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ATTORNEY GENERAL

ATTORNEY GENERAL OPINION
2022-4

The Honorable Collin Walke
State Representative, District 87
2300 N. Lincoln Boulevard, Room 501
Oklahoma City, OK 73105

March 24, 2022

Dear Representative Walke:

This office has received your request for an Official Attorney General Opinion in which you make the following comments and ask, in effect,¹ the following questions:

In 2018, the Legislature enacted House Bill 3036 (“H.B. 3036”), which amended the Oklahoma Public Health Code and made the State Board of Health a purely advisory body. See 2018 Okla. Sess. Laws ch. 183.

- 1. Did the conversion of the State Board of Health to a purely advisory body via H.B. 3036 violate OKLA. CONST. art. V, § 39, which states that the Legislature shall create a State Board of Health and prescribe its duties?**
- 2. Does transferring all non-advisory authority from the State Board of Health to the State Commissioner of Health create irresolvable statutory conflicts?**

I.
BACKGROUND

In Oklahoma, three state actors have primary responsibility for carrying out the provisions of the Oklahoma Public Health Code (the “Code”):² the State Board of Health (“Board”), the State Commissioner of Health (“Commissioner”), and the State Department of Health (“Department”). Together, the Commissioner and the Department have a myriad of responsibilities under Oklahoma law, but their core functions involve statewide public health concerns.

¹ Your exact question asks, “[W]hether making the Board of Health an advisory board was in violation of the Oklahoma Constitution given the Constitutional dictates of a board of health and the ensuing conflicts between statutory law, administrative rules, and authority over the same.”

² Codified at Title 63 in the Oklahoma Statutes.

The Commissioner is responsible for, among other things, (1) “general supervision of the health of the citizens of” Oklahoma, (2) investigating the “causes of disease and injury, and especially of epidemics, and the causes of mortality, and the effects of localities, employment, conditions and circumstances on the public health[.]” and (3) implementing measures—including quarantine and isolation—necessary to prevent or suppress the spread of “communicable, contagious or infectious disease[s.]” 63 O.S.2021, § 1-106(B)(1).

The Department carries out duties as directed by the Commissioner and “[p]erform[s] any and all health-related services, within the scope of practice, as prescribed by state law, by [the Board], or by standards of care for medical services.” *Id.* § 1-105e(A)(3).

Before the enactment of House Bill 3036 (“H.B. 3036”), the Board—a nine-member body appointed by the Governor and subject to Senate confirmation—was responsible for appointing the Commissioner and “[e]stablish[ing] such divisions, sections, bureaus, offices, and positions in the [Department] as it deems necessary to carry out the provisions of th[e] Code.” 63 O.S.2011, § 1-104(B)(4); *see also id.* § 1-106(A) (the Commissioner serves at the pleasure of the Board). The Board was also the body with rulemaking authority under the Code. *Id.* § 1-104(B)(2).

The Commissioner, in turn, was “the executive officer” of the Department, charged with supervising its activities and “act[ing] for the Department in all matters except as may be otherwise provided in th[e] Code[.]” *Id.* § 1-106(B)(2); *see also id.* § 1-105 (creating the Department, consisting of the Commissioner and “such divisions, sections, bureaus, offices, and positions” established by the Board or by law).

The Commissioner and the Department were overseen by the Board prior to the enactment of H.B. 3036. The passage of H.B. 3036 did not affect the collective functions of these state actors. Instead, it redistributed authority between the Board and the Commissioner.

First, H.B. 3036 transferred the Board’s powers and duties to the Commissioner and expressly stated that, going forward, the Board would be “an advisory body” to the Commissioner. 2018 Okla. Sess. Laws ch. 183, § 1. To leave no doubt, the Legislature stated “[a]ny provision in statute that provides to the Board authority that is not advisory in nature shall be deemed to grant the duty or power to the Commissioner.” *Id.*

Second, it provided that instead of being an officer appointed by the Board, the Commissioner shall be appointed by, and serve at the pleasure of, the Governor subject to the advice and consent of the Senate. *Id.* § 2.

Third, it explicitly shifted organizational responsibility over the Department from the Board to the Commissioner. *Id.* § 3.

II. DISCUSSION

First, you ask whether transferring the Board’s substantive duties to the Commissioner, and leaving the Board as solely an advisory body, violated Article V, Section 39 of the Oklahoma Constitution.

Second, you ask whether this transfer of duties resulted in any statutory conflicts that cannot be resolved through the rules of statutory construction.

A. Transferring the Board’s authority to the Commissioner and converting the Board to an advisory body did not violate Article V, Section 39 of the Oklahoma Constitution.

To answer your first question, we review the text and history of Article V, Section 39. Enacted in 1907, Article V, Section 39 provides as follows:

The Legislature shall create *a Board of Health*, Board of Dentistry, Board of Pharmacy, and Pure Food Commission, *and prescribe the duties of each*. All physicians, dentists and pharmacists now legally registered and practicing in Oklahoma and Indian Territory shall be eligible to registration in the State of Oklahoma without examination or cost.

OKLA. CONST. art. V, § 39 (emphasis added).³

The text—which has not been amended since its adoption—directed the Legislature to create not only a Board of Health, but also three other licensing/regulatory bodies—a Board of Pharmacy, a Board of Dentistry, and a Pure Food Commission. It states that “[a]ll physicians, dentists and pharmacists now legally registered and practicing in Oklahoma and Indian Territory shall be eligible to registration in the State of Oklahoma without examination or cost.” *Id.* Each of the listed professions correspond to the boards named in Article V, Section 39, and each of those boards had a territorial equivalent. *See* 1893 Statutes, ch. 8 (board of health), ch. 29 (board of dental examiners), ch. 61 (board of pharmacy). Accordingly, Article V, Section 39 is properly read as directing the Legislature to create state licensing bodies for certain medical professions, while at the same time enabling practitioners licensed by the analogous territorial licensing bodies to continue to practice without paying a registration fee or taking an exam before the newly created state licensing bodies.

A look at the history of territorial laws and the adoption of Article V, Section 39 supports this textual interpretation. *See, e.g., Chicago, R.I. & P. Ry. Co. v. Gist*, 1920 OK 238, ¶ 6, 190 P. 878, 884 (“Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it.” (quoting *U.S. v. Union Pac. R.R. Co.*, 91 U.S. 72 (1875))).

To begin, the term “Board of Health” as used in the Constitution must be understood in its historical context. Prior to statehood, the public health concerns of the territory were the responsibility of the Territorial Board of Health (“Territorial Board”). As relevant here, the Territorial Board also served as the licensing and regulatory body for individuals wishing to practice medicine in Oklahoma Territory. *See* 1893 Statutes, ch. 8 § 14; *see also Bd. of Med.*

³ This type of directive to the Legislature is not atypical of the Oklahoma Constitution. *See, e.g.,* OKLA. CONST. art. III, § 2 (“The Legislature shall create a State Election Board to be charged with the supervision of such elections as the Legislature shall direct.”); OKLA. CONST. art. VI, § 21 (“The Legislature shall create a Board of Arbitration and Conciliation in the Department of Labor . . .”).

Exam'rs v. Gulley, 1913 OK 578, ¶ 1, 136 P. 1083, 1083 (acknowledging that a license to practice medicine in the Oklahoma territory was issued by the Territorial Board). The Territorial Board was also empowered to make rules to prevent the spread of infectious disease, establish quarantines, arrange for removal of putrid bodies, destroy impure food, and to perform other duties. 1893 Statutes, ch. 8 § 4.

The Legislature did in fact create the licensing boards listed in Article V, Section 39. *See* 1905 Sess. Laws, ch. 15 (pre-statehood Board of Dentistry); 1909 Okla. Sess. Laws, ch. 27, art. I (Board of Pharmacy); 1907–08 Okla. Sess. Laws, ch. 37, art. I (Pure Food Commission). With respect to the licensing of physicians, the Legislature created the Board of Medical Examiners to license and regulate the practice of medicine in Oklahoma. 1907–08 Okla. Sess. Laws, ch. 70A, art. I.

Meanwhile, the Legislature created a separate “State Board of Health”—as well as a “State Commissioner of Health”—to perform other functions including quarantining against those from outside territory known to be infected, reporting to the Governor upon the sanitary condition and needs of the State, and establishing university laboratories to examine the water supply. *See* 1907–08 Okla. Sess. Laws, ch. 79, art. II, §§ 1–5.⁴

Only a year after the Board of Medical Examiners was created, the Oklahoma Court of Criminal Appeals—in a case involving the prosecution of a physician for practicing without a valid license—took the view that, by creating the Board of Medical Examiners, the Legislature had carried out its duty under Article V, Section 39 to create a Board of Health:

The territorial laws relating to the practice of medicine were not extended and did not remain in force in the state of Oklahoma by reason of [Article V, Section 39] . . . *This provision of the Constitution was made effective by chapter 70a, art. 1, p. 791a, Sess. Laws 1907–08*, the same being entitled: “An act to define and regulate the practice of medicine; to create a board of medical examiners for the examination and licensing of physicians and surgeons and to prescribe their qualifications; to provide for their proper regulation, and to provide for the revocation of their license; to require itinerant venders to procure a county license and to fix suitable penalties for the violation of this act, and repealing laws and parts of laws in conflict herewith.” This law was approved June 12, 1908, and became effective on the 24th day of August, 1908.

State v. Harmon, 1909 OK CR 129, 104 P. 370, 372 (emphasis added).

Based on this contemporaneous reading of the Constitution, the Legislature satisfied the directive of Article V, Section 39 by creating the Board of Medical Examiners as the licensing/regulatory successor to the Territorial Board. The intent of the framers and the voters adopting the state constitution, as found in the instrument itself and in a contemporaneous interpretation of it, was to create a body to *license physicians*. It is this intent of the framers and adopters that controls the

⁴ You reference an Attorney General Opinion in which this office stated that the State Board of Health and the State Department of Health are separately created and exist in the law as independent entities. 1981 OK AG 161, ¶ 6. This current Opinion is not in conflict with the previous Attorney General Opinion.

analysis. *See Draper v. State*, 1980 OK 117, ¶ 8, 621 P.2d 1142, 1145–46 (“Effect must be given to the intent of [the Constitution’s] framers and of the people adopting it.”); *Inst. for Responsible Alcohol Policy v. State ex rel. Alcoholic Beverage Laws Enf’t Comm’n*, 2020 OK 5, ¶ 16, 457 P.3d 1050, 1056 (“Constitutional construction requires the Court to garner the drafter’s intent . . .”).

Instead of reconstituting a Board of Health for licensing purposes, the Legislature decided to sever this licensing responsibility and place it within a newly created Board of Medical Examiners.⁵ *See Ins. Co. of N. Am. v. Welch*, 1915 OK 914, 154 P. 48, 52 (noting that unless prohibited by the constitution, the Legislature can “redistribute the executive powers of the state government in any manner they s[ee] fit”).

This leads to the conclusion that by transferring the Board’s authority to the Commissioner and converting the Board to a purely advisory body, H.B. 3036 did not violate the Oklahoma Constitution because the responsibilities as they existed in the modern-day Board did not exist pursuant to a constitutional command. The Legislature was afforded discretion for the assignment of all responsibilities, with the constitutional minimum that the Legislature must create an entity to license physicians.⁶

B. Converting the Board of Health to an advisory body did not create irreconcilable statutory conflicts.

In your second question, you pose several examples of purported statutory conflicts that arise from H.B. 3036. For example, H.B. 3036 amended Title 63, Section 1-104 to make the Commissioner a gubernatorial appointee that serves at the pleasure of the Governor, but it left Title 63, Section 1-106 unchanged—a section that provides for the Commissioner to serve at the pleasure of the Board. Similarly, Title 63, Section 1-705—a section not amended by H.B. 3036—provides that the Board, “upon recommendation of [the Commissioner] and with the advice of the Oklahoma Hospital Advisory Council . . . shall promulgate rules and standards for the construction and operation of hospitals . . .” 63 O.S.2021, § 1-705(A). If the Board’s authority is transferred to the Commissioner, you suggest that this statute is nonsensical insofar as it requires the Commissioner to make a self-recommendation.

The fundamental rule of statutory construction is to ascertain and give effect to the intention and purpose of the Legislature. *See McIntosh v. Watkins*, 2019 OK 6, ¶ 4, 441 P.3d 1094, 1096. That being said, strict adherence to the statutory text can create absurd results, especially when

⁵ It is of historical note, however, that the Legislature charged both the Board of Health and the Board of Medical Examiners with the ability to correct any Territorial Board of Health licensing mistakes that occurred prior to statehood. *See* 1907–08 Okla. Sess. Laws, C.R. No. 24.

⁶ Even if we were to conclude that Article V, Section 39 was referring to the modern-day Board and not a licensing body for physicians, we would reach the same result. The Legislature created the Board and prescribed its original duties shortly after Oklahoma was admitted into the Union. *See* 1907–08 Okla. Sess. Laws, ch. 79, art. II. As for H.B. 3036, one does not look to the state constitution to determine what is permitted, only what is prohibited. *Tate v. Logan*, 1961 OK 136, 362 P.2d 670, 674; OKLA. CONST. art. V, § 36. Because the constitution defers to the Legislature to prescribe the duties of the Board, and no other entity is constitutionally charged with advising the Commissioner, H.B. 3036 is a lawful exercise of the Legislature’s prerogative to reorganize powers granted to elected entities. *See Ins. Co. of N. Am.*, 1915 OK 914, 154 P. at 52.

amendments reach across multiple enactments. “When the legislative objective appears clear from an examination of the enactment, words may be altered, modified or supplied in order to afford them the force and effect that was doubtless intended.” *Wilks v. Wilks*, 1981 OK 91, ¶ 14, 632 P.2d 759, 762; *In re Blain*, 1946 OK 238, ¶ 14, 172 P.2d 795, 799.

The language of H.B. 3036 is unambiguous in its expression of the intent and purpose of the Legislature. A word-for-word substitution of “Board” for “Commissioner” is not the intent. The Legislature made clear that the Board’s authority is limited to advising the Commissioner, who shall assume all former authority of the Board. In situations where this creates an absurd result, the text of the statute must give way to the intent of the Legislature as evidenced by the text of the enactment. *See Wilks*, 1981 OK 91, ¶ 14, 632 P.2d at 763; *In re Blain*, 1946 OK 238, ¶ 14, 172 P.2d at 799. Title 63, Section 1-705, for example, should be read simply to instruct the Commissioner to promulgate rules with the advice of the Oklahoma Hospital Advisory Council. *See City of Sand Springs v. Dep’t of Pub. Welfare*, 1980 OK 36, ¶ 28, 608 P.2d 1139, 1151 (“Where statutes conflict in part, the one last passed, which is the later declaration of the Legislature, should prevail, superseding and modifying the former statute only to the extent of such conflict.”).

It is, therefore, the official opinion of the Office of the Attorney General that:

- 1. In directing the Legislature to create a “Board of Health,” OKLA. CONST. art. V, § 39 requires the creation of a licensing body for the practice of medicine. *See State v. Harmon*, 1909 OK CR 129, 104 P. 370. Consistent with this directive, the Legislature created the Board of Medical Examiners. *Id.*; *see also* 1907–08 Okla. Sess. Laws, ch.70A, art. I.**
- 2. The functions and authority granted to the State Board of Health by the Legislature in 1907–08 Okla. Sess. Laws, ch. 79, art. II, § 1 were not mandated by the Oklahoma Constitution. Accordingly, nothing in the Constitution prohibited the Legislature from transferring the Board’s authority to the State Commissioner of Health and converting the Board to a purely advisory body. OKLA. CONST. art. V, § 36.**
- 3. The Legislature expressed its clear intention to vest all non-advisory functions of the Board in the Commissioner and the statutory text should be interpreted to effectuate that intent. *Wilks v. Wilks*, 1981 OK 91, 632 P.2d 759, 763; *City of Sand Springs v. Dep’t of Pub. Welfare*, 1980 OK 36, 608 P.2d 1139.**


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