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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JESSIE WELSH-ALEXIS; FRANKLIN LAMBERT; PHILLIP SCOTT
WARNER; and SAGUARO VALLEY CREMATION SERVICES, L.L.C.,
Plaintiffs/Appellants,

v.

STATE OF ARIZONA ex rel. THE BOARD OF FUNERAL DIRECTORS
AND EMBALMERS, *Defendant/Appellee.*

No. 1 CA-CV 17-0768
FILED 10-30-2018

Appeal from the Superior Court in Maricopa County
No. LC2017-000061-001
The Honorable Patricia A. Starr, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Paul J. McMurdie joined.

C A T T A N I, Judge:

¶1 Jessie Welsh-Alexis, Franklin Lambert, Phillip Scott Warner, and Saguaro Valley Cremation Services, L.L.C., (collectively, "Licensees") appeal from the superior court's ruling affirming the decision of the Arizona Board of Funeral Directors and Embalmers imposing discipline against their respective funeral-industry-related licenses. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Saguaro Valley is a Board-licensed crematory located in Mesa. Welsh-Alexis was Board-licensed in funeral directing, embalming, and cremations and worked as the responsible cremationist at Saguaro Valley. She supervised Warner, who was licensed as and worked as a cremationist at Saguaro Valley. Lambert was licensed to practice funeral directing and embalming, and worked as Saguaro Valley's business manager and transporter. Lambert had previously been licensed as a cremationist as well, but that license was revoked in 2011.

¶3 Saguaro Valley was an independent crematory, and as such did not operate as a funeral home but rather received human remains for cremation from licensed funeral homes. Each set of human remains to be sent for cremation would be boxed and sealed by the sending funeral home in a "minimum container," a body-sized cardboard container used to store, transport, and cremate bodies. Either Saguaro Valley would pick up or the funeral home would deliver containers to the crematory. Each such container would be accompanied by a disposition-transit permit specifying the identity of the decedent and the authorized disposition for the remains. Saguaro Valley would then either cremate the container of human remains immediately or store the container until it could be cremated. After cremation, Saguaro Valley would return the cremated remains and a certificate of cremation to the sending funeral home to be passed on to the decedent's family.

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¶4 In September 2015, the Board received two formal written complaints regarding Saguaro Valley's handling of containers of human remains. The first was filed by Mario Francini, a funeral director and part-owner of a funeral home that used Saguaro Valley for cremations. Francini recounted that in June 2015, late one morning when he was delivering containers for cremation, he observed four dollies double-stacked with containers outside of Saguaro Valley's refrigeration unit. Then, late one morning in mid-August 2015, again while delivering containers, Francini arrived at Saguaro Valley to find the retorts (cremation chambers) running but the crematory deserted. When Welsh-Alexis returned 20 minutes later, Francini again observed multiple dollies, some double-stacked with containers, sitting outside of Saguaro Valley's refrigeration unit; he later observed that the refrigerator itself was not running. Francini's complaint focused on his discomfort with seeing the containers stacked, both as disrespectful to the deceased and as potentially unsafe since each container could only hold up to around 250 pounds.

¶5 The second complaint was filed by Sylvia Moreno, part-owner of the same funeral home. She recounted that in June 2015, she observed Lambert double-stack containers in the back of a van for transport to Saguaro Valley. Although other transport companies commonly used racks to carry multiple containers, Lambert stacked the containers directly on top of others, with no rack, divider, or support between them. The weight was such that Moreno could see the lower layer of containers bend in the middle when Lambert loaded containers on top. Moreno continued to be troubled by Lambert's stacking, and she eventually filed a formal written complaint with the Board in September 2015.

¶6 These complaints triggered an investigation by the Board. *See* Ariz. Rev. Stat. ("A.R.S.") § 32-1367(A). In late September, the Board's investigator went to Saguaro Valley to collect cremation logs, and while there, she observed three dollies, two of them double-stacked, holding containers outside of the refrigeration unit, even though only one container remained refrigerated. Two of Saguaro Valley's three retorts were running, and the third was not functional at the time. Warner, the only employee present, also showed the investigator Saguaro Valley's transport vehicles (minivans), which he claimed could accommodate five or six containers (that is, stacks two or three containers high) even though the vehicles had no racks or any other kind of separator in the back.

¶7 Using Saguaro Valley's own cremation logs, as well as records from the funeral homes that sent remains to Saguaro Valley, the investigator also calculated the total number of containers in Saguaro

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Valley's possession each day in June, July, and August 2015. Given the maximum capacity of the refrigeration unit (16 containers) and the maximum number of cremations possible each day (around 15, accounting for cremations with three retorts throughout daylight hours at approximately 2 hours per container), the investigator's calculation showed that on several days, Saguaro Valley had more containers than it could either cremate or store in refrigeration.

¶8 Additionally, the investigation revealed that Saguaro Valley had cremated almost 200 containers for which the disposition-transit permit specified a different crematory. For 60 of these, the inaccurate death records that resulted were later corrected, but the other 138 remained incorrect.

¶9 The Board then issued a disciplinary complaint against the Licensees. As factual bases for discipline against Saguaro Valley and the other Licensees, the complaint alleged (1) stacking containers (Lambert doing so in transit, Warner at the crematory itself, Welsh-Alexis as supervisor for directing or allowing both), (2) storing containers unrefrigerated (Warner and Welsh-Alexis), and (3) accepting inaccurate disposition-transit permits (Saguaro Valley only).¹ The complaint alleged that these practices were subject to discipline on various legal bases, including as unprofessional conduct, repeated or continuing negligence, or professional incompetence, *see A.R.S. §§ 32-1366(A), -1301(54)(k), conduct failing to preserve the dignity of human remains (including by failing to properly refrigerate remains), *see A.R.S. § 32-1399(2), (3); Ariz. Admin. Code ("A.A.C.") R4-12-612(3), and conduct reflecting disrespect for the decedent (or lacking careful and competent handling) contrary to prevailing standards and practices of the profession in Arizona, *see A.A.C. R4-12-301(A)(1)-(2), (B).***

¶10 After a four-day evidentiary hearing through the Office of Administrative Hearing ("OAH"), the administrative law judge ("ALJ") found that the Licensees had kept at least some containers outside of refrigeration, had stacked containers in violation of professional standards, and had improperly accepted containers for cremation when the disposition-transit permit specified a different facility. The ALJ recommended that each license held by each Licensee be suspended for 30 days, followed by 1 year of probation.

¹ The complaint also alleged that Saguaro Valley had improperly stacked trays of cremated remains, but that allegation was not proven.

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¶11 The Board accepted all of the ALJ’s findings of fact and conclusions of law, but opted to impose more substantial discipline. Citing the severity and pervasiveness of the misconduct involved, the Board voted to (1) as to Welsh-Alexis, revoke her funeral director and cremationist licenses and impose 2 years of probation on her embalmer’s license, (2) as to Lambert, revoke his funeral director’s license and impose 2 years of probation on his embalmer’s license, (3) as to Warner, revoke his cremationist license (which had lapsed before the conclusion of the disciplinary proceeding), and (4) as to Saguar Valley itself, impose 1 year of probation supervised by a Board-appointed funeral director, as well as a \$3,000 civil penalty.

¶12 The Licensees moved for rehearing, which the Board denied. The Licensees then timely appealed the Board’s decision to the superior court, which affirmed. *See A.R.S. §§ 12-902, 32-1367(J), 41-1092.08(H).* The Licensees then appealed to this court. We have jurisdiction under A.R.S. § 12-913. *See Svendsen v. Ariz. Dep’t of Transp.*, 234 Ariz. 528, 533, ¶ 13 (App. 2014).

DISCUSSION

I. General Principles.

A. Standards of Review.

¶13 On judicial review of the Board’s decision, the superior court must affirm unless the decision “is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion.” A.R.S. § 12-910(E); *see also Horne v. Polk*, 242 Ariz. 226, 230, ¶ 13 (2017). The Board’s decision will be upheld if the evidentiary record supports the decision, even if the record would also support a different conclusion. *Horne*, 242 Ariz. at 230, ¶ 13; *see also DeGroot v. Ariz. Racing Comm’n*, 141 Ariz. 331, 336 (App. 1984).

¶14 On appeal, this court is not bound by the superior court’s assessment and instead independently reviews the administrative record to determine whether a preponderance of the evidence supports the Board’s decision. *See Parsons v. Ariz. Dep’t of Health Servs.*, 242 Ariz. 320, 322, ¶ 10 (App. 2017). We review legal determinations *de novo*. *McGovern v. Ariz. Health Care Cost Containment Sys. Admin.*, 241 Ariz. 115, 118, ¶ 8 (App. 2016).

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B. Legal Bases for Discipline.

¶15 The Board may discipline licensed funeral directors, embalmers, cremationists, and crematories for acts of unprofessional conduct, repeated or continuing negligence or other professional incompetence, or violations of statutes and rules governing the funeral service profession. A.R.S. §§ 32-1366(A) (funeral directing or embalming), -1398.01 (applying title 32, chapter 12, article 3 – which includes § 32-1366 and other provisions – to crematory disciplinary proceedings); *see also* A.R.S. § 32-1398(A)(10). For these purposes, unprofessional conduct includes gross negligence or incompetence that is reasonably related to funeral directing. A.R.S. § 32-1301(54)(k).

¶16 All Board licensees are prohibited from engaging in conduct causing “disrespect for the deceased person . . . [that is] contrary to the prevailing standards and practices of the profession in [Arizona].” A.A.C. R4-12-301(A)(1); *see also* A.A.C. R4-12-301(A)(2) (regarding care, handling, or transportation of human remains “in accordance with the prevailing standards and practices of the profession in this state”). In addition to being a rule violation in and of itself, any violation of this provision is also “deemed to be evidence of gross negligence, repeated or continuing negligence or other professional incompetence.” A.A.C. R4-12-301(B).

II. Specific Violations.

A. Stacking Containers.

¶17 The Licensees do not dispute that they would stack containers in transit or when reorganizing the refrigeration unit to prepare for the day’s cremations. Rather, noting that no Arizona statute or rule expressly prohibits stacking, they contend that stacking containers was not misconduct.

¶18 Discipline may be imposed, however, for conduct reflecting “disrespect for the deceased person . . . [that is] contrary to the prevailing standards and practices of the profession in this state.” A.A.C. R4-12-301(A)(1); *see also* A.R.S. § 32-1399(2) (requiring a crematory to store containers securely and in a manner preserving dignity of the human remains); A.A.C. R4-12-301(B) (noting that violations of (A)(1) are “deemed evidence” of gross negligence or incompetence subject to discipline under A.R.S. § 32-1366(A)(1)-(2)). And here, ample evidence supports the Board’s finding that prevailing standards in the funeral profession do not allow stacking containers. Witnesses from funeral industry trade associations, a funeral-industry consumer advocacy organization, and a mortuary science

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degree program uniformly testified that stacking containers was disrespectful to the deceased and thus unacceptable under professional norms. *See DeGroot*, 141 Ariz. at 336 (requiring deference to agency's determinations if supported by substantial evidence). As these witnesses further explained, the prohibition on stacking avoided risks such as crushed containers and damage to the human remains within.

¶19 The Licensees argue that this evidence was insufficient because it was not directed to standards and practices in Arizona specifically, and that their own witnesses showed that in the Arizona funeral industry, stacking was not considered improper. But the witnesses testifying on the Licensees' behalf almost uniformly described observing stacking only in the remote past—8, 10, or even 20 years before. Several denied engaging in stacking themselves, explaining that stacking was used only if necessitated by lack of adequate equipment such as shelving or dollies. And several expressed distaste with the practice, stating that “it’s not right” and that they would not want to have to explain the practice to decedents’ families. Notably, the funeral home owner who most vehemently supported stacking was flatly contradicted by the same facility’s funeral director, who testified that he stopped stacking immediately upon taking responsibility for the funeral home because stacking “was not a practice that [he] would endorse or wish to be a part of.”

¶20 Although the Licensees’ witnesses stated that stacking was not improper, their own practices suggested otherwise. And in any event, assessment of witness credibility and weighing conflicting evidence regarding professional norms rests “peculiarly within the province of the trier of facts.” *See Anamax Mining Co. v. Ariz. Dep’t of Econ. Sec.*, 147 Ariz. 482, 486 (App. 1985). In light of the industry experts’ testimony and the Licensees’ witnesses’ own practices and disavowal of stacking, substantial evidence supports the conclusion that stacking containers fell below professional standards. *See A.A.C. R4-12-301(A)(1); see also Horne*, 242 Ariz. at 230, ¶ 13 (noting that agency’s factual findings will be upheld if they are supported by substantial evidence).

¶21 The Licensees further argue that the prohibitions on failing to preserve the “dignity” of or causing “disrespect” for the deceased are inherently subjective, rendering the provisions unconstitutionally vague in violation of due process guarantees. *See Ethridge v. Ariz. State Bd. of Nursing*, 165 Ariz. 97, 104–05 (App. 1989) (noting that a statutory prohibition (or requirement) that is “so vague that persons of common intelligence must necessarily guess as to its meaning and will differ as to its application”

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deprives those governed of due process); *see also Berenter v. Gallinger*, 173 Ariz. 75, 81 (App. 1992) (noting the danger of arbitrary or discriminatory enforcement of provisions too vague to provide an objective standard for enforcement). Even assuming “disrespect for the deceased person,” standing alone, might be overly subjective, the prohibition on disrespectful conduct is constrained by the objective requirement that the act be “contrary to the prevailing standards and practice of the profession in this state.” *See A.A.C. R4-12-301(A)(1)*. As described above, the evidence provided ample basis for the conclusion that there was no dispute in the field about the propriety of stacking: the practice was strictly prohibited. And particularly in the context of regulations applicable to trained professionals, reliance on professional standards provides an objective baseline and thus adequate notice of the conduct proscribed. *See Golob v. Ariz. Med. Bd.*, 217 Ariz. 505, 513, ¶¶ 29–32 (App. 2008); *Ethridge*, 165 Ariz. at 105–06.

¶22 Accordingly, the Board did not err by imposing discipline based on the Licensees’ practice of stacking containers.

B. Non-Refrigeration.

¶23 The Licensees acknowledge that statutes and regulations require containers to be stored in refrigeration, but argue that no substantial evidence supported the finding that containers were ever kept outside of refrigeration. They rely on Welsh-Alexis and Warner’s testimony that containers were always properly stored in refrigeration, and their explanation that on the few occasions containers were observed outside of refrigeration, the containers had appropriately been removed for just a few minutes to reorganize the refrigerator for the day’s cremations.

¶24 But other evidence supports a contrary conclusion. The second time Francini observed containers sitting outside of the refrigeration unit (which he noticed was not even functioning), no one was present at the crematory and Welsh-Alexis did not return for 20 minutes. Even setting aside functionality of the refrigerator itself, physically leaving the crematory with the containers sitting out is inconsistent with Welsh-Alexis’s proffered explanation of reorganizing the refrigerator. Although the Licensees urge that Francini was not a credible witness, we defer to the fact-finder’s credibility assessment and do not reweigh its resolution of conflicting testimony. *See Anamax*, 147 Ariz. at 486; *see also Horne*, 242 Ariz. at 230, ¶ 13.

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¶25 In addition to direct observation of containers outside the refrigeration unit, the Board investigator's statistical evidence provides further support for the finding that some containers must have been stored outside refrigeration. Compiling data from the funeral homes sending containers to Saguaro Valley and Saguaro Valley's cremation logs, the investigator calculated the total number of containers in Saguaro Valley's possession each day in June, July, and August 2015. On several days, the total number of containers in Saguaro Valley's custody exceeded its maximum capacity (around 15 containers cremated plus 16 containers stored in refrigeration).

¶26 The Licensees argue that the investigator's calculation was flawed because it failed to account for the time of day each container was received, it assumed each container was stored at least one night, and it assumed only containers for adults (as opposed to the much smaller containers for children or body parts). But the precise time a container was received is irrelevant to the aggregate calculation of total containers that must be cremated or stored each day, which was the focus of the investigator's assessment. Similarly, the calculation did not assume any particular container would be stored for a night, but rather correctly relied on the premise that each container in Saguaro Valley's control would either have to be cremated or stored. And although the Licensees suggest that the refrigeration unit could accommodate far more small containers than adult-sized containers, they offer only speculation that any such small containers were present on any of the days the number of containers in Saguaro Valley's possession exceeded its capacity.

¶27 Accordingly, the record supports the Board's conclusion that Saguaro Valley on occasion kept containers of human remains outside of a secure refrigeration unit in violation of governing statutes and regulations. *See A.R.S. § 32-1399(2), (3); A.A.C. R4-12-612(3); see also Horne, 242 Ariz. at 230, ¶ 13.*

C. Disposition Transit Permits.

¶28 The Licensees next argue that the Board erred by imposing discipline for Saguaro Valley's acceptance and cremation of containers of human remains with disposition-transit permits specifying a different cremation facility. They contend that the Board erred as a matter of law because the relevant regulation does not restrict a disposition-transit permit's validity to a particular *facility*, but rather only to the final disposition type (e.g., cremation, burial, etc.). *See A.A.C. R9-19-302(A)* (requiring a funeral establishment to obtain a disposition-transit permit

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specifying one or more “final disposition listed in subsection (B)(5)” and limiting validity of the permit to “each final disposition listed”), (B)(5) (listing types of “final disposition,” including burial, entombment, anatomical gift, cremation, or removal from the state) (2015).² Thus, in the Licensees’ view, even though each disposition-transit permit includes the name of the facility to perform the final disposition, because the regulation does not require that the facility be specified, cremation by a facility different than the one designated cannot be the basis for a violation.

¶29 We need not reach the issue of whether the regulation requires that a disposition-transit permit designate a specific facility for final disposition, however, because the misconduct alleged by the Board was not a rule violation, but rather repeated or continuing negligence in the practice of funeral directing. And ample evidence supported the Board’s conclusion that, regardless whether the disposition-transit permit was required to specify a facility, proceeding with cremation when the permit in fact specified a different final disposition facility constituted repeated or continuing negligence.

¶30 Each disposition-transit permit includes information identifying the decedent, identifying the responsible funeral facility and authorized manner of disposition, and specifying at least one disposition facility. The permit then requires the responsible professional at the disposition facility to sign the permit “certify[ing] that the above described remains were disposed of at the following location and by the method specified above.” Thus, for each disposition-transit permit designating a facility other than Saguaro Valley, Welsh-Alexis would have had to sign the permit falsely certifying that the cremation had been performed at a different facility.

¶31 Welsh-Alexis testified that the funeral director sending the remains was the only one authorized to make or amend the disposition-transit permit, and thus the funeral director was ultimately responsible for making sure the permit reflected the correct disposition facility. But other witnesses indicated that the cremationist receiving the remains was also responsible for ensuring that the facility listed was accurate and, if not, requesting a corrected permit from the sending funeral director. Even a cemetery professional testifying on the Licensees’ behalf affirmed that, if he

² This regulation was amended and renumbered in part effective October 1, 2016. *See* 22 Ariz. Admin. Reg. 1782; *see also* A.A.C. R9-19-308(B) (2016). For ease of reference, we cite the version in effect in 2015, the time of the underlying conduct at issue.

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had received a disposition-transit permit indicating a different cemetery, he would “drop everything until everything was corrected.” And Welsh-Alexis herself, on the one occasion she noticed a different crematory listed, contacted the funeral director who had sent the remains and asked to have the disposition-transit permit corrected.

¶32 Moreover, Saguaro Valley’s practice of cremating containers of human remains for which the disposition-transit permit specified a different crematory was not insignificant, but rather resulted in almost 200 inaccurate death records. Although 60 such records were later corrected, the other 138 remained incorrect at the time of the investigation. And while the cremation certificate (provided to the decedent’s family) would reflect the correct crematory even if the disposition-transit permit did not, the certificate would not remedy an inaccurate death record.

¶33 In sum, regardless whether A.A.C. R9-19-302 required the disposition-transit permit to specify a specific final disposition facility, the Board did not err by concluding that when the permit in fact specified a different facility, Saguaro Valley’s repeated practice of proceeding with cremation without first correcting the permit constituted repeated or continuing negligence justifying discipline under A.R.S. § 32-1366(A)(2).

III. Board Proceedings and Scope of Discipline.

A. Discipline on Funeral Director and Embalmer Licenses.

¶34 The Licensees argue that the Board exceeded its authority by imposing discipline relating to Welsh-Alexis and Lambert’s funeral director and embalmer licenses because Welsh-Alexis was practicing only as a cremationist (not as a funeral director or embalmer) and Lambert was acting only as Saguaro Valley’s business manager (not as a funeral director or embalmer). In the Licensees’ view, because each type of license authorizes specific (and distinct) fields of practice within the funeral profession, misconduct in one field/license is not a basis to discipline other licenses.

¶35 The statutory grounds for Board discipline are broader than the Licensees suggest. The Board may discipline its licensees for, among other grounds, professional incompetence or repeated or continuing negligence “in the practice of funeral directing,” or “unprofessional conduct,” which includes various types of misconduct that usually (but not always) must be reasonably related to “funeral directing.” A.R.S. §§ 32-1366(A)(1), (2), -1301(54). And “funeral directing” is defined broadly to include “providing a service in the disposition of dead human bodies for

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compensation.” A.R.S. § 32-1301(23). The underlying conduct on which the complaint was based—stacking and improper storage of containers—fall within this field. The Licensees offer no authority for the proposition that practicing within a single licensure insulates their other licenses from discipline for misconduct related to the funeral industry generally. *Cf.* A.R.S. § 32-1301(54)(m) (defining “unprofessional conduct” to include prior revocation of a license by the board or other licensing authority of another jurisdiction).

B. Warner’s Expired License.

¶36 The Licensees contend that the Board exceeded its authority by revoking Warner’s cremationist license because his license expired before the Board imposed discipline. The Licensees suggest that because a licensed cremationist who fails to renew the license before its annual expiration “shall apply for a new license,” A.R.S. § 32-1394.02(D), the expired license becomes a nullity that is not subject to Board discipline.

¶37 Some other regulatory commissions are granted express statutory authorization to proceed with investigation or disciplinary proceedings after a license lapses. *See, e.g.*, A.R.S. § 32-2153(E) (real estate commissioner). Even absent such express statutory language, however, the power to complete disciplinary proceedings commenced before expiration of a license is implicit in the Board’s statutory underpinnings. For instance, the Board has a duty to investigate all written complaints suggesting grounds for discipline, and its governing statutes mandate a formal hearing process before certain discipline can be imposed. *See* A.R.S. § 32-1367(A)-(E). Such provisions and the public interests they are designed to protect would be thwarted if a licensee could avoid discipline simply by choosing not to renew the license, particularly with a license that requires annual renewal. *See, e.g.*, *Trappers Lake Lodge & Resort, LLC v. Colo. Dep’t of Revenue*, 179 P.3d 198, 200-01 (Colo. App. 2007) (collecting cases); *Nims v. Wash. Bd. of Registration*, 53 P.3d 52, 55-56 & n.17 (Wash. Ct. App. 2002) (as amended) (collecting cases); *see also Patel v. Kan. State Bd. of Healing Arts*, 920 P.2d 477, 479-80 (Kan. Ct. App. 1996) (holding that regulatory board retained continuing jurisdiction over a disciplinary proceeding commenced when license was active).

C. Lambert’s Prior Disciplinary Proceedings.

¶38 The Licensees argue that the Board improperly considered matters outside the record when deciding the appropriate disciplinary action to take against Lambert. During the Board’s discussion, one Board

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member read an excerpt from the transcript of the 2011 disciplinary hearing resulting in revocation of Lambert's cremationist license. Although the transcript itself was not entered into evidence before the ALJ, the fact of revocation and the facts underlying that disciplinary proceeding—including the broadcast news exposé of Lambert (then the responsible cremationist for the crematory that would later be renamed Saguaro Valley) storing human remains outdoors in a van for up to 19 hours—were described in some detail at the evidentiary hearing. And the complaint provided the Licensees with notice that, should the ALJ find grounds for discipline, previous Board disciplinary actions would become relevant to what new disciplinary action would be warranted. Under these circumstances, it was not improper for the Board to rely on its own institutional knowledge when assessing the degree of discipline to impose on Lambert.

D. Modification of the ALJ's Recommended Discipline.

¶39 The Licensees argue that the Board improperly failed to provide a written justification for rejecting or modifying the ALJ's recommended discipline as required by A.R.S. § 41-1092.08(B). But the Board offered explicit written justifications for the modifications. On consideration, the Board concluded that the ALJ's recommendations "did not adequately account for the severity" of the Licensees' violations, noted the number of violations (reflecting that the misconduct constituted standard practices at Saguaro Valley), and as to Lambert, considered the previous discipline imposed. Although the Licensees characterize the Board's rationale as an after-the-fact justification for excessive discipline, the concerns expressed in the Board's written rationale were consistent with those expressed during its discussion at the Board hearing.

E. Bias or Prejudice and Scope of Discipline Imposed.

¶40 The Licensees further assert that the degree of discipline actually imposed was excessive and shockingly disproportionate to the offenses. But the Board is authorized to impose discipline ranging from a letter of censure to license revocation, *see A.R.S. § 32-1367(E)*, and absent extraordinary circumstances and as long as grounds for discipline exist, "if the discipline originally imposed falls within the permissible range, it would be unlikely the action could be seen as arbitrary." *Maricopa Cty. Sheriff's Office v. Maricopa Cty. Emp. Merit Sys. Comm'n*, 211 Ariz. 219, 222, ¶¶ 16-17 & n.6 (2005).

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¶41 The Licensees suggest that the level of discipline imposed in this case was “so unreasonably disproportionate to the offense as to be arbitrary and without reasonable cause.” *Id.* at ¶ 16 n.6. But the Board could properly consider the Licensees’ multiple violations—misconduct that had become their standard practices—as grounds to impose a more severe sanction.

¶42 The Licensees further suggest that the Board’s decision was tainted by bias against them. They claim that the Board’s executive director threatened to run Saguaro Valley out of business and revoke Welsh-Alexis and Lambert’s licenses, and that the disciplinary proceeding (and the excessive discipline imposed) simply fulfilled this threat.

¶43 The Board is presumed to be fair absent evidence of actual bias or prejudice; “mere speculation regarding bias will not suffice.” *Pavlik v. Chinle Unified Sch. Dist.* No. 24, 195 Ariz. 148, 152, ¶ 11 (App. 1999); *see also Lathrop v. Ariz. Bd. of Chiropractic Exam’rs*, 182 Ariz. 172, 180 (App. 1995). And here, the Licensees presented nothing more than speculation to support their claim that the executive director’s alleged animus drove the proceedings. This is particularly true given that the Board forwarded the case to OAH for adjudication before an undisputedly neutral ALJ, and the Board adopted the ALJ’s findings of fact and conclusions of law wholesale (albeit while imposing increased discipline).

¶44 Moreover, both Francini and Moreno—who filed the formal complaints that initiated the Board’s investigation—testified that they had decided to file the complaints independently, not at the executive director’s urging. Although the Licensees presented affidavits (and later testimony) from three individuals asserting that the executive director made comments indicating that Saguaro Valley, Lambert, and Welsh-Alexis were in trouble, the conversations either referenced or post-dated the filing of the written complaints, which triggered a mandatory investigation regardless of the executive director’s views. *See A.R.S. § 32-1367(A).* And although the Licensees speculate that the executive director was influencing the proceedings behind the scenes, the owner of Saguaro Valley expressly acknowledged that he had no knowledge of what role (if any) the executive director was in fact playing. *Cf. Horne*, 242 Ariz. at 230, ¶ 14 (holding that the merger of prosecutorial and adjudicative functions *in a single official* violates due process “where an agency head makes an initial determination of a legal violation, participates materially in prosecuting the case, and makes the final agency decision”).

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¶45 Accordingly, because the Licensees have not shown that the Board's disciplinary decision was tainted by bias or prejudice, and given a reasonable basis for the discipline imposed, the Board's decision was not subject to reversal as arbitrary or capricious. *See A.R.S. § 12-910(E).*

IV. Attorney's Fees on Appeal.

¶46 The Licensees request an award of their appellate attorney's fees and costs on multiple bases. *See A.R.S. § 12-348(A)(2).* Because they have not prevailed, however, we deny their requests.

CONCLUSION

¶47 The superior court judgment upholding the Board's final disciplinary decision is affirmed.



AMY M. WOOD • Clerk of the Court
FILED: AA