

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL
SERVICES, DIVISION OF FUNERAL,
CEMETERY, AND CONSUMER SERVICES,

Petitioner,

vs.

Case No. 14-1936

ROSE HILL CEMETERY COMPANY,

Respondent.

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RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on July 9, 2014, by video teleconferencing at sites located in Tampa and Tallahassee, Florida.

APPEARANCES

For Petitioner: Linje E. Rivers, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: George Saclarides, pro se
Rose Hill Cemetery Company
4406 East Chelsea Avenue
Tampa, Florida 33610

STATEMENT OF THE ISSUE

The issue is whether Respondent violated section 497.152(1)(a) and (b), Florida Statutes (2013), and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

The Department of Financial Services ("Department") filed an administrative complaint against Respondent Rose Hill Cemetery Company ("Rose Hill" or "Respondent") on March 19, 2014, alleging violations of chapter 497, Florida Statutes. Respondent requested a formal hearing before the Division of Administrative Hearings ("DOAH") on April 8, 2014, based upon disputed issues of material fact set forth in the Administrative Complaint. The Department referred the request to DOAH initiating the current proceeding. The parties filed a Joint Pre-Hearing Stipulation on June 30, 2014.

At the hearing, Petitioner presented the testimony of Jessica Helms Morse, Leonardo Rodriguez-Martinez, Christina Wilder, and Raymond Coleman as witnesses and offered 14 exhibits, all but one (Exhibit 9, the Affidavit of George Laing) of which were admitted into evidence. Respondent offered the testimony of its manager, George Saclarides, and offered one exhibit, which was admitted into evidence.

A one-volume Transcript was filed on August 12, 2014. After the hearing, Petitioner filed its proposed findings of fact and

conclusions of law on August 22, 2014. Respondent did not make a post-hearing submission.

References to statutes are to Florida Statutes (2013) unless otherwise noted.

FINDINGS OF FACT

Stipulated Facts

1. The Department and the Division of Funeral, Cemetery and Consumer Services ("Division") within the Department have jurisdiction over cemetery license number F039451.

2. At all times relevant to this matter, Rose Hill was licensed as a cemetery (license number F039451), pursuant to chapter 497, Florida Statutes. Rose Hill operated at 4406 Chelsea Avenue, Tampa, Florida 33610.

3. In 2013, Petitioner received a complaint from Mr. Leonardo Rodriguez-Martinez alleging that Rose Hill failed to use due care in the installation of a casket and vault during a grave-site funeral ceremony for his wife, Mrs. Maria Benitez Lugo.

4. In 2013, Mr. Rodriguez-Martinez contracted with Rose Hill for burial services for Mrs. Lugo along with the installation of a vault and casket.

5. On or about April 17, 2013, Rose Hill performed the contracted burial services.

6. After the services were completed, the casket was placed in a cement vault. The body of the deceased was inside the casket.

7. In order to lower the vault and casket into the burial plot, Rose Hill used a back hoe and attached a chain to the cement vault with the casket inside.

8. Raymond Coleman works for Rose Hill. He operated the back hoe used to inter the vault and casket of Mrs. Lugo.

9. While attempting to move the vault and casket, the chain attached to the back hoe broke causing the vault to fall and crack.

10. The cement vault cracked in such a manner that it was rendered unusable for the interment of Mrs. Lugo's casket.

11. Rose Hill staff proceeded to find a replacement vault.

12. Soon thereafter, Rose Hill replaced the broken chain and the broken vault and interred the casket without further incident.

Findings of Fact Not Stipulated to by the Parties

13. George Saclarides was hired in 2008 as the cemetery manager at Rose Hill.

14. As manager, Mr. Saclarides is responsible for maintaining the cemetery, purchasing equipment, maintaining the equipment and supplies needed to operate the cemetery, hiring the staff to maintain the premises, and performing cemetery services.

He is the individual responsible for meeting with consumers and entering into contracts for services at Rose Hill.

15. Mr. Saclarides hired Raymond Coleman as the assistant cemetery manager. Mr. Coleman is responsible for the daily maintenance of the cemetery grounds. He cuts the grass, maintains the premises, and performs general repairs.

16. Mr. Coleman also leads a team of workers during cemetery services. These responsibilities include digging burial plots, transporting cement vaults, and interring cement vaults and caskets.

17. Mr. Saclarides met with Mrs. Lugo's family after her death. Mr. Rodriguez-Martinez, the complainant in this matter, discussed the burial arrangements for his wife, Mrs. Lugo. An interpreter was used during these discussions because Mr. Rodriguez-Martinez speaks Spanish, not English, and Mr. Saclarides does not speak Spanish.

18. During this meeting, Mr. Saclarides discussed the service with the family and informed Mr. Rodriguez-Martinez that a remote set-up would be used for his wife's burial service, followed by the transport of his wife's casket via John Deere front end loader to her final resting place within the cemetery.

19. Mr. Rodriguez-Martinez expressed concern with how his wife's casket would be transported to the burial plot and said he

preferred to have pallbearers lift and carry the casket to the final burial location.

20. Mr. Saclarides' reason for having the service at the remote location within the cemetery, then transporting the casket to the burial plot, was that the remote location was more convenient for elderly and people unable to walk on uneven ground to reach the site. Also, some people do not like to walk across gravesites to reach the burial plot.

21. In retrospect, Mr. Saclarides was glad he suggested the remote site for the service. The day of the funeral when the burial plot was dug, the maintenance workers had a difficult time shoring up the sides of the plot. This was due to the high content of "sugar sand" in the soil which causes the sides of the plot to crumble or cave in. He does not believe the pallbearers could have carried the casket all the way to the site because the two sand piles from the site were blocking access to the site. Also, he feared the sides of the site could crumble or even collapse.

22. On April 19, 2013, the services started at the front of the cemetery, in the remote location, and went smoothly. As the family and Mr. Saclarides were walking the 65-70 feet from the remote location to the burial site, Mr. Rodriguez-Martinez (and others) heard a loud crash. When the back hoe was lifting the vault with Mrs. Lugo's casket inside, the chain attaching the

vault to the back hoe broke, and the vault and casket fell about two to three feet to the ground.

23. Mr. Rodriguez-Martinez returned to the remote location after hearing the crash and found the cement vault with his wife's casket lying on the ground. The vault had broken in the fall. The casket was undamaged.

24. Ms. Christina Wilder, a guest at the funeral, witnessed the events as they unfolded. She saw the casket swinging as it was lifted and heard the vault fall, stating it sounded "like a cannon shot." She was critical of Rose Hill for not having a plan in place for emergencies or mishaps such as this.

25. Rose Hill did have a plan in place. Mr. Saclarides sent his employees, including Mr. Coleman, to retrieve a new vault from the rear portion of the cemetery and place the casket inside to be moved, with a new chain attaching it to the back hoe, to the burial plot. This entire process caused a delay of about 45 minutes.

26. Ms. Wilder was present with Mr. Rodriguez-Martinez and served as his interpreter when he met with Ms. Jessica Helms, the Division's examiner. Ms. Wilder helped Mr. Rodriguez-Martinez file his complaint and provided pictures and a DVD of the funeral service and the incident to Ms. Helms.

27. Ms. Helms investigated the complaint filed by Mr. Rodriguez-Martinez. She is responsible for inspections,

financial examinations, and investigations into licensees of the Division. She has completed over 100 complaint investigations while employed with the Division.

28. Ms. Helms has completed approximately five inspections of Rose Hill. She visited the cemetery to investigate Mr. Rodriguez-Martinez's complaint. She was already familiar with the set-up at Rose Hill. She had expressed her safety concerns regarding the remote set-up with Mr. Saclarides on multiple occasions. Rose Hill continued to use the remote set-up, despite Ms. Helms' concerns.

29. Ms. Helms inspects about 25 cemeteries a year, and the Division regulates about 150 cemeteries throughout the state. She has never seen the remote set-up at any cemetery, except Rose Hill. Based upon her experience, she believes other cemeteries do not use the remote set-up due to concerns with the risk of keeping human remains secure during transport in a fashion such as occurred in this case.

30. Ms. Helms states that a cement vault is not made to be used for transporting a casket containing human remains. A cement vault is used to support the grave space so that soil, dirt, and other elements will not cause the casket to collapse once interred in the burial space.

31. Ms. Helms testified that National Concrete Burial Vault Association ("NCBVA") standards deal with the construction and

use of concrete burial vaults. She believes the standards suggest that cement vaults not be used as transportation containers. A review of the NCBVA standards provided at the hearing does not support this opinion. The standards neither provide requirements for how to transport a casket inside a vault, nor prohibit such transport. The standards instruct a manufacturer of cement vaults on what materials to use and what load and stress are required.

32. Ms. Helms did provide numerous reasons why she believed the remote grave site is not appropriate and why it could lead to an incident such as occurred here. A remote location was unnecessary in her opinion when immediately following the service the remains were to be interred.

33. Further, having the casket placed into the vault and having the entire 2,000-pound vault attached to a tractor and lifted with the family and guests of the deceased present is an uncommon and inappropriate practice. She believes that allowing this to occur in the presence of those assembled for the funeral is "disturbing."

34. Ms. Helms questions whether the use of the remote location was for the convenience of the family and guests or for the cemetery. The distance to the final burial site was only 65-70 feet beyond the remote location. Also, the deceased's spouse wanted the service at the final burial location or, at

least, wanted the casket carried by pallbearers, not by tractor, to the final location.

35. Ms. Helms acknowledged that Mr. Saclarides maintains all the required records for Rose Hill and that the cemetery has shown "great improvement" since he took over as manager in 2008.

36. Mr. Coleman has used the same chain that failed in this instance the entire time of his employment at Rose Hill, at least six years. It has never failed in the past. The chain is heavy grade and rated to handle at least 4,000 pounds, more than enough to carry the vault with the casket enclosed.

37. Mr. Saclarides showed remorse on the day of the funeral after the incident with the vault being dropped from the tractor when the chain failed. He used his best efforts to ensure that a new vault was quickly procured, and that the vault and casket were properly interred within 45 minutes of the incident.

38. Mr. Saclarides showed remorse again in his response to the complaint giving rise to this matter when he personally apologized for the accident during the burial service. He noted that Rose Hill had never had a chain break before the incident on April 19, 2013.

39. Mr. Saclarides appeared sincere in his remorse for the incident occurring at the funeral of Mrs. Lugo when he testified at hearing.

CONCLUSIONS OF LAW

40. DOAH has jurisdiction of the parties and the subject matter of these proceedings pursuant to sections 120.569 and 120.57(1), Florida Statutes.

41. The Board of Funeral, Cemetery, and Consumer Services ("Board"), created within the Division, and the Department have jurisdiction over Rose Hill's license as a cemetery.

42. The Board and Division have jurisdiction over the subject matter of this proceeding pursuant to the provisions of section 20.121 and chapter 497, Florida Statutes, the Florida Funeral, Cemetery, and Consumer Services Act ("Act").

Burden and Standard of Proof

43. Because administrative fines are penal in nature, the Department has the burden of proving by clear and convincing evidence the allegations of the Administrative Complaint. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

44. The "clear and convincing" standard requires:

[T]hat the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re: Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

45. Statutes that authorize the imposition of penal sanctions are strictly construed. Any ambiguity in the law is construed in favor of Respondent. Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990).

46. Although the "clear and convincing" standard would seem to preclude ambiguous evidence, this standard of proof can be met when the evidence is merely in conflict. Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991). In fact, a case cannot go to hearing under section 120.57(1)(i) and jurisdiction must be relinquished, unless some factual evidence is in conflict.

47. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegations of wrongdoing made in the charging document. Due process prohibits Petitioner from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument unless those matters have been tried by consent. See Shore Vill. Prop. Owners' Ass'n, Inc. v. Dep't of Env'tl. Prot., 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); and Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

The Charges

48. Count I of the Administrative Complaint (the only count) alleges that "[w]hile attempting to move the vault and casket, the chain attached to the back hoe broke causing the vault to fall and crack. It was determined that Rosehill [sic] failed to install the vault and casket with due care when the chain attached to the back hoe broke causing the vault to fall and crack."

49. Count I of the Administrative Complaint alleges violations of two provisions of the Act:

Section 497.152(1)(a), Florida Statutes, which provides that it is a violation to fail to comply with any provisions of this chapter or any lawful order of the board or department or of the statutory predecessors of the board or department.

Section 497.152(1)(b), Florida Statutes, which provides that it is a violation to commit fraud, negligence, incompetency, or misconduct in the practice of any of the activities regulated under this chapter.

50. In determining whether Rose Hill violated the statutes above, section 497.386(4), Florida Statutes, applies: "all human remains transported or stored must be completely covered and at all times treated with dignity and respect."

51. In determining whether the required level of respect and dignity has been breached, the use of an objective reasonable-person standard is required. Cf. State v. Kees, 919

So. 2d 504, 507-508 (Fla. 5th DCA 2005) (explaining that using a subjective standard, instead of the required objective reasonable-person standard, in the criminal statute under review therein would result in unconstitutional arbitrary and capricious prosecution). The Department concludes from this analysis that since no one else in the cemetery industry in Florida implements a remote service, it is reasonable to conclude the required level of respect and dignity was not shown for the remains of Mrs. Lugo by using a tractor to transport her casket inside a cement vault. While reliance on this case interpreting a criminal statute may be tenuous, standing alone, the testimony offered by several witnesses at hearing significantly strengthens this position.

52. Mr. Rodriguez-Martinez, the husband of the deceased, Mrs. Lugo; Ms. Wilder, a guest and family member of the deceased; and Ms. Helms, the Division's examiner, each testified they found Rose Hill's treatment of Mrs. Lugo's body to be undignified and disrespectful. Further, while specific standards and methods of vault transport are not mentioned in the Act, the statute specifically requires that human remains be treated with dignity and respect at all times. The evidence is demonstrable and substantial that Mrs. Lugo's body was not treated with dignity and respect at all times pursuant to section 497.386(4).

53. The finding that Mrs. Lugo's remains were not treated with dignity and respect at all times is not a finding that

Mr. Saclarides and the employees of Rose Hill intended to treat the deceased with less than the full amount of dignity and respect, which she and her family deserved. Mr. Saclarides gave numerous explanations for why Rose Hill, as a matter of common practice, hold funerals in the remote location, then move the vault containing the casket and the remains to the burial site. The reasons given, as a general proposition, are not wholly unreasonable: many people would prefer a shorter walk to the site of the service for health and other personal reasons; some people prefer not to walk across ground hallowed by those who are buried beneath it; the issue of gravesites collapsing or settling are common in parts of Florida with sandy (or "sugar sand") ground and pallbearers could have a difficult time traversing the ground to the grave site. He also notes that there is no statutory provision prohibiting his use of the remote site for a burial service, followed by transport of the casket within the concrete vault to the final burial site. Mr. Saclarides is correct in his reading of the Act with respect to remote services and transport to a burial site not being prohibited.

54. While the reasons offered by Mr. Saclarides for holding the remote service followed by transport to the final burial site have some merit, they are not valid in this case. From the first meeting at Rose Hill, Mr. Rodriguez-Martinez seemed uncertain and disturbed by the thought of his wife's remains being transported

by tractor or other heavy equipment to the burial site. He preferred to have pallbearers bear the casket from the remote site to the burial site. His worst fears were confirmed when the unfortunate accident occurred just after the conclusion of the ceremony. His pre-funeral concerns alone should have served as a warning to Mr. Saclarides that the family might be upset by seeing the vault carried by tractor to the burial site. The accident, while impossible to imagine or predict by Mr. Saclarides or his employees, resulted in an emotional nightmare for the family and friends of the deceased. Fortunately, the casket and the remains were not damaged or revealed in the mishap.

The Penalty

55. Florida Administrative Code Rule 69K-11.001 contains the disciplinary guidelines applicable to specific violations of chapter 497 by cemeteries. It provides as follows:

Listed below is a range of disciplinary guidelines from which disciplinary penalties will be imposed upon licensees guilty of violating Chapter 497, F.S. The disciplinary guidelines are based upon a single-act violation of each provision listed.

56. Rule 69K-11.001(2) (d) provides a maximum penalty of revocation for violation of section 497.152(1) (a). Rule 69K-11.001(2) (k) also provides a maximum penalty of revocation for violation of section 497.152(1) (b).

57. The Board may deviate from the disciplinary guidelines that list the minimum or maximum penalties listed in subsection (2) of rule 69K-11.001, in the presence of aggravating or mitigating circumstances that are supported by clear and convincing evidence:

Aggravating or mitigating circumstances may include, but are not limited to, the following:

1. The severity of the violation.
2. The degree of harm to the consumer or public.
3. The number of times the violations previously have been committed by the licensee.
4. The disciplinary history of the licensee.
5. The status of the licensee at the time the violation was committed.

Rule 69K-11.001(3).

58. The Department failed to prove, by clear and convincing evidence, that the methods used by Rose Hill were a danger to the consumers and public. The accident that occurred on April 19, 2013, at Rose Hill resulting in the dropping of the vault with the casket and remains of Mrs. Lugo were unfortunate and clearly disturbing to the family and those who attended the funeral. They were disturbing to the cemetery manager and his employees, as well. However, they do not rise to the level where the actions of the cemetery personnel that day exhibited "fraud, deceit, negligence, incompetency, or misconduct in the practice of any of the activities regulated by this chapter" pursuant to

section 497.152(1)(b). While the practice of holding a remote service then moving the vault and casket in the manner described here was both unusual and unique in Florida, the evidence does not support a finding that Rose Hill's staff could have foreseen what occurred on the day in question. The chain had never broken previously, and no individual's casket had ever been dropped while in a vault being transported. The staff at Rose Hill did everything in their power to bring a new vault to the site and complete the interment within a reasonable amount of time.

59. This is not to conclude that Rose Hill is without blame in this matter. The Department presented clear and convincing evidence that Rose Hill violated a provision of chapter 497, specifically, section 497.386(4), which requires that "all human remains transported or stored must be completely covered and at all times treated with human dignity and respect." Handling the casket and vault in such a public manner as done by Rose Hill and, apparently, only by Rose Hill, is not dignified to the same extent as discreetly removing the casket after a funeral service and driving it by hearse, wheeling it with attendants, or carrying it with the help of pallbearers to the final burial site. The unusual practice that occurred at Rose Hill was disturbing to the deceased's family when they learned about the practice prior to the funeral, to those who attended the funeral,

and to the Department's examiner, who has considerable experience in the inspection of cemeteries and funeral homes.

60. Rose Hill mitigated the penalty to be imposed for its violation of section 497.152(1)(a) in several ways, pursuant to rule 69K-11.001(1). The violation was not severe because Rose Hill had performed such tasks innumerable times in the past without a mishap such as occurred here. The degree of harm to the consumer or public was moderate. While the family was greatly upset when the vault dropped and cracked, the staff immediately remedied the problem as best they could by retrieving a new vault and transporting it along with the casket inside to the burial site within 45 minutes. This was fast work on the part of the cemetery staff. While it may be argued that this practice of transport was engaged on many times in the past, Rose Hill was never cited for it, despite the examiner being aware of the practice and frowning upon it. Therefore, Respondent was not on notice that it was violating a provision of the Act until this matter arose. Rose Hill appears to have a good disciplinary record, at least since 2008 when Mr. Saclarides became manager. No evidence was produced of any prior disciplinary action taken against Respondent. Additionally, no evidence was produced that the licensee was in a questionable status with the Department at the time of this violation, which would constitute an aggravating factor.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner enter a final order finding that Respondent Rose Hill violated sections 497.152(1)(a) and 497.386(4) of the Act, as alleged in the Administrative Complaint, and imposing discipline as follows: a \$1,000 administrative fine and a reprimand. Further, to the extent the Board has authority, it is recommended that the Board order Rose Hill to cease and desist from its practice of remote burials with transport of the vault containing the casket and initiate rulemaking or seek a legislative change, if desired, to make the practice of remote burials specifically prohibited.

DONE AND ENTERED this 9th day of September, 2014, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
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this 9th day of September, 2014.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.