

February 23, 2000

No. 8271

This opinion is issued in response to a question from Lorna Youngs, Deputy Director, Driver and Motor Vehicle Services Division of the Oregon Department of Transportation, concerning the use of Highway Funds.^{1/}

QUESTION PRESENTED

May Highway Funds be used to implement and administer those provisions of Oregon Laws 1999, chapter 1099 (House Bill 3292) that require ODOT to place a positive drug test result on an employment driving record and provide an opportunity for hearing?

ANSWER GIVEN

No. Highway Funds cannot constitutionally be used for this purpose

DISCUSSION

I. House Bill 3292

House Bill 3292 enacted several new statutes and amended several existing provisions effective March 1, 2000,^{2/} related to alcohol and drug testing of persons who drive commercial vehicles.^{3/} Under these new provisions, motor carriers are required to establish or participate in an alcohol and drug testing program that meets the federal requirements of 49 CFR Part 382, and the medical review officer of the testing program must report all positive drug test results to the Oregon Department of Transportation (ODOT). ORS 825.410(1), (3). When ODOT receives a positive drug test report, ODOT must notify the driver of the right to an administrative hearing to

determine if the test result should be placed on the driver's employment driving record. ORS 825.412(1). If the driver requests an administrative hearing, the issues are:

- whether the person named in the report is the person who took the test,
- whether the motor carrier or consortium has a program that meets the requirements of 49 CFR Part 382, and
- whether the medical review officer making the report correctly followed the procedures for testing established by the motor carrier or consortium.

ORS 825.412(3). If the driver fails to request a hearing or if, after a hearing, ODOT determines that the above requirements are met, ODOT must place the positive drug test result on the driver's employment driving record.^{4/} ORS 802.200(10)(b), 825.412(4), (6).

We are asked whether Highway Funds may be used to pay ODOT's cost in carrying out these statutory mandates.

II. Use of Highway Funds

Article IX, section 3a, of the Oregon Constitution provides that revenues from motor vehicle taxes and motor vehicle fuel "shall be used exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state."^{5/} These revenues may also be used for costs of administration and, to the extent derived from taxes levied on commercial vehicles, "for enforcement of commercial vehicle weight, size, load, conformation and equipment regulation." Or Const Art IX, § 3a(2)(a), (d).

The language of Article IX, section 3a that allows use of Highway Funds for the "improvement, * * * operation and use" of highways has been narrowly construed by the Oregon Supreme Court. In *Rogers v. Lane County*, 307 Or 534, 771 P2d 254 (1989), the court found that construction of an airport parking lot and covered walkway from the parking lot to the airport itself was not a highway-related project and therefore not a constitutionally permissible use of Highway Funds. The Court concluded that the expenditure of Highway Funds must be limited exclusively to expenditures on highways, roads, streets and roadside rest areas themselves or for other projects or purposes "that primarily and directly facilitate motorized vehicle travel." *Id.* at 545. See also *Automobile Club of Oregon v. State of Oregon*, 314 Or 479, 490-491, 840 P2d 674 (1992) (underground storage tank assessments and emission fees are taxes or excises for purposes of Article IX, section 3a; because their use to aid gasoline stations in meeting federal environmental regulations and for public transportation projects is not constitutionally permissible, the fees are invalid).

Article IX, section 3a(2)(a) also permits the use of Highway Funds for "the costs of administration." This office has previously concluded that Highway Funds may be used for the administrative costs of a statutorily mandated program only if the program is a permissible use of

Highway Funds. *See* 48 Op Atty Gen 345 (1997) (use of Highway Funds for start-up and administrative costs of special license plate programs that generate revenue for non-highway purposes would violate constitution); 39 Op Atty Gen 400 (1978) (use of Highway Funds for administrative expenses of the Advisory Committee on Bicycles allowable in proportion to services directly connected to its advice on bicycle paths, lanes and trails); *see also* Letter of Advice dated October 19, 1993, to Gary Weeks, Director of the Department of Administrative Services (OP-6474) (use of Highway Funds for costs of providing motor vehicle records to criminal justice agencies via the Law Enforcement Data System (LEDS) is not constitutionally permissible, but cost of using LEDS for vehicle registration purposes is allowable administrative expense).

Under ORS 825.412, when ODOT receives a report of a positive drug test, ODOT must notify the tested driver and provide an opportunity for an administrative hearing. If the statutory criteria are met, ODOT must place the test result on the driver's employment driving record. ORS 825.412(4), 802.200(10). We find nothing in ORS 825.412, 802.200 or any other law that authorizes ODOT to use this information for any regulatory purpose related to the driving privileges of the tested driver, to the vehicle registration or operating authority of a motor carrier or for any other program that “primarily and directly facilitate[s] motorized vehicle travel.” We conclude therefore that ODOT’s maintaining the test-result information and providing an administrative hearing to the tested driver constitutes a non-highway purpose. Because Highway Funds cannot constitutionally be used for non-highway purposes, Highway Funds cannot be used to implement and administer those provisions of HB 3292 that require ODOT to place a positive drug test result on an employment driving record and provide an opportunity for hearing.^{6/}

HARDY MYERS
Attorney General

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^{1/} “Highway Funds” refer to moneys derived from taxes and fees on motor vehicles and motor vehicle fuels that are dedicated for highway purposes as specified in Article IX, section 3a, of the Oregon Constitution.

^{2/} In discussing this legislation, we cite to the new or amended provisions of the Oregon Revised Statutes rather than the provisions of House Bill 3292.

^{3/} House Bill 3292 applies to motor carriers who operate commercial vehicles or commercial motor vehicles, as those terms are defined in ORS 801.208 and 801.210. For ease of reference, we use “commercial vehicle” when referring to these terms.

^{4/} ODOT may release information about positive drug test results only to persons who provide ODOT with written permission to release the information from the driver who is the subject of the test. ORS 802.202. ODOT is exempt from civil liability for placement of a positive drug test result on an

employment driving record and for the release of this information if it occurs in the normal course of business. ORS 825.412(7).

^{5/} Article IX, section 3a, of the Oregon Constitution provides:

(1) Except as provided in subsection (2) of this section, revenue from the following shall be used exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state:

(a) Any tax levied on, with respect to, or measured by the storage, withdrawal, use, sale, distribution, importation or receipt of motor vehicle fuel or any other product used for the propulsion of motor vehicles; and

(b) Any tax or excise levied on the ownership, operation or use of motor vehicles.

(2) Revenues described in subsection (1) of this section:

(a) May also be used for the cost of administration and any refunds or credits authorized by law.

(b) May also be used for the retirement of bonds for which such revenues have been pledged.

(c) If from levies under paragraph (b) of subsection (1) of this section on campers, mobile homes, motor homes, travel trailers, snowmobiles, or like vehicles, may also be used for the acquisition, development, maintenance or care of parks or recreation areas.

(d) If from levies under paragraph (b) of subsection (1) of this section on vehicles used or held out for use for commercial purposes, may also be used for enforcement of commercial vehicle weight, size, load, conformation and equipment regulation.

Article IX, section 3a was adopted by vote of the people of Oregon on May 20, 1980. It replaced former section 3, which similarly dedicated revenues from fuel taxes and vehicle operation fees as Highway Funds, except that it also authorized use of these revenues for policing highways and development and maintenance of parks and historic places. *Former Or Const Art IX, § 3 (repealed May 20, 1980).*

^{6/} Although ODOT cannot use Highway Funds for this purpose, ODOT must implement this portion of HB 3292 if it has funds that are not constitutionally, statutorily or otherwise dedicated to some other purpose. If ODOT does not have such non-dedicated funds, ODOT must seek funding from the Emergency Board to implement this portion of HB 3292. *See 38 Op Atty Gen 1908 (1978) (advising DMV to implement program for which Emergency Board refused to appropriate funds if its existing appropriation and budget do not prohibit necessary expenditures); 34 Op Atty Gen 1114 (1970) (agency not required to perform statutory functions after legislature and Emergency Board refuse funding).*