

**JURISDICTION:** OKLAHOMA TAX COMMISSION  
**CITE:** 2018-11-15-04 / NON-PRECEDENTIAL  
**ID:** P-17-103-H  
**DATE:** NOVEMBER 15, 2018  
**DISPOSITION:** DENIED  
**TAX TYPE:** INCOME / AEROSPACE CREDIT  
**APPEAL:** NONE

### 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, the Commission hereby adopts the Findings of Fact, Conclusions of Law and Recommendation made and entered by the Administrative Law Judge on the 18<sup>th</sup> day of October, 2018, appended hereto, together herewith shall constitute the Order of the Commission.

SO ORDERED

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

NOW on this 18<sup>th</sup> day of October 2018, the above-styled and numbered cause comes on for consideration pursuant to assignment regularly made by the Oklahoma Tax Commission to ALJ, Administrative Law Judge. TAXPAYER and SPOUSE (“Protestants”) appear through CPA, CPA. The Compliance Division (“Division”), Oklahoma Tax Commission, appears through AGC, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

#### PROCEDURAL HISTORY

On June 19, 2017, the protest file was received by the Office of Administrative Law Judges for further proceedings consistent with the *Uniform Tax Procedure Code*<sup>1</sup> and the *Rules of Practice and Procedure Before the Office of Administrative Law Judges*.<sup>2</sup> On June 20, 2017,

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<sup>1</sup> OKLA. STAT. ANN. tit. 68, § 201 *et seq.* (West 2014).

<sup>2</sup> OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-49.

the Court Clerk mailed the Introductory Letter to the Protestants that this matter had been assigned to ALJ, Administrative Law Judge (“ALJ”), and docketed as Case Number P-17-103-H.

On September 6, 2017, the ALJ issued the Amended Scheduling Order submitting this matter on stipulations and briefs. On September 18, 2017, the parties filed Joint Stipulation of Issue and Facts, with Stipulated Exhibits 1 through 4. On October 30, 2017, the Protestants filed their Position Letter. On November 16, 2017, the Division filed its Response Brief. The ALJ closed the record and submitted this case for decision.

### **JOINT STIPULATION OF ISSUE AND FACTS**

On September 18, 2017, the parties filed Joint Stipulation of Issue and Facts, with Stipulated Exhibits 1 through 4:

#### **STATEMENT OF ISSUE**

Whether Protestant, TAXPAYER, qualifies as a “Qualified Employee” as defined under 68 O.S. Supp. 2014, § 2357.301 as claimed on Protestants’ amended income tax returns for years 2013 and 2014, so that Protestants may claim the Credit for Employees in the Aerospace Sector (“the Tax Credit”).

#### **STATEMENT OF FACTS**

1. On or about March 31, 2016, Protestants filed their 2013 Amended Oklahoma joint income tax return claiming the Tax Credit. That return was processed and a refund was issued to Protestants on June 23, 2016 in the amount of \$4,649.00.

2. On or about March 31, 2016, Protestant filed their 2014 Amended Oklahoma joint income tax return claiming the Tax Credit. That return was processed and a refund was issued to Protestants on April 21, 2016 in the amount of \$5,172.00.

3. On or about April 24, 2017, the Division mailed adjustment letters to Protestants for tax years 2013 and 2014. The Division disallowed the Tax Credit and adjusted Protestants' returns to reflect the same.

4. On or about May 30, 2017, Protestants timely responded to the adjustment letters via letter protesting the disallowance of the Tax Credit for tax years 2013 and 2014.

5. Protestant, TAXPAYER, graduated from the University of Oklahoma with a Bachelor of Science degree in Electrical Engineering on May 16, 2000.

6. Protestant, TAXPAYER, has been employed as an aerospace engineer at Tinker Air Force Base since April 10, 2000.

7. Protestant receives his wages through Defense Finance and Accounting Services. It is the entity that handles payroll for civilian employees employed with the Department of Defense at Tinker Air Force Base.

8. This protest is properly before the Administrative Law Judge.

### CONCLUSIONS OF LAW

1. The Legislature vested the Oklahoma Tax Commission with jurisdiction over the parties and subject matter of this proceeding.<sup>3</sup>

2. Taxation is an exclusively legislative function that can be exercised only under statutory authority and in the manner specified by statute.<sup>4</sup> The Aerospace Development Act ("Act")<sup>5</sup> of the Oklahoma Income Tax Code<sup>6</sup> governs the basis for the Division's action and Protestants' protest.

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<sup>3</sup> See OKLA. STAT. ANN. tit. 68, § 207 (West 2014). See also OKLA. STAT. ANN. tit. 68, § 221(C) (West 2014) and OKLA. ADMIN. CODE § 710:1-5-38 (July 11, 2013).

<sup>4</sup> *State ex rel. Oklahoma Tax Com'n v. Texaco Exploration & Production, Inc.*, 2005 OK 52, 131 P.3d 705.

<sup>5</sup> OKLA. STAT. ANN. tit. 68, § 2357.301 *et seq.* (West 2017).

3. A taxpayer's income tax liability is determined under the law in effect when the income is received.<sup>7</sup>

4. A credit of up to \$5,000.00 per year, but not to exceed five (5) years is allowed against the tax imposed by § 2355 of the Oklahoma Income Tax Code to a qualified employee for taxable years beginning after December 31, 2008.<sup>8</sup> The credit is a non-refundable credit and, if not used, may be carried over, in order, to each of the five (5) subsequent taxable years.<sup>9</sup>

5. A "Qualified Employee" under the Act was originally defined to mean "any person employed by or contracting with a qualified employer on or after January 1, 2009, who has been awarded an undergraduate or graduate degree from a qualified program by an institution, and who was not employed in the aerospace sector in this state immediately preceding employment or contracting with a qualified employer."<sup>10</sup>

6. Pursuant to its authority to facilitate the administration, enforcement and collection of any taxes levied by the tax laws of the State of Oklahoma, the Tax Commission contemporaneous with the enactment of the Act promulgated OAC 710:50-15-109 which provides in pertinent part:

"Qualified employee" is any person newly employed by or contracting with a qualified employer on or after January 1, 2009 employed in Oklahoma. Further, the person must have been awarded an undergraduate or graduate degree from a qualified program by an institution. Qualified employees do not included person [sic] employed in the aerospace sector in this state

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<sup>6</sup> OKLA. STAT. ANN. tit. 68, § 2351 *et seq.* (West 2017).

<sup>7</sup> *Affiliated Management Corp. v. Oklahoma Tax Commission*, 1977 OK 183, 570 P.2d 335. See *Wootten v. Oklahoma Tax Com'n*, 1935 OK 54, 40 P.2d 672.

<sup>8</sup> OKLA. STAT. ANN. tit. 68, § 2357.304(A) (West 2017).

<sup>9</sup> OKLA. STAT. ANN. tit. 68, § 2357.304(B) and (C) (West 2017).

<sup>10</sup> OKLA. STAT. tit. 68, § 2357.301(5) (West 2008).

immediately preceding employment or contracting with a qualified employer.<sup>11</sup>

7. In 2014, the definition of “qualified employee” was amended to provide (with the amended language underscored) as follows, to-wit:

“Qualified employee” means any person, regardless of the date of hire, employed in this state by or contracting in this state with a qualified employer on or after January 1, 2009, who has been awarded an undergraduate or graduate degree from a qualified program by an institution, and who was not employed in the aerospace sector in this state immediately preceding employment or contracting with a qualified employer. Provided, the definition shall not be interpreted to exclude any person who was employed in the aerospace sector, but not as a full-time engineer, prior to being awarded an undergraduate or graduate degree from a qualified program by an institution or any person who has been awarded an undergraduate or graduate degree from a qualified program by an institution and is employed by a professional staffing company and assigned to work in the aerospace sector in this state;<sup>12</sup>

8. Contemporaneous with the statutory amendment of the definition of qualified employee, the Tax Commission amended the language of OAC 710:50-15-109(b)(5):

“Qualified employee” is any person, regardless of the date of hire by the qualified employer, newly employed by or contracting with a qualified employer in Oklahoma on or after January 1, 2009. Further, the person must have been awarded an undergraduate or graduate degree from a qualified program by an institution. Qualified employee does not include a person employed in the aerospace sector in this state immediately preceding employment or contracting with a qualified employer. Qualified employee may include a person who was employed in the aerospace sector, but not as a full-time engineer, prior to being awarded an undergraduate or graduate degree from a qualified program by an institution or any person who has been awarded an undergraduate or graduate degree from a qualified program by an institution and

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<sup>11</sup> OKLA. ADMIN. CODE § 710:50-15-109(b)(5) (June 25, 2009).

<sup>12</sup> OKLA. STAT. tit. 68, § 2357.301(5) (West 2014).

is employed by a professional staffing company and assigned to work in the aerospace sector in this state.<sup>13</sup>

9. The fundamental rule and primary goal of statutory construction is to ascertain and give effect to legislative intent.<sup>14</sup> The starting point for any inquiry into legislative intent is the language of the statute.<sup>15</sup> When the words of a statute are plain and unambiguous, no occasion exists to employ the rules of construction, and the statute will be accorded its clear and definite meaning.<sup>16</sup>

10. Only where the legislative intent cannot be ascertained from a statute's text, as when ambiguity or conflict with other statutes is shown to exist, may rules of statutory construction be invoked.<sup>17</sup> The test for ambiguity in a statute is whether statutory language is susceptible to more than one reasonable interpretation.<sup>18</sup>

11. In resolving an ambiguity in a statute, courts will look to the provisions of the relevant legislative scheme to ascertain and give effect to the legislative intent and the public policy underlying that intent.<sup>19</sup> In interpreting statutes, courts do not limit their consideration to a single word or phrase in isolation to determine their meaning, but construe together the provisions of relevant legislative enactments to ascertain and give effect to the legislature's intention and will, and attempt to avoid unnatural and absurd consequences.<sup>20</sup> It is important in

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<sup>13</sup> OKLA. ADMIN. CODE § 710:50-15-109(b)(5) (August 27, 2015).

<sup>14</sup> *Rogers v. Quiktrip Corp.*, 2010 OK 3, 230 P.3d 853.

<sup>15</sup> *Redmond v. Cauthen*, 2009 OK CIV APP 46, 211 P.3d 233.

<sup>16</sup> *Id.*

<sup>17</sup> See Note 14, *supra*.

<sup>18</sup> *YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, 136 P.3d 656.

<sup>19</sup> *Wilhoit v. State*, 2009 OK 83, 226 P.3d 682, corrected.

<sup>20</sup> *Tull v. Commissioner of Dept. of Public Safety*, 2008 OK CIV APP 10, 176 P.3d 1227.

construing the Legislative intent behind a word in a statute to consider the whole act in light of its general purpose and objective, considering relevant portions together to give full force and effect to each.<sup>21</sup> The words of a statute will be given their plain and ordinary meaning unless it is contrary to the purpose and intent of the statute when considered as a whole.<sup>22</sup> The subject matter and purpose of a statute are material to ascertaining the meaning of a word or phrase used and that language should be construed to be harmonious with the purpose of the act, rather than in a way which will defeat it.<sup>23</sup> Statutes are interpreted to attain that purpose and end championing the broad public policy purposes underlying them.<sup>24</sup>

12. Tax statutes are penal.<sup>25</sup> Penal statutes are to be strictly construed.<sup>26</sup> Strict construction regarding a penal statute is that which refuses to extend the law by implication or equitable consideration and confines its operations to cases clearly within the letter of the statute, as well as within its spirit or reason.<sup>27</sup> Courts cannot enlarge the taxing act's ambit to make its provisions applicable to cases not clearly within the legislature's contemplation or to fill lacunae in the revenue law in a manner that would distort the enactment's plain language.<sup>28</sup>

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<sup>21</sup> *Estes v. ConocoPhillips Co.*, 2008 OK 21, 184 P.3d 518.

<sup>22</sup> *Stump v. Check*, 2007 OK 97, 179 P.3d 606.

<sup>23</sup> See Note 20, *supra*.

<sup>24</sup> *Keating v. Edmondson*, 2001 OK 110, ¶ 8, 37 P.3d 882 (citations omitted).

<sup>25</sup> *Williams v. Smith & Nephew, Inc.*, 2009 OK 36, 212 P.3d 484; *Globe Life and Acc. Ins. Co. v. Oklahoma Tax Com'n*, 1996 OK 39, 913 P.2d 1322.

<sup>26</sup> *Mid-Continent Pipeline Co. v. Crauthers*, 1954 OK 61, 267 P.2d 568.

<sup>27</sup> *State ex rel. Allen v. Board of Ed. of Independent School Dist. No. 74 of Muskogee County*, 1952 OK 241, 206 Okla. 699, 246 P.2d 368.

<sup>28</sup> See Note 25, *supra*.

13. Statutes exempting property from taxation are to be strictly construed against the claimant.<sup>29</sup> Claims of exemption must be by express grant.<sup>30</sup> An exemption cannot exist by implication and a doubt is fatal to the claim of exemption.<sup>31</sup>

14. Tax exemption, deductions, and credits depend entirely on legislative grace and are strictly construed against the exemption, deduction or credit.<sup>32</sup> To be allowed, authority for the deduction sought must be clearly expressed.<sup>33</sup> None may be allowed in absence of a statutory provision therefor.<sup>34</sup>

15. The rule of strict construction comes into play only when the language, after analysis and subsection to the ordinary rules of interpretation, presents ambiguity.<sup>35</sup> Tax exemptions must be construed sensibly in order to give effect to the governing legislative scheme.<sup>36</sup>

16. Whether language of statute is ambiguous presents questions of law.<sup>37</sup>

17. Rules promulgated pursuant to the Administrative Procedures Act<sup>38</sup> are presumed to be valid until declared otherwise by a court of competent jurisdiction.<sup>39</sup> The rules promulgated

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<sup>29</sup> *American Airlines, Inc. v. Oklahoma Tax Com'n*, 2014 OK 95, ¶ 30, 341 P.3d 56, 64, citing *Blitz U.S.A., Inc. v. Oklahoma Tax Com'n*, 2003 OK 50, ¶ 14, 75 P.3d 883, 888.

<sup>30</sup> *Id.*, citing *In re Noble's Estate*, 1938 OK 324, ¶ 7, 183 Okla. 148, 80 P.2d 243, 245.

<sup>31</sup> *Id.*, citing *Oklahoma City v. Shields*, 1908 OK 195, ¶ 10, 22 Okla. 265, 100 P. 559.

<sup>32</sup> *TPQ Inv. Corp. v. Oklahoma Tax Com'n*, 1998 OK 13, ¶ 8, 954 P.2d 139, 141.

<sup>33</sup> *Home-State Royalty Corp. v. Weems*, 1935 OK 1043, 175 Okla. 340, 52 P.2d 806 (1935).

<sup>34</sup> *Id.* See, *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440, 54 S.Ct. 788, 78 L.Ed. 1348 (1934).

<sup>35</sup> *Colcord v. Granzow*, 1928 OK 211, ¶ 18, 137 Okla. 194, 278 P.2d 654, 660, citing *Ruling Case Law*, Volume 25, p. 1076.

<sup>36</sup> *American Airlines, supra* at ¶ 31, citing *Blitz, supra* at ¶ 16.

<sup>37</sup> *YDF, Inc., supra*; *State ex rel. Oklahoma Tax Com'n v. Sun Co., Inc.*, 2009 OK 11, 222 P.3d 1046.

<sup>38</sup> OKLA. STAT. ANN. tit. 75, § 250 *et seq.* (West 2018).

<sup>39</sup> OKLA. STAT. ANN. tit. 75, § 306(C) (West 2018).

pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law. They are valid and binding on the persons they affect, have the force of law and are prima facie evidence of the proper interpretation of the matter to which they refer.<sup>40</sup> The legislature is deemed to have adopted an administrative construction of a statute when, subsequent to such construction, it amends the statute or reenacts it without overriding such construction.<sup>41</sup>

18. 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.<sup>42</sup> Agency rules need not be specifically authorized by statute, but must generally reflect the intent of the Legislature as expressed in the statute.<sup>43</sup> As a general rule, it is presumed that administrative rules and regulations are fair and reasonable, and that the complaining party must prove the contrary by competent and convincing evidence.<sup>44</sup>

19. 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 charge with its execution.<sup>45</sup> 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

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<sup>40</sup> OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2018).

<sup>41</sup> *Branch Trucking Co. v. State ex rel. Oklahoma Tax Com'n*, 1990 OK 41, 801 P.2d 686.

<sup>42</sup> *See, Arkansas Louisiana Gas Co. v. Travis*, 1984 OK 33, 682 P.2d 225; *Boydston v. State*, 1954 OK 327, 277 P.2d 138.

<sup>43</sup> *Jarboe Sales Co. v. Oklahoma Alcoholic Beverage Laws Enforcement Com'n*, 2003 OK CIV APP 23, 65 P.3d 289.

<sup>44</sup> *State ex rel. Hart v. Parham*, 1966 OK 9, 412 P.2d 142.

<sup>45</sup> *Schulte Oil Co., Inc. v. Oklahoma Tax Com'n*, 1994 OK 103, 882 P.2d 65.

with the agency's construction, the Legislature's silence may be regarded as acquiescence in the agency's construction,<sup>46</sup> and the agency's construction is given controlling weight and will not be disregarded except in cases of serious doubt.<sup>47</sup>

20. The informal interpretations of a statute by the administrative agency charged with its implementation and enforcement are not entitled to deference, but are of assistance in ascertaining the purpose, policy, and meaning of a statute.<sup>48</sup> To have persuasive value, the administrative interpretation must be reasonable and not clearly wrong.<sup>49</sup>

21. The Oklahoma Aeronautics Commission, the agency charged with promoting and developing the aerospace industry in Oklahoma, provides information concerning the aerospace income tax credits.<sup>50</sup> The interpretations advanced by the Aeronautics Commission are similar to informal interpretations or program statements, and while the interpretations are not entitled to deference, they may be considered to the extent that the same are well-reasoned and have power to persuade.<sup>51</sup>

22. In the frequently asked questions section to the Aeronautics Commission's website, the Commission in part opines, "[a] 'qualified employee' is any person hired by or contracting with a 'qualified employer' after December 31, 2008" in response to the question "[w]ho qualifies for these tax credits".

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<sup>46</sup> *R.R. Tway, Inc. v. Oklahoma Tax Com'n*, 1995 OK 129, 910 P.2d 972.

<sup>47</sup> *Cox v. Dawson*, 1996 OK 11, 911 P.2d 272.

<sup>48</sup> *Laws v. State ex rel. Oklahoma Dept. of Human Services*, 2003 OK CIV APP 97, 81 P.3d 78, *certiorari denied*.

<sup>49</sup> *Keating, supra* at ¶ 15.

<sup>50</sup> [http://www.ok.gov/OAC/Aerospace\\_Industry/index.html](http://www.ok.gov/OAC/Aerospace_Industry/index.html).

<sup>51</sup> *Hunnicut v. Hawk*, 229 F.3d 997 (C.A. 10th, Okla. 2000).

23. In administrative proceedings, the burden of proof is on the taxpayer to show in what respect the action or proposed action of the Tax Commission is incorrect.<sup>52</sup>

24. Failure to provide evidence which is sufficient to show an adjustment to the action of the Division is warranted will result in the denial of the protest.<sup>53</sup>

## DISCUSSION

### 2013 TAX YEAR

Regarding the 2008 version of the definition of “qualified employee,” which applies to the 2013 tax Year, the Tax Commission has determined that a degreed engineer hired by a qualified employer prior to January 1, 2009 is not a “qualified employee.”<sup>54</sup> In that case, the Commission concluded that the definition of “qualified employee” was ambiguous because the word “employ” had more than one accepted meaning by definition. The Commission construed the word “employed” as used in the definition to mean “hired;” citing with approval, conformity with the Oklahoma Aeronautics Commission website as to who qualifies for the credit, the public policy or purpose of the Act as being contrary to an all-encompassing definition and its own rule which had been in effect for three regular sessions of the Legislature at the time and no action had been taken to repeal the rule.

## DISCUSSION

### 2014 TAX YEAR

Regarding the 2014 amendment to the definition of “qualified employee,” the Tax Commission has determined that a degreed engineer hired by a qualified employer in the

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<sup>52</sup> OKLA. ADMIN. CODE § 710:1-5-47; *In re Adway Properties, Inc.*, 2006 OK CIV APP 14, 130 P.3d 302; *Geoffrey, Inc. v. Oklahoma Tax Com’n*, 2006 OK CIV APP 27, 132 P.3d 632.

<sup>53</sup> *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Com’n*, 1988 OK 91, 768 P.2d 359, 362, citing *Continental Oil Co. v. Oklahoma State Bd. of Equalization*, 1976 OK 23, 570 P.2d 315, 317.

<sup>54</sup> Oklahoma Tax Commission Order No. 2012-08-28-05.

aerospace sector of Oklahoma prior to January 1, 2009 is not a “qualified employee.”<sup>55</sup> In that case, the Commission concluded that the legislative purpose of the amendment is clear when read in context and allows an employee working for or contracting with a qualified employer in a state other than Oklahoma to claim the credit as a qualified employee on or after January 1, 2009, when employed in the Oklahoma aerospace sector. This conclusion is buttressed by the predicate implied by the second sentence of the amended definition of qualified employee. The implication is when could a non-full-time engineer have been employed in the aerospace sector or an engineer have been assigned to work in the aerospace sector in this state and not be excluded from the definition. The only date referenced in the definition is “on or after January 1, 2009.” Accordingly, a person could have been employed in the aerospace sector prior to January 1, 2009, but not as a full-time engineer and still qualify for the credit after obtaining the required degree. Similarly, an engineer could be assigned to work in the aerospace sector in this state on or after January 1, 2009, and not be excluded from the definition. However, any person employed in the aerospace sector in this state as a full-time engineer prior to January 1, 2009, is excluded from the definition.

### CONCLUSION

The Protestants have failed to meet their burden of proof, by preponderance of the evidence, that the Division’s disallowance of the Aerospace Credit for the 2013 and 2014 Tax Years was incorrect, and in what respects.

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<sup>55</sup> See Oklahoma Tax Commission Order No. 2015-03-05-04. See also Oklahoma Tax Commission Order No. 2016-12-13-04.

**RECOMMENDATIONS**

The ALJ recommends denying the protest, as more fully set forth.

## 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 2014) and OKLA. STAT. ANN. tit. 75, § 302 (West 2002).