

BEFORE THE BOARD OF FUNERAL SERVICE
STATE OF MONTANA

IN THE MATTER OF CASE NO. 2012-FNR-LIC-54 REGARDING:

THE PROPOSED DISCIPLINARY) Case No. 1721-2012
TREATMENT OF THE LICENSE OF)
WILLIAM A. SPOJA, JR.,)
Licensed Crematory Operator,)
License No. 749.)
and)

IN THE MATTER OF CASE NO. 2012-FNR-LIC-55 REGARDING:

THE PROPOSED DISCIPLINARY) Case No. 1722-2012
TREATMENT OF THE LICENSE OF)
CENTRAL MONTANA CREMATORIUM,)
INC., Licensed Crematory,)
License No. 192.)

**PROPOSED FINDINGS OF FACT; CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

I. INTRODUCTION

In this matter, the Business Standards Division (BSD) has alleged that the license of William Spoja and Central Montana Crematorium should be sanctioned because they have both violated Mont. Code Ann. §§ 37-1-316(2), 37-1-316(15), 37-1-316(18), 37-19-401, and 37-19-705(4). BSD further alleges that Spoja has violated Mont. Code Ann. § 37-19-302. The parties agreed to submit the issue of whether the licensees violated the above-mentioned statutes on cross motions for summary judgment. Oral argument was held on the issue of liability on August 8, 2012.

Having carefully considered the motions, the hearing officer finds that BSD's motion is well taken and grants BSD's motion for summary judgment. Because the hearing officer finds (1) that neither collateral estoppel or *res judicata* foreclosed BSD's prosecution of sanctions against the licensees, (2) that the licensees have not

been denied due process in the administrative proceeding, and (3) that Title 39, Chapter 19 when read in its entirety does not permit persons who are not licensed as morticians and does not permit an unlicensed mortuary to engage in the practice of pacemaker removal or placing human remains into cremation containers, the licensees' motions for summary judgment are denied. The rationale that supports these decisions follows.

The hearing officer communicated the above determination to the parties in an order dated September 21, 2012. The hearing officer then held a conference with the parties on October 1, 2012 to discuss scheduling a hearing regarding imposition of sanctions. At the conference, the hearing officer told the parties that based upon the information he had received regarding the violations in the motion pleadings, he was not inclined to impose any greater sanction than a private reprimand upon the licensees. In light of this, the parties agreed to submit the issue of sanctions to the hearing officer without a hearing.

On October 4, 2012, the licensees submitted a motion for clarification regarding the propriety of the licensee's conduct in placing human remains into cremation containers after the remains arrive at the crematorium. BSD responded to that motion. Clarification of the hearing officer's ruling on that issue is appropriate. As noted above, the hearing officer believes that the statutes in question do not permit persons licensed solely as crematory operators or facilities licensed only as crematoriums to place human remains in cremation containers. The rationale that supports this decision also follows.

II. FACTS THAT ARE NOT IN DISPUTE¹

A. Facts related to the 2006 adjudication of Case Nos. CC-05-0097 and 0100 and the 2007 citizen complaints against Mr. Spoja.

1. In 2004, Richard Brown filed a complaint with the Board of Funeral Service regarding Mr. Spoja's license. Brown's complaint stated:

¹ The licensees' response to BSD's motion for summary judgment indicated that the licensees did not agree that there were no disputed material facts. This statement caused the hearing officer to inquire during oral argument as to whether summary judgment was appropriate in this matter. In response to this inquiry, counsel for the licensees agreed that there was no dispute that the licensees removed pacemakers at the crematorium prior to cremation. Rather, the dispute in this case centers on the legal implications of a person licensed only as a crematory operator to engage in that practice. Furthermore, the proposed notice of board action which led to this tribunal's 2006 recommended decision and the Board's adoption of that decision are not subject to dispute.

Above named business advertizes [sic] “direct cremation” in the Lewistown News Argus and if requested sends out prices for their services. My complaint is the removal of a pacemaker by them and also viewing at the crematory. MCA 37-19-101 Definitions [sic] (28) (a) suitable room for viewing. A crematory does not have a room for viewing to obtain a license.

Licensees’ Motion Exhibit H.

2. As a result of Brown’s complaint, the screening panel initiated an investigation and made a reasonable cause finding regarding Brown’s complaint. The complaint was directed solely at the crematorium operator’s license belonging to Mr. Spoja. No complaint was filed against the license of Central Montana Crematorium.

3. On December 23, 2004, pursuant to Mont. Code Ann. § 37-1-309, in Case No. CC-05-0097, the screening panel of the Board of Funeral Service issued a notice of proposed board action and opportunity for hearing which stated that Richard Brown had filed a formal complaint alleging that “Mr. Spoja is providing services to the public that require a licensed mortician and licensed mortuary.” The proposed board action went on to indicate that it found reasonable cause to believe that Mr. Spoja had violated Mont. Code Ann. § 37-1-316(18) “conduct that does not meet the generally accepted standards of practice . . .” As a basis for that finding, the notice went on to cite the definition of “mortuary” contained in Title 37, Chapter 19 which defines mortuary as “a place of business containing a viewing room and devoted exclusively to activities related to the preparation and arrangements for funerals, transportation, burial or other disposition of dead human bodies” (Mont. Code Ann. § 37-19-101(28)(a)), and further defines the term “mortuary” to include “conducting activities from a place of business referred to in subsection (28)(a) that are incidental, convenient or related to the preparation of funeral or memorial services or rites or the transportation, burial, cremation, or other disposition of dead bodies in any area where those activities may be conducted.” Licensees’ Motion Exhibit I.

4. As a result of the notice of proposed board action in Case No. CC-05-0097, the matter was set for contested case hearing. The parties filed cross motions for summary judgment based upon stipulated facts and a stipulated issue for determination. On May 4, 2006, this tribunal issued a recommended decision in Case No. CC-05-0097. Based on the stipulation of the parties, the only issue which this tribunal decided in that case was the question of whether Mr. Spoja had been providing “at-need” funeral arrangements or “pre-need” funeral arrangements without proper licensing. Licensees’ Motion Exhibit G. None of the issues litigated by the parties and none of the stipulated facts promulgated by the parties in their briefing or

relied upon by this tribunal in its recommended decision touched on the question of whether Mr. Spoja had violated licensing requirements by removing pacemakers from decedents or by placing human remains into cremation containers.

5. On July 26, 2006, the Board of Funeral Service issued its final order in Case No. CC-05-0097 adopting the recommended decision of this tribunal, making that decision the final agency decision in that matter.

6. In 2004 and 2005, two citizen complaints were filed against Central Montana Crematorium. Those complaints, 2005-4 and 2005-8, were investigated by the screening panel of the Board of Funeral Service. After investigating those complaints, the Board sent a letter to Central Montana Crematorium noting that “the circumstances surrounding this case do not constitute a level of unprofessional conduct justifying legal or disciplinary proceedings.” The letter further indicated that the complaint was dismissed with prejudice. Exhibit M, October 22, 2007 letter from Christina Medina, compliance specialist, to Central Montana Crematorium.

B. Facts related to the charges underlying the instant complaints.

1. William A. Spoja is a licensed crematory operator in the State of Montana. Mr. Spoja operates Central Montana Crematorium in Lewistown, Montana, a licensed Montana crematory.

2. Mr. Spoja holds neither a mortician’s license nor a funeral director’s license. Central Montana Crematorium is not a licensed mortuary. Mr. Spoja and Central Montana Crematorium perform direct cremations for the public and are not affiliated with any licensed mortician, funeral director, or mortuary or funeral home.

3. In performing direct cremations for the public, the licensees receive human remains before they are prepared for cremation. Mr. Spoja then prepares the human remains for cremation at the holding facility located at the crematorium. Mr. Spoja and Central Montana crematorium also engage in the practice of placing human remains into cremation containers that arrive at the crematorium not already in such containers.

4. If the crematorium receives a body for cremation that has a pacemaker, Mr. Spoja removes the device prior to the cremation of the body. On October 6, 2011, Mr. Spoja testified at a legislative committee meeting that he was engaging in the practice of removing pacemakers prior to cremating dead bodies. Licensee’s Exhibit A. Removal of pacemakers is necessary because such devices explode upon incineration. For this reason, removal of the pacemaker prior to incineration is required by Mont. Code Ann. § 37-19-705(3).

5. By removing pacemakers from dead bodies at Central Montana Crematorium, Mr. Spoja is engaging in conduct for which he is not licensed. By permitting the removal of pacemakers within its facility, Central Montana Crematorium is engaging in conduct that is by statute relegated to properly licensed mortuaries. Central Montana Crematorium is not licensed as a mortuary in Montana.

III. OPINION²

A. *Propriety of summary judgment in administrative proceedings.*

Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment is appropriate where “the pleadings . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), Mont. R. Civ. P.

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once the moving party meets this burden, the burden then shifts to the party opposing the motion to establish otherwise by more than mere denial or speculation. *Ravalli County Bank v. Gasvoda* (1992), 253 Mont. 399, 883 P.2d 1042. Reasonable inferences from the proof must be drawn in favor of the party opposing summary judgment. *Sherrad v. Prewett* (2001), 306 Mont. 511, 36 P.3d 378.

In this matter, the parties do not dispute any facts necessary to determine whether the licensees have violated any of the sections of Title 37 as alleged in the complaint. As there is no dispute of fact, the only question here is one of the application of the applicable statute to the facts. Summary judgment is appropriate in this proceeding.

B. *There is no irregularity and no denial of due process in the Board filing a complaint.*

The licensees argue that the Board had no authority “under its own rules” to issue the complaints in this matter. Licensees’ Motion for Summary Judgment, page 16. The licensees cite no authority for this proposition. Mont. Code Ann. § 37-1-308 permits a Board or Board member to file a complaint. There is no basis

² Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

to find that the Board's decision to file a complaint in this matter somehow renders the complaint flawed.

The licensees' suggestion that there is a due process violation in the matter before this tribunal is defeated by three important procedural safeguards within the regulatory scheme. First, a screening panel, comprised of board members who may not sit as adjudicators of the matter, must make a determination based upon reasonable cause that the licensees have violated Title 37. Second, upon a finding of reasonable cause, the matter is then sent to an independent hearing officer who must accord procedural due process to the licensees in a contested case hearing proceeding. Third, due process is accorded in these proceedings because judicial review of the administrative process utilized in this proceeding is available to the licensees (as provided by Mont. Code Ann. § 2-4-701). Indeed, where judicial review of the administrative hearing process exists, there can be no denial of due process even assuming some type of bias in the screening panel's decision. *Schneeman v. State Dept. of Labor and Industry*, (1993), 257 Mont. 254, 259, 848 P.2d 504, 507 (holding that "where the statutes provide for judicial review of a particular order made or agreed upon by a prejudiced commissioner, there is no denial of due process"). Even assuming that the member of the screening panel was biased against Mr. Spoja, the existence of a decision making process first through this unbiased hearing officer unaffiliated with the Board and then through judicial review forecloses the argument that the screening panel's issuance of the complaint constitutes a denial of due process.

Because there is no basis for finding that the licensees' due process rights have been violated, their argument to that effect does not constitute a basis for granting summary judgment.

C. Collateral estoppel and res judicata do not preclude the instant prosecution.

The licensees contend that the instant prosecution of their licenses is precluded by collateral estoppel and *res judicata*. The licensees argue that both the Board's previous final adjudication of this tribunal's decision in *Spoja and Gallagher*, CC-05-0097, 0098, 0099, and 0100 (hereinafter referred to as Case No. CC-05-0097) as well as a subsequent decision of the Board's screening panel in 2007 not to prosecute complaints against Mr. Spoja preclude the present prosecution.

Collateral estoppel prevents parties from relitigating issues which have been previously determined between the parties. *Brault v. Smith*, 209 Mont. 21, 26, 679 P.2d 236, 238 (1984). *Res judicata* bars relitigation of a claim against a

defendant once a final judgment has been rendered. *Wiser v. Board of Dentistry*, 2011 MT 56, ¶8, 360 Mont. 1, 251 P.3d 675.

In order for collateral estoppel to apply to a proceeding, four elements must exist: (1) the issue decided in the previous litigation must be identical to the issue to be decided in the pending litigation, (2) there must be a final judgment on the merits in the earlier proceeding, (3) the litigant in the previous proceeding must be the same litigant in the instant proceeding or be in privity with the litigant in the previous proceeding, and (4) the litigant against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue. *Smith, supra; Aetna Life and Cas. Ins. Co. v. Johnson*, 207 Mont. 409, 673 P.2d 1277 (1984). A matter is *res judicata* to subsequent claims if four criteria are satisfied: (1) the parties are the same; (2) the subject matter is the same; (3) the issues are the same; and (4) the relationship between the parties, the subject matter, and the issues is the same. *Majerus v. Skaggs Alpha Beta*, 245 Mont. 58, 61, 799 P.2d 1053, 1055 (1990). *See also, Wiser*, ¶9. Only where it clearly appears that the precise question involved in the second case was raised and determined in the former will the earlier judgment bar the subsequent action. *Wiser*, ¶14; *Baertsch, et al. v. Lewis & Clark Co.*, 223 Mont. 206, 210, 727 P.2d 504, 506 (1986).

The 2007 decisions of the screening panel to not issue a notice of proposed board action against the crematorium cannot be invoked as a basis for granting summary judgment to the licensees as those decisions were not final agency decisions giving rise to either collateral estoppel or *res judicata*. In order for collateral estoppel or *res judicata* to apply, there must be a valid and final judgment. *Wiser*, ¶9, *Baertsch*, 223 Mont. at 209, 727 P.2d at 506. In the arena of administrative law, only final agency decisions can form a basis upon which to invoke collateral estoppel or *res judicata*. 2 Am. Jur. 2d *Administrative Law*, §375; *Better Homes Const., Inc., v. Goldwater*, 203 Ariz. 295, 298-99, 53 P.3d 1139, 1142-43 (App. 2002).

Under Title 2, Chapter 4 (the Montana Administrative Procedure Act) and Title 37, the decision of the screening panel is not a final agency determination. It is simply a determination that reasonable grounds exist to support a finding that a violation may have occurred. Mont. Code Ann. § 37-1-307(1)(d). It is not until after a reasonable grounds finding is made by the screening panel and a complaint issued by the screening panel that the matter moves forward to a contested case hearing. The only place under Montana's administrative hearing scheme where a determination of legal rights, duties, and privileges can be made is through a contested case hearing. Mont. Code Ann. § 2-4-102(4). The power to make a final agency determination is reserved to an adjudication panel and cannot be made by a screening panel. Mont. Code Ann. § 37-1-307(1)(d). In fact, no member of the screening panel can serve as a member of the adjudication panel which makes the

final agency determination. *Id.* It is apparent from the structure of Montana’s administrative hearing scheme that a decision of the screening panel is not a final agency decision upon which collateral estoppel or *res judicata* can be invoked. Therefore, the 2007 decisions of the screening panel do not preclude the instant complaints either under collateral estoppel or *res judicata*.

This tribunal’s earlier adjudication in Case No. CC-05-0097 cannot form the basis for invoking collateral estoppel as the issue in that case was not the same as the issue in the present case. In that earlier adjudication, the issue was “whether licensees William Spoja and Allen C. Gallagher have been providing ‘at need’ funeral arrangements, ‘pre-need’ funeral arrangements, and/or pre-need funeral agreements without proper licensing.” Proposed Findings of Fact, Conclusions of Law and Recommended Order dated May 4, 2006, Page 1. The issue in this case is whether Mr. Spoja has exceeded the scope of his crematory operator’s license by removing pacemakers from corpses and whether both Mr. Spoja and Central Montana Crematorium have aided or abetted the unlicensed practice of mortuary science by engaging in such conduct. The issues in Case No. CC-05-0097 and the issues now pending before this tribunal are not the same and the Board’s final order in Case No. CC-05-0097 does not, therefore, collaterally estop BSD from prosecuting these complaints.

Likewise, the hearing officer does not see how the decision in Case No. CC-05-0097 precludes the present complaint under the doctrine of *res judicata*. As noted above, *res judicata* precludes subsequent litigation only where, among other things, the subject matter of the present and past actions is the same and the issues are the same and relate to the same subject matter. *Wiser, supra*. By stipulation of the parties (i.e., Mr. Spoja’s agreement with BSD), the only issue litigated in Case No. CC-05-0097 was the question of whether Mr. Spoja’s offering of pre-need or at-need arrangements for crematory services constituted the making of funeral arrangements such that Mr. Spoja needed to have a funeral director’s license in order to offer those arrangements. By Mr. Spoja’s agreement, there was no litigation related to the issue of whether removal of a pacemaker or placing human remains in a cremation container was outside the scope of a crematory operator’s license. The decision in Case No. CC-05-0097 did not cover that issue and does not present a bar to the present litigation.

In addition, the facts of the two cases are not clearly the same. The Montana Supreme Court has held that where two causes, although seeking the same relief, rest upon a different state of facts, the adjudication in the one constitutes no bar to a recovery in another. *Wiser*, ¶15, citing *Fox v. 7L Bar Ranch Co.*, 198 Mont. 201, 207, 645 P.2d 929, 932 (1982). The only facts clearly alleged and clearly adjudicated in Case No. CC-05-0097 was the issue of whether Mr. Spoja was offering “at-need”

funeral arrangements or “pre-need” funeral arrangements without proper licensing based on conduct he had engaged in during 2004. Here, the factual allegations relate to Mr. Spoja’s admission to a legislative committee in 2009 that he and his staff removed pacemakers from dead bodies prior to cremating those bodies. Under these circumstances, the decision in Case No. CC-05-0097 cannot serve to bar the instant complaint. *Fox, supra*.

Finally, even if the decision in Case No. CC-05-0097 barred the present action against Mr. Spoja’s license, in no event could that decision present a *res judicata* bar against the license of Central Montana Crematorium. Central Montana Crematorium was not a party to the previous litigation nor was it accused of any wrongdoing in the matter which culminated in the decision in Case No. CC-05-0097. Because neither the legal doctrine of collateral estoppel or the legal doctrine of *res judicata* preclude BSD’s prosecution in this matter, the licensees’ motion for summary judgment cannot be granted on that basis.

D. A licensed crematorium operator who is not also a licensed funeral director or mortician violates professional licensing standards by either removing pacemakers from decedents or placing human remains into a cremation container. A facility licensed only as a crematorium and not also licensed as a mortuary that permits the removal of pacemakers from dead bodies or permits placing dead bodies into cremation containers violates professional licensing standards.

Mont. Code Ann. § 37-1-316 provides in pertinent part:

The following is unprofessional conduct for a licensee . . . governed by this chapter:

(2) permitting, aiding, abetting or conspiring with a person to violate or circumvent a law relating to licensure or certification;

* * *

(15) assisting in the unlicensed practice of a profession or occupation or allowing another person or organization to practice or offer to practice by use of the licensee’s license;

* * *

(18) conduct that does not meet the generally accepted standards of practice.

Mont. Code Ann. § 37-19-302 prohibits a person not licensed as a mortician from practicing mortuary science. Mont. Code Ann. § 37-19-401 requires an operating mortuary to be licensed by the Board of Funeral Service. Mont. Code Ann.

§ 37-19-705(4) permits a crematorium to hold human remains in a holding facility in the event that the crematorium is unable to perform cremation upon receipt of human remains. Mont. Code Ann. § 37-19-705(5) states that “[h]uman remains delivered to a crematory may not be removed from the cremation container, and the cremation container must be created with the human remains.” Admin. R. Mont. 24.147.2301 provides that a licensee’s violation of any of the provisions of Title 37, Chapter 19 constitutes unprofessional conduct.

The rules of statutory construction require that the language of a statute be construed according to its plain meaning. *Lovell v. St. Comp. Mut. Ins. Fund*, 260 Mont. 279, 860 P.2d 95 (1993). Where the language is unambiguous, courts must look at the plain meaning of the statute and may not go further and apply other means of interpretation. *Tongue River Electric Co-op v. Montana Power Company*, 195 Mont. 511, 636 P.2d 862 (1981). A court must find legislative intent from the plain meaning of the language by reasonably and logically interpreting the statute as a whole without omitting or inserting anything or determining intent from a reading of only part of the statute. *Gaub v. Milbank Ins. Co.*, 220 Mont. 424, 715 P.2d 443 (1986). Statutes must be read in their entirety and legislative intent may not be gained from the wording of one particular section or sentence but only from consideration of the whole. A court’s duty is to interpret individual sections of the act in such a manner as to insure coordination with the other sections of the act. *State v. Meador*, 185 Mont. 32, 601 P.2d 386 (1979).

In the decision in Case No. CC-05-0097, this tribunal determined that the statutory prescriptions contained in Title 39, Chapter 19 provide a comprehensive regulatory scheme that regulates funeral directing, mortuaries, and crematoriums. Having again carefully considered the entirety of Title 37, Chapter 19, the hearing officer sees no basis to depart from that legal finding. The legislature’s intent to regulate all three fields comprehensively is evident not only in the plain language of the statutes, but also in the manner in which the statute was promulgated.

In construing a particular statute, all acts relating to the same subject or having the same general purpose are read as together constituting one law regulating that subject. *Ewald v. Certain Intoxicating Liquors*, 71 Mont. 79, 227 Pac. 472 (1924). The sections of the statute relating to crematoriums utilize definitions found in Montana Code Annotated § 39-19-101. The definitions contained in Montana Code Annotated § 39-19-101 and the portion of Title 37, Chapter 19 authorizing and regulating crematoriums were promulgated simultaneously in the same Senate Bill by the 1993 Legislature. *See*, Chapter 38, L. 1993, Secs. 1 through 10. The definitional section of Montana Code Annotated § 39-19-101 and the sections relating to regulation of crematoriums were promulgated at the same time. Reading the entirety of Title 37, Chapter 19, it is evident that the legislature intended to enact a

comprehensive regulatory scheme that would encompass funeral directors, mortuaries, and crematoriums.

Because the statute is comprehensive, the licensees' conduct in this case must be measured not only against the requirements applicable to crematoriums, but also against the statutory requirements regarding conduct that is relegated to licensed morticians and licensed mortuaries. A "mortician" is defined as a person licensed under Title 37, Chapter 19 to practice mortuary science. Mont. Code Ann. § 37-19-101(28). "Mortuary science" is defined as the profession of funeral directing and embalming. Mont. Code Ann. § 37-19-101(29). Montana prohibits the practice of funeral directing by anyone who does not hold a funeral director's or mortician's license. Mont. Code Ann. §§ 37-19-301 and 302. Montana also prohibits the practice of mortuary science by anyone who does not hold a mortician's license. Mont. Code Ann. § 37-19-302. Preparing dead bodies for disposition and maintaining a mortuary for preparation of dead bodies is "funeral directing." Mont. Code Ann. § 37-19-101(20).

"Cremation" is defined as "the technical process, using heat, that reduces human remains to bone fragments." Mont. Code Ann. § 37-19-101(11). The purpose of Title 37, Chapter 19, Part 7 (which requires licensure for crematory operation) is to provide standards for the licensing and regulation of crematoriums in order to protect the public health, safety, and welfare and to ensure the qualified and professional practice of crematory operations. Nothing in Title 37, Chapter 19, Part 7 indicates that the legislature intended through that part's enactment to permit licensed crematory operators to engage in any conduct other than the process of cremation, i.e., the technical process using heat to reduce dead bodies to bone fragments. These statutes, considered together, demonstrate that under Title 37, Chapter 19, only licensed morticians can prepare dead bodies for burial or other disposal.³

Mr. Spoja holds neither a funeral director's nor a mortician's license. Mr. Spoja's removal of pacemakers from dead bodies and placing of bodies into cremation containers is quintessentially preparation of a dead body for disposition, an action that is relegated under Title 37, Chapter 19 to persons licensed as

³ Mr. Spoja has not been charged with engaging in funeral directing without a license in this matter and the hearing officer's discussion regarding this point is meant simply to illustrate that the statutory scheme requires licensure as a mortician in order to engage in the practice of removing a pacemaker. By employing this argument, the hearing officer is not finding and does not mean to suggest that Mr. Spoja has violated any statutory prohibition with which he has not been charged. Given the parameters of the complaints presently before him, the hearing officer has no jurisdiction to find that Mr. Spoja had violated standards of professional conduct by engaging in funeral directing without a license.

morticians. Nothing in Title 37, Chapter 19, Part 7 permits a crematory operator to do anything more than to undertake cremation, “the technical process, using heat, that reduces human remains to bone fragments.” Certainly, nothing in Part 7 permits a crematory operator to engage in preparation of a dead body for cremation. As a person licensed only as a crematory operator, the only thing Mr. Spoja can do upon receiving a body not ready for cremation (i.e., one that still has a pacemaker in it or is not already in a cremation container) is to place the body in a holding facility.

Central Montana Crematorium is not a licensed mortuary. Only licensed mortuaries in Montana may be used for the preparation of dead bodies. Mont. Code Ann. § 37-19-101(20) and (28). Nothing in Title 37, Chapter 19, Part 7 would permit an entity licensed only as a crematory to also be used as a mortuary without being licensed as a mortuary. To the contrary, as pointed out by BSD, the only thing that can be done by a crematory when it receives a body that cannot be cremated upon receipt is to place the body in a holding facility. By permitting Central Montana Crematorium, which is not a licensed mortuary, to be used for the removal of pacemakers or to be used for placing bodies into cremation containers, the licensees are utilizing the crematorium for a purpose for which the crematorium is not licensed and cannot be used.

The hearing officer’s reading of Title 37, Chapter 19 to only permit licensed morticians to remove pacemakers is buttressed by the title’s distinction between the requirements to obtain a crematorium or crematorium technician’s license and the title’s far more stringent requirements for obtaining a funeral director’s or mortician’s license. In order to qualify to be either a licensed crematorium operator or a crematory technician, a person need only be 18 years old, of good moral character, and be a high school graduate. Mont. Code Ann. § 37-19-301. To be licensed as a funeral director or mortician requires much more. Specifically, it requires that in addition to being of good moral character, a person must (1) present evidence of having satisfactorily completed 90 quarter credits of study at an accredited college or university; (2) have graduated with a diploma from an accredited college of mortuary science; (3) have passed an examination required by the board; and (4) serve a one year internship under the supervision of a licensed mortician. Mont. Code Ann. § 37-19-302. It is plainly evident from the substantial additional education requirements, testing requirements, and internship requirements for licensure as a mortician that Title 37, Chapter 19 contemplates that only licensed morticians will engage in the preparation of dead bodies for burial or other disposition.

In addition, as pointed out by BSD in its motion for summary judgment, unless authorized by law, it is a misdemeanor crime in Montana to undertake an autopsy, dissection, or other postmortem examination of a deceased person. Mont. Code Ann. § 50-21-106. This includes “any postmortem examination involving

dissection of any part of the body.” Mont. Code Ann. § 50-21-103. Morticians are exempted from the prohibition as that statute does not restrict “the right of a licensed mortician to dissect a human body for proper preparation of the body for burial, cremation, or other disposition provided by law.” Mont. Code Ann. § 50-21-105.

Likewise, the language of Mont. Code Ann. § 37-19-705(5) leaves no doubt that persons licensed only as crematory operators and facilities licensed only as crematoriums cannot place bodies into cremation containers. Under that statute, all human remains delivered to the crematory must remain in the cremation container in which they arrived. Taken in conjunction with Title 37, Chapter 19’s apparent mandate that only licensed morticians can prepare dead bodies for burial or other disposal, the inescapable conclusion is that persons licensed only as crematory operators and facilities licensed only as crematoriums cannot place bodies into cremation containers.

The licensees maintain that they have a right to engage in the pursuit of employment and that the absence of anything in Title 37, Chapter 19, Part 7 that specifically prohibits the removal of pacemakers or placing bodies in cremation containers means that they may engage in such activity. That argument ignores the requirement that the entirety of Title 37, Chapter 19 be read in *para materia* and that Mr. Spoja’s and Central Montana Crematorium’s conduct must be measured against the strictures of not only Part 7 but also against all parts of Chapter 19. That argument also fails to consider the Montana Supreme Court’s admonition that the right to pursue employment does not mean that such right is not subject to reasonable police regulation. *Wiser v. State (Wiser I)*, 2006 MT 20, ¶24, 331 Mont. 28, 129 P.3d 133 (“while one does have the fundamental right to pursue employment, one does not have the fundamental right to practice his or her profession free of state regulation promulgated to protect the public’s welfare”). *See also, Montana Cannabis Industry Assoc. v. State*, 2012 MT 201, ¶20 (persons do not have a fundamental right to pursue a particular employment or employment free of state regulation).

Interpreting Title 37, Chapter 19 to require a person to be licensed as a funeral director or mortician in order to remove a pacemaker or place a body into a cremation container does not impermissibly fetter Mr. Spoja in his pursuit of a profession of his choosing. Rather, in order to ensure the safety of the public, it simply requires that Mr. Spoja become licensed as a mortician if he wishes to undertake such actions. Likewise, if Central Montana Crematorium wishes to engage in conduct relegated to licensed mortuaries, it needs to meet the requirements for and become licensed as a mortuary in Montana.

By removing pacemakers without being properly licensed and placing bodies into cremation containers, Mr. Spoja has aided and abetted in circumventing requirements that a person be licensed as a mortician in order to remove pacemakers, has assisted in the unlicensed practice of mortuary science, and has failed to adhere to professional standards, violations respectively of Mont. Code Ann. § 37-1-316(2), (15), and (18). By engaging in this conduct, Mr. Spoja has also violated the prohibition in Mont. Code Ann. § 37-19-302 against engaging in the practice of mortuary science while not licensed as a mortician. *Cf., Teleophase Society of Florida v. State Bd. of Funeral Directors and Embalmers*, 334 So. 2d 563 (Fla. 1976) (holding that a crematorium's actions of engaging in conduct that fell within the definition of funeral directing amounted to unlicensed practice and was properly enjoined). By removing pacemakers from bodies, Mr. Spoja is permitting the crematorium he operates to operate in violation of Mont. Code Ann. § 37-19-401. By removing pacemakers from bodies that cannot be immediately cremated upon arrival at the crematorium, Mr. Spoja is also violating Mont. Code Ann. § 37-19-705(4).

By permitting pacemakers to be removed within its facilities and permitting bodies to be placed into cremation containers while licensed only as a crematorium and not as a mortuary, Central Montana Crematorium has aided and abetted in circumventing requirements that a facility be licensed as a mortuary in order to prepare bodies for disposition, has assisted in unlicensed practice by permitting its facility to be used as a mortuary while not licensed as a mortuary, and has violated professional standards, violations respectively of Mont. Code Ann. § 37-1-316(2), (15), and (18). Because the crematorium is being used as a mortuary without being licensed as such, Central Montana Crematorium is also violating Mont. Code Ann. § 37-19-401. *Cf., Teleophase Society of Florida, supra*⁴. Because Central Montana Crematorium is not limiting itself to placing bodies that cannot be cremated upon receipt into a holding facility, the crematorium is also violating Mont. Code Ann. § 37-19-705(4).

E. *The appropriate sanction.*

A regulatory board may impose any sanction provided for by Montana Code Annotated Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont.

⁴ At the oral argument in this matter, the hearing officer commented that this dispute appeared to be somewhat of a turf war between Mr. Spoja and other funeral directors. This turf war, if it is one, is not unlike the one described by the Montana Supreme Court in *Wiser I*, *supra*, ¶¶ 7- 11 (noting in great detail the ongoing dispute between denturists and dentists following the legislature's determination to place the regulation of both denturists and dentists under the power of the State Board of Dentistry). In the case before this tribunal, the legislature, as is its prerogative, has decided the turf war by relegating the preparation of dead bodies for disposition to persons licensed as morticians in Montana.

Code Ann. § 37-1-307(e). Among other things, Montana Code Annotated § 37-1-312 provides that a regulatory board may impose a private reprimand and that the Board may further stay the imposition of a sanction.

To determine which sanctions are appropriate, the regulatory board must first consider the sanctions necessary to protect the public. Only after this determination has been made can the board then consider and include in the order requirements designed to rehabilitate the licensee. Mont. Code Ann. § 37-1-312(2).

Having first carefully considered the protection of the public, the hearing officer recommends that Mr. Spoja be issued a private reprimand and that the Board then stay imposition of this recommended sanction. Mr. Spoja has been forthright about his conduct, honestly believing, albeit incorrectly, that the law did not prohibit him from removing pacemakers and placing bodies into cremation containers. Indeed, his conduct might not have come to light except for his willingness to testify openly about it to a legislative sub-committee. Furthermore, it is clear to the hearing officer that Mr. Spoja earnestly desires to abide by all regulations imposed upon crematory operators and crematoriums. He has unwaveringly adhered to the parties' pre-hearing stipulation that prohibited him from removing pacemakers during the pendency of these proceedings. In light of these factors, the hearing officer is convinced that Mr. Spoja and Central Montana Crematorium will abide with the final order in this matter. Neither considerations of the protection of the public nor rehabilitation of the licensees requires anything more than a private reprimand which should be permanently stayed by the Board.

IV. CONCLUSIONS OF LAW

1. There is no material dispute of fact in this matter and summary judgment is appropriate.
2. The screening panel's issuance of the complaints in this matter does not violate the due process rights of the licensees.
3. The doctrines of collateral estoppel and *res judicata* do not preclude BSD's prosecution of the license violations in this case.
4. Summary Judgment as requested by the licensees is denied because licensees have not been subjected to a violation of due process and neither collateral estoppel or *res judicata* prevent BSD's prosecution of the complaints against the licensees.

5. By removing pacemakers from dead bodies and placing dead bodies into cremation containers while not licensed as a funeral director or mortician, Mr. Spoja has violated the professional standards set forth in Mont. Code Ann. §§ 37-1-316(2), 37-1-316(15), 37-1-316(18), 37-19-302, 37-19-401, and 37-19-705(4). By permitting removal of pacemakers and permitting the placing of dead bodies into cremation containers within its facility while not being licensed as a mortuary, Central Montana Crematorium has violated Mont. Code Ann. §§ 37-1-316(2), 37-1-316(15), 37-1-316(18), 37-19-401, and 37-19-705(4).

6. Because the violations alleged in the complaints have been proven by a preponderance of the evidence through undisputed fact, and because those undisputed facts demonstrate as a matter of law that BSD is entitled to judgment, summary judgment in favor of BSD is required.

7. The appropriate sanction in this matter is to impose a private reprimand upon the licensees and then permanently stay imposition of that sanction.

V. ORDER

Based on the foregoing, the hearing officer recommends that the Board of Funeral Service find that Mr. Spoja and Central Montana Crematorium have violated professional standards. The hearing officer further recommends that the Board impose a private reprimand upon the licensees and then permanently stay imposition of that sanction.

DATED this 12th day of October, 2012.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.