



Protecting, maintaining and improving the health of all Minnesotans

**Minnesota Department of Health
ADMINISTRATIVE PENALTY ORDER**

Wagner Funeral Home
Joseph M. Wagner
17365 Johnson Memorial Drive
Jordan, Minnesota 55352

I. Authority

The Minnesota Department of Health is authorized, pursuant to Minn. Stat. §149A.06, to order corrections and assess administrative penalties in an amount up to \$10,000.00 per violation for violations of Minnesota Statutes, Chapter 149A.

II. Findings of Fact

1. On September 27, 2017, the Minnesota Department of Health (“MDH”), Mortuary Science Section conducted a routine funeral home inspection of Wagner Funeral Home, located in Jordan, Minnesota. Wagner Funeral Home, license number (0873), is owned and operated by Joseph M. Wagner, (“Mr. Wagner”) a licensed mortician (M-2690).
2. During the inspection of the preparation and embalming room, MDH discovered that Wagner Funeral Home used the preparation and embalming room to store glass jars containing food from the Wagner apple orchard business. MDH observed five rows of wooden crates positioned on the floor against the wall of an active preparation and embalming room. MDH also observed the wooden crates were stacked over four feet in height and were blocking emergency equipment including the eyewash and shower station, which must be tested during the inspection. The hazardous waste container was also stored in front of the crates on the floor.
3. When I asked Mr. Wagner about the contents contained in the glass jars inside of the crates, Mr. Wagner stated that it was applesauce from the apple orchard. Mr. Wagner admitted to storing the crates with the jars of applesauce in the preparation and embalming room because he did not have enough storage space.

4. During the administrative inspection of Wagner Funeral Home's records, the funeral provider could not produce documentation of decedent records that are required to be available for inspection purposes. Wagner Funeral Home is not completing certificate of removals for all decedents, obtaining written authorizations to embalm from the legal next of kin, or completing embalming reports. The provider does not display the establishment license or mortician licenses at the funeral home. Merchandise pricelists are not available on site for review and all records are retained in an unlicensed location. After reviewing previous years of inspections reports for the establishment, correction orders were issued on September 20, 2013 for previous violations; however, Wagner Funeral Home failed to correct the violations for the administrative part of the inspection.

III. Violation References

Minnesota Statutes, Chapters §149A.20 Subd. 10-Display of License
Minnesota Statutes, Chapters §149A.50 Subd. 5-Display of License
Minnesota Statutes, Chapters §149A.71 Subd. 2 (C)-Preventative Requirements
Minnesota Statutes, Chapters §149A.75- Funeral Industry Practices; Retention of Documents
Minnesota Statutes, Chapters §149A.90 Subd. 4-Certificate of Removal
Minnesota Statutes, Chapters §149A.90.Retention of Certificate of Removal
Minnesota Statutes, Chapters §149A.91 Subd. 4-Authorization to Embalm
Minnesota Statutes, Chapters §149A.91 Subd. 5-Authorization to Embalm
Minnesota Statutes, Chapters §149A.91 Subd. 10-Required Records
Minnesota Statutes, Chapters §149A.92 Subd. 7-Access and Privacy
Minnesota Statutes, Chapters §149A.92 Subd. 8-Sanitary conditions and permitted use
Minnesota Statutes, Chapters §149A.92 Subd. 10-Occupational and Work Place Safety

IV. Conclusions

1. Failure to display the individual mortician license and establishment license in the establishment; Wagner Funeral Home is violating Minn. Stat. § 149A.20, Subdivision 10 and 149A.50, Subdivision 5.
2. Failure to complete required paperwork for transporting human remains, and recording of embalming reports used to record how a decedent is being prepared; Wagner Funeral Home is violating Minn. Stat. §149A.75, §149A.90, Subdivision. 1 & 4, and §149A.91, Subdivision.10.
3. Failure to obtain the appropriate signature(s) on embalming authorizations from the person with the legal right to control the disposition; Wagner Funeral Home is violating Minn. Stat. § 149A.91, Subdivision. 4 & 5.
4. Failure to make available pricelists for all merchandise that Wagner Funeral Home offers to consumers requesting services; Wagner Funeral Home is violating Minn. Stat. §149A.71, Subdivision. 2(C),

5. Based on the decision to store wooden crates contained with food in the preparation and embalming room where there are toxic chemicals and infectious materials; Wagner Funeral Home is violating OSHA Bloodborne Pathogens Standard-29CF1910.1030 and Minn. Stat. §149A.92, Subdivision. 8 &10.
6. Failure to make the room private and secure from the entrance of unauthorized personnel; Wagner Funeral Home is violating Minn. Statute §149A.92, Subdivision.7.

V. Corrective Order

It is ordered that Wagner Funeral Home, must demonstrate, IN WRITING, that the corrective actions specified below have been completed or that appropriate steps toward correcting the violation(s) have been taken. Wagner Funeral Home must send a written letter to MDH's Mortuary Science Section demonstrating that it has complied with this Corrective Order or, if Wagner Funeral Home has not yet complied with the Corrective Order, Wagner Funeral Home must detail its plans for complying with this Order. Wagner Funeral Home must send this letter within 30 days of receipt of this order.

If, within the 30-day period, Wagner Funeral Home fails to demonstrate that the corrective actions specified below have been taken or that it has taken appropriate steps toward correction of the violations specified above, the forgivable penalty assessed will become due and payable as described in section VI. A plan to correct the violations shall be developed within the 30-day period for corrective action. The plan must be approved by the Department. Failure to comply with the approved plan shall be cause for subsequent enforcement action.

The following corrective actions are required by this order:

1. The Funeral Home owner must immediately remove all glass jars of food contained in crates from the preparation and embalming room. Mr. Wagner, funeral home owner and mortician, must agree to cease all storage of food and any other items unrelated to supplies and equipment used to prepare and embalm human remains. Owner must send photos of the preparation and embalming room clear of all prohibited items.
2. Within 30 days of the receipt of this order, Joseph M. Wagner, owner and mortician of Wagner Funeral Home must attend an in person two-hour OSHA, Bloodborne Pathogens Training. The purpose of this training is to educate Mr. Wagner of what bloodborne pathogens are and provide knowledge of why food cannot be stored in an active preparation and embalming room. Within ten days of the completion of the training, Wagner Funeral Home must provide to the Department a copy of a certificate of completion for OSHA training with the name and credentials of the trainer, the date training was held.

3. Within 30 days of the receipt of this order, Joseph M. Wagner, owner and mortician of Wagner Funeral Home must submit copies of funeral home forms that the establishment will use to document and record required authorizations and permits. Wagner Funeral Home must submit a copy of: A Certificate of Removal, A Written Embalming Authorization form, An Embalming Record, and individual merchandise pricelists for urns, caskets, and outer-burial containers.
4. Within 30 days of the receipt of this order, Joseph M. Wagner, owner and mortician of Wagner Funeral Home must submit photos of the privacy sign attached to the preparation and embalming room door and submit a video of the prep room doors being locked and secure from authorized personnel. Mr. Wagner must also submit photos of Wagner Funeral Home establishment license and the mortician license displayed at the funeral home in a conspicuous manner.
5. Within 90 days of the receipt of this order, Joseph M. Wagner, Owner of Wagner Funeral Home must attend a three-credit Continuing Education course on Ethics. The purpose of this course is to provide knowledge on ethical practices of funeral service. Within ten days of the completion of the training, Wagner Funeral Home must provide to the Department a copy of a certificate of completion for Ethics Training with the name and credentials of the trainer, the date training was held and a list including the name, license number if applicable, and signature of each person who attended the training.

VI. PENALTY ASSESSMENT

Forgivable Penalty Assessment

You are assessed a FORGIVABLE administrative penalty of \$2,500 for the violations described in Sections II, III, and IV.

If you demonstrate to the satisfaction of the Department, IN WRITING, within 30 days that the corrective actions listed above have been completed or that appropriate steps have been taken toward correcting the violations, which may include the development of a plan for correction, this penalty will be forgiven.

If you fail to demonstrate that the corrective actions and/or appropriate steps toward correcting the violations have been taken, the assessed penalty becomes DUE AND PAYABLE on the 31st day after this order was signed. A plan to correct the violation shall be developed within the 30-day time period for corrective action. The plan must be approved by the Department. Failure to comply with the approved plan shall be cause for subsequent enforcement action.

Non-forgivable Penalty Assessment

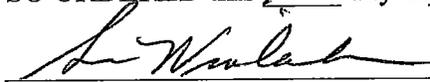
You are also assessed a NONFORGIVABLE penalty of \$5,000 for the violations described in Sections II, III, and IV.

The penalty shall be paid by certified check or money order payable to "Treasurer, State of Minnesota." The payment must be submitted to the Minnesota Department of Health at the address listed below within 30 days of the date of receipt of this Order.

VII. REQUEST FOR HEARING

You may appeal this order by requesting a hearing. The hearing request must be made in writing and must be delivered to the Department of Health at the address listed below by certified mail within 20 days of the date of this order. The request must state the specific reasons for seeking a review of the order. The Minnesota Department of Health will initiate the hearing process within 30 days of receiving a request for a hearing.

SO ORDERED this 13th day of November.



Susan Winkelmann, Assistant Division Director
Health Regulation Division
Minnesota Department of Health
85 East Seventh Place
P.O. Box 64900
St. Paul, Minnesota 55164-0900

Direct required correspondence and any appeals to:

Catherine Lloyd, Manager of the Mortuary Science Section,
Minnesota Department of Health,
P.O. Box 64882
St. Paul, MN 55164-0882



Protecting, Maintaining and Improving the Health of All Minnesotans

August 8, 2018

BY U.S. MAIL:

Judge Jeanne Cochran
Office of Administrative Hearings
P.O. Box 64620
St. Paul, MN 55164-0629

Joseph Wagner
Wagner Funeral Home
17365 Johnson Memorial Dr.
Jordan, MN 55352

Lindsay Strauss
Office of the Attorney General
Suite 900, Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2127

RE: Joseph Wagner, Wagner Funeral Home

OAH Docket No. 68-0900-34952

Dear Judge Cochran, Mr. Wagner and Ms. Strauss:

Enclosed is a copy of the Order that I issued in this case.

Sincerely,

A handwritten signature in cursive script that reads 'Patricia Winget'.

Patricia Winget
Adviser to the Commissioner
P.O. Box 64975
St. Paul, Minnesota 55164-0975

RECEIVED

AUG 10 2018

ATTORNEY GENERAL

STATE OF MINNESOTA

BEFORE THE MINNESOTA COMMISSIONER OF HEALTH

In the Matter of Administrative Penalty Order
Issued to Wagner Funeral Home
and Joseph M. Wagner

ORDER

OAH Docket No. 68-0900-34952

BACKGROUND

Administrative Law Judge Jeanne M. Cochran heard this case on April 12, 2018. Lindsay K. Strauss, Assistant Attorney General, 445 Minnesota St., Suite 900, St. Paul, MN 55101, represented the Minnesota Department of Health (Department). Joseph M. Wagner, owner and manager, appeared without counsel on behalf of Wagner Funeral Home (Respondent). On April 30, 2018, Judge Cochran issued her Findings of Fact, Conclusions, and Recommendation, that the Commissioner uphold the Department. Neither party filed exceptions to the ALJ's Report.

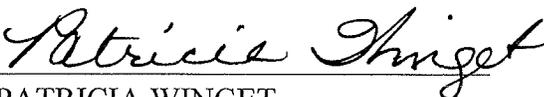
ORDER

Based on the record, THE COMMISSIONER ORDERS that:

1. Administrative Law Judge Cochran's attached Findings of Fact dated April 30, 2018, are adopted with the following changes:
 - A. In the fifth bullet point of Finding of Fact No. 7, the citation is changed to Minn. Stat. § 149A.71, subd. 2(c)(3).
 - B. In the sixth bullet point of Finding of Fact No. 7, the citation is changed to Minn. Stat. § 149A.71, subd. 2 (c)(2).
 - C. In the eleventh bullet point of Finding of Fact No. 7, the citation is changed to Minn. Stat. § 149A.92, subd. 7.
 - D. In Finding of Fact No. 19, the date is changed to February 4, 2014. In footnote 31, the date is changed to February 4, 2014.
2. Administrative Law Judge Cochran's Conclusions of Law dated April 30, 2018, are adopted with the following changes:

- A. In Conclusion of Law No. 22, the citation is changed to Minn. Stat. § 149A. 92, subd. 7.
- B. In Conclusion of Law No. 29, in footnote 102, the citation is changed to Minn. Stat. § 149A.06, subd. 4.
3. Administrative Law Judge Cochran’s Memorandum dated April 30, 2018, is adopted with the following changes:
- A. In the second paragraph, the word “relating” is deleted from the end of the first sentence and in footnote 106, the citation is changed to Minn. Stat. § 149A.92, subs. 8 and 10.
- B. In the first sentence of the second paragraph under “Departments Position,” the citation is changed to Minn. Stat. § 149A.06, subd. 5(a).
4. The Administrative Penalty Order issued by the Minnesota Department of Health is affirmed.
5. Respondent is assessed a forgivable penalty of \$2,500 and a non-forgivable penalty of \$5,000.

Dated: August 8, 2018



PATRICIA WINGET
Adviser to the Commissioner
Minnesota Department of Health

NOTICE

This is the Commissioner’s final Order. Under Minn. Stat. §§ 14.63 and 14.64, a party seeking judicial review must file its petition with the Court of Appeals and serve it on the Department either personally or by certified mail within 30 days of receiving this Order.

MEMORANDUM

Administrative Law Judge Jeanne M. Cochran thoroughly and accurately addressed all facts and the applicable law in her recommendation, which needs no further comment.

P.W.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Administrative Penalty
Order Issued to Wagner Funeral Home
and Joseph M. Wagner

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

The above-entitled matter came before Administrative Law Judge Jeanne M. Cochran for an evidentiary hearing on April 12, 2018. The record closed on that date at the conclusion of the hearing.

Lindsay K. Strauss, Assistant Attorney General, appeared on behalf of the Minnesota Department of Health (Department). Joseph M. Wagner, owner of Wagner Funeral Home, appeared on his own behalf and on behalf of Wagner Funeral Home (collectively, Respondents).

STATEMENT OF THE ISSUES

1. Did the Department act in accordance with Minn. Stat. § 149A.06 (2016) when it issued the Administrative Penalty Order dated November 13, 2017 (2017 APO) to Respondents?
2. Is the non-forgivable penalty of \$5,000 imposed on Respondents in the 2017 APO supported by the record?

SUMMARY OF CONCLUSION AND RECOMMENDATION

The Administrative Law Judge concludes the 2017 APO, including the \$5,000 non-forgivable penalty, is consistent with the requirements of Minn. Stat. §149A.06 and is supported by the record. The Administrative Law Judge recommends the Commissioner of the Department of Health (Commissioner) **AFFIRM** the 2017 APO.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Joseph Wagner (Wagner) is a mortician licensed by the state of Minnesota.¹
2. Wagner owns and operates Wagner Funeral Home in Jordan, Minnesota.²
3. Wagner also owns and operates a funeral home in Belle Plaine, Minnesota.³
4. Wagner has owned and operated Wagner Funeral Home in Jordan, Minnesota (herein after “the Wagner Funeral Home”) since sometime prior to October 1999.⁴
5. Wagner does not have any employees who work at the Wagner Funeral Home.⁵ Wagner does all of the preparation and embalming work himself.⁶
6. As a licensed mortician, Wagner is required to know the provisions of Minn. Stat. ch. 149A (2016), the statutes governing morticians and funeral providers.⁷

I. 1999 Administrative Penalty Order (1999 APO)

7. On October 5, 1999, Department mortician investigator, Timothy Koch (Koch), inspected the Wagner Funeral Home.⁸ Based on Koch’s personal observations and interview of Wagner, Koch identified 13 violations of the chapter 149A.⁹ Those violations included:

- Minn. Stat. § 149A.50, subd. 5 – requiring funeral providers to conspicuously display each license to operate a funeral establishment in the place of business;
- Minn. Stat. § 149A.20, subd. 10 – requiring funeral providers to conspicuously display each license to practice mortuary science in the place of business;
- Minn. Stat. § 149A.71, subd. 2(e) – requiring funeral providers to give a general price list to consumers upon the beginning discussion of either the prices of or the overall type of funeral service or disposition or specific funeral goods or funeral services offered by the funeral home;

¹ Exhibit (Ex.) 1 at MDH/Wagner 008 (2017 APO).

² *Id.*; Testimony (Test.) of Joseph Wagner.

³ Test. of J. Wagner.

⁴ See Ex. 7 at MDH/Wagner 039-042 (1999 APO and inspection form dated Oct. 5, 1999).

⁵ Test. of J. Wagner.

⁶ *Id.*

⁷ Test. of Erika Fulgern.

⁸ Ex. 7 at MDH/Wagner 038, 042.

⁹ *Id.* at MDH/Wagner 038-040, 042.

- Minn. Stat. § 149A.71, subd. 2(f) – requiring funeral providers to give an itemized written statement, for retention, to each consumer who arranges a funeral at the conclusion of the discussion of the arrangements. The statement must be signed by the consumer and the licensed mortician making the arrangements;
- Minn. Stat. § 149A.71, subd. 2(c)(2) – requiring funeral providers to make available a separate price list for outer burial containers;
- Minn. Stat. §149A.71, subd. 2(c)(3) – requiring funeral providers to make available a separate price list for alternative containers;
- Minn. Stat. § 149A.71, subd. 2(c)(4) – requiring funeral providers to make available a separate price list for cremation containers;
- Minn. Stat. § 149A.90, subd. 4 – requiring morticians and funeral directors to complete a removal certificate for each dead human body prior to the removal of the body from the place of death;
- Minn. Stat. § 149A.91, subd. 4 – requiring that written embalming authorization be obtained from the individual lawfully entitled to custody of the body prior to the embalming process;
- Minn. Stat. § 149A.91, subd. 10 – requiring that funeral providers maintain an accurate record of every embalming performed;
- Minn. Stat. § 149A.92, subd. 5 – requiring that the embalming room in a funeral establishment must be private;
- Minn. Stat. § 149A.92, subd. 7 – requiring that the entrance and egress doors carry a sign indicating the room is private and that access is limited; and
- Minn. Stat. § 149A.92, subd. 9 – requiring funeral providers to dispose of infectious and pathological waste in accordance with the infectious control act, Minn. Stat. §§ 116.75-116.83.¹⁰

8. On October 12, 1999, the Department issued the 1999 APO to Respondents.¹¹ The 1999 APO specifically provided that the Department is authorized pursuant to Minn. Stat. § 149.06 to “order corrections and assess administrative penalties in an amount up to \$10,000 per violation of Minnesota Statutes, chapter 149A and Minnesota Rules, chapter 4610.”¹² The 1999 APO listed the facts supporting the 13

¹⁰ *Id.* at MDH/Wagner 038-041.

¹¹ *Id.* at MDH/Wagner 038.

¹² *Id.*

violations listed above, and imposed forgivable penalties totaling \$13,700 for the 13 violations.¹³ The individual penalty amounts were as follows:

- Minn. Stat. § 149A.50, subd. 5 – \$100;
- Minn. Stat. § 149A.20, subd. 10 – \$100;
- Minn. Stat. § 149A.71, subd. 2(e) – \$2,500;
- Minn. Stat. § 149A.71, subd. 2(f) – \$2,500;
- Minn. Stat. § 149A.71, subd. 2(c)(2) – \$1000;
- Minn. Stat. §149A.71, subd. 2(c)(3) – \$1000;
- Minn. Stat. § 149A.71, subd. 2(c)(4) – \$1000;
- Minn. Stat. § 149A.90, subd. 4 – \$500;
- Minn. Stat. § 149A.91, subd. 4 – \$1000;
- Minn. Stat. § 149A.91, subd. 10 – \$500;
- Minn. Stat. § 149A.92, subd. 5 – \$500;
- Minn. Stat. § 149A.92, subd. 7 – \$500; and
- Minn. Stat. § 149A.92, subd. 9 – \$2,500.¹⁴

9. The 1999 APO also required that within 31 days of the order, Wagner demonstrate to the Department that he had corrected the violations or had taken appropriate steps toward correcting the violations.¹⁵

10. The 1999 APO explained that it could be appealed by submitting a request for a hearing within 20 days of receipt.¹⁶ Wagner did not appeal the 1999 APO.¹⁷

11. The Department subsequently stayed the \$13,700 in penalties imposed by the 1999 APO.¹⁸

¹³ *Id.* at MDH/Wagner 038-040.

¹⁴ *Id.* at MDH/Wagner 038-041.

¹⁵ *Id.* at MDH/Wagner 040.

¹⁶ *Id.* at MDH/Wagner 041.

¹⁷ *See id.* at MDH/Wagner 025.

¹⁸ *Id.*

II. 2013 Inspection

12. On September 20, 2013, Department mortician investigator, Erika Fulgern (Fulgern), conducted an inspection of the Wagner Funeral Home.¹⁹ Fulgern is a licensed mortician.²⁰

13. The inspection consisted of two parts: inspection of documentation and inspection of the preparation and embalming room.²¹

14. During the 2013 inspection, Fulgern noted a number of documentation problems including: failure to obtain written permission to remove the body from the place of death; failure to obtain written authorization to embalm the body; failure to keep records of embalmings performed at the facility; failure to have price lists for caskets and other burial containers on site; and failure to display the mortician's license and the establishment license.²²

15. In addition, Fulgern noted that the preparation and embalming room did not have an emergency shower or emergency eye wash, and failed to have the required privacy signage.²³

16. As a result, Fulgern identified a number of violations of the provisions of chapter 149A including:

- Minn. Stat. § 149A.20, subd. 10;
- Minn. Stat. § 149A.50, subd. 5;
- Minn. Stat. § 149A.71, subd. 2;
- Minn. Stat. § 149A.90, subd. 4;
- Minn. Stat. § 149A.91, subd. 5;
- Minn. Stat. § 149A.91, subd. 10;
- Minn. Stat. § 149A.92, subd. 5;
- Minn. Stat. § 149A.92, subd. 6;
- Minn. Stat. § 149A.92, subd. 7; and

¹⁹ Test. of E. Fulgern; Ex. 5 (inspection form dated Sept. 20, 2013).

²⁰ Test. of E. Fulgern.

²¹ *Id.*

²² *Id.*; Ex. 5 (inspection form dated Sept. 20, 2013).

²³ Test. of E. Fulgern; Ex. 5.

- Minn. Stat. § 149A.92, subd. 10.²⁴

17. At the end of the 2013 inspection, Fulgern issued a correction order for Wagner's failure to comply with these regulations.²⁵ The correction order required some of these items to be corrected immediately and other items, such as installation of the emergency equipment, to be corrected by January 20, 2014.²⁶ No penalty was issued for the violations identified during the inspection.²⁷

18. The correction order explained that it could be appealed by submitting a request for a hearing within 20 days of receipt.²⁸ The correction order also specified that the Department "may impose any additional remedy available under this chapter."²⁹ Wagner did not appeal this correction order.³⁰

19. On February 4, 2013, Fulgern sent a letter to Wagner regarding the status of one of the items that was not yet completed.³¹ That item was completed shortly thereafter.³²

III. 2017 Inspection

20. On September 27, 2017, Fulgern conducted another routine inspection of the Wagner Funeral Home.³³ This inspection consisted of an inspection of the preparation and embalming room, and a records review.³⁴

21. In the preparation and embalming room, Fulgern observed a large number of crates containing jars of applesauce.³⁵ The crates with the applesauce were from an apple orchard located next door to the Wagner Funeral Home.³⁶ The apple orchard is owned by Wagner's brother.³⁷ Wagner was storing the crates of applesauce in the preparation and embalming room for his brother because his brother was short of storage space.³⁸

22. The crates had been in the preparation and embalming room for approximately one year prior to the inspection on September 27, 2017.³⁹ Wagner

²⁴ *Id.*; Ex. 5.

²⁵ Ex. 5 at MDH/Wagner 045-046; Test. of E. Fulgern.

²⁶ Ex. 5 at MDH/Wagner 045-046.

²⁷ Test. of E. Fulgern; Ex. 7 at MDH/Wagner 025.

²⁸ Ex. 5 at MDH/Wagner 045.

²⁹ *Id.*

³⁰ Test. of E. Fulgern.

³¹ Ex. 4 (letter from Fulgern to Wagner dated Feb. 4, 2017).

³² Test. of Joseph Wagner.

³³ Test. of E. Fulgern; Ex. 2 (inspection form dated Sept. 27, 2017).

³⁴ Test. of E. Fulgern.

³⁵ Test. of E. Fulgern; Exs. 1-2 (2017 APO; 2017 inspection form); Ex. 3 (photos from the inspection taken on Sept. 27, 2017).

³⁶ Test. of J. Wagner.

³⁷ *Id.*

³⁸ *Id.*; Ex. 1 at 008 (2017 APO).

³⁹ Test. of J. Wagner.

embalmed approximately six bodies in the room while the crates of applesauce were stored there.⁴⁰

23. The crates were stacked in five rows. Each row was approximately four crates high and three crates deep.⁴¹

24. The hazardous waste container was stored directly in front of the crates.⁴² The hazardous waste container is used to dispose of organs, blood, and other hazardous waste from the preparation and embalming process.⁴³

25. The preparation and embalming room has an emergency shower and an emergency eye wash.⁴⁴

26. The crates of applesauce were directly under the emergency shower.⁴⁵

27. In addition, the crates were 12 inches or less from the edge of the emergency eye wash, and stacked about four feet high.⁴⁶ The location of the crates made it difficult to properly access the eye wash.⁴⁷ To properly access the eye wash, a person needs to bend over in front of the eye wash and push down on the eye wash levers with the front of the person's face.⁴⁸

28. During a routine inspection like this one, Fulgern usually tests the emergency shower and eye wash to ensure they are working properly.⁴⁹

29. Fulgern was not able to test the shower at the Wagner Funeral Home because it was blocked by the crates.⁵⁰ Fulgern noted this on her inspection report.⁵¹ Fulgern also noted that she was not able to test the eye wash due to the location of crates.⁵²

30. In addition to her concerns about the crates, Fulgern identified other concerns with the preparation and embalming room.⁵³ She noted the valve in the flush sink was not working properly, and identified an issue with the vent in the preparation

⁴⁰ Test. of J. Wagner.

⁴¹ Ex. 1 at MDH/Wagner 008 (2017 APO); Ex. 3 at MDH/Wagner 054 (photo of crates).

⁴² Test. of E. Fulgern; Ex. 1 at MDH/Wagner 008; Ex. 3 at MDH/Wagner 054.

⁴³ Test. of E. Fulgern.

⁴⁴ Test. of E. Fulgern; Ex. 3 at MDH/Wagner 054.

⁴⁵ Test. of E. Fulgern; Ex. 3 at MDH/Wagner 054.

⁴⁶ Test. of E. Fulgern; Test. of J. Wagner; Ex. 3 at MDH/Wagner 054.

⁴⁷ Test. of E. Fulgern.

⁴⁸ *Id.*

⁴⁹ Ex. 2 at MDH/Wagner 048 (inspection form dated September 27, 2017); Test. of E. Fulgern.

⁵⁰ Test. of E. Fulgern; Ex. 3 at MDH/Wagner 054.

⁵¹ Ex. 2 at MDH/Wagner 048.

⁵² *Id.*

⁵³ Test. of E. Fulgern.

and embalming room.⁵⁴ She also noted the lack of a privacy sign on the door to the preparation and embalming room.⁵⁵

31. Fulgern also identified a number of documentation and record keeping issues during the inspection.⁵⁶ First, Wagner was not able to produce proper hazardous waste disposal documentation.⁵⁷ In addition, Wagner was not completing the certificate of removals for all decedents, obtaining written authorizations to embalm from legal next of kin, or completing embalming reports.⁵⁸ Fulgern also noted that Wagner was not displaying the establishment license or the mortician's license at the funeral home, and merchandise price lists were not available on site for review.⁵⁹ Finally, Wagner was keeping business records relating to decedents in a file at his brother's apple orchard, next door.⁶⁰ Fulgern noted each of these issues as a violation of chapter 149A on her inspection report.⁶¹

32. At the conclusion of her inspection, Fulgern issued a correction order to Wagner.⁶² Fulgern required Wagner to take a number of actions including: removing the crates and cleaning the preparation and embalming room; fixing the ventilation in the room; fixing the flush sink; installing the required privacy signage; displaying licenses; making price lists available; obtaining the necessary body removal and embalming authorizations; keeping accurate records of embalming; and maintaining records at the funeral home rather than at the apple orchard.⁶³

33. The correction order explained that it could be appealed by submitting a request for a hearing within 20 days of receipt.⁶⁴ The correction order also provides that the Department "may impose any additional remedy available under this chapter."⁶⁵

IV. 2017 APO

34. When Fulgern returned to the Department, she discussed the inspection and violations with her manager, Catherine Lloyd.⁶⁶

35. Fulgern expressed concerns about the storage of crates of applesauce in the preparation and embalming room.⁶⁷ She was concerned about the storage of food in the room because hazardous chemicals are used in the preparation and embalming

⁵⁴ Test. of E. Fulgern; Ex. 2 at MDH/Wagner 048.

⁵⁵ Test. of E. Fulgern; Ex. 2 at MDH/Wagner 048-049.

⁵⁶ Test. of E. Fulgern.

⁵⁷ *Id.*; Ex. 2 at MDH/Wagner 048.

⁵⁸ Test. of E. Fulgern; Ex. 2 at MDH/Wagner 049.

⁵⁹ Test. of E. Fulgern; Ex. 2 at MDH/Wagner 049.

⁶⁰ Test. of E. Fulgern; Test. of J. Wagner.

⁶¹ Ex. 2.

⁶² Ex. 2 at MDH/Wagner 050-051.

⁶³ *Id.*

⁶⁴ *Id.* at MDH/Wagner 050.

⁶⁵ *Id.*

⁶⁶ Test. of E. Fulgern; Test. of Catherine Lloyd.

⁶⁷ Test. of E. Fulgern; Test. of C. Lloyd.

room.⁶⁸ Fulgern noted that Minnesota law provides that the room is only to be used for body preparation and embalming purposes.⁶⁹ In addition, she was concerned about the crates because the crates blocked proper access to the emergency shower and eye wash.⁷⁰

36. During their discussion, Fulgern and Lloyd also reviewed previous years' inspection reports and determined that a number of the other violations observed during the 2017 inspection were repeat violations from past years.⁷¹

37. Because of the nature of the violations and because some of the violations were repeat violations, the Department issued the 2017 APO on November 13, 2017.⁷²

38. The 2017 APO cited the Wagner Funeral Home and Wagner for the following violations of chapter 149A (2016):⁷³

- Minn. Stat. § 149A.20, subd. 10 – for failing to display the individual mortician license;
- Minn. Stat. § 149A.50, subd. 5 – for failing to display the establishment license;
- Minn. Stat. § 149A.71, subd. 2(c) – for failing to make price lists available to consumers;
- Minn. Stat. § 149A.75 - for failing to retain certain documents;
- Minn. Stat. § 149A.90, subds. 4-5 – for failing to complete and retain a certificate for each dead human body prior to the removal of the body from the place of death;
- Minn. Stat. § 149A.91, subds. 4-5 – for failing to obtain proper written authorization to embalm a dead body from the individual lawfully entitled to custody of the body prior to the embalming process;
- Minn. Stat. § 149A.91, subd. 10 – for failing to create and maintain an accurate record of every embalming performed at Wagner Funeral Home;
- Minn. Stat. § 149A.92, subd. 7 – for failing to make the preparation and embalming room private and secure;

⁶⁸ Test. of E. Fulgern.

⁶⁹ Test. of E. Fulgern; Minn. Stat. § 149.92, subd. 8.

⁷⁰ Test. of E. Fulgern.

⁷¹ Test. of E. Fulgern; Ex. 1 at MDH/Wagner 009.

⁷² Test. of E. Fulgern; Test. of C. Lloyd.

⁷³ Test. of E. Fulgern; Ex. 2.

- Minn. Stat. § 149.92, subd. 8 – for using the preparation and embalming room for the storage of food items for the apple orchard rather than only for preparation and embalming purposes;
- Minn. Stat. § 149A.92, subd. 10 and OSHA Bloodborne Pathogens Standard 29 CFR 1910.1030 – for storing food in the preparation and embalming room where there are toxic chemicals and infectious materials.⁷⁴

39. The 2017 APO included a \$2,500 forgivable penalty and a \$5,000 non-forgivable penalty.⁷⁵ The Department based these penalty amounts on the Wagner Funeral Home’s history of repeat violations and its concern about the seriousness of the violations relating to the use of the preparation and embalming room, as well as the size of the business.⁷⁶

40. The 2017 APO provided that the \$2,500 forgivable penalty would be forgiven if Wagner and the Wagner Funeral Home demonstrated, in writing within 30 days, that the following actions had been completed or that appropriate steps toward correcting the violations have been taken:⁷⁷

- Immediately removing the crates with jars of applesauce from the preparation and embalming room, and agree to cease all storage of food and any other items unrelated to supplies and equipment used to prepare and embalm human remains.⁷⁸ “Owner must send photos of the preparation and embalming clear of all prohibited items.”⁷⁹
- Within 30 days of receipt of the 2017 APO, Wagner must attend an in-person two-hour OSHA, Bloodborne Pathogens Training. “The purpose of this training is to educate [Wagner] of what bloodborne pathogens are and provide knowledge of why food cannot be stored in an active preparation and embalming room.”⁸⁰
- Within 30 days of receipt of the 2017 APO, Wagner must submit copies of funeral home forms that the establishment will use to document and record required authorizations and permits.⁸¹
- Within 30 days of receipt of the 2017 APO, Wagner must submit photos of the privacy sign attached to the preparation and embalming room door and submit a video of the preparation and embalming room doors being

⁷⁴ Ex. 1 at MDH/Wagner 009-010 (2017 APO); Ex. 2 at MDH/Wagner 48-49 (inspection report dated Sept. 27, 2017).

⁷⁵ Ex. 1 at MDH/Wagner 011-012.

⁷⁶ Test. of E. Fulgern; Test. of C. Lloyd.

⁷⁷ Ex. 1 at MDH/Wagner 011.

⁷⁸ *Id.* at MDH/Wagner 010.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at MDH/Wagner 011.

locked and secure.⁸² Wagner must also submit photos of the Wagner Funeral Home establishment license and mortician license displayed at the funeral home in a conspicuous manner.⁸³

- Within 90 days of receipt of the 2017 APO, Wagner must attend a three-credit Continuing Education course on Ethics. “The purpose of this course is to provide knowledge of ethical practices of funeral service.”⁸⁴

41. The 2017 APO notified Wagner that he could appeal the APO by submitting a written request for a hearing within 20 days of the issuance of order.⁸⁵

42. On November 26, 2017, Wagner submitted an appeal letter to the Department requesting a hearing regarding the 2017 APO.⁸⁶ This request was made 13 days after issuance of the 2017 APO.⁸⁷

43. In his appeal letter, Wagner disputed that the crates blocked access to the eye wash.⁸⁸ Wagner also informed the Department that he had taken the corrective actions at the facility required by the 2017 APO, and was going to enroll in the required continuing education classes as they became available.⁸⁹ He attached documentation showing completion of the required actions.⁹⁰

44. In addition, Wagner asked that the \$5,000 penalty be reduced because \$5,000 would create a “severe hardship” on his small, family-owned business.⁹¹ Wagner noted that the families he serves “are typically local people [he] has known [his] whole life.”⁹² He also noted that he has “never had a complaint regarding insufficient paperwork or the mishandling of personal effects.”⁹³

45. By a letter dated January 2, 2018, the Department denied Wagner’s request for a reduced penalty.⁹⁴ In the letter, the Department stated that it would not reduce the \$5,000 penalty “due to [the Wagner Funeral Home’s] repeated violations” of chapter 149A and prior correction orders.⁹⁵

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at MDH/Wagner 012.

⁸⁶ Ex. 6 at MDH/Wagner 013 (letter from Wagner to Lloyd (Nov. 26, 2017)).

⁸⁷ Exs. 1, 6.

⁸⁸ Ex. 6 at MDH/Wagner 013.

⁸⁹ *Id.* at MDH/Wagner 014.

⁹⁰ *Id.* at MDH/Wagner 015-024.

⁹¹ *Id.* at MDH/Wagner 014.

⁹² *Id.* at MDH/Wagner 014. During the hearing, Wagner stated that he obtains oral consent from his customers prior to removing a body or embalming a body. Test. of J. Wagner.

⁹³ Ex. 6 at MDH/Wagner 014.

⁹⁴ Ex. 7 (letter from Department to Wagner (Jan. 2, 2018)).

⁹⁵ *Id.*

46. On January 3, 2018, the Department issued the Notice and Order for Hearing and Prehearing Conference to Respondents, initiating the contested case in this matter.

47. At the hearing, Lloyd stated that the Department would be issuing a letter in the near future forgiving the \$2,500 penalty because Wagner had demonstrated compliance with the correction items.⁹⁶ She also indicated that the \$5,000 non-forgivable penalty has not been waived by the Department.⁹⁷

48. As of the date of the hearing, Wagner had not paid the \$5,000 non-forgivable penalty.⁹⁸

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 (2016) and 149A.04, .60.

2. Respondents received timely notice of the contested case proceeding and all relevant substantive and procedural requirements of statutes and rules have been fulfilled.

3. The burden of proof in this matter is on the Department to show by a preponderance of the evidence that a violation of chapter 149A has occurred.⁹⁹

4. Minn. Stat. § 149A.20, subd. 10 requires that a “license to practice mortuary science must be conspicuously displayed at all times in the holder's place of business. Conspicuous display means in a location where a member of the general public within the holder's place of business will be able to observe and read the license.”

5. The Department has shown by a preponderance of the evidence that Wagner violated Minn. Stat. § 149A.20, subd. 10 by failing to display his mortician license at the Wagner Funeral Home.

6. Minn. Stat. § 149A.50, subd. 5 requires that a “license to operate a funeral establishment must be conspicuously displayed in the funeral establishment at all times. Conspicuous display means in a location where a member of the general public within the funeral establishment will be able to observe and read the license.”

⁹⁶ Test. of C. Lloyd.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Minn. R. 1400.7300, subp. 5 (2017).

7. The Department has shown by a preponderance of the evidence that the Wagner Funeral Home violated Minn. Stat. § 149A.50, subd. 5 by failing to display its establishment license.

8. Minn. Stat. § 149A.02, subd. 22 defines the term “funeral provider” to mean “any person that sells or offers to sell funeral goods, funeral services, burial site goods, or burial site services to the public.”

9. The Department has demonstrated that Respondents are “funeral providers” within the meaning of Minn. Stat. § 149A.02, subd. 22.

10. Minn. Stat. § 149A.71, subd. 2(c) provides “funeral providers must make available for viewing to people who inquire in person about the offerings or prices of funeral goods or burial site goods, separate printed or typewritten price lists using a ten-point font or larger. Each funeral provider must have a separate price list for each of the following types of goods that are sold or offered for sale:

1. caskets;
2. alternative containers;
3. outer burial containers;
4. alkaline hydrolysis containers;
5. cremation containers;
6. hydrolyzed remains containers;
7. cremated remains containers;
8. markers; and
9. headstones

11. The Department has shown by a preponderance of the evidence that Respondents violated Minn. Stat. § 149A. 71, subd. 2(c) by failing to make available price lists for merchandise that the Wagner Funeral Home offers for sale to persons who inquire about offerings or prices.

12. Minn. Stat. § 149A.90, subd. 4 provides that “[n]o human body shall be removed from the place of death by a mortician or funeral director or by a non-compensated person with the right to control the dead human body without the completion of a certificate of removal and, where possible, presentation of a copy of that certificate to the person or a representative of the legal entity with physical or legal custody of the body at the death site. The certificate of removal shall be in the format provided by the commissioner. . . .”

13. Minn. Stat. § 149A.90, subd. 5 provides in pertinent part that “[t]he original certificate of removal shall be retained by the individual making the removal and shall be kept on file, at the funeral establishment to which the body was taken, for a period of three calendar years following the date of the removal.”

14. The Department has shown by a preponderance of the evidence that Respondents violated Minn. Stat. § 149A.90, subsd. 4-5 by failing to complete and

retain a certificate of removal for each dead human body prior to the removal of the body from the place of death.

15. Minn. Stat. § 149A.91, subd. 4 provides in pertinent part that “[n]o dead human body shall be embalmed without written authorization. Written authorization to embalm a dead human body must be obtained from the individual lawfully entitled to custody of the body or the individual's legal designee as soon as is practicable following the death. . . . The original written authorization to embalm shall be maintained in the records of the funeral establishment that causes the embalming to be performed and a copy of the authorization must be delivered to the person who has legal right to control the disposition or that person's legal designee.”

16. Minn. Stat. § 149A.91, subd. 5 provides that the written authorization to embalm must contain certain information specified in the statute.

17. The Department has shown by a preponderance of the evidence that Respondents violated Minn. Stat. § 149A.91, subds. 4-5 by failing to obtain proper written authorization to embalm a dead body from the individual lawfully entitled to custody of the body prior to the embalming process and by failing to retain written authorizations in the records of the funeral establishment.

18. Minn. Stat. § 149A.91, subd. 10 provides that “[e]very funeral establishment that causes a dead human body to be embalmed shall create and maintain on its premises or other business location in Minnesota an accurate record of every embalming performed.” The record shall include certain information specified in the statute.¹⁰⁰

19. The Department has shown by a preponderance of the evidence that Respondents violated Minn. Stat. § 149A.91, subd. 10 by failing to create and maintain an accurate record of every embalming performed at the Wagner Funeral Home.

20. Minn. Stat. § 149A.75 requires funeral providers to retain and make available for inspection “true and accurate copies of the applicable price lists specified in section 149A.71, subdivision 2, paragraphs (c) to (e), for a minimum of one calendar year after the date of their last distribution to customers. In addition, funeral providers must retain a copy of each statement of funeral goods, funeral services, burial site goods, and burial site services selected, as described in section 149A.71, subdivision 2, paragraph (f), for a minimum of three calendar years from the date of the arrangement conference.

21. The Department has demonstrated that Respondents violated Minn. Stat. § 149A.75 by failing to retain the specified documents.

22. Minn. Stat. § 149.92, subd. 7 provides that “[t]he preparation and embalming room must be private and have no general passageway through it. The

¹⁰⁰ Minn. Stat. § 149A.91, subd. 10.

room shall, at all times, be secure from the entrance of unauthorized persons. Authorized persons are those persons described in section 149A.91, subdivision 2. Each door allowing ingress or egress shall carry a sign that indicates that the room is private and access is limited.”

23. The Department has shown by a preponderance of the evidence that Respondents violated Minn. Stat. § 149A.92, subd. 7 by failing to make the preparation and embalming room private and secure as specified in the statute.

24. Minn. Stat. § 149A.92, subd. 8 provides that the “preparation and embalming room shall not be used for any other purposes.”

25. The Department has shown by a preponderance of the evidence that Respondents violated Minn. Stat. § 149A.92, subd. 8 by using the preparation and embalming room for another purpose: namely, storing food items for a neighboring business.

26. Minn. Stat. § 149A.92, subd. 10 provides that “[a]ll applicable provisions of state and federal regulations regarding exposure to workplace hazards and accidents shall be followed in order to protect the health and safety of all authorized persons who enter the preparation and embalming room.”

27. Federal OSHA standard applicable to bloodborne pathogens provides that food shall not be kept in areas where blood or other potentially infectious materials are present.¹⁰¹

28. The Department has shown by a preponderance of the evidence that Respondents violated Minn. Stat. § 149A.92, subd. 10 and the federal OSHA standard applicable to bloodborne pathogens by storing food in the preparation and embalming room where blood and infectious materials are present.

29. Minn. Stat. § 149A.06, subd. 1 authorizes the Department to issue an order imposing administrative penalties for violations of chapter 149A and requiring the violations to be corrected. The penalty may be forgiven where the violations have been corrected, except the agency may issue an order with a penalty that will not be forgiven “where there are repeated or serious violations.”¹⁰²

30. Minn. Stat. § 149A.06, subd. 5 provides that the maximum amount of a penalty issued by the Department is \$10,000 for each specific violation identified during an inspection, investigation, or compliance review. In determining the penalty amount, the Department is to consider the following factors:

1. the willfulness of the violation;
2. the gravity of the violation;
3. the history of past violations;

¹⁰¹ 29 C.F.R. 1910.1030(d)(2)(ix)(2017).

¹⁰² Minn. Stat. § 149A.92, subd. 4.

4. the number of violations;
5. the economic benefit gained by the person allowing or committing the violation; and
6. other factors as justice may require, if the regulatory agency specifically identifies the additional factors in the regulatory agency's order.¹⁰³

The statute further provides that “[i]n determining the amount of a penalty for a violation subsequent to an initial violation . . . , the regulatory agency shall also consider:

1. the similarity of the most recent previous violation and the violation to be penalized;
2. the time elapsed since the last violation; and
3. the response of the subject of the order to the most recent previous violation.¹⁰⁴

31. The Department has shown by a preponderance of the evidence that the 2017 APO was properly issued. The 2017 APO is supported by the record, and the non-forgivable penalty amount is justified based on a consideration of the statutory factors.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The Commissioner should **AFFIRM** the 2017 APO, including the \$5,000 non-forgivable penalty.

Dated: April 30, 2018


JEANNE M. COCHRAN
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

¹⁰³ Minn. Stat. § 149A.06, subd. 5(b).

¹⁰⁴ *Id.*, subd. 5(c).

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions of Law, and Recommendations. Under Minn. Stat. § 14.61 (2016), the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Jan Malcolm, Commissioner, Minnesota Department of Health, 85 East Seventh Place, P.O. Box 64975, St. Paul, MN 55164, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2016). The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1 (2016), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Minn. Stat. chapter 149A regulates “the removal, preparation, transportation, arrangements for disposition, and final disposition of dead human bodies for purposes of public health and the protection of the public.”¹⁰⁵

In this case, there is no real dispute that Respondents violated the provisions of chapter 149A cited in the 2017 APO relating.¹⁰⁶ Rather the dispute centers on the amount of the non-forgivable penalty imposed by the Department and whether it is reasonable.

I. Respondents’ Position

Respondents’ argue that the non-forgivable penalty is too large and should be reduced. Respondents assert that the penalty does not fit the violations. Respondents disagree that the violations have caused any harm to the public or that there is any real public health problem.

¹⁰⁵ Minn. Stat. § 149A.01, subd. 1.

¹⁰⁶ Wagner does dispute the Department’s assertion that the crates were blocking the emergency eye wash, but the 2017 APO does not include any violation relating to access to the eye wash. Rather, the violations included in the 2017 APO relating to the crates are based on the improper use of the room for storage of food in violation of Minn. Stat. § 149A.02, subds. 8, 10. Ex. 1 at MDH/Wagner 009-010.

Respondents maintain the record keeping violations are not harmful to customers because Wagner operates his business in a small town and knows most of the people who purchase merchandise and services from the Wagner Funeral Home. Wagner asserts that he obtains oral consent from customers prior to removing a body or embalming a body, and does not see any harm arising from the lack of written authorization. Wagner claims he has never received a complaint from any customer relating to these matters.

With regard to the preparation and embalming room, Respondents argue that there is no public health issue because the crates contained applesauce stored in sealed jars. There was no raw food stored in the room. In addition, Respondents claim that any concerns about access to the emergency eye wash and shower are unwarranted given that Wagner is the only person working in the preparation and embalming room. Also, in Wagner's view, he could access the eye wash and shower.

Finally, Wagner maintains that he was not aware that the Department could impose a \$5,000 penalty for repeat violations of record keeping and other requirements. He maintains that the Department investigator should have told him during an earlier inspection that repeat violations could result in a substantial penalty, but failed to do so.

II. Department's Position

The Department responds that the non-forgivable penalty of \$5,000 is warranted because there were repeat violations and because of the seriousness of the violations relating to the storage of crates of food in the preparation and embalming room. The Department notes that several of the violations found during the 2017 inspection (lack of written permission to remove the body, embalming authorization, embalming record keeping, signage, price lists, and display of licenses) were repeat violations of those found during earlier inspections. The Department also considered the storage of food in the preparation and embalming room to be a serious violation because toxic chemicals are used in the embalming process and because of concerns related to the presence of bloodborne pathogens.¹⁰⁷ The Department emphasizes that the requirements of chapter 149A are designed to protect public health and the consumers of funeral services.

The Department notes that it has authority to impose a fine of up to \$10,000 per violation of chapter 149A pursuant to Minn. Stat. § 216B.06, but did not do so. The Department maintains that it considered the small size of the Wagner Funeral Home when determining the size of the penalty. The Department also asserts that Wagner should not have been surprised by the imposition of a non-forgivable fine of \$5,000 because Wagner, as a licensed mortician, is required to be familiar with the provisions of chapter 149A including the Department's penalty authority. In addition, the Department points out that the 1999 APO notified Respondents that the Department could impose a fine of up to \$10,000 per violation of chapter 149A.

¹⁰⁷ Test. of E. Fulgern.

III. Analysis

Based on a review of Minn. Stat. §149A.06 and the record in this case, the Administrative Law Judge concludes that the 2017 APO was properly issued and is supported by the record. Minn. Stat. § 149A.06, subd. 1 authorizes the Department to assess monetary penalties for violations of chapter 149A. Pursuant to Minn. Stat. § 149A.06, subd. 5, the Department may impose a penalty of up to \$10,000 “for each specific violation.” The penalty may be non-forgivable where there are repeated or serious violations.¹⁰⁸

Minn. Stat. § 149A.06, subd. 5 also enumerates factors for the Department to consider in determining the penalty amount, as follows:

1. the willfulness of the violation;
2. the gravity of the violation;
3. the history of past violations;
4. the number of violations;
5. the economic benefit gained by the person allowing or committing the violation; and
6. other factors as justice may require, if the regulatory agency specifically identifies the additional factors in the regulatory agency's order.

In addition, where one or more repeat violations are identified, the Department is to consider the following in setting the penalty amount:

1. the similarity of the most recent previous violation and the violation to be penalized;
2. the time elapsed since the last violation; and
3. the response of the subject of the order to the most recent previous violation.¹⁰⁹

The Department’s witnesses, Fulgern and Lloyd, both testified that the Department considered the factors above as they relate to Respondents in setting the penalty amount. The witnesses both noted that many of the violations were repeat violations and emphasized the seriousness of the embalming room violations. Lloyd and Fulgern also pointed out that the Department has the authority to impose of a fine of up to \$10,000 per violation but instead imposed a fine of \$7,500 total (\$2,500 forgivable and \$5,000 nonforgivable) for all 12 of the violations included in the 2017 APO. In setting the penalty amount, the Department considered the size of the business and that Wagner is a sole proprietor. The record reflects that the Department appropriately considered the factors set forth in Minn. Stat. § 149A.06, subd. 5.

¹⁰⁸ Minn. Stat. § 149A.06, subd. 4.

¹⁰⁹ Minn. Stat. § 149A.06, subd. 5.

The Administrative Law Judge also agrees with the Department that the non-forgivable penalty amount of \$5,000 is reasonable. The record reflects that at least eight of the 12 violations included in the 2017 APO are repeat violations from the 2013 inspection, and seven of the 12 violations are repeat violations of the 1999 inspection.¹¹⁰ In addition, the Department correctly noted that the new violations of Minn. Stat. § 149A.92, subds. 8, 10 relating to the improper use of the embalming room are serious violations. Taken together, a non-forgivable total penalty of \$5,000 for the eight repeat violations and the two serious violations is reasonable. A fine of this amount equates to a penalty of approximately \$500 per repeat or serious violation. This amount is large enough to encourage compliance by Respondents and at the same time properly reflects the small size of the business involved. Given that the Department has the authority to impose a penalty of up to \$10,000 per violation, the \$5,000 non-forgivable penalty amount is reasonable under the facts of this case.

Finally, the Administrative Law Judge does not find merit to Wagner's argument that the \$5,000 non-forgivable penalty should be reduced because he was not aware that a penalty of this amount could be imposed for repeat violations. Wagner fails to recognize that as a licensed mortician, he is charged with knowledge of chapter 149A. Minn. Stat. § 149A.06 expressly authorizes the Department to impose a non-forgivable penalty "where there are repeated or serious violations."¹¹¹ In addition, as discussed above, Minn. Stat. § 149A.06 authorizes a penalty of up to "\$10,000 for each specific violation."¹¹² Moreover, the 1999 APO issued to Respondents specifically provided that the Department is authorized pursuant to Minn. Stat. § 149A.06 to "order corrections and assess administrative penalties in an amount up to \$10,000 per violation of Minnesota Statutes, chapter 149A and Minnesota Rules, chapter 4610."¹¹³ Thus, Wagner was on notice that the Department has the authority to issue a non-forgivable penalty and the amount of such penalty could be up to \$10,000 per violation.

For these reasons, the Administrative Law Judge concludes that the 2017 APO was properly issued and the \$5,000 non-forgivable penalty is reasonable under the facts of this case.

J. M. C.

¹¹⁰ See Ex. 1 at MDH/Wagner 009, Ex. 2 at MDH/Wagner 048, Ex. 5 at MDH/Wagner 044, Ex. 7 at MDH/Wagner 027-029.

¹¹¹ Minn. Stat. § 149A.06, subd. 4.

¹¹² Minn. Stat. § 149A.06, subd. 5.

¹¹³ Ex. 7 at MDH/Wagner 038.