JURISDICTION: **OKLAHOMA TAX COMMISSION**
CITE: **2011-02-22-05 / NON-PRECEDENTIAL**
ID: **SJ-10-006-H**
DATE: **FEBRUARY 22, 2011**
DISPOSITION: **DENIED**
TAX TYPE: **SPECIAL LICENSE PLATE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

APPLICANT[1] ("Applicant") appears pro se.[2] The Motor Vehicle Division ("Division"), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On October 27, 2010, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*[3] and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.[4]

On November 3, 2010, OTC ATTORNEY filed an Entry of Appearance as Counsel of record for the Division. On November 12, 2010, the Division filed by electronic transmission, a copy of the envelope containing OTC ATTORNEY'S introductory letter and Entry of Appearance mailed to the Applicant at ADDRESS 1, which had been returned by the United States Postal Service as "Return to Sender/Attempted-Not Known/Unable to Forward." On November 15, 2010, OTC ATTORNEY filed an Amended Entry of Appearance as Counsel of record for the Division, which was mailed to the original address and to the Applicant at ADDRESS 2. On November 22, 2010, the Division notified the Court Clerk[5] by electronic transmission that the Amended Entry of Appearance had been returned as undeliverable. On November 22, 2010, OTC ATTORNEY filed an Amended Entry of Appearance as Counsel of record for the Division, which was mailed to the Applicant at ADDRESS 1. On November 23, 2010, the Notice of Hearing was sent by certified mail return receipt requested to the Applicant at the following two (2) addresses: ADDRESS 1 and ADDRESS 2.[6] The hearing

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[1] At the beginning of the hearing, the Applicant advised the undersigned that his middle initial was N. not A. The correction was noted for the record and the Applicant's name has been corrected accordingly.

[2] "**[P]ro se"** (proh **say** *or* **see**), *adv.* & *adj.* [Latin] For oneself; on one's own behalf; without a lawyer <the defendant proceeded pro se> <a pro se defendant>. -- Also termed *pro persona*; *in propria persona*; *propria persona*; *pro per*. See PROPRIA PERSONA. BLACK'S LAW DICTIONARY (8th ed. 2004), available at http://westlaw.com.

[3] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[4] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

[5] OKLA. ADMIN. CODE § 710:1-5-10(c)(2) (June 25, 1999).

[6] On November 24, 2010, the return receipt for ADDRESS 1 (####) was signed by NAME. On

on this matter was set for December 21, 2010, at 9:30 a.m., with position letters or memorandum briefs due on or before December 14, 2010.

On December 13, 2010, the Applicant's Position Letter was filed with an attachment thereto.[7] On December 14, 2010, the Division's Memorandum Brief was filed with Exhibits A through C attached thereto.

On December 21, 2010, at 9:30 a.m. an open hearing[8] was held as scheduled. Both parties appeared at hearing. The Division called ADMINISTRATOR, Administrator, Motor Vehicle Division, Oklahoma Tax Commission, who testified about the processing of the application, how the Division made the decision to deny the Applicant's request for a personalized license plate, and as custodian of the Division's records. The Division's Exhibits A through D were identified, offered, and admitted into evidence without objection. The Applicant was called by the Division as a witness and the Applicant testified on his own behalf concerning the application and his intent for requesting a personalized license plate. The Applicant did not identify and offer any exhibits to be admitted into evidence.[9]

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, the Applicant's Position Letter, and the Division's Memorandum Brief, the undersigned finds:

1. On August 25, 2010, the Division received Applicant's Form 749 Personalized License Plate Application ("Application"). On the Application, the Applicant made two (2) choices for a personalized license plate; "FREHEMP" and "FREEHMP," on a "sea green" (light green) background. On the Application, the Applicant certified that the personalized license plate was to be displayed on a 2000 Toyota Tacoma, which has been registered with the Division and an Oklahoma title issued thereon as provided for in Oklahoma's motor vehicle laws. The Application[10] contains the following notice, to-wit:

> **Any special plate request deemed to be offensive to the general public will not be issued.**

November 29, 2010, the return receipt for ADDRESS 2 was filed with the Court Clerk, but the signature is illegible and does not reflect the date the return receipt was signed.

[7] The envelope reflects the Applicant's address as ADDRESS 1.

[8] The Applicant waived his right to a confidential hearing as provided by the provisions of OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2011).

[9] The attachment to the Applicant's Position Letter was offered, identified, and admitted as Division's Exhibit D.

[10] Division's Exhibit A.

2. By letter dated August 30, 2010, the Division notified the Applicant that it was unable to process the Application because the personalized license plate alphanumeric choices thereon violated the provisions of OKLA. ADMIN. CODE § 710:60-3-150(d), which provides, "No special license plate will be issued if the proposed message may be deemed offensive to the general public, in the context of display of the message on a state-issued plate, under the guidelines in 710:60-3-151(c)."[11]

3. On September 30, 2010, the Applicant mailed a protest to the Division's denial of the Application and requested a hearing. The basis of the protest is that the Division's denial is erroneous and a violation of the Applicant's right to free speech.[12]

4. The Division denied the Applicant's request for personalized license plate choices of "FREHEMP" and "FREEHMP" because the proposed message may be deemed offensive to the general public, in the context of display of the message on a state-issued license plate. The Division based its decision upon the standard that an objective, reasonable person would find that the proposed choices on the Application fall into the category of drugs.[13]

5. The Applicant's intent in requesting a personalized license plate with the choices of "FREHEMP" and "FREEHMP" is to educate[14] the public in the uses of hemp for agricultural, industrial, environmental, economic, medicinal, and for smoking, leisure, and creative purposes.[15]

STATEMENT OF ISSUE

The issue to be decided is whether the choices "FREHEMP" and "FREEHEMP" on Applicant's personalized license plate Application may be deemed offensive to the general public, in the context of the display of the message on a state-issued license plate based on the standard of whether an objective, reasonable person would find the proposed choices on the Application as falling into any of the categories enumerated in OKLA. ADMIN. CODE § 710:60-3-151 (July 11, 2010).[16]

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[11] Division's Exhibit B. *See* Notes 21-22, *infra.*

[12] Division's Exhibit C. The envelope containing the protest has multiple stamped impressions which state "SAVE THE EARTHLINGS 'FREE HEMP'."

[13] Testimony of ADMINISTRATOR. *See* Notes 21-22, *infra*.

[14] The Applicant's efforts to educate the public include meeting with the Sierra Club. Testimony of Applicant.

[15] Testimony of Applicant. *See* Division's Exhibit D.

[16] *See* Note 22, *infra.*

CONCLUSIONS OF LAW

1. The Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[17]

2. The rules promulgated pursuant to the Administrative Procedures Act[18] are presumed to be valid and binding on the persons they affect and have the force of law.[19]

3. Section 1135.4 of Title 47[20] ("Statute") provides in pertinent parts as follows, to-wit:

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

4. The Tax Commission promulgated Tax Commission Rule 710:60-3-150[21] ("Rule I") to implement and administer the Statute, which addresses the application process for ordering all "special" license plates, including personalized license plates, and which reads in pertinent parts 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.
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> (d) **Non-offensive content policy.** No special license plate will be issued if the proposed message may be deemed offensive to the general public, in the

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[17] OKLA. STAT. ANN. tit. 47, § 1135.4 (West 2008). *See* Notes 21-22, *infra.*

[18] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2002).

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

[20] *Id. See* OKLA. STAT. ANN. tit. 47, § 1113(A) (West Supp. 2010), 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…

[21] OKLA. ADMIN. CODE § 710:60-3-150 (July 11, 2010).

> context of display of the message on a state-issued license plate, under the guidelines in 710:60-3-151(c).
>
> …

5. The Tax Commission promulgated Tax Commission Rule 710:60-3-151[22] ("Rule II") to implement and administer the Statute and Rule I, which addresses personalized license plates, in pertinent parts as follows, to-wit:

> (c) **Non-offensive content policy.** The Commission shall review personalized license plate applications that are not automatically rejected when compared to a database of prohibited or previously issued personalized plates. The Commission shall deny a request if an objective, reasonable person would find that the proposed combination of letters and/or numbers listed on the application falls into at least one of the following categories:
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> (1) carries a sexual connotation;
> (2) expresses contempt, ridicule or superiority based on race, gender, politics, ethnic heritage, or religion;
> (3) is vulgar, derogatory, profane or obscene;
> (4) refers to bodily functions, bodily fluids, or intimate body parts;
> (5) refers to alcohol, drugs or drug paraphernalia, illegal activities or gangs; or
> (6) would otherwise be inappropriate for display on a state-issued license plate.
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> (d) **Other criteria.** The criteria in this paragraph are not exhaustive. Dictionaries and compilation of offensive words, terms or letter/number combinations, in any language, gathered from the experience of Oklahoma and other states may also be used as a guide.

6. 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.[23]

7. Every statute is deemed constitutionally valid until a court of competent jurisdiction declares otherwise.[24]

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[22] OKLA. ADMIN. CODE § 710:60-3-151 (July 11, 2010).

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

[24] *See, State ex rel. York v. Turpen*, 1984 OK 26, 681 P.2d 763.

8. 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.[25]

9. 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,[26] and the agency's construction is given controlling weight and will not be disregarded except in cases of serious doubt.[27]

10. 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.[28]

11. Agency rules need not be specifically authorized by statute, but must generally reflect the intent of the Legislature as expressed in the statute.[29] 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.[30]

12. In all proceedings before the Tax Commission, unless provided by law, the taxpayer has the burden of proof.[31]

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

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

[27] *Cox v. Dawson*, 1996 OK 11, 911 P.2d 272.

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

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

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

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

> In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the Applicant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the Applicant 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 Applicant 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.

13. The Division's action is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[32]

CONSTITUTIONAL ISSUE

Whether the Oklahoma Tax Commission's interpretation and application of Statute, Rule I, and Rule II as they relate to the application for a license plate with the choices "FREEHMP" and "FREHEMP" violate the free speech guarantees of the First and Fourteenth Amendments or Okla. Const. Art. II, § 22.

DISCUSSION
CONSTITUTIONAL ISSUE

The Applicant's contentions include, "…the fact that the Oklahoma Tax Commission has already issued a license plate tag: HEMPONE[33] and…EVOLING. My main contention involves the use of trees and deforestation. Wood pulp treated with chorline [sic] creates a known toxic waste: dioxen [sic]. Whereas paper made from hemp treated with peroxide emits only oxygen and hydrogen, the two most abundant gases in the atmosphere. I have enclosed eleven pages an [sic] overview of the history of cannabis hemp. The statutory law upon which I rely to substantiate my position is the First Amendment of the Bill of Rights. 'Freedom of Speech' [sic] the cornerstone of our democracy…."[34]

The Division responds, "The alphanumeric character combinations of Applicant's personalized license plate choices are abbreviations of the words 'free hemp'. Applicant attached an eleven page article to his position letter filed herein, which throughout acknowledges that 'hemp' is coextensive in meaning to 'cannabis' and 'marihuana'."[35]

Pursuant to the Oklahoma Uniform Controlled Dangerous Substances Act,[36] 63 O.S. § 2-101(23),[37] "marihuana" is defined as:

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

[33] ADMINISTRATOR could not confirm or deny whether the Division had issued the personalized license plate "ONEHEMP." The Applicant did not testify as to why "evoling," if such a tag has been issued, would be deemed offensive to the general public; nor did the Applicant question ADMINISTRATOR on such a personalized tag.

[34] Position Letter at 2-3.

[35] Division's Brief at 3. *See* Division's Exhibit D. The Applicant testified that the excerpts were from a book titled "The Emperor Wears No Clothes," having as its purpose the decriminalization of "cannabis" in all forms.

[36] OKLA. STAT. ANN. tit. 63, § 2-101, *et seq.* (West 2004).

[37] OKLA. STAT. ANN. tit. 63, § 2-101(23) (West Supp. 2011).

> …[A]ll parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of such plant which is incapable of germination;"

There is no Oklahoma jurisprudential case law governing the Oklahoma Tax Commission's denial of issuance of offensive personalized license plates. The Oklahoma Tax Commission has, however, issued OTC (Precedential) Order No. 95-03-23-014 (March 23, 1995), adopting and setting forth as its own the standard developed in *Kahn v. Dept. of Motor Vehicles*, 16 Cal.App.4th 159, 170, 20 Cal.Reptr.2d 6 (1993), for determining whether a personalized license plate's content may be offensive to the general public. *Kahn* teaches that '[t]he 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.'"[38]

The provisions of the Oklahoma Trafficking in Illegal Drugs Act, 63 O.S. §2-414, *et seq.*[39] apply to persons convicted of violations with respect to marihuana.[40] That Act makes it a crime to knowingly distribute, manufacture, bring into this state or possess marihuana in specified quantities, and sets criminal penalties therefore.[41] In short, the possession of marihuana (cannabis) is a crime in Oklahoma, and Oklahoma's public policy set forth in the Oklahoma Statutes labels it a controlled dangerous substance. The legislative declaration of the illegal nature of cannabis in Oklahoma makes an Oklahoma license plate bearing the choices of "FREHEMP" or "FREEHMP" offensive to the general public of Oklahoma.

To accept the Applicant's position would be to focus on the intention of the Applicant by his choice of words, an approach disapproved of in *Kahn, supra.* No evidence in the record demonstrates the choices "FREHEMP" or "FREEHMP" may be deemed not offensive to the general public, in the context of display of the message on a state-issued license plate by a preponderance of the evidence based upon the standard that an objective, reasonable person would find the choices as fallings into the category of drugs. The Applicant has not met his burden of proof in this proceeding.[42]

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[38] *Kahn v. Dept. of Motor Vehicles*, 16 Cal.App.4th 159, 170, 20 Cal.Reptr.2d 6 (1993).

[39] OKLA. STAT. ANN. tit. 63, § 2-414, *et seq.* (West 2004).

[40] OKLA. STAT. ANN. tit. 63, §2-415(A)(1) (West Supp. 2011).

[41] OKLA. STAT. ANN. tit. 63, § 2-415(C)(1), (D) (West Supp. 2011).

[42] *See* Note 35, *supra*.

CONCLUSION
CONSTITUTIONAL ISSUE

The Division's position is supported by ample Oklahoma case law. The Statute, Rule I, and Rule II are deemed constitutionally valid until a court of competent jurisdiction determines otherwise.

NON-CONSTITUTIONAL ISSUE

Whether the Division properly denied the Application for a personalized license plate in the alphanumeric combinations "FREEHMP" and "FREHEMP" pursuant to the Statute, Rule I, and Rule II, as what may be deemed offensive to the general public, in the context of display of the message on a state-issued license plate based upon the standard that an objective, reasonable person would find the choices as falling into the category of drugs.

DISCUSSION
NON-CONSTITUTIONAL ISSUE

There is no Oklahoma jurisprudential case law governing the Division's denial of the issuance of offensive personalized license plates. The Oklahoma Supreme Court has not been presented with an opportunity to interpret the provisions of the Statute or the Rules.

The *Rules of Practice and Procedure Before the Office of Administrative Law Judges*[43] provides that the burden of proof is on the Applicant to show that the Division erred in application of the Rules that the Applicant's choices for a personalized license plate may be deemed offensive to the general public, in the context of display of the message on a state-issued license plate.[44] The only evidence submitted by the Applicant, in addition to his testimony, as to whether the alphanumeric combinations "FREEHMP" and "FREHEMP" may not be offensive to the general public is an eleven (11) page except from a book which is intended to educate[45] the public in the uses of "Cannabis Hemp" for agricultural, industrial, environmental, economic, medicinal, and for smoking, leisure, and creative purposes.[46]

The Applicant testified that his personal political viewpoint is for the decriminalization of marihuana.[47] The Applicant also testified that the general public's perception of "hemp" is the same as "marihuana," which in the Applicant's opinion is a result of seventy (70) to

[43] *See* Note 4, *supra.*

[44] *See* Note 22, *supra*.

[45] The Applicant's efforts to educate the public include meeting with the Sierra Club.

[46] Testimony of Applicant. *See* Division's Exhibit D.

[47] The Applicant does not dispute that the meaning of "hemp" is co-extensive with the meaning of "cannibis" and "marihuana."

eighty (80) years of propaganda. In the words of the Applicant, trying to change the general public's perception of "hemp" is like "rolling a snowball up a hill."[48]

No other evidence was presented as to whether the Applicant's choices for a personalized license plate may not be deemed offensive to the general public, in the context of display of the message on a state-issued license plate based upon the standard that an objective reasonable person would find that the choices "FREHMP" or "FREEHMP" *did not* fall into the category of drugs. There were no surveys presented, no treatises or scholarly documents were introduced into evidence regarding what may or may not be offensive to the general public.[49]

CONCLUSION
NON-CONSTITUTIONAL ISSUE

On the non-constitutional issue, the Applicant has failed to meet his burden of proof that the Division's denial of the Application for a personalized license plate is incorrect pursuant to the Statute, Rule I, and Rule II, and in what respects.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protest to the Division's denial of the Application should be 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.

NOTE: The distinction between a Commission Order designated as "Precedential" or "Non-Precedential" has been blurred because all OTC Orders resulting from cases heard by the Office of Administrative Law Judges are now published, not just "Precedential" Orders. *See* OKLA. STAT. ANN. tit.68, § 221(G) (West Supp. 2009) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002). *See also* OTC Orders 2009-06-23-02 and 2009-06-23-03 (June 23, 2009), which also conclude the language of the Statute is "clear and unambiguous."

[48] Testimony of Applicant.

[49] *See* OTC Order No. 2009-10-29-02 (October 29, 2009). *See* also OTC Order No. 2010-10-14-002 (October 14, 2010), where the Tax Commission held an Applicant's choices of "CANIBUS," "CAN1BUS," "CANIBU5," AND "CAN1BU5" may be deemed offensive to the general public.