

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2009-10-29-02 / NON-PRECEDENTIAL
ID: SJ-09-004-H
DATE: OCTOBER 29, 2009
DISPOSITION: DENIED
TAX TYPE: MOTOR VEHICLE / PERSONALIZED TAG
APPEAL: NO APPEAL TAKEN

ORDER

The above matter comes on for entry of a final order of disposition by the Oklahoma Tax Commission. Having reviewed the files and records herein, including the Findings of Fact, Conclusions of Law and Recommendations made and entered by the Administrative Law Judge on the 18th day of June, 2009, the Commission denies the application of the Motor Vehicle Division for a hearing en banc and makes the following Findings of Fact and Conclusions of Law and enters the following order.

STATEMENT OF THE CASE

The Applicant appeals from a denial of the Motor Vehicle Division of the Oklahoma Tax Commission to approve his application for a personalized license plate bearing the letters "IM GAY."

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the briefs and the transcript of the hearing, the undersigned finds:

1. On April 6, 2009, the Applicant contacted the Division by telephone and inquired why a "personalized" license plate ("PLP") with the letter combination "IM GAY" was not available. The Applicant was informed by telephone that the letter combination could not be issued because it violated the Tax Commission Rule prohibiting the issuance of any PLP which may be offensive to the public.¹

2. On April 6, 2009, the Applicant presented an "Original" PLP Application ("Application") and paid the remittance of Twenty-two Dollars (\$22.00) to the Division for processing. The Applicant's only choice on the Application was "IM GAY."²

3. SUPERVISOR, Supervisor, Special Tag Section of the Motor Vehicle Division, consulted her Administrator (ADMINISTRATOR) and the Motor Vehicle Division's Deputy Director (DIRECTOR) about the decision to deny the Application.³

¹ Tr. at 4-5.

² Division's Exhibit A.

³ Tr. at 9.

4. On April 6, 2009, the Division, through SUPERVISOR, advised the Application would be denied. At the request of the Applicant, SUPERVISOR presented the Applicant a letter⁴ denying the Application, which states in pertinent part, as follows, to-wit:

Please be advised pursuant to the Oklahoma Tax Commission promulgated rule (copy enclosed) 710:60-3-150(d), "No special license plate will be issued which may be offensive to the general public."

It has been determined your special license plate is in violation of this guideline....

5. On April 8, 2009, the Applicant hand-delivered a timely written protest to the Division's denial of the Application.⁵

6. The front page of an application ("Form 749") contains the following in bold type above an applicant's six (6) choices for a PLP: "**Any special plate request deemed to be offensive to the general public will not be issued.**"⁶ The instructions on the back page of Form 749⁷ state in pertinent part, as follows, to-wit:

Your choices may be:

- 1) a combination of 4 letters minimum and up to 3 numbers maximum (i.e. ABCD123 or 13-ABCE), or
- 2) may be any combination of intermingled letters and numbers (i.e. AB12C or 1A7), or
- 3) may be between 1 and 7 letters, or
- 4) 7 numbers

The only punctuation available is a hyphen or space. No other punctuation or symbols can be used. Plates considered to be offensive to the general public will not be issued....

⁴ Division's Exhibit B. The denial letter incorrectly states the Application is a "Renewal" instead of an "Original." Tr. at 19.

⁵ Division's Exhibits C and D. On the protest is SUPERVISOR'S hand-written notation that the protest was received April 8, 2009.

⁶ Division's Exhibit A.

⁷ The Administrative Law Judge is taking judicial notice of Form 749 to complete the factual details and background of this protest. OKLA. ADMIN. CODE § 710:1-5-36 (June 25, 1999). Form 749 is available on the Tax Commission website at <http://www.oktax.state.ok.us> (Last visited May 11, 2009).

7. The Tax Commission has not promulgated any specific guidelines to determine what PLP's may be offensive to the general public.⁸

8. The Division does not have any standard policy, written or otherwise, to determine whether a PLP request may be offensive to the general public, including sexual connotations.⁹

9. Any Encoder, including SUPERVISOR, can utilize the Division's "Slang Dictionary" or perform a "Google" search when processing a Form 749. An Encoder usually consults SUPERVISOR or her Co-Supervisor, their Administrator (ADMINISTRATOR), and/or the Division's Deputy Director (DIRECTOR).¹⁰

10. The determination of whether a Form 749 request may be offensive to the general public is made by the Encoder based upon his or her own personal perceptions and ideas, which vary from person to person, or the applicant's name (first/last), initials, gender, occupation or what may be the applicant's personal interpretation of the request.¹¹

11. At hearing, the Division articulated three (3) "unofficial" categories of PLPs which may be offensive to the general public: "Sexual Connotations," "Racial or Ethnic Comments," and "Cuss Words."¹²

12. The Division automatically deems anything that could be read as saying "Gay" or "Lesbian" as being deemed offensive,¹³ but it would issue a PLP saying "GAY" if that was the applicant's name.¹⁴

13. The Applicant does admit "IM GAY" could denote sexual orientation or preference, which could have a sexual connotation, just as "Straight" does, but denies that his sexual orientation may be offensive to the general public.¹⁵

⁸ Tr. at 8.

⁹ Tr. at 8-9.

¹⁰ Tr. at 26.

¹¹ Tr. at 10-25.

¹² Tr. at 23-25.

¹³ Tr. at 23.

¹⁴ Tr. at 25.

¹⁵ Tr. at 4 and 7.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.¹⁶

2. Section 1135.4 of Title 47 (“Statute”)¹⁷ provides in pertinent parts as follows, to-wit:

A. The Oklahoma Tax Commission is hereby authorized to design and issue personalized license plates....

B. Such plates shall be designed and issued for the following:

1. Any person in any combination of numbers or letters from one to a maximum of seven;

3. The Tax Commission promulgated Tax Commission Rule 710:60-3-150 (“Rule”)¹⁸ to implement and administer the Statute, which addresses the application process for ordering all “Special” License Plates, including PLPs, and which reads in pertinent part as follows, to-wit:

(a) **General provisions.** Applications for ordering all types of personalized and special license plates, authorized by statute, may be obtained from the Oklahoma Tax Commission or from any motor license agency.

...

(c) **No conflict policy.** No special license plate can be issued which conflicts with the regular plate numbering system.

(d) **Non-offensive content policy.** No special license plate will be issued which may be offensive to the general public.

...

4. The rules promulgated pursuant to the Administrative Procedures Act¹⁹ are presumed to be valid and binding on the persons they affect and have the force of law.²⁰

¹⁶ OKLA. STAT. ANN. tit. 47, §1135.4 (West 2008) and OKLA. ADMIN. CODE § 710:60-3-150 (July 1, 2008).

¹⁷ *Id.* See OKLA. STAT. ANN. tit. 47, § 1113(A) (West Supp. 2009), which in pertinent part states:

...The license plate and decal shall be of such size, color, design and numbering as the Tax Commission may direct....

¹⁸ OKLA. ADMIN. CODE § 710:60-3-150 (July 1, 2008)

¹⁹ OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2002).

²⁰ See *Toxic Waste Impact Group, Inc. v. Leavitt*, 1988 OK 20, 755 P.2d 626.

5. The Tax Commission, as an administrative agency, is powerless to strike down a statute for constitutional repugnancy. The authority to invalidate an unconstitutional enactment resides solely in the judicial department.²¹

6. Every statute is constitutionally valid until a court of competent jurisdiction declares otherwise.²²

7. Great weight is accorded an agency's construction of a statute when the administrative interpretation is made contemporaneously with the enactment of the statute and the construction is longstanding and continuous by the agency charged with its execution.²³

8. Where the Legislature is made repeatedly aware of the operation of the statute according to the construction placed upon it by an agency and the Legislature has not expressed its disapproval with the agency's construction, the Legislature's silence may be regarded as acquiescence in the agency's construction,²⁴ and the agency's construction is given controlling weight and will not be disregarded except in cases of serious doubt.²⁵

9. The rules and regulations of an administrative agency which implement the provisions of a statute are valid unless they are beyond the scope of the statute, are in conflict with the statute or are unreasonable.²⁶

10. Agency rules need not be specifically authorized by statute, but must generally reflect the intent of the Legislature as expressed in the statute.²⁷ As a rule, it is presumed that administrative rules and regulations are fair and reasonable and that the complaining party has the burden of proving the contrary by competent and convincing evidence.²⁸

11. In all proceedings before the Tax Commission, unless otherwise provided by law, the taxpayer has the burden of proof.²⁹

²¹ *Dow Jones & Company, Inc. v. State ex rel. Oklahoma Tax Commission*, 1990 OK 6, 787 P.2d 843.

²² *Id.* See OK Const. Art. 7, § 1.

²³ *Schulte Oil Co., Inc. v. Oklahoma Tax Commission*, 1994 OK 103, 882 P.2d 65.

²⁴ *R.R. Tway, Inc. v. Oklahoma Tax Commission*, 1995 OK 129, 910 P.2d 972.

²⁵ *Cox v. Dawson*, 1996 OK 11, 911 P.2d 272.

²⁶ *Arkansas Louisiana Gas Co. v. Travis*, 1984 OK 33, 682 P.2d 225. See *Boydston v. State*, 1954 OK 327, 277 P.2d 138.

²⁷ *Jarboe Sales Company v. Oklahoma Alcoholic Beverage Laws Enforcement Commission*, 2003 OK CIV APP 23, 65 P.3d 289.

²⁸ *State ex rel. Hart v. Parham*, 1966 OK 9, 412 P.2d 142.

²⁹ OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

12. The Division's action is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.³⁰

CONSTITUTIONAL ISSUES

“Whether the Oklahoma Tax Commission's interpretation and application of promulgated Rule 710:60-3-150(d) as it relates to APPLICANT'S application for a license plate stating 'IM GAY' is viewpoint specific and therefore unconstitutional.”³¹

Whether the Rule is unconstitutionally vague, allowing OTC personnel the opportunity to enforce the rule according to their personal prejudices.³²

DISCUSSION

The Applicant's first contention is the Division erred in its interpretation and application of the Rule in violation of his First Amendment rights, as applicable to the states through the Fourteenth Amendment. Specifically, the Applicant contends the Division is interpreting and applying the Rule in a manner that is viewpoint specific and therefore unconstitutional.

The Applicant's second contention is the Rule is unconstitutionally vague, allowing the Division's personnel the opportunity to enforce the Rule according to their personal prejudices.

The Division responds to the Applicant's constitutional arguments by stating that the Tax Commission as an administrative agency is powerless to strike down a *statute* or *rule* as repugnant to the freedom of speech provisions of the U.S. Constitution and Oklahoma Constitution. However, the Division asserts that the provisions of the Rule and the Division's application of the Rule in this case do not violate the Applicant's First Amendment rights to free speech.

In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999), provides in pertinent part:

. . . “preponderance of the evidence” means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

³⁰ See *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

³¹ Applicant's Brief at 1.

³² Applicant's Brief at 4.

In support of its constitutional argument, the Division cites the Supreme Court of Oklahoma in *Dow Jones*, which held, “We agree with the Commission that, as an administrative agency, it is powerless to strike down a statute for constitutional repugnancy. Within the framework of Oklahoma’s tripartite distribution of government powers, the authority to invalidate an unconstitutional enactment resides *solely* in the judicial department. Art. 7, § 1, Okl. Const. confers on administrative agencies only that quantum of ‘judicial power’ which is necessary to support their exercise of adjudicative authority in individual proceedings brought before them. The power assigned to boards and commissions is not coextensive with that which is vested in the courts. Every statute is hence constitutionally valid until a court of competent jurisdiction declares otherwise.”³³

CONCLUSION

The Division’s position is supported by ample Oklahoma case law. The Rule is deemed constitutionally valid until a court of competent jurisdiction determines otherwise.

NON-CONSTITUTIONAL ISSUE

Whether the Division properly denied the Application for a PLP in the letter combination “IM GAY,” pursuant to the Rule, as offensive to the general public.

DISCUSSION

The Administrative Rules of the Oklahoma Tax Commission provide that the burden of proof of showing that the Division erred in application of the Rule that a specialized license plate shall be denied if it may be offensive to the general public is on the Applicant.³⁴ The only evidence submitted by the applicant as to whether a license plate in the letter combination “IM GAY” may be offensive to the general public is the testimony of the applicant that he did not think his orientation was any more offensive to the general public than a straight person’s orientation.³⁵ No other evidence as to whether the plate may be offensive to the general public was presented. There were no surveys presented, no expert witness was called, no treatises or scholarly documents were introduced into evidence regarding what might or might not be offensive to the general public.

In 1995 the Oklahoma Tax Commission issued OTC Order No. 1995-03-23-014 which denied a taxpayer’s request for a personalized license plate. In that order the Tax Commission adopted the test used by the California court in the case of *Kahn v. Dept. of Motor Vehicles*, 20 Cal. Rptr.2d 6, 13 (Cal. App. 2 Dist. 1993) to determine whether a tag was offensive. “The standard . . . is not the intention of the tag’s owner by his choice of words, but what people of ordinary intelligence would understand from the use of the word.” The only evidence on the

³³ See Note 46, *supra*. (Citations omitted). (Emphasis original).

³⁴ OKLA ADMIN. CODE § 710:1-5-47

³⁵ Tr. at 4

tag's offensiveness presented by the applicant in this matter was evidence of the tag's offensiveness (or lack thereof) to the applicant. There was no evidence presented of the tag's offensiveness from an objective standard to people of ordinary intelligence.

The applicant places great emphasis on the process used by the Division in arriving at its determination of whether or not the tag may be offensive to the general public. The Rule of the Tax Commission does not require that any particular process be used in arriving at a determination of offensiveness. The test adopted by the Tax Commission in its 1995 order does not require the adoption of a particular process. It provides that an application for a tag which may be viewed as offensive to the general public from an objective basis may be denied even if the tag would not be offensive to the applicant or to some other person with knowledge or viewpoints not held by the general public. It is worth noting that in the Tax Commission order which adopted the *Kahn* test there is no discussion of the process used by the Division in arriving at its determination. The only issue of concern to the Tax Commission was whether a tag might be seen as offensive by the general public regardless of what the applicant intended.

The relevance of the *Kahn* test to this proceeding is that it limits the type of evidence which should be considered in determining if the Applicant has met his burden of proof. It precludes consideration of Applicant's testimony that he does not consider his orientation offensive, just as the Tax Commission in its 1995 order refused to consider the intention of the tag's owner.

The question before the Commissioners in this matter is not whether any or all of the individual Commissioners personally find the proposed license plate offensive, but whether the Applicant has submitted evidence sufficient to meet his burden of proof that the Motor Vehicle Division's determination that the proposed license plate may be offensive to the general public is in error.

The burden of proof in this matter is not on the Division to show that the plate applied for may be offensive to the general public. The burden of proof is on the applicant to show that the plate is not offensive to the general public. The evidence presented by the Applicant is wholly insufficient to meet that burden of proof.

DISPOSITION

The Oklahoma Tax Commission orders that the protest to the Division's denial of the Application for a personalized license plate to read "IM GAY" is denied.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.