

No. 95237-0

NO. 49691-7

**COURT OF APPEALS, DIVISION II
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

RESPONDENT.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Cemeteries¹ have responsibilities and obligations to both the living and the dead. One of those obligations is to ensure that the human remains with which they are entrusted rest undisturbed. For that reason, Washington law prohibits the unlawful disturbance of human remains. RCW 68.50.140, .200, .220. It also prohibits cemetery authorities from altering cemetery property, if doing so would disturb interred remains. RCW 68.24.060. Violation of these prohibitions is unprofessional conduct and subjects the cemetery to discipline by the Washington State Funeral and Cemetery Board.

Appellant, Southwick, Inc., removed the cremated remains (“cremains”) of 37 individuals buried in the urn garden at Forest Memorial Gardens Cemetery and reburied the cremains in a new urn garden. It made no attempt to contact the deceased’s next of kin prior to doing so, as required by RCW 68.50.220.

The Funeral and Cemetery Board notified Southwick that it was charged with unprofessional conduct for its actions in moving the cremains. Through extensive briefing and two hearings, the Board

¹ Private cemeteries in Washington are operated under grants of authority issued by the Department of Licensing and enforced by the Funeral and Cemetery Board. The entity responsible for operating a cemetery is referred to as a “cemetery authority.” RCW 68.04.190. For the sake of clarity, this brief will refer to cemetery authorities simply as “cemeteries.”

provided Southwick all due process, and Southwick fully litigated before the Board every issue and legal conclusion that appears in the Final Order. The Board properly applied the law when it disciplined Southwick, and its Final Order should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Was Southwick provided due process when it was notified of the factual allegations against it, did not contest those factual allegations, and had an opportunity to fully argue and litigate all of the legal conclusions made in the Final Order?
2. When Southwick moved the cremains of 37 individuals without notifying their next of kin, did it violate RCW 68.50.140 and commit unprofessional conduct when that statute prohibits the removal of human remains without the authority of law?
3. When Southwick moved the cremains of 37 individuals in order to alter and replot its land, did it violate RCW 68.24.060, which prohibits cemeteries from replotting their land, if doing so disturbs any human remains?
4. This Court may affirm on any legal basis supported by the undisputed facts. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993); RAP 2.5(a); *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2014). Should this Court affirm the Board's determination that

Southwick's actions were unprofessional conduct when it clearly violated RCW 68.50.220 when it moved remains from one plot to another within the same cemetery without first notifying next of kin?

5. Should the Court deny an award of fees and costs when Southwick should not prevail on judicial review, and the Board's actions had a reasonable basis in fact and the law?

III. STATEMENT OF THE CASE

A. Cemetery Licensing in Washington

In Washington, private cemeteries operate under a Certificate of Authority issued by the Funeral and Cemetery Board. RCW 68.04.190. In addition to granting cemeteries the authority to operate, the Board enforces and administers the provisions of the chapters governing cemeteries (RCW 68.04 through 68.50) and adopts "standards of professional conduct or practice." RCW 68.50.090, RCW 68.05.115. The Board functions in conjunction with the Department of Licensing, which employs the Board's program administrator and staff. RCW 68.05.095.

To enforce the standards of professional conduct and the statutes governing cemeteries, the Board, or its representative, is empowered to serve a notice of charges on a cemetery authority and to hold hearings if the cemetery authority "is violating or has violated any statute of the state of Washington or any rule of the board." RCW 68.05.320(1)(b). In

practice, the program administrator at the Department oversees staff, and they work as a “prosecuting authority” on behalf of the Board. Adjudicative hearings are prosecuted by the Department before the Board. On judicial review, the Department defends the Board’s decision.

B. Southwick Moved the Cremains of 37 Individuals

In the 1980s, Southwick began operating Forest Memorial Cemetery in Olympia under a Cemetery Certificate of Authority registered with the Washington State Funeral and Cemetery Board. AR 279 (Finding of Fact (FF) 4); 58; 483. After taking over the cemetery, Southwick established an urn garden, which eventually contained 37 urns. AR 279-80; 58; 483. The urn garden was unknowingly placed above a water easement owned by the City of Olympia (City). AR 280 (FF 9); 485. In 2011, the City informed Southwick that the urn garden, and other encroachments, had been placed over the easement. AR 280 (FF 6); 179; 484-85. The City asked Southwick to remove these encroachments. *Id.* Eventually, Southwick complied and moved the urn garden away from the easement. AR 280-81 (FF 10); 485. The 37 urns were disinterred and reburied in the new urn garden. AR 281 (FF 11); 488. Southwick did not notify the families of the deceased that the cremains would be moved either prior to moving the urns or after reburying the urns. AR 281 (FF

14); 56; 435:2-4. A family member discovered the reburial and complained to the Department of Licensing. AR 55.

C. Procedural History

After investigating, the Department issued a Statement of Charges against Southwick for moving cremains to another place in its cemetery without first notifying next of kin. AR 15-17. Southwick was charged with violating RCW 68.50.200, .220 and RCW 68.24.060. *Id.* In its answer to the Statement of Charges, Southwick admitted that it moved the cremains and asserted that it relied on its own rules and regulations in determining its obligations. AR 58-59.

Later, the Department moved to amend the Statement of Charges to remove an allegation and to correct a technical deficiency. AR 40-42. The Amended Statement of Charges included a reference to RCW 18.235.130(8), a provision of the Uniform Regulation of Business and Professions Act (URBP) that makes it unprofessional conduct to violate the provisions of the URBP or any of the specific statutes governing a profession. AR 44-46. That motion was granted, AR 303-305, and the Department served the Amended Statement of Charges. AR 379-381.

The parties filed cross motions for summary judgment, which were heard by the Presiding Officer of the Board.² AR 122-33; 49-53. Because Southwick did not contest the facts, the Department sought partial judgment on the merits, reserving the issue of sanctions for a hearing before the full Board. AR 49-53. The Department's motion was granted; Southwick's motion was denied. AR 277-284. The Presiding Officer issued a Findings of Fact, Conclusions of Law and Order on Motion for Summary Judgment. *Id.* That Order included a conclusion of law that was not requested: that Southwick violated RCW 68.50.140, which prohibits the removal of human remains "without lawful authority." AR 49-53 (Department's Motion for Partial Summary Judgment); 278-283 (Order on Summary Judgment).

Southwick moved for reconsideration of the Order on Summary Judgment and that motion was heard by the full Board. AR 382-398. The motion objected to the conclusion that Southwick was in violation of RCW 68.50.140 on the grounds that the statute was not included in the charges. AR 282 (Order on Summary Judgment); 388-391 (Motion for Reconsideration). The motion also substantively and rigorously defended against the conclusion that Southwick violated RCW 68.50.140 on two

² Motions for Summary Judgment are authorized as part of the Department's adjudicative process, WAC 10-08-135. The Presiding Officer shall have the authority to rule on motions for summary judgment. WAC 10-08-200(5). *See also* WAC 308-08-006 (adopting the model rules of procedure in 10-08 WAC by the Department of Licensing).

separate bases: 1) the remains were never moved from their plots because the plot numbers remained the same after they were moved, therefore, RCW 68.50.140 was not implicated; and 2) that Southwick's rules and regulations provided it the full legal authority to move remains at its discretion. AR 389-391.

The full Board held a hearing at which it first heard argument on Southwick's Motion for Reconsideration. Southwick reiterated its argument that it had not violated RCW 68.50.140. AR 421-22. Southwick asserted that, "for there to be a violation of subsection 4, the remains have to be removed out of the cemetery," and because the urns were never removed from the cemetery, section .140 was not violated. AR 421:23-422:5. Southwick also argued that it "acted with the authority of law because the legislature has specifically authorized cemeteries, like Southwick, to adopt rules and regulations" AR 422:5-422:12.

After hearing Southwick's Motion for Reconsideration, the Board heard evidence on the proposed sanctions from the Department and mitigating circumstances from Southwick's witness. AR 2-3. Given that the URBP authorizes \$5,000 for each violation,³ that the Amended Statement of Charges alleged two violations of RCW 18.235.130(8) for each of 37 moved cremains, and taking into account the mitigating

³ RCW 18.235.110(1)(h).

circumstances, the Department's witnesses recommended a \$10,000 fine, a reprimand to the cemetery license, and required notification to the families, including placing a notice in the local newspaper to aid in reaching families whose whereabouts are unknown. AR 453 and 470. Southwick's witness testified that next of kin rarely alert the cemetery when they move. AR 491.

In its Final Order, the full Board granted Southwick's motion for reconsideration, reconsidered the alleged violations, and found that Southwick committed the violations alleged in the Amended Statement of Charges. AR 7 (Conclusion Of Law (COL) 4.3-4.9). The Board also adopted the Findings of Fact and Conclusions of Law contained in the Order on Motions for Summary Judgment, with modifications. AR 5 (FF 3.2).

In its Final Order, the Board concluded that RCW 68.50.140 provided a "general prohibition against removal of interred human remains." AR 7 (COL 4.4). The Board then discussed the two statutes that authorize cemetery authorities to disturb human remains if certain requirements are met. AR 7 (COL 4.4-4.6). These include RCW 68.50.200, which Southwick was not charged with violating, and RCW 68.50.220, which it was. AR 7 (COL 4.5). The Board concluded that Southwick did not meet the requirements of RCW 68.50.220 when it

moved the 37 sets of cremains, and therefore violated RCW 68.50.140. AR 7 (COL 4.6). The Board further concluded that Southwick violated RCW 68.24.060 when it “constructively amended the plot map” and when “it moved human remains in the process of altering plot locations.” AR 8 (4.7).

For these violations, the Board imposed sanctions 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.” AR 9. Southwick appealed to the Thurston County Superior Court, which affirmed the Board’s Order. CP 4-29. This appeal followed.

IV. STANDARD OF REVIEW

The appellate court’s “limited review of an agency decision is governed by the Administrative Procedure Act (APA), chapter 34.05 RCW.” *Campbell v. Emp’t Sec. Dep’t*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014); RCW 50.32.120. This Court sits in the same position as the superior court and applies the APA standards directly to the administrative record. *Campbell*, 180 Wn.2d at 571. Here, the decision on review is the Board’s Final Order. *Id.*; *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993); AR 10-11.

The reviewing court must consider the Board’s decision to be prima facie correct, and “the burden of demonstrating the invalidity of [the

decision] is on the party asserting invalidity.” RCW 34.05.570(1)(a); *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). The Court should reverse the Board’s order only if it determines “that [the] person seeking judicial relief has been substantially prejudiced by the action complained of.” RCW 34.05.570(1).

Under the APA, the court gives “[g]reat deference” to the Board’s factual findings and substantial weight to the Board’s interpretation of the law. *Daniels v. Dep’t of Emp’t Sec.*, 168 Wn. App. 721, 727, 281 P.3d 310 (2012) (quoting *Galvin v. Emp’t Sec. Dep’t*, 87 Wn. App. 634, 641, 942 P.2d 1040 (1997)). Because the underlying facts, that Southwick moved the cremains of 37 individuals from an established urn garden to a new location and did so without notifying the deceased’s next of kin, are not in dispute, AR 281 (FF 14); AR 435:2-4, these findings are verities on appeal. *Darkenwald v. Emp’t Sec. Dep’t*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015); *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 32–33, 226 P.3d 263 (2010).

Whether Southwick’s undisputed actions violated the standards of professional conduct is a question of law reviewed de novo, under the error of law standard. RCW 34.05.570(3)(d); *Tapper*, 122 Wn.2d at 407. But the Court gives “substantial weight” to the agency’s interpretation of laws that it administers. *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings*

Bd., 142 Wn.2d 543, 553, 14 P.3d 133 (2000). Here, that deference is particularly appropriate because “the subject area falls within the agency’s area of expertise” as this agency is a regulatory board comprised of representatives from the funeral and cemetery industry. *Campbell v. Bd. of Vol. Firefighters*, 111 Wn. App. 413, 419, 45 P.3d 216 (2002) .

The standard of review of a constitutional due process challenge is de novo. *State v. Nelson*, 158 Wn.2d 699, 702, 147 P.3d 553 (2006) (citing *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004)). However, procedural due process is a flexible concept, *Lungu v. Dep’t of Licensing*, 146 Wn. App. 485, 186 P.2d 1067 (2006), and a party must demonstrate prejudice in its ability to present and prepare its defense to prove a due process violation. *Motley-Motley, Inc. v. State Pollution Control Hearings Bd.*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005). Even if a pleading failed to give adequate notice of the issue, no due process violation will be found if the issue has nonetheless been fully litigated. *See McDaniel v. Dep’t of Soc. And Health Services.*, 51 Wn. App. 893, 898, 756 P.2d 143 (1988) (citing *NLRB v. Highway & Local Motor Freight Employees, Local 667*, 654 F.2d 254 (6th Cir. 1981)).

Finally—and importantly in a case involving only the application of the law to the undisputed facts—this Court may affirm on any legal ground supported by the record because this Court applies the law to the

facts de novo. *Tapper*, 122 Wn.2d at 403; RAP 2.5(a); *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2014).

V. ARGUMENT

The Board's Final Order should be affirmed. Southwick received all due process, and the Board's Final Order is free from errors of law.

Due process entitled Southwick to notice of the Board's allegations and a meaningful opportunity to challenge those allegations. The factual claims made by the Board have never been challenged, and Southwick had multiple opportunities, through both briefing and oral argument, to present its legal arguments. Even though the Final Order included a statute with which Southwick was not originally charged, in the end, Southwick fully litigated all of the issues the Board addressed in its Final Order, and notice of the statute at the beginning of the proceedings would not have altered the evidence Southwick presented since it did not contest the facts. Southwick availed itself of the full process the Board was required to provide.

Moreover, this Court should affirm the Board's Final Order because it is free from errors of law. Southwick removed the remains of 37 individuals from their plots without notifying their next of kin and did so in order to alter the cemetery property in which they were interred. In doing so, Southwick violated the statutes intended to prevent human

remains from being disturbed, except in limited circumstances. RCW 68.50.140, RCW 68.50.220, and RCW 68.24.060. The Board properly found that Southwick's actions constituted unprofessional conduct under the URBP and imposed appropriate discipline.

Additionally, because this Court may affirm on any grounds factually supported by the record, this Court should affirm the Board's conclusion that Southwick committed unprofessional conduct because it violated RCW 68.50.220 (the requirement that next of kin be notified prior to moving human remains from one plot to another within a cemetery) and RCW 68.24.060 (the prohibition on altering cemetery property if doing so disturbs human remains). These violations support a penalty of \$7,500.00.

A. Southwick Received All Due Process

There was no due process violation here because Southwick had a meaningful opportunity to fully address all violations in the Final Order and fully litigated every matter before the Board, even though RCW 68.50.140 was absent from the charging document. Additionally, Southwick suffered no prejudice in preparing its defense, as the facts have been undisputed at every stage.

1. Because Southwick had notice and an opportunity to be heard on all violations in the Final Order, Southwick prepared and presented a defense and suffered no prejudice

In the context of administrative discipline, due process requires that a licensee must be notified of the charges against it and have a meaningful opportunity to contest those charges. *Martin v. Dep't of Licensing*, 175 Wn. App. 9, 21, 306 P.3d 969 (2013). "Where there is sufficient notice and [an] issue is fully litigated," the administrative decision will be upheld, even if an allegation was not included in the pleadings or charging documents. *McDaniel v. Dep't of Soc. and Health Services.*, 51 Wn. App. 893, 898, 756 P.2d 143 (1988) (quoting *NLRB v. Highway & Local Motor Freight Employees, Local 667*, 654 F.2d 254, 256 (6th Cir. 1978)). There is no due process violation if a party has had the ability to prepare and present its defense. *Motley-Motley*, 127 Wn. App. at 81.

The Board's determination on an issue should be upheld unless "the parties had not been afforded an opportunity to address themselves to the issue." *Int'l Ass'n of Firefighters, Local No. 469 v. Public Emp't Rel. Comm'n*, 38 Wn. App. 572, 579, 686 P.2d 1122 (1984). Due process does not require that a specific issue or allegation be included in the pleadings, instead it requires only notice and a meaningful opportunity to be heard.

See NLRB v. Blake Const. Co., Inc., 663 F.2d 272, 279 (D.C. Cir. 1981). If an issue is “not raised in the [pleadings], in the briefs, or in oral argument, and no evidence was presented concerning that issue,” then the Respondent has received neither notice nor a meaningful opportunity to be heard. *NLRB v. Local Union No. 25, Int’l Broth. Of Elec. Workers*, 586 F.2d 959, 961 (2nd Cir. 1978). But, where the issue has been fully litigated, the administrative law judge's decision will be upheld. *See McDaniel v. Dep’t of Soc. And Health Services.*, 51 Wn. App. 893, 898, 756 P.2d 143 (1988) (citing *NLRB v. Highway & Local Motor Freight Employees, Local 667*, 654 F.2d 254 (6th Cir. 1981)).

McDaniel is instructive here. In that case, the Administrative Law Judge found that McDaniel “willfully and intentionally received an overpayment of public funds.” *McDaniel*, 51 Wn. App. at 895. However, the notice issued by the Department of Social and Health Services did not indicate that “intentional” conduct would be at issue in the case. *Id.* at 898. Nonetheless, the Court found that McDaniel had “a meaningful opportunity to litigate the intention issue at the hearing,” noting that “her attorney raised the issue of intention in his opening statement.” *Id.* Thus, the court found that there was no due process error, even though there was insufficient notice. *Id.*

Here, Southwick had the opportunity to argue and prepare and present a defense against RCW 68.50.140 before the full Board and thus suffered no prejudice and there was no due process violation. *Motley-Motley*, 127 Wn. App. at 81. After the Order on Summary Judgment was issued by the presiding officer, Southwick filed a Motion for Reconsideration, which was heard by the full Board and which included a memorandum of law. AR 382-396. In that motion, Southwick substantively addressed the violation of RCW 68.50.140, asserting that it “did not violate RCW 68.50.140.” *Id.* Southwick argued, first, that RCW 68.50.140 applied only to “grave robbing” and required that the remains be fully removed from the cemetery. AR 389-91. Southwick also argued that its rules and regulations permitting it to correct errors in burials granting it lawful authority to disturb the remains. AR 390. Southwick made the same arguments verbally before the Board. AR 421-22.

Thus, Southwick received notice of the alleged violation of RCW 68.50.140 in the initial order on summary judgment and, in argument before the full Board, presented its legal arguments about why it believed it had not violated that statute. Therefore, it had an opportunity to be heard by the full Board on that issue and suffered no prejudice in its ability to prepare and present defense to RCW 68.50.140. *Motley-Motley*, 127 Wn.

App. at 81 Accordingly, the requirements of due process in administrative proceedings were satisfied. The Board's Order should be affirmed.

2. The absence of a reference to RCW 68.50.140 from the charging document did not prevent Southwick from presenting any additional evidence because it had full notice of the factual allegations, which it did not contest

No additional evidence was necessary or pertinent to RCW 68.50.140 beyond the undisputed facts. Southwick has never disputed the facts, despite its multiple opportunities to do so. Nonetheless, Southwick asserts that it "did not present evidence addressed to" RCW 68.50.140. Appellant's Br. at 18. Southwick relies on *Mansour v. King Cnty*, 131 Wn. App. 255,128 P.3d 1241 (2006). There, the court explained that due process entitled a respondent "to know ahead of time exactly what [] was required to [be] prove[d]." *Mansour*, 131 Wn. App. at 272. In that case, a citation in the charging documents to the specific ordinance was required, because each King County animal control ordinance required the County to prove different factual elements. *Id.* at 271-72. Thus, in that situation, absent the exact statute, the respondent did not have "adequate notice of what facts the County had to prove." *Id.* at 270. But that is not the case here.

In its Answer to the Statement of Charges, Southwick conceded that it moved the cremains and that its decision was "guided by RCW

68.20.060 and our correction of errors clause rather than other RCWs within Chapter 68.” AR 59. Nor did Southwick dispute the factual allegations 1) in its Motion for Summary Judgment, 2) in responding to the Department’s Motion for Partial Summary Judgment, 3) at the hearing on summary judgment 4) in its Motion for Reconsideration 5) when appearing before the full Board on its Motion for Reconsideration or 6) on judicial review in the superior court. By filing a summary judgment motion, Southwick argued there were no disputed issues of material fact. *See Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (“The burden is on the moving party to show that there is no genuine issue as to any material fact.”).

Additionally, even if section .140 had been included in the Statement of Charges, Southwick would not have put forth any additional evidence. Both RCW 68.50.140 and section .220 are concerned with the same behavior: the unlawful disturbance of human remains in their resting places. These are the factual allegations that were included in the Statement of Charges, and the same conduct amounted to violations of different statutes. The only difference was the legal argument, and, as already explained, Southwick had a full opportunity to make its legal arguments asserting it did not violate RCW 68.50.140.

Under RCW 68.50.140(4), no person is permitted to remove or disinter human remains without authority of law. And RCW 68.50.220 grants a cemetery the authority to move remains from plot to plot within a cemetery, so long as the appropriate next of kin is first notified. The Board explained that section .220 was one of Southwick's potential defenses against a violation of section .140. AR 7 (COL 4.6). Because .220 and .140 overlap, Southwick's evidence on the alleged violation of .220 was necessarily the same as any evidence it might offer on .140. And Southwick offered none. Furthermore, at any point after the Order on Summary Judgment and before the hearing before the full Board, Southwick had the opportunity to request a continuance for an opportunity to present more evidence, but it did not do so.

At every step of these proceedings, Southwick's defenses have been entirely legal, not factual. Initially, Southwick filed a Motion for Summary Judgment in which it conceded the underlying facts but asserted that RCW 68.24.060 did not prohibit any behavior, that its self-promulgated rules granted it lawful authority to move the remains, and that, based on an absurd legal construction of the term "plot," it had not moved the cremains, but had merely shifted the locations of the plots. *Id.* AR 214-219. In its Motion for Reconsideration, Southwick again conceded the factual allegations, but argued that it had not violated any of

the statutes in question, including RCW 68.50.140. AR 382-96. In fact, in that Motion, Southwick advanced the same arguments on section .140 that it does before this Court. AR 389-91; Appellant's Br. at 14-15, 18-23. Thus, Southwick was not deprived of the opportunity to present any evidence to the Board, nor of the chance to prepare or present a defense. *Motley-Motley*, 127 Wn. App. at 81. Southwick had ample notice of the allegations it faced and multiple meaningful opportunities to contest those allegations. It received all due process.

B. The Board Properly Concluded That Southwick Committed Unprofessional Conduct

Southwick committed unprofessional conduct and the Board's order should be affirmed. Private cemeteries in Washington are required to comply with the laws and regulations governing cemeteries, and failure to do so is unprofessional conduct. Under RCW 18.235.130(8), it is unprofessional conduct to violate any of the provisions in the URBP or the chapters governing certain businesses or professions listed in RCW 18.235.020(2). RCW 18.235.130(8). The cemetery business is among the regulated businesses, and the Funeral and Cemetery Board is authorized to enforce and administer the provisions in chapter 68.04 through 68.50 RCW. RCW 18.235.020(2)(b)(iv).

The Board's Final Order concluded that Southwick had committed unprofessional conduct under the URBP provision RCW 18.235.130(8), which was alleged in the Amended Statement of Charges. ¶ 5.2. AR 8. The Board determined that Southwick violated RCW 68.50.140 and RCW 68.24.060, which justified the two violations of RCW 18.235.130(8).

When Southwick moved the cremains of 37 individuals without first notifying the next of kin, as required by RCW 68.50.220, it disturbed human remains without authority of law and violated RCW 68.50.140(4). When Southwick established an urn garden and later disturbed the cremains in order to relocate the urn garden, it altered its property and it violated RCW 68.24.060. Southwick does not dispute this conduct. Rather, Southwick asserts that it can immunize itself from regulation by adopting its own rules. Appellant's Br. at 22. But a cemetery cannot adopt rules that limit the Board's authority or that contravene Washington statutes. Southwick committed multiple violations of the standards of professional conduct, and the Board's Order should be affirmed.

- 1. Southwick committed unprofessional conduct when it disinterred human remains without authority of law by moving the cremains of 37 people without notifying their next of kin**

When Southwick disinterred and reburied the cremains of 37 individuals without notifying the appropriate next of kin, it removed

human remains without authority of law and thus violated RCW 68.50.140. In order to ensure that human remains are left in peace, there is a general prohibition on their removal or disinterment. RCW 68.50.140(4) provides, “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.” Human remains include cremated human remains. RCW 68.04.020. Cemeteries, however, have authority of law to disinter human remains under certain circumstances, so long as the cemetery complies with the applicable legal requirements before doing so.

First, human remains may be removed from a plot with the written consent from the next of kin. RCW 68.50.200. Second, remains may be removed by the cemetery authority when the purchase price of a plot is past due, upon order of a court or a coroner, or moved from one plot to another plot within the same cemetery.⁴ RCW 68.50.220. However, under any of these circumstances, the cemetery must first provide notification to the next of kin before moving the remains:

RCW 68.50.200 . . . [does] 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*

⁴ The notice requirements for a court order are set forth in RCW 68.50.210.

shall provide notification to the person cited in RCW 68.50.200 before moving human remains.

RCW 68.50.220 (emphasis added). A “plot” is a “space in a cemetery, used or intended to be used for the interment of human remains.” RCW 68.04.230.⁵ Therefore, a cemetery has authority of law to remove human remains from one plot to another, so long as they notify the appropriate next of kin before moving the human remains.

Southwick ignored its obligations under the statute and therefore disinterred human remains without authority of law. RCW 68.50.140(4). The cremains of 37 people were interred in plots within an urn garden at the cemetery. AR 280 (FF 9). Southwick disinterred those 37 sets of cremains from their resting places and moved them to 37 different spaces within the cemetery. AR 281 (FF 13). Southwick does not dispute that it did not notify the next of kin. By failing to notify the next of kin, Southwick lacked the lawful authority to disturb the remains. That constitutes unprofessional conduct under RCW 18.235.130(8). The Board’s Order disciplining Southwick for violating its statutory obligations should be affirmed.

⁵ “Human remains” include cremated human remains. RCW 68.04.020

2. The Board properly concluded that Southwick violated RCW 68.24.060 when it altered its property and disturbed human remains

Because cemeteries are the last resting place of human remains, there are strict regulations governing the use of cemetery property. Once a particular place is dedicated as a cemetery, it may only be used as a cemetery, unless the superior court for the county issues an order removing the dedication.⁶ RCW 68.24.070. Cemetery authorities are given wide latitude to determine how to divide and arrange their property. RCW 68.24.020; *Clark v. Sunset Hills Memorial Park*, 45 Wn.2d 180, 273 P.2d 645 (1954) (cemetery subdivisions are not subject to oversight by county or city authorities). But there are statutory requirements imposed on cemeteries after the land is subdivided.

After the land is subdivided (i.e. mapped or platted), the cemetery is required to file a map or plat with the county recorder. RCW 68.24.030. Once human remains are placed in any portion of the cemetery, the restrictions on the authority's powers are heightened. At that point, the cemetery is not permitted to alter that portion of its property if doing so

⁶ Prior to the superior court issuing such an order, the cemetery must prove that: (1) no human remains were placed in, or all human remains have been removed from the property in question; (2) the property is not being used for the placement of human remains; and (3) the cemetery provided at least 60 days' notice of the proposed action with both the funeral and cemetery board and the department of archaeology and historical preservation. RCW 68.24.090.

would “disturb the interred remains of any deceased person.” RCW 68.24.060.

Here, Southwick inarguably altered its previously divided property when it moved the urn garden it had established after taking over the cemetery. AR 281 (FF 13). Originally, Southwick established its urn garden near the Lord’s Prayer Monument, on the water easement owned by the City. AR 483. Southwick subdivided the urn garden into specific plots, which were then sold for the interment of cremains. *Id.* After the City’s complaints about the encroachment, Southwick moved the urn garden and the Lord’s Prayer Monument to another spot in the cemetery. AR 58-59. By moving the urn garden, Southwick “altered in shape and size” its previously divided property.

Regardless of whether Southwick’s alterations to its property were otherwise required, it was not permitted to disturb remains to make those changes. RCW 68.24.060. Southwick had the responsibility to ensure the remains in the original urn garden would remain undisturbed before establishing the urn garden. But, it did not live up to this responsibility—the City’s easement was in place long before Southwick established the encroaching urn garden. AR 279-281. Rather, Southwick disregarded the encumbrance on its land when establishing the urn garden. When it later moved the urn garden, Southwick disturbed the human remains resting

there. Southwick's conduct constitutes unprofessional conduct under RCW 18.235.130(8) by violating RCW 68.24.060 and the Board's Order should be affirmed.

Southwick's contention that RCW 68.24.060 does not forbid any conduct is mistaken. Appellant's Br. at 24-25. The plain language of the statute permits cemeteries to alter their land only if doing so will not disturb human remains: "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). Thus, the statute forbids any change to cemetery property if it would disturb human remains. RCW 68.24.060. The law is replete with similarly structured restrictions which are obvious prohibitions on conduct. *See e.g.*, RCW 25.15.051 (allowing a foreign PLLC to perform services in Washington, *so long as* it complies with specific requirements); RCW 9.41.175(2) (allowing Canadian citizens to possess firearms in Washington, *so long as* they meet established requirements; violation of this provision is a misdemeanor RCW 9.41.810). The conduct is only permissible if the required conditions are met. Here, RCW 68.24.060 explicitly prohibits a cemetery from altering its property unless specific circumstances are met.

A violation of the regulations governing cemeteries is unprofessional conduct under RCW 18.235.130(8). The Board properly applied the law when it found that Southwick committed unprofessional conduct based on a violation of RCW 68.50.060. The Board's Final Order should be affirmed.

3. Southwick does not and cannot have a rule that allows it to violate the laws governing Washington cemeteries

Southwick argues it has a rule that grants itself the authority to “remove and reinter” remains at will within the cemetery. Appellant's Br. at 15. First, the rule Southwick relies on is actually an agreement limiting its liability to its clients and so has no impact on the Board's regulatory authority. Second, Southwick may not absolve itself of the statutory restraints imposed by the legislature by enacting its own “rules” because cemeteries may not adopt rules that circumvent or contravene the statutes that regulate them. *See Arnold v. City of Seattle*, 185 Wn.2d 510, 527-28, 374 P.3d 111 (2016).

First, Southwick misconstrues the rule it relies on. The “rule” is actually a provision limiting liability between Southwick and its clients. It states, in pertinent part, that “The corporation [Southwick] shall not be liable in damages to any person for any such inadvertent error committed by it.” AR 163. This rule insulates Southwick from civil claims by next of

kin (or other injured parties) for any mistakes it makes in burying or marking remains. The provision does not, and cannot, prohibit the Department and the Board from exercising its regulatory authority and disciplining Southwick when it violates statutory requirements.

Furthermore, the Board was created to enforce the laws and regulations governing cemeteries. RCW 68.05.105. Thus, the Board has unambiguous authority to discipline cemeteries that violate those laws and regulations. RCW 68.05.120, .300. Cemeteries may adopt rules regarding certain aspects of cemeteries, RCW 68.20.060, but Southwick's laws cannot contravene statutes.⁷ See *Metropolitan Park Dist. of Tacoma v. Dep't of Nat. Res.*, 85 Wn.2d 821, 857, 539 P.2d 854 (1975) ("Ultra vires acts are those done wholly without legal authorization or in direct violation of existing statutes.") (citing *Finch v. Matthews*, 74 Wn. 2d 161, 172, 443 P.2d 833 (1968)). Southwick's position would lead to the absurd result that the legislature created a thorough regulatory regime governing cemeteries, created a Board to enforce that regulatory regime, and then granted cemeteries the means to evade those regulations. For example,

⁷ Southwick, like all private cemeteries, is incorporated under the laws of the State of Washington. RCW 68.20.010. Like any corporation, Southwick has the power to "make and amend bylaws, *not inconsistent . . . with the laws of this state*, for managing the business and regulating the affairs of the corporation." RCW 23B.03.020(2)(c). Cemeteries are granted the same powers as other corporations, "[u]nless otherwise limited by the law under which created . . ." RCW 68.20.050. Southwick also has the power to make and adopt rules and regulations necessary for the operation and protection of a cemetery. RCW 68.20.060.

Southwick's absurd interpretation would allow cemeteries to adopt rules permitting discrimination against non-Caucasians, despite the statute prohibiting cemeteries from refusing to bury non-Caucasians. RCW 68.50.035.

Moreover, Southwick's expansive interpretation of the statute that allows it to adopt rules contravenes the overall statutory scheme. Courts consider statutes in the context of the overall statutory scheme to determine their meaning. *Assoc. of Wash. Spirits and Wine Distributors. v. Washington State Liquor Control Bd.*, 128 Wn.2d 342, 350, 340 P.3d 849 (2015). Statutes are read in context and with a view to their place in the entire statutory scheme. *Braun v. Selig*, 194 Wn. App. 42, 48, 376 P.3d 447 (2016) (quoting *Sturgeon v. Frost*, 577 U.S. ___, 136 S.Ct. 1061, 1070 (2016)). Thus, the Court should consider "[t]he entire sequence of statutes enacted by the same legislative authority, relating to the same subject matter." *Id.* at 48 (citing *In re marriage of Little*, 96 Wn.2d 183, 189, 634 P.2d 498 (1981)).

Here, the statutes following the general grant of rule-making power in RCW 68.20.060 give examples of the issues those rules might address: the type of markers and monuments permitted (RCW 68.20.062); the erection of monuments and effigies (RCW 68.20.063); regulation of plants and shrubs (RCW 68.20.064); and improper assemblages, and prevention

of interment (RCW 68.20.065). Southwick is entitled to make rules to govern the cemetery within the general contours of the statutory scheme, not to adopt rules that invalidate the statutes themselves. Southwick's position that its own rules permit it to disregard the law is untenable and unsupported.

The Board properly found that Southwick committed unprofessional conduct, and the Board properly disciplined Southwick. The Order should be affirmed.

C. The Undisputed Evidence Shows That Southwick Committed Unprofessional Conduct, and This Court May Affirm On That Basis

The Court applies the law de novo and may affirm the Board's Order on any basis established by the undisputed facts. *Tapper*, 122 Wn.2d at 403. As explained above, this Court should simply affirm the Board's Final Order. But, in the alternative, this Court may apply the undisputed facts to the laws to affirm the conclusion that Southwick committed unprofessional conduct and to affirm the imposition of a \$7,500.00 fine and a requirement to notify next of kin. The sanction was appropriate considering the evidence in the record and was within the range of discipline available to the Board.

On appeal, a court "may sustain a trial court on any correct ground." *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986); *see*

also *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 530, 359 n. 10, P.3d 771 (2015). And because this Court's review of the agency's application of the law is de novo, this Court can sustain a judgment "on any basis established by the pleadings and supported by the proof." *Haymond v. Dep't of Licensing*, 73 Wn. App. 758, 761, 872 P.2d 61 (1994); *Tapper*, 122 Wn.2d at 403; RAP 2.5(a); *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2014).

1. The undisputed evidence establishes Southwick violated RCW 68.50.220

Here, the Board's final order did not enter a conclusion of law that Southwick violated RCW 68.50.220 because it concluded the violation was of the related statute, RCW 68.50.140. AR 7-8. However, the record and the Board's findings of fact support the conclusion that Southwick violated RCW 68.50.220. Cemeteries have authority of law to move human from one plot to another within the cemetery, provided the next of kin is notified before the human remains are moved. RCW 68.50.220. Here, the facts are uncontested: Southwick moved the cremains of 37 individuals without notifying their next of kin. AR 280-81. The Court, in its de novo review, should sustain the Board's Order on this additional basis.

2. The discipline imposed by the Board was reasonable and should be affirmed regardless of the legal basis reached by this Court

This Court should sustain the Board's Order because the discipline the Board imposed was reasonable and well within the range of available discipline for 37 violations of any of RCW 68.50.220, RCW 68.50.140, or RCW 68.24.060. Southwick was charged with unprofessional conduct per RCW 18.235.130(8) in the form of violating two substantive statutes, and the Board found violations of unprofessional conduct per RCW 18.235.130(8) for two substantive statutes. Under the URBP, each violation of unprofessional conduct is punishable by a fine of up to \$5,000.00, in addition to "other corrective action." RCW 18.235.110(1).

Here, Southwick's undisputed conduct violated the plain language of RCW 68.24.060 and RCW 68.50.220, and there were 37 separate violations of each statute. Therefore, as charged, the Board was empowered to impose a maximum fine of \$370,000 (\$5,000 for two types of unprofessional conduct which occurred 37 times), in addition to imposing other corrective action. The discipline imposed here was a fine of \$7,500.00 and a requirement to notify next of kin including notice in the local newspaper for a period of three days. AR 8. This is well within the range of penalties the Board could have imposed for findings

violations of RCW 68.50.220, RCW 68.24.060, and RCW 18.235.130(8).

The Court, therefore, should affirm the Board's sanction.

D. Southwick Should Not Be Awarded Fees and Costs Under the Equal Access to Justice Act

Only parties that prevail on judicial review are entitled to fees and costs under the Equal Access to Justice Act (EAJA). RCW 4.84.350. Because the Board's Final Order was based on substantial evidence, and the Board properly found that Southwick committed unprofessional conduct, Southwick should not prevail on judicial review. Thus, Southwick should not be awarded fees under the EAJA. *Olympic Healthcare Svcs II, LLC, v. Dep't of Soc. and Health Services*, 175 Wn. App. 174, 188, 304 P.3d 491 (2013).

Even if this Court reversed the Board's Order, Southwick would not necessarily be a prevailing party under the EAJA. "A qualified party should 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). Neither a reversal of agency action on procedural grounds, *Brotherton v. Jefferson Cnty.*, 160 Wn. App. 699, 705-06, 249 P.3d 666 (2011), nor a decision that does not grant relief on "a significant issue," *Herbert v. Washington State Public Disclosure Comm'n*, 136 Wn. App. 249, 268, 148 P.3d 1102 (2006), is grounds for an

award under the EAJA. For instance, if this matter were remanded for further hearings on the issue of RCW 68.50.140, Southwick would not be a prevailing party on a significant issue. *See Ryan v. Dep't of Soc. and Health Services*, 171 Wn. App. 454, 287 P.3d 629 (2012).

Further, attorney fees and other expenses cannot be obtained if the agency action was substantially justified. RCW 4.84.350. Agency action is substantially justified when it “would satisfy a reasonable person” and “had a reasonable basis in law and fact.” *Raven v. Dep't of Soc. & Health Services*, 177 Wn.2d 804, 832, 306 P.3d 920 (2013) (internal citations omitted). There is no requirement that the action be correct. *Id.* Here, the facts are undisputed: without notifying the next of kin, Southwick moved the remains of 37 people and altered its property during that process. Those acts reasonably appeared to violate RCW 68.50.220 and RCW 68.24.060. Thus, the Board’s discipline of Southwick had a reasonable basis in fact and the law. Because the Board’s discipline was substantially justified, Southwick is not entitled to attorney fees and other expenses under the EAJA.

Nonetheless, the Board’s Order should be affirmed, and Southwick should be denied attorney fees and costs.

VI. CONCLUSION

When Southwick removed the cremains from their plots without notifying the next of kin, it ignored its obligations under RCW 68.50.140 and RCW 68.50.220 and engaged in unprofessional conduct under the URBP. When Southwick moved the urn garden where those 37 people were resting without authority of law, it violated RCW 68.24.060, which prevents a cemetery from altering its property once human remains have been placed there. Southwick was provided all due process to contest the alleged violations of the standards of professional conduct. The Board's Final Order is without error of law, and should be affirmed.

RESPECTFULLY SUBMITTED this 20th day of December, 2016.

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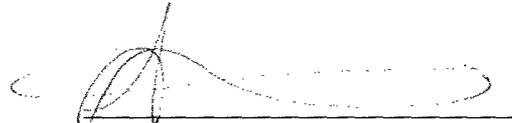
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AMY PHIPPS, Legal Assistant

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