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NO. 95237-0

SUPREME COURT OF THE STATE OF WASHINGTON

SOUTHWICK, INC., a Washington Corporation,

Appellant,

v.

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

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Licensed cemeteries are entrusted with the responsibility of ensuring that the deceased rest undisturbed. Southwick, Inc., a licensed cemetery, violated RCW 68.50.140, which provides a general prohibition on moving human remains, when it disinterred the cremated human remains of 37 individuals without first notifying their next of kin. After burial, a cemetery may move the deceased to another location within the cemetery. But the cemetery is required to “provide notification” to the next of kin “before moving human remains.” RCW 68.50.220.

Southwick makes the extraordinary argument that RCW 68.20.060 and RCW 68.24.110, which authorize cemetery authorities to adopt and apply operational rules, allow Southwick to adopt an internal rule to move human remains without notifying next of kin. But Southwick’s rules cannot—and by their own language do not—absolve it of the statutory requirement to notify the next of kin before moving human remains.

The Court should affirm the Board’s order imposing administrative sanctions against Southwick for violating the laws governing cemeteries.

II. ISSUE PRESENTED

Did Southwick, Inc., unlawfully disinter and relocate human remains without prior notice to the next of kin as required by chapter 68.50 RCW?

III. STATEMENT OF THE CASE

A. Southwick Moved the Cremated Remains of 37 Individuals Without Notifying Their Next of Kin

The underlying facts are undisputed. 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), 483. Around 1985,¹ Southwick established an urn garden, which eventually contained 37 urns. AR 136-37, 483.

Southwick adopted its current business rules in July 2011, including a rule to address “correction of errors” in interments. AR 83, 94, 96, 482-83. One month later, in August 2011, the City of Olympia (City) informed Southwick that the urn garden was above a City water easement and asked Southwick to remove the urns and other encroachments. AR 280 (FF 6), 179, 484-85. Southwick informed the City by letter that it obtained permission to remove two “people” and were working on the cremated remains. AR 184. Southwick concluded its letter by stating, “Thank you for allowing our families the time they need to relocate their loved ones.” *Id.* Despite taking three years to move the urn garden, Southwick never

¹ Owner, Tim Burgman, submitted a declaration stating Southwick established the urn garden in 1985. AR 136-37. His daughter, Theresa Burgman, testified at the hearing that Southwick established the urn garden in 1986. AR 483.

provided any notice to the families of the remaining deceased prior to disinterring the urns or after reburying them. AR 281 (FF 14), 486-87.

The State learned that Southwick moved the urns without notifying relatives after Connie Thompson visited the cemetery and discovered that her mother's and father's remains had been disturbed and relocated without her family's knowledge. AR 138-39. Following Ms. Thompson's visit, her niece (the granddaughter of Ms. Thompson's parents) filed a complaint with the Department of Licensing. *Id.*

B. The Department Issued Southwick a Statement of Charges

The Uniform Regulation of Business and Professions Act, chapter 18.235 RCW, makes it "unprofessional conduct" to violate any provision of chapter 68.50 RCW and empowers the Board to impose civil penalties for the violations, including monetary penalties of up to \$5,000 per violation. RCW 18.235.130(8); RCW 18.235.110(1)(h). Accordingly, the Department of Licensing issued Southwick a Statement of Charges seeking civil sanctions against Southwick's cemetery certificate of authority for unprofessional conduct. AR 15-17, 44-45.² The Department alleged Southwick violated two statutes governing the disturbing of human

² Southwick erroneously referred to the Board's disciplinary process as quasi-criminal. Pet. 8. Only proceedings that seek to revoke certain professional licenses, such as legal or medical licenses, are considered quasi-criminal. *Hardee v. State*, 172 Wn.2d 1, 6, 256 P.3d 339 (2011).

remains: RCW 68.50.220, which requires “notification to the [next of kin] before moving human remains,” and RCW 68.24.060, which prohibits altering a cemetery property if doing so will disturb interred remains. *Id.*

Southwick conceded that it moved remains without notifying the next of kin but contended that its own internal rules and regulations authorized it to move the remains without complying with the statutes regulating cemeteries. AR 58-59, 122-27, 385-88. Southwick relied on its newly-adopted internal rule, which states that the cemetery may “correct errors” made in interments, disinterments, and removals. AR 163 (Southwick rule 10(j)). Southwick’s internal rules also require all interments, disinterments, and removals to be made subject to the laws of “properly constituted authorities.” AR 159.

In response to cross motions for summary judgment, the Funeral and Cemetery Board’s presiding officer concluded that Southwick unlawfully disturbed human remains in violation of RCW 68.50.140. AR 282 (CL 5-6). The presiding officer further held that Southwick had not notified or obtained permission from surviving relatives, as required by RCW 68.50.220 and RCW 68.50.200. AR 281 (FF 14). The presiding officer ordered the matter set for hearing for the Board to determine the appropriate sanction. AR 283.

Southwick moved for reconsideration, arguing that the order violated procedural due process because the Amended Statement of Charges did not allege a violation of RCW 68.50.140. AR 382-98. Southwick also contested the conclusion that Southwick violated RCW 68.50.140, continuing its argument that its internal business rules and regulations provided it the full legal authority to move human remains at its discretion, without notification. AR 389-91.

C. The Board Issued a Final Order

The Board granted Southwick's motion for reconsideration and held a hearing on the motion and the issue of penalties. AR 8. The Board found that Southwick violated RCW 68.50.140 by moving the remains without notifying surviving family members. *Id.* The Board determined that RCW 68.50.140 provides a "general prohibition against removal of interred human remains," unless an exception applies. AR 7 (CL 4.4). The Board explained that remains may be moved if the cemetery obtains the consent of the next of kin or provides notice to the next of kin, pursuant to RCW 68.50.200 and RCW 68.50.220. AR 7 (CL 4.5 & 4.6). Because Southwick did not obtain permission or provide notice, the Board held that Southwick disinterred 37 human remains in violation of RCW 68.50.140. AR 7 (CL 4.6). The Board also concluded that Southwick violated RCW 68.24.060

because it moved human remains when altering a plot map and failed to properly update the plot map. AR 8 (CL 4.7).

The Board determined that in violating RCW 68.50.140 and RCW 68.24.060, Southwick engaged in unprofessional conduct under RCW 18.235.130(8). AR 7 (CL 4.3-4.9). Although the Board was statutorily authorized to issue a fine of up to \$5,000 for each of the 37 failures to notify next of kin, it imposed a sanction of only \$7,500. RCW 18.235.110(1)(h); AR 9. In addition, the Board required Southwick to attempt to notify the next of kin, including placing an appropriate notice in the local newspaper for three days. AR 9; *see* RCW 18.235.110(1)(j) (allowing disciplinary authorities to require “other corrective action.”).

D. The Board’s Order Was Repeatedly Affirmed on Appeal

The Board’s order was affirmed on appeal to the superior court. CP 4-29. Southwick appealed to the Court of Appeals, which held: (1) the Board satisfied the requirements of procedural due process by giving Southwick notice and an opportunity to be heard on the issue of RCW 68.50.140 before issuing a final order, (2) the Board properly concluded Southwick violated RCW 68.50.140, but (3) the Board erred in finding Southwick violated RCW 68.24.060. *Southwick, Inc. v. Dep’t of Licensing*, 200 Wn. App. 890, 893, 403 P.3d 934 (2017). The Court remanded to the Board to reconsider the monetary sanction in light of its ruling. *Id.* at 893.

This Court granted Southwick's petition solely on the issue of whether Southwick acted with "authority of law" under RCW 68.50.140 when it moved the cremated remains without notifying the next of kin.

IV. ARGUMENT

A. Standard of Review

The Administrative Procedure Act governs this Court's review of the Board's Final Order. RCW 34.05.570. Southwick bears the burden of proving the invalidity of the Board's decision. RCW 34.05.570(1)(a).

The Court reviews the Board's legal conclusions de novo under the error of law standard. *Ames v. Health Dep't Med. Quality Health Assurance Comm'n*, 166 Wn.2d 255, 260, 208 P.3d 549 (2009). Although the Court is not bound by the Board's interpretation of the law, it "accord[s] substantial weight to the agency's interpretation of the law it administers—especially when the issue falls within the agency's expertise." *Id.* at 260-61. Here, application of the laws concerning disinterment and reburial of human remains falls squarely within the expertise of the Funeral and Cemetery Board. RCW 68.05.090.

Finally, the determination of whether undisputed facts amount to a statutory violation is a question of law, which the Court reviews de novo. *See State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). The Court

may affirm on any legal ground supported by the record. RAP 2.5(a); *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

B. Southwick Violated the Law When It Disinterred Human Remains Without Notifying the Surviving Relatives

Southwick violated Washington law, and thus committed unprofessional conduct, when it disinterred the remains of 37 individuals, and reburied them in another location, without notifying or obtaining the consent of surviving relatives. This action violates RCW 68.50.140, which provides in relevant part:

(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.

Southwick's movement of cremated remains falls squarely within this statute. Cremated remains are included in the statutory definition of "human remains." RCW 68.04.020. And Southwick is a person within the meaning of the statute. Although "person" is not defined in Title 68 RCW, it may be construed to include a corporation. RCW 1.16.080; *see also State v. Evans*, 177 Wn.2d 186, 194, 298 P.3d 724 (2013) (interpreting identity theft statute use of term "person" to include corporations). Indeed, if the

term “person” did not include corporations, it would have clearly unintended consequences throughout chapter 68.50 RCW. *See, e.g.* RCW 68.50.185 (prohibiting a person authorized to dispose of human remains from cremating more than one body at a time); RCW 68.50.240 (establishing recordkeeping requirements for persons in charge of internments or cremation).

Read in full, chapter 68.50 RCW contains limited exceptions to the general prohibition on disinterring human remains. Generally, remains may be removed from a plot only if consent is obtained from a surviving family member, RCW 68.50.200, or permission is granted by a court. RCW 68.50.210. These requirements do not apply when a cemetery authority moves human remains within the cemetery. RCW 68.50.220. But, when doing so, RCW 68.50.220 mandates that a cemetery authority “shall provide notification” to the next of kin “*before* moving human remains.” *Id.* (emphasis added).³ Southwick failed to notify the next of kin as required by RCW 68.50.220.

³ “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.*” RCW 68.50.220 (emphasis added).

As this Court has recognized, “there is a right of custody over and interest in, a dead body, and the disposal of the body.” *Adams v. King County*, 164 Wn.2d 640, 658, 192 P.3d 891 (2008) (quoting *Herzl Congregation v. Robinson*, 142 Wash. 469, 471, 253 P.654 (1927)). It is deeply woven into the American culture that “[t]he normal treatment of a corpse, once it is decently buried, is to let it lie.”⁴ Although the prior notice required by RCW 68.50.220 is not for a set period of time, if the families had received notice, they could have asked to be present for the disinterment and reburial, ensured that cultural and religious beliefs were respected, and if necessary, obtained an injunction or other relief from the courts. *See, e.g. Bellevue Masonic Temple, Inc. v. Lokken*, 75 Wn.2d 537, 545, 452 P.2d 544 (1969) (approving a court order that “scrupulously respected the family’s feelings” by allowing them to be present, inspect, and object to the manner in which remains were disinterred); *Herzl*, 142 Wash. at 471 (recognizing Orthodox Jewish custom regarding disinterment).

Southwick’s failure to comply with the law is particularly egregious because the cemetery took three years to respond to the City’s request that the urns be removed from the easement. There is no question that there was

⁴ Peter Zablotzky, “*Curst Be He That Moves My Bones:*” *The Surprisingly Controlling Role of Religion in Equitable Disinterment Decisions*, 83 N.D. L. Rev. 361 (2007) (quoting R.F. Martin, Annotation, Removal and Reinterment of Remains, 21 A.L.R.2d 472, 476 (2004)).

ample time to notify the surviving family members before disinterring their loved ones, as required by RCW 68.50.220. Therefore, the Court should affirm the Board's order.

C. The Undisputed Facts Amount to a Violation of RCW 68.50.220 and, Therefore, Unprofessional Conduct

Even if Southwick did not violate the broad prohibition on removing human remains under RCW 68.50.140, the Court should still affirm the Board's order imposing sanctions. 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). Because this Court reviews the application of the law to the undisputed facts de novo, this Court can sustain a judgment "on any theory established by the pleadings and supported by the proof." *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989); *Costich*, 152 Wn.2d at 477; RAP 2.5(a).

Here, by its plain language, RCW 68.50.220 requires a cemetery authority to "provide notification to the [next of kin] before moving human remains." The Board found, and Southwick does not dispute, that Southwick moved the remains of 37 individuals without notifying their next of kin. AR 5 (FF 3.2 (incorporating findings in Order on Motions for Summary Judgment)); 281 (FF 13-14). Further, the Department of Licensing charged Southwick with violating RCW 68.50.220, AR 45, and

the Board's final order found that Southwick "violated statutes pertaining to its licensure and thereby engaged in unprofessional conduct as alleged in the Amended Statement of Charges."⁵ AR 8 (Final Order 5.2). Applying RCW 68.50.220 de novo to the undisputed facts, the Court should conclude that Southwick violated that statute and, therefore, committed unprofessional conduct under RCW 18.235.130(8).

D. Southwick's Internal Rules Required Compliance with the Laws Governing Cemeteries

Even if Southwick could enact rules that override chapter 68.50 RCW—and it cannot—Southwick has not done so. The rule Southwick relies on states that it may correct errors made in interments. AR 163 (Southwick rule 10(j)). But Southwick's rules also state that any disinterment will be "subject to the orders and laws of the properly constituted authorities and to these Rules and Regulations." AR 159 (Southwick rule 10(a)). Based on Southwick's own rules, any family that entered into a contract with Southwick would not know that Southwick believed the cemetery's rules allows it to disinter remains without providing notice.

Southwick's communications with the City indicate that it was well aware that disinterment without notice was impermissible under both the

⁵ The Department alleged Southwick violated RCW 68.50.220 in both the initial and amended statement of charges. AR 37, 45.

law and Southwick's internal rules. Southwick informed the City that it obtained permission from the next of kin to move two sets of human remains. AR 184. Southwick concluded the letter to the City by stating: "Thank you for allowing our families the time they need to relocate their loved ones." *Id.* But instead of contacting the families to allow them to "relocate their loved ones," Southwick delayed compliance with the City's easement and relocated the loved ones without ever notifying the families.

E. Cemeteries May Not Adopt Rules that Conflict with Statutory Requirements

Even if Southwick's rules did state that it could disinter remains in violation of chapter 68.50 RCW, there would be no statutory authority for such rules. Cemeteries may not adopt rules that conflict with statutory requirements.

Even when the legislature delegates rulemaking authority to an administrative agency, agency rules that conflict with the law are invalid. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007); *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 591, 99 P.3d 386 (2004). Similarly, although municipalities have legislative authority, a city ordinance may not conflict with a state statute. *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991). And, while corporations are authorized to adopt by-laws, they may do so only so long

as they are “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).

Despite these clear limitations on rulemaking authority, Southwick argues that RCW 68.20.060 and RCW 68.24.110 provide cemeteries authority to adopt and enforce rules that contradict the statutes that regulate cemeteries. Pet. 19. In making this extraordinary argument, Southwick cites this Court’s decision in *State v. Gunwall*, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986), that the constitutional prohibition on intruding into an individual’s private affairs without “authority of law” refers to authority granted by a statute, common law, or court ruling. Pet. 19. Southwick contends that because cemeteries have statutory authority to enact rules, *any* rule a cemetery adopts is enforceable, even if it conflicts with state law.

If Southwick’s argument were correct, cemeteries could adopt rules exempting themselves from every statute governing cemetery operations, including, for example, the statute prohibiting cemeteries from refusing to bury a “non-caucasian.” RCW 68.50.035. The legislature cannot and has not delegated that authority. While RCW 68.20.060 and RCW 68.24.110 provide cemeteries with authority to enact rules and sell plots subject to those rules, they do not cede legislative authority to regulate cemeteries. RCW 68.20.060 provides:

A cemetery authority may make, adopt, amend, add to, revise, or modify, and enforce rules and regulations for the use, care, control, management, restriction and protection of all or any part of its cemetery and for the other purposes specified in RCW 68.20.061 through 68.20.067, 68.20.070 and [68.56.050].⁶

Even if the power to override state statutes could be delegated to private corporations, nothing in RCW 68.20.060 attempts to relieve cemetery authorities of the obligation to comply with state law or empower them to alter the law. There is simply no support for Southwick's contention that its internal rules provide authority of law to violate the statutory requirement that it notify the next of kin before moving human remains.

Nothing in RCW 68.24.110 provides additional rulemaking authority. The statute merely allows a cemetery to sell plots according to its internal business rules:

After filing the map or plat and recording the declaration of dedication, 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. Plots or rights of interment may be subject to other limitations, conditions, and restrictions as may be part of the declaration of dedication by reference, or included in the instrument of conveyance of the plot or rights of interment.

The plain language of this statute does not allow Southwick to create or enforce a rule that contradicts statutory authority. Cemetery rules are not

⁶ The current language of the statute refers to “* 68.48.080” which contains a reviser’s note stating this statute was recodified as RCW 68.56.050.

“law,” and they cannot provide the authority of law to excuse compliance with statutory requirements.

This Court should hold that cemetery rules are limited in scope and may not contradict the requirements found in statutes regulating cemeteries.

V. CONCLUSION

Southwick violated chapter 68.50 RCW when it disinterred human remains without providing notice to the next of kin. Southwick’s internal business rules do not and cannot excuse it from complying with the statutory preconditions to moving human remains. This Court should affirm the Board’s Order.

RESPECTFULLY SUBMITTED this 7th day of May, 2018.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7th day of May, 2018, at Olympia, Washington.



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