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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**



DIVISION ONE
FILED: 09/06/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

ARIZONA ASSOCIATION OF
CHIROPRACTIC; ANTHONY A. GROSS,
DC; ARIZONA COLLEGE OF EMERGENCY
PHYSICIANS; CRAIG NORQUIST, MD;
ARIZONA DENTAL ASSOCIATION;
REGINA COBB, DMD; ARIZONA
MEDICAL ASSOCIATION; HENRI
CARTER, MD; ARIZONA NURSES'
ASSOCIATION; JENNIFER MENSIK,
PhD, RN; ARIZONA OCCUPATIONAL
THERAPY ASSOCIATION; NINA
CASTILLO, MS, OTR/L; ARIZONA
OPTOMETRIC ASSOCIATION;
CHRISTINA OLIVETTI, OD; ARIZONA
OSTEOPATHIC MEDICAL ASSOCIATION;
JEFFREY W. MORGAN, DO; ARIZONA
PHARMACY ALLIANCE; MARK BOESEN,
RPh; ARIZONA PHYSICAL THERAPY
ASSOCIATION; KAY WING, PT;
ARIZONA STATE ASSOCIATION OF
PHYSICIAN ASSISTANTS; AND
MICHELLE DIBAISE, PA-C,

Plaintiffs/Appellants,

v.

JAN BREWER, in her capacity as
Governor of the State of
Arizona; and DOUG DUCEY, in his
capacity as Treasurer of the
State of Arizona,

Defendants/Appellees.

1 CA-CV 10-0575

DEPARTMENT D

MEMORANDUM DECISION

(Not for Publication -
Rule 28, Arizona Rules
of Civil Appellate
Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-011326

The Honorable Sam Myers, Judge

AFFIRMED

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I R V I N E, Presiding Judge

¶1 The Arizona Association of Chiropractic and other healthcare professional associations and some individual members (collectively "Associations") appeal summary judgment in favor of Arizona's Governor in their challenge to legislation directing the transfer of monies from certain special funds to the general fund. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In 2008, the State of Arizona faced a severe budget shortfall of about 1.2 billion dollars. In response, the legislature enacted House Bill ("HB") 2620, which reduced the budgets of many state agencies. See 2008 Ariz. Sess. Laws, ch. 53 (2nd Reg. Sess.) Responding to similar circumstances in 2009, the legislature enacted HB 2209. See 2008 Ariz. Sess. Laws, ch.

285. In addition to reducing agency budgets, HB 2620 and HB 2209 directed the transfer of monies from certain special funds established for medical and health regulatory agencies ("Boards") to the State's general fund.

¶3 The funds derived from licensing fees collected by the Boards from the regulated professionals. The enabling statutes creating the funds provided that ten percent of the fees collected shall be deposited into the State's general fund, with ninety-percent remaining in the Boards' funds subject to appropriation by the legislature. See Ariz. Rev. Stat. ("A.R.S.") §§ 32-906 (2008) (chiropractic), -1406 (2008) (medical), -1212 (2008) (dental), -1611 (2008) (nursing), -3405 (2008) (occupational therapy), -1705 (2008) (optometry), -1805 (2008) (osteopathy), -1907 (2008) (pharmacy), -2004 (2008) (physical therapy), -2506 (2008) (physician assistants).

¶4 In April 2009, the Associations filed a claim in superior court challenging the legality of HB 2620 and HB 2209, and seeking return of the special funds or declaratory relief. They moved for summary judgment arguing that the transfers were not appropriation decisions, the funds were held in trust and could not be appropriated, the bills levied a tax without specifically stating the objective or a two-thirds vote, and raising other statutory objections under Title 35.

¶5 The Governor filed a cross-motion and argued the legislature did not violate its constitutional authority to appropriate funds. The trial court ruled in favor of the Governor, finding: (1) the transfers were "a permissible exercise of the legislature's appropriation authority"; (2) there was no evidence "the State Treasurer held the Boards' funds as a conduit or custodian"; and (3) regardless of whether the funds are characterized as a tax or a fee, the Associations failed to cite constitutional or statutory authority that prohibited the Governor "from revising the percentage of the licensure fees that goes into the general fund." The court rejected the Associations' "additional constitutional and statutory" claims. The Associations timely appeal.

DISCUSSION

¶6 We review de novo a grant of summary judgment involving constitutional claims and issues of statutory interpretation. *Arpaio v. Maricopa County Bd. of Supervisors*, 225 Ariz. 358, 361, ¶ 6, 238 P.3d 626, 629 (App. 2010). We may affirm a grant of summary judgment if it is correct for any reason. *City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, ¶ 14, 32 P.3d 31, 36 (App. 2001).

¶7 We start by recognizing that the legislature has plenary power over the use and priority of State funds. Ariz. Const. art. 4, Pt. 2, § 20. "[U]nless that power is limited by

express or inferential provisions of the Constitution, the legislature may enact any law which in its discretion it may desire." *Ariz. Farm Bureau Fed. v. Brewer*, 226 Ariz. 16, 19, ¶ 7, 243 P.3d 619, 622 (App. 2010) (citation omitted). The legislature's power to make laws is subject only to state and federal constitutional limitations. *Litchfield Elem. Sch. Dist. No. 79 v. Babbitt*, 125 Ariz. 215, 223, 608 P.2d 792, 800 (App. 1980). There is a strong presumption that a legislative enactment is constitutional, and the party challenging the enactment must prove beyond a reasonable doubt it is unconstitutional. *Id.*

¶8 The legislature's authority is not absolute, however, but limited to public monies. *Ariz. Farm Bureau*, 226 Ariz. at 19, ¶ 10, 243 P.3d at 622. "Public monies" are defined as "all monies coming into the lawful possession, custody or control of state agencies, boards, commissions or departments or a state officer, employee or agent in his official capacity, irrespective of the source from which, or the manner in which, the monies are received." A.R.S. § 35-212(B) (2011);¹ *State v. Mecham*, 173 Ariz. 474, 481, 844 P.2d 641, 648 (App. 1992). "Public monies" includes "money belonging to, received or held

¹ We cite to the current version of applicable statutes when no revision material to this case has occurred.

by, state, county, district, city or town officers in their official capacity." A.R.S. § 35-302 (2011).

¶9 In this case, a typical enabling statute reads:

A. The Arizona medical board fund is established. Pursuant to §§ 35-146 and 35-147, the board shall deposit ten per cent of *all monies collected* under the provisions of this chapter in the state general fund and deposit *the remaining ninety per cent in the Arizona medical board fund*.

B. Monies deposited in the fund are subject to § 35-143.01.

A.R.S. § 32-1406 (Arizona medical board). Section 35-143.01 provides:

A. *All monies deposited in special agency funds of self-supporting regulatory agencies, as provided in § 35-142, to be used by such agency for administration and enforcement, shall be subject to annual legislative appropriation.*

B. Unless otherwise provided by the legislature, a special fund self-supporting regulatory agency shall not expend more monies than are *appropriated* by the legislature for a fiscal year, and any monies remaining at the end of the fiscal year revert to the special agency fund.

(Emphasis added.)

¶10 Here, the special funds derived from fees that were legitimately collected by the Boards in an official capacity. By definition, they were "public monies" subject to legislative appropriation. Section 35-143.01(A) plainly states so.

¶11 The Associations argue that the transferred funds have not been previously appropriated by the legislature. They fail, however, to cite any applicable constitutional provision that requires an appropriation. The cases they rely on to support the contention that the legislature must “‘identify some appropriation that must be reduced’ if it wishes to transfer some money from special funds to the general fund” are distinguishable.

¶12 In *Rios v. Symington*, a prior appropriation was not required not to authorize legislative transfers, but because Article V, Section 7 prevented the governor from vetoing items in a bill unless it contained “several items of appropriations” of money. 172 Ariz. 3, 11, 833 P.2d at 20, 28. In *League of Ariz. Cities and Towns v. Martin*, 219 Ariz. 556, 560-61, ¶¶ 14-18, 201 P.3d 517, 521-22 (2009), the Arizona Supreme Court addressed the validity of transfers in a different section of HB 2209 under Article IV, Part 2, Section 20. There, the Court looked for a prior appropriation because the legislature failed to specify that the amount would come from public revenue previously set aside for cities and towns. In effect, the Court held that the legislature could not simply appropriate money that did not belong to the State.

¶13 The transferred sums here, in contrast, were collected and held by state agencies. Because they were public monies

subject to legislative appropriation, the transfers did not have to reduce a prior appropriation.

¶14 The Associations next contend that the transfers of regulatory fees into the general fund converted them into unconstitutional taxes because they were ultimately used for purposes of the general fund. The Associations argue that *Hawaii Insurers Council v. Lingle*, 201 P.3d 564 (Haw. 2008) is on point. We disagree.

¶15 In *Hawaii Insurers*, the Hawaii Supreme Court found its legislature violated the separation of powers doctrine because the fees that were transferred to the general fund were taken from an agency whose budget is allocated by the insurance commissioner, a member of the executive branch. *Id.* at 568, 572. The agency was required to keep a reserve intended to handle emergencies for the protection of policy holders. *Id.* at 568.

¶16 Here, the Boards are not independent of the legislature, but rely on it to approve their annual budget and other appropriation matters. See A.R.S. § 35-143.01 ("Unless otherwise provided by the legislature, a special fund self-supporting regulatory agency shall not expend more monies than are appropriated by the legislature for a fiscal year"). Because the Arizona legislature has not delegated its appropriation power over the Boards' funds, there is no violation of the separation of powers doctrine.

¶17 The Associations also contend that the transfers violated Article IX, section 17(2)(b)(iii), of the Arizona constitution because the funds were held by the State in trust or a custodial capacity. We recently rejected a similar challenge to HB 2620 in *Arizona Farm Bureau Federation*, a case involving the transfer to the general fund of monies from special funds set up for farmers. 226 Ariz. at 21, ¶¶ 2-3, 243 P.3d at 621.

¶18 In *Arizona Farm Bureau Federation*, two of three fee collection statutes named the grower, shipper or handler “a trustee of the monies until they are paid” to the councils and referenced a statute that allowed the treasurer to invest trust and treasury monies. 226 Ariz. at 21, ¶¶ 18-19, 243 P.3d at 624 (citing A.R.S. § 35-313) (emphasis added). Despite such terms, we declined to infer a trust relationship, reasoning “the legislature knows how to create a trust when it wishes to do so, and it does so with more specific language.” *Id.* at 22, ¶ 24, 243 P.3d at 625. Finding no explicit statement of a “clear and unequivocal” intent to create a trust, we held that none was created. *Id.* at 21-22, ¶¶ 20-21, 25, 243 P.3d at 624-25.

¶19 The statutes here likewise state no legislative intent to create a trust. Rather, they indicate a contrary intent that monies in the special funds are not considered “trust monies.” “Trust monies,” are defined as “treasury monies other than

operating monies." A.R.S. § 35-310(5) (2011); *Ariz. Farm Bureau*, 226 Ariz. at 22, ¶ 23, 243 P.3d at 625. Under Title 35, when interest from treasury monies is paid to the state general fund, those special funds are considered "operating monies." See A.R.S. § 35-310(2) (Supp. 2010).

¶20 The enabling statutes here provide that interest from the special funds "accrues to the general fund." A.R.S. § 35-142(A), (F). The Comptroller's affidavit also confirmed that "all interest earned on the monies in the Funds is deposited into the [general fund]." By definition, the special funds were not "trust monies."

¶21 Nor can we find a custodial relationship even though the enabling statutes reference a statute that provides "the state treasurer shall be the custodian of all such funds." A.R.S. § 35-142(A)(8). Section 35-142 appears in Title 35, Article I, which deals with "Budgetary and Fiscal Provisions For State Agencies." Statutes that appear in Title 35, Article I, do not limit the legislature's authority, but govern how the Boards can spend their money. See *Ariz. Farm Bureau*, 226 Ariz. at 20-21, ¶ 14, 243 P.3d at 624-25.

¶22 Additionally, the use of the term "custodian" is ambiguous. The State Comptroller testified in his affidavit that he is "the custodian of *financial records*" for the Boards' funds. (Emphasis added.) He stated that "[t]he State of Arizona

has classified and reported [those] Funds in the State's audited financial statements among the State's special revenue funds and not among its trust or agency funds." He attests that they are not set up as "funds for which money is held in trust."

¶23 The Associations correctly argue that the State does not always get title to the monies in its possession. *Kotterman v. Killian*, 193 Ariz. 273, 284, 972 P.2d 606, 617 (1999). Nevertheless, they fail to show how the State was "a mere custodian or conduit" of the funds. The funds here did not derive from a purely federal source. *Cf. Navajo Tribe v. Ariz. Dep't of Admin.*, 111 Ariz. 279, 280-81, 528 P.2d 623, 624-25 (1974). Nor are they like workers' compensation funds, which have a limited purpose and an ascertainable beneficiary. See *Moran v. Derryberry*, 534 P.2d 1282, 1286 (Okla. 1975); *Workers' Comp. Fund v. State*, 125 P.3d 852 (Utah 2005).

¶24 Although we recognize that the legislature originally reserved the statutory funds for the Board's regulatory purposes, the enabling statutes do not show "an irrevocable dedication of the monies in the funds." *Ariz. Farm Bureau*, 226 Ariz. at 23, ¶ 30, 243 P.3d at 626 (citing *Arpaio*, 225 Ariz. at 363, ¶ 19, 238 P.3d at 631). Nor do they provide that the monies shall be used solely for the benefit of the Boards' licensees. *Id.* at 23, ¶ 29, 243 P.3d at 626 (finding no custodial relationship because funds were "not used for the sole benefit

of the crop producers who pay the fees or any donors who donate monies"). The enabling statutes identify no beneficiary of the funds and do not guarantee any licensee a particular benefit. *Id.* Indeed, the statutes do not permit any particular licensee to legally challenge how the Boards use their fees. *Id.* at ¶ 28.

¶25 Under these circumstances, we conclude that neither a trust nor custodial relationship existed. Consequently, the Associations failed to prove a clear violation of Article IX, Section 17(2)(b)(iii).

¶26 The Associations further contend that the trial court erred in concluding that the legislature intended to transfer the monies in the Board's funds without first amending the enabling statutes, in violation of Article IV, Part 2, ¶ 14. Addressing the Association's claim that the transfer of funds was unconstitutional, the trial court ruled as follows:

[The Associations] only challenge the constitutionality of the legislation that changes (ultimately) the percentage that goes into the general fund. Whether or not the character of the funds is construed as a fee or a tax is ultimately a distinction without a difference; Plaintiffs cite no constitutional or legislative authority that prohibits the legislature *from revising the percentage of the licensure fees that goes into the General fund.*

(Emphasis added.) The Associations assert that the phrase "revising the percentage of licensure fees that goes into the General fund" refers to a legislative revision of the enabling

statutes' ninety-to-ten allocation of monies between the special and general funds.

¶27 To the extent the ruling may be construed this way, we agree that it was erroneous. Article IV, Part 2, ¶ 14 of the Arizona Constitution plainly states, "No Act or section thereof shall be revised or amended by mere reference to the title of such Act, but the Act or section as amended shall be set forth and published at full length." This provision does not apply in this case, however, because there is no evidence the legislature intended to amend the enabling statutes, and the statutes were in fact not amended. Furthermore, there is no requirement that the legislature must first amend the enabling statutes before it may redirect monies to the general fund where, as here, the legislature created statutory funds. *See Arpaio*, 225 Ariz. at 363, ¶ 18, 238 P.3d at 631 (citation omitted).

¶28 To the extent the trial court's ruling can be interpreted to mean that it does not matter whether the transfers were fees or taxes because they merely increased the amount of monies already appropriated to the general fund, it is correct. Under Arizona law, the transfer of monies from special funds to the general fund does not increase tax revenue if, as here, those monies were merely transferred from "funds already within the government's possession." *See id.* at 364, ¶ 24, 238 P.3d at 632.

¶29 The Associations next argue that the legislature effectively levied new taxes without first "stating distinctly the object of the tax, to which object only it shall be applied." Ariz. Const. Art. IX, §§ 3, 9. The funds here, however, derived from licensing fees, not taxes.

¶30 Even assuming that the transfers of the funds converted the fees into taxes for the purposes of Article 9, Sections 3 and 9 apply only to property taxes. *Ariz. Farm Bureau*, 226 Ariz. at 24, ¶ 35, 243 P.3d 627. The fees paid for "the privilege of engaging in an occupation is clearly an excise" tax. *Id.* at ¶ 36. Because these funds derived from professional licensing fees, they would be excise taxes, to which Article IX does not apply. *Id.* at ¶ 35.

¶31 The Associations additionally contend that the transfers in HB 2209 raised tax revenue without a two-thirds vote of each house of the legislature, in violation of Article IX, section 22 of the Arizona Constitution. We disagree.

¶32 Article IX, Section 22 requires any act that imposes a new tax, fee, or assessment providing for a net increase in state revenue be passed by a two-thirds super majority of both houses of the legislature. *Arpaio v. Maricopa County Bd. of Supervisors*, 225 Ariz. at 364, ¶ 24, 238 P.3d at 632. In *Arpaio*, we held that the transfer of public funds already in the

government's possession did not violate Section 22, because the burden on the tax- and fee-paying public did not increase. *Id.*

¶33 Like *Arpaio*, the transfers here did not increase the overall tax burden on the licensees, but merely shifted public monies already in the possession of the State treasurer. *See id.* Accordingly, HB 2209 did not require a super-majority vote under Article IX, Section 22.

¶34 Finally, the Associations argue that the legislature's appropriation violated A.R.S. § 35-143.01(C) (stating "[a]ny unexpended or unencumbered balance" does not revert to the general fund at the end of a fiscal year) and A.R.S. § 35-142(F) (allowing monies to be used to pay claims for the general fund, but requiring that "sufficient monies remain" for payment of the Boards' own claims). As noted in ¶ 19, however, these statutes appear in Title 35, Article 1, which does not limit the legislature's plenary power over the appropriation of funds, but how the Boards may spend their money. *See Ariz. Farm Bureau*, 226 Ariz. at 20-21, ¶ 14, 243 P.3d at 624-25; *accord Crane v. Frohmiller*, 45 Ariz. 490, 496, 45 P.2d 955, 958 (stating only the Constitution can limit the supreme authority of the legislature over appropriation matters). The trial court did not err in summarily denying these statutory arguments.

CONCLUSION

¶35 For these reasons, we affirm.

/s/
PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/
JOHN C. GEMMILL, Judge

/s/
PHILIP HALL, Judge