

**LETTER OPINION
2012-L-13**

December 19, 2012

Mr. Lynn D. Helms
Director
Department of Mineral Resources
600 E Boulevard Ave Dept. 405
Bismarck, ND 58505-0840

Dear Mr. Helms:

Thank you for your letter asking whether civil penalties collected under N.D.C.C. § 38-08-16(1) by the North Dakota Industrial Commission should be deposited into the state tuition fund. You also ask if the Commission, as part of negotiating settlements for violations of its laws, rules, or orders, may suspend the payment of a civil penalty on condition that the violator agrees to make a donation to the Abandoned Oil and Gas Well Plugging and Site Reclamation Fund.

It is my opinion that N.D.C.C. § 38-08-15(6) requires all amounts paid as penalties received by the Industrial Commission to be paid to the State Treasurer and credited to the general fund. It is my further opinion that, depending on the facts and circumstances, a court may conclude that the Industrial Commission lacks authority to completely suspend the payment of a civil penalty on the condition that the violator agrees to make a donation to the Abandoned Oil and Gas Well Plugging and Site Reclamation Fund.

ANALYSIS

Disposition of Civil Penalties

The Industrial Commission is authorized to impose a “civil penalty” upon any person who is in violation of N.D.C.C. ch. 38-08 or any rule, regulation, or order of the Commission.¹ You indicated civil penalties collected by the Commission are currently deposited into the state tuition fund.

N.D.C.C. § 38-08-15(6) states “. . . and all amounts paid as penalties provided for by this chapter must be paid to the state treasurer and credited to the general fund.”

Therefore, it is my opinion that N.D.C.C. § 38-08-15(6) requires all money received by the Industrial Commission under N.D.C.C. § 38-08-16(1) to be paid to the State Treasurer and credited to the general fund.

¹ N.D.C.C. § 38-08-16(1).

Authority to Suspend Civil Penalties Conditioned on a Donation

In your letter you indicated the Industrial Commission often settles complaints by negotiating settlements prior to or during litigation. You also indicated the Commission often suspends all or a portion of a civil penalty for a specified period of time under certain conditions, including an agreement for the violator to make a prescribed donation to the Abandoned Oil and Gas Well Plugging and Site Reclamation Fund ("Fund").² You ask if the Commission may suspend the payment of a civil penalty on condition that the violator agrees to make a donation to a designated state fund.

The Industrial Commission has very broad, general jurisdiction and authority to regulate the production of oil and gas and the oil and gas industry in this state.³ As previously stated, it is authorized to impose a civil penalty on any person who violates any provision of N.D.C.C. ch. 38-08 or any rule, regulation, or order of the commission.⁴ Also, the Commission is authorized to compromise any civil penalty.⁵

As an administrative agency, the Commission has legislative authority to resolve adjudicative proceedings by stipulations, settlement, waiver of hearing, consent order, default, alternative dispute resolution, or other informal disposition.⁶ "Generally, if authorized by law and if justified in fact, imposition of a regulatory sanction by an administrative agency is a discretionary exercise of power."⁷ The North Dakota Supreme Court has permitted agencies to have certain flexibility when imposing regulatory sanctions, for example, by interpreting specific legislative authority for certain sanctions according to the maxim of jurisprudence stating that the greater contains the less.⁸

Thus, the Commission has both clear statutory authority and implied inherent authority as an administrative agency to resolve controversies. This state has a long-recognized public policy of

² See N.D.C.C. § 38-08-4.5. The purpose of the Fund is to defray the costs incurred in carrying out the plugging or replugging of wells, the reclamation of well sites, and all other related activities. The Fund has several sources of revenue, one being "[m]oneys donated to the commission for the purposes of this section."

³ See N.D.C.C. § 38-08-04.

⁴ N.D.C.C. § 38-08-16.

⁵ Id.

⁶ Amerada Hess Corp. v. Furlong Oil & Minerals Co., 348 N.W.2d 913, 916 (N.D. 1984); N.D.C.C. § 28-32-22.

⁷ Wisdom v. N.D. Real Estate Comm'n, 403 N.W.2d 19, 22 (N.D. 1987), Larsen v. Comm'n on Med. Competency, 585 N.W.2d 801, 808 (N.D. 1998).

⁸ Wisdom, 403 N.W.2d at 22; see also N.D.C.C. § 31-11-05(27). For a specific example, where the constitution allows for the removal of judges from office, a suspension without pay is authorized as a lesser sanction than removal from office even where another constitutional provision forbids reducing a judge's pay. In re Disciplinary Action Against McGuire, 685 N.W.2d 748, 764 (N.D. 2004).

encouraging settlements of controversies between parties.⁹ Thus, because the Fund is statutorily authorized to receive donations, a request for donations in certain circumstances is a legitimate tool for the Commission to use when crafting a just resolution.

However, even with considerable discretion to compromise settlements, discretion is subject to reversal if it is abused.¹⁰ The Commission should be mindful that its overriding duty is to regulate the oil and gas industry of this state and to do so, has the statutory authority to impose civil penalties. The Commission must be careful not to greatly favor the use of donations over the statutory civil penalties, since such a practice could be viewed as circumventing legislative authority by diverting monies owed to the general fund that would otherwise be subject to disbursement pursuant to legislative appropriation.¹¹

Therefore, based upon the forgoing analysis, it is my opinion that the use of donations as a settlement tool is within the authority and discretion of the Commission. However, it is further my opinion, that the near complete suspension of civil penalties in favor of donations to the Abandoned Oil and Gas Well Plugging and Site Reclamation Fund, depending on the facts and circumstances, could be viewed by a court as an abuse of the Commission's discretion.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.¹²

⁹ E.g., Blackburn, Nickels & Smith, Inc. v. Nat'l Farmers Union, 452 N.W.2d 319, 323 (N.D. 1990); Thomas C. Roel Associates, Inc. v. Henrikson, 295 N.W.2d 136, 137 (N.D. 1980); Bohlman v. Big River Oil Co., 124 N.W.2d 835, 837 (N.D. 1963); N.D.A.G. 95-L-196.

¹⁰ Larsen, 585 N.W.2d at 808.

¹¹ N.D. Const. art X, § 12(1), N.D.C.C. §§ 38-08-15(6), 38-08-04.11(3)(b).

¹² See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).