

OFFICIAL OPINION NO. 88-04, Civil Penalties - Article VIII, § 3

January 27, 1988

Mr. John J. Smith, Secretary
Department of Water and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

Official Opinion No. 88-04

Civil Penalties - Article VIII, § 3

Dear Secretary Smith:

You have requested an official opinion from this office in regard to the following factual situation.

FACTS:

The Department of Water and Natural Resources is anticipating a request to draft a bill for the 1988 Legislative Session that would create a State Cleanup Fund which would be used to respond to spills and leaks of regulated substances and petroleum products. One of the sources of funding being considered are civil penalties that are collected as a result of violating environmental control statutes. Article VIII, Section 3 of the South Dakota Constitution states: "... all fines collected from violations of state laws shall be paid to the county treasurer ... to be distributed among and between all of the several public schools incorporated in such county ...". The Department is concerned whether the Legislature may, consistent with that provision, provide that civil penalties collected for environmental harm under SDCL Titles 34A and 45 be placed in such a cleanup fund.

Based upon those facts, you have asked the following question:

QUESTION:

Does Article VIII, Section 3 of the South Dakota Constitution mandate that civil penalties collected pursuant to SDCL Titles 34A and 45 be paid to the benefit of the public schools?

The constitutional provision at issue is Article VIII, § 3. It originally consisted of a single paragraph which provided in pertinent part that the interest and income of the permanent school fund, "together with the net proceeds of all fines for violation of state laws" would be apportioned among the several public school corporations. While Article VIII as a whole garnered significant discussion in the printed debates of the constitutional conventions, I have discovered no elucidation of the "fine" language found in Section 3. See South Dakota Constitutional Debates, Vol. I (1883); Vol. II (1889); Schomer v. Scott, 65 S.D. 353, 274 N.W. 556 (1937). It appears that Section 3 as finally adopted in 1889 was the same version as appears in the 1883 proposed Constitution.

Article VIII, § 3 was amended in 1930; the "fine" language was removed from what became the first paragraph of Section 3, and a second paragraph was added dealing solely with fines. The 1929 Senate Joint Resolution which put the proposed constitutional amendment on the ballot was entitled:

A Joint Resolution, Proposing and Agreeing to an Amendment to Section Three (3) of Article VIII, of the Constitution ... which Amendment would provide that the Net Proceeds of All Fines for Violation of State Laws, Be Paid into the School Fund of Each County in which the Prosecution Has Been Conducted and Fine Collected...."

Senate Joint Resolution No. 2, S.L. 1929, Ch. 84. As amended in 1930, Section 3 provided:

That the proceeds of all fines collected from violations of state laws shall be paid to the county treasurer of the county in which said fine shall have been imposed, and by him remitted to the state treasurer and apportioned by the commissioner of school and public lands back to the county from which such moneys were collected to be distributed among and between all of the several public schools incorporated in such county in proportion to the number of children in each, of school age, as may be fixed by law.

Finally, in 1982 Section 3 was amended to delete reference to the state treasurer and the commissioner of school and public lands from the second paragraph. That paragraph of Section 3 now provides:

That the proceeds of all fines collected from violations of state laws shall be paid to the county treasurer of the county in which said fine shall have been imposed, and by him

distributed among and between all of the several public schools incorporated in such county in proportion to the number of children in each, of school age, as may be fixed by law.

The pertinent question is what the framers of the Constitution intended when they used the word "fines." In construing a constitutional provision, it is presumed that the framers used words in their natural sense and fully intended what those words say. Schomer v. Scott, supra, 274 N.W. at 561.

When words ... are clear and unambiguous, they are to be given their natural, usual meaning and are to be understood in the sense in which they are popularly employed.

Kneip v. Herseeth, 87 S.D. 642, 214 N.W.2d 93, 102 (1974); see also Boe v. Foss, 76 S.D. 295, 77 N.W.2d 1 (1956).

The purpose of constitutional or statutory construction is to discover the intent of those who adopted the provision.

Intent cannot be completely known until there is understanding of the full purpose which has prompted the framing of any document. In the instant case, there is no room for doubt as to the purpose which prompted the framers of our Constitution in using the language contained in article 8 thereof. They have stated their purpose in clear and unmistakable language, and that purpose has been approved by the sovereign people through the adoption of our fundamental charter.

Schomer v. Scott, supra, 274 N.W. at 559. The Court concluded that the entire thrust of Article VIII was to devise a plan to make it impossible for funds dedicated to educational purposes to be lost.

The Court went on to consider both the provisions of Article VIII dealing with the principal of educational funds and those dealing with the interest earned on those funds. However, the Court made no reference to the "fine" language in concluding that the county was absolutely liable for losses of principal and for semi-annual interest payments under Section 11.

Much has been written concerning the "income and interest" language in Section 3, and elsewhere in Article VIII. See In Re State Bonds, 7 S.D. 42, 63 N.W. 223 (1895); State v. Ruth, 9 S.D. 84, 68 N.W. 189 (1896); Schomer v. Scott, supra; Schelle v. Foss, 76 S.D. 620, 83 N.W.2d 847 (1957). It seems clear from those cases that the state and the

counties act as constitutional trustees of the permanent school and other educational funds. See Kanaly v. State By and Through Janklow, 368 N.W.2d 819 (S.D. 1985).

However, I have discovered only two cases which deal directly with the "fines" language of Section 3. Both State v. Davis, 11 S.D. 111, 75 N.W. 897 (1898) and State v. Nelson, 8 S.D. 327, 66 N.W. 468 (1896) concluded that forfeited bail money did not have to be placed in the school fund. See also, AGR 70-29, where one of my predecessors concluded that Article VIII, § 3 and the implementing statutes are concerned only with "fines" and forfeited bail was neither a fine nor a "penalty" pursuant to SDCL 23-48-30 (now SDCL 23A-27-25). See further, AGR 72-17 on fines imposed against delinquent children.

I have also examined the pertinent statutory history which relates to Article VIII, Section 3. SDCL 23A-27-25 provides:

All fines and pecuniary penalties, other than forfeitures provided for in § 23A-43-23 and costs as provided in § § 23-3-52 and 23A-27-26, for the violation of any state law, when collected, shall be paid into the treasury of the proper county, the net proceeds of which shall be applied and used each year for the benefit of the public schools of this state.

The precursor of this statute provided:

All fines, forfeitures, and pecuniary penalties, prescribed as a punishment, by any of the provisions of this code, when collected, shall be paid into the treasury of the proper county, to be added to the county general fund.

Penal Code of 1877, § 792; Compiled Laws of Dakota, § 6984 (1887).

Further, SDCL 13-13-4 provides:

The county general school fund to be apportioned pursuant to § 13-13-5 shall consist of the net proceeds of all fines for violation of state laws and any tax so designated in Title 10.

Statutorily, it appears that the legislative implementation of Article VIII, Section 3 has consistently referred to criminal proceedings. SDCL 23A-27-25 is located in the statutes on criminal procedure. The statute originated in the Penal Code of Dakota Territory. Indeed the 1885 version of the statute referred to "fines, forfeitures, and pecuniary penalties prescribed as a punishment for crime...." S.L. 1885, Ch. 111, § 2.

Although the two cases which consider the "fine" language, and the relevant statute, are all related to criminal proceedings, I am reluctant to conclude on that alone that "fine" refers only to criminal sanctions. This is especially true in light of the trust responsibilities so evidence in Article VIII. Therefore, I have looked to the general case law in an attempt to determine what the "plain" or "ordinary" meaning of the word "fine" might be.

In ordinary legal phraseology a "fine" is a pecuniary punishment which may be legally imposed or assessed only by a lawful tribunal in a case wherein it has jurisdiction, properly invoked, of the offense charged and of the person of the accused. It is the sentence pronounced by the court for the violation of a criminal law, the amount of which may be fixed by law or left in the discretion of the court. Frazier v. Terrill, 65 Ariz. 131, 135, 175 P.2d 438, 441; Sinner v. State, 128 Neb. 759, 760, 260 N.W. 275, 276; State v. Rumfelt, 241 N.C. 375, 376, 85 S.E.2d 398, 400; Murphy v. State, 119 Or. 658, 250 P. 834, 49 A.L.R. 384; Commonwealth v. Dressell, 174 Pa.Super. 39, 42, 98 A.2d 430, 432; 36A C.J.S. Fines § § 1 and 5.

Marquart v. Maucker, 215 N.W.2d 278, 282 (Ia.1974).

While the words "fine" and "penalty" are often utilized interchangeably, Sawyer v. Barbour, 142 Cal.App.2d 827, 300 P.2d 187, 191 (1956), "fine" typically "imports a punitive assessment payable to the public treasury...." Sander v. Pacific Gas and Electric Company, 126 Cal.Rptr. 415, 53 Cal.App.3d 661, 677 (1975). As the North Carolina Supreme Court held in State v. Rumfelt, 241 N.C. 375, 85 S.E.2d 398, 401 (1955):

To our minds, there is a clear distinction between a "fine" and "penalty." A "fine" is the sentence pronounced by the court for a violation of the criminal law of the state, while a "penalty" is the amount recovered--the penalty prescribed--for a violation of the statute law of the state or the ordinance of a town. This penalty is recovered in a civil action of debt.

See also, Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553, 559 (1976) comparing "fines" and "restitution."

In Frazier v. Terrill, 65 Ariz. 131, 175 P.2d 438 (1946), the Court in considering the distinction between a "fine" and a "penalty" held:

In certain connections the word "fine" has been held to be synonymous with "penalty" (State v. McConnell, 70 N.H. 158, 46 A. 458; Hanscomb v. Russell, 77 Mass. 373), but by

decisions too numerous to need to be specially referred to it has been confined to its ordinary meaning and we think it must be so confined in this case. The framers of the constitution weighed well their words in prescribing the limits of the jurisdiction of this court. It cannot be supposed that they would have used the restrictive word "fine," if they had meant to express the idea conveyed by the broad word "penalty," or by the still broader word "punishment."

175 P.2d at 442, quoting from State v. Price, 124 La. 917, 50 So. 794, 795 (1909).

However, at least in terms of statutory construction, the South Dakota Supreme Court has indicated it will not necessarily be bound by the word used in the statute. The Court has adopted a two tier analysis of whether a particular statute imposes a criminal or civil sanction, not necessarily to determine what happens to the money exacted, but rather to determine what rights are involved. First, the Court "determines whether the legislature indicated an express or implied preference for one label or the other [criminal/civil] in establishing the penalizing mechanism." State v. Feiock, 364 N.W.2d 536, 538 (S.D.1985). If the Court determines a civil penalty was intended, the second step is to decide whether the exaction is so punitive that it negates the intent to impose a civil sanction.

The Court considered the additional "fine schedule" authorized by SDCL 32-22-55, and stated:

Standing alone, the words "shall be fined" and "fine schedule" on their face indicate that the sanctions set forth in that statute are to be deemed criminal in nature. That is not the end of our inquiry, however, for "[i]n the interpretation of an act of the legislature, it is the intent of that body that governs and not the literal meaning of the words employed." Read v. Jerauld County, 70 S.D. 298, 302, 17 N.W.2d 269, 271 (1945); State ex rel. Sperling v. Bd. of County Comm'rs, 73 S.D. 361, 43 N.W.2d 232 (1950).

364 N.W.2d at 539.

After examining that legislative intent, the Court concluded that the Legislature intended a civil sanction, notwithstanding the use of the word "fined." Compare, State v. Western Capital Corp., 290 N.W.2d 467 (S.D. 1980), where the Court determined that legislative use of the words "civil penalty" was indicative of civil rather than criminal proceedings.

Accordingly, it appears that use of the word "fine" normally connotes a criminal sanction, although that is not an inflexible rule, at least in terms of statutory construction. However, none of these cases concerned whether the pecuniary sanction was something which had to be paid to a particular fund because of the language used. The closest parallel which I have found in that regard is the Nebraska experience.

The Nebraska Constitution provides at Article VII, § 5 that "[a]ll fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective sub-divisions where the same may accrue." The Nebraska Supreme Court has on several occasions examined whether particular pecuniary sanctions fall within that language. Addressing the intent of the constitutional provision the Court found:

It is worthy of note that the provision in question is found in the article of the Constitution entitled "Education." This brings two reasons to the fore as to the meaning intended. In the first place, it is evident that the section was not intended as a limitation upon the police power, (Everson v. State, 66 Neb. 154, 92 N.W. 137) or it would have been placed in the Bill of Rights; and in the second place, it is consistent with the historical belief of the people of this state that there is a close connection between law observance and public education, which has given rise to a general notion that moneys exacted as punishment for crime should go to the school fund as a deterrent to crime by applying such exactions to the support of a better public school system.

School District of City of Omaha v. Adams, 26 N.W.2d 24, 27 (Neb. 1947).

Accordingly, that Court has held that the language of Article VII, § 5 of the Nebraska Constitution applied only to criminal proceedings and to those license fees where the business licensed, by its nature, required police regulation. See DeCamp v. City of Lincoln, 277 N.W.2d 83 (Neb. 1979); School District of McCook v. City of McCook, 81 N.W.2d 224 (Neb. 1957); Sinner v. State, 260 N.W. 275 (Neb. 1935). It has done so in the face of constitutional language much broader in scope than South Dakota's provision.

It appears that other states specifically provide in their constitutions that the fines in question refer to breaches of the penal laws. See, e.g., State ex rel. Commissioners of Public Lands v. Anderson, 56 Wis.2d 666, 203 N.W.2d 84 (1973); Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976); State ex rel. Rodes v. Warner, 197 Mo. 650, 94 S.W. 962 (1906). Compare, People v. Barber, 14 Mich.App. 395, 165 N.W.2d 608 (1968) where "fines" are constitutionally dedicated to library uses.

When all of these various factors are considered together, it is my opinion that the framers of the Constitution referred to criminal proceedings when they used the word "fines." General case law provides that the ordinary meaning of "fine" is a criminal sanction. The two cases which have considered the "fine" language in the South Dakota Constitution both were criminal in nature. Compare Yankton County v. Faulk, 1 Dak. 348, 46 N.W. 583 (Dak.Terr. 1876). The statutory implementation of the constitutional provision originated in the Penal Code before statehood and is still found in the criminal procedure statutes. Finally, states with comparable constitutional provisions have interpreted the "fine" language to have a criminal context. Accordingly, it is my opinion that the Legislature may, consistent with Article VIII, § 3, provide that those "civil penalties," which are not criminal sanctions, can be paid into a newly created cleanup fund. My answer to your question is No.

Respectfully submitted,

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Attorney General