



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

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The Honorable Kenneth Faerber
Commissioner, Department of Energy
State Capitol Complex
Charleston, West Virginia 25305

Dear Mr. Faerber:

This is in response to a recent letter from Mr. John H. Johnston of your office wherein at your request he asked for an opinion regarding the legality of your office's appointing a hearing officer to serve the Division of Oil and Gas, whether such hearing officer would be empowered to conduct hearings concerning compliance with statutory and regulatory requirements, and whether the Division of Oil and Gas is authorized by law to assess penalties due to operator noncompliance with statutory and regulatory requirements.

1. Whether The Division of Oil and Gas Is Authorized by Law to Assess Penalties Due to Operator Noncompliance With Statutory and Regulatory Requirements

There are no express statutory provisions which authorize the Division of Oil and Gas to assess penalties. However, there are several statutory provisions from which such authority may be reasonably implied. In addition, W. Va. Code § 22B-1-34(a), setting forth a maximum civil penalty for violations of said article, presupposes the existence of such authority.

Under Code 22-1-13(a), the Director of the Division of Oil and Gas is empowered with jurisdiction and authority over all persons and property necessary to administer and enforce the provisions of Code 22B-1-1 et seq., and Code 22B-1-2(b) authorizes the Director to promulgate necessary rules and regulations.

Pursuant to Code 22B-1-28, the Director is authorized to file complaints or hear complaints filed by an aggrieved person against well operators, to fix a time and place for hearing such complaints, to take evidence, to make findings of fact, and to enter orders. The statute specifically states:

"[T]he director shall make his findings of fact and enter such order as in his judgment is just and right and necessary to secure the proper administration of this article, and if he deems necessary, restraining the well operator from continuing to drill or case any well or from further plugging, filling or reclaiming the same, except under such conditions as the director may impose in order to ensure a strict compliance with the provisions of this article * * * ." (Emphasis added.)

Oil and Gas Inspectors are authorized to issue the following orders under Code 22B-1-3:

1. Order to cease further operations upon a finding of imminent danger to persons;
2. Order to cease further operations upon a finding of imminent danger that a fresh water supply will be contaminated or lost;
3. Order to abate a violation within a specified time; and
4. Order to cease further operations for failure to abate a violation within the specified time.

The broad enforcement powers under the above statutory provisions are tantamount to "life and death" control over an oil and gas operation, as the power to order cessation of further operations accordingly terminates all income therefrom, while additional expenditures are required to plug any unoperated well pursuant to Code 22B-1-23, unless such violation shall have been abated.

In State Human Rights Commission v. Pauley, 158 W. Va. 495, 212 S.E.2d 77 (1975), the West Virginia Supreme Court of Appeals set forth the following principle of statutory construction to be followed in determining implied powers of an administrative agency:

"An administrative agency has, and should be accorded, every power which is indispensable to the powers expressly granted, that is, those powers which are necessarily, or fairly or reasonably, implied as an incident to the powers expressly granted.' * * *" 212 S.E.2d at 79, quoting 1 Am. Jur. 2d Administrative Law § 44.

See also Colvin v. State Workmen's Compensation Commission, 154 W. Va. 280, 175 S.E.2d 186 (1970); Mohr v. County Court of Cabell County, 145 W. Va. 377, 115 S.E.2d 806 (1960); Wilhite v. Public Service Commission, 150 W. Va. 747, 149 S.E.2d 273 (1966); 1 Am. Jur. 2d Administrative Law § 70.

In State Human Rights Commission v. Pearlman Realty Agency, 161 W. Va. 1, 239 S.E.2d 145 (1977), the Supreme Court of Appeals was presented the issue of whether a state agency that is expressly empowered to issue "cease and desist orders" is thereby empowered to fix and award compensatory damages, and whether such compensatory damages award, without any monetary loss by the party discriminated against, and without a trial by jury, was an unconstitutional deprivation of property under Article III, Section 13, of the West Virginia Constitution. The court held that the agency does hold such implied authority under its express power to issue cease and desist orders and that such damage awards without trial by jury are constitutional since judicial review is ultimately available.

The language of the court in Pearlman has particular significance in the instant matter:

"[W]here the award of damages is purely incidental, as here, and is a means of enforcing the broad powers of the Commission, we find it no more constitutionally odious than the other statutorily authorized penalties and requirements set out in the Commission's cease and desist order, all of which require the expenditure of time and money * * * ." 161 W. Va. at 4.

Thus, it is our opinion that the assessment of penalties because of operator noncompliance with the statutory and regulatory requirements is incidental to the express enforcement powers under the statute. Moreover, Code 22B-1-34(a) presupposes this authority by setting forth a maximum civil penalty of Two Thousand Five Hundred Dollars (\$2,500.00) for violation of article one of that chapter. After notice by the Division of Oil and Gas, each day a violation continues constitutes a separate offense. The Division of Oil and Gas shall recover such penalty by a civil action brought before the circuit court of the county in which the subject well or facility is located. Such recovery presupposes a prior assessment by the Division, and payment of the assessed penalty to the Division of Oil and Gas would obviate the need for filing a civil action. Significantly, the statute does not require trying the matter before a circuit court, nor

any conviction of the violator as a prerequisite to the assessment of penalties, which are to be credited to the general fund of the state. Rather, the implication is clear that the Division must assess penalties prior to enforcement of such assessments in circuit court proceedings.

2. Whether the Director of the Division of Oil and Gas is Authorized to Appoint a Hearing Officer

Code 22B-1-2 sets forth specific powers and duties of the Director. Subsection (c) (6) provides that the director shall have the power and duty to: "[e]mploy a hearing officer and such clerks, stenographers and other employees, as may be necessary to carry out his duties and the purposes of the division of oil and gas and fix their compensation * * * ."

Based on the foregoing, it is the opinion of this office that the Director of the Division of Oil and Gas has the power to assess penalties for violations of duly promulgated rules and regulations, and to appoint a hearing officer to hear contested cases, which hearing officer is empowered to conduct hearings concerning compliance with statutory and regulatory requirements. The Director is authorized to promulgate rules and regulations governing such procedures, and to file causes of action in circuit court against violators who refuse to pay such assessed penalties.

Very truly yours,

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