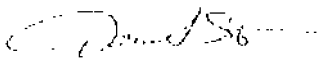
IT IS HEREBY ORDERED THAT

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 Leison, Presiding Officer
Washington State Funeral and Cemetery Board

☐ EXPEDITE
☐ Hearing is set:
Date:
Time:
Judge/Calendar: Hon. Anne Hirsch
Civil Motion Calendar

☐ No Hearing is set

E-FILED
SUPERIOR COURT
THURSTON CO., WA
September 23, 2016
Linda Myhre Enlow
Thurston County Clerk

IN THE SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

SOUTHWICK, INC., a Washington corporation,

Plaintiffs,

v.

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

Defendants.

NO. 16-2-00102-34

NOTICE OF APPEAL TO COURT OF APPEALS, DIVISION II

Southwick, Inc., Petitioner herein, seeks review by the designated appellate court of the Order Affirming Washington State Funeral and Cemetery Board's Final Order, Findings of Fact, Conclusions of Law, and Order—September 23, 2016.

A copy of the Decision is attached to this Notice.

DATED this 23rd day of September, 2016.

LAWER DAVIES, P.S.

Matthew B. Edwards, WSBA no. 18342
Attorneys for Plaintiff, Southwick, Inc.

LAWER DAVIES, P.S.
[illegible]
Olympia, Washington 98502
Phone: [illegible]
Facsimile: [illegible]

DECLARATION OF SERVICE

I, Julie Thomas, certify and declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on 23rd of [illegible], 2016, I caused service of the foregoing document to the following individuals in the manner described below:

R. July Simpson
Office of the Attorney General
Licensing & Administrative Law Division
PO Box 40110
Olympia, WA 98504-0110

Via Regular U.S. Mail

DATED this 23rd day of [illegible], 2016, at Olympia, Washington.

[illegible]
Julie Thomas, Legal Assistant

LEGEREC DAVIES, P.S.
[illegible]

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

SOUTHWICK, INC., a Washington corporation, Petitioner, STATE OF WASHINGTON DEPARTMENT OF LICENSING BUSINESS AND PROFESSIONS DIVISION, WASHINGTON STATE FUNERAL AND CEMETERY BOARD,	NO. 16-2-00102-34 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (Clerk's Action Required)

This matter came before the court for a hearing on July 15, 2016, pursuant to the Washington Administrative Procedure Act; all parties were represented by counsel. The Court, having reviewed the Board's Administrative Record, the pleadings on file, and having heard argument, and being fully advised, hereby makes the following:

FINDINGS OF FACT

I.

At the time of filing the petition for review, Petitioner, Southwick, Inc., was a resident of Thurston County, State of Washington and the holder of a cemetery certificate of authority.

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II.

The Petitioner, Southwick, Inc., moved 37 sets of cremains that were inurned within the Forest Memorial Cemetery in Olympia, WA, without notifying or obtaining consent from any of the next of kin of any of the urns it moved.

III.

The Washington State Funeral and Cemetery Board entered a final order on January 6, 2016, imposing sanctions based on its finding of unprofessional conduct as alleged in the Amended Statement of Charges.

From the foregoing Findings of Fact, the Court enters the following:

CONCLUSIONS OF LAW

I.

The Court has jurisdiction over the parties and subject matter.

II.

The factual findings are undisputed in this case. The described findings above constitute violation of the rules and statutes governing the conduct of cemeteries in the State of Washington, and thus constituted unprofessional conduct under RCW 18.235.130, as alleged in the Amended Statement of Charges.

III.

The Board's conclusions of law do not constitute an error of law and are otherwise in accordance with the Washington Administrative Procedure Act.

From the foregoing Findings of Fact and Conclusions of Law, and for the reasons explained in this Court's Letter Opinion dated August 18, 2016, which is incorporated herein by reference, the court enters the following:

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ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Final Order of the Washington State Funeral and Cemetery Board is affirmed.

DATED this 27 day of September, 2016

JUDGE MICHAEL HEVERLY

Presented by:
ROBERT W. FERGUSON
Attorney General

Bruce L. Turnell WSBA 15435
for

R. HILY SIMPSON WSBA [illegible]
Assistant Attorney General
Attorney for Respondent

Approved as to Form: only; all right to appeal reserved

Matthew H. Edwards, WSBA # 18332
Counsel for Petitioner

[PROPOSED] FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

I certify that on the 14th day of October, 2016, I caused a true and correct copy of this brief to be served on the following in the manner indicated below:

via First Class Mail + e-mail

By: _____
Matthew B. Edwards

OWENS DAVIES PS

October 14, 2016 - 4:08 PM

Transmittal Letter

Document Uploaded: 2-496917-Appellant's Brief.pdf

Case Name: Southwick v. Washington State, and its Department of Licensing etc
Court of Appeals Case Number: 49691-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Appellant Southwick's Opening Brief

Sender Name: Matt Edwards - Email: medwards@owensdavies.com

A copy of this document has been emailed to the following addresses:

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BruceT1@atg.wa.gov