



JOHN M. O'CONNOR  
ATTORNEY GENERAL

ATTORNEY GENERAL OPINION  
2022-3

Joshua Smith, Director  
Board of Tests for Alcohol and Drug Influence  
P.O. Box 36307  
Oklahoma City, OK 73136-2307

March 17, 2022

Dear Director Smith:

This office has received your request for an Attorney General Opinion in which you ask the following questions:

**Does 62 O.S.[2021,] § 211, which requires certain self-sustaining state boards to pay into the General Revenue Fund ten percent of the gross fees charged, collected, and received by the board, apply to the Board of Tests?**

**Is the Board of Tests considered a self-sustaining [b]oard when it receives pass through funding appropriated by [the] Department of Public Safety (“DPS”)?**

**If the answer is yes, is the Board of Tests required to transfer any unpaid fees from past years to the General Revenue Fund?**

I.  
BACKGROUND

In 1967, the Legislature established the State Board of Chemical Tests for Alcohol Influence (the “Program”), which the Department of Public Safety (“DPS”) administered under its Alcohol Drug Countermeasures Unit. 1967 Okla. Sess. Laws ch. 86, § 9. Under the Program, the State Director of Tests developed rules governing evidentiary breath testing, approved breath test instruments, and trained and certified instrument operators. *See id.* However, in 2003 the Legislature abolished the Alcohol Drug Countermeasures Unit and transferred its powers, duties, and responsibilities to a new agency—the Board of Tests for Alcohol and Drug Influence (the “Board”). 47 O.S.2021, § 759.1.

The Board’s powers and responsibilities include, but are not limited to: approving and monitoring laboratories for the analysis of a person’s blood, breath, saliva, and urine; prescribing uniform standards for satisfactory methods, procedures, techniques, devices, equipment, and records for the performance of such tests and analyses; prescribing the requisite training, education,

qualifications, and competence of the individuals administering and conducting such tests and analyses; issuing permits to qualified laboratories and individuals; and prescribing uniform standards, conditions, methods, procedures, techniques, devices, equipment, and records for the collection, handling, retention, storage, preservation, and delivery of specimens of blood, breath, saliva, and urine obtained for the purpose of determining the alcohol concentration thereof or the presence or concentration of any other intoxicating substance therein. 47 O.S.2021, § 759(C).

Put simply, the Board is the government body that sets standards for the collection and analysis of an individual's breath, blood, saliva, or urine for alcohol and drug testing purposes.

## II. DISCUSSION

You have asked whether the Board is subject to the requirements of Title 62, Section 211 of the Oklahoma Statutes. This provision provides:

Unless otherwise provided by law, all self-sustaining boards created by statute to regulate and prescribe standards, practices, and procedures in any profession, occupation, or vocation shall pay into the General Revenue Fund of the state ten percent (10%) of the gross fees charged, collected, and received by such board.

62 O.S.2021, § 211.

By its terms, this provision applies only to (1) self-sustaining boards (2) that are created by statute (3) to regulate and prescribe standards, practices, and procedures in any profession, occupation, or vocation.

The term "self-sustaining," as used in Title 62, Section 211, implies (1) an internal source of revenue sufficient to support a board's core and incidental functions, and (2) that a board does not normally require additional funds from the Legislature to operate. *See* 1971 OK AG 368 (opining that the Board of Nursing Homes is self-sustaining because it receives "no appropriation from the State," and because "its only source of revenue is from the fees charged by the Board"); 2003 OK AG 19 (interpreting Title 62, Section 211 as only applying to "non-appropriated" boards); *see also* 3A O.S.2021, § 731(A) (indicating that "self-sustaining" means "self-funded").

By statute, the Board is empowered to "charge appropriate fees for operations incidental to its required duties and responsibilities." 47 O.S.2021, § 759(E). These fees are deposited into the Board's revolving fund and used to cover the Board's operating expenses. *Id.* § 759(F).

In addition to the Board's self-generated fees, the Legislature "shall appropriate funds to [DPS] for the support of the Board . . . and its employees," and the Board "may expend appropriated funds for purposes consistent with [Title 47, Sections 751 through 761 and Title 3, Sections 301 through 308.]" *Id.* § 759(A).<sup>1</sup>

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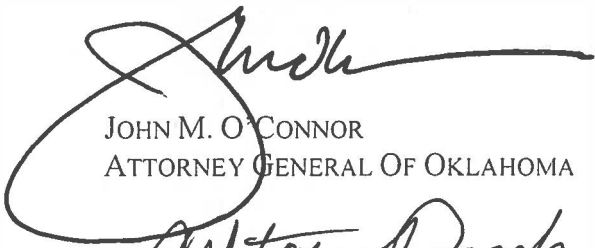
<sup>1</sup> Sections 751 through 761 of Title 47 are focused on drug and alcohol testing of individuals operating motor vehicles. The cited provisions of Title 3 govern drug and alcohol testing of individuals operating aircrafts.

Because the Legislature is required by statute to appropriate funds for the support of the Board, the Board is not self-sustaining. The appropriation of funds to the Board via DPS is not relevant for the purposes of Title 62, Section 211. Rather, the Legislature made the explicit decision to provide that, in addition to whatever fees the Board collects for “incidental” operations, it also *must* be supported by appropriated monies. It is well-established that entities receiving legislative appropriations are not “self-sustaining”. No authority supports the conclusion that the Board should be treated differently simply because its required appropriations are received via pass-through from DPS. The fact that those appropriations first pass through another agency does not change their nature, source, or purpose. *Cf. Reynolds v. Fallin*, 2016 OK 38, ¶ 12, 374 P.3d 799, 805 (finding that a legislative transfer of funds to an agency through a “pass-through account” constitutes an appropriation).

In conclusion, because the Board receives legislative appropriations, it is not self-sustaining, and we need not consider whether the Board satisfies the second and third elements of Title 62, Section 211. Since Title 62, Section 211 is inapplicable to the Board of Tests for Alcohol and Drug Influence, we need not address your third question.

**It is therefore the opinion of the Attorney General that:**

**The Board of Tests for Alcohol and Drug Influence is supported by legislative appropriations and is not self-sustaining. See 47 O.S.2021, § 759(A); 1971 OK AG 368, 2003 OK AG 19. Accordingly, the Board is not required to pay ten percent (10%) of all gross fees received into the General Revenue Fund pursuant to 62 O.S.2021, § 211.**

  
JOHN M. O'CONNOR  
ATTORNEY GENERAL OF OKLAHOMA

  
ASHTON POARCH  
ASSISTANT ATTORNEY GENERAL

