



SECRETARY OF THE AIR FORCE
WASHINGTON

11

The Honorable William E. Reukauf
Acting Special Counsel
United States Office of Special Counsel
1730 M Street N.W., Suite 300
Washington, DC 20036-4505

Re: Office of Special Counsel File Nos. DI-10-2151, DI-10-2538 and DI-10-2734

Dear Mr. Reukauf:

I am responding to two Office of Special Counsel letters, dated May 27, 2010 and July 8, 2010, sent to the Secretary of Defense concerning the Office of Special Counsel's referral for investigation whistleblower disclosures from Mr. James Parsons, Ms. Mary Ellen Spera, and Mr. William Zwicharowski, all of whom are employees at the Port Mortuary located at Dover Air Force Base, Delaware. Based upon the allegations made by these whistleblowers, the Office of Special Counsel found a substantial likelihood that the allegations resulted in violations of law, rule or regulation, gross mismanagement, and a substantial and specific danger to public health and requested that the Department of Defense investigate. The Office of Special Counsel described the four sets of allegations as follows: (1) the preparation of the remains of a deceased Marine; (2) improper handling and transport of remains with possible contagious disease; (3) improper transport and processing of remains of military dependents; and (4) improper handling of cases of missing portions. The Secretary of Defense has delegated the responsibility of investigating and responding to these allegations to me as the Secretary of the Air Force.

Multiple investigations were conducted into the allegations. The specific allegations made by Mr. Parsons relating to alleged mishandling of the remains of a deceased Marine were not substantiated. However, in reviewing all aspects of the case file it was determined that Port Mortuary personnel did fail to send an instruction letter to the receiving funeral home which resulted in a violation of an Air Force Instruction. Ms. Spera's allegations relating to the improper handling and transport of remains with possible contagious disease were substantiated in part. No violation of law, rule or regulation was found with regard to the adequacy of precautionary measures and warnings given to Port Mortuary personnel. Further, there was no finding of a substantial and specific danger to public health. With regard to transporting the possibly contagious remains, however, Port Mortuary personnel violated multiple rules and regulations by failing to contact the receiving foreign country to determine the current shipping requirements and for failing to notarize and submit certain documentation to the embassy or consulate for shipping approval. No violations of law, rule or regulations were found relating to the allegations of improper transport of remains of military dependents from the Landstuhl mortuary to the Port Mortuary. However, while the cremations of the fetal remains at issue were done in accordance with the requisite law, Port Mortuary personnel failed to follow established

policy rules with respect to administrative documentation requirements, resulting in multiple violations of internal standard operating procedures.

With regard to the allegations made by Mr. Zwicharowski and Ms. Spera relating to the improper handling of cases of missing portions, there were findings that rules and regulations were violated. Specifically, it was determined the loss of accountability for two partial remains resulted in violations of a number of Department of Defense and Air Force rules and regulations. There was also a violation of rule and regulation for failing to properly identify a portion and follow the disposition instructions of the person authorized to direct disposition of the remains of the deceased Service member. Based on the investigation, there was a finding of gross mismanagement with regard to this set of allegations. There was no evidence of any substantial and specific danger to public safety.

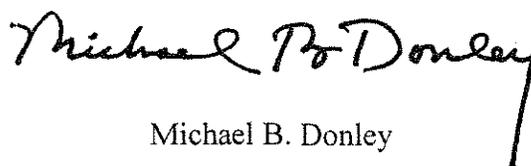
The Air Force has taken substantial corrective action in response to these findings, including the following actions. A memorandum of agreement has been signed by the Armed Forces Medical Examiners and the Air Force Mortuary Affairs Center with regard to processing and maintaining a chain of custody of remains and partial remains processed through the Port Mortuary. All Port Mortuary standard operating procedures have been reviewed and many have been revised. In particular, a joint standard operating procedure covering both the Port Mortuary personnel and the Office of the Armed Forces Medical Examiner has been drafted and is in the final stages of execution. It covers most if not all aspects of processing human remains through the Port Mortuary. The joint standard operating procedure incorporates many improvements to the process including increased cooperation between the medical examiners and Port Mortuary personnel in accounting for human remains and partial remains, improvements to the accountability for portions (*i.e.* multiple and more frequent inventories of portions, the use of an additional bag to store portions of human remains, a limitation of one portion per storage location, photographs of all portions at triage and improved electronic tracking). A new exposure control plan has been executed which addresses, among other things, precautionary measures for airborne contagions and appointment of unit safety representatives. Shipping containers for fetal remains have been improved and a letter of agreement between the Port Mortuary and the Army has been drafted and is in the process of being executed. In addition, the Port Mortuary has significantly increased training in all areas, including exposure control training, use of the electronic tracking system, continued professional embalming education, and sending key personnel to classes on teamwork, leadership and management. The current Commander overseeing the Port Mortuary has issued a written directive to the Port Mortuary Director, requiring the issuance of letters of instruction to receiving funeral homes. In addition, improvements have been made to the process of determining appropriate viewability and restorative actions in difficult cases including a procedure for conflict resolution when embalmers disagree on the handling of a case. There have also been improvements made to the process of notification to, and approval from, the family members in such difficult cases. Finally, appropriate disciplinary action has been initiated.

The attached report contains the names of witnesses and is for your official use. I understand you will provide a copy of this report to the President and the House and Senate

Armed Services Committees for their review and to the above named whistleblowers. My staff will forward you another version of the report which will exclude personal identifying information of the deceased and their families. I request that you make only the redacted version available to members of the public.

We appreciate your efforts to bring this matter to our attention. If the Air Force can be of any further assistance, please contact Ms. Cheri L. Cannon, Deputy General Counsel for Fiscal, Ethics and Administrative Law at (703) 693-9291 or cheri.cannon@pentagon.af.mil.

Sincerely,

A handwritten signature in black ink that reads "Michael B. Donley". The signature is written in a cursive style with a long vertical stroke at the end.

Michael B. Donley

Attachment:
Report of Investigation

REPORT OF INVESTIGATION
OSC File Nos. DI-10-2151, DI-10-2538 and DI-10-2734

REPORT OF INVESTIGATION	1
INFORMATION INITIATING THE INVESTIGATION	3
CONDUCT OF THE INVESTIGATION	3
STRUCTURE OF REPORT	5
SECTION 1 – BACKGROUND.....	7
THE PORT MORTUARY	7
ARMED FORCES MEDICAL EXAMINER.....	11
CASUALTY AFFAIRS	12
ARMY MORTUARY AT LANDSTUHL, GERMANY.....	13
SECTION 2 – PREPARATION OF THE REMAINS OF A DECEASED MARINE.....	14
OSC SUMMARY OF DISCLOSURE INFORMATION.....	14
LAW, RULE OR REGULATION	16
SUMMARY OF EVIDENCE.....	20
ANALYSIS	56
CONCLUSION	63
SECTION 3 – IMPROPER HANDLING AND TRANSPORT OF REMAINS WITH POSSIBLE CONTAGIOUS DISEASE	64
OSC SUMMARY OF DISCLOSURE INFORMATION.....	64
LAW, RULE OR REGULATION	65
SUMMARY OF EVIDENCE.....	69
ANALYSIS	81
CONCLUSION	85
SECTION 4 – IMPROPER TRANSPORT AND PROCESSING OF REMAINS OF MILITARY DEPENDENTS	87

OSC SUMMARY OF DISCLOSURE INFORMATION.....	87
LAW, RULE OR REGULATION	88
SUMMARY OF EVIDENCE.....	94
ANALYSIS	110
CONCLUSION	117
SECTION 5 – IMPROPER HANDLING OF CASES OF MISSING PORTIONS	120
OSC SUMMARY OF DISCLOSURE INFORMATION.....	120
LAW, RULE OR REGULATION	121
SUMMARY OF EVIDENCE.....	125
ANALYSIS	179
CONCLUSION	191
SECTION 6 – GROSS MISMANAGEMENT	193
SECTION 7 – A SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH ...	197
SECTION 8 – REVERENCE, CARE AND DIGNITY.....	200
SECTION 9 – CORRECTIVE ACTION	201
SECTION 10 – CONCLUSION.....	211
APPENDIX.....	213

INFORMATION INITIATING THE INVESTIGATION

The Office of Special Counsel (OSC) referred three cases to the Secretary of Defense (SECDEF) for investigation pursuant to 5 U.S.C. § 1213. By letter dated May 27, 2010, OSC referred to SECDEF for investigation a whistleblower disclosure from Mr. James Parsons, an “embalming/autopsy technician” at the Dover Air Force Base (AFB) Port Mortuary (hereinafter referred to as OSC File No. DI-10-2151 or the “May OSC Referral Letter”).¹ According to OSC, Mr. Parsons has alleged that “employees at the Department of the Air Force, Air Force Mortuary Affairs [Operations] (AFMAO), Port Mortuary, Dover [AFB], Delaware, have engaged in conduct which constitutes a violation of a law, rule, or regulation.” The allegations relate to an incident that occurred on February [], 2010, involving the preparation of the remains of a deceased Marine. After review and based on the information disclosed by Mr. Parsons, OSC “concluded that there is a substantial likelihood that the information Mr. Parsons provided to OSC discloses a violation of a law, rule or regulation.” *See* May OSC Referral Letter.

By letter dated July 8, 2010, OSC referred to SECDEF for investigation two additional whistleblower disclosure cases, one from Ms. Mary Ellen (Mel) Spera, a mortuary inspector and another from Mr. William Zwicharowski, a senior mortuary inspector at the Port Mortuary (hereinafter referred to as DI-10-2538 and DI-10-2734 or the “July OSC Referral Letter”).² The July OSC Referral Letter involved three separate sets of allegations, characterized by OSC as follows: 1) improper handling and transport of remains with possible contagious disease; 2) improper transport and processing of remains of military dependents; and 3) improper handling of cases of missing portions. OSC stated that, “[t]ogether, their allegations raise serious concerns regarding the processing and transportation of human remains of deceased personnel.” After review and based on the information disclosed by Ms. Spera and Mr. Zwicharowski, OSC concluded that there was a substantial likelihood that the information provided to OSC “discloses a violation of a law, rule or regulation, gross mismanagement, and a substantial and specific danger to public health” at the Port Mortuary. *See* July OSC Referral Letter.

SECDEF delegated the above-referenced OSC case referrals to the Secretary of the Air Force (SECAF) for action. This Report of Investigation (ROI) addresses all three OSC case files referred by OSC to SECDEF for investigation. The allegations in these three OSC cases were investigated and the summary of evidence for each is set forth below. In its letter, OSC noted that “where specific violations of law, rule or regulation are identified, these specific references are not intended to be exclusive.” As such, this ROI addresses both the allegations of specific violations as well as additional issues discovered during the investigation.

CONDUCT OF THE INVESTIGATION

Both the May and July OSC Referral Letters to SECDEF were delegated to SECAF for action and then forwarded to the Air Force Inspector General (SAF/IG) for investigation. In

¹ Mr. Parsons, according to the May OSC Referral Letter, has consented to the release of his name in conjunction with this report of investigation.

² Ms. Spera and Mr. Zwicharowski, according to the July OSC Referral Letter, have also consented to the release of their names in conjunction with this report of investigation.

addition to the above-referenced OSC allegations, between November 2009 and July 2010, similar as well as additional allegations regarding the handling and preparation of remains at the Port Mortuary Division, AFMAO were raised by these same employees through other means. Certain allegations were sent to the Department of Defense (DoD) Inspector General (IG) Hotline in November 2009³ and were then referred to the Air Force Inspector General's Directorate for Complaints Resolution (SAF/IGQ). Other allegations were made directly to the 436th Air Wing Inspector General at Dover AFB in March 2010 and then transferred to SAF/IGQ on June 2, 2010.

On May 28, 2010, the Air Force Inspector General (TIG) appointed an investigating officer (IO), from SAF/IGQ to conduct an investigation into the whistleblower allegations contained in the May OSC Referral Letter, as well as the additional allegations forwarded to SAF/IGQ. On June 4, 2010, the TIG appointed an attorney from the Air Force Judge Advocate General Corps to serve as a legal advisor to the IO and to assist in conducting the investigation. Initial interviews of the complainants, subjects and witnesses began on June 7, 2010. Upon receipt of the July OSC Referral Letter, two of the three sets of allegations contained therein were included to the SAF/IGQ investigation. The third set of allegations, alleging improper transport and processing of remains of military dependents, involved actions of the U.S. Army Mortuary Affairs Activity-Europe (USAMAA-E) at Landstuhl, Germany and had potential criminal implications. The investigation of this set of allegations was therefore referred to the Army IG and to the Air Force Office of Special Investigations (AFOSI).

In the course of the SAF/IGQ investigation, the IO conducted initial complaints analysis interviews with each of the three whistleblowers, and thereafter interviewed 40 witnesses including Mr. Parsons, Ms. Spera and Mr. Zwicharowski. Follow up interviews were conducted with several of these witnesses. The IO also collected and examined the relevant documentation including case files, the Report of Investigation from a Commander Directed Investigation (CDI) as well as relevant emails and memoranda for record pertaining to the allegations. The IO also reviewed pertinent industry textbooks and had targeted inquiries made to selected State Funeral Board members and funeral directors. Pertinent legal authorities, including relevant federal and state law were researched and reviewed. This included, for example, relevant federal and state laws pertaining to health and safety requirements, cremation, as well as state licensing requirements for embalmers and funeral directors. In addition, applicable DoD, Air Force, Army and Navy rules and regulations as well as Port Mortuary standard operating procedures (SOPs) were researched and reviewed. The SAF/IGQ investigation was conducted from May 28, 2010 to March 31, 2011.

As previously stated, with regard to the third allegation in the July OSC Referral Letter, multiple investigations were conducted into the allegations that USAMAA-E packaged fetal remains improperly, failed to include proper documentation, and Port Mortuary personnel failed to adhere to applicable regulations, directives, and SOPs when conducting cremations of fetal remains. The Army IG directed an investigative inquiry and AFOSI conducted an investigation

³ Mr. Zwicharowski sent a letter outlining a number of allegations to Senator Thomas R. Carper's office in November 2009, which was forwarded to the DoD IG Hotline. The DoD Inspector General's Office forwarded the complaint via Hotline email to SAF/IG to investigate. The Hotline email went to an inactive account of a SAF/IGQ service member who had separated from the Air Force. The letter was resent to SAF/IGQ on May 17, 2010.

on the matter. Although not charged with investigating these allegations, tangentially the SAF/IGQ investigation obtained relevant information.

On September 7, 2010, the Army IG appointed an investigating officer (Army IO) to conduct an inquiry (Army IG inquiry) into the third set of allegations, who thereafter completed an undated report. In his inquiry, the Army IO interviewed four witnesses at USAMAA-E and collected documentation including, for example, emails, an information paper and memorandum for record prepared by the Director of Mortuary Affairs at USAMAA-E, the case files maintained by USAMAA-E of all fetal and infant remains sent to the Port Mortuary for cremation, documentation of industry standards, and shipping orders made by USAMAA-E for shipping containers. The Army IO also reviewed applicable law and regulations, specifically extracts from Title 16 of the Code of Federal Regulations and Army Regulation (AR) 638-2, *Care and Disposition of Remains and Disposition of Personal Effects*, effective January 22, 2001. On October 4, 2010, the Army IG completed an amendment to the Army IO's report. Additional information was received from the Army IG on December 21, 2010, which included emails, regulations, and photographs. On April 1, 2011, the Army IG completed an addendum to the Army IO's report. The Army IG investigation was conducted from September 2010 to April 2011.

A Special Agent (SA) from AFOSI conducted the AFOSI investigation from December 1, 2010 through December 17, 2010. The SA interviewed eight witnesses and collected documentation including, for example, the cremation files maintained by the Port Mortuary of the five cases cited to in the allegations, the construction permit to build the crematory at the Port Mortuary, crematory education and training records, and other background information on the crematory at the Port Mortuary. The SA also reviewed applicable law and regulations, specifically the SOPs on the crematory at the Port Mortuary and Section 3159 of Title 16 of the Delaware Code. The AFOSI report of investigation was completed on January 19, 2011. AFOSI thereafter completed two follow-up interviews and collected additional information in February 2011.

The standard of proof used in determining the finding for each allegation was the preponderance of the evidence, *i.e.* was it more likely than not that the alleged violation occurred. This standard is the standard used by the Air Force and the Army in conducting investigations of this nature.

Pursuant to 5 U.S.C. § 1213(c), an agency is afforded 60 days to complete the required report of investigation. The Air Force has been granted five extensions for its response to the May OSC Referral Letter, which is due on May 11, 2011. The Air Force has also been granted four extensions for its response to the two cases contained within the July OSC Referral Letter, which is also due on May 11, 2011.

STRUCTURE OF REPORT

As noted above, OSC referred four sets of allegations to SECDEF for investigation. This ROI addresses each set of allegations in a separate segment of the report. Section 1 of the ROI

provides background. Section 2 addresses the allegations involving the preparation of the remains of a deceased Marine. Sections 3, 4 and 5 respectively address the allegations of improper handling and transport of remains with possible contagious disease, improper transport and processing of remains of military dependents, and improper handling of cases of missing portions. Sections 6 and 7 respectively address the allegations of gross mismanagement and dangers to public health. Section 8 addresses reverence, care and dignity. Corrective actions are addressed in Section 9. Section 10 is the conclusion of the report. An appendix consisting of a list of state licensing laws, a list of witnesses and an abbreviation table follows the conclusion of the report.

SECTION 1 – BACKGROUND

THE PORT MORTUARY

AFMAO was activated on December 15, 2008 as a direct reporting unit to the Directorate of Services, Manpower and Personnel, Headquarters Air Force (HAF/A1S). AFMAO's mission is to ensure dignity, honor, and respect for our fallen military members and other eligible personnel, and to provide care, service, and support to their families. AFMAO is comprised of three divisions: Operations, Port Mortuary, and Mortuary Affairs. There is also a Chaplain Branch and an office for Public Affairs. The allegations in this investigation primarily concern issues within the Port Mortuary Division.

DoD Directive 1300.22, *Mortuary Affairs Policy* (certified current as of November 21, 2003), established policy and assigned responsibility for mortuary affairs within the DoD. Paragraph 5.3 of DoD Directive 1300.22 states SECAF "shall operate and maintain" a port-of-entry mortuary in support of all the military services. The Directive also establishes the Secretary of the Army as the Executive Agent for mortuary affairs within the DoD. Based on this designation, AFMAO operates within Army policy guidelines as well as DoD, Air Force, and AFMAO SOPs. The Port Mortuary, located on Dover AFB, is operated and maintained by the Air Force and is the largest mortuary in the DoD. As the Nation's sole port mortuary and the only DoD mortuary located in the continental United States, the Port Mortuary is responsible for the return of all DoD personnel and dependents from Overseas Contingency Operations (OCO) and other overseas deaths. Additionally, when requested, the Port Mortuary maintains contingency capabilities in the event of homeland mass fatalities.

The Port Mortuary is historically known as the Dover Port Mortuary. On December 15, 2008, the Port Mortuary was realigned from the 436th Airlift Wing to become part of AFMAO. AFMAO combined the missions of both Air Force Mortuary Affairs (which had been located at Randolph AFB in San Antonio, Texas) and the Dover Port Mortuary.

In January 2009, after the realignment, Colonel Robert Edmondson⁴ became the AFMAO Commander. Colonel Edmondson served as Commander until October 2010. In June 2008, Mr. Trevor Dean⁵ was assigned as the Port Mortuary Director under the old organization. After the

⁴ Colonel Edmondson's career has been in Services. Colonel Edmondson is neither a licensed funeral director nor embalmer. The Services officer career path, however, includes mortuary affairs duties, primarily by interacting with family members and funeral preparation. Colonel Edmondson served as the course director for the Mortuary Officer's course at the Air Force Institute of Technology and was assigned to the Air Staff in HAF/A1S, Services, prior to taking command of AFMAO. In October 2010, during a scheduled Change of Command, he left AFMAO and currently works at the Pentagon at HAF/A1M, Manpower Requirements, Organization, and Resources.

⁵ Mr. Dean has been licensed in California as a mortician and funeral director since 1993. He attended a 12 month mortuary science program at the San Francisco College of Mortuary Science, San Francisco in 1991. He began his career with the Air Force in 1996 as a mortuary inspector/embalmer at the [now closed] Port Mortuary at Travis AFB, California. In 1997, he moved to the Air Force Services Headquarters Mortuary Affairs in San Antonio, Texas. In 2006, he obtained an Associate of Applied Science degree in mortuary science from San Antonio College in Texas. In June 2008, Mr. Dean relocated to Dover to become the Port Mortuary Director, Dover AFB.

re-organization, he served as both the Director, Port Mortuary Division, and the Deputy Director, AFMAO, until Mr. Quinton “Randy” Keel⁶ was assigned as the Director, Port Mortuary Division, in June 2009. [Mortuary Affairs Division Director]⁷ was named the Director of the Mortuary Affairs Division.

About 70 military, civilian and contractor personnel work in the Port Mortuary Division. To accomplish its mission, the Port Mortuary relies on other personnel from various organizations and agencies. The Port Mortuary has support from approximately 55 deployed Active Duty and Reserve members from the Air Force, Army, Marines and Navy, the 436th Airlift Wing and support from the Armed Forces Institute of Pathology Office of the Armed Forces Medical Examiners (OAFME or AFME). This includes pathologists, anthropologists and forensic photographers. Support is also obtained from the Federal Bureau of Investigation (FBI), licensed dental technicians, and investigators from the Army Criminal Investigation Division (CID), AFOSI, and the Naval Criminal Investigative Service.

At the relevant time, the Port Mortuary Division has three branches, the Administration Branch, the Operations Branch and the Mortuary Branch. The Administration Branch, among other things, handles dual case file management for every human remains processed through the Port Mortuary from arrival to departure. The case files consist of a 6-part hard copy record and an electronic file of the Mortuary Operations Management System (MOMS).

The Operations Branch, among other things, manages the Dignified Transfers and maintains the schedule of augmented personnel. A solemn Dignified Transfer of remains is conducted at Dover AFB upon every arrival of remains of U.S. military members who die in the theater of operations. The Dignified Transfer honors those who have given their lives in the service of our country. A Dignified Transfer is the process by which, upon the return from the theater of operations to the United States, the remains of fallen military members are transferred from the aircraft to a waiting vehicle and then to the Port Mortuary. The Dignified Transfer is not a ceremony; rather, it is a solemn movement of the transfer case by a carry team of military personnel from the fallen member’s respective service. A senior ranking officer of the fallen member’s service presides over each Dignified Transfer.

In April 2009, SECDEF implemented a media policy that (1) gives family members the opportunity to allow media access during Dignified Transfers, and (2) provides an entitlement for family members to travel to Dover AFB to witness the Dignified Transfer. During the relevant timeframe, the only Dignified Transfers that were open to media coverage, with family

⁶ Mr. Keel is a licensed funeral director and mortician in Texas (1995) and Ohio (2004). Mr. Keel stated that he has an Associate’s Degree in Mortuary Science, a Bachelor’s Degree in Management and a Master’s Degree in Human Relations. He served a tour with the Navy working as a mortuary officer in Guam. He also worked in funeral homes as a licensed funeral director/embalmer in Texas and managed three funeral homes and a crematory near Dayton, Ohio prior to working for Headquarters Mortuary Affairs in San Antonio. Prior to his assignment at AFMAO, Mr. Keel had been the Technical Identification Branch Chief at Headquarters Mortuary Affairs in San Antonio.

⁷ When AFMAO was created, [Mortuary Affairs Division Director] was named the Director of the Mortuary Affairs Division. He, like Mr. Dean and Mr. Keel, relocated to Dover from San Antonio. Previously, [Mortuary Affairs Division Director] had worked for Headquarters Mortuary Affairs in San Antonio since 2003. Prior to relocating to Dover, he served as the Branch Chief of the Entitlements Branch of Headquarters Mortuary Affairs.

approval, were those personnel who died in the line of duty supporting Operations Enduring Freedom and Iraqi Freedom.

The Mortuary Branch is responsible for the supervision and oversight of the mortuary functions which include embalming, dress and wrap, cosmetics, anatomical restoration, casketing, and shipping operations of the Port Mortuary Division. Mortuary Branch personnel include mortuary inspectors (embalmers), autopsy/embalming technicians, and military personnel assigned to augment the mission. The Mortuary Branch coordinates with the OAFME, the Administration Branch and liaisons from the various Branches of Service to expedite the return of the fallen in a timely manner.

The three whistleblowers, Mr. Zwicharowski, Ms. Spera and Mr. Parsons, currently⁸ work in the Mortuary Branch. Mr. Zwicharowski⁹ is the Mortuary Branch Chief and is the direct supervisor for both Ms. Spera¹⁰ and Mr. Parsons.¹¹ Ms. Spera is one of four mortuary inspectors and Mr. Parsons is one of four autopsy/embalming technicians.

The allegations in this investigation primarily concern issues within the Port Mortuary Division. The scope and magnitude of operations of the Port Mortuary are incomparable to civilian mortuary facilities. The Port Mortuary Division received over 4,000 individual remains and fragmented or partial remains over a three-year period from 2008 through 2010. These remains and partial remains were prepared by career employed embalmers and autopsy/embalming technicians (with augmentation from deployed personnel) and sent to their final resting place at locations throughout the world. The standard and expectation is that the mission be executed flawlessly.

Most of the remains received at the Port Mortuary are from combat operations. The resulting condition of the remains is to a degree that is rarely seen in civilian mortuaries. One embalmer, hired by AFMAO in October 2009 with over 11 years experience as a licensed mortician and funeral director in the civilian mortuary field, stated that he had “seen more mutilated, decomposed, and charred remains in nine months [at AFMAO] than I have in 12, 13 years.” Another embalmer with over 20 years experience stated that the civilian funeral director/embalmer and military mortuary specialist were “completely different, apples and

⁸ In November 2009, Mr. Zwicharowski was reassigned to the Mortuary Affairs Division under [the Mortuary Affairs Division Director]. Prior to November 2009 and since November 2010, he has been the Mortuary Branch Chief.

⁹ Mr. Zwicharowski is a licensed funeral director and embalmer in Pennsylvania. He received his education at the Pittsburgh Institute of Mortuary Science in 1981-1982. Mr. Zwicharowski began working at the Dover Port Mortuary in 1999. Prior to working at the Dover Port Mortuary, Mr. Zwicharowski owned and operated a funeral home.

¹⁰ Ms. Spera is a licensed funeral director and embalmer in Oklahoma and Kansas and has a Bachelor of Science degree in Mortuary Arts from the University of Central Oklahoma (1998). Ms. Spera was the lead mortuary specialist with the Army in Landstuhl, Germany from January 2006 to October 2007. She started her present duties at AFMAO as a temporary “GWOT (Global War on Terrorism) overhire” in November 2007. She was hired permanently into her position in late 2009.

¹¹ Mr. Parsons was hired as an autopsy/embalming technician on December 21, 2009. Prior to his current assignment, Mr. Parsons served with the Army as a graves registration specialist (1983-1985), mortuary affairs specialist at the Frankfurt Army Mortuary (1985-1992), and Army liaison at the Dover Port Mortuary (2004-2008). Mr. Parsons is not a licensed funeral director/embalmer.

oranges. In the civilian sector, it is rare to embalm an autopsied case; here every single case is autopsied. Outside you experience trauma a few times a year; here it's a few times a day." Extensive restoration of remains is oftentimes required by the embalmers and technicians in order to properly preserve the remains and provide an opportunity for a final viewing (if desired) by the family and loved ones of the fallen military member. As a result of the trauma faced by AFMAO personnel on a daily basis, AFMAO leadership developed a strong resiliency program for the personnel to address the potential of post traumatic stress disorder.

Handling and Preparation of Remains – Overview

The preparation of remains at the Port Mortuary begins with their arrival at Dover AFB with the Dignified Transfer. During the Dignified Transfer, which may be attended by family members, remains are unloaded from the aircraft and escorted to the Port Mortuary. The transfer cases in which the remains are transported are given a container number that is entered into MOMS and secured in refrigerated units outside the main facility¹² until the following morning when the preparation begins. The following morning, the transfer case is moved to the receiving dock of the main facility by an "Ops Processing Team" from the Port Mortuary. Once the medical examiner is present, the top of the transfer case is opened.

After the top part of the transfer case is opened, the transfer case is scanned for any unexploded ordnance by Explosive Ordnance Disposal (EOD) personnel. Once the transfer case has been rendered safe by EOD personnel, the human remains pouch is taken out of the transfer case and placed on a gurney. A medical examiner monitors the opening of the transfer case and the human remains pouch and a photographer with the OAFME photographs the transfer case and the human remains pouch. A medical examiner will then separate the remains and portions.¹³ At the Triage station, the remains and portions are individually entered into MOMS. A specific bar code for each individual remains or portions is created by the MOMS database, and referred to as either the Dover case number or "bar code" number. Each individual remains and individual portion are tagged, if possible, with their distinct bar code number. Currently, individual portions are placed in a sealable plastic bag (referred to as a portion bag) and labeled with the bar code number on both sides of the bag. The same is done for the documents associated with the remains and portions. The individual portion bag and document bag are then placed in a larger plastic sealable bag. The larger bag is also affixed with the bar code labels with the associated Dover number. This process is explained in greater detail below at page 127.

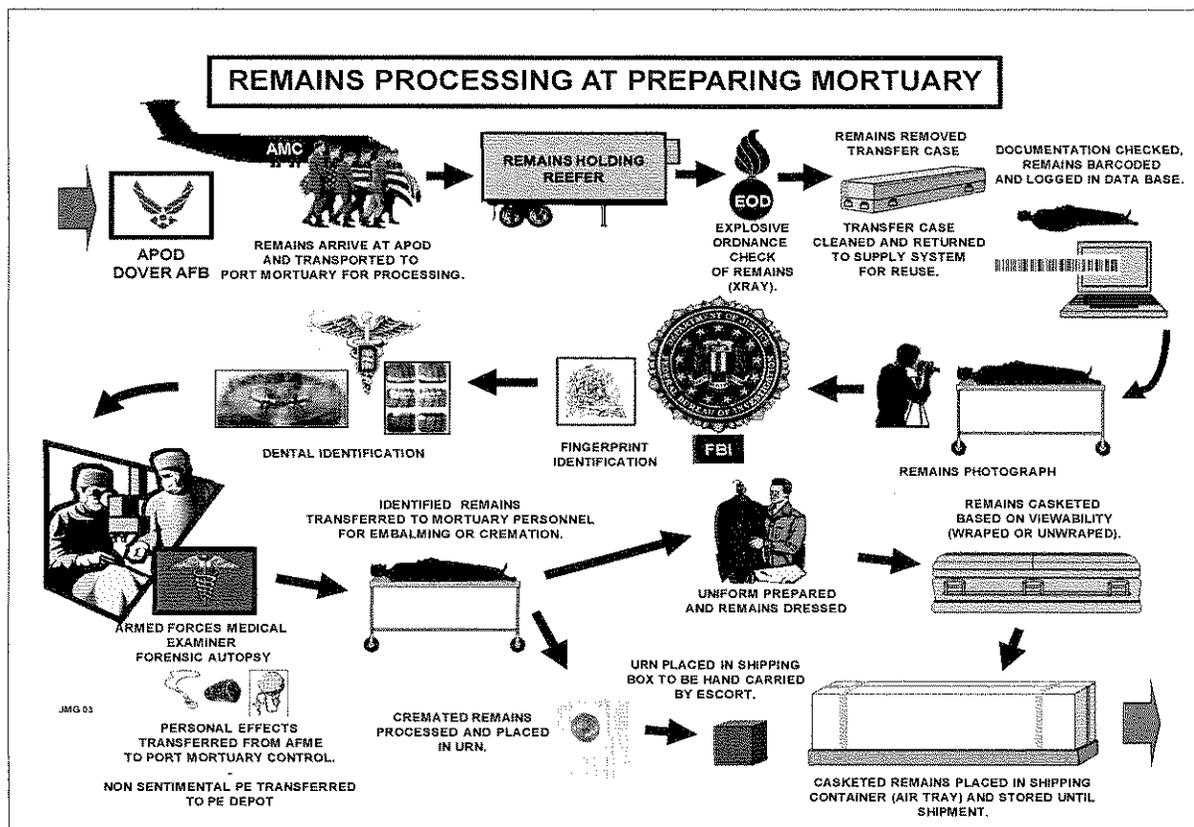
After the remains and portions are coded and tagged, they are placed on a gurney and wheeled to the Fingerprint and Dental stations for formal identification, as applicable. The remains and portions then proceed to the X-ray station for x-rays and CAT scans. After x-ray, the remains and portions are brought into the autopsy suite for completion of the autopsy by medical examiners, who also take any necessary DNA samples for identification purposes. Once the autopsy is complete, remains are normally embalmed, and then proceed to the dress and

¹² For safety reasons, the transfer cases are stored outside the main facility until they can be scanned for any unexploded ordnances.

¹³ Because of the nature of warfare, it is not uncommon for the bodies of fallen service members to arrive at the Port Mortuary as fragmented human remains. Generally, an intact body or the non-intact torso of the human remains is referred to as "remains." Fragments separated from the body are referred to as "portions."

restoration area where any required restoration by embalmers and embalming technicians is accomplished. If the remains have been determined to be viewable or viewable for identification, they are dressed in the appropriate uniform, or in clothes as directed by the person who is authorized to direct disposition of the remains (PADD). If the remains are determined to be non-viewable, the remains are placed in a full body wrap with the Service member's uniform placed on top.

Generally, the remains are then placed into a casket and shipped as directed by the PADD. Throughout this process, the status of the location of remains and associated actions are updated at each station in MOMS. The following diagram prepared by the Army is illustrative of the mortuary process.



ARMED FORCES MEDICAL EXAMINER

The Armed Forces Medical Examiner (AFME) is authorized under 10 U.S.C. § 1471 to investigate and determine the cause or manner of death in certain cases. That statute lists the types of circumstances that create jurisdiction for the AFME to conduct a forensic pathology investigation. The statute does not require that a forensic pathology investigation be conducted in all cases; rather the statute states that the AFME may conduct an investigation if it has jurisdiction.

DoD Directive 1300.22, paragraph 5.6.2 states the AFME will “conduct or review medico-legal investigations, which may include autopsy examinations, of the deaths of active duty Service members.” DoD Instruction 5154.30, *Armed Forces Institute of Pathology Operations*, March 18, 2003, paragraph E2.2.3.1 states that the AFME will make the determination of whether it will conduct a forensic pathology investigation. Under limited circumstances, a commander may require the AFME to conduct a forensic pathology investigation. The record indicates that autopsies are conducted on all Service members whose remains are processed through the Port Mortuary.

In addition, specifically included under the jurisdiction of the AFME are civilian dependent deaths occurring outside the United States where the cause of death is unknown. Also under their jurisdiction are deaths that occur on a military installation with exclusive federal jurisdiction where the cause of death is unknown.

CASUALTY AFFAIRS

Under DoD Instruction 1300.18, *Department of Defense (DoD) Personnel Casualty Matters, Policies, and Procedures*, January 8, 2008 (Incorporating Change 1, August 14, 2009), each Military Service is required to maintain a casualty office which serves as the focal point on all casualty matters for that Service. This office provides authorized and necessary assistance to eligible family members of deceased, missing and injured personnel. Assistance may include but is not limited to transportation assistance; applying for and receiving benefits and entitlements; receipt of personnel effects; mortuary and funeral honors assistance; and information and referral, including emotional and spiritual support; and other assistance as requested. The casualty assistance officer¹⁴ is the person assigned by the Service (or DoD component concerned) to provide assistance to the families of ill, injured, missing or deceased personnel. The person who is authorized to direct disposition of the remains of a deceased Service member (or other deceased individual) is referred to as the “person authorized to direct disposition of human remains” or “PADD.” This is usually the primary next of kin as designated by the Service member.

Each Military Service maintains a Service liaison section that interfaces with AFMAO regarding the remains and personal effects of their deceased Service members. In this role, the Service liaison serves as the conduit for information with the Services’ casualty assistance officers and the PADDs (and/or the family) in matters of benefits, disposition instructions, transportation of remains, and other matters pertaining to the handling of remains. The Service liaison receives and handles disposition of personal effects, assists in the procurement of uniforms and accouterments to ensure the remains are properly dressed, provides AFMAO information on issues regarding entitlements, travel, escorts, and waivers, and ensures that the remains are transported to the final destination.

¹⁴ Pursuant to DoD Instruction 1300.18, paragraph 4.2, “[e]ach Military Service has its own title for casualty assistance officers: Army – Casualty Assistance Officer (CAO); Marine Corps and Navy – Casualty Assistance Calls Officer (CACO), and Air Force – Casualty Assistance Representative (CAR), Family Liaison Officer (FLO) and Mortuary Officer. For purposes of the Instruction, the term casualty assistance officer [is] used.”

ARMY MORTUARY AT LANDSTUHL, GERMANY

Under DoD Directive 1300.22, paragraph 5.5.3, the Secretaries of the Military Departments shall “[o]perate overseas mortuaries consistent with force demands and needs of the Military Services, ensuring that remains of DoD personnel, their dependents and eligible noncombatants are processed quickly, efficiently and cost effectively.”

USAMAA-E operates a mortuary at Landstuhl, Germany (Landstuhl Mortuary). Soldiers and civilian employees from the 21st Theater Sustainment Command’s Mortuary Affairs Office process the remains and personal effects of U.S. Service members for shipment back to the United States or country of origin at the Landstuhl Regional Medical Center.

Additionally, the Mortuary Affairs Office handles deceased retirees, dependents and DoD civilians for processing back to the United States and provides support to U.S. European Command and some outlying units of U.S. Africa Command, which encompasses about 37 countries.

SECTION 2 – PREPARATION OF THE REMAINS OF A DECEASED MARINE

OSC SUMMARY OF DISCLOSURE INFORMATION

According to the May OSC Referral Letter, Mr. Parsons provided the following information to OSC concerning an incident that occurred on February [], 2010, involving the preparation of the remains of a deceased Marine.¹⁵ According to OSC, Mr. Parsons has alleged the following:

- (1) Mr. Parsons has alleged that Mr. Keel determined that the remains in this case should be made viewable for identification, despite the assessment of several Mortuary Specialists/Embalmers that the remains were non-viewable and should be wrapped in a full body wrap, rather than dressed in uniform.
- (2) According to Mr. Parsons, Mr. Keel instructed him and Mortuary Specialist/[Embalmer 1] to prepare and dress the remains in uniform. [Embalmer 1] and Mr. Parsons sought guidance from Mr. Keel when they were unable to position the Marine's left arm so that it would fit into the uniform because of the massive injuries sustained in that area. In response, Mr. Keel instructed them to saw off the left arm bone with a cross saw and place the bone in the right leg of the "unionall"¹⁶ inside the uniform, where the lower portion of the leg was missing. According to OSC, Mr. Parsons refused to cut off the arm bone; however, [Embalmer 1] complied with Mr. Keel's instruction. Mr. Parsons then placed the bone with the right leg as instructed. Mr. Parsons contends that Mr. Keel's actions and instructions violated agency policy and regulations governing the care and disposition of remains of deceased personnel.
- (3) According to OSC, the Department of Defense Mortuary Affairs Policy mandates that the remains of all military members "will be handled with the reverence, care, and dignity befitting them and the circumstances." DoD Directive 1300.22, paragraph 4.2. Mr. Parsons explained that Port Mortuary personnel must comply with Army Regulation (AR) 638-2, *Care and Disposition of Remains and Disposition of Personnel Effects*, and the Armed Services Public Health Guidelines in carrying out the functions of the Port Mortuary.
- (4) According to OSC, Appendix C of AR 638-2, *Armed Services Specification for Mortuary Services* (Specification), establishes the minimum standards for the care and handling of deceased personnel, and states that the "military services require that all remains be processed or reprocessed in a manner reflecting the highest standards of the funeral service profession." Appendix C, paragraph 6a. According to OSC, the Specification

¹⁵ During processing at the Port Mortuary, the remains of the deceased Marine were given Dover Case No. D10-0128.

¹⁶ A "unionall" is a plastic, protective undergarment in which the remains is placed prior to being dressed in uniform.

defines two viewing classifications. Under the first classification, remains are non-viewable where there exists extreme mutilation, advanced stages of decomposition, or severe burn wounds or charring, and restoration of viewable exposed tissue surfaces is not possible. Under the second classification, remains are viewable where they are undamaged by trauma or disease, or where damaged viewable tissue surfaces are restored by restorative artwork. Appendix C, section C-2. A third classification, viewable for identification, is not defined in the regulations or Specification, but is incorporated into the forms and instructional materials and used at the Port Mortuary. Remains may be classified as viewable for identification where they do not meet the criteria for viewable, but can be dressed in uniform and cosmetically prepared in a manner that viewing by family members for identification purposes is appropriate.

- (5) OSC further stated that the Specification and Army Pamphlet 638-2 (Pamphlet) accompanying AR 638-2 delineate the requirements and measures to be taken for the preparation and dressing of remains, including but not limited to cosmetic application and restorative work to be performed. Pursuant to the Specification, “[n]on-viewable remains that cannot be dressed shall be wrapped” as specified in that paragraph. Appendix C, paragraph 6g. The Pamphlet states that “[e]very effort will be made to properly dress the remains in the uniform,” and that “[o]nly when necessary (excess leakage or offensive odors) will remains be wrapped as prescribed.” Army Pamphlet 638-2, Appendix C-3.
- (6) According to OSC, Mr. Parsons acknowledged that the priority is to dress the remains in uniform when possible, but stressed that the measures taken to achieve this goal must nevertheless comply with the regulatory requirements and standards. In this case, three Mortuary Specialists/Embalmers, including [Embalmer 1], determined that the remains were non-viewable and required wrapping in a full body wrap in lieu of a uniform.¹⁷
- (7) According to OSC, Mr. Parsons concurred with their determination. He explained that it was clear that wrapping the body was necessary in this case, because there was extensive soft tissue and bone loss in the left arm and both legs, and the inability to effectively suture those areas created a high risk for leakage. The need for a full body wrap was further demonstrated when he and [Embalmer 1] were unable to dress the remains in uniform due to the severe injuries sustained.¹⁸ Mr. Parsons contends that Mr. Keel’s instructions to saw off the arm bone and dress the remains in uniform, despite the significant risk of leakage, altered the condition of the remains in a manner that violated the regulatory requirements and did not afford this Marine the “reverence, care and dignity” that is required.
- (8) According to OSC, Mr. Parsons further explained that all Mortuary Specialists/Embalmers must be licensed as an embalmer in at least one state, and he

¹⁷ According to OSC, the two additional mortuary specialists/embalmers were identified by OSC as Ms. Spera and [Embalmer 3]. According to OSC, Mr. Parsons further noted that neither [Embalmer 1] nor [USMC Corporal/Liaison], the designated Marine Corps Liaison, would sign off on the Quality Assurance Inspection form because they disagreed with Mr. Keel’s handling of the remains.

¹⁸ According to OSC, Mr. Parsons noted that while a full body wrap was necessary, the Marine’s head and face were in good condition. Under these circumstances, they would have preserved and wrapped the head so that the receiving funeral home could apply cosmetics and allow the family to view the face, if they desired.

believes that the actions Mr. Keel took and directed others to take also violated state regulatory standards governing the care and disposition of remains, as well. While it is Mr. Parsons' understanding that the family chose not to view the remains in this case, he emphasized that Mr. Keel's actions could have had devastating consequences resulting in unnecessary distress for the family.

LAW, RULE OR REGULATION

As set forth below, applicable law reviewed included Federal statutes, DoD and Service component rules and regulations, state licensing statutes and administrative regulations, and relevant common law standards of care.

Federal Statutes

Under 10 U.S.C. §§ 1481-82, the "Secretary concerned" has the authority to care for the remains of a Service member who dies while on active duty, including the preparation of the remains for burial, including cremation if requested by the PADD. The applicable Federal statutes reviewed authorize DoD and its Service components to provide certain death benefits to Service members, but do not provide further details about preparation of remains.

DoD and Service Component Rules and Regulations

Reverence, Care and Dignity

DoD Directive 1300.22, *Mortuary Affairs Policy*, February 3, 2000 (certified current as of November 21, 2003), paragraph 4.2, requires that "[r]emains will be handled with the reverence, care, and dignity befitting them and the circumstances." The Directive does not elaborate on what constitutes the requisite "reverence, care, and dignity befitting them and the circumstances." Joint Publication 4-06, *Mortuary Affairs in Joint Operations*, June 5, 2006, Chapter I, paragraph 2 also states that "[h]uman remains will be handled with the [sic] reverence, care, and dignity," but does not further define the terms. Moreover, there are no regulations or rules from any of the Military Service components which define these terms.¹⁹ DoD Instruction 1300.18, *Department of Defense (DoD) Personnel Casualty Matters, Policies, and Procedures*, January 8, 2008 (Incorporating Change 1, August 14, 2009), paragraph 4.3 states "[t]he remains of deceased personnel will be recovered, identified, and returned to their families as expeditiously as possible while maintaining the dignity, respect, and care of the deceased as well as protecting the safety of the living."²⁰

¹⁹ See Air Force Instruction (AFI) 34-242, *Mortuary Affairs Program*, April 2, 2008 (Incorporating Change 1, April 30, 2008); Navy Medical Command Instruction (NAVMEDCOMINST) 5360.1, *Decedent Affairs Manual*, September 17, 1987; Army Regulation (AR) 638-2, *Care and Disposition of Remains and Disposition of Personal Effects*, effective January 22, 2001; and Department of the Army (DA) Pamphlet 638-2, *Procedures for the Care and Disposition of Remains and Disposition of Personal Effects*, December 22, 2000.

²⁰ The DoD Directive refers to "reverence, care and dignity." The DoD Instruction refers to "dignity, respect, and care." The mission of AFMAO refers to "dignity, honor and respect." Although each regulation uses slightly different language, we interpret the intent behind all three to be the same.

Preparation of Remains

Under AFI 34-242, paragraph 2.8, preparation of remains “includes embalming, wrapping or dressing and cosmetizing...” According to AFI 34-242, paragraph 12.12.5, personnel at the Port Mortuary will “[p]repare and casket the remains, complying with disposition instructions from the PADD.” Paragraphs 2.8 and 10.2.8 provide that, “government morticians will follow the Armed Services Public Health Guidelines,” and “[p]repare unembalmed remains or reprocess remains already embalmed to meet or exceed the Armed Services Public Health Guidelines.” According to the Armed Services Public Health Guidelines, morticians are to prepare remains “in compliance with state, federal and foreign health laws” (paragraph 1.8.1) and “in a manner reflecting the highest standards of the funeral service profession” (paragraph 1.8.1.3).

NAVMEDCOMINST 5360.1, paragraph 6-1, provides that all remains be prepared “following approved high standards of the mortuary profession.” Under Paragraph 6-4(a)(2), “[t]he embalmer will be required to ascertain and comply with State, Federal, and local health ... laws concerning [the] processing ... of remains.”

Under AR 638-2, paragraph 2-17d, “[p]reparation of remains consists of embalming and other preservative measures, restorative art to include derma surgery, dressing or wrapping, placing in casket, and other related items. Preparation will be done under standards outlined in the Armed Services Specification for Mortuary Services.” AR 638-2, Appendix C, paragraph C-6a(6.1) states that, “[t]he military services require that all remains be processed or reprocessed in a manner reflecting the highest standards of the funeral service profession.” In addition, AR 638-2 includes the “Armed Forces [sic] Public Health Guidelines” as Appendix I to the regulation.

Viewability Standards

Both AFI 34-242 and AR 638-2 set forth viewability standards. Attachment 1 to AFI 34-242 provides a glossary of terms. The following terms are defined as follows:

Nonviewable remains – A remains that has been extremely mutilated, severely burned or charred, or in an advanced stage of decomposition so that restoration to the known ante mortem appearance by major restorative procedures is not possible. Examples of nonviewable remains include: “floaters”, some homicides, some suicides, fatal injury cases involving extensive mutilation or disfiguration to the head and facial features; charred and burned viewable surfaces.

Viewable remains – Any remains undamaged by trauma or disease; or those damaged by trauma or disease but viewable tissue surfaces have been restored to the known ante mortem appearance of the deceased by restorative artwork.

Mutilated – Remains that have undergone severe disfiguring or distorting trauma.

Under viewability standards set forth in AR 638-2, the terms are defined as follows:

C-2b(2.1.1) *Nonviewable*. Any remains where there exists extreme mutilation, advanced stages of decomposition, or severe burn wounds or charring and restoration of viewable exposed tissue surfaces to the known ante mortem appearance of the deceased by restorative art is not possible, for example, floater, homicidal, suicidal, and major trauma cases.

C-2c(2.1.2) *Viewable*. Any remains (1) undamaged by trauma or disease or (2) remains damaged by trauma or disease but the viewable tissue surfaces are restored to the known ante mortem appearance of the deceased by restorative artwork.

AR 638-2 defines “restoration” as the “[t]reatment of the deceased in the attempt to recreate natural form and color.” According to AR 638-2, paragraph C-4f(4.2.4), “[m]ajor restorative art is an integral part of the processing and/or reprocessing of remains. It shall include, but not be limited to, rebuilding a large wound; rebuilding of facial features such as ear, nose, eye, mouth, chin, and so forth; removal of damaged tissue followed by restoration; restoration of scalp hair; and the application of cosmetics to render restored surfaces undetectable. Restorative art shall be accomplished in accordance with the highest professional standards.”

In addition, the DA Pamphlet 638-2, Appendix B, paragraph B-2j, provides that:

Generally speaking, there are three classifications of viewability: viewable, viewable for ID, and nonviewable. Viewable remains are presentable and will in themselves not cause further distress. It is believed the appearance of the remains is similar to the deceased’s normal appearance. Viewable for ID remains are less presentable than viewable and may cause additional distress when viewed. However, the remains still show identifiable features and characteristics ... Nonviewable remains are not presentable and may cause additional distress when viewed. Frequently nonviewable remains have been severely disfigured and bear no resemblance to the deceased. The family should be asked to allow the funeral home staff or family physician to view the remains first and to advise them whether viewing the remains is in their best interest.

The DA Pamphlet in Appendix C, paragraph C-3 also states that “[e]very effort will be made to properly dress the remains in the uniform” and that “[o]nly when necessary (excess leakage or offensive odors) will remains be wrapped as prescribed.”

Instruction Letter to Receiving Funeral Home

Paragraph 3.31 (*Sending the Instruction Letter to the Receiving Funeral Home*) of AFI 34-242 requires the Port Mortuary to “forward a letter informing the receiving funeral director of the condition of the remains and the payment information.” According to the AFI, the letter “will accompany the remains to the receiving funeral home.” The AFI cautions that, “[i]f the remains are nonviewable, the letter should not imply the Air Force prohibits the opening of a closed casket after it arrives at the funeral home. It is the right of the PADD to have the casket opened unless state law prohibits it.”

State Licensing Statutes and Rules

Mortuary inspectors (embalmers) at the Port Mortuary are required to hold a state embalmer or funeral director’s license. As part of the investigation, a review was conducted of the licensing requirements for the following states: Texas, Illinois, Ohio, Delaware, Pennsylvania, Kansas, Virginia, and Oklahoma. Most of the states provide only general guidance or are silent on specific prohibited embalming procedures. All state statutes reviewed, with the exception of Oklahoma, address misconduct and prohibited acts regarding funeral director business practices in general terms. The pertinent provisions from each state are set forth in the Appendix.

Common Law Standard of Care

During the investigation, the IO was referred to a well known textbook and reference for mortuary professionals, Mortuary Law, by T. Scott Gilligan (J.D.) and Thomas F.H. Stueve, (A.B., L.L.B., A.M.) (9th Revised Ed. 1995). The authors, in addition to statutory requirements, examine the legal duties of the funeral director. The authors identified two duties “recognized by the law which impact directly on the funeral director.” The first, relevant here, is “the duty not to interfere with the right of burial.”²¹ According to the text, “[t]he right of possession of the body for the purpose of burial carries with it the right to receive the body in the condition it was in at the time of death.” The authors go on to recognize that “[m]utilation, although slight and necessary, is involved in embalming a body” and that a funeral director “has the right to do this as the mutilation is implicitly sanctioned by the permission given to embalm the body.”

An action in tort against the United States is governed by the Federal Tort Claims Act. *See* 28 U.S.C. § 1346. Under Section 1346(b)(1), liability, if any, for a tort claim against the Federal government for injury caused by a negligent or wrongful act or omission of any employee of the Federal government while acting within the scope of his office or employment would be in accordance with the law of the place where the act or omission occurred. Here the events occurred in Delaware.

The State of Delaware recognizes a cause of action for abusing, mishandling, or mistreating a corpse. *See Boyle v. Chandler*, 138 A. 273, 276 (Del. Super. Ct. 1927). Delaware takes the majority view that to be actionable there must be an element of malice, intent, or gross

²¹ The second duty is to exercise reasonable care to keep the funeral home premises or other places under the control of the funeral director in a reasonably safe condition.

negligence or carelessness that causes emotional distress. For recovery of damages, it is not necessary for a plaintiff to show physical injury as a result of such infliction of emotional distress. See Boyle, 138 A. at 276; Nagle v. Riverview Cemetery Company of Wilmington, 1989 WL 16983 (Del. Super. 1989). Simple negligence is not sufficient for a damages recovery in Delaware for this tort, unless the plaintiff can show proof of physical injury caused by simple negligence. See Boyle, 138 A. at 276; Estate of Smith v. City of Wilmington, 2007 WL 879717 (D.Del. 2007); Nagle v. Riverview Cemetery Company of Wilmington, 1989 WL 16983 (Del. Super. 1989). The minority view on the tort of abusing a corpse only requires a showing of simple negligence. That view has been adopted by Restatement (Second) of Torts, but has been expressly rejected by Delaware. See Fahey-Hosey v. Capano, 1999 WL 743985 (Del. Super. 1999).²²

Under tort law, the standard of care required is normally determined based on what a reasonably prudent person would have done under such circumstances. When a tort is alleged against a professional, that standard is defined differently. Professionals in Delaware must exercise the skill and knowledge normally held by members of the profession in similar communities. Specifically, the Delaware Pattern Jury Instructions define the professional standard of care required as follows: “One who undertakes to render services in the practice of a profession or trade is always required to exercise the skill and knowledge normally held by members of that profession or trade in good standing in communities similar to this one.” See DEL. P.J.I. CIV. § 8.1 (2000).²³

Delaware does not have case law specific to the standard of care required of an embalmer with respect to handling human remains, nor does it have case law specific to the unique situation of embalmers in the military. However, because of their expertise, training, and licensing requirements, an embalmer would likely be held to a professional standard of care for determining negligence.

SUMMARY OF EVIDENCE

According to the record, the Marine associated with Dover Case No. D10-0128 was killed in action in January 2010 as a result of multiple traumatic injuries received as a member of a dismounted patrol that was struck by an improvised explosive device (IED) while conducting combat operations in Afghanistan. The Casualty Status Report listed the cause of death as “multiple amputations due to the direct blast of the IED” and indicated that he was missing a left arm, a left leg, and had major trauma from the waist down.

²² The States of Florida, Illinois, Ohio, and Oklahoma also take the majority view with respect to mistreating a corpse that to be recoverable a plaintiff must prove more than simple negligence. See Kimple v. Riedel, 133 So.2d 437 (Fla. App. 1961); Mensing v. O'Hara, 189 Ill. App. 48, (Ill. App. 1 Dist. 1914); Grill v. Abele Funeral Home, 42 N.E.2d 788 (Ohio App. 1940); Dean v. Chapman, 556 P.2d 257 (Okla. 1976). Texas takes the minority view that simple negligence is sufficient for a cause of action, but its position is rooted in contract law rather than tort. See Pat H. Foley & Co. v. Wyatt, 442 S.W.2d 904 (Tex. Civ. App., 1969).

²³ These instructions are based on the holdings in Tydings v. Lowenstein, 505 A.2d 443, 445 (Del. Supr. 1986); Seiler v. Levitz Furniture Co., 367 A.2d 999, 1007-08 (Del. Supr. 1976); and Sweetman v. Strescon Indus., Inc., 389 A.2d 1319, 1324 (Del. Super. 1978).

[USCM Senior Liaison],²⁴ the Senior Marine Corps liaison at the Port Mortuary, testified that “when you have a death, everything will go to the Marine Corps Casualty Branch at Quantico.” The Casualty Branch will contact the Casualty Assistance Call Officers (CACO) coordinators and assign a CACO to go talk with the family and do the initial visitation. [USMC CACO] was the U.S. Marine CACO for the deceased Marine’s PADD. As the CACO, he notified the family in January 2010 that their son had died. [USMC CACO] stated that he did not personally brief the PADD on the condition of the remains and was unsure whether other personnel had done so. He testified that Chief Hospital Corpsman [Senior Navy Mortician],²⁵ the Senior Navy liaison at the Port Mortuary, may have briefed the family on the conditions of the remains when they went to Dover for the Dignified Transfer. [USMC CACO] stated that the family had expressed a desire to the funeral director to have their Marine dressed in his uniform.

According to the record, the remains of the deceased Marine arrived at Dover for a Dignified Transfer on January [], 2010 and was brought to the Port Mortuary on the morning of January [], 2010. During the intake and triage process, a CAT scan of the remains was taken which, among other things, indicated the presence of the left humerus bone, 12 -15 inches in length. The remains were autopsied²⁶ by a medical examiner from the OAFME who provided a medical examiner’s letter to the Marine Casualty Office. This medical examiner’s letter (also known as a “family letter”) described the condition of the remains as “[n]on intact torso with loss of most of the upper extremity (humerus is present) including bone and muscle. Loss of left lower extremity including bone and muscle. Loss of right lower extremity involving the thigh, including its femur and muscle. Recovery is uncertain.” According to [Senior Navy Mortician], the information in the “family letter” is shared with the family.

[USCM Senior Liaison] stated that his office became involved in the Marine case “from the moment that we received the Personnel Casualty Report, the PCR. When someone dies, information is sent to us from theater and from Quantico, Casualty Branch.” [USCM Senior Liaison] indicated that the case manager (who is a funeral director) for the deceased Marine was [Senior Navy Mortician] and that if there had been any discussions with the CACO regarding the situation with the left arm bone, it would have been [Senior Navy Mortician] who had such discussions. According to [USCM Senior Liaison], the Marine Casualty Office’s case file indicated that the Marine was originally slated for a “full body wrap.”²⁷

²⁴ [USCM Senior Liaison] has been licensed as a funeral director and embalmer in the state of Virginia since the late 1960s. He serves as the coordinator/liaison between the Port Mortuary, CACO, family and funeral director for all Marine Corps cases. His duty position “belong[s] to the Casualty Branch of the Marine Corps at Quantico, Virginia.”

²⁵ [Senior Navy Mortician] works with [USCM Senior Liaison] in the same office. He has been assigned to the Port Mortuary as the Senior Navy Mortician since November 2008. He has been licensed as a mortician in the state of Texas since 1985 and was a licensed funeral director before he came into the Navy in January 1992.

²⁶ Pursuant to 10 U.S.C. § 1471 the AFME may conduct a forensic pathology investigation to determine the cause or manner of death of a deceased person. Autopsies are conducted on most if not all remains processed through the Port Mortuary.

²⁷ Mr. Parsons explained that “[a] full body wrap consists of a blanket, a sheet and plastic sheeting along with cotton, hardening compounds and drying agents to help for moisture.” According to Appendix C of AR 638-2, the plastic sheet is wrapped around the remains. “The white cotton sheet is then wrapped around the plastic sheathed remains followed by the blanket which shall have as few creases as possible, and be secured with large safety pins placed no more than 8 inches apart.” Mr. Parsons stated that, “[w]hat I mean by pin it is they would actually make it so that this full body wrap looks very – looks like it was done with great care, and it is. Great care meaning there is

[Senior Navy Mortician] explained that in his position he provides the Navy and Marine Corps with technical expertise “pertaining to the arrival of deceased military family members ... and assisting them in order to prepare the remains to be sent home.” Among other things, he serves as a conduit of information between the Navy and Marine Corps and the CACO (here [USMC CACO]) with regard to the condition of the body and options available to the family.

[W]hat we usually do is I will let the CACO know that we’re not going to be able to give them a definite viewability until after we’ve confirmed with the embalmer, one of the funeral directors, and then what I like to do because [there’s] usually other questions that follow – in other words, the condition of the body, I don’t like to speculate, so what I will do is I will hold until the medical examiner is finished with their examination and they provide us a family letter stating what items or what portions of the body are missing; and that way, we can better inform them as far as the possible viewability or the condition of the body, and then what portions are missing...

[USCM Senior Liaison] indicated that he viewed the remains in question on the morning after they arrived at the Port Mortuary. [USCM Senior Liaison] explained that the humerus is the long bone in the arm and when he saw the Marine’s arm, the bone “had probably about six or eight inches sticking out,” protruding out “pretty much perpendicular. It was sticking pretty much straight out, maybe at a slight angle.” [USCM Senior Liaison] did not recall the condition of the Marine’s face but, based on the fact he was initially assessed to be a full body wrap and the information he reviewed in the case file, he speculated that he could have had a lot of burns to his face.

[USMC Corporal/Liaison]²⁸ currently serves as the Marine Corps liaison between the Marine Corps CACO and the Port Mortuary. [USMC Corporal/Liaison] works for [USCM Senior Liaison]. He testified that he had handled over 150 Marines since he’s been at Dover but remembers “this particular case because of just what happened and because I wasn’t pleased with the situation.” In viewing the remains, [USMC Corporal/Liaison] recalled that the remains of the Marine had “extreme trauma to his body and [that] his left arm was basically gone” except for four to six inches of bone sticking out perpendicular to the body. The edge of the bone was ragged and “very sharp.” However, “[h]is face was good²⁹ ... [w]hat they call the mortuary view

probably 100 to 200 pins placed on the blanket and all the pins are dress right, dress. They all go in the same direction. There [are] no bumps or no folds. It’s very smooth and done with great care.”

²⁸ As liaison, [USMC Corporal/Liaison] generally does not deal with the family directly but works through the CACO to provide information to the family. He does meet with the families of deceased Marines at Dover prior to the Dignified Transfer, where the remains are removed from the aircraft upon arrival at the Port Mortuary. He assists with preparing the remains for final disposition, specifically measuring and putting together the uniform in which the remains will be dressed, if applicable. He maintains contact with the CACO with respect to viewability issues and other details involving the remains. [USMC Corporal/Liaison] has mortuary experience as a crematorium operator in the civilian sector.

²⁹ The description of the Marine’s face is consistent with the IO’s viewing of the pre-autopsy photographs.

ID [or] viewable for identification purposes.” At the time he initially viewed the remains there had not been a final decision made as to viewability.

[USMC Corporal/Liaison] stated that he normally provides the CACO “a heads-up” regarding the probable viewability status of remains upon their arrival at the Port Mortuary, but if viewability is unknown, he will wait for the final decision of the embalmer. He does not have the authority to make final viewability decisions. During the time he has been the Marine Corps liaison, [USMC Corporal/Liaison] said that in 95% of all cases family members want to know whether or not they will be able to see their deceased’s remains again.

On January [], 2010, the PADD signed the Statement of Disposition of Remains providing authority for the Port Mortuary to prepare, dress and casket the remains. Preparation of the remains generally includes embalming and the application of restorative art techniques.

The deceased Marine was embalmed by [Navy Embalmer],³⁰ who is the mortuary liaison for the Marine Corps assigned to Marine Corps Headquarters, Quantico, Virginia. At the time of the alleged incident, [Navy Embalmer] was on temporary duty at AFMAO. According to [Navy Embalmer], “the Marines had suffered some heavy casualties and they had gotten, approximately, six or seven deceased coming in all at once, and the Armed Forces Medical Examiners they weren’t done with their investigation until later in the evening. So Mr. Keel asked if I would lend a hand in the embalming process.” Because he was new to the Port Mortuary, [Navy Embalmer] stated he performed the embalming of the deceased Marine under the supervision of Mr. Keel, the Port Mortuary Director, and [Embalmer 1],³¹ a mortuary inspector/embalmer at the Port Mortuary.³²

Witnesses stated that when a body first arrives at the Port Mortuary, those seeing the remains may make an initial assessment as to its probable viewability. In this case, the general initial assessment was that the remains would be non-viewable based on the extent of trauma, and some of the paperwork indicates as such. However, only an embalmer can make the final determination of recommended viewability.

[Navy Embalmer] stated that when he went to embalm the remains, “I knew that I was able to make him somewhat viewable because his head and face were in fairly good condition. With the exception of his arm and his lower body, and – from an embalming standpoint, the face

³⁰ Since 2006, [Navy Embalmer] has been licensed as a funeral director and embalmer in Texas and has an Associate’s Degree in funeral service. [Navy Embalmer] has worked with AFMAO several times since 2007 in a temporary duty status when there is an influx of casualties and AFMAO requests mortician assistance. Generally [Navy Embalmer] handles administrative type duties such as logistics when he is at Dover; however, he stated he has embalmed remains three or four times during his temporary duty at the Port Mortuary.

³¹ [Embalmer 1] was hired as a mortuary inspector (embalmer) on or about October 16, 2009. At the time of the incident, [Embalmer 1] was a probationary employee with about 3 ½ months at AFMAO. [Embalmer 1] was initially licensed as a funeral director and mortician in the state of Illinois in 1998. He received an Associate’s Degree in mortuary science from Southern Illinois University (SIU). He spent one year in an apprenticeship at a civilian funeral home and then later managed four funeral homes. In 2007, he received a Bachelor’s Degree from SIU in health management. He served in the Air Force from 1990-94 at Kelly AFB working in document security for Air Force Intelligence.

³² [Navy Embalmer] indicated that while he worked embalming the Marine’s remains, both [Embalmer 1] and Mr. Keel were in the embalming suite embalming other remains and “were within 10 feet of me at all times.”

is the focal point. I knew I could make him viewable – or at least viewable for identification purposes.”

[Navy Embalmer] characterized the condition of the remains as follows, “[f]rom the waist down he had suffered an IED-related blast injury, so from the waist down it was in very, very poor condition – ‘mutilated’ is really, the only word – and from the waist up he was – he was in a fairly intact physical condition with the exception of – I believe it was his left arm had been, I guess, blown off, and it was charred and, and what remained of his left arm was approximately a 10-inch piece of charred bone and sinew. There was really no muscle or tissue left on it.” This remaining piece of bone was sticking straight out perpendicular to the body. [Navy Embalmer] stated that the head and face of the remains were in “fairly good condition.”

[Navy Embalmer] indicated that, in his view, “the real issue” with the bone “sticking 10 inches or so out of the – the rest of the body, was getting the body to fit into the casket.” He stated that because of the condition of the burn, “there was really no way to pull it down and attach it” to the body like you could with a full arm. He indicated that “we could have, on the table, put a uniform on [the remains] and [the bone] would have been sticking out, you know, nearly a foot.” [Navy Embalmer] testified that the left arm bone was immovable.

IO2: Now [w]as the bone moveable and it just wouldn’t stay in place at the side of the body, or it wouldn’t move at all?

W: It was really affixed, and it was because of the charred sinew and tissue sticking straight out. It was – because it wasn’t a clean incision. It was really – you know, the flesh was torn away by, I assumed, the IED blast.

IO2: Right.

W: So – the really – I guess the joint wasn’t working like it should because of all the – the charred muscle and ligaments that wouldn’t allow it to move. It was sticking straight out, yes.

IO2: Okay. So the normal process of cutting tissue or bone to move the body—to move the bone next to the body, in your opinion, was not going to work?

W: No, sir. And even if it were possible, then we would have had to duct-taped,[sic] or something, it to the side of the body, which would make dressing, you know, that much more difficult.

Mr. Keel stated that he “first viewed the remains when they arrived in [e]mbalming.” He indicated that the Marine remains “had trauma on both legs and possibly missing parts of both legs ... and then his left arm was missing with the exception of a three-inch bone shard projecting at about a 90-degree angle straight up.” He stated that the face “looked good” and “was in a condition where the family could see him.” Mr. Keel indicated that the remains could have been placed in the casket with the bone sticking out at a 90-degree angle.

[Navy Embalmer] indicated that it was fairly late when they finished the embalming – around 10:30 or 11:00 p.m. and that they left the remains in embalming overnight. He stated it

was normal practice to leave the remains overnight and then the next day, after the chemicals have had time to sit and firm the tissue, come back and “do a lot of restorative artwork.”

According to the DD Form 2063, *Record of Preparation and Disposition of Remains*, embalming of the Marine’s remains began on January [], 2010 and was completed on [the next day] January [], 2010. [Navy Embalmer] testified that he did not sign off on the embalming report because he is not an employee of AFMAO and he was under the direct supervision of [Embalmer 1] and Mr. Keel. He indicated that he “believe[d] [Embalmer 1] filled out the embalming report.” Under the Mortuary Data section of the DD Form 2063, the case was marked as “viewing questionable” and “ID only.” The form also had checked the recommendation that the family not be allowed to review the remains. Mr. Keel signed the second page of the form as the supervising embalmer.

As the case manager for the deceased Marine, [Senior Navy Mortician] knew [Navy Embalmer] was the primary embalmer but stated that he had not been involved in any part of the embalming of the remains. He did not recall viewing the body, whether any issues arose regarding viewability or fitting in the uniform, or any conversations with the family. He also did not recall whether the Marine went out as a full body wrap or “being view ID.” He stated that most families want to see their deceased members in uniform. “So we push pretty stiffly with the mortuary to try to do everything they can if at all possible to at least put them in that View ID status, even if the other portions of the body may not be there.”

[USMC Corporal/Liaison], the Marine Corps liaison, stated that [Navy Embalmer], a Navy mortician stationed at the Marine Corps Base Quantico, was the embalmer “and he wasn’t really too familiar with the process, so I waited until he was completely done with embalming and even as the funeral director and licensed embalmer that he was, he didn’t even know if he was going to be viewable or not.” [USMC Corporal/Liaison] stated that, “at this point in time [we anticipated] doing a full body wrap and just bagging and creaming the face if the family wished to see him, they would have that option. The reason why I know this is because it’s my job to do the uniforms and on full body wraps, I don’t have to measure a uniform because they’re not actually physically going to be wearing it.” For a full-body wrap, the uniform is placed on top of the body wrap, which makes it unnecessary to take exact measurements for fitting the uniform, as would be required if the remains were dressed. [USMC Corporal/Liaison] indicated that this was the view of “[Navy Embalmer], myself, and one of the head embalmers, [Embalmer 3].”³³

[USMC Corporal/Liaison] stated that he and [Navy Embalmer] had asked [Embalmer 3] (because of all his experience) to view the body and tell them what he thought regarding viewability of the deceased Marine. According to [USMC Corporal/Liaison], [Embalmer 3]

³³ [Embalmer 3] is a mortuary inspector (embalmer) who was hired at AFMAO in June 2007. He is a licensed funeral director and embalmer in the state of Ohio receiving one license in late 1989 and the other in January 1990. [Embalmer 3] attended two years of college and a year of Mortuary school. He graduated in December 1988 from the Cincinnati College of Mortuary Science. He stated that he has over twenty years in the mortuary business. In a Memorandum for Record dated July 9, 2010, [Embalmer 3] indicated that he had embalmed 250 cases at AFMAO in the last year.

(who was not the embalmer responsible for embalming the remains) opined that it would be a full body wrap (non-viewable), so [USMC Corporal/Liaison] prepared the uniform accordingly. [Embalmer 3] provided this opinion, according to [USMC Corporal/Liaison], because of the position of what remained of the left arm bone.

[Embalmer 3] stated that he saw the remains after embalming but prior to the arm bone being cut off. He recalled viewing the remains “when the cavity packs were being taken off and the body was being prepped to go to the next step of getting dressed or getting wrapped.” His initial thinking was that the remains would be a full body wrap “due to the nature and extent of the trauma that was incurred.” [Embalmer 3] stated that the face was “okay.”

After embalming, the Marine’s remains were moved to “Dress and Wrap.” According to [Embalmer 1], an embalmer, it is now called dress and restoration and “[i]t’s the area where we dress the fallen in uniforms, do the cosmetics, restorative art and then they are sent over to Departures, which is the old Shipping.” [Embalmer 1] indicated that the remains arrived in dress and restoration in a full body pack, “which means his remains was in a body bag that had cotton on the bottom that was saturated with very strong embalming fluid.” [Autopsy/Embalming Technician 2]³⁴ and Mr. Parsons, both autopsy/embalming technicians, were in the process of taking the remains out of the body bag.

Mr. Parsons stated that his first contact with the Marine remains was “[t]he day that we were going to prepare him to move to dress and restoration.” Mr. Parsons stated that when the remains had arrived in his area, he and [Embalmer 1] were present. He did not recall “when [Autopsy/Embalming Technician 2] came into the picture. I don’t remember off the top of my head if he was there at the beginning but he was there during – when we started to process him for shipment.”

Mr. Parsons described what he generally does when remains arrive in his area for preparation, “[m]ost of the time it entails if they are in a – in a cavity pack, like I—I said earlier, we would take off all that cotton, the embalming fluid, we would wash the remains, try to get all the embalming fluid off and try to make sure they’re as clean as possible, and then we would – once we have done that, if there’s nothing else wrong with the service member, like he’s not missing any limbs or there’s nothing – that he’s basically intact, we would then take him into the dress and restoration area.”

Mr. Parsons testified that the Marine remains had been “classified as viewable for identification purposes by the embalmer on record, which was Mr. Keel. He was the embalmer on record as far as the embalming report goes.” Mr. Parsons indicated that Mr. Keel “did not actually embalm the remains,” and that a Navy corpsman “by the name of [Navy Embalmer]” embalmed the remains.

³⁴[Autopsy/Embalming Technician 2] is a GS-09 autopsy and embalming technician who started his employment with AFMAO on January 4, 2010. At the time of this incident, [Autopsy/Embalming Technician 2] was a probationary employee who had been employed about a month with AFMAO. [Autopsy/Embalming Technician 2] received an Associate’s Degree in funeral science from Florida Community College and obtained a license in Florida as a funeral director and mortician in January 2006.

Mr. Parsons described the condition of the Marine when he arrived in his area for dressing, “[i]n this case, this Marine was missing – of course he was missing his forearm, his left forearm. He was missing all the tissue on his humerus, he was missing quite a bit of his legs, both legs, missing a lot of tissue, a lot of bone loss, not a lot of skin on the legs, so there wasn’t enough skin to actually – to be able to suture, to bring it together, to basically seal the exposed tissue.” Mr. Parsons stated that “[t]he condition of the left arm was that there was nothing above – nothing below the humerus, from the humerus up to the shoulder, there was no tissue, so no supporting tissue around the bone, nothing but bone.” He indicated that the remaining portion of the left humerus bone “was sticking out in a way where it was basically at the three o’clock position,” such that he would not have fit in a casket in that condition.

Mr. Parsons was interviewed twice during the investigation. In his initial interview, Mr. Parsons estimated that the bone was approximately seven to eight inches long. A second interview was conducted with Mr. Parsons to clarify his testimony regarding the length of the piece of bone that was removed. Mr. Parsons reviewed photographs taken of the remains prior to autopsy that showed the protruding left humerus bone. After reviewing various photographs, Mr. Parsons opined that it appeared the remaining portion of the humerus bone was closer to ten to twelve inches long. He also noted that at the end of the bone was a joint, which was most likely the elbow area.

[Autopsy/Embalming Technician 2], an autopsy/embalming technician, stated that he was one of three persons working on the Marine Corps case (after the remains had been embalmed); the other two were [Embalmer 1], an embalmer, and Mr. Parsons. [Autopsy/Embalming Technician 2] testified that the work load was heavy the day the deceased Marine was brought in and “they brought in some other embalmers.” He indicated that a Navy embalmer named [Navy Embalmer] embalmed the remains in this case. He also stated that “Mr. Keel had then took over for this guy ...”

Mr. Keel testified that in situations where the lower torso is missing, the Port Mortuary has techniques

where we will treat that area, make sure that the viscera is returned to the fullest extent possible. As long as there is an abdominal cavity to place the viscera in, and isolate and treat that area either – primarily, through chemical treatment to cauterize the tissue, and then secondarily, through aeration, which we would force air directly over that exposed area that has no skin. It’s pretty much muscle tissue, to dehydrate that area and prevent leakage. And then once the dehydration process is completed, you know, it’s a challenge, though, because we want to dehydrate one area and not dehydrate another area, so we can isolate and dehydrate, and then use a combination of materials, absorbent and Unionalls, you know, to pretty much minimize the possibility of leakage.

[Autopsy/Embalming Technician 2] stated that Mr. Keel showed them a new “wind tunnel technique” to dry out tissue and prevent leakage so that remains could be placed in a uniform

rather than a full body wrap.³⁵ [Autopsy/Embalming Technician 2] testified that they used the technique in this case and the technique was “extremely effective” and “[e]verybody was amazed that saw it ... [i]t dried tissue out ... [it] was that effective, and it was a great way of treating it.” [Autopsy/Embalming Technician 2] stated that the percentage chance of leakage or odor with the remains was “very minimal.”

Mr. Parsons also testified, in unsworn testimony provided to the IO during the IO’s complaint analysis interview, regarding the wind tunnel technique. He stated that Mr. Keel “had taken the remains, taken a large industrial fan and placed sheets around it and sheets around the remains to make it like a wind tunnel to dry the remains.” Mr. Parsons indicated that he did not “see anything unethical about [the technique] – anything that would actually do any harm.” He indicated that “[i]t’s a very good technique. It worked.”

[Embalmer 1] indicated that while he first viewed the remains of the deceased Marine when the remains first came into Triage at the Port Mortuary, his focus on the remains occurred after the remains had been embalmed and were taken into Dress and Wrap. “[W]hen they got him out of the pack” is when [Embalmer 1] was “able to really focus on the condition of his remains.” With respect to the condition of the face, [Embalmer 1] recalled that there “wasn’t a scratch on it.” [Embalmer 1] described the condition of the remains as completely missing the right leg and the lower portion of the left leg. He also indicated that “[t]he arm wasn’t there;” instead there was a bone about three to four inches long “sticking up and out,” perpendicular to the body. He indicated that the tip of the bone was jagged. He also indicated that the remaining bone “was just mutilated. I mean, he wasn’t charred remains.”³⁶

As for the condition of the shoulder, [Embalmer 1] stated that “[i]t was just all muscle tissue. There was maybe some skin off down around, but for the most part, it was just all muscle.” In response to the question, “[w]hat was holding the bone portion into the shoulder,” [Embalmer 1] answered, “[j]ust all the connective tissue on the muscle attaching itself to the bone.”

After seeing the condition of the remains, [Embalmer 1] testified that, “I really thought it was going to be a full body wrap, because of the injuries I saw” which evidenced “major trauma to the legs and his left arm.” [Embalmer 1] indicated that he had been told that the remains were supposed to be “a view ID.”

So I saw that bone and I had never seen anything like that. I was like, wow, how are we going to get him in his uniform? And that was my concern. Not only if he was a full body wrap, but that bone was going to be – if it was a full body wrap, that bone was going to be a concern for puncturing through the plastic. So I was like – I had never seen anything like that.

³⁵ According to [Autopsy/Embalming Technician 2], with the wind tunnel technique, the body is placed on an elevated gurney which has sheets attached to it over the body. A big high speed fan is placed at the end of the gurney with the sheet around it and air is directed over all displayed open tissue.

³⁶ [Embalmer 1]’s testimony in this regard differs from the testimony of [Navy Embalmer]. The photographs taken of the remains prior to embalming do not indicate any charring of the remains.

[Embalmer 1] stated that he, Mr. Parsons, and [Autopsy/Embalming Technician 2] were working to dress the remains in the uniform but could not do so with the bone positioned as it was. They tried to move the piece of bone next to the body, but it would not move enough to do so.

W: [y]ou know, we tried to get the bone, try to bring it down and it just – it wouldn't. It was just that – because of the embalming and the high point in the cavity pack, that tissue was so fixated, that it was hard to maneuver that bone up like that.

IO: Would that bone portion not come down closer to the body or would it spring back, or was there no movement or little movement?

W: Very little. Because ideally, it would be nice if you could try to bring it down, but it was up. It would not – it would budge a little bit, but it wouldn't – it wouldn't come down.

Mr. Parsons testified that, at that point, “[t]he option we have is to manipulate the arm to be able to bring it closer to the rest of the upper torso. We attempted to do that and were not successful.” He explained he and [Embalmer 1] tried to “manipulate [the bone] closer to the torso and it wouldn't move, and once it doesn't move – once the embalming process is – is taken place, if – most of the time, what position your body is in, that's the position it tends to stay in.” Mr. Parsons clarified that what he meant by “not move” was that the bone would move a little but would not stay in place near the torso.

Mr. Parsons testified that “the remains in question could have been placed in a wrap and we actually could have manipulated the arm by taking gauze or some kind of – something else to be able to constrict the arm closer to the torso that it wouldn't stick out so that the remains could have been placed in a wrap.” He indicated that, they “wouldn't be able to place the arm in a sleeve or into a jacket ... so that the arm would be anatomically correct in the jacket.”

[Autopsy/Embalming Technician 2] indicated that, “[o]n the left side of the man's body he had about a three- to four-inch piece of bone that was sticking out from his shoulder socket. The bone was devoid of most of any tissue and the problem was it was sticking straight up,” perpendicular to the ground. [Autopsy/Embalming Technician 2] was asked whether the bone could move.

W: Very, very limited movement. In other words, in other words, you know, it's like you move something down and it's like snapping right back into place. We could not move it down a 90 degree angle, but could we move it 20 degrees either side? Yeah, but it just – it didn't make any improvement on any way that we did it.

IO1: Was there any tissue or muscle or tendons connecting the bone to the shoulder?

W: Just around the actual shoulder joint, that was where it was, but beyond that, no.

IO1: Would the bone have moved, in your opinion, if that had been snipped or cut, the tissue?

W: You know what? The only – in my opinion, the only way that that would have worked is if you completely went around the entire joint and removed all tissue from the, would be proximal end of the humerus bone. Of course if you did that then the humerus bone is going to fall off. So, I mean, either way, I mean, yeah, it could have, but it's – it's all the muscle that's attached completely around it, you know, in a 360 degree circle is what is causing, you know, this bone to remain in its place.

[Autopsy/Embalming Technician 2] stated that a full body wrap “wouldn't have kept [the bone] down...” He felt you would have had to “just wrap the whole thing up” with the bone sticking out and would also have to “put something there so that when you did the wrap around it didn't poke through your body wrap.” [Autopsy/Embalming Technician 2] recalls “taking some gauze and trying to get [the bone] back down the body. Every time we do it, we couldn't – it was so short everything kept slipping off of it, and we could not wrap it around and get the thing down.”

The IO questioned [Autopsy/Embalming Technician 2] as to his emphasis on the “smallness of this bone.” [Autopsy/Embalming Technician 2] testified, “and I do emphasize the smallness of the bone because of that, you're not going to [manipulate] it...—if it was a seven inch piece of bone, I'm going to be able to manipulate it. And that's why the importance of the size of this bone was. It was so small it could not be manipulated.” A second interview was conducted with [Autopsy/Embalming Technician 2] to clarify his estimate of the length of the piece of bone. In the first interview, he had stated the piece of bone was approximately three to four inches long. During the second interview he was shown the photographs taken before the autopsy and opined the piece of bone could have been five to six inches long.

[Autopsy/Embalming Technician 2] testified that after Mr. Keel took over the case from the embalmer [Navy Embalmer], “what he [Mr. Keel] wanted to do was to try to get this Marine into his uniform because his face looked good.” [Autopsy/Embalming Technician 2] stated that when the Marine first came in, “someone” made an early guess that “because of the damage to his left area as well as his legs, he was going to be a full body wrap.” [Autopsy/Embalming Technician 2] indicated a full body wrap “does not facilitate any kind of viewing of the body. The uniform would then be placed over [the full body wrap.]” [Autopsy/Embalming Technician 2] stated that, “Mr. Keel and the rest of management has been forthright with whatever we need to be able to upgrade these bodies so that they can go home in uniform.”

[Embalmer 1] was not sure how to handle the situation so he consulted Mr. Keel, the Port Mortuary Director. “I'm not sure if I called Mr. Keel or I went to his office, but Mr. Keel came to Embalming. And we were all standing there just like, what do we do with this bone sticking up in the air?” Mr. Parsons also stated that since they were unable to manipulate the bone and

reposition it to remain in place, [Embalmer 1] “decided to – to ask Mr. Keel who was the director of the mortuary, what his opinion would be to be able to manipulate the bone.”

According to [Embalmer 1], when Mr. Keel arrived, [Embalmer 1] “told Mr. Keel, ‘my biggest concern right now is this bone.’” According to [Embalmer 1],

Mr. Keel said, “what needs to be done is it needs to be removed.”
... “The bone needs to be removed so that it is flush with that tissue that’s still remaining there.” And I asked him, “Do you want me to remove the bone?” And he said, “Yes.” I go, “But once we remove the bone, it’s gone.” He goes, “Then you put in mortuary putty,” which is this – it’s this putty – “seal it off, pad it, and then – pad it and then he [can] be placed in his uniform.” And even when he left – I kept asking him, “So you want me to cut this bone off?” He said, “Yes.”

According to Mr. Parsons, “Mr. Keel said to cut it off.” Mr. Parsons indicated that “Mr. Keel then left the room after he said cut it off, left the embalming room and that was the last – only discussion we had with Mr. Keel about that.”

[Autopsy/Embalming Technician 2] indicated that there was a discussion about what to do with the remaining left humerus bone. [Autopsy/Embalming Technician 2] testified that “fitting in the casket wasn’t the issue ... The issue was his uniform. That was the problem. You can’t have this jagged piece of bone sticking straight up ... that was our problem that we were faced with.” [Autopsy/Embalming Technician 2] was not sure whether it was [Embalmer 1] or he that suggested they ask Mr. Keel. [Autopsy/Embalming Technician 2] indicated that Mr. Keel came down. “He inspected [the arm], you know, looked it over and, you know, he came to the same conclusion that, you know, there was no way to get it down, and the option he faced was, you know, basically the same one we were all thinking about, you know, is that we can get this guy out in uniform, except for this bone.”

According to [Autopsy/Embalming Technician 2], “Mr. Keel said do the same when you do it for a charred. You know, take – remove the jagged piece of bone using one of our saws and keep it with the body.” [Autopsy/Embalming Technician 2] was not sure of the exact words used by Mr. Keel and stated he did not know whether Mr. Keel used the words “cut if off” or “cut it off like you would a charred body.” [Autopsy/Embalming Technician 2] testified as follows:

W: It would, – well, again, we understood what [Mr. Keel] meant. I mean, it’s a piece of bone, remove the bone just like you would if it was a charred, remove the bone, keep it with the body, you know and

IO2: Was there an attempt to saw through portions of the bone to get it to bend down?

W: Well, no. I mean it’s a three-inch piece of bone. You’re not going to – if it had been a long bone, we could – it could have

possibly, but, you know, then you get into the other thing. I mean because the only way you're going to bend it is going to be crack it, which is worse, to make a clean cut, and then reposition it, or to cause something to fracture, or worse. In this case, it looked like a three to maybe four inches. It was already jagged on one end, so it was – the simplest and easiest thing was cut through it, making sure that you keep it with the body. Again, what was the – the result was it now gave us a clean cut, we were able to bandage up that area to prevent leakage, and the Marine went home in his uniform, and that piece of bone remained with him.”

IO1: Where did that piece of bone remain?

W: I don't remember the exact location, because Jim Parsons is the one that did that. I had something else to do at that time. It was removed, and I remember that he had taken it and taped it up whenever I walked away or whenever he was taping it up, and then he placed it somewhere on the body, like physically associated with the body. But where, I'm not sure.

IO2: Did Mr. Keel witness the bone being the bone being removed or—

W: No.

IO2: He left?

W: To the best of my knowledge he was not there, no. Not whenever it was cut through, no.

[Autopsy/Embalming Technician 2] testified that [Embalmer 1] was the embalmer who removed the bone.

In his testimony, [Navy Embalmer] (who embalmed the Marine) indicated that he returned the next day after embalming. He stated, “it was myself, [Embalmer 1], Randy Keel, and there was another AFMAO employee in the room,” who he did not know but indicated that he was a mortuary specialist/embalmer. According to [Navy Embalmer], they had a discussion around mid-day about the situation with the piece of bone and what to do about it.

So we – we were deciding, you know, what to do. And we measured the body, and we knew the measurements of the casket, and – that's – you now—we were all licensed funeral directors and embalmers. We came to the decision that the bone would have to be excised, would have to be cut, in order to make the uniform not only look proper, but in order for the remains to fit into the casket well, because there was, really, no moving that [bone] down to the side of the body.

[Navy Embalmer] stated that he left before the bone was removed, but when he returned [Embalmer 1] showed him the excised “bone fragment” which he estimated to be “approximately 10 inches.”

According to Mr. Keel, “after the embalming, we looked at the remains [which] were in a condition where they could be viewed. The only problem was the uniform with the three-inch bone projection at that 90-degree angle. We would not be able to dress him in his Marine Corps uniform due to that.” Mr. Keel stated that “a Navy mortician” [Navy Embalmer], “two Air Force embalmer’s” – [Embalmer 1] and [Autopsy/Embalming Technician 2] – and he “consulted” on “what the possibilities were.” He also stated that Mr. Parsons was involved. “I don’t recall him being involved in the initial discussion and decision, but he did assist in the process itself.” In determining the possibilities, “[w]e could try to apply pressure to return the bone to an anatomically correct position, the danger of that would be if the bone broke, creating another shard that would give an unnatural appearance or the other option is to reset the bone similar to what we see in compound fractures in the legs ... [where the bone] cuts through the skin. The bone will – the way it’s positioned cannot be set to where you could close that incision, and in those cases, we will cut the bone, and then manually reset it, and then allow us to suture up and restore it to minimize and prevent any leakage.”

Mr. Keel explained that when he said “cut the bone,” the bone would be completely “removed” (severed) from the body. By the word “reset,” Mr. Keel explained that he meant that the bone was to be “separated” from the torso and “positioned in a more natural position.” Mr. Keel was asked “how the word manipulate can mean removing a bone?” He responded, “We would try different steps. If pressure doesn’t work ... then we would apply pressure to see if we can return them to a more natural state. And then if that doesn’t work, then we would apply different techniques such as cutting tendons, in addition to pressure, to try to do that.” Mr. Keel explained that simultaneously removing a three-inch bone fragment that was sticking straight up and resetting it in its natural state, restored “in a normal, anatomically correct position” would also be manipulation.

Mr. Keel testified that he made the decision to “cut and reset” the bone fragment, but clarified that the decision to use this procedure was “unanimous” among the four of them – [Navy Embalmer], [Embalmer 1], [Autopsy/Embalming Technician 2] and he. He does not recall Mr. Parsons’ reaction.

Mr. Keel indicated that they did go to the Marine Corps Liaison, [USMC Corporal/Liaison] “to let him know we could restore [the Marine] to a natural state by removing ... that bone.” According to Mr. Keel, [USMC Corporal/Liaison] agreed. “We actually gave him two choices. We could restore the natural appearance of the arm or we could restore it to where it could fit the uniform and apply the sleeve at the side.” According to Mr. Keel, [USMC Corporal/Liaison] “recommended that we go with the sleeve at the side.”

[USMC Corporal/Liaison] testified as follows:

Randy Keel mentioned sawing off the arm, sawing off the bone, making it flush so we could put a jacket on him and make him viewable, and then he suggested making a fake arm and – just so we could make his arms viewable in the casket. And he said, ‘As the liaison, I have that choice,’ and for me, I don’t think it was my place – and I know I suggested that we call the CACO and we let

the CACO talk to the family, let the family know the situation, and let the family decide. And I said, 'We can let the parents know he's going to be full body wrap, but you can view his face,' you know, 'And then we can say his arm, he's got a bone sticking out, you know, we have this option, we can saw off the bone and then we'd be able to put a uniform on him.' Those were the choices that were given.

[USMC Corporal/Liaison] explained that normally the Marine Corps liaison will speak with the CACO about issues involving Marine Corps remains, not Mr. Keel. "I did not directly talk to the CACO because the Navy and Marine Corps don't exactly like me talking to CACOs because I'm not a licensed funeral director. But I can explain the process to them. And I know [Navy Embalmer] was talking with the CACO and I don't exactly remember what played out." [USMC Corporal/Liaison] was not comfortable making that decision so he went to his boss, [USCM Senior Liaison], the Senior Marine Corps liaison and told him of the situation. [USMC Corporal/Liaison] said that he knew [USCM Senior Liaison] "went back to the embalming room to inspect the situation."

[USMC Corporal/Liaison] indicated that "there was adequate time to talk to the family" as there was a time lag after the deceased Marine was embalmed and when he was shipped. He also said that he did not talk with the Marine Corps CACO ([USMC CACO]) about this situation and was not aware of whether [USCM Senior Liaison] had any conversations with the CACO. [USMC Corporal/Liaison] stated that in his opinion Mr. Keel was "leaning towards cutting off his arm because he is – he takes it very seriously about making everyone viewable that can be." He testified that he was not around when the final decision was made and that [USCM Senior Liaison] did not get back with him.

[USCM Senior Liaison] stated that he got involved in the case when [USMC Corporal/Liaison] apparently told Mr. Keel that he needed to talk with [USCM Senior Liaison]. This occurred on the day the Marine was prepared. He stated that [USMC Corporal/Liaison] did not provide him with any background information. According to [USCM Senior Liaison], Mr. Keel "came back, got me, took me back to where the body was – had been embalmed and he showed me the arm with the small part of the humerus that was sticking out. He says, '[w]ell, what do you want to do?' And I told him, ... 'It's really up to what you want to do,' because we don't get involved in what the embalmers do." [USCM Senior Liaison] indicated it was a short conversation, about five minutes in length. [USCM Senior Liaison] indicated that there were several persons involved in the discussion – Mr. Keel, [Navy Embalmer], [Embalmer 1] and perhaps Mr. Parsons. According to [USCM Senior Liaison], the indication he got was they were thinking about removing the bone. [USCM Senior Liaison] stated that he did not tell them to cut off the bone; he told them to do "whatever you think you need to do as an embalmer." [USCM Senior Liaison] was under the impression that it was going to be a full body wrap. He testified, "in order to wrap them and complete the work they need to do, if this bone is sticking out like this, there's no way they can do that. They can't wrap the body appropriately. And if you want my professional opinion as an embalmer, I don't see where they did anything wrong as far as cutting the bone."

[USCM Senior Liaison] said that no other options were discussed with him. He stated that he did not know what actions had been made to pull the remaining piece of bone closer to the body, but he opined there should have been no problem doing so. [USCM Senior Liaison] indicated that his “first choice” in handling the bone situation would have been to manipulate the bone – “cut a muscle and bent the arm back down and taped it to the body, that would have probably been the most logical way to do that. Cutting the arm off would be more in line with mutilation.” [USCM Senior Liaison] testified that “[m]utilation would be removing something you shouldn’t remove.” [USCM Senior Liaison] indicated that “if they could have taped [the bone] down around the torso... there would really be no need to cut it off.” He stated several times during his first and second interviews, however, that he saw nothing wrong with cutting off the piece of bone, if it was determined necessary by the embalmer and the bone was kept with the body. He also stated there would not be a problem where the PADD was aware of the situation and said go ahead. [USCM Senior Liaison] stated that he would have gone to the PADD if he had been asked to do so³⁷ (he was not), or if he had thought it was necessary to do so. He did not believe it was necessary in this case.

[USCM Senior Liaison] stated that he did not see the Marine after he was completed. He learned that the bone had been cut off and placed in the stocking with the leg, after a complaint had been made to the Commandant of the Marine Corps (*see* discussion below at page 40). [USCM Senior Liaison] also indicated that he was not aware that the Marine had been put in uniform until he was told that a few days before his second interview in this investigation. He indicated the fact that the Marine had been dressed in his uniform and not placed in a full body wrap as he originally thought did not change his opinion.

According to Mr. Parsons, after Mr. Keel left, he discussed with [Embalmer 1] his view “that [the remains] should be in a full body wrap.” Mr. Parsons acknowledged that at this point the decision on viewability had already been made by Mr. Keel. Mr. Parsons testified that he indicated to [Embalmer 1] “that I wasn’t going to be the one to do that [cut off the bone].” [Embalmer 1] then said, “I’ll have to do it.” At that point, “[Embalmer 1] went and got the saw and [Embalmer 1] cut the bone off.” The bone was separated from the body “directly [from] the shoulder, very close to the socket.”

Mr. Parsons explained that there are two saws in the embalming room. “The purpose for having the saws in the embalming suite is like, if you would have a – a charred remains that had been in a fire and had been charred, a lot of times, of course, the limbs are at angles that you would not be able to place them in a casket. They could be over their head, could be out to the sides, where you would not be able to place them in a casket. That way you would be able to use the saw to manipulate through tissue, maybe through some of the bone to be able to move the arms into a position that they would be able to be wrapped and placed in a casket.” Mr. Parsons testified the difference between handling charred remains and the treatment of the Marine remains is that “[t]he arms or the limbs are not removed ... They are left attached to the remains.”

³⁷ [USCM Senior Liaison] indicated that his office will “automatically” ask the CACO to go back to the PADD where the deceased comes in with a beard or a mustache “to find out if they want it shaved off.” [USCM Senior Liaison] explained, “[t]he idea is to make sure that’s what the family wants to do. It’s not for us to decide what the family wants to do.”

[Embalmer 1] stated that after Mr. Keel left, he removed the piece of bone. He further stated:

IO1: After the portion was sawed off, can you indicate where the cut-off portion was. Was it at the shoulder or was it at the edge of the ball joint or –

W: What I had, once it was removed, was just bone. There was no ball, no – it was just the jagged edge, half of it was the jagged point. It wasn't like a pencil, but it was jagged. Here's the bone. It was jagged on the one side and then kind of jagged down to the shaft of the bone itself, but I don't – it was a shaft. I didn't see any ball or anything like that, sir.

IO1: About how long was the portion that you removed?

W: Three, three and a half – because once the bone was removed, I placed the bone – ideally, it would have been best to try to get the bone in that area, but that jagged part, I was worried about – to try to pad that area with the jagged bone, I was worried that the – that jagged bone would puncture through the cotton and through the plastic, then we had potential risk of leakage. So I was like, I wanted to do – what I did, I placed the bone in some cotton with some embalming powders, wrapped it in cotton, got some surgical tape, taped it on the ends so there was no worries of the bone puncturing through the cotton or the plastic, that the body could be placed in a Unionall, which is like an adult-sized Onesy, plastic. So the bone was like – I sat there and I taped it all up and I thought about trying to get – trying to reassociate on that side, but with all the padding we had there and trying to get that area just right, so Mr. Parsons then placed it down on the left – around the left leg.

[Embalmer 1] testified that, in his opinion, there was no significant concern about leakage or odor, “not the way we had him prepared ... With all the padding, with the sealant we used, the mortuary putty, the padding, the layers of plastic that he was in, because he wasn't just in one Unionall. I mean, we had stockings up to the waist, that there was surgical tape around that. He was in at least one, if not two, full sized uniforms that with, of course, the legs being gone was folded up, so – .” [Embalmer 1] further opined that the removal of the remaining piece of bone would have also been necessary if the remains had been prepared in a full body wrap due to the fixation of the bone.

Mr. Keel indicated that he was not present when the bone was cut and did not know who removed it, and how or whether the bone had been reattached. “When I came back, that area was already wrapped, so I didn't see how – his exact position.” He stated that it would be a problem if the bone had been put down by the leg as “that would not be a natural anatomical position, obviously.” Mr. Keel was not aware of whether the PADD or the funeral director were notified of the situation with the left arm bone or the “cut and reset” procedure.

[Embalmer 1] indicated that from the time he came into dress and restoration – when Mr. Parsons and [Autopsy/Embalming Technician 2] were taking the remains out of the body pack – he was “not aware if [USCM Senior Liaison] or anybody else came in during that time frame.” He also indicated that there were not “any other mortuary specialists that were there that day that were involved in the discussion.” When asked whether anyone from the Marine Corps Liaison Office came to review the remains, [Embalmer 1] indicated “that wasn’t my case,” and that the case belonged to a mortician named [Navy Embalmer]. [Embalmer 1] testified that he did not “know if [Navy Embalmer] was there or not.”

Mr. Parsons testified that on the day of this incident, he had discussions with [Embalmer 1], Mr. Keel, and [USMC Corporal/Liaison]. He did not recall talking with anyone else about the incident that day. Mr. Parsons testified that [USMC Corporal/Liaison], the Marine Corps liaison, came into the embalming suite and “did not like the condition that we had taken the bone and sawed it off.” He also indicated that [USMC Corporal/Liaison] told him that he as the Marine Corps liaison “had reported to the PADD that the Marine was going to be in a full body wrap.” According to Mr. Parsons, [USMC Corporal/Liaison] “based this on his opinion when the Marine came in,” and stated that it was his opinion as well. Mr. Parsons indicated that what [USMC Corporal/Liaison] “had already done is he prepared a uniform for a full body wrap.”

In unsworn testimony provided to the IO, Mr. Parsons indicated that he “asked [Embalmer 1] what to do with [the excised bone] and he said to go ahead and wrap it in cotton and with tape and we would put it in the Unionall.”

According to [Navy Embalmer],

[t]here was some discussion of [making a semblance], and it was decided because—because the missing arm was on the left-hand side of the body, and typically, a body is viewed from the right, that the best course of action would be – like I said, call the funeral director, explain to him that the arm is missing, and then that the sleeve would be tucked on the left-hand side, and that the lining of the casket was pulled out so that you really couldn’t see the left-hand sleeve of the uniform at all.

[Navy Embalmer] testified that, “[USMC Corporal/Liaison] was asked his opinion, because he’s the expert on Marine Corps uniforms – on would it be better to drape the empty sleeve across the stomach, which is, you know, kind of normal, where they cross the hands, or place it to the side. So he did give his opinion that it would be better to place it to the side like the body were – were almost at the position of attention in the casket. And so his opinion was tak[en] into account as far as the dressing was” concerned.

[Autopsy/Embalming Technician 2] stated he was not aware of any discussion about having the Marine Corps liaison consult with the family about the bone being removed and did not have any knowledge as to whether [USMC Corporal/Liaison] had made any comment to the family regarding the circumstances surrounding the arm. [Autopsy/Embalming Technician 2] stated that he believed it was not necessary to contact the family about removing the bone, “[a]nd

I, you know, as a professional embalmer in a case like this here, that would be something that I wouldn't necessarily do, because this is no different than having the autopsy ... or whenever an embalmer makes an incision of a body and does everything else that we do and restore the body, we don't consult with the family."

[Autopsy/Embalming Technician 2] related that at some point in the process there was a discussion with [USMC Corporal/Liaison], the Marine Corps liaison, [Embalmer 1], Mr. Parsons, and himself regarding creating a semblance of the missing left arm. He recalled the encounter with [USMC Corporal/Liaison] was brief. "[A]ll the discussions that really took place [with [USMC Corporal/Liaison]] that I was privy to was not centered around removing the bone; it was all centered around the idea of creating a prosthetic arm afterwards."

[Autopsy/Embalming Technician 2] stated that Mr. Parsons was against it. "I think [USMC Corporal/Liaison] – he may have been the one that suggested, no, let's just use a sleeve. I believe in that case [the Marine] went out [of] here with a pinned sleeve on."

[Autopsy/Embalming Technician 2] indicated that the Marine was dressed in his uniform.

[USMC Corporal/Liaison] testified that, "I've already got a uniform done ... And then Mr. Keel was like, 'No, we can do this, make him view ID.' I knew that the uniform wasn't big enough for him and I knew I was going to have to go back and make a uniform." Once the decision was made that the remains were viewable, [USMC Corporal/Liaison] testified that he had to rush to re-do the uniform since he had prepared the uniform for a full body wrap. [USMC Corporal/Liaison] said that he was not there when the bone was cut off. However, he stated that [Embalmer 1] told him a couple days later that he was the person who cut off the bone and that he "was told to by Mr. Keel." During the final quality review of the remains prior to shipment, [USMC Corporal/Liaison] stated that he personally was not pleased with how the uniform looked on the remains; the uniform was not snug and was sloppy, which he attributed to the lack of a shoulder.

In this particular case, all the way to the end after we view him in the casket and sign off, basically say "everything is perfect on the uniform," I told [Navy Embalmer] that I did not want to sign because I did not like the way he looked in the uniform, I didn't feel comfortable with the situation. So if you look at the forms, [Navy Embalmer] signed what they call the QA, the final "everything is good." I told them I didn't want any part of this.

[Navy Embalmer] said that after the bone had been excised, he personally "call[ed] the funeral director and briefed him on the situation – the funeral director at the receiving end – and you know, I told him – I explained to him the condition of the body, and I explained to him that the family should be able to view him for at least identification purposes, but that I would let him use his professional judgment, because I didn't know the emotional state of the family, obviously." [Navy Embalmer] testified that he explained to the funeral director that the legs and arm were missing but that the face was in viewable condition. [Navy Embalmer] stated that he "[did not] believe the funeral director was briefed on all the specifics [as to position of the arm and its excision]. He was – it was just briefed to him that there was – the left arm was missing."

During this discussion, the funeral director expressed to [Navy Embalmer] the family's desire that they wished, if at all possible, to see the deceased in his uniform. According to [Navy Embalmer], this type of request is typical as it is "very important for the family to view the remains."

The record indicated that restoration and dressing of the remains were accomplished on February [], 2010. The Request for Shipment dated February [], 2010 indicated the condition of the remains as a "full body wrap." [Embalmer 1] signed the Request for Shipment as the embalmer. The deceased Marine's remains departed the Port Mortuary on February [], 2010. There is no evidence in the record that the Port Mortuary provided the receiving funeral home with an instruction letter informing the funeral director of the condition of the remains.

According to the record, the funeral or memorial service for the deceased Marine was held on February [], 2010. [USMC CACO], the CACO, indicated that the family spent some private time in the room with the deceased but was not sure whether the family actually viewed the remains. [USMC CACO] stated that he had conversations with the funeral director but was not sure whether he was aware of the condition of the remains. [USMC CACO] testified that he believed the funeral director and "Dover" (possibly [Senior Navy Mortician]) had conversations.

On the Transfer of Custody of Remains form, the funeral director, [Funeral Director] wrote by hand in the box entitled, "Conditions of Remains: ... excellent condition in spite of extremely difficult circumstances." He added at the bottom under "Remarks: ... outstanding communication, and performance of duty by all Marine and Navy personnel involved. Myself and everyone at [Funeral Home] extend our deepest thanks. [Funeral Director]."

On February [], 2010, [Funeral Director] wrote a letter to Colonel Edmondson "to convey the deep appreciation and gratitude we at [Funeral Home] Funeral Home wish to convey to Petty Officer [Navy Embalmer] and all the staff involved with the details regarding [the Marine]." [Funeral Director] wrote:

I have been in funeral service for over twenty-five years including three years in a large embalming center. I must tell you how impressed I am with the work done in Dover. I would also like to mention that I was especially impressed with Petty Officer [Navy Embalmer] who kept me closely informed of the difficult situation in respect to the injuries and treatment of those injuries. This was of key importance to me as the family had questions about viewing. This kind of communication is only seen by only the best in the business and I am very thankful. I would also like to point out that Petty Officer [Navy Embalmer] never said "I" it was always "We" did this... etc. No less than two times he made a point of saying that the work was a group effort. Again I am very impressed.

In closing I just want to again express the gratitude from all of us at [Funeral Home] for the high quality performance of everyone there at Dover Air Force Base.

Colonel Edmondson recalled receiving the February [] letter from the funeral director. He stated that this was the only letter he had ever received from a funeral director while he was the commander, and he had shared it at a commander's call. He also asked that the letter be placed in the personnel files of the individuals responsible for preparing the remains. Colonel Edmondson forwarded a copy of the letter to [Navy Embalmer]'s direct supervisor, [Marine Corps Casualty Branch Chief] at Quantico and [Marine Corps Casualty Branch Chief] shared the letter with [Navy Embalmer]. Colonel Edmondson said he did not reply to the letter.

Complaint to Marine Commandant

Several months after the remains were prepared and shipped to the funeral home, word reached the Commandant of the Marine Corps about the case. [USCM Senior Liaison] testified that Mr. Parsons told him about the complaint he [Mr. Parsons] had filed, a couple of days before it reached the Commandant. Upon learning of Mr. Parsons' complaint, [USCM Senior Liaison] called his boss at Quantico, [Marine Corps Casualty Branch Chief], Branch Chief for the Marine Corps Casualty Branch, and told him, "I think we may have an issue." Two days later, the Marine Commandant called the Quantico Casualty Branch requesting information. At that point, [USCM Senior Liaison] said his immediate boss, [Supervisor to USMC Senior Liaison], called him and told him to start gathering information. [USCM Senior Liaison] forwarded documents from the case file kept by his office.

Mr. Keel testified that he made Colonel Edmondson aware of the Marine Commandant interest and "gave him some information about the facts surrounding the case." Colonel Edmondson confirmed that he was first informed there was an issue with the preparation of the Marine's remains on or about June 4, 2010 when Mr. Keel called him relaying that the Marine Corps Casualty Office had called stating that the Commandant of the Marine Corps had inquired about the case. Colonel Edmondson's recollection was that a letter or email had been sent to the Commandant relaying that the Marine's remains were mutilated by the Port Mortuary. Colonel Edmondson directed Mr. Keel to put together an email with everything relating to the case so he could inform his boss, [Director of Services/A1S], Director of Services, HAF/A1S.

On June 5, 2010, Mr. Keel provided Colonel Edmondson by email the following summary of the events that had occurred:

It was brought to my attention this morning through [USMC Corporal/Liaison] and [Senior Navy Mortician] that a concern was addressed by some unknown entity to the Office of the Commandant of the Marine Corps regarding the case of [the Marine] and that the Commandant of the Marine Corps is believed to have discussed the issue with the Secretary of Defense according to them.

[The Marine] died of blast injuries in Afghanistan on [] Feb 2010 [sic]. Due to the nature of his injuries the Office of the Armed Forces Medical Examiner informed Marine Corps Casualty that [the Marine's] remains were incomplete missing his left arm and had suffered lower extremity trauma. Marine Corps Casualty informed the PADD ... of the fact that her son's remains were incomplete. [She] elected to receive the incomplete remains of her son ...

[The Marine's] face and head was in condition [sic] which would allow for viewing however, he would not be able to be placed naturally into his uniform due to a 3 inch bone shard projecting upward at a 90 degree angle. We provided the Marine Corps liaison with two options, we could leave [the Marine] in his current state and facilitate a full body wrap or we could reset the bone into the correct anatomical position and have him dressed in his Marine Corps uniform. Consulted on this matter were myself, [Embalmer 1], and Marine Corps liaison and Navy Mortician [Navy Embalmer]. [Autopsy/Embalming Technician 2], Autopsy/Embalming Tech and licensed embalmer was also present during the discussion as well as Mr. James Parsons, Sr[.], Autopsy/Embalming Tech. We unanimously agreed that the right thing to do was to reset the bone back into its correct anatomical position so that [the Marine] could be buried in his Marine Corps uniform and that his family would have the opportunity to see him if they so decided. [Embalmer 1] and [Navy Embalmer] reset the bone and [the Marine] was dressed in his uniform. The second option provided to the Marine Corps Liaisons was whether they would like for us to restore the physical appearance of the missing arm or to leave the sleeve and glove empty and have the sleeve pinned at his side. [USMC Corporal/Liaison] requested that the empty sleeve be pinned at his side.

Throughout the entire process, [the Marine] was cared for with the highest level of dignity, honor, and respect and all procedures followed during his embalming and restoration are accepted throughout the funeral service industry and mortuary science.

At the end of his email, Mr. Keel made reference to the letter received from the funeral director, "express[ing] his deep appreciation and gratitude to [Navy Embalmer] and all the Port Mortuary staff that cared for him and for the high quality performance of everyone at Dover AFB." Mr. Keel's email does not state that the bone was cut off; instead he used the phrase "reset the bone."

Colonel Edmondson, AFMAO Commander, used Mr. Keel's summary to respond to HAF/AIS by email dated June 5, 2010, stating what had occurred with the Marine's remains and the left arm bone in particular. In the email, he indicated that "[w]hile we've not seen the

allegation, our understanding is that it was reported to the Commandant as ‘mutilation of remains.’ This assertion is false. By definition, Morticians sanitize, preserve and restore remains. This often involves manipulation [and] reconstruction, however, this is by no means mutilation. To the contrary its sole purpose is to allow families to view their fallen in as natural a repose as possible.” Colonel Edmondson’s email also used the word “reset” but did not specifically state that the bone had been first cut off.

The IO and legal advisor questioned Mr. Keel as to why he had used the word “reset” in his June 5, 2010 summary, instead of specifically stating that the piece of bone had been cut off or removed. Mr. Keel stated that what he meant by the word reset was that the piece of bone had been cut off first and then repositioned with the remains. He stated that the word “reset” was commonly used in the embalming business to mean removal and repositioning.³⁸

The term reset used in Mr. Keel’s email to Colonel Edmondson was subsequently used by Colonel Edmondson in his email to HAF/A1S. Colonel Edmondson said his understanding of the term “would be to put it [the remaining portion of the bone] back into the position that it would be prior to being broken.” Colonel Edmondson stated that he knew the remaining portion was cut off and thought that it was going to be placed back into the anatomically correct position.

Colonel Edmondson testified regarding a conversation he had with [Marine Corps Casualty Branch Chief], Chief, Marine Corps Casualty, on June 5, 2010. [Marine Corps Casualty Branch Chief] told him that he had spoken to the Marine Corps liaison at Dover and was comfortable with the actions taken. “He wasn’t sure why anybody was raising an issue with it because everything he knew about it, the family was happy, the receiving funeral home was happy, and his liaison team who was involved in the case was happy with it.” Colonel Edmondson offered to have Mr. Dean or Mr. Keel speak with him; however, he stated he did not hear from the Chief, Marine Corps Casualty after that telephone call.

In an email to Colonel Edmondson dated June 7, 2010, Mr. Keel stated that he had communicated with a [Marine Corps Casualty Branch Chief] from the Marine Corps who stated that “ensuring that Marine Corps families have the opportunity to see their fallen loved ones should continue to be our [AFMAO] top priority.” In that same email, Mr. Keel informed Colonel Edmondson that [Marine Corps Casualty Branch Chief] “did not believe that the concern came from the family but that it may has [sic] been brought to the Commandant’s attention through channels originating from an employee of this organization [AFMAO].”

Mr. Dean, Deputy Director, AFMAO, was also aware of the inquiry from the Marine Corps, the fact that the union had sent an “e-mail to OSD” (Office of the Secretary of Defense) and “OSD coming back to [AFMAO] through Air Force channels.” He stated he was aware that Colonel Edmondson had a discussion with [Marine Corps Casualty Branch Chief] of the Marine Corps. Mr. Dean stated that he reviewed the email dated June 5, 2010 that the AFMAO Commander, Colonel Edmondson, sent to HAF/A1S in response to the OSD inquiry. Mr. Dean explained that use of the word “reset” in the email was correct, and was meant to indicate that

³⁸ The term “reset” does not appear in the glossary of any of the military rules and regulations. It also does not appear in any of the textbooks (*i.e.* Robert Mayer’s textbook on Embalming and J. Sheridan Mayer’s textbook on Restorative Art), referenced later in this report, both of which contain multi-page glossaries.

the bone had been cut, but remained with the body rather than completely removed from the remains. Mr. Dean agreed, however, that the term “reset” could refer to a procedure whereby a tendon was cut to move the bone back down to its anatomically correct position. Mr. Dean acknowledged that he could not say that HAF/A1S would understand that the use of the word “reset” in Colonel Edmondson’s email meant the bone was cut and actually separated rather than a tendon being cut and the bone remaining attached to the body.

Colonel Edmondson stated that he believed the actions taken to prepare the remains of this Marine were consistent with dignity, honor, and respect.

Additional Viewpoints

In addition to the testimony cited above, the IO solicited the viewpoints of a number of witnesses regarding this incident as well as a sampling of civilian funeral directors and members of a state board of funeral directors. The IO also examined certain well known mortuary textbooks to ascertain industry standards. This testimony and information is set forth below.

Mr. Parsons stated (in his unsworn testimony) that he had never seen, in his mortuary experience (since 1983), anyone remove a body part in order to place the deceased member in uniform. Mr. Parsons did state, however, that “[i]f the family would have consented, I think it could have been done. Would it have been done? Well, it was done. It was done with or without the family’s consent. If the family had consented, it would probably be okay.”

After the incident, Mr. Parsons talked with [Embalmer 3]. According to Mr. Parsons, [Embalmer 3] indicated that he had come in and looked at the remains at some point and “did not believe that [the deceased Marine] should be dressed either, that he should have been a full body wrap.” Mr. Parsons also had a conversation with [Embalmer 1] after the incident. According to Mr. Parsons, they had a discussion “because [Embalmer 1] did not feel comfortable with what he did and [Embalmer 1] told me that he just did what he was told. So I’m just trying to make it so you understand that [Embalmer 1] is a probationary employee, he’s very – in my opinion, fearful for his job, and that he was doing what he was told and that’s what he told me.”

Afterwards, [Embalmer 1] indicated that “because I had a sense” that “something was going on with this case,” I talked with Mr. Keel about removing the bone. Mr. Keel responded, “[w]ell, we’re treating it like a charred remain.” [Embalmer 1] replied that “well, some folks don’t see it like that,” and Mr. Keel responded, “[w]e were trying to get him in his uniform, so the family can see him one last time.” [Embalmer 1] explained,

When I talked to Mr. Keel and I said, “I’ve never come across this. There’s certain things you do at the mortuary, and you don’t see – I have not seen out in the civilian sector what we do here. And with the bone, it’s not something I went out and did on my own. I went to who I thought was the senior embalmer, my boss, and that’s what he said needed to be done.”

[Embalmer 1] was asked, “[i]s [severing the arm bone] something that you believe that the PADD should be notified before doing or does this fall under the semblance of the embalming latitude that was given when they get permission to embalm?” He responded, “[t]hat’s a good question, sir. I really don’t know. Like I said, when I came across this, I didn’t know really how to approach this, and that’s why I went to Mr. Keel.”

[Embalmer 1] stated that, “I’ve seen – coming from the civilian side, I’ve seen more mutilated, decomposed and charred remains in nine months than I have in 12, 13 years.” He indicated that since arriving at the Port Mortuary, he had witnessed Ms. Spera completely remove a left arm that had been charred. [Embalmer 1] stated that Ms. Spera had a saw at her station that was used for charred remains. With the charred remains at issue, the arm was positioned “in front of the face, chest” and over the head of the remains and had to be removed in order to properly place the remains in a casket. According to [Embalmer 1], the excised arm was kept with the remains. [Embalmer 1] also indicated that [Embalmer 3] would cut remains but not excise the part. “Now, [Embalmer 3], he’ll go through all of the tendons, all the muscles, all the bone, and just leave just – maybe, because as your muscle fibers, you know, your string of muscle fibers and maybe he’ll just leave like a hair or maybe three or four strands.”

[Embalmer 1] testified that the issue of removing an arm in a situation such as this had not been addressed in his academic studies or training. He also indicated that there had been no discussions relating to charred remains and the difficulties in repositioning such remains. He testified that he was not aware of any State Board restrictions on removing body parts without permission of the PADD, but did not contact his State Board regarding the issue.

[Autopsy/Embalming Technician 2] stated that AFMAO has a procedure used with charred bodies where the body assumes “what is known as the pugilist pose,” with arms and legs drawn up and hands turned back. In these cases the arm or leg is fixed and will not move. [Autopsy/Embalming Technician 2] explained that with such charred bodies, “the embalmers will then take a saw and cut through the humerus bones, through all the triceps and bicep muscle and if possible, they’ll try to leave at least a strand that holds the two together so you don’t have an arm, you know, become disassociated from the body.” When asked how many times, in his experience, has he had to completely remove a limb of charred remains, [Autopsy/Embalming Technician 2] said, “none, because I haven’t done that work.” [Autopsy/Embalming Technician 2] indicated that he did not have experience with “a totally charred body.” He did state that “I just witnessed the other day,”³⁹ he “witnessed [Embalmer 3] with Jim Parsons assisting – do exactly that. They took and they – they cut through the – [Embalmer 3] cut through the humerus bone of two arms on a charred body.” According to [Autopsy/Embalming Technician 2], [Embalmer 3] did not remove the arm, “he left a small piece of tissue attached to the body.” [Autopsy/Embalming Technician 2] stated that he has “not personally witnessed that many limbs being cut through. In fact, the only time I have seen that – we have discussed it because of charred remains ... it’s not like a real common thing that you’re going to see there, no.”

³⁹ [Autopsy/Embalming Technician 2] was interviewed on July 7, 2010. The incident he described with [Embalmer 3] and the charred remains would have occurred well after the February [] incident at issue herein.

[Embalmer 3] said he had not been involved in the discussions regarding what to do with the bone, nor did he know if the family knew of the situation. He stated that he spoke to Mr. Parsons about what happened and was told that Mr. Keel instructed that the left arm be sawed off and that [Embalmer 1] cut off the arm because Mr. Keel requested it. [Embalmer 3] stated that remains cannot be put in a full body wrap with arms that stick out like the arm in this case. He opined that he would have first attempted to manipulate the bone close to the body and secure it with gauze or manipulate the bone by cutting tendons to get it down into position. If that did not work, he would cut through the bone to move the bone inward but leave it attached.

[Embalmer 3] stated that he was aware that the left arm bone of the Marine's remains that is the subject of this allegation was removed, but had isolated himself from the case because he was so "disgusted" by what occurred. In an email to self dated February [], 2010, he stated, "[a]s per a conversation with other staff, this deceased service member's left arm was 'amputated' and placed in the right leg of the unionall and dressed." He further indicated that in a second conversation with another staff member, "Mr. Keel was not present for any of the 'bandaging' of this SM [Service member]." [Embalmer 3] testified that he did not observe the bone being removed, but was told by Mr. Parsons that Mr. Keel had instructed them to "[s]aw the arm off."

[Embalmer 3] stated that "cutting off an arm is mutilation ... it's mutilation of a corpse, taking a piece that's attached off intentionally."⁴⁰ [Embalmer 3] stated that, "I just – I can't get my head around why you would cut an arm off to get somebody into a uniform." He further stated that he would consider the removal of the bone acceptable if the PADD knew all the facts and gave their permission, but "I wouldn't like it."

In a memorandum dated July 9, 2010, [Embalmer 3] stated, "I want to clarify the difference between civilian funeral director/embalmer and military (mortuary specialist). They are completely different, apples and oranges. In the civilian sector, it is rare to embalm an autopsied case; here every single case is autopsied. Outside you experience trauma a few times a year, here it's a few times a day. Note: Dover standards are higher than any. (Germany/Italy; the sutures are not as tight, they don't hypo as thoroughly as we do, [t]he wraps aren't nearly as tight, etc, etc)."

[Embalmer 3] stated in his memorandum that the Navy embalmer "had never worked at Dover before," and questioned whether he was familiar with Port Mortuary techniques and standards. He wrote that, "Mr. Keel made the determination without listening to our input. Note: Mr. Zwicharowski always insisted on at least more than one opinion and the difficult cases were always determined after input from as many MS [mortuary specialists] as possible. We may have typically left the classification as non-view then try to upgrade and make the determination after seeing the results." He stated that the third "person working the case [Embalmer 1]" did not have the experience (in his opinion) to work the case either. "The fact that he went to Mr. Keel for instruction is evidence of that he was unsure of himself, and for the

⁴⁰ [Embalmer 3] provided as an example of what he considers mutilation the situation where the deceased had bucked teeth. When the family viewed the body, they noticed the deceased did not look right and realized upon looking in the mouth that the mortician had knocked out the teeth without the family's permission. [Embalmer 3] considered cutting off the arm bone the same as knocking out the bucked teeth.

record, I feel he [Mr. Keel] gave him the wrong advice.” [Embalmer 3] indicated that he had worked 250 cases last year and “I would be surprised if the Navy embalmer, Mr. Keel and [Embalmer 1] did 25 between them.”

[Senior Navy Mortician], the Senior Navy liaison at the Port Mortuary, was questioned about his opinion as to what constitutes mutilation. In response he stated, “in this case would that have probably been improper – there’s probably a gray area there, it’s probably something I would have to read up on in order to be able to make a better judgment. Me, personally, I’ve always been very apprehensive to do any removal or anything that may alter the viewability or anything of the body without consulting the family because this is such a sensitive area.” [Senior Navy Mortician] stated repeatedly during his interview, that under the circumstances described in this case, he would have obtained permission from the family before removing the bone.

IO1: The situation with [the Marine] involved a portion of his upper humerus, about three, three and a half inches long, that was protruding out at an angle that would prohibit him from being dressed in the uniform. In that case, based on your experience and you were going to try and make the body viewable and put it in a uniform, what options would you consider to take to address that, get that bone in the proper place where it can be fitted with the uniform?

W: Well, first of all what I would do is if I could not position it the way that I needed to for whatever reason, the condition of the body, I would consult one of the other morticians and say, “What are the options here?” One thing I’ve always not been really in favor of is doing any removal without family permission. I mean, there’s times where you have different cases that will come in. We request permission to remove facial hair, so if we’re going to request to make any other alterations, to me I would say we would want to inform the family and let them know that in order to do this particular – to make this particular thing happen, whether that’s making him viewable in a uniform, we would need to do this and with a signed permission from them, then I would probably go ahead if I had that permission and make that alteration.

But without their permission, I would be very apprehensive to do that, you know, unless there was some other written regulation or law that could be given to me by the mortuary that would say, “Hey, look, you know, due to these circumstances and this condition, you have the authority to do that, whatever is necessary to make the body viewable or presentable to family.”

IO1: What options would you consider to try and manipulate that, that bone fragment I guess would be the best way to –

W: Well, really, I mean, if it’s pretty much kind of fused in that position where it cannot be maneuvered and it would appear that the only option would be to reduce it or to remove it, myself, personally, I would go back to the casualty officer and let him

know what our situation is and then suggest that if they give us permission to remove that portion in order to make the uniform presentable, if the family's willing to do that and they're willing to give us some signed documentation saying that we have permission to do that and that's what the family wants, then I would move forward and do that. If not, then I would explain to them that due to the condition, we're not able to place the uniform on there and it could be the difference between view ID and making them that way or just saying it's a full body wrap.

[Senior Navy Mortician] also considered the described three or four inch bone fragment as a portion.

Well, I think the purpose is, is because you're having to remove a portion. I think you need to go back to the family and explain that they were told that the arm was missing ... So I mean, you know, by just saying, "The arm's gone," that's not really, you know, giving everybody the complete information. I mean, yes, the majority of the arm is gone and that's probably how I would have explained it had I viewed it, is that the majority of the arm is gone so that this way, if you have to go back and make a statement that in order to place the uniform on there, that portion of the arm that's still attached, whether it's to the joint or whatever, would need to be removed and I would – because you're talking about a removal of a portion of body. Me, personally, I would want some kind of permission in order to do that.

[Senior Navy Mortician] stated that because this was a Marine Corps case, he would have contacted [USCM Senior Liaison], the Senior Marine Corps liaison, to see how the Marine Corps wanted to handle the situation.

When asked whether there were any ethical implications on the decision to remove the bone, [Navy Embalmer] responded, "No, sir, I don't. I believe the goal of Dover Port Mortuary is to give the family as much closure as possible and part of that is to view the body, and – you know, a general consensus was made. Nothing was done on the fly with just one person's opinion. So, no sir, I think there really are no ethical implications at all, and the right thing was done for the family."

When asked where "viewability" fell on the scale of importance, [Navy Embalmer] stated that "preservation of the body" and "odor control" would be first, and "viewability" would be right after that. With regard to the deceased Marine's remains, he testified that he did not have concerns regarding "odor control" or "leakage control." He stated "because of the techniques employed by the Dover Port Mortuary that, really, leakage or odor control wouldn't be an issue with these remains. They [the Port Mortuary] have ways [to] control it. They're, obviously, well-versed with traumatically injured bodies."

IO2: Okay. Given the circumstances, the remains were – y’all were trying to make them viewable, would you consider the removing the bone fragment was a portion of the embalming process that – a normal progression, I guess, in the embalming process to accomplish to make the remains viewable?

W: Yes, sir. Typically, embalmers do not amputate anything, but because of the trauma with – especially, IED-related deaths—it is not uncommon in those incidents to do that sort of thing. It is rare, but it really was the only course of action in order to make the body viewable.

[Navy Embalmer] indicated that he “believe[d]” the family did view the remains.

IO1: Okay. In this scenario, would you see a necessity to contact the PADD, the Person Authorized to Direct Disposition, before doing something like this, or not?

W: Absolutely not, sir. The PADD gave the military the permission to embalm. Going into great detail of what the embalming process entails, [would] only add more grief to the PADD, who is already, obviously, grieving. Very few people understand what goes on in an embalming room. And especially if the PADD is deep in to the beginnings of grief, calling them and explaining all the technical aspects involved would be a very, very bad idea, in my opinion.

Ms. Spera, a mortuary inspector (embalmer) assigned to the Port Mortuary Division, testified that she was not present when the incident regarding the deceased Marine occurred but said she was told what happened by [Embalmer 1] the next day “because he was upset about it.” According to Ms. Spera, [Embalmer 1] told her something to the effect that “Mr. Keel told me to take off an arm on that Marine and I did it, but I’m not comfortable with it. I don’t think that was right.” According to Ms. Spera, Mr. Keel told [Embalmer 1] to place the arm “down on the person’s – on the remains’ leg.” According to Ms. Spera, [Embalmer 1] indicated the reason Mr. Keel wanted the arm bone cut off was “so that [the deceased Marine] could be put in a uniform.” Ms. Spera also stated that she knew from talking with [USMC Corporal/Liaison], the Marine Corps liaison, he was not happy with the fact that the arm bone was removed and placed down at the leg. Ms. Spera indicated that, “[i]f I was going to do something like that, I would make sure that I would talk to the liaison team and let them know what I’m doing, why I’m doing it, and get permission from the family to do so.”

Ms. Spera stated that after [Embalmer 1] told her what had happened, she contacted the Oklahoma and Kansas Board of Funeral Directors. Based upon the hypothetical she gave (the details of which are not part of the record), they first asked whether the family had given permission. They “clearly stated in their – in their eyes” removal of a part of a person’s upper arm “would be considered mutilation,” which could result in the embalmer’s license being revoked.

[Embalmer 2]⁴¹ is a mortuary inspector (embalmer) assigned to the Port Mortuary Division. She did not view the remains, but discussed the issue with [Embalmer 1] after he had removed the piece of bone. She stated that [Embalmer 1] described the bone as being three inches long. According to [Embalmer 2], [Embalmer 1] told her he had discussions with Mr. Keel, his supervisor, and “was advised to take that portion off and place it back with the body.” [Embalmer 2] indicated that [Embalmer 1] agreed with the actions taken.

She was not aware of any prohibitions in Delaware or Maryland state laws that would prohibit removing a piece of bone during the embalming process. [Embalmer 2] opined that based on what she knew the piece of bone could have been contained with a full body wrap but would have had to have been removed in order to dress the remains in a uniform.

Mr. William Zwicharowski did not review the remains, but did discuss the incident with [Embalmer 1], and Mr. Parsons, among others. Mr. Parsons told him that he was asked to cut off the arm and refused but that [Embalmer 1] went ahead and sawed it off. Mr. Zwicharowski testified that [Embalmer 1] talked with him a few times that next week. For the most part, he did not talk about what happened but according to Mr. Zwicharowski did say, “[y]ou know, I can’t wait till you come back,’ because he was kind of, I guess, had mixed emotions as to what he did and why.” “[Embalmer 1] did tell me that he wouldn’t sign off on that body. He did tell me that, that he refused to sign it and he asked Mr. Keel to sign off.”

Mr. Zwicharowski discussed options with regard to charred remains where the muscles contract in heat and fire and then the arms go up in front of them. “That being the case, there are times that I will always try to tie them first with gauze, if I have to cross them and hold them down or wrap around the entire body. That’s the method of choice. If they have to cut muscle in order to relieve the arm, that’s common practice in those cases of nonviewable charred remains.” When asked “what if that doesn’t work,” Mr. Zwicharowski responded, “I’ve never had it happen, sir ... If you relieve the muscle, I don’t know of anything that would not allow the joint to move.” He stated that if a bone had to be removed, it should be done by the medical examiner, not the embalmer.

Mr. Zwicharowski opined that, “[t]o remove a bone, I’m going to say absolutely the family should – I wouldn’t do it without the family’s approval.” He likened it to altering a tooth and indicated that, “in order to even alter that tooth, we, the funeral profession always ask the family for permission to alter that tooth.”

In an undated memorandum for record, Mr. Zwicharowski stated that he was made aware of the February [] incident. He stated that, “[b]oth of the more experienced mortuary specialists/embalmers, [Embalmer 3] and Ms. Mel Spera, had determined the case/remains to be non-viewable [emphasis in original] due to the condition of the body. Both specialists recommended wrapping the body and allowing the funeral director at the receiving funeral home to unwrap the remains and allow the family to view the marine’s face under restricted conditions

⁴¹ [Embalmer 2] was hired at AFMAO in October 2009. She is a licensed mortician in the state of Delaware (2008). [Embalmer 2] stated that she was also in the Air Force Reserves and had served five tours at the Port Mortuary before becoming a civilian employee.

in the funeral home. Mr. Keel changed the view ability to viewable and instructed [Embalmer 1] to prepare and dress the marine. It is my understanding that [Embalmer 1] asked Mr. Keel for advice on exactly how to prepare the remains.”

Mr. Zwicharowski goes on in the memorandum to state, “[w]hen dressing [the Marine’s] remains, [Embalmer 1] had trouble positioning the left arm. So, he went to Mr. Keel for advice, and Mr. Keel allegedly told [Embalmer 1] to ‘cut it off.’ So, against his better judgment, [Embalmer 1], who has only been working at the port mortuary approximately 5 months, took a cross cut carpenter’s saw and sawed off the marine’s humerus. Mr. Keel instructed [Embalmer 1] to put the bone in [the marine’s] pants.” Mr. Zwicharowski stated, “when a portion is separate from the torso for whatever reason, it is to be placed in the anatomically correct position. Mr. Keel had [Embalmer 1] put the bone in the marine’s pants. Amputation of a service member’s arm is contrary to providing Honor, Dignity and Respect to our fallen.”

Mr. Zwicharowski further stated that under Pennsylvania State Board of Funeral Directors rules and regulations demonstrating disrespect toward or mutilating the remains of a deceased person is in violation of 13.202 Unprofessional Conduct.

In his testimony, Mr. Zwicharowski also discussed some of the differences in viewability between the civilian and military sectors. “[T]he [civilian] funeral professions viewable is, you know, they died today and they’re going to be viewed tomorrow night. We don’t get them for three days, so there’s a lot of consequences just in the time lapse alone, let alone the trauma that’s involved probably at least 50 percent have probably been IEDs throughout the whole – [we’re] talking explosions. But there’s a – yes, we’ll call them viewable. It’s pretty high; higher than I would have ever expect[ed] when the war began. If somebody had asked me in the beginning of the war, I would [not] have imagined that 50 [percent] would have been viewable, never, especially with IEDs coming into play.”

Mr. Zwicharowski also discussed considerations when deciding the viewability classification.

And I’m going to say that leakage is one, odor is another. Decomposition. If no matter what we do with that body in that plastic, if we have an odor of decomposition, and to save the government the embarrassment – and it happens. We’ve had cases, again – ... And it’s a tough decision. I’ll be very honest with you. Every day it’s a tough decision to wrap or to view. And we all want to say we can do it, and I’m one of them. We can make it. We can do it. We can get this. The family can see them and everybody wants [the] family to see them and you might get – I tell people you might get 99 of those and you’re the hero. You might get 99 and you’re lucky you got them. Everybody – all these bodies are going out viewable, but that 100th body or that one percent, are you willing to pay the consequences if there is odor, an embarrassing odor, if the uniform does get soiled and leaks in the casket, you know, the family comes into a viewing and the pillow is red, are you willing to face the music if it happens? And that makes you a little bit conservative but, and again, we’ve

all done it –

Mr. Dean, Deputy Director of AFMAO, was not involved in any discussions or aware of the issue involving the removal of the piece of bone until Mr. Keel brought it to his attention after the Marine had been prepared and sent home. According to Mr. Dean, Mr. Keel was aware that “there were some individuals who didn’t agree with the position and he wanted to make me aware of it.” He also stated, “this may not be something that happens on a daily basis in funeral homes across the country, but certainly is a procedure that would be acceptable in order to allow a family to view their loved one.” Mr. Dean stated that his knowledge of the situation came from information provided to him from Mr. Keel. He understood the bone to be about a three inch bone shard and that it was cut off so that the Marine could be dressed in his uniform rather than a full body wrap.

Mr. Dean submitted additional information to the IO in a memorandum for record dated August 6, 2010. In this memorandum, Mr. Dean provided “additional information and references ... regarding restorative art practices used by professional morticians at the Port Mortuary and across the country.” Specifically, Mr. Dean referenced certain excerpts from a textbook entitled Restorative Art by J. Sheridan Mayer. He stated, “[a]s we discussed the goal of restorative art is to restore an individual to the known ante mortem appearance to the extent possible.” Examples of restorative art that he cites to include “artificially recreat[ing] missing parts,” excising mangled structures, the necessary removal of bone fragments and surface tissues (in cases of compound fractures) and artificially restoring a missing or badly mutilated forearm. He further wrote, “[w]e’ve established the purpose of restorative art, but must go further into the true reason to employ these methods. Restoring the known ante-mortem appearance allows for the family to see their loved one and this viewing has the potential to assist with accepting the finality of death and allowing for a critical part of the bereavement process. We must employ techniques and skill in every case, if at all possible, on behalf of the families we serve.”

Mr. Dean also provided the IO with a 2010 ruling from a Florida Administrative Hearing examiner (Administrative Judge or AJ) involving an allegation that the excision and subsequent disposal of the protruding portion of a tongue of a deceased person by a licensed Florida embalmer/funeral director without authorization from the family violated the requirement to provide the appropriate dignity and respect to the remains. Florida Department of Financial Services v Watts, DOAH Case No. 09-2065PL (February 4, 2010). The Administrative Judge determined that neither Florida statutes nor its administrative rules elaborated “on what constitutes the requisite dignity and respect due a decedent’s remains.” The AJ determined that “without such rules, the only standards which arguably govern licensed funeral homes, funeral directors and embalmers are those generally accepted practices established in the embalming and mortuary industry for the handling of dead human bodies.” She noted that the funeral home had consent from the decedent’s family to prepare the body for viewing but found that authorization irrelevant to the issue of whether the remains were treated with dignity and respect. According to the AJ, it was undisputed that excising was an accepted method of last resort to deal with swelling of the tongue that disfigures a deceased person’s natural appearance. The AJ found that such practice “is specifically acknowledged as a generally accepted practice by the seminal textbook on embalming, Embalming: History, Theory and Practice by Robert G. Mayer.” The AJ noted that the Embalming textbook was used “by all 49 of the colleges of mortuary science in the United States.” She also noted that the embalmer, in excising a small piece of the tongue,

“did not remove a body part from [the decedent’s] body since [the decedent’s] tongue remained with her body.”

Embalming History, Theory, and Practice, by Robert G. Mayer, (4th Edition, 2006) is a respected textbook used by colleges of mortuary science and is a reference for practitioners, as noted by several witnesses, including Mr. Dean, Mr. Zwicharowski, and [Autopsy/Embalming Technician 2]. The IO found, according to the textbook, that embalmers throughout the United States prepare remains with two main purposes in mind: to ensure preservation of the remains and to restore the remains to an acceptable appearance. According to Mr. Mayer, “restorative art is defined as ‘care of the deceased to recreate natural form and color.’” The goal of such a restoration is not so much to make the deceased look “lifelike,” but to try to lessen the evidence of devastation caused by many factors, to include trauma, “which have affected those areas of the body which will be viewed.”

In his textbook, Mr. Mayer states, “whenever the service is made challenging because of the circumstances of death, the embalmer should communicate realistic expectations to the family directly or through the arranging funeral director. Representations concerning embalming and restoration should be full and factual. Misrepresentations are unethical and unprofessional and should be avoided at all times.” Mr. Mayer explains that, “[p]ermission for embalming and restorative work should be obtained by the funeral director from the party in charge of arrangements ... If excision or similar extensive restorative procedures are to be performed specific restorative permission should be obtained.”

The Embalming textbook also addresses positioning problems when distorted positions of the extremities exist.

It may even be necessary to place straps around the body and table to hold the body in the correct position. Limbs can be gently forced, but if it appears that ligaments or skin will be torn, leave the limbs in their position. A manual aid, such as splinting and wrapping a limb can be used to position a limb. The operative aid of cutting tendons should only be used when absolutely necessary. ... After casketing, disfigured arthritic hands can be partly hidden from view by placing the casket blanket around the hands. This procedure and how they will be handled should be explained to the family prior to viewing.

Mr. Keel testified that he was not aware of any State Board restrictions on removing body parts without the express permission of the PADD or family. He also indicated that in his view, “[t]here’s a big difference between a three-inch piece of bone and a body part.” Regarding mutilation, Mr. Keel testified that, “any incision or, you know, destruction of the body is technically mutilation. Now, there’s necessary mutilation and unnecessary mutilation ... Is it necessary? Does it fulfill a purpose either during the autopsy, the embalming process, the restorative art process? In this particular case, it was a necessary form of mutilation. Just like when we cut the raised vessels, that’s a necessary form of mutilation for the embalming process. This was a necessary form in order to make sure that his mom and dad could see him.”

In response to the IO's request, Mr. Keel also provided the IO with a memorandum for record dated August 10, 2010. Mr. Keel included, among other things, information regarding restorative art techniques, and made reference to the well known reference book by J. Sheridan Mayer. According to Mr. Keel, Mr. Mayer's textbook Restorative Art "is accepted across the funeral service profession and utilized by a majority of mortuary colleges." Mr. Keel quotes Mr. Mayer's definition of restorative art as "the care of the deceased to recreate natural form and color." Mr. Mayer also states that, "[w]ith a few exceptions, [restorative art] is limited to the visible parts of the remains."

In his memorandum, Mr. Keel states,

Over the years I have dedicated to this profession caring for those who died due to severe trauma and serving their surviving family members, a single profound request has been commonplace, "I need to see him." While we have an obligation to make every attempt to restore the deceased to a natural and lifelike appearance, this need is even greater for our fallen killed in foreign lands in service to our Nation. Even though death related to combat often involves more extreme trauma, family members need to see and confirm that this truly is their loved one. Such trauma often requires major restoration...⁴²

In his memorandum, Mr. Keel states that "[i]n order to meet this request and provide families the choice of seeing their loved one, practitioners of mortuary science may in some instances be required to excise or cut tissue and/or bone in order to restore the natural anatomical form and appearance." Mr. Keel cites the discussion by Mr. Mayer regarding "compound fractures" and analogizes that to the situation with the deceased Marine. "Compound fractures" are defined by Mr. Mayer, as "[b]roken bones which lacerate or puncture the skin."⁴³ According to Mr. Mayer:

Multiple compound fractures vary in treatment according to the location and the condition of the superficial tissues. It may be necessary to pry them into alignment, wire pieces together, bridge mutilated parts, artificially recreate missing parts, or supply padding for the surface tissues. The damage may be so extreme

⁴² According to Mr. Mayer, "[m]ajor restorations are classified as those which: (1) require a long period of time, (2) are extensive or (3) require technical skill. Time and extent repairs are linked to the restoration of a full head of hair, subtissue surgery of a swollen neck, problems with buck-teeth, deep wound preparation (after excision of necrotic, mutilated or diseased tissues), care of deep lacerations, repair (or reconstruction) of multiple fractures, third degree burns, skin slip, dismemberment of a limb (or head) and complete loss of a part. Technical skill is required to artificially construct a distorted portion of the face or cranium, wax surfacing over a large wound (cheek, forehead or neck) modeling a facial feature, achieving a natural appearance when masking a completely discolored face (or large post mortem stain) with opaque cosmetics or matching wax with complexion."

⁴³ Under the Section on compound fractures, Mr. Mayer addresses fractured cheekbones, fractures in the lower jaw and fractured nasal bones – all of which appear in the visible parts of the face. The section does not address compound fractures of arms or legs.

that it is necessary to remove both the bone fragments and surface tissues. (Removal of bones from tissues requires extreme care to avoid harm to the operator).

With regard to the deceased Marine, Mr. Keel (in his memorandum) described the trauma to the remains and indicates that “[h]is head and face were in a viewable condition.”

Attempts were made to return the [three inch] fragment to a natural position, however it was determined that any additional pressure would further fracture or break the bone. In its current position, dressing of remains in uniform would not be possible which would leave complete wrapping of remains in a full body wrap as the only option. This would prevent a recommendation of viewability. All options were discussed between [Navy Embalmer], [Embalmer 1] (Licensed Embalmer), and [Autopsy/Embalming Technician 2] (Licensed Embalmer), and myself as to the best possible solution to ensure his family could see him one final time. It was unanimously determined that the best course of action was to cut and reset the bone in its nature state similar to an Osteotomy.⁴⁴ It is my understanding that [Navy Embalmer] also discussed this option with other USMC liaison personnel. This option met with no objections from any personnel involved.

Mr. Keel stated that “[a]lthough the degree of trauma and amount of restoration we are required to perform is different than that of the private sector, the fact that these Soldiers, Sailors, Airmen, [and] Marines died in overseas locations far from home only increases the desire for their families to want to see them one last time.”

In his text, not cited by Mr. Keel, Mr. Mayer states that “[p]ermission to undertake a major or minor restoration should be secured from someone in authority ... especially before making incisions or excisions necessary to a major restoration: either can be legally described as mutilation.” Mr. Mayer notes that, “[o]bviously the details [of the major restoration] are not disclosed to the family.” Mr. Mayer goes on to state that, “[t]he only restorations for which permission is not sought are those incurred in the preparation of the remains, viz. swelling, leakage, or tissue discoloration.”

Restorative Art also addresses the importance and objectives of restoration in preparing remains for viewing by the family and friends:

When mutilation from injury or disease necessitates a restoration, the presentation of the loved one for viewing in a natural, unmarked condition has a comforting psychological effect on the

⁴⁴ Webster’s Dictionary defines an osteotomy as a “surgical operation in which a bone is divided or a piece cut out of it,” usually to shorten, lengthen, or change its alignment. For example, a surgeon may remove a wedge of bone located near a damaged joint to cause a shift of weight from the area where there is cartilage damage to an area where there is more normal or healthy cartilage.

family and friends. The closed casket leaves a bitter memory in the mind of the mourners; they will always retain a mental image of ugliness and shock. The open viewing helps them accept the finality of death and gives them the opportunity to make a tactual farewell.

Civilian Funeral Directors and State Board Members in the Embalming and Mortuary Industry

The IO directed a sampling of civilian funeral directors' and state board members' opinions given a scenario similar to the one that occurred at the Port Mortuary. The sampling involved asking individuals from Virginia, Ohio and Indiana the following question: "[h]ave you ever been involved in a situation where it was necessary to remove a bone or a limb during embalming?"

Three individuals from Virginia were contacted, all with the same funeral home in Norfolk, Virginia. Two of the individuals were embalmers; the third was a partner in the funeral home and was a member of the Virginia State Board which promulgates ethical standards for the funeral profession and helps craft statutes and regulations. One of the embalmers when asked the question said that he had never heard of removing a limb from a body, except for one instance on television, where "[t]he guy was prosecuted. Criminally prosecuted." He emphasized that they do not remove tissue, and that their job is "restorative." In his words, "[w]e make the body as whole as possible. We don't cut him up more."

The State Board member said that removing parts of damaged limbs could be done under extreme circumstances, though under Virginia statutes, he believed there would have to be explicit permission from the family for anything beyond the most basic treatment of the deceased. He also said that while many accident victims come in missing all or partial limbs, removing tissue is not common practice, and that for anything other than "routine" restoration, the family must be consulted – a practice which he believed Virginia shared with most other states.

The third embalmer from Virginia stated that his first choice would be to tie down the protruding bone with a strap, and that he would always try the least invasive procedure first. If it became necessary to remove part of a bone, a scenario which he had not encountered and imagined to be extremely rare, the embalmer stated that he would first ask the family. He further stated that, if part of the bone was removed with family permission, he would wrap it in sealed plastic and place it out of sight, most likely at the foot of the casket. He emphasized that it is extremely important to be honest and truthful with the family, and permission should be obtained for anything beyond the most standard restoration procedures.

The Indiana Funeral Directors Association (which is in charge of ethical standards and regulations for the profession in the state) was contacted and directed the inquiry to an embalmer who has served as an expert witness in several court cases. When asked the question, he stated he could not imagine a scenario where it would not be possible to secure the remaining bone to the body with a strap or gauze, unless the body had been severely burned for a sustained period

of time, such as in a house fire, and the joints had actually shifted position. He did not believe that brief exposure such as an explosion would produce the same result. He stated that he would make every attempt not to remove a part of a bone, but if for some reason it did become necessary, he would get permission from the family, and would place such a remnant in the foot of the casket.

The Ohio Board of Embalmers and Funeral Directors in Columbus, Ohio was contacted. This organization is in charge of ethical standards and regulations for the profession in Ohio. The first professional questioned stressed that she was only responsible for laws and standards and that she did not practice embalming. She stated that while there was nothing in Ohio's rules that would strictly prohibit removal, communication with the family under such circumstances would be essential. She referred the inquiry to a partner and funeral director in Columbus. He indicated that he had never encountered a situation where the bone could not be manipulated or tied down. While removing part of a bone or a limb would not be a violation of the rules, provided the family was made aware of it in advance, he said he would personally have a difficult time calling up a family and asking them that question. He also stated that he would not remove part of a bone without permission, but that there were probably other professionals across the country who would do so without making such a difficult phone call. When asked if he thought such behavior would be unethical, he replied that he was unsure and glad he had not faced such a situation himself.

None of the funeral directors contacted had faced a situation where removal of a bone or limb had been required, but the consensus of their opinions was that they would seek the permission of the family before doing so. None of these individuals were working under the circumstances found at the Port Mortuary.

ANALYSIS

Mr. Parsons contends that Mr. Keel determined that the remains in this case should be made viewable for identification and dressed in uniform, despite the assessment of several mortuary specialists/embalmers that the remains were non-viewable. He also alleges that he and [Embalmer 1] were unable to position a projecting arm bone so that it would fit into a uniform because of injuries sustained in that area. He contends that Mr. Keel instructed them to saw off the arm bone and place it in the right leg of the unionall; that Mr. Parsons refused to do so; that [Embalmer 1] cut it off; and that Mr. Keel instructed Mr. Parsons to place the arm bone in the right leg of the unionall. Mr. Parsons contends that Mr. Keel's actions and instructions violated agency policy and regulations governing the care and disposition of remains of deceased personnel, including the requirement that remains "will be handled with the reverence, care, and dignity befitting them and the circumstances" and that all remains be processed in a manner reflecting the highest standards of the funeral service profession. He believes that the actions Mr. Keel took and directed violated state regulatory standards as well. Mr. Parsons contends that this was so because the body should have been placed in a full body wrap because of a high risk for leakage, as well as the fact that he and [Embalmer 1] were unable to dress the remains in uniform due to the severe injuries sustained. Mr. Parsons contends that Mr. Keel's actions could have had devastating consequences resulting in unnecessary distress for the family.

In analyzing these allegations and the underlying facts, it is helpful to first address the matters that are not in dispute. Specifically, it was policy of the Army,⁴⁵ AFMAO, and the preference of the decedent's Service (the Marine Corps), the great majority of families whose Service members are killed in the line of duty, and this Marine's particular family, to prepare the remains so that the family could view them in uniform.

Although initial indications were that this may not be possible due to the trauma inflicted on the remains as a result of the IED, embalmers with responsibility for the specific case or their (licensed) supervisors had authority to make the determination whether specific remains are viewable.

The individuals who had the responsibility to prepare (embalm) the remains and to make these determinations in this case were the embalmers assigned to the case ([Navy Embalmer] and [Embalmer 1]), and their supervisor (Mr. Keel). Mr. Keel was [Embalmer 1]'s supervisor as well as the Director of the Port Mortuary Division and the acting Branch Chief for the Mortuary Branch. He supervised the embalming work performed by [Navy Embalmer] and signed DD Form 2063, *Record of Preparation and Disposition of Remains* as the embalmer of record. Therefore, he had the ultimate authority and responsibility in this matter. As noted in the summary of evidence, although Mr. Keel did not routinely do embalming himself, he was licensed to do so.

While it had first appeared to [Embalmer 3] (an embalmer who reviewed the remains but was not involved in the preparation of the remains), and Mr. Parsons that a determination of viewable would not be feasible, in part because of the danger of leakage and odor, the application of a technique introduced by Mr. Keel (drying by means of a "wind tunnel"), together with routine embalming measures controlled these risks. Indeed, all who observed the process agreed that the technique had been very effective. In addition, both [Navy Embalmer] and [Embalmer 1] testified that based on the way the remains were prepared, they had no significant concern about leakage or odor. After the remains were prepared and dressed there was no evidence that any leakage or odor occurred with the remains, either at the Port Mortuary or at the funeral home where the remains was sent. To the contrary, the civilian funeral director wrote a letter to the AFMAO Commander lauding the dedication and capability of Port Mortuary personnel in preparing the remains. Mr. Parsons' allegations regarding the need for a full body wrap because of the risk of leakage are not supported by the weight of the evidence. Based upon this evidence, the IO determined that the issue of leakage and odor did not present a bar to classifying the remains of the deceased Marine as viewable for identification. This evidence also supports a finding that preparing the remains as viewable for identification did not pose an inappropriate risk that the family would be subjected to unnecessary distress because of potential leakage occurring after the remains were shipped.

⁴⁵ The Army serves as the Executive Agent for mortuary affairs within DoD. Army (DA) Pamphlet in Appendix C, paragraph C-3 states that "[e]very effort will be made to properly dress the remains in the uniform" and that "[o]nly when necessary (excess leakage or offensive odors) will remains be wrapped as prescribed."

Consistent with the overarching objective in preparing the remains in this case (allowing the remains to be viewed in uniform by the family) and AFMAO policy, Mr. Keel made a determination that the body could be rendered viewable for identification⁴⁶ and directed that the remains be dressed in uniform. Those with this responsibility, [Embalmer 1] and Mr. Parsons, encountered difficulties doing so because, as a result of the trauma inflicted by an IED, the left humerus (which had been stripped of flesh by the IED) stuck out from the torso “pretty much perpendicular.” Although there were various recollections regarding the length of this bone (ranging from 3 inches to 15 inches), the IO determined it was, in fact, about 12 to 15 inches long.⁴⁷

The evidence reflects that those witnesses who saw this bone agreed that it would prevent dressing the deceased Marine in his uniform. The evidence further indicates that those persons involved in the preparation of the remains who attempted to physically move the bone into alignment with the torso, found that it could not be pressured into a natural alignment, and to the extent that it would move at all, would not remain in place. Mr. Keel instructed Mr. Parsons and [Embalmer 1] to excise the bone and [Embalmer 1] did so. The evidence also shows that, after Mr. Keel left the embalming room, Mr. Parsons (without talking to Mr. Keel) refused to sever the bone. It was determined that, while other knowledgeable people expressed views that there may have been alternative, less intrusive measures that could have been taken, those who were attempting to give effect to the objective of preparing the remains so that the Marine could be viewed in his uniform were the individuals responsible for making these determinations and, by a preponderance of the evidence, their determinations were consistent with DoD regulations.

Based upon the provisions of 10 U.S.C. §§ 1481-82 and DoD Directive 1300.22, it is clear that the Port Mortuary has the requisite authority to prepare the remains of deceased Service members. There is no question based on information in the record that the PADD in this case provided the Port Mortuary with authority to “prepare, dress and casket” the remains of the deceased Marine. Under Air Force regulations (AFI 34-242), preparation of remains includes embalming, wrapping or dressing and cosmetizing, consistent with the PADD’s disposition instructions. Army regulations (AR 638-2) define preparation of remains more broadly to include restorative art. AR 638-2 paragraph C-4f, states that major restorative art is an integral

⁴⁶ The standards for viewability are not models of clarity. It is notable, however, that in considering the applicability of the standards (“non-viewable,” “viewable” and “viewable for identification”), the initial condition of the remains is not the dispositive factor. Rather, the determination of which standard applies, turns on the condition of the remains that can be achieved after application of embalming and appropriate restorative art techniques. For example, the “non-viewable” standard is qualified by language “and restoration of viewable tissue surfaces” is not possible. The language permits remains which experience serious trauma (and which are thus potentially “non-viewable” under the standard), to become “viewable” through the application of restorative art. The “viewable” category encompasses remains “where damaged viewable tissue surfaces are restored by restorative artwork.” And even the undefined “viewable for identification” category contemplates remains being dressed in uniform and cosmetically prepared in a manner that viewing by family members for identification purposes is appropriate. DA Pamphlet 638-2, Appendix B, paragraph B-2j.

⁴⁷ Several witnesses, including Mr. Keel, [Autopsy/Embalming Technician 2] and [Embalmer 1] testified that the bone was about 3-4 inches long. [USCM Senior Liaison] testified that it was probably 6-8 inches long. [Navy Embalmer] stated the bone was approximately 10 inches in length. Mr. Parsons initially testified that the bone was approximately 7-8 inches but upon reviewing the CAT scan photographs of the remains, he stated the bone appeared to be 10 to 12 inches long. [Autopsy/Embalming Technician 2] was also shown the CAT scan photographs of the remains in a second interview and based upon that review, stated that the bone could have been 5-6 inches long.

part of processing human remains. The IO determined that, under the applicable regulations, removal of the bone cannot be excluded from the meaning of major restorative art.

While there is a difference in recollections as to whether the protruding bone would have prevented placing the remains in a full body wrap and/or the casket, those who viewed the body were in agreement that it would prevent dressing the remains in uniform as the family wanted.⁴⁸ In this case, as a consequence of the IED explosion, the arm bone stuck out from the body in an unnatural position and could not be moved into a more natural position. To leave the bone in such an unusual position would present the remains in an unnatural state, even if it could have fit into a uniform. Consequently, the authorization by the family to “prepare, dress and casket” the remains can be understood, within the context of the applicable military regulations and the circumstances, to have constituted consent to these measures.

While the State of Delaware recognizes a cause of action for abusing, mishandling, or mistreating a corpse, none of the Delaware cases found addressed accepted or prohibited practices for embalming or restoring remains in the preparation process. Under tort law, the standard of care required is normally determined based on what a reasonably prudent person would have done *under such circumstances*. Delaware case law does not specify the standard of care required of an embalmer with respect to handling human remains. However, professionals in Delaware are held to a higher standard of care and must exercise the skill and knowledge normally held by members of the profession in good standing in similar communities. Embalmers, because of their expertise, training, and licensing requirements, would likely be held to a professional standard of care for determining negligence.

The evidence reflects a legitimate disagreement as to the handling of the deceased Marine and the decision to make the remains viewable for identification. The views of embalmers and experts who commented on the propriety or impropriety of the actions taken, expressed views that ranged from it would require the permission of the family to do so, to permission of the family would certainly be helpful in resolving the matter, to cannot say it would have been necessary, with the majority of the views expressed falling in the first or second category. All those interviewed are professional and experienced in the field of mortuary science.⁴⁹ However,

⁴⁸ There is some testimony by [Navy Embalmer] that removing the arm bone was necessary in order to place the remains in the casket. This is not supported by the weight of the evidence. Mr. Keel and [Autopsy/Embalming Technician 2] testified that “fitting in the casket wasn’t the issue;” the issue was the uniform. If the remains had been placed in a full body wrap, the arm bone would have been brought closer to the body and there would have been no need to excise the bone in order to fit the remains in the casket. Witnesses, including Mr. Zwicharowski, [Embalmer 3], [USCM Senior Liaison], Ms. Spera and three of the civilian funeral directors, testified that procedures, less intrusive than removal, were available to deal with the arm bone. Of these witnesses, only [USCM Senior Liaison] and [Embalmer 3] actually saw the remains before they were restored. These procedures included manipulating the bone closer to the body and securing it with gauze or cutting the tendons at the shoulder which would allow the bone to be moved closer to the body. In addition, and as a last resort, the bone could have been partially cut, keeping it attached but allowing the bone to be manipulated down toward the torso. This testimony is supported by [Embalmer 1]’s observation that the left arm bone portion was attached to the shoulder by “connective tissue on the muscle attaching itself to the bone.” All of these options, however, would necessitate the remains being placed in a full body wrap and preclude the option of placing the remains in uniform.

⁴⁹ While all had embalming experience, some have been licensed longer than others: [USMC Senior Liaison] (late 1960s); Mr. Zwicharowski (1981-82); [Senior Navy Mortician] (1985); [Embalmer 3] (1989-90); Mr. Dean (1993),

the orientation of many of the witnesses ([USCM Senior Liaison], [Senior Navy Mortician], [Navy Embalmer], Mr. Keel, Mr. Dean) is as a funeral director rather than an embalmer. That is, for these individuals, the focus of their experience has been working in mortuary affairs with families rather than routinely performing embalming procedures on remains. The focus of other witnesses ([Embalmer 3], Ms. Spera, and Ms. Zwicharowski) has been on embalming remains. The disagreement reflected in the testimony presents a tension between two views. On the one hand, there is a legitimate and strong desire to dress remains whenever possible so that the family can see their deceased loved one just one more time. On the other hand, there is a legitimate concern as to where the appropriate line is with regard to conducting restorative art and making remains viewable.

The civilian textbooks considered on this issue did not address the specific situation presented by the Marine, but in general terms were consistent with the first category of opinion. In the Mortuary Law textbook, the authors recognized that, “[m]utilation, although slight and necessary, is involved in embalming a body” and that a funeral director “has the right to do this as the mutilation is implicitly sanctioned by the permission given to embalm the body.” Neither the textbook, Embalming History, Theory, and Practice, by Robert G. Mayer, nor the textbook Restorative Art by J. Sheridan Mayer, however, directly address whether excising an arm bone (in order to dress the remains in uniform rather than a full body wrap) falls within the “slight and necessary” mutilation allowed when permission is given to embalm the body. In the textbook on Restorative Art, the author explains that incisions and excisions during the course of major restoration “can be legally described as mutilation,” and states that permission should be secured before undertaking such major restorative procedures. The author goes on to state that the only restorations for which permission is not sought are those incurred in the preparation of the remains like swelling, leakage or tissue discoloration. In the Embalming textbook, the author likewise states that “if excision or similar extensive restorative procedures are to be performed, specific restorative permission should be obtained.”

In considering how to apply these views to the unique military circumstances of the Port Mortuary, it is helpful to consider that this range of opinion suggests, at the least, that removal of the bone was not, itself, so significant that permission of the family could not be properly granted. Consequently, in considering the conduct of Port Mortuary personnel in this unique environment, the effect on the family of seeking such permission must weigh heavily in the determination of whether it was essential under the particular circumstances.⁵⁰

The Port Mortuary is a one of a handful of military mortuaries and the only one located in the United States. Because of its unique mission and the nature of its work, the circumstances of the Port Mortuary “community” of embalmers are not comparable to those of a civilian funeral home. There can be no doubt that the military is a unique environment, and especially so for the embalming profession. Comparing the operation of the Port Mortuary with a civilian funeral

Mr. Keel (1995); Ms. Spera (1998); [Embalmer 1] (1998); [Autopsy/Embalming Technician 2] (2006); [Navy Embalmer] (2006) and [Embalmer 2] (2008).

⁵⁰ It is noteworthy that while the situations are not the same, it is apparently accepted practice to use a saw to cut through body parts of charred remains as necessary to be able to wrap and casket them. Although some of the witnesses made distinctions between cutting all the way through versus cutting most of the way through limbs of remains in these circumstances, clearly the act of cutting through limbs when necessary in such contexts was considered acceptable.

home shows stark differences. During his interview, [Embalmer 1] stated that he had seen more “mutilated, decomposed and charred remains in nine months” at AFMAO than he had in 12-13 years in the civilian world. [Embalmer 3] testified as to the difference between a civilian funeral director/embalmer and a military mortuary inspector (embalmer). He stated that in the civilian sector, it is rare to embalm an autopsied case; at AFMAO every single case is autopsied. Civilian funeral directors may experience trauma a few times a year; at AFMAO it is a few times a day. Mr. Zwicharowski also testified as to the differences between AFMAO and the civilian sector. He stated that in the civilian sector, a person may die one day and be viewed the next evening. At AFMAO, “we don’t get [the remains] for three days, so there’s a lot of consequences just in the time lapse alone, let alone the trauma that’s involved.” He indicated that at least fifty percent of the cases at AFMAO had experienced an IED explosion. Such injuries are infrequent if not rare in most civilian jurisdictions outside AFMAO.

In light of the uniqueness of the military mission at the Port Mortuary and the flexibility allowed by the applicable regulations, the IO concluded, by a preponderance of the evidence, that under the circumstances of the Port Mortuary and this particular case, the conduct of the embalmers and Mr. Keel did not violate the applicable common law standard of care either in excising the bone or by not causing the family to be contacted before the bone was excised.

Similarly, their conduct did not violate standards made applicable to the respective individuals by their state of licensure. Mortuary inspectors (embalmers) at the Port Mortuary are required to hold a state embalmer or funeral director’s license. Mr. Keel is licensed in Texas and Ohio. [Navy Embalmer] is licensed in Texas. [Embalmer 1] is licensed in Illinois. As part of the investigation, a review of the licensing requirements for these states was conducted. The licensing requirements for these states provided only general guidance or were silent on specific prohibited embalming procedures. Based on the preponderance of the evidence, there was no finding of a violation of state licensing rules.

Three regulations address reverence, care and dignity. Pursuant to DoD Directive 1300.22 and Joint Publication 4-06, the Port Mortuary was required to handle the remains of the deceased Marine “with reverence, care, and dignity.” The DoD Directive includes the phrase “befitting them and the circumstances.” DoD Instruction 1300.18 states “[t]he remains of deceased personnel will be recovered, identified, and returned to their families as expeditiously as possible while maintaining the dignity, respect, and care of the deceased as well as protecting the safety of the living.” None of the regulations elaborate on what constitutes the requisite “reverence, care and dignity” due a decedent’s remains. The rules and regulations promulgated by the military components are likewise silent. However, the additional language in the DoD Directive (“befitting the circumstances”) and the DoD Instruction (“protecting the safety of the living”) indicate that the handling of remains in a military environment can be different than the civilian environment and presents unique challenges. In meeting these challenges, however, the Armed Services Public Health Guidelines as well as AR 638-2 require embalmers to prepare remains “in a manner reflecting the highest standards of the funeral profession industry.”

Although there was no violation of law, rule or regulation in not contacting the family before the bone was excised, it is appropriate to consider whether under the circumstances of this case failure to contact the family before excising the bone itself constituted a lack of reverence,

care and dignity in handling the remains. In making this assessment, the military-unique circumstances are significant.

Implicitly and explicitly recognized in the views of various witnesses was the fact that compelling the family to address such a question would inflict additional emotional distress on them. In the context of this particular case -- where the Marine had been killed in the service of his country, away from his family, and the family was thus already bearing the emotional trauma of his ultimate sacrifice -- the choice between further burdening the family with this question or not, or alternatively simply denying the family the opportunity to view the Marine's remains in uniform as they requested by avoiding the issue and simply putting the remains in a full body wrap, was particularly difficult. As noted by one of the civilian experts consulted in this investigation, he was glad he had not faced such a situation himself.

It is significant that, in the process intended to honor fallen Service members, the liaison to the families is accomplished by the Service of the fallen member. [USCM Senior Liaison], the Senior Marine liaison, deferred to the embalmers stating "we don't get involved in what the embalmers do." When [USCM Senior Liaison] was made fully aware of the facts of the case, he testified that he had no problem with them cutting off the bone. [USCM Senior Liaison] testified he was not asked by Mr. Keel to notify the family. He said he would have done so if he had been asked to do so or if he thought it was necessary to do so. He testified that he did not believe it was necessary to contact the family.

There are no indications that the decisions made and the actions taken were motivated by any purpose other than to appropriately honor the Marine and to give effect to the wishes of his family. In determining whether the actions taken in the handling of the Marine violated law, rule or regulation, it should be noted that this is an unusual case where reasonable minds could differ and did at the time the decisions were made. Perhaps [Senior Navy Mortician] best captured the essence of the dilemma when he stated "there's probably a gray area" here "because this is such a sensitive area." Taking into account the evidence, including the unique circumstances of this case, the laws, rules and regulations and the analysis above, therefore it was concluded that the actions taken in this matter did not violate any law, rule or regulation and did satisfy the requirements that, "...all remains be processed or reprocessed in a manner reflecting the highest standards of the funeral service profession" and that "[r]emains will be handled with the reverence, care, and dignity befitting them and the circumstances."

Other Matters

Neither [Embalmer 1] nor Mr. Parsons were directly asked whether Mr. Keel instructed them to place the bone in the right leg of the unionall, and neither person volunteered this information. In unsworn testimony, Mr. Parsons indicated that he asked [Embalmer 1] what to do with the excised bone and [Embalmer 1] told him to wrap it and put it in the unionall. Ms. Spera provided hearsay testimony that [Embalmer 1] told her that Mr. Keel had instructed him to place the arm bone with the Marine's leg. Mr. Keel testified that the appropriate placement of the excised bone was to place it in the correct anatomical position but was not asked whether he instructed [Embalmer 1] and Mr. Parsons to place the excised arm bone with the right leg of the deceased Marine. It is undisputed that Mr. Parsons placed the bone in the right leg of the

unionall inside the uniform. The IO determined that doing so did not violate any law, rule or regulation and was similar to testimony under these circumstances, civilian embalmers would place the detached bone at the foot of the casket. It was not established by a preponderance of the evidence that Mr. Keel instructed Mr. Parsons or [Embalmer 1] to place the excised bone in the right leg of the unionall.

The record indicates that the PADD was provided information from the medical examiner's "family letter," which describes the condition of the body. The medical examiner's letter specifically stated that the "humerus is present." The evidence also shows that neither the PADD nor the funeral director were informed of the position of the left arm bone and the decision to remove the bone in order to dress the deceased Marine in his uniform. The funeral director was told by [Navy Embalmer] that the left arm was missing. Because the severed bone was placed out of sight in the right leg of the unionall and covered in the uniform trousers, it is not likely that the funeral director would know by looking at the remains that the humerus bone had been removed. While [Navy Embalmer] testified that he spoke with the receiving funeral director, there is no evidence in the record that the Port Mortuary provided the receiving funeral home with an instruction letter informing the funeral director of the condition of the remains as required by AFI 34-242, paragraph 3.31. The failure to send such instruction letter results in a violation of the AFI.

CONCLUSION

In light of the significant differences between AFMAO and the civilian sector, the challenges associated with AFMAO's processing of severely damaged bodies, including unique trauma associated with war (such as from IEDs), and rules governing AFMAO, the preponderance of the evidence supports a finding that there was no violation of a law, rule or regulation, and that AFMAO handled the remains with "reverence, care, and dignity befitting them and the circumstances." The allegations of impropriety were not substantiated.

Other Conclusions

While the IO found no violation of law, rule or regulation with regard to the preparation of the deceased Marine, the circumstances demonstrate that it may be helpful for AFMAO to establish an internal process to address unusual cases, to include peer review, levels of approval required for unusual circumstances, and a process to obtain the appropriate military Service position as to whether further contact with the family is advisable.

The failure of the Port Mortuary to send the instruction letter to the receiving funeral director as required by paragraph 3.31 of AFI 34-242 resulted in a violation of the Air Force regulation.

SECTION 3 – IMPROPER HANDLING AND TRANSPORT OF REMAINS WITH POSSIBLE CONTAGIOUS DISEASE

OSC SUMMARY OF DISCLOSURE INFORMATION

According to the July OSC Referral Letter, Ms. Spera provided the following information to OSC concerning the preparation and transport of possible contagious remains in late May, early June 2010. According to OSC, Ms. Spera has alleged the following:

- (1) According to OSC, Ms. Spera alleged that Port Mortuary officials failed to take precautionary measures or provide adequate warnings in response to a determination that remains received by the Port Mortuary were possibly infected with a contagious disease.
- (2) Specifically, Ms. Spera contended that on May 29, 2010, Dr. [Chief Medical Examiner], Chief Armed Forces Medical Examiner, determined that through an autopsy that the remains of a deceased “third country national”⁵¹ were possibly infected with contagious tuberculosis. Dr. [Chief Medical Examiner] informed all personnel working in the Port Mortuary that day that the remains had active tuberculosis.
- (3) According to OSC, Ms. Spera worked the following day; however, she and other employees were not informed that possibly contagious remains were in the facility. She was not advised of the presence of these remains until June 1, when Dr. [Medical Examiner 2], Armed Forces Medical Examiner, brought the individual’s death certificate to her for signature. Ms. Spera and Dr. [Medical Examiner 2] conferred with Port Mortuary Director Quinton Keel, who denied having knowledge of the possibly contagious remains and provided no further guidance regarding precautionary measures to be implemented.
- (4) According to OSC, Ms. Spera posted a warning sign on the door to the refrigerator where the remains were located, which prompted personnel to take precautions by wearing protective masks, gowns, and booties when entering the refrigerator and while preparing the remains for departure. Autopsy Technician [Autopsy/Embalming Technician 3] advised Ms. Spera that he informed Mr. Keel of the possibly contagious remains on May 29, and Mr. Keel instructed him to double-bag the remains in human remains pouches on that date. Thus, Ms. Spera contends that Mr. Keel knew of the possibly contagious remains and failed to take steps to warn and protect Port Mortuary personnel.

⁵¹ According to OSC, Ms. Spera explained that “third country nationals” are non-U.S. citizens who are employed by contractors providing services to the U.S. military overseas. As such, these individuals are not entitled to mortuary benefits; however, if their death occurs on a U.S. military base, their remains are transported to the Port Mortuary contractor for final disposition. According to OSC, in this case the third country national was a citizen of India who was working for a contractor in Kuwait at the time of his death.

- (5) According to OSC, Ms. Spera explained that remains containing active tuberculosis pose a potential health risk, because the infectious spores can be released into the air when the lungs aspirate during movement and when the lungs are exposed and manipulated during autopsy. She further noted that the spores can remain in the air for a few days and may contaminate the heating ventilation and air conditioning (HVAC) system. In past instances where remains were suspected of having an infectious disease, Ms. Spera stated that safety procedures consistent with the Armed Services Public Health Guidelines were promptly implemented to prevent potential contamination of the facility and/or the spread of infection to personnel. According to OSC, these procedures included shutting down the HVAC system, posting warnings alerting personnel to take precautionary measures, and email communications providing details of the incident and information for contacting a health advisor. In this case, however, Port Mortuary management did not implement any of these precautionary measures.
- (6) According to OSC, Ms. Spera further alleged that Mr. Keel and [Major 1], Officer in Charge, Departures Branch, improperly ordered the transport of the possibly contagious remains back to Kuwait through Ramstein Air Base, Germany. She stated that on June 3, 2010, after Dr. [Chief Medical Examiner] prepared a written declaration of possibly contagious remains, [Major 1] disseminated an email with shipping documents, stating “[w]e HIGHLY advise that the remains are ‘Positive for tuberculosis’ and HIGHLY advise ‘Re-Icing’ in Ramstein and at [the Theater Mortuary Evacuation Point] Kuwait.” Ms. Spera contends that, in light of Dr. [Chief Medical Examiner]’s [sic] declaration, the unembalmed remains should not have been shipped with an instruction to open the transfer case for re-icing, as the transfer case was not adequately marked with visible warning labels to alert the personnel responsible for re-icing to take precautionary measures. In this instance, she alleged that the remains should have been embalmed or cremated, depending on the instructions provided by the contractor before shipping, which would have eliminated the need to open the transfer case for re-icing. Ms. Spera contends that Mr. Keel’s and [Major 1]’s actions were not consistent with the Armed Services Public Health Guidelines and unnecessarily exposed personnel to potential infection.

LAW, RULE OR REGULATION

As set forth below, applicable law reviewed included DoD Joint Publications, Air Force regulations, the Armed Services Public Health Guidelines and Port Mortuary Standard Operating Procedures.

Joint Publication

Joint Publication 4-06, *Mortuary Affairs in Joint Operations*, 5 June 2006, Chapter 6, paragraph 3(i), states “[h]andling or working around human remains in various stages of decomposition requires that strict health and sanitation procedures be enforced for the safety of all those involved. The potential for infection and the spread of contagious disease is always present. Therefore, CP [collection point] personnel handling human remains or working in the

areas where human remains have been should always be conscious of sanitation hazards and keep themselves and their work areas clean. Personnel handling human remains should wear, at a minimum, rubber gloves and surgical masks with eye protection.”

Air Force Regulations

AFI 34-242, *Mortuary Affairs Program*, April 2, 2008 establishes guidance and assigns responsibilities for the Air Force Mortuary Affairs program. All Air Force military and civilian personnel must comply with the AFI. In addition, “[n]o waivers may be granted for any part of the publication.” Provisions relevant to the issues herein include the following:

- Paragraph 4.8: “[a] government mortuary will prepare the remains” of personnel who support the Air Force via contract and who die outside CONUS [continental United States] (depending on where death occurred and the provisions of the contract). The contract may cover the costs of preparation and transportation.
- Paragraph 12.22: “[s]afety is a major concern in all operations. Leaders must be aware of safety-related factors involving remains handling and ensure Operational Risk Management is integrated into processes and operations. Sanitation of the morgue and personnel should be constantly monitored.”
- Paragraphs 2.8 and 10.2.8: “government morticians will follow the Armed Services Public Health Guidelines,” and “[p]repare unembalmed remains or reprocess remains already embalmed to meet or exceed the Armed Services Public Health Guidelines.”

Armed Services Public Health Guidelines

The Armed Services Public Health Guidelines are public health guidelines which provide guidance to mortuary service practitioners to prevent the transmission of many infectious agents associated with medical and paramedical environments. The following provisions are relevant to the issues herein.

- Paragraph 1.2 sets forth disinfection procedures for embalmers. Paragraphs 1.2.1-1.2.3 require an embalmer to “[a]lways wear an outer, protective garment, preferably one which is impervious to the penetration of liquids and aerosols, such as a rubber or plastic wraparound apron or gown,” wear “disposable protective head and shoe coverings” and “rubber or plastic gloves.” Under paragraph 1.2.4, an embalmer must “[w]ear a protective oral-nasal mask designed to prevent the inhalation of infectious or hazardous chemical particulates.”
- The air exhaust and purification guidelines are explained in paragraph 1.5, which states “[u]se an efficient air exhaust or air purification system during preparation of a remains to maintain a nonhazardous level of airborne contamination. Respirable contaminants usually include those microbial agents measuring 5.0 microns or less in diameter. The air exchange system also prevents the accumulation of formaldehyde vapor and/or paraformaldehyde aerosol concentrations in the preparation room environment. Ensure 12-15 complete air

changes per hour and that aldehyde concentrations do not exceed 5.0 ppm to eliminate the potential health hazard to the embalmer.”

- Under a section entitled General Safety Guidelines, paragraph 10.8.6.3⁵² [sic] mortuary service practitioners are to “[a]dhere to an effective program of routine tuberculin sensitivity tests and prophylactic immunizations for infectious diseases endemic to the geographic areas involved.”
- Morticians are to prepare and ship remains “in compliance with state, federal, and foreign health laws” (paragraph 1.8.1) and “in a manner reflecting the highest standards of the funeral service profession” (paragraph 1.8.1.3).
- Paragraph 1.8.5 states, “Regulation 71.157, *Dead Bodies, in the Foreign Quarantine Manual of Operations*, controls the importation of a person who died from a quarantinable disease. Remains of a person dead from a quarantinable disease must be properly embalmed and placed in a hermetically sealed casket or cremated.”
- With regard to contagious remains, the Armed Services Public Health Guidelines provide, paragraph 1.12.3, “[i]n cases where death was the result of a contagious or communicable disease, immediately place the remains in a transfer case or casket. Immediately close and hermetically seal the transfer case or casket. Affix a gummed label, 2 by 4 inches, bearing the word “CONTAGIOUS,” to the outer surface at the head end of the casket, or metal transfer case.
- The Armed Services Public Health Guidelines do not provide specific guidance on shipping remains overseas other than a paragraph on “shipping containers.” Paragraph 1.14 provides, in part, that “[i]n the case of an overseas shipment, provide a casket shipping container that meets the requirements of the air carrier(s) and the overseas countries involved.”

Port Mortuary Division Standard Operating Procedures

Four Port Mortuary Division SOPs contain provisions relevant to this set of allegations. All four of these SOPs were signed and certified by Mr. Keel, the Port Mortuary Director. According to the SOPs, compliance is mandatory.

Two of the SOPs address personal protective equipment. According to the *Port Mortuary Division Operating Instructions*,⁵³ March 27, 2010, paragraph 6.3, “Personal Protective Equipment (PPE) requirements are mandatory.”

Port Mortuary Division SOP 34-242-01, *Mortuary Branch*, April 25, 2010, paragraph 5.2, provides that “[c]ontact with Human Remains involves a degree of risk. All human blood, bodily fluids, and tissue should be treated as if it is infectious. Appropriate Personal Protective Equipment should be utilized at all times when coming into contact with human remains.” Paragraph 6.1 states “[a]ll personnel must comply with Universal Precautions when handling

⁵² Paragraph 10.8.6.3 is incorrectly labeled and can be found immediately after paragraph 1.6.2.

⁵³ No number is assigned to this SOP.

HRs [human remains], and wear Personal Protective Equipment, to include eye protection and authorized full face respirators when exposed to formaldehyde fumes.”

SOP 34-242-01 also addresses safety and sanitation. Paragraph 4.7 provides that “[a]ll personnel assigned to the Port Mortuary are required to report any safety or security concerns immediately to his/her supervisor. Additionally, all personnel are instructed to maintain the highest level of sanitation, cleanliness and general organizational tidiness in their work areas. It is the responsibility of all personnel to immediately take action and resolve any deficiencies. Any deficiencies beyond the scope or ability of personnel must be reported immediately to his/her immediate supervisor.” This identical provision is found in Port Mortuary Division SOP 34-242-03, *Operations Branch*, April 1, 2010, paragraph 4.4.

SOP 34-242-01 paragraph 5.8.4 deals with transporting human remains outside of the United States. According to paragraph 5.8.4.1, “[I]icensed personnel will provide the Shipping section with all requirements for a transport to a destination outside of the [United States] and the mode of travel.” Paragraph 5.8.5 states the Administration Branch will secure all necessary documentation and required signatures for transporting human remains outside of the United States.

SOP 34-242-02, *Administration Branch*, April 1, 2010 sets forth the responsibilities of the Administration Branch, including, for example, shipments overseas. “For overseas shipments, [the Administration Branch must] ensure compliance with country’s special shipping requirements” (paragraph 4.2). Paragraph 5.2.3.4 provides procedures for shipments of human remains overseas. It states “[i]f HR [human remains] shipment is to an overseas location, personnel must contact specific country for current requirements. Death certificates are requested well ahead of initial shipment, along with statement of non-contagious disease from the ME [medical examiner]. The death certificate, statement of non-contagious disease, embalmer’s affidavits and other required documents according to the location are notarized. Personnel submit the notarized documents to embassies and consulates for shipping approval.”

Transportation management guidance is provided under paragraph 5.3. It states in paragraph 5.3.3.4, “[i]f the remains are shipping to an overseas location, notify the medical examiner’s office to request original signed [death certificates] and non-contagious disease letter. Check the Yellow Book⁵⁴ for current shipping regulations. The countries are listed in alphabetical order. Gathering the paperwork may take time if a consulate is involved and copies may need to be provided to [the Traffic Management Office].”

⁵⁴ The “Yellow Book” is a reference book published annually by Nomis Publications, Inc. entitled “Funeral Home and Cemetery Directory.” It is referred to as the “Yellow Book” due to the color of its cover. In addition to serving as a directory of, among other things, funeral homes, cemeteries, and trade service companies including crematories, it also contains a listing of requirements for shipping human remains to other countries.

SUMMARY OF EVIDENCE

Precautionary Measures and Provision of Adequate Warnings

In May 2010, a third country national employee⁵⁵ of an Air Force contractor was found unresponsive in his truck's cab in Iraq. He was pronounced deceased but the cause and manner of death was not determined at that time. An investigation into the circumstances surrounding his death was opened and it was determined that pursuant to Title 10, United States Code, Section 1471, an autopsy of the remains was required to be completed by the OAFME at Dover, Delaware, in order to determine the cause and manner of death. The remains were sent to the Port Mortuary for an autopsy pursuant to a Criminal Investigation Division (CID) investigation.

On May 29, 2010, the Saturday before Memorial Day, Dr. (Commander, USN) [Medical Examiner 4], a forensic pathologist, performed an autopsy of the deceased third country national at the Port Mortuary in Dover. At the time, Dr. [Medical Examiner 4] was a forensic pathologist in training who performed the autopsy under the supervision of Dr. (Captain, USN) [Chief Medical Examiner]. Dr. [Chief Medical Examiner] is the Chief Medical Examiner for DoD who, among other things, performs autopsies at the Port Mortuary. He was the medical examiner on duty at the Port Mortuary on May 29, 2010. In his interview, Dr. [Chief Medical Examiner] stated that during the autopsy, Dr. [Medical Examiner 4] found nodules in the lungs of the third country national which was a possible indicator of an infectious disease such as a fungal infection or tuberculosis (TB). Once the nodules were discovered, the medical examiner staff changed from the "normal masks – paper masks" to M95 masks which (while more uncomfortable) according to Dr. [Chief Medical Examiner], provides "a greater degree of protection from infectious disease processes such as tuberculosis."

After the autopsy was complete, Dr. [Chief Medical Examiner] stated that they "finished up our area, washed it down with bleach, like we do for every case." The medical examiner released the remains on May 29, 2010. According to the death certificate signed by Dr. [Medical Examiner 4], the "disease or condition directly leading to death" was listed as "arteriosclerotic cardiovascular disease." Mr. Keel signed the death certificate on June 1, 2010 as the mortician.

Dr. [Chief Medical Examiner] stated that there was "very, very low risk" of spreading TB in this case prior to the autopsy because the TB was in the lungs. He testified "until we opened the body, it really wasn't exposed" and the risk of human remains with active TB infecting another person in the mortuary center first occurs during autopsy when the lungs are opened up and cut into.

Dr. [Chief Medical Examiner] did not order turning off the HVAC system, stating that, in his opinion, turning off the HVAC system in the building or in the autopsy room would be "the worst thing you could do."⁵⁶ Dr. [Chief Medical Examiner] testified that, "in the large autopsy room there is a very, very good ventilation system that pulls air from the center of the room

⁵⁵ Non-U.S. citizens who are employed by contractors providing services to the U.S. military overseas are considered "third country nationals."

⁵⁶ The IO indicated that the Port Mortuary facility has a separate HVAC system for the autopsy suite and embalming room.

across the personnel and out the side walls, minimizing any exposure.” He also stated that “from what I’m told is that all that air is filter[ed] through a series of hepa-filters before it leaves the building.” If the HVAC system had been turned off, “the air is not being moved and removed.” With the HVAC system on, “[t]he air turns over every 4 minutes in the autopsy room, 15 times an hour, and you want that fresh air coming in, and then being filtered on the way out.” He continued, “we don’t want to stand there with the HVAC system turned off and just letting – if there is anything, letting it build up in that area.” He also stated that there would be no reason to turn off the HVAC system anywhere else.

According to Dr. [Chief Medical Examiner], Dr. [Medical Examiner 4] also informed the Port Mortuary personnel of the possibly contagious remains immediately. According to Dr. [Medical Examiner 4]’s notes from his daily log, “[o]n 29 [May] 2010, key personnel involved with this case were notified regarding the potential infectious hazard of the remains. Personnel notified were [Employee in Dental Department] and [Dentist] of the Dental [D]epartment, [FBI Employee] of the FBI, [Technical Sergeant 1] and [Radiologist] of Radiology, Dover PM [Port Mortuary] embalming personnel, [Autopsy Assistant], the autopsy assistant, [AFME Photographer], the photographer, and SA [Special Agent] [SA 1] who attended the autopsy from CID.” Dr. [Chief Medical Examiner] indicated that notification to personnel was verbal. Dr. [Chief Medical Examiner] testified that the medical examiners did not advise the Port Mortuary personnel of any procedures they should follow when the medical examiners released the remains to the Port Mortuary personnel. According to Dr. [Chief Medical Examiner], the medical examiners “suggest[ed] that they [Port Mortuary personnel] follow whatever infectious disease guidelines they have for handling bodies.”

Two employees from the Mortuary Branch of the Port Mortuary Division were on duty on Saturday, May 29, 2010 – [Embalmer 2], a mortuary inspector (embalmer) and [Autopsy/Embalming Technician 3],⁵⁷ an autopsy/embalming technician. [Autopsy/Embalming Technician 3] testified that he was notified by the medical examiner on May 29th that remains that had been autopsied might be contagious for TB. [Autopsy/Embalming Technician 3] informed other Port Mortuary personnel on duty that day, which were only a few because of the holiday weekend.

At this time, Mr. Keel served as both the Director of Port Mortuary Division and as the acting Chief of the Mortuary Branch. [Autopsy/Embalming Technician 3] testified that he “called Mr. Keel as soon as I got word about the case,” which was sometime between 9:45 and 10:30 on Saturday morning. [Autopsy/Embalming Technician 3] stated that Mr. Keel “asked what I was going to do with it and I told him the stuff I was going to take, and he said okay.” According to the IO, Mr. Keel provided no additional direction to [Autopsy/Embalming Technician 3] on what to do.

When asked whether there were any procedures in place for handling contagious remains, [Autopsy/Embalming Technician 3] responded, “[h]andling hazardous remains, as soon as we find out – I’m just trying think. Just full entire PPE [personal protective equipment], respirator

⁵⁷ [Autopsy/Embalming Technician 3] was hired as a civilian for the Port Mortuary in November 2009. He had previously been deployed to the Port Mortuary for two 120 day rotations (in 2007 and 2009) while on active duty. He served in the Embalming Section for both rotations.

and just inform everyone that's in the facility or that's going to be in the area of what's going on." He indicated that he got this from OJT [on the job training] rather than from any written procedures. He testified that while the medical examiner said that the remains "had a high possibility of being positive" for TB, he handled the remains as if the remains were positive for TB. He went on to say that "[m]e personally, it's kind of common sense if you know that someone could be possibly contaminated to gear up, head to toe, no ifs ands or buts about it. It's better to be safe than to be sorry."

Mr. Keel confirmed that he learned about the possibility of infectious remains on Saturday from [Autopsy/Embalming Technician 3]. "[Autopsy/Embalming Technician 3] said that there was a case that the medical examiner had some concerns that there may be some potential tuberculosis. There were some signs that they may be possibly infectious, so I asked him to, you know, practice universal precautions." Mr. Keel stated that the remains were already in autopsy when they discovered signs that the remains may be potentially infectious. He testified that he told [Autopsy/Embalming Technician 3] to keep the remains in autopsy, wear full protective equipment, including full-face respirator and "particularly once the remains are completed by the medical examiner, place them in triple bags, and then, you know, do a thorough sanitation, send out 110 bleach solution of all equipment, the gurney, instruments, everything that was involved in the autopsy process." He also stated that he told [Autopsy/Embalming Technician 3] to "make sure the bag was ... clearly marked as potentially 'TB, Do Not Open'" and to place the remains in reefer 4. He indicated that the Command Control Center controls the reefer keys and told [Autopsy/Embalming Technician 3] "not to allow access, so not give the key to anyone." Mr. Keel noted that he briefed Mr. Dean after being notified.

Mr. Keel stated that Port Mortuary personnel practiced universal precautions when they handle remains, under the assumption that every remains may have an infectious disease. These precautions include wearing personal protective equipment to protect the mouth, nose, eyes and other contact with the remains or bodily fluids. He also stated there was an infectious control plan,⁵⁸ but he believed it was written after the incident. Mr. Keel indicated that he was not aware of any specific written guidance in existence at the time of the incident on what Port Mortuary personnel were to specifically do if possible or actual contagious remains were discovered.

[Embalmer 2] testified that she arrived at work on May 29th around 9:30 a.m. (about one half hour earlier than usual) and that around 10:00 a.m. she was informed by [Autopsy/Embalming Technician 3] that "we have a contaminated case with TB." [Embalmer 2]

⁵⁸ As the Port Mortuary Director, Mr. Keel issued an undated memorandum for AFMAO personnel setting forth the "AFMAO Exposure Control Plan" (ECP). The ECP did not address airborne pathogens such as tuberculosis, nor did it address the communication requirements when potential or actual infected human remains are present at the Port Mortuary. According to the memo, the ECP "is provided to eliminate or minimize occupational exposure to bloodborne pathogens in accordance with OSHA standard[s]." Under the ECP, universal precautions must be adhered to anytime there is "a risk of exposure to bodily fluids." PPE is provided to employees and includes gloves, gowns, foot protection, eye protection, disposable shirts and pants, hair cover, respiratory protection, face and mouth shields. The ECP included "communication of hazards to employees and training." However, the communication required was the provision of "information about hazardous chemicals that their employees may be exposed to on a job site and suggested precautions for employees."

stated that she “instructed [Autopsy/Embalming Technician 3] to dispose of all instruments and anything that came in contact with that case and that’s for sanitation purposes.” According to [Embalmer 2], [Autopsy/Embalming Technician 3] “relayed” to her that “if you were to enter the [contaminated] area, make sure you wear a mask.”

[Autopsy/Embalming Technician 3] testified that once the remains left autopsy, they “came into my direct handling.” He stated that he took the following actions:

I removed the remains directly into embalming. I cleared out the room. I turned off the automatic doors. I told everyone don’t come into the facility – or do not come inside this room until I’m done. From there I proceeded on to suture up the remains. Then I did put it into two body bags, if I’m correct. From there, I stepped into our isolation room[,] I de-gowned, I went up front, I grabbed the keys to the reefers,⁵⁹ went back, I geared [back up], I told everybody to stay out of the hallways, no if ands or buts about it, no questions asked. I wrote on the body bag – no sorry, I cut out a biohazard sign from one of our bags. I ta[p]ed it on the body bag and I wrote TB and I put a plus. I proceeded – I pushed the body down and to reefer four and I locked it up...

[Autopsy/Embalming Technician 3] indicated that he did not put a sign on the outside of the reefer but that a coworker, Ms. Spera put up a sign on the door the following day. [Embalmer 2] indicated that she did not recall seeing any signs on the door to the reefer on Saturday, but noted there was a sign on Sunday (or possibly Monday) morning on the reefer. Mr. Keel testified that he did not discuss placing a sign on the reefer during his telephone call with [Autopsy/Embalming Technician 3] on Saturday. Mr. Keel believed a sign was placed on the reefer door as a secondary precaution. He testified that he “believe[d] I instructed [Major 3]” to put up a sign on the door after he walked by and saw that it was not marked. He did not say when this happened.

The next day, Sunday, May 30th, both Ms. Spera and [Autopsy/Embalming Technician 1],⁶⁰ an autopsy/embalming technician reported for work at the Port Mortuary. [Autopsy/Embalming Technician 1] indicated that there was no briefing or information relayed to him regarding the contagious remains when he arrived at work. He learned about “a positive TB case” at the Port Mortuary from his co-worker, [Autopsy/Embalming Technician 3]. [Autopsy/Embalming Technician 1] indicated that he did have to go into the reefer during the time the remains of the third country national were kept there. He testified that he did not see any signs on the reefer alerting personnel to the fact that potential contagious remains was inside; nor did he see any markings on the bags that contained the remains of the third country national. [Autopsy/Embalming Technician 1] told the IO that he was not aware of any guidelines that the

⁵⁹ Access to the reefers is controlled by the AFMAO Command Control Center.

⁶⁰ [Autopsy/Embalming Technician 1] is an autopsy/embalming technician who has been assigned as a civilian to AFMAO since January 2010. He previously was part of the 512th Airlift Wing at Dover AFB and while in military status had five to six rotations with the Port Mortuary working primarily the same duties.

Port Mortuary has to handle contagious remains. He also had not received any training (on the job or otherwise) regarding the handling of contagious remains.

Ms. Spera indicated that she worked Sunday, May 30th but stated that she did not learn that there was “contagious remains in the building” until Tuesday, June 1st. According to Ms. Spera, no one worked on Monday, May 31st which was the Memorial Day holiday. She testified that the remains was “placed in two remains pouches and placed in the reefer four and there was not any notification on the door of the reefer, placed on the reefer, nor did [Autopsy/Embalming Technician 3] [or] [Embalmer 2] tell me about the incident on Sunday. I found out Tuesday when – that there were contagious remains in the house.”

[Autopsy/Embalming Technician 3] stated that he told Ms. Spera about the situation as soon as she walked in on Sunday, May 30, 2010. He testified that she then placed a sign on the outside of the reefer, on the reefer door. [Autopsy/Embalming Technician 1] indicated that Ms. Spera “was also aware of it and she – you know, just say for, precautionary reasons, if we have to go in there, we should, you know, put on the protective gear.” [Embalmer 2] indicated that she and Ms. Spera were the only embalmers at work on Sunday and that Ms. Spera was the person who made her aware that there should have been a sign placed on the door of the reefer. She also indicated that [Autopsy/Embalming Technician 3] was at work on Sunday as well.

Ms. Spera testified that she learned about the contagious remains from “[CID Agent],” the Port Mortuary in-house CID agent. According to Ms. Spera, Dr. [Medical Examiner 2]⁶¹ came to the embalmer’s office on Tuesday, June 1st looking for the embalmer who would sign the American death certificate for the third country national.⁶² Ms. Spera indicated that she could sign it. She then asked, “[a]re you going to be signing the non-contagious letter,” and that is when [CID Agent], and I do not have a last name, piped up and said, “[o]h, no, he’s contagious.’ And both Dr. [Medical Examiner 2] and I looked at him and said, “[w]hat?” And he goes, “[y]eah, he’s got active TB.”

Dr. [Medical Examiner 2] was not working the day the possibly contagious remains arrived at the Port Mortuary. On his next duty day (he was not sure whether it was Sunday, Monday, or Tuesday), he was informed by the medical examiner investigator of the possibly contagious remains. “[I]t came to my attention that there was – someone had asked for a letter of non-contagious – a non-contagious letter, which is normal to be signed for an individual that’s going outside the United States. And at that point and time, when someone asked for a letter of non-contagious, the investigator – I don’t recall who the investigator was – I believe it was [CID Agent], but I do not recall who the investigator was – stated that, “[w]ell, we can’t sign a non-contagious letter, cause it is contagious’ and that’s the first I heard about it, and I asked him, ‘what do you mean it’s – we have a possible contagious case?’”

⁶¹ Dr. (Major) [Medical Examiner 2] is an Air Force medical examiner assigned as the Deputy Medical Examiner with the OAFME since 2006. In this position, he performs, among other things, autopsies at the Port Mortuary.

⁶² Ms. Spera stated that most third country nationals “go back to Kuwait or Afghanistan where they died to be shipped onward for final burial to wherever their home is.” The employing company handles the shipment to their home country and the burial, but the Port Mortuary ships the remains back to either Kuwait or Afghanistan. According to Ms. Spera, one of the pieces of documentation necessary to do that is a non-contagious letter signed or produced by the OAFME, stating the person is non-contagious.

Dr. [Medical Examiner 2] stated, “so that morning, as I’d come aware of it, I talked to Mr. Keel to just make sure that he’s aware that there is a possible contagious individual in [the] Port Mortuary, make sure that he was aware of it, and I believe, at that time, he [Mr. Keel] was not aware of it ... It’s my understanding that the person that was there that weekend for mortuary, from the embalming site, was made aware of it.” He further stated that “[w]hen I talked to [Mr. Keel], he said – he had not gotten that message, that he was not aware that had – that there was a possible infectious case.”

Mr. Keel acknowledged that Dr. [Medical Examiner 2] briefed him on Tuesday, June 1st with Ms. Spera present. Mr. Keel indicated that he previously knew that they had “a potential TB case” but that Dr. [Medical Examiner 2] told him that it was “an active TB case.”

According to Ms. Spera,

Mr. Keel was notified by Dr [Medical Examiner 2], myself and [CID Agent] were there with him to find out, you know, so [CID Agent] could answer any questions. Dr. [Medical Examiner 2] asked Mr. Keel if he was aware there was contagious remains in the building and he said, “[n]o, I’m not.” And he said, “[o]h.” [Mr. Keel] mentioned he had to go to a meeting and I just – I said – I said, “[o]kay, sir, well then I’ll put up the sign on reefer four to make people aware not to go into the reefer without proper PPE on.

A printout from MOMS on this case showed an entry made by Ms. Spera at 9:03 a.m. on June 1, 2010. The summary she entered states “Active TB – Contagious” and the detailed comment states, “Dr. [Medical Examiner 2] just informed me that ME 10-0352 has active TB. CPT [[Chief Medical Examiner]] discovered it during autopsy on Saturday. Mr. Keel was just informed.”

Ms. Spera indicated that after she learned about the case on Tuesday, she “posted notification on the [reefer] door with the Dover number and the ME [medical examiner’s] number saying possible active TB case, please wear mask, gloves, boot covers, and gowns prior to entering the reefer.”

When asked if there are any procedures in place for handling contagious remains, Ms. Spera indicated affirmatively, but said she had not read them since 2008 and did not “know if they’ve changed.” Ms. Spera stated that past practice for handling contagious remains has been to remove the remains “to an isolation bay that we have. They’re autopsied there and embalmed there, if necessary, or if there’s embalming authorized by the family.” She also testified that “usually there’s an E-mail that has gone out to everyone in the building stating we have ... possibly contagious remains, this is possibly what the disease was. If you have these symptoms, please seek medical attention, as necessary.” Additionally, she believed the HVAC system for the facility should be turned off to prevent spreading of the contagions. Ms. Spera indicated that “[o]nce th[e] embalming’s done, the – the hazard goes away. But because this was a third country national, we did not embalm.” She indicated that she knew this “because I asked

[Embalmer 2] about it on the first when I found out that we had a contagious remain in the house.”

Dr. [Medical Examiner 2] testified that there was “very little chance of infection just by being around the human remains [uncut].” He testified that the “biggest danger is to the medical examiners themselves,” not the triage staff because TB has to be “aerosolized.” He further stated that the risk of aerosolization was greatest for the medical examiners during the autopsy when the lung tissue is first cut and “you are releasing [the TB particles] back and up into your face.”

Mr. Keel understood from the medical examiner (Dr. [Medical Examiner 5]) that the chance of exposure was minimal to non-existent because “the mode of transmission of tuberculosis was coughing, sneezing, sputum particles going out. But that mode of transmission was less viable post-mortem versus living.” He indicated that “at the same time we want to, you know, maximize precautions and minimize exposure.” When asked what follow-on procedures were implemented to make sure employees were briefed coming on duty Sunday, Monday and Tuesday, Mr. Keel indicated that the only follow-on precaution implemented was to “[j]ust not to provide any access to reefer 4, that was the only precaution. Other than that, there wasn’t an inherent threat.”

Mr. Dean, the Deputy Director, AFMAO testified that he was not at the Port Mortuary facility over the long weekend and that he believed Mr. Keel informed him about the potentially contagious remains on Tuesday, June 1st. From this conversation, Mr. Dean understood that the personnel working with the remains wore universal precaution equipment (personal protective gear) at all times, that the remains had been placed in three human remains pouches, and that a sign had been placed on the human remains pouch notifying personnel of the potential TB remains. He was also told there was a sign placed on the outside of the refrigerator. Mr. Dean indicated that the universal precautions are set forth in the Armed Services Public Health Guidelines which is specific to mortuaries within the DoD.

Mr. Dean testified that he made Colonel Edmondson aware of the potentially infectious remains after he learned of it from Mr. Keel. He thinks it was probably Tuesday but was not sure of the timeframe. Mr. Dean was asked if he was concerned that it took three days for the personnel at the Port Mortuary to tell him that the facility had possibly contagious remains. Mr. Dean replied, “[y]eah, we [Mr. Keel and I] did discuss that. I can’t recall the exact specifics, but I was concerned about that and wanted to make sure that he was engaged and you know from our discussion, I feel that they did everything that they needed to do to make sure our folks were safe.” Mr. Dean continued by stating that he could not remember what Mr. Keel had to say about why it took three days to inform him of the contagious remains.

Mr. Dean testified that with regard to tuberculosis, “it probably would have been worse to shut [the HVAC system] down” for the preparation areas (*i.e.* embalming and autopsy) as the system “is geared towards things like contaminants that would become airborne.” If the HVAC system had been shut down, the “TB particles would have become trapped in our system.” With the HVAC system working, the TB particles “would have been filtered in the system.” Mr. Dean indicated that the medical examiners “could shut [the HVAC system] down should there be some

other event where that would be necessary. In this particular case I don't believe that shutting the system down would [have] been helpful."

Colonel Edmondson recalled that he was not aware of the incident at the time it occurred but learned of it from either Mr. Dean or Mr. Keel a few days later. Colonel Edmondson was not sure of the exact day but stated it may have been on the Tuesday after the Memorial Day weekend. When he was notified, he was told that Ms. Spera had complained about the handling of the situation but it was handled correctly, personnel had protective gear, and the remains were stored properly. "[I]t seems like the way it was conveyed to me, it was not an issue of, 'Hey, I want to make you aware of some contagious remains and this is how we're handling it.' It wasn't that. It was Mrs. Spera is complaining about such and such, and such and such. It was more along the making me aware that she was complaining about something, which she was prone to do."

Colonel Edmondson testified that he was concerned about the potentially contagious remains, and he "asked some basic questions like 'Well, did we handle it correctly?' Yes absolutely. 'People had the protective gear?' Yes. 'Is it stored correctly?' All of the things that we do and they indicated that we had done all of those things. So this was, you know, there was no issue to complain about it, it was all done correctly." Colonel Edmondson was not aware of the procedures for shipping remains that are possibly contagious.

Transport of Remains to Kuwait

The remains of the third country national were kept in reefer 4 between May 29th and June 4th when they were readied for transport back to Kuwait via Germany. The Port Mortuary was responsible to ensure this shipment to Kuwait was done properly. For purposes of the investigation, it is presumed that once the remains arrived in Kuwait, they would be turned over to the deceased's contracting company who would be responsible for returning the remains to the final country of destination.

[Autopsy/Embalming Technician 1] testified that he was not aware of the shipment process but he did place the remains in the transfer case prior to the remains being taken from reefer 4 to the shipping area. He stated that he believed the remains were doubled bagged. MOMS indicates that the third country national's remains were handled on June 4th by [AFMAO Employee]. The MOMS documentation does not reflect [Autopsy/Embalming Technician 1]'s involvement in handling the remains in the reefer.

[Logistics Supervisor 1]⁶³ is the logistics supervisor at the Port Mortuary. In his testimony, he provided an overview of what is involved in shipping remains from the Port Mortuary to an overseas location after receiving the release of the remains from the medical examiner. As the logistics supervisor, he coordinates the scheduling of a flight to the destination country. The Port Mortuary shipping supervisor, in this case [Major 1], ensures the required paperwork is associated with the correct remains and the data contained in MOMS. He testified that "[t]here are two people that sign the form saying that the body has been confirmed who they

⁶³ [Logistics Supervisor 1] was assigned to the Port Mortuary while on active duty until his retirement in 2008. He then returned as a civilian in the same job as he had on active duty--logistics supervisor.

were looking for.” The remains are normally contained in two human remains pouches (one white and the other black) and placed in a transfer case. Remains that are not embalmed are packed in ice. Documentation and any special handling instructions are taped to the outside of the transfer case.

[Major 1] was deployed to the Port Mortuary for 120 days beginning in May 2010. At the time of this incident, [Major 1] had just arrived at the Port Mortuary and was serving as the Chief of the Departure Branch⁶⁴ and as a Crematory Officer. She testified that her boss, Mr. Keel, directed her to return the remains to Kuwait through Germany. She asked Mr. Keel how to handle the contagious remains case, and he was the primary person who provided her the guidance that she followed. [Redacted].

Mr. Keel stated that he assisted [Major 1] with preparing the remains for shipping since this was her first shipment. He told her to make sure the receiving parties were aware that the remains were potentially contagious for TB so that the personnel re-icing the remains did not open the human remains pouch. In an email dated June 2, 2010, Mr. Keel provided instructions to [Major 1] and [Logistics Supervisor 1] regarding the shipment of the remains. He ended his email with “CAUTION: Remains are in refrigerator 4 and are TB positive, please use applicable PPE.” He stated that they used the term “positive TB” in the email as the worst case scenario so that all necessary precautions were taken.

[Major 1] sent an email dated June 3, 2010 to all personnel handling the remains stating, “***We HIGHLY advise that the remains are ‘Positive for Tuberculosis’ and HIGHLY advise ‘Re-icing’ in Ramstein and at TMEP [theater mortuary evacuation point] Kuwait***.” In addition to personnel in Germany and Kuwait, the email was sent to several AFMAO employees including Mr. Keel, [Logistics Supervisor 1], [Autopsy/Embalming Technician 2] and [Embalmer 1]. Ms. Spera, [Autopsy/Embalming Technician 3] and [Autopsy/Embalming Technician 1] were not on the email. According to [Major 1], the email she sent was crafted from a template provided by Mr. Keel. Although the letter from the medical examiner stated that the remains were possibly contagious and did not mention TB, [Major 1] stated that Mr. Keel directed her to use the terminology “positive TB” in the email message. She did not question the reason for the change in wording.

[Major 1] also stated that Mr. Keel provided information as to the marking of the remains – that the body bags at both the head and the foot were marked “TB positive” and that in the documentation taped to the outside of the transfer case, there should be information (including

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

⁶⁴ [Redacted].

[Major 1]'s email) notifying everyone that this case was "TB positive." [Major 1] explained that the unembalmed remains were to be re-iced during the lay-over in Germany to prevent decomposition. She confirmed with Mr. Keel that the possibility of infection of personnel handling the transfer case was low. Opening the transfer case and re-packing the case with ice did not involve opening the human remains pouch.

Mr. Keel also provided guidance as to the precautions to take within the Port Mortuary, to include ensuring all personnel wore protective equipment (*i.e.* respirator, body suit and protective gloves) while handling the remains. Mr. Keel also told her to ensure the remains were placed in three body bags. [Major 1] stated that Mr. Keel shared a "list of items" needed for shipping remains to Germany or Kuwait, but did not reference any written guidance for shipping possibly contagious remains to another country nor did she recall reading any guidance. She did recall that protective gear was required while handling human remains in accordance with standard operating procedures.

The IO asked Dr. [Chief Medical Examiner] for his medical opinion regarding the risk of infection for the workers opening the transfer case overseas to re-ice the remains. Dr. [Chief Medical Examiner] stated that there was minimal risk so long as only the transfer case is opened, not the body bags, and that the body bags were undisturbed so nothing is aerosolized. Dr. [Chief Medical Examiner] agreed that double or triple bagging the remains kept the risks minimal as did keeping paperwork with the remains indicating the possibility of contagion.

[Logistics Supervisor 1] stated that the Port Mortuary does not ship contagious remains. He indicated that with regard to potentially infectious remains, "[t]hat's what they thought when it came in." He testified that he saw the sign on the reefer indicating there were possibly infected remains inside.⁶⁵ However, in this case, he considered the remains not contagious based on the medical examiner's determination. When asked if it was his understanding (during the shipping process) that the remains were not contagious, [Logistics Supervisor 1] responded "[t]hat's what I heard from a medical examiner, yes, and I heard that from Ms. Spera as well." He later stated that he did not hear this from the medical examiner but that Mr. Keel told him that the remains were not "positively positive for TB." While [Logistics Supervisor 1] received (and responded to) Mr. Keel's email of June 2, 2010, in which Mr. Keel referred to the remains as being positive for TB, he stated he asked Mr. Keel about marking the remains contagious and was told that treating the remains as positive for a contagion was "overkill." [Logistics Supervisor 1] testified that "[s]ince it wasn't tuberculosis, the medical examiners did not give us anything else to stick on the transfer case." He also received a copy of the email from [Major 1] dated June 3, 2010, which indicated that the remains were contagious with TB. [Logistics Supervisor 1] testified that he did not agree with [Major 1]'s handling the remains as if they were contagious because it was his understanding they were not contagious. However, he did not try to correct her because she was his superior. [Logistics Supervisor 1] stated that the remains in question was placed in three pouches.

⁶⁵ [Logistics Supervisor 1] also stated that he was aware of concern about the potentially infected remains on the part of the base civil engineers. According to [Logistics Supervisor 1], "the CE [civil engineers/HVAC] guys [[Civilian Engineer/HVAC Employee] and his assistant] got a little ruffled because they were working in the reefer and no one told them it was a TB case in the building."

Mr. Dean indicated that there are protocols for shipping remains that are possibly infectious. He stated, “[w]e rely on consulates. We rely on the Code of Federal Regulations[;] we rely on a foreign affairs manual. We rely on the Yellow Book for Funeral Directors which outlays you know the requirements.” Mr. Dean was uncertain as to whether the AFMAO guidelines covered contagious or possibly contagious remains and explained that this is the first foreign conflict where the United States has moved deceased third country nationals and foreign detainees to a domestic mortuary and then back overseas. He stated that remains shipped overseas are returned via the theater mortuary evacuation point and remain within military jurisdiction until their final destination.

Mr. Keel stated that it was common to ship remains from the Port Mortuary overseas, citing third country national remains as one example. He recalled that at a minimum the remains were to be placed in a sealed container and required a “statement of contagious disease” letter from the medical examiner “advising the condition of the remains.” He did not recall any specific requirements for shipping remains to Kuwait, but stated that he would reference what are known as the “Red” and “Yellow” books which provide country specific requirements for shipping remains. Mr. Keel stated that the books contain the same information but are just published by different companies.

In the introduction to the “International Shipping and Receiving of Human Remains” section of the Yellow Book, it states, “[w]hen shipping to a foreign country, it is necessary that the shipping funeral director call the embassy to determine the current regulations.” Further, the Yellow Book states “if there is a situation where the remains is to be shipped to one country and then transported to another country for final disposition, both countries regulations must be complied with.” It listed the following as the paperwork requirements for shipping remains to Kuwait: (1) death certificate, (2) non-communicable disease letter, (3) embalmer letter, (4) passport of deceased, (5) burial permit, (6) consul fee \$64.00, (7) no casket requirement, and (8) county seals.

The Port Mortuary case file for the remains in question contained the following documentation: death certificate signed by a medical examiner stating the cause of death was cardiovascular disease, a letter from the medical examiner stating that the remains may be infected with a contagious disease (in lieu of a non-communicable disease letter), a passport, and a letter from the medical examiner authorizing releasing of the remains. There was no copy of a burial permit, embalmer’s letter, or consul payment.

In the Yellow Book, it states that “[i]f the cause of death is pending on the death certificate from the Coroner or Medical Examiner, that office will need to issue a letter stating the death is not due to a contagious disease.” The IO spoke with [Executive Director/author], who is the executive director for the American Society of Embalmers and authors the international shipping section of the Yellow Book. According to the IO, [Executive Director/author] “clarified” the above referenced statement “compared to the listed country requirement for a non-communicable disease letter.” According to the IO, [Executive Director/author] stated that if the cause of death is annotated on the death certificate as other than a contagious disease, there is no requirement for a non-

communicable disease letter. That explanation does not actually appear in the Yellow Book and appears contrary to the listing for Kuwait in the Yellow Book, which requires both a death certificate as well as the “non-communicable disease letter.” The death certificate of the third country national at issue here listed the cause of death as “[a]rteriosclerotic cardiovascular disease.”

Dr. [Chief Medical Examiner] testified that he was not familiar with the guidelines for sending remains from the Port Mortuary to another country. However, he stated that he knew medical examiners from the OAFME “sign letters of non-contagion, ... that says that, ‘To the best of our knowledge,’ that there’s nothing contagious about this case.” In this case, instead of a letter of non-contagion, a “Letter of Possible Contagious Disease,” dated June 3, 2010 was signed by Dr. [Chief Medical Examiner]. It stated that the deceased third country national “may possibly be infected with a contagious disease.” According to [Logistics Supervisor 1], this letter was included in the envelope taped to the top of the transfer case.

[Major 1] stated that she did not receive any queries or feedback about the email message from the personnel handling the remains en route. Mr. Keel also stated that he received no feedback from the personnel handling the remains en route about any problems or concerns.

Notification of Non-Contagion

According to Dr. [Medical Examiner 4]’s journal entries, he consulted with Dr. [Doctor] at the Infectious Disease Department of the Armed Forces Institute of Pathology. Upon reviewing tissue slides of the granulomas found in the lungs, Dr. [Doctor] “determined that this tissue has no infectious hazard, especially for Mycobacterium tuberculosis.” On July 13, 2010, according to Dr. [Medical Examiner 4]’s journal entries, he emailed “all personnel involved with this case to include OAFME staff (Armed Forces Medical Examiner, Operations, dental, radiology, photographer, assistants, and histo techs), Mortuary staff (Mr. Keel), and CID regarding the non-infectious nature of this case base[d] on infectious disease workup of tissue samples.”

On July 13, 2010, Mr. Keel received an email from Dr. [Medical Examiner 4], stating that test results had been received and the third country national’s remains were determined to not have active TB. When asked what follow-on notification he made to personnel, Mr. Keel responded as follows:

W: I notified [Autopsy/Embalming Technician 3] and all the personnel who had come in contact with that, which included [Major 1], who assisted with the transfer process, so notified her. Just anyone that potentially may have come in contact with him, so they would have that peace of mind that they were not infectious.
IO1: And there was not any attempt to notify the people that may have heard by rumors what happened?
W: No, sir. No, sir. Notified the chain of command and notified all personnel who even had, you know, somewhat – any type of contact.

IO2: Did you do that verbally or e-mail or –
W: Verbally.

[Major 1] indicated that Mr. Keel did notify her verbally that the final tests indicated that the third country national was not positive for TB and that she believed she shared that information with her staff. Mr. Dean testified that Mr. Keel let him know as well. [Autopsy/Embalming Technician 3] testified that Mr. Keel did not have any further discussion with him about the TB case. [Autopsy/Embalming Technician 1] stated that he did not recall any follow-on briefings about the contagious remains or anything else being said about it.

ANALYSIS

Precautionary Measures and Provision of Adequate Warnings

Ms. Spera alleged that Port Mortuary officials failed to take precautionary measures and provide adequate warnings in response to a determination that remains received by the Port Mortuary were possibly infected with TB. Ms. Spera further alleged that procedures that Port Mortuary officials should have taken included shutting down the HVAC system, posting warnings alerting personnel to take precautionary measures and email communications providing details of the incident and information for contacting a health advisor. Based upon the evidence in the record, the IO found that adequate precautionary measures were taken and adequate warnings were given.

The record reflects that the risk of TB infection to Port Mortuary personnel working in triage was very minimal. The IO found that the universal practice in the mortuary industry is to wear appropriate protective gear at all times when handling remains in order to protect against the possibility of infection from remains during their preparation. The wearing of this protective gear is mandated by the Armed Services Public Health Guidelines as well as Port Mortuary SOPs. Under the Armed Services Public Health Guidelines, this protective gear includes an outer, protective garment (preferably impervious to the penetration of aerosols), disposable protective head and shoe wear, rubber or plastic gloves and a protective oral-nasal mask designed to prevent the inhalation of infectious particulates. The record reflects that the medical examiners and Port Mortuary personnel who came in contact with the remains during this time wore appropriate protective gear in accordance with the Armed Service Public Health Guidelines and standard operating procedures.

In addition, according to both Dr. [Chief Medical Examiner], the Chief Medical Examiner for DoD and Dr. [Medical Examiner 2], the risk of human remains with active TB infecting another person in the mortuary center first occurs during autopsy when the lungs are opened up and cut into. Once the potential TB was discovered during autopsy, the medical examiners took immediate precautions (*e.g.*, changing to M95 masks) and provided verbal warnings to the personnel working at the Port Mortuary at the time as to the presence of remains with possible TB.

The record reflects that Mr. Keel, the Director of the Port Mortuary, was aware of the situation and discussed the appropriate precautionary measures needed. Upon notification from

the medical examiner, [Autopsy/Embalming Technician 3] as the autopsy/embalming technician on duty, immediately called Mr. Keel, the Port Mortuary Director and discussed the steps to be taken. While there is some difference in the testimony as to whether [Autopsy/Embalming Technician 3] indicated the steps he was going to take and Mr. Keel provided no input or whether Mr. Keel directed [Autopsy/Embalming Technician 3] to take certain steps, the end result is that Mr. Keel sanctioned the steps taken by [Autopsy/Embalming Technician 3].

After speaking with Mr. Keel, [Autopsy/Embalming Technician 3] took immediate action to isolate the remains in the embalming suite. He wore proper protective gear (including a full-face respirator) while suturing the remains and then placed them in multiple human remains pouches, at least two as recalled by [Autopsy/Embalming Technician 3], but possibly three as stated by other personnel. In either case, the remains were placed in extra human remain pouches because of the possible contagious situation. [Autopsy/Embalming Technician 3] then placed identifying signage on the exterior of the pouches – a biohazard sign on the pouch with the warning “TB+” – and placed the remains in a secure reefer pending shipment. The reefer is accessed only with a key which is controlled by the AFMAO Command Control Center. Mr. Keel directed that the reefer keys were not allowed to be given out to anyone. In addition, Mr. Keel instructed [Autopsy/Embalming Technician 3] to do a thorough sanitation, including using a 110 bleach solution on the equipment, the gurney, the instruments, and everything else used in the autopsy process. [Autopsy/Embalming Technician 3] complied with these directions and alerted the Port Mortuary staff working at the time of the potential danger. He also took other precautionary steps, such as turning off the automatic doors, and telling everyone not to come into the room until he was done. [Autopsy/Embalming Technician 3] also notified other Port Mortuary employees of the presence of the possibly contagious remains upon their arrival to work on Sunday ([Embalmer 2] and [Autopsy/Embalming Technician 1] testified that they were notified by [Autopsy/Embalming Technician 3]; [Autopsy/Embalming Technician 3] testified Ms. Spera was notified on Sunday also).

A sign was eventually placed on the reefer door by Ms. Spera, after she discovered there was potentially contagious remains inside. The sign clearly notified Port Mortuary staff of the possibly contagious remains and to take precautionary measures when entering the reefer. Although Ms. Spera testified she was first notified of the potentially contagious remains on Tuesday, the IO found the preponderance of the evidence indicated she was notified on Sunday.

The record also reflects that Mr. Keel provided [Major 1] (and her staff in the Departures Section) guidance as to the precautions to take within the Port Mortuary, including ensuring that personnel wore protective equipment while handling the remains, and placing the remains in three body bags.

Based on the record and as set forth above, the preponderance of the evidence supports a finding that Port Mortuary employees who handled the remains of the third country national were aware of its possible contagious condition⁶⁶ and took proper precautionary measures. In addition, exposure to the remains (and thus any TB particles) was limited by placing the remains

⁶⁶ While [Autopsy/Embalming Technician 1] testified that he did not see the sign on the reefer door or the markings on the body bags, he did testify that [Autopsy/Embalming Technician 3] told him about the possibly contagious remains.

in a secure reefer with restricted access and by placing the remains in multiple body bags. Those who did come in contact with the body bags were apprised of the condition of the remains by the markings on the body bag.

With regard to the HVAC system, the evidence indicates that the Port Mortuary has two separate systems, one for the autopsy and embalming suites and another for the rest of the Port Mortuary. Dr. [Chief Medical Examiner], as the Chief Medical Examiner for DoD, did not order turning off either of the HVAC systems. Both Dr. [Chief Medical Examiner] and Mr. Dean testified that turning the HVAC system down would be counter-productive, as the HVAC system in the autopsy area was designed to cleanse the air of contagions. The system actually pulls the air out of the autopsy area at a high rate, filters it, and fresh air replaces it. Shutting the HVAC system down would result in the more dangerous situation of leaving potential contagions present in the working areas. Thus, it was reasonable to leave the HVAC system on in the autopsy/embalming area and there was no need to shut the HVAC system down in the remaining parts of the Port Mortuary.

Upon review, while there are general provisions regarding safety and sanitation, no law, rule or regulation was found which details the procedures for Port Mortuary personnel when handling contagious or possibly contagious remains at the Port Mortuary.⁶⁷ However, as discussed above, general rules regarding safety and sanitation were in effect and followed. Thus, with regard to the warnings and precautionary measures, there was no violation of any law, rule or regulation.

Transport of Remains to Kuwait

Ms. Spera also alleged that Mr. Keel and [Major 1] improperly ordered the transport of the possibly contagious remains back to Kuwait through Germany. She contends that the remains should not have been shipped with an instruction to open the transfer case for re-icing because the transfer case was not adequately marked to alert personnel responsible for the re-icing to take precautionary measures. She further contends that the remains should have been embalmed or cremated, depending on the instructions provided by the contractor.

There is no written standard in DoD, Air Force or Port Mortuary rules and regulations which explains how to ship overseas remains that are possibly contagious with TB. Paragraph 1.12.3 of the Armed Services Public Health Guidelines states that where the cause of death was the result of a contagious or communicable disease, the outside of the case containing contagious remains will be marked "CONTAGIOUS." In this case, the remains had not yet been determined to be positively contagious. Moreover, the cause of death was determined to be other than a contagious disease. While the transfer case was not marked as "contagious," documentation in the envelop attached to the outside of the transfer case clearly indicated that the remains were possibly contagious and the body bags inside the transfer case were marked "TB positive" at both the head and the foot of the bag. In addition, Port Mortuary personnel

⁶⁷ Paragraph 1.8.5 of the Armed Services Public Health Guidelines is not applicable in that it involves cases where a deceased person is being imported to the United States and the death was the result of a contagious or communicable disease. That was not the case here. The third country national was leaving the United States and died of causes other than a contagious or communicable disease.

emailed all personnel who would be handling the transfer case with notification that the remains were positive for TB. This was done, according to the testimony in the record, as a worst case scenario.

The record shows that the shipped remains were placed in two or three human remains pouches (body bags) and then placed in the transfer case. There was no requirement for the remains to be removed from the human remains pouches after leaving the Port Mortuary prior to arrival in Kuwait. The re-icing was accomplished without opening the human remains pouches. The testimony from the medical examiners indicated that there was minimal risk to personnel handling the shipped remains as long as only the transfer case is opened and that the body bags were undisturbed so nothing is aerosolized.

The record indicates that the remains were sent to the Port Mortuary for an autopsy by the OAFME. The record did not evidence any request by the contracting company to embalm or cremate the remains at the Port Mortuary. The remains were to be shipped back to Kuwait after the autopsy and the contractor was responsible for preparing and transporting the remains to his home of record for burial. Thus, there was no authorization given to the Port Mortuary to embalm or cremate the remains.

Based upon a preponderance of the evidence, the IO found no violation of law, rule or regulation with regard to ordering the remains to be transported to Kuwait through Germany and to require re-icing in Germany.

Additional Considerations

The record reflects, however, that the Port Mortuary did not follow all the rules and regulations regarding shipping remains overseas. AFI 34-242, paragraph 2.8 requires Port Mortuary morticians to follow the Armed Services Public Health Guidelines, which in turn require morticians to ship remains in compliance with state, federal and foreign health laws. Paragraph 4.2 of SOP 34-242-02, *Administration Branch* requires the Port Mortuary to ensure compliance with the foreign country's special shipping requirements. Paragraph 5.2.3.4 requires the Port Mortuary personnel to contact the receiving country for current requirements if remains are being shipped overseas. In addition, documentation must be notarized and the notarized documents must be submitted to the embassies and consulates for shipping approval. The rule also requires a death certificate and a statement of non-contagious disease.

Paragraph 5.3.3.4 requires, among other things, that the Port Mortuary is required to check the Yellow Book for current shipping regulations. While the Yellow Book lists shipment requirements for many countries, it specifically warns that "it is necessary that the shipping funeral director call the embassy to determine the current regulations."

The third country national was working for an Air Force contractor in Iraq at the time of his death. His remains was being transported back to Kuwait by the Air Force, and according to Ms. Spera would be shipped onward by the employing company for final burial to wherever his home is.

Under the rules and regulations cited above, Port Mortuary personnel were required, at a minimum, to contact Kuwait to determine the current shipping requirements for deceased remains. Based upon the evidence in the record, no one contacted Kuwait to determine the requisite shipping requirements. The evidence also indicates that the requirements for documentation notarization and submission to the embassy and consulate for shipping approval were not done. The failure to contact Kuwait violates AFI 34-242, the Armed Services Public Health Guidelines and SOP 34-242-02. The failure to comply with the other requirements of paragraph 5.2.3.4 results in a violation of SOP 34-242-02. Mr. Keel was both the Port Mortuary Director as well as the acting Chief of the Mortuary Branch. He directed [Major 1], Chief of the Departure Section,⁶⁸ to return the remains to Kuwait and provided her guidance on what to do. As such, Mr. Keel is responsible for the ensuing violations.

The preponderance of the evidence shows that the evidentiary record does not include documentation showing that all the administrative paperwork requirements listed in the Yellow Book were met. Specifically, there was no burial permit, embalmer's letter, or documentation of payment for the consul fee – all listed as requirements in the Yellow Book. The Yellow Book also lists as required paperwork for shipping remains the inclusion of a “non-communicable disease letter.” In lieu of a non-communicable disease letter, the Port Mortuary provided a letter from the medical examiner stating that the remains may be infected with a contagious disease. It is not clear from the record whether a “non-communicable disease letter” requires a statement that the remains are not contagious or whether the letter can simply “advise as to] the condition of the remains” as Mr. Keel contends. The Yellow Book offers no guidance on the meaning of this requirement. We conclude that the most appropriate interpretation of the requirement for a non-communicable disease letter is that such a letter can only be signed when the remains are verified as non-contagious. Because contagious and potentially contagious remains must sometimes be shipped, a warning letter to that effect should be an adequate substitute for a non-communicable disease letter. A warning letter was signed in this case, which arguably meets the intent of that requirement.

The Yellow Book is merely a secondary source, which by its terms indicates that “[w]hen shipping to a foreign country, it is necessary that the shipping funeral director call the embassy to determine the current regulations.” This was not accomplished.

CONCLUSION

Based on the preponderance of the evidence, the IO concluded that adequate warnings were given and appropriate precautionary measures were taken to ensure the risk to Port Mortuary personnel was appropriately minimized. The IO also found that it was not in violation of law, rule or regulation for Mr. Keel to order the remains be shipped back to Kuwait through Germany with instructions to re-ice the remains in Germany. Adequate warnings were given to allow personnel in Germany and Kuwait to take the proper precautions.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

⁶⁸ [Redacted].

The Port Mortuary did, however, violate AFI 34-242, the Armed Services Public Health Guidelines and Port Mortuary SOP 34-242-02 when it failed to contact Kuwait to determine the current shipping requirements for deceased remains. The Port Mortuary also violated SOP 34-242-02 when it failed to notarize and submit documentation to the embassy and consulate for shipping approval. Based on the preponderance of the evidence, Mr. Keel is responsible for the violations of rule and regulation.

Other Conclusions

While the IO concluded that adequate precautionary measures were taken and adequate warning were given regarding the existence of remains potentially contagious for TB within the Port Mortuary, it should be noted that what was missing was any action to issue a general warning to the AFMAO/Port Mortuary staff. The record reflects that no one from the Port Mortuary, including Mr. Keel, the Port Mortuary Director, sent an email out to Port Mortuary staff, advising them of the presence of possibly contagious remains in the Port Mortuary. The record also reflects that no email was sent to Port Mortuary staff notifying them that the results of the TB analysis were negative.

While failing to provide such information did not violate a law, rule or regulation, (nor did such failing result in a substantial and specific danger to public health at the Port Mortuary), Mr. Keel was remiss in attending to the needs of his employees.⁶⁹ Because of the nature of the work and the stress that accompanies it, AFMAO has a Chaplain's Branch and a resiliency program (including mental health support to assure adequate decompression) to assist AFMAO employees handle the stressful work they do. To allay anxiety in an already stressful environment, it would have been considerate and a prudent management practice for Mr. Keel to have sent out emails notifying his staff of the presence of the possibly contagious remains, any precautionary measures needed and the fact that the remains were ultimately found to be non-contagious. However, failing to do so did not violate a law, rule or regulation.

⁶⁹ Likewise, there was no violation of a law, rule or regulation, nor was it a substantial and specific danger to public health at the Port Mortuary, when Mr. Keel did not inform non-AFMAO employees who came to the Port Mortuary for other business, such as the civil engineers. The record indicates that the civil engineers in the Port Mortuary that weekend were working in the reefer (it is unclear which reefer or what exactly they were doing). However, by the time the remains were placed in reefer 4, they had been sutured and bagged multiple times. As such, the civil engineers (or other visitors) would have had little or no exposure to infection in the reefer unless someone opened the bags. Still, it would have been prudent for Mr. Keel to send out a general alert to anyone potentially coming near the remains so additional precautions could have been put in place.

SECTION 4 – IMPROPER TRANSPORT AND PROCESSING OF REMAINS OF MILITARY DEPENDENTS

OSC SUMMARY OF DISCLOSURE INFORMATION

According to the July OSC Referral Letter, Ms. Spera provided the following information to OSC concerning the transport and processing of remains of military dependents.

- (1) According to OSC, Ms. Spera disclosed that Port Mortuary officials have failed to address recurring incidents in which the fetal remains of dependents of military personnel have been shipped to the Port Mortuary for cremation in an unsafe and disrespectful manner, and often lacking the requisite paperwork for disposition.
- (2) Ms. Spera further contends that Port Mortuary management has failed to adhere to applicable regulations, directives, and standard operating procedures in conducting cremations for these remains.⁷⁰ She stated that in February 2010, the Port Mortuary received the fetal remains of an Air Force dependent (Dover Case No. D10-0257) from the U.S. Army Mortuary Affairs Activity-Europe (USAMAA-E). Ms. Spera notified Mr. Keel and AFMAO Mortuary Affairs Director [Mortuary Affairs Division Director] by email that the embalmed fetus had been transported from USAMAA-E wrapped in cotton, inside of a plastic pail, placed in a cardboard box with a pillow. She questioned why the fetus was transported in a manner that afforded no protection in the event there was a load shift or someone stepped on the box. In addition, she advised Mr. Keel and [Mortuary Affairs Division Director] that the remains lacked critical documentation, such as the required medical examiner's certificate granting permission to cremate. She pointed out that pursuant to the Criteria for Disposition of Infant Remains, this fetus, at 24 weeks of gestation, should have a death certificate. As the Port Mortuary had only recently begun performing cremations in December 2009, she questioned which medical authority would be responsible for providing permission to cremate remains in this and future cases. Mr. Keel responded with an email stating, "Not Applicable," and the remains were cremated two days later without a medical examiner's certificate.
- (3) According to Ms. Spera, the Port Mortuary received the fetal remains of another Air Force dependent (Dover Case No. D10-0406) in early April 2010, which was also transported in a cardboard box and lacked the necessary paperwork. She advised [Mortuary Specialist 1], Disposition Branch Chief, AFMAO Mortuary Affairs, and he indicated he would look into the matter. She stated that later in April, the Port Mortuary received two additional fetal remains of Air Force dependents (Dover Case Nos. D10-

⁷⁰According to OSC, Port Mortuary activities are carried out in accordance with Army Regulation (AR) 638-2, *Care and Disposition of Remains and Disposition of Personnel Effects*. Pursuant to AR 638-2, paragraph 2-13, dependents of military personnel, which by definition include children under age 21, are entitled to mortuary benefits. AR 638-2, Appendix C-12, provides that cremation procedures for adult remains apply to neonatal, infant, and child remains. Ms. Spera explained that in each of the cases discussed, the fetal remains of dependents were shipped to the Port Mortuary to be cremated and forwarded to a location designated by the family.

0472 and D10-0473), both of which arrived unembalmed in cardboard boxes. Ms. Spera was not present when these two remains arrived, but [Mortuary Specialist 1] viewed and took photographs of the remains. He relayed to her that he agreed the fetuses should be transported in rigid, secure containers, but noted that there was an “internal squabble” regarding this issue.

- (4) Ms. Spera further alleged that on May 17, 2010, the Port Mortuary received the fetal remains of an Army dependent (Dover Case No. D10-0564) from USAMAA-E, without paperwork. The embalmed fetus was wrapped in a disposable surgical drape and a pinned sheet, in a cardboard box with a pillow. Ms. Spera stated that Mr. Keel forwarded an AFMAO Cremation Authorization Form and death certificate to Port Mortuary personnel, and the remains were cremated on May 19, 2010, with Mr. Keel’s authorization. Ms. Spera was not at work when the remains were cremated and had not reviewed or approved the paperwork. The following day, [Major 1], who performed the cremation, asked her to review the paperwork to ensure that it was complete. According to OSC, Ms. Spera identified several deficiencies and questions and advised [Major 1] that she would not have cremated the remains prior to resolving those issues. Among the deficiencies, Ms. Spera noted that permission to cremate had not been obtained from the Army, as required by Army Directives and the AFMAO, Port Mortuary Standard Operating Procedures (SOPs). The SOPs for Outbound Transportation and Medical Disposal specifically require that “[a]ll U.S. Army cremations performed at Dover require prior written approval from Commander, Casualty and Mortuary Affairs Operations Center (CMAOC).” According to OSC, on May 20, 2010, Ms. Spera contacted [Army Captain], Army CMAOC, and he confirmed that CMAOC requires permission to cremate at the Port Mortuary for all human remains. He further advised her that he did not believe permission to cremate would be granted, as he understood that a moratorium on cremation at the Port Mortuary issued by the Secretary of Defense remained in effect. According to OSC, the whistleblowers are not certain regarding the status of the moratorium.

LAW, RULE OR REGULATION

The Secretary concerned has statutory authority under 10 U.S.C. § 1485 to process the remains of deceased dependents of members of the Armed Forces. DoD Directive 1300.22, *Mortuary Affairs Policy*, February 3, 2000 (certified current as of November 21, 2003), paragraph 4.2, requires that “[r]emains will be handled with the reverence, care, and dignity befitting them and the circumstances.” The Directive does not elaborate on what constitutes the requisite “reverence, care, and dignity befitting them and the circumstances.” Joint Publication 4-06, *Mortuary Affairs in Joint Operations*, June 5, 2006, Chapter I, paragraph 2 also states that “[h]uman remains will be handled with the [sic] reverence, care, and dignity,” but does not further define the terms. Moreover, there are no regulations or rules from any of the Military Service components which define these terms.⁷¹ DoD Instruction 1300.18, *Department of*

⁷¹ See Air Force Instruction (AFI) 34-242, *Mortuary Affairs Program*, April 2, 2008 (Incorporating Change 1, April 30, 2008); Navy Medical Command Instruction (NAVMEDCOMINST) 5360.1, *Decedent Affairs Manual*, September 17, 1987; Army Regulation (AR) 638-2, *Care and Disposition of Remains and Disposition of Personal*

Defense (DoD) Personnel Casualty Matters, Policies, and Procedures, January 8, 2008 (Incorporating Change 1, August 14, 2009), paragraph 4.3 states “[t]he remains of deceased personnel will be recovered, identified, and returned to their families as expeditiously as possible while maintaining the dignity, respect, and care of the deceased as well as protecting the safety of the living.”⁷²

Guidance for issuing death certificates for deaths occurring at Army military treatment facilities in Europe is set forth in Army in Europe Regulation 40-400, *Reporting Births, Deaths, and Diseases*, July 24, 2003. If a dependent dies or is dead upon arrival at an Army military treatment facility in Germany, a DD Form 2064 (*Certificate of Death*) is completed. The physician completes the DD Form 2064 when the cause of death was of a known clinical diagnosis. For other deaths, referred to as “forensic deaths,” the DD Form 2064 can only be completed after autopsy by a pathologist and in coordination with the medical examiner.

Under AFI 34-242, *Mortuary Affairs Program*, April 2, 2008, (Incorporating Change 1, April 30, 2008), paragraph 4.3.1, the Air Force requires the issuance of death certificates for all deceased dependents, specifically including neonatal deaths, stillborn, miscarriages and abortions.

With regard to fetal deaths, Army in Europe Regulation 40-400, paragraph 4, states:

The death of a fetus before it has been completely expelled or extracted from the mother is considered a fetal death, regardless of the length of the pregnancy. Death is indicated when the fetus, after this separation, does not breathe or show any other evidence of life (a heartbeat, umbilical-cord pulse, or definite movement of voluntary muscles) ... In the absence of contrary host-nation laws, the death of a fetus weighing more than 500 grams is considered a stillbirth; the death of a fetus weighing less than 500 grams is considered an abortus. [Military treatment facility] commanders will determine the requirements of host-nation laws. If host-nation laws differ from these criteria, the host-nation laws will be followed. DD Form 2064 is required for a stillbirth, but not for an abortus.

Landstuhl Regional Medical Center (LRMC) Memo 40-45 confirms that at Landstuhl, the death of a fetus weighing less than 500 grams is considered a miscarriage. However, under LRMC Memo 40-45, an exception to policy letter will be accomplished by the hospital commander if the family would like the remains from a miscarriage to be treated as that of a person.

Effects, effective January 22, 2001; and Department of the Army (DA) Pamphlet 638-2, *Procedures for the Care and Disposition of Remains and Disposition of Personal Effects*, December 22, 2000.

⁷² The DoD Directive refers to “reverence, care and dignity.” The DoD Instruction refers to “dignity, respect, and care.” The mission of AFMAO refers to “dignity, honor and respect.” Although each regulation uses slightly different language, we interpret the intent behind all three to be the same.

The Armed Services Public Health Guidelines sets forth the required treatment of neonatal remains. Paragraph 1.9.4.3 of the Guidelines states, “[p]repare stillborn, viewable and noninjectable neonates in the same manner as described above [for full term viewable and injectable neonates], except totally immerse the stillborn or premature neonate in a two percent concentration, by volume, or aldehyde solution.”

Under 10 U.S.C. § 1485, the Secretary concerned may authorize transportation or payment for transportation of the remains of a deceased dependent to the home of the decedent or to any other place appropriate. Further, the Secretary concerned may furnish mortuary services and supplies for a deceased dependent, if practicable and if local commercial mortuary services and supplies are not available or their cost is prohibitive. If the military furnishes mortuary services and supplies for a deceased dependent, Section 1485 requires the family of a deceased dependent to reimburse the military for the expense of those services and supplies.

AFI 34-242 at Table 4.1, provides that human remains located in Europe that are to be sent to the Port Mortuary at Dover AFB will be transported using Air Force aircraft. Unless directed otherwise by the family, the remains will be transported on the first available aircraft, on a space available basis. However, if directed by the family, the Air Force will use a commercial carrier to transport remains directly to a destination of family choice. Paragraph 4.3.2 and Table 4.2 of the same regulation state the Air Force considers the outside shipping container and transfer case used to transport dependent remains as a transportation expense and is provided at government expense. The family does not reimburse the military for any transportation costs.

Under AFI 34-242 paragraph 2.27.1.2, remains, being transported by government aircraft from a mortuary facility in Europe to the Port Mortuary, “should be uncasketed and placed in an aluminum transfer case. No cargo will be loaded on top of transfer cases containing human remains.” This is reiterated at Table 4.2 which states “[i]f a government mortuary prepares the remains and Dover Port Mortuary reprocesses” then “[r]emains will be returned to Dover Port Mortuary in a transfer case.” There is no exception for fetal, infant, or child remains and there is no reference to how remains should be shipped if sent to the Port Mortuary for cremation.

Army Regulation (AR) 638-2, *Care and Disposition of Remains and Disposition of Personal Effects*, effective January 22, 2001, paragraph 6-5, states that “the Army will provide the transfer case regardless of the Service to which the deceased belonged if the remains are prepared in an Army mortuary.” Paragraph 6-5a provides that

[T]ransfer cases will be used when adult-sized remains of eligible deceased (including adult reimbursable cases) covered by this regulation are prepared in an Army mortuary outside of the United States and shipped to a port mortuary in the United States. (This does not preclude use of a locally produced casket for shipment of remains to the United States when this procedure is advantageous to the U.S. Government.) A transfer case may be used to ship remains of an eligible dependent infant or child to the port mortuary in the United States; this is provided if a suitable casket (infant- or child-type) is not available. The transfer case will not

be used to ship remains beyond the port mortuary in the United States.

With regard to paperwork, AFI 34-242 at Table A3.3 lists the mortuary case file format for a dependent case and includes the categories of documents that should be included in the case file:

Table A3.3. Case File Format for Other Categories of Eligible Decedents.

Front of file	Table of contents
Tab 1	All Message Traffic
Tab 2	Air Force form 969, confirmation letter, or DD Form 2065 if death is overseas
Tab 3	All identification documents
Tab 4	DD Form 2063 or 2062
Tab 5	Department of the Army or Navy Forms if used
Tab 6	Payment documents, copies of purchase and delivery orders, paid vouchers, and any other document relating to expenses
Tab 7	AF Form 140, Cremation Authorization and Disposition of Remains Request
Tab 8	DD Form 1300, DD Form 2064 and/or copy of state death certificate
Tab 9	Chronological log of events
Tab 10	Any other document you feel is necessary. Contents of this tab will be listed in the table of contents

Army Regulation 638-2 at Table 1-6 lists documents commonly prepared or obtained when disposing of remains. That table reads as follows:

Table 1-6
Documents commonly prepared or obtained in disposition of remains

Verification of status	Recovery and identification of remains	Preparation of remains	Disposition of remains	Shipment of remains	Travel orders	Financial	Summary court martial report
1. Initial casualty report	1. DA Form 2773 with—	1. DD Form 2062 (Note 5)	1. DA Form 7302	1. Government Bill of Lading	1. DD Form 1610	1. SF 1034	1. Appointing order
2. Supplemental casualty report	a. DD Form 565	2. Mortuary service contract with GPL (Note 5)	2. DA Form 5329	2. Message, e-mail and related correspondence	a. Escort	2. DD Form 1375	2. Transportation order
3. DD Form 1300	b. DD Form 890	3. DD Form 2063 (Note 6)	3. Special escort request		b. Funeral travel	3. SF 1080	3. Letters to the PERE
4. Enlistment contract (Note 1)	c. DD Form 891	4. Message, e-mail and related correspondence	4. Flag case memo		2. ITO	4. PADD's funeral and interment service contract with GPL	4. Will
5. DA Form 5328 (Note 2)	d. DD Form 892		5. Family Arranged memo		a. Escort	5. Certificate of determination	5. Sale of PE documents
6. DA Form 5327 (Note 2)	e. DD Form 893		6. DD Form 93		b. Funeral travel	6. DD Form 1131	6. Receipts
7. Request from U.S. Department of State (Note 3)	f. DD Form 894		7. DA 2386		3. Message, e-mail and related correspondence	7. IMPAC credit charge sales slip with—	7. Letters to creditors
8. Installation commander's statement (Note 4)	g. DA Form 5520		8. DA Form 5330			a. DA Form 3078	8. Letters to other interested parties
9. Message, e-mail and related correspondence	h. FD 258		9. Disposition memorandum from TAPC-PED-D (Note 4)			b. Cash register receipt	9. Certificate of destruction or withdrawal
	2. Civil death Certificate		10. Family arranged memorandum (Note 7)			8. Message, e-mail and related correspondence	10. Inventory of PE held by civil or military law enforcement authorities
	3. DD Form 2064		11. Message, e-mail and related correspondence				11. Inventory of PE
	4. CILHI Identification Memorandum						a. DA Form 54
	5. AFIRB Findings						b. DD Form 1076
	6. Message, e-mail and related correspondence						12. Shipping documents
							13. Message, e-mail and related correspondence

Notes:

- (1) Only for applicants for enlistment
- (2) Only for DA or DOD civilian employee
- (3) Only for other U.S. citizens outside the United States
- (4) Only for indigents and other unclaimed remains on a military installation
- (5) Only for mortuary services provided by contract mortuary
- (6) Only for mortuary services provided by Arm Service mortuary
- (7) Only when family arranges disposition prior to briefing.

AFMAO Port Mortuary Division Standard Operating Procedure (SOP) 34-242-04, *Crematory Section* (referred to hereinafter as SOP 34-242-04 or Crematory Section SOP) was issued and became effective on November 1, 2009. The SOP was signed and certified by Mr. Keel as the Office of Primary Responsibility (OPR). The SOP indicates at the beginning of the document and at the end immediately before Mr. Keel's signature, that "compliance with this publication is mandatory." The SOP "will be used as guidance for all personnel authorized access to the Crematory. It is designed to provide operational guidance and outline procedures routinely encountered during daily operations." The SOP also supersedes all prior versions of the procedures contained therein.

Paragraph 1.2 of the Crematory Section SOP, sets forth the Port Mortuary documentary requirements needed before remains can be cremated. The requirements listed are as follows:

- 1.2.1 Release of Remains from the Office of the Armed Forces Medical Examiner, State Medical Examiner, or other cognizant medical authority certifying cause of death.
- 1.2.2 Authorization to Cremate from the Office of the Armed Forces Medical Examiner, State Medical Examiner, or other cognizant medical authority certifying cause of death.
- 1.2.3 Disposition Instruction from Service Casualty or Mortuary officer assisting the family.
- 1.2.4 Completed AFMAO Cremation Authorization Form.
- 1.2.5 Burial Transit Permit.

The Crematory Section SOP emphasizes the requirements in paragraph 1.3, which states “[s]torage is authorized for a reasonable length of time. **Under no circumstances will a cremation be performed without completion of all items listed in section 2 above**” (emphasis appears in the SOP). The term “section 2” references the five requirements listed in paragraph 1.2. Further, these same five requirements are listed on the second page (entitled “Policy and Procedures”) of the sample AFMAO “Cremation Authorization” form found at Appendix 1 of that SOP.

MOMS incorporates these same requirements. Paragraph 9.1 of SOP 34-242-04 (the chapter explaining entries into MOMS) states, “[w]hen it is determined that remains will be cremated at Dover, the following actions must be taken in the Mortuary Operations Management System (MOMS).” The listed requirements include the following:

- subparagraph 9.1.1.1: “A check mark will be applied to the ‘ME (Medical Examiner) Authorization Required’ and ‘Family Authorization Required’ fields in the expanded ‘Disposition Information’ screen below;”
- paragraph 9.2: “Before remains can be scanned to the Crematory Station location in MOMS, the Cremation Officer must receive the cremation authorizations from the Medical Examiner’s Office and the family PADD;”
- paragraph 9.3 requires the Cremation Officer to scan and upload those authorizations to MOMS;
- paragraph 9.4 requires a second person verify those authorizations were successfully uploaded; and
- paragraph 9.6.1 advises the Crematory Operator to check for these authorizations in MOMS and if “any information is missing on the Authorizations tab, STOP and contact the Cremation Officer immediately” (emphasis appears in the SOP).

AFMAO Port Mortuary Division SOP 34-242-02, Section 2, *Outbound Transportation and Medical Disposal*, effective on July 19, 2009, stated at paragraph 5C1.1, “[a]ll US Army cremations performed at Dover require prior written approval from Commander, Casualty and Mortuary Affairs Operations Center (CMAOC).” Under paragraph 5F.4, it was stated “[a]ll US Army cremations performed at Dover require prior written approval from Commander, (CMAOC). Cremation MUST not occur until authorization is granted in writing” (emphasis appeared in the SOP).

On April 1, 2010, AFMAO Port Mortuary Division SOP 34-242-02, *Administration Branch*, became effective. This new SOP set forth procedures for, among other things, shipping and medical disposal. By its terms, the new SOP superseded all prior versions of these procedures which would include the July 19, 2009 SOP referenced above. The current SOP 34-242-02 does not include the provision regarding prior written approval from CMAOC.

The State of Delaware requires the chief medical examiner or an assistant or deputy medical examiner to complete a special cremation permit prior to the cremation of a human body, the purpose of which affirms that there is no medical reason not to cremate the remains. *See* 16 Del.C. § 3159. Delaware law also requires a death certificate and a cremation authorization form signed by the next of kin or legal representative of the deceased prior to the cremation of a human body. *See* 16 Del.C. § 3159.

The crematory at the Port Mortuary is located on Dover AFB and is operated by the military. Being federally owned and operated, the operation of the crematory is not subject to the jurisdiction of Delaware law or regulation, with the exception of air quality standards. The Air Force conferred directly with the Delaware State Board of Funeral Services and the Delaware Attorney General's office, and both agencies agreed that the Port Mortuary is not subject to Delaware state law or regulation regarding cremation processes.

SUMMARY OF EVIDENCE

Background

In 2008, the Air Force began implementing plans to construct a crematory at the Port Mortuary. Prior to that, no crematory was owned or operated by any component within DoD. On June 18, 2009, Dover AFB was granted approval by the Delaware Department of Natural Resources and Environmental Control to construct a crematory on the base premises. The crematory at the Port Mortuary became operational in November 2009.

On November 1, 2009, Mr. Keel issued SOP 34-242-04⁷³ which defined the scope, organization and responsibilities of personnel assigned to the Crematory Section of the Port Mortuary Division. Mr. Keel testified that the Port Mortuary applied Delaware state law and the Cremations Association of North America (CANA) standards to their cremation processes. He stated the Port Mortuary Crematory Section SOP was drafted based on those standards, and that the SOP was written consistent with Delaware state law.⁷⁴

The remains of military dependents who die in Germany are often processed at a military mortuary operated by the Army in Landstuhl, Germany. Prior to the opening of the Port

⁷³ Ms. Spera testified that in February 2010, the SOPs at the Port Mortuary were not readily available to her.

⁷⁴ When questioned by AFOSI, Mr. Keel stated that the Port Mortuary chose to follow Delaware state standards (although the Port Mortuary as a federal entity is not required to follow state law in this instance). Mr. Keel stated that there were only limited requirements for cremations under Delaware law. Specifically, he stated the Delaware legal limits were that first, animal and human remains may not be cremated together, second, no more than one human's remains may be cremated at a time, and third, every attempt will be made to recover all ashes prior to conducting another cremation.

Mortuary crematory, military families living in Germany in need of crematory services would often use a German crematory in Frankfurt or Mannheim. However, once construction was completed, USAMAA-E began facilitating the use of the Port Mortuary crematory for military families in need. In doing so, USAMAA-E would package and ship human remains to the Port Mortuary for cremation. USAMAA-E would also help military families complete the administrative steps necessary to process the remains at the Port Mortuary, such as completing required paperwork.

According to [Army Mortuary Officer 2],⁷⁵ a USAMAA-E mortuary officer and Mr. Parsons, an autopsy/embalming technician at the Port Mortuary and former employee at USAMAA-E, once the crematory at the Port Mortuary opened, USAMAA-E began shipping fetal remains to the Port Mortuary. [Army Mortuary Officer 2] stated that all fetal remains weighing more than 500 grams are considered a person and treated as such. [Army Mortuary Officer 2] also stated the military will treat fetal remains weighing less than 500 grams as a person, if the family so desired.

Mr. Parsons testified to the same effect. Mr. Parsons indicated that fetal remains not being treated as the remains of a person were disposed of by the medical treatment facility as medical waste. According to Mr. Parsons, “if they’re not treated as a person, then they will go ahead and they would either never come to the mortuary and be treated as medical waste in the hospital ... if they shipped them to us and they were going to be cremated, they were going to be treated as a person.”

Ms. Spera alleged that five fetal remains were shipped from USAMAA-E to the Port Mortuary for cremation between February 2010 and May 2010 in an unsafe and disrespectful manner, and often lacking the requisite paperwork for disposition. The five fetal remains were identified by her as being associated with Dover Case Nos. D10-0257, D10-0406, D10-0472, D10-0473, and D10-0564. She explained that she identified discrepancies for each of the five cases and it was Mr. Keel’s job to ensure the discrepancies were corrected prior to any cremations being conducted.

From November 2009 through October 2010, Mr. Keel served as the Port Mortuary Director as well as the acting Branch Chief for the Port Mortuary Branch. The Port Mortuary Branch had responsibility for cremating the fetal remains at issue here. The record indicates that Mr. Keel served as the Cremation Officer for all five of the fetal cases at issue here. The Cremation Officer schedules the date of cremation, validates documentation, oversees the quality assurance process, conducts MOMS cremation data entry, and coordinates disposition of cremated remains.

According to Mr. Dean, the AFMAO Deputy Director, Mr. Keel’s division is charged with mortuary inspector duties for all remains that have been prepared (embalmed) and shipped to the Port Mortuary. “There is a reporting mechanism in place to notify shipping mortuaries of any deficiencies and corrective action taken. It is at Mr. Keel’s discretion to notify the command section of any instances that may require coordination at that level.”

⁷⁵ [Army Mortuary Officer 2] has been a licensed funeral director in Utah since 1994. He has been a civilian mortuary officer with the Army for six years, all served at the Landstuhl mortuary in Germany.

Packaging and Shipping

Mr. Keel stated that prior to the crematory being opened at the Port Mortuary, fetal remains would be sent from USAMAA-E in infant caskets. Mr. Keel explained that because there was no crematory there at that time, employees at the Port Mortuary would process the fetal remains and forward them inside the casket to the family's receiving funeral home or civilian crematory. Mr. Keel testified that soon after the crematory at the Port Mortuary opened, USAMAA-E began sending fetal remains there for cremation. However, Mr. Keel stated "when [USAMAA-E] started sending [fetal remains] here for cremation is when we started to see the change" from using infant caskets to shipping fetal remains in cardboard boxes.

Mr. Parsons testified similarly, stating that prior to the opening of the crematory at the Port Mortuary, USAMAA-E would ship fetal remains to the Port Mortuary in infant caskets. Mr. Parsons described these infant caskets as being made of wood, and that the infant caskets would properly protect the fetal remains in shipment.

Ms. Spera testified as to her observations of the packaging of fetal remains in the five cases. She explained the fetal remains were packaged in plastic containers, which in turn were shipped in cardboard boxes. She described the plastic containers as "like about a half gallon of ice cream size tub. They're packed in that. There was cotton laid around the fetus, under and over, and then there – the tub was placed in a cardboard box and there was a pillow placed in the cardboard box also." Further, she stated that the plastic containers were medical containers used by hospital staff, and the pillows were used for cushioning in shipment.

Ms. Spera testified that the problem with the packaging of these fetal remains was "that if a load shifted or somebody was walking by and lost their balance, if they had stepped on it, they would have crushed the fetus." Further, she opined that "it just lacks dignity, honor and respect." There was no evidence that any fetal remains were actually damaged in shipment.

Ms. Spera testified that she made both Mr. Keel and [Mortuary Specialist 1]⁷⁶ aware of fetal remains being shipped in inadequate containers. She indicated that most of the cases were Air Force dependents "so that's why [Mortuary Specialist 1] was – was made aware" since he is the Chief of the Entitlements Branch at AFMAO.

[Mortuary Specialist 1] testified that he saw the containers holding the fetal remains associated with Dover Case Nos. D10-0472 and D10-0473 after their arrival at the Port Mortuary in April 2010. He testified "[t]hey were in plastic, sealed lid, round container that was placed inside what I would call about a one and a half cube cardboard box with stuffing around the outside. It was a cardboard box." [Mortuary Specialist 1] was asked whether he believed the fetal remains he saw were packaged appropriately. He responded "I had high questions on that.

⁷⁶ [Mortuary Specialist 1] has been the Chief of the Entitlements Branch at AFMAO since 2009. Prior to 2009, he worked (from 2004 to 2009) as a civilian mortuary specialist for the Air Force Mortuary Affairs in San Antonio, Texas. He has been a licensed funeral director-embalmer in Texas since 1984. [Mortuary Specialist 1] previously was on active duty with the Navy as a mortician and served as Deputy of the Navy Mortuary Affairs.

Personally, no.” [Mortuary Specialist 1] stated that he directed that photographs be taken of the boxes because of his concerns with how the fetal remains were packaged.

Mr. Parsons stated he also saw the same two boxes witnessed by [Mortuary Specialist 1]. Mr. Parsons confirmed the description of the plastic containers, stating that “someone else called them like margarine containers,” and stated that one of the plastic containers he saw was not closed properly. Mr. Parsons testified that “[t]he plastic containers were not rigid, they were almost like an ice cream container type, not – they weren’t ice cream containers, but the type you would see, like plastic ice cream containers ... it’s not going to protect the fetuses very well.” Mr. Parsons also provided a description of the cardboard boxes, stating the boxes were “pretty much like a packing box, not reinforced, not like a tri-wall container or anything like that for – for – that you would send shipping. Something you might receive a package at your house in.” He further stated that the two boxes he saw appeared re-used.

Drawing on his personal experience, [Mortuary Specialist 1] stated that fetal remains should have been shipped inside an infant casket.⁷⁷ [Mortuary Specialist 1] used to work as a mortician with the Navy in Europe and had a different practice with shipping fetal remains than USAMAA-E was using. He stated that the fetal remains should have been placed in an infant casket, which “in turn, is put in a shipping box which can also be utilized as the outer burial container ... If that has to then in turn be placed in a transfer case because of the way the terminal wishes to have it presented to them, that’s fine. But those two fetuses should have been prepared and not released from the Landstuhl mortuary in anything other than a casket.” [Mortuary Specialist 1] further explained in his prior position with the Navy, the infant casket and shipping container would be paid for by the Navy as a transportation expense. [Mortuary Specialist 1] said he took his concerns to Mr. Keel.

Mr. Keel was aware of “a couple of situations” regarding how fetal remains were arriving from USAMAA-E. He stated fetal remains were arriving “in different ways. They may be in just a cardboard box with padding inside, a sealed container within there.” Mr. Keel stated “our concern was that it wasn’t very dignified and it may not protect the remains as much as we would like during the transportation process.” Mr. Keel also opined the cardboard containers used were “improper” and that sturdier containers should have been used. Further, he stated that the packaging should have been improved, that there should have been “[a] little bit more proper packing. Instead of, you know, of sheets instead of packing materials, just more dignified.”

The record reflects that Mr. Keel was copied on an email sent by Ms. Spera on May 17, 2010 regarding Dover Case No. D10-0564 which included, among other things, the following statement:

We received an embalmed fetus from USAMAA-E yesterday which is [the fetal remains of an Army dependent]. The fetus was wrapped in a disposal surgical drape and pinned sheet. The [fetal remains] was then placed into a cardboard box with a pillow on top

⁷⁷ [Embalmer 1], an embalmer at the Port Mortuary shared [Mortuary Specialist 1]’s opinion that fetal remains should have been shipped in an infant casket and shipping container.