

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

Case No. 22-0066PL

vs.

ADRIENNE DISHONNE LEGER,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham, Division of Administrative Hearings (“DOAH”), for final hearing by Zoom teleconference on March 9, 2022, at multiple sites in Leon and Palm Beach Counties, Florida.

APPEARANCES

For Petitioner: James A. Bossart, Esquire
Department of Financial Services
Larson Building, Room 612
200 East Gaines Street
Tallahassee, Florida 32399

For Respondent: Alterraon Phillips, Esquire
APLaw, LLC
11358 Okeechobee Boulevard, Suite 2
Royal Palm Beach, Florida 33411

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, a licensed funeral director, failed to maintain a body under refrigeration or otherwise to treat

the remains with dignity and respect, as Petitioner alleges; and, if so, whether and what penalty or penalties should be imposed against Respondent's license.

PRELIMINARY STATEMENT

On November 29, 2021, the Department of Financial Services ("DFS") issued a two-count Administrative Complaint against Adrienne Dishonne Leger ("Leger"). The gravamen of Count I, withdrawn at hearing, was the allegation that Leger had failed to obtain a burial-transit permit. In Count II, DFS alleged that Leger had improperly held a human body for more than 24 hours without either refrigerating the body or embalming it, as required by statute, and that she had failed to handle the body with dignity and respect. Because DFS presented evidence at hearing showing that the body in question had been both embalmed and maintained under refrigeration, however, Count II effectively boiled down to the charge of disrespectful handling, which is what this case is primarily about.

Leger timely requested a formal administrative hearing by filing an Election of Proceeding, which DFS referred to DOAH on January 7, 2022. Upon assignment, the undersigned set the case for a final hearing on March 9, 2022.

At the final hearing, which took place as scheduled with both parties present, DFS called six witnesses: Ebony Morgan, Terrence Fuller, Jessica Cordero, Patricia Jo Ralph, Geronimo Mena, and Joseph Finocchiaro. In addition, Petitioner's Exhibits 1, 2, 5, 7, 9, and 10 were admitted into evidence. Leger elected not to present a defensive case-in-chief.

Each party timely filed a Proposed Recommended Order (“PRO”). The parties’ PROs have been considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2021, except that all references to statutes or rules defining disciplinable offenses or prescribing penalties for committing such offenses are to the versions that were in effect at the time of the alleged wrongful acts.

FINDINGS OF FACT

1. Leger is a Florida licensed funeral director and embalmer, holding license number F045309. At all times relevant to this matter, Leger was the funeral director in charge (“FDIC”) of RWS Funeral Services, LLC, d/b/a Shawn Johnson Funeral and Cremation Services (“SJFCS”).

2. As a licensee, Leger falls within the regulatory jurisdiction of DFS, which, among other statutory responsibilities, prosecutes alleged violations of chapter 497, Florida Statutes, for which the Board of Funeral, Cemetery, and Consumer Services (the “Board”) has found probable cause.

3. The main disciplinary charge against Leger in this case, i.e., that she failed to treat a body with dignity and respect, is founded upon a single allegation of material fact, which is stated in the Administrative Complaint as follows:

On January 27, 2020, [driver] Sam Pierce was called in by [Leger] to remove [R’Asia Washington’s] body from [SJFCS] to Everglades Crematory. Sam Pierce observed that [the] body was lying on the floor, not refrigerated, and was in an advanced state of decomposition.

Admin. Compl. at 4 (emphasis added).

4. Mr. Pierce, the driver identified in the Administrative Complaint as an eyewitness to this allegedly undignified and disrespectful handling of the body, did not testify at hearing. There is no evidence in the record establishing that Mr. Pierce, or anyone else, saw the body of R'Asia Washington (the "Decedent") *lying on the floor* at the SJFCS funeral home on January 27, 2020, or any other date. The evidence likewise fails to show that the Decedent's body was "in an advanced state of decomposition" as alleged. Although there *is* persuasive evidence that, by February 7, 2020, the Decedent's body showed signs of surface decomposition indicative of inadequate or nonexistent post-embalming care, Leger was not charged with negligently failing to provide reasonable "aftercare," and thus she cannot be found guilty in this proceeding on that ground. In short, DFS failed to prove the key factual allegation against Leger (i.e., that the Decedent's body had been lying on the floor, decomposing) upon which the charge of failing to treat the Decedent's body with dignity and respect was based.

5. Because of this failure of proof, few additional findings of fact are necessary. Nevertheless, a brief historical narrative will be provided, to make a complete record, and to elaborate upon the ultimate determination that Leger is not guilty of the offenses with which she was charged herein.

6. The Decedent, a minor, passed away under tragic circumstances on January 22, 2020, at a hospital in Savannah, Georgia, while away from home on a family vacation. The Decedent's mother, Ebony Morgan, immediately contacted SJFCS to make funeral arrangements, which included transporting the body back to Palm Beach County, Florida, where the family was from.¹ After taking care of this sad business, Ms. Morgan drove back to her home in West Palm Beach the same day.

¹ A Georgia funeral home called Celebration of Life appears to have collected the Decedent's body from the hospital and *possibly* embalmed the body before it was removed to Florida. As will be seen, the body *was* embalmed, but the evidence fails to show who performed the initial procedure, where it was done, or when.

7. On Friday, January 24, 2020, Ms. Morgan viewed her daughter's body at the SJFCS funeral home. The Decedent looked "the same" to Ms. Morgan as she had two days earlier in the Georgia hospital.

8. SJFCS does not have refrigeration facilities on site and must contract with other companies for the storage under refrigeration of human remains. It is undisputed that, on Monday, January 27, 2020, SJFCS placed the Decedent's body into refrigerated storage at Everglades Cremations, a refrigeration facility located in Broward County. There, the body remained until February 6, 2020, a fact which is also undisputed.

9. The evidence fails to establish where the Decedent's body was kept over the weekend preceding its removal to Everglades Cremations. It is *possible* that the body was taken to ABCO Crematory in Fort Lauderdale, as Respondent's counsel told DFS in a letter to its investigator dated March 12, 2020. A finding to this effect, however, cannot be made on the instant record.² This minor factual dispute is immaterial.³ To repeat for emphasis, there is no evidence that the body was badly decomposed or lying on a floor at the SJFCS home on January 27, 2022, as alleged in the Administrative Complaint. There is, further, no evidence concerning the condition of the body upon its arrival at Everglades Cremations, where it would stay, in refrigerated storage, for ten days.

10. On February 1, 2020, Leger signed a DFS form entitled "Funeral Establishment — Monthly Report of Cases Embalmed and Bodies Handled" ("Bodies Handled Report"), which is a record that section 497.382 requires be

² Since the attorney's letter does not mention Everglades Cremations, it is possible that he was simply mistaken on this point; the evidence shows that SJFCS moved other bodies to ABCO Crematory for storage under refrigeration during this time frame and that the Decedent's body could have been among them. It should be added that there is no allegation or evidence, nor does the undersigned suspect, that SJFCS's counsel tried to mislead DFS regarding the location of the body.

³ To be clear, there is no evidence that the body was lost or misplaced during the weekend in question, nor was Leger charged with being unable to account for the whereabouts of the body.

filled out and executed each month by a funeral establishment's FDIC. This one, for the month of January 2020, shows that SJFCS handled five bodies during the period, including that of the Decedent. Leger is identified as the embalmer for four of the cases listed in the January 2020 Bodies Handled Report. She is not, however, named as the embalmer of the Decedent. In lieu of providing the embalmer's name where the form calls for this information, the report states "ship-in."

11. The statute requires that the Bodies Handled Report be signed by "the embalmer who performs the embalming," if the body has been embalmed by someone other than the FDIC. § 497.382(1), Fla. Stat. As mentioned above, *see* footnote 1, the evidence fails to establish, according to the clear and convincing standard, who embalmed the Decedent's body. The January Bodies Handled Report, however, which Leger signed *before* the alleged mistreatment of Decedent's body became the subject of dispute, is persuasive proof that Leger likely was *not* the embalmer in this case. The report, moreover, supports the inference that the embalmer was not a Florida licensee (who would have been legally obligated to sign the report), which is consistent with the possibility that the Decedent was embalmed in Georgia, although the record evidence is insufficient to support a finding to this effect.

12. On February 6, 2020, after the Decedent's body had been returned to the SJFCS funeral home, Ms. Morgan saw her daughter's remains again for the first time since January 24, 2020, almost two weeks earlier. Ms. Morgan was understandably mortified to discover that the body, which had looked fine upon arrival in Florida, was now showing visible signs of decomposition—a distressing fact which is undisputed. In addition to its disturbing appearance, the poor condition of the body made an open casket funeral, which Ms. Morgan wanted, unlikely, if not impossible.

13. Dissatisfied with SJFCS, Ms. Morgan retained another funeral home, which retrieved the body and handled the funeral arrangements going forward. On February 7, 2020, a DFS investigator took photographs of the

Decedent's body at the successor funeral home. These pictures were received in evidence and, taken together, are clear and convincing proof that the body was, indeed, showing some effects of decomposition as of February 7, 2020.⁴

14. DFS called as an expert witness a full-time faculty member of Miami-Dade College named Joseph Finocchiaro. Mr. Finocchiaro is the program coordinator of funeral service education at the college, and he rendered opinions on the art and science of embalming, which the undersigned found to be credible and informative. The following findings on the subject of embalming are based upon Mr. Finocchiaro's unrefuted testimony.

15. Although often considered a single procedure, embalming is a process which involves a series of steps and acts, from the initial preservation of the body through the ongoing care necessary to slow down the natural decay until final disposition, e.g., cremation or burial.

16. Based upon his review of the photographs taken on February 7, 2020, Mr. Finocchiaro observed signs of decomposition indicating that the Decedent's body had not received proper post-embalming aftercare. Specifically, Mr. Finocchiaro saw desquamation (or "skin slip") and the presence of mold.

17. Skin slip occurs when the epidermis (top skin layer) separates from the dermis, causing the skin to peel off. This is one of the first signs of decomposition, and it is extremely common. Controlling desquamation is one of the most routine issues handled in the funeral home preparation room.

⁴ To a layperson such as the undersigned, who is unaccustomed to seeing human remains in a state of decay, the images are somewhat disturbing and unpleasant to view. It is easy to imagine that a family member, especially a parent, would be emotionally distressed, if not horrified, to see his or her loved one in such a state. For some perspective, however, the evidence shows that, to a professional knowledgeable about the process of decomposition and the means of arresting it, and whose work brings him or her into regular contact with human remains, the condition of the Decedent's body, while poor, probably would not have been shocking. A skillful practitioner, moreover, could mitigate the damage caused by the corruption to improve the body's appearance. Indeed, that is what happened in this case, as the successor funeral home restored the Decedent's body well enough to permit a limited viewing by immediate family, albeit not the open casket funeral originally planned.

18. The common treatment for skin slip is a surface compress, which involves the direct application of formaldehyde to the surface of the body, to preserve the remaining skin. This is a routine aftercare practice.

Mr. Finocchiaro saw no evidence in the pictures that compresses had been used to arrest the skin slippage visible on the Decedent's body.

19. Mold is a common occurrence when a body is stored in refrigeration. Mold must be removed immediately when found, usually with an abrasive scratch pad or sponge, followed by the application of a mold retardant. Based on his review of the photos, Mr. Finocchiaro saw no evidence of attempts to remediate the mold on the Decedent's body, which appeared to be extensive and likely was the result of more than a week's worth of growth.

20. Mr. Finocchiaro's opinions, which the undersigned accepts as true, are that, as of February 7, 2020: (i) the Decedent's remains likely had been embalmed; (ii) the condition of the body was very poor; and (iii) the remains had not received proper post-embalming aftercare. It is so found.

21. Mr. Finocchiaro concluded, based upon the lack of reasonable aftercare, that the body had not, in his opinion, been treated with dignity and respect. With due respect to Mr. Finocchiaro, whose thoughtful testimony the undersigned found genuinely helpful, his opinion as to this ultimate fact is rejected, not only because it invades the province of the fact-finder as to a matter that requires no expertise, but also because the inference that the body was treated in an undignified and disrespectful manner does not inevitably follow from the basic fact of negligent embalming with such force as to constitute clear and convincing evidence of mistreatment.

22. To explain, Mr. Finocchiaro's testimony establishes, clearly, that the Decedent's body would not have deteriorated to the poor condition it was in as of February 7, 2020, if reasonable post-embalming techniques had been applied according to the standard of care. In short, there is clear and convincing evidence of negligent embalming (or professional malpractice) in

the instant record.⁵ DFS did not charge Leger with negligent embalming based upon the failure to provide adequate aftercare, however, and thus a finding of such malpractice cannot provide grounds for discipline in this case, even assuming Leger could be held directly or vicariously accountable for same—an issue which need not be decided.

23. Although the phrase “dignity and respect” is nowhere defined in the statute or applicable rules, treating a body with dignity and respect is plainly not synonymous with embalming a body according to the standard of care. Think of a doctor who commits malpractice while treating his patients with the utmost dignity and respect, or, conversely, of the physician whose care and treatment is always impeccable despite his insulting or disrespectful bedside manner. The same is true in this context. While negligent embalming is *consistent with* failing to treat a body with dignity and respect, it is *not* consistent *only* with treating a body disrespectfully, any more than treating a body respectfully guarantees that the embalming will be performed in accordance with the standard of care.

24. In sum, the proof of negligent embalming in this case, without more than has been shown, is not clear and convincing evidence that the

⁵ Mr. Finocchiaro’s testimony was not rebutted, and the undersigned has credited this evidence, as noted. There are, however, a couple of points that give the undersigned pause. Florida Administrative Code Rule 69K-33.001(2)(h) provides that “[h]uman remains stored in refrigeration shall be inspected by operational staff of the establishment or facility at each handling and no less than monthly.” The Decedent’s body was at Everglades Cremations in refrigerated storage from January 27, 2020, until February 6, 2020—ten days. There is no evidence that the body was in poor condition on January 27, 2020, and from that date through February 6, 2020, the duty to inspect the body fell, clearly if not exclusively, to the staff of Everglades Cremations. The rule in question provides further that any mold “noted on the remains” shall be promptly eliminated. There is no evidence that the operational staff of Everglades Cremations noted any mold on the Decedent’s body or that, if they did, notice thereof was given to Leger. The question arises: Did Leger have a personal duty to inspect the body while it was stored in refrigeration at Everglades Cremations? Rule 69K-33.001(2)(h) does not impose such a duty, and Mr. Finocchiaro did not testify that the standard of care required Leger to travel to the refrigeration facility to inspect the bodies that SJFCS had stored there. If Leger had no duty to inspect the Decedent’s body while it was stored in refrigeration, it is difficult to see how she could have been negligent in failing to arrest decomposition occurring during that time. Finally, it bears mentioning, for what it’s worth, that rule 69K-33.001(2)(h) declares that the treatment of mold and mildew found on a body stored in refrigeration “shall not constitute embalming.”

Decedent's body was not accorded dignity and respect at all times. Although the inference of disrespectful treatment might be *permissible* based upon the basic fact of negligent embalming, the undersigned declines to make such an inference here, which is his exclusive prerogative as fact-finder.

DETERMINATIONS OF ULTIMATE FACT

25. In the Administrative Complaint, Count II, DFS charged Leger with violations of sections 497.152(1)(a), (b), and 497.153(4)(h), based upon allegations that she: (i) improperly held the Decedent's body in place for more than 24 hours, in contravention of section 497.386(2), by failing either to place the body under refrigeration or to embalm the body; and (ii) failed to handle the body with dignity and respect, in contravention of section 497.386(4).

26. The Decedent's body *was* embalmed, according to DFS's expert witness, whose testimony in this regard the undersigned has credited. For that reason, section 497.386(2) did not require the body to be maintained under refrigeration. Nevertheless, the body was stored in a refrigeration facility as well. It is determined as a matter of ultimate fact that Leger did not violate section 497.386(2) and, therefore, that she is not guilty of an offense under section 497.152(1).

27. It is determined as a matter of ultimate fact that there is insufficient, clear and convincing evidence proving that Leger handled the body in an undignified or disrespectful manner. Consequently, it is determined as a matter of ultimate fact that Leger is not guilty of an offense under section 497.152(1)(a), (b), or section 497.153(4)(h).

28. It is determined as a matter of ultimate fact that the evidence adduced fails to prove DFS's allegations against Leger by the requisite standard of proof, i.e., clear and convincing evidence.

CONCLUSIONS OF LAW

29. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 497.153(4)(d), Florida Statutes.

30. Upon a finding of probable cause by the Board to believe that grounds exist for imposing discipline against a funeral director's license, DFS is responsible for filing the formal administrative complaint and prosecuting the case against the licensee. § 497.153(3)(e), Fla. Stat.

31. Section 497.152(1) authorizes the Board to take disciplinary action against a licensee for:

(a) Violating any provision of this chapter or any lawful order of the board or department or of the statutory predecessors to the board or department.

(b) Committing fraud, deceit, negligence, incompetency, or misconduct in the practice of any of the activities regulated under this chapter.

32. Section 497.152(4)(h) authorizes the Board to take disciplinary action against a licensee for “[f]ailing to perform any statutory or legal obligation placed upon a licensee.”

33. In Count II of the Administrative Complaint, DFS charged that, “by failing to maintain [the Decedent’s] body under refrigeration at a temperature of 40 degrees Fahrenheit [sic] or to embalm the body in contravention of section 497.386(2), Florida Statutes, and [by] *otherwise fail[ing] to treat the body with dignity and respect*, [Leger] violated section 497.152(1)(a), (1)(b), and (4)(h), Florida Statutes, and is subject to discipline thereunder.” Admin. Compl. at 5 (emphasis added).

34. Section 497.386 provides, in relevant part, as follows:

(2) A dead human body may not be held in any place or in transit over 24 hours after death or pending final disposition *unless the body* is maintained under refrigeration at a temperature of 40 degrees Fahrenheit or below or *is embalmed* or otherwise preserved in a manner approved by the

licensing authority in accordance with the provisions of this chapter.

* * *

(4) The licensing authority shall establish by rule the minimal standards of acceptable and prevailing practices for the handling and storing of dead human bodies, provided that *all human remains transported or stored must be completely covered and at all times treated with dignity and respect.*

(Emphasis added).

35. Florida Administrative Code Rule 69K-33.001(2) provides, in pertinent part, as follows:

(h) *Human remains stored in refrigeration shall be inspected by operational staff of the establishment or facility at each handling and no less than monthly.* Any vermin infestation, mold, or mildew noted on the remains shall be promptly and effectively treated for containment or elimination of same; elimination, if necessary, shall be performed by a funeral director & embalmer, embalmer, or an intern or apprentice of same. Such treatment shall not constitute embalming and shall not require the approval of a legally authorized person.

(i) *The requirement that human remains be handled, stored, and treated by all chapter 497, F.S., licensees with dignity and respect in accordance with chapter 497, F.S., and rules thereunder is not contingent on payment to the licensee of amounts due for professional services by the licensee.*

(Emphasis added).

36. If ambiguous, the foregoing statutory and rule provisions, being disciplinary in nature, must be construed in favor of the licensee who would be punished in the event of a finding of violation. *Munch v. Dep't of Pro. Regul., Div. of Real Estate*, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); *see also, e.g., Griffis v. Fish & Wildlife Conserv. Comm'n*, 57 So. 3d 929 (Fla. 1st

DCA 2011)(statutes imposing a penalty must never be extended by construction); *Camejo v. Dep't of Bus. & Pro. Regul.*, 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); *McClung v. Crim. Just. Stds. & Training Comm'n*, 458 So. 2d 887, 888 (Fla. 5th DCA 1984)("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee."); *Lester v. Dep't of Pro. & Occ. Reguls.*, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

37. The controlling version of such statutes and rules is the one in effect at the time the alleged disciplinable offense was committed. *Childers v. Dep't of Env't Prot.*, 696 So. 2d 962, 964 (Fla. 1st DCA 1997). Whether Leger committed an offense, as charged, is a question of ultimate fact to be decided in the context of each alleged violation. *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

38. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a license is considered penal in nature. *State ex rel. Vining v. Fla. Real Estate Comm'n*, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, DFS must prove the charges against Leger by clear and convincing evidence. *Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 933-34 (Fla. 1996)(citing *Ferris v. Turlington*, 510 So. 2d 292, 294-95 (Fla. 1987)); *Nair v. Dep't of Bus. & Pro. Regul., Bd. of Med.*, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

39. Further, the facts proven must be those alleged in the administrative complaint. Due process prohibits an agency from taking disciplinary action against a licensee based upon factual matters not specifically alleged in the charging instrument. See § 120.60(5), Fla. Stat. ("No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of

a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action.”); *see also Trevisani v. Dep’t of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005)(“A physician may not be disciplined for an offense not charged in the complaint.”); *Marcelin v. Dep’t of Bus. & Pro. Regul.*, 753 So. 2d 745, 746-47 (Fla. 3d DCA 2000).

40. Regarding the standard of proof, in *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a “workable definition of clear and convincing evidence” and found that, of necessity, such a definition would need to contain “both qualitative and quantitative standards.” The court held that:

[C]lear and convincing evidence requires that 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 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.

Id. The Florida Supreme Court later adopted the *Slomowitz* court’s description of clear and convincing evidence. *See In re Davey*, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the *Slomowitz* test, adding the interpretive comment that “[a]lthough this standard of proof may be met where the evidence is in conflict, ... it seems to preclude evidence that is ambiguous.” *Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991), *rev. denied*, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

41. Neither the statute, nor the rule, which requires that human remains be treated with dignity and respect, establishes the standard of practice or describes the kind of mistreatment that constitutes a failure to afford dignity

and respect. Based upon the plain meaning of these terms, the undersigned suspects that allowing a body to lie on the floor, as alleged in the Administrative Complaint, probably falls short of the standard of practice. Because this allegation was not proved, however, it is not necessary to decide this issue.

42. In its PRO, DFS argues that because Leger “fail[ed] to follow generally accepted practices established in the embalming and mortuary industry for the handling of dead human remains,” the “only inference that can be drawn” is that she failed to treat the Decedent’s body with dignity and respect. This, arguably if not effectively, is a new theory, which was not charged in the Administrative Complaint.

43. To be sure, DFS charged Leger with failing to treat the body with dignity and respect. Further, DFS is permitted to prove this charge through circumstantial evidence, provided such evidence meets the clear and convincing standard. Thus, there is nothing problematic, per se, in DFS’s reliance upon an inference of misconduct to prove its case.

44. The problem is that the basic fact from which DFS would have the undersigned infer Leger’s alleged failure to afford dignity and respect is, in so many words, the negligent embalming which Mr. Finocchiaro’s testimony persuasively showed to have occurred. Negligent embalming, however, is a separate disciplinable offense. Nowhere in the Administrative Complaint is it alleged that Leger committed negligence by failing to apply post-embalming techniques as required under the prevailing standard of care to arrest decomposition. This is no small omission. Had Leger been placed on notice that DFS intended to prove negligent embalming as a basis for inferring disrespectful handling, she might have retained an expert of her own to testify about the standard of care. Finding Leger guilty and imposing discipline based upon a finding of negligent embalming would be a violation of due process.

45. DFS attempts to circumvent this pleading deficiency by conflating negligence and disrespectful treatment. It argues in its PRO that “[b]y failing to keep the body in a suitable condition for burial [by failing to follow generally accepted practices established by the embalming and mortuary industry for the handling of dead human bodies], [Leger] failed to treat the human remains with dignity and respect.” In other words, by committing negligent embalming, Leger treated the Decedent’s body in an undignified and disrespectful manner.

46. Having made this argument, DFS then turns it around, restating the proposition in reverse: “[Leger’s] violation of section 497.386(4), Florida Statutes, [i.e., her disrespectful treatment of the Decedent’s body,] demonstrated negligence or incompetency in the practice of activities regulated under chapter 497, Florida Statutes, [meaning, in this case, embalming,] and constituted a violation of section 497.152(1)(b), Florida Statutes.” In other words, by treating the Decedent’s body disrespectfully, Leger committed negligence in the practice of embalming.

47. Based on the plain language of section 497.386(4), it is concluded that, whatever treating a body with dignity and respect entails, such treatment differs from, and is not coterminous with, embalming a body according to the standard of care. Proof of one does not, without more, establish the other, and vice versa. Consequently, a charge of disrespectful handling, as alleged in this case, cannot be understood as a charge of negligence in the practice of embalming, which is a discrete offense having different factual elements. Because Leger was not charged with negligent embalming, she cannot be found guilty of that offense.

48. Nor, it is concluded, can negligent embalming be used as a basis for inferring—that is, as circumstantial evidence of—disrespectful treatment of a body in violation of section 497.386(4), absent allegations of fact regarding the negligence. If this were permissible, DFS would be able to bootstrap the charged offense (disrespectful handling) to an uncharged offense (negligent

embalming), of which the licensee had no notice and, accordingly, no fair opportunity to defend herself against. If DFS wants to prove disrespectful handling using negligent embalming as circumstantial evidence thereof, then it needs to allege *the facts* supporting a determination that the licensee's embalming techniques fell below the standard of care. Such was not done in this case.

49. Alternatively, even if it were legally permissible to infer that Leger failed to treat the Decedent's body with dignity and respect from the basic fact that she failed to provide adequate post-embalming care,⁶ such an inference is certainly not *required*. As explained above, the inference of disrespectful treatment is *not* the "only" one which arises from the basic fact of negligent embalming, as DFS argues, and it is not so strong an inference as to constitute clear and convincing proof of the alleged violation. As fact-finder, the undersigned chose not to make the inference, which is a (negative) finding of fact rather than a conclusion of law.

50. DFS argues that an adverse inference of guilt should be drawn from Leger's decision not to testify at the final hearing. Such an inference is permissible. *Omulepu v. Dep't of Health*, 249 So. 3d 1278, 1281 (Fla. 1st DCA 2018). The inference is not strong in this case, however, because Leger might reasonably have thought (correctly as it happens) that DFS had failed to carry its burden of proof and, thus, that her testimony was not needed to avoid discipline. Under these circumstances, the undersigned declines to draw an adverse inference from Leger's silence.

51. Finally, in fairness, it should be remembered that although the evidence in this record (i.e., Mr. Finocchiaro's testimony) establishes that someone failed to exercise reasonable care in providing post-embalming services, Leger had not been notified that this was going to be an issue. Likely (or possibly) for that reason, she did not defend herself against the

⁶ To be clear, the undersigned has not found that Leger is responsible, directly or vicariously, for such negligence. The evidence is insufficient to make such a finding.

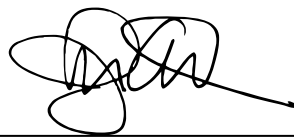
allegation of negligent embalming, with the result that Mr. Finocchiaro's testimony was not rebutted. Had negligent embalming been pleaded as a grounds for imposing discipline, and had Leger presented expert testimony on the issue, she might have created a genuine dispute as to her alleged negligence, if any, and raised enough doubt to preclude an adverse finding—a task made easier due to the prosecution's relatively heavy burden of proving the charges by clear and convincing evidence.

52. The bottom line is that DFS presented insufficient proof of its material allegations of fact against Leger. This negative determination of ultimate fact is dispositive.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Funeral, Cemetery, and Consumer Services enter a final order exonerating Adrienne Dishonne Leger of all charges brought against her in this proceeding.

DONE AND ENTERED this 25th day of April, 2022, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of April, 2022.

COPIES FURNISHED:

James A. Bossart, Esquire
Department of Financial Services
Larson Building, Room 612
200 East Gaines Street
Tallahassee, Florida 32399

Mary Schwantes, Director
Division of Funeral, Cemetery,
and Consumer Services
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0361

Marshawn Michael Griffin, Esquire
Department of Financial Services
Larson Building, Room 612
200 East Gaines Street
Tallahassee, Florida 32399

Diane Wint, Agency Clerk
Division of Legal Services
Department of Financial Services
Larson Building, Room 612.14
200 East Gaines Street
Tallahassee, Florida 32399-0390

Alterraon Phillips, Esquire
APLaw, LLC
11358 Okeechobee Boulevard, Suite 2
Royal Palm Beach, Florida 33411

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.