

**STATE OF CONNECTICUT
CONNECTICUT BOARD OF EXAMINERS OF
EMBALMERS AND FUNERAL DIRECTORS**

Carl Swan, Embalmer
License No. 001811
7 Leffingwell Road
Clinton, CT 06413

Petition No. 950606-030-007

FINAL MEMORANDUM OF DECISION

Procedural Background

The Department of Public Health ("Department") petitioned the Connecticut Board of Examiners of Embalmers and Funeral Directors ("Board") with a Statement of Charges, dated April 28, 1997, against Carl Swan, Embalmer ("respondent"). The Statement of Charges alleged that respondent's conduct concerning the cremains of Mr. Mark Zubee constituted grounds for disciplinary action pursuant to Connecticut General Statutes §20-227(4).¹ Dept. Exh. 2.

The Department gave respondent the opportunity to attend a compliance conference scheduled on October 25, 1996 to show compliance with all lawful requirements for the retention of his license. Dept. Exh. 1.

The Board served the Notice of Hearing and Statement of Charges on respondent by certified mail, return receipt requested. Dept. Exh. 2. On June 12, 1997, the Respondent filed an Answer with a Special Defense.² Resp. Exh. 1.

On July 24, 1997, the Board held an administrative hearing to adjudicate respondent's case.³ Respondent appeared with his attorney, William Gallagher, Esq., for Gallagher, Gallagher & Calistro; Ellen Shanley, Esq., represented the Department. The

¹ The word "ashes" is used in the petition. The word "cremains" is technically more accurate and is used through out this memorandum.

² Respondent's Exhibit 1 is the respondent's answer to the complaint.

³ A transcript (hereinafter Tr.) was made of the hearing that consists of 219 pages. The Department called two witnesses and offered 13 exhibits. The respondent called two witnesses and offered 4 exhibits.

Board conducted the hearing in accordance with Connecticut General Statutes Chapter 54 and the Regulations of Connecticut State Agencies §19-2a-1, *et seq.*

All Board members participating in this decision received complete copies of the record and attest that they have either heard the case or read the record in its entirety. This decision is based entirely on the record and the specialized professional knowledge of the Board in evaluating the evidence.

Allegations and Answer with Special Defense

1. In the Statement of Charges, the Department alleged that respondent is, and has been at all times referenced therein, the holder of Connecticut embalmer license number 001811. Dept. Exh. 2. Respondent admitted this allegation. Resp. Exh. 1.
2. The Department alleged that, while practicing at the Swan Funeral Home, in Clinton, Connecticut, during August of 1993, respondent arranged to have decedent Mark Zubee cremated, and to place his ashes in a niche at Beaver Brook Cemetery Memorial Garden, in Clinton, Connecticut. Dept. Exh. 2. Respondent admitted that while practicing at the Swan Funeral Home during August of 1993, he arranged to have Mr. Zubee cremated. Respondent denied the remainder of the allegations in this paragraph. Resp. Exh. 1.
3. The Department alleged that respondent failed to complete his contractual obligations in a timely manner, by failing to place the decedent's remains in the niche. Dept. Exh. 2. Respondent denied this allegation. Resp. Exh. 1.
4. The Department alleged that the above described facts constituted grounds for disciplinary action pursuant to Connecticut General Statutes §20-227(4). Dept. Exh. 2. Respondent denied this allegation. Resp. Exh. 1.
5. By way of a special defense, the Respondent claimed that the Board lacked subject matter jurisdiction to hear the petition because the allegations did not implicate conduct within the profession of an embalmer. Resp. Exh. 1. The Board finds that it has jurisdiction over the matters at issue pursuant to Conn. Gen. Stat. §20-223.

Findings of Fact

1. Respondent is, and has been at all times referenced in the Statement of Charges, the holder of Connecticut embalmer license number 001811. Dept. Exh. 2; Resp. Exh. 1.
2. Mr. Mark Zubee died on August 8, 1993. Resp. Exh. 2.

3. On August 8, 1993, the Respondent met with Mrs. Myra Zube, mother of the decedent, and Ms. Bonnie Plass, the sister of the decedent, at the Swan Funeral Home to discuss funeral arrangements for the decedent, including cremation of the decedent's body and placement of the cremains in a niche at the Beaver Brook Cemetery. Tr. 20-21, 38, 48-49, 99-100, 110.
4. As a result of the August 8, 1993 meeting, the Respondent offered and Mrs. Zube accepted that the respondent would provide and arrange for certain funeral goods and services in consideration for a payment \$2,510. Said agreement was reduced to a writing. Dept. Exh. 4.; Tr. 21, 33, 69, 79, 100, 138.
5. After the August 8, 1993 meeting, Mrs. Zube and Ms. Plass expected that the Respondent would handle the cremation of the decedent, including the placement of the cremains in the niche. Tr. 34, 42-44, 79-80, 100, 138, 167-168.
6. After the August 8, 1993 meeting, the family of Mrs. Zube was obligated to arrange with Shelly Brothers for the production of a plaque which they did as instructed by the Respondent. Tr. 78, 167; Dept. Exh. 10, 11, 12, 13..
7. The Respondent made a cash advance of \$500.00 as payment to Beaver Brook Cemetery for crypt #10 wherein the cremains of Mr. Zube would be placed. Dept. Exh. 4; Resp. Exh. 10; Tr. 99, 108, 162.
8. While practicing at the Swan Funeral Home, in Clinton, Connecticut, during August of 1993, respondent arranged to have decedent Mark Zube cremated, and to place his cremains in a niche at Beaver Brook Cemetery Memorial Garden, in Clinton, Connecticut. Dept. Exh. 2, 4, 9; Resp. Exh. 1, 3; Tr. pp. 20-22, 32-34, 37-38, 42-44, 48-49, 69, 100, 109, 167-168, 189-190, 196, 198, 200-201.
9. On August 27, 1993, the Connecticut Medical Examiner released the body to Foundation Hill Cemetery for cremation as arranged by the Respondent. Resp. Exh. 2; Tr. 102.
10. On September 1, 1993, Foundation Hill Cemetery cremated Mr. Zube's body. Resp. Exh. 3.
11. On or about September 1, 1993, the Respondent picked up the cremains from the crematory. Tr. 142.
12. The Respondent retained those cremains in his place of business for one and a half years, i.e., from September 1, 1993 until May 7, 1995. Tr. 113-4, 136, 142, 147.
13. On May 7, 1995, the Clinton Police Department informed the respondent that

someone had tampered with the name plaque for Mr. Zubee at the Beaver Park Cemetery and the cremains of Mr. Zubee were presumed stolen. Tr. 119-123; Dept. Exh. 7.

14. The family first learned that the Respondent had not placed the cremains in the niche when contacted by the Clinton Police Department on May 7, 1995. Tr. 23, 49-50, 80, 144.
15. In 1993, the Respondent did not record or keep paper work pertaining to crypts that he purchased under the terms of a statement of funeral goods and services. Tr. 130-131.
16. In 1993-1995, the Respondent did not record or track the whereabouts of cremains, including his possession, release of the same to families or placement into a niche. Tr. 130-131, 134-135, 151-152, 159, 161, 179-180.
17. Respondent failed to complete his contractual obligations in a timely manner, by failing to place the decedent's cremains in the niche. Dept. Exh. 2, 4; Resp. Exh. 3; Tr. pp. 20, 22-23, 31, 35, 44, 53, 75-77, 79-80, 82-84, 88, 100-101, 110-115, 121-123, 144, 147.

Discussion and Conclusions of Law

Connecticut General Statutes §20-227 provides in pertinent part:

[T]he board may take any of the actions set forth in section 19a-17 against a licensee, registrant or holder of an inspection certificate if it finds the existence of any of the following grounds: . . . (4) incompetency, negligence or misconduct in the carrying on of such business or profession

The Department bears the burden of proof by a preponderance of the evidence in this matter. The Department sustained its burden of proof as to all elements of the Statement of Charges. The Board found all Department witnesses and documentary evidence credible. Further, while testifying on the record during the hearing, respondent made a statement adverse to his own interests by admitting that he probably told the decedent's mother he would hold the decedent's cremains until the plaque was made for the crypt. Tr. 100. Testimony from the Respondent that is adverse to his own interests is given considerable weight. The Board acknowledges the forthright testimony of the respondent and his acknowledgment of ultimate responsibility. In addition, the evidence offered by the Department and the Respondent was consistent and corroborated each

other as to the responsibilities of the parties.

The Board finds that respondent engaged in misconduct in the business or profession of funeral directing. The Department did not present sufficient evidence to prove that respondent was incompetent or negligent in such business or profession. Respondent knew or should have known that he had the decedent's cremains in his office for one and a half (1 1/2) years. Respondent did not move them during that time period, even though he had knowledge of the intended final disposition of such cremains. The Board rejects the Respondent's defense that the role of the caretaker or the plaque manufacturer provides a defense or justification for the untimely placement of cremains in the niche. Tr. 151-160, 209-212. The Board finds that respondent's misconduct constitutes grounds for disciplinary action, pursuant to Connecticut General Statutes §20-227(4).

As to the Special Defense, the Respondent bears the burden of proof by a preponderance of the evidence that subject matter jurisdiction is lacking. Respondent did not sustain his burden of proof as to such special defense. Conn. Gen. Stat. § 20-223 authorizes an embalmer to act as a funeral director and engage in the activities of such a license holder, subject to the same statutory obligations. None of the allegations in the Statement of Charges reach beyond the scope of the embalmer license held by the respondent and his claims to the contrary are completely without merit.

Order

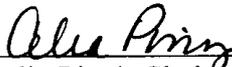
Pursuant to the authority vested in it by Connecticut General Statutes §19a-17 and §20-227, the Board orders the following in this case against Carl Swan, Embalmer, Petition No. 950606-030-007, Connecticut embalmer license number 001811:

1. Compliance with the requirements of this Order shall begin no later than forty-five (45) days from the date of mailing of this decision ("compliance date").
2. This decision shall serve as a letter of reprimand to respondent from the Board.
3. Respondent's license shall be placed on probation until such time as the Department determines that he has a new system in place at the Swan Funeral Home to ensure that the final disposition of cremains occurs in a timely manner.

So ordered this 26 day of February, 1998.

Connecticut Board of Examiners of
Embalmers & Funeral Directors

BY:



Celia Pinzi, Chairperson

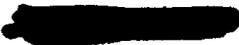


STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC HEALTH

June 11, 1998

Mr. Carl Swan
7 Leffingwell Road
Clinton, Connecticut 06413

Re: Memorandum of Decision
Petition No. 950606-030-007
License No. 001811


Dear Mr. Swan:

Please accept this letter as notice that you have completed the terms of your license probation, effective the date of this letter.

Notice will be sent to the Department's Licensure and Registration section to remove all restrictions from your license related to the above-referenced Memorandum of Decision.

Thank you for your cooperation during this process.

Very truly yours,

A handwritten signature in cursive script that reads "Bonnie Pinkerton".

Bonnie Pinkerton, RNC
Division of Health Systems Regulation

cc: Debra Tomassone



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