

## Scott, David E

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**From:** McDowell, Kevin <Kevin.McDowell@atg.in.gov>  
**Sent:** Monday, August 22, 2016 5:26 PM  
**To:** Scott, David E  
**Subject:** RE: Legal interpretation guidance, case 2015/0710

David: The first question is fairly straight-forward. The OISC does not have the authority to mitigate a penalty. Should the OISC impose a civil penalty, the penalty imposed has to be in accordance with the Board's schedule of civil penalties. IC 15-16-4-69(b), IC 15-16-5-66(a). Of course, the OISC is not required to impose a civil penalty for a violation. 357 IAC 1-6-7(a). The OISC can chose other sanctions separate from or in addition to a civil penalty. See 357 IAC 1-6-7(b).

The Board, however, is not so limited. Anyone assessed a civil penalty by the OISC has the right to appeal to the Board. IC 15-16-4-64.5(a), IC 15-16-4-5-67(a). The Board, after conducting a hearing, must either "affirm, set aside, or modify the action of the state chemist." IC 15-16-4-64.5(e), IC 15-16-5-67(e).

Other boards also deal with civil penalties. The licensing boards under the Indiana Professional Licensing Board have the authority to levy civil fines against licensees. Even though they have such power, the legislature does require them to consider factors, such as the ability to pay. For example, the following language appears at IC 25-1-9-9(a)(6):

"When imposing a fine, the board shall consider a practitioner's ability to pay the amount assessed. If the practitioner fails to pay the fine within the time specified by the board, the board may suspend the practitioner's license without additional proceedings. However, a suspension may not be imposed if the sole basis for the suspension is the practitioner's inability to pay a fine."

Since this is a legislative mandate to consider ability to pay civil fines by licensing agencies, I don't see why the Board could not also do so. I also don't believe the prohibition against considering mitigating elements under 357 IAC 1-6-5 can be applied to the Board. I realize the Board may have intended this type of fine to be "strict liability" with no consideration of any mitigating circumstances, the Board cannot hide behind its own rule to prevent itself from modifying an action of the OISC. Statute indicates the Board does have this authority. If it is not so inclined to do so, that is one matter. It can affirm the OISC or set aside the civil penalty. But it can't refuse to consider modification solely based on its rule when statute indicates it can modify an action of the OISC.

The Board can be creative (you suggested such an avenue yourself). The Board has to keep in mind what the purpose of a civil penalty is: Achieve compliance with State law. The goal is not to be punitive. If the penalty is punitive, there will be no remedial effect. With a potential \$44,000 civil penalty staring the company in the fact, I would suspect you've got their attention. What the Board needs to do is tajlor the OISC findings to a remedial action that achieves compliance and is likely to deter the offender from any future indiscretions. Not everyone needs to be treated the same (and they aren't in court). The Board needs to craft the proportional response.

I am hopeful this addresses your concerns. If you need anything additional, please let me know.

Kevin

**From:** Scott, David E [mailto:scottde@purdue.edu]  
**Sent:** Friday, August 19, 2016 12:57 PM  
**To:** McDowell, Kevin <Kevin.McDowell@atg.in.gov>  
**Subject:** Legal interpretation guidance, case 2015/0710

Kevin,

We are in the process of negotiating the disposition of a case in which OISC documented a firm storing bulk pesticides for 176 days without the required secondary containment. See attached draft case summary. As a result OISC has assessed a \$44,000 civil penalty (176 days X \$250) for this violation. There are those that are arguing that the size of the penalty is too draconian for this small firm, in consideration of the fact that no resulting harm has been documented. This situation has raised a number of questions for which we need some legal guidance. Thanks in advance for any light that you may be able to shine on this issue.

IC 15-16-4-69 and IC 15-16-5-66 both say that OISC may impose civil penalties in accordance with the schedule of civil penalties adopted by the Indiana Pesticide Review Board and that the Board shall establish that schedule by rule. The Board established that schedule in 357 IAC 1-6. That rule and schedule indicate that the violation of 355 IAC 5-4-1(a) "store a bulk storage container outside of secondary containment" is subject to a civil penalty of \$250\* per day of violation. The schedule includes, " \*This penalty shall not be subject to the potential for mitigation listed in section 5 of this rule." The questions that have been raised are:

1) Does the restriction against mitigation of this civil penalty apply only to OISC when imposing the penalty during the judgement phase of the regulatory process or does it also apply to the Board during the penalty phase if this case were appealed under IC 15-16-4-64.5 or IC 15-16-5-66? In other words, can the Board mitigate or reduce this penalty, even if OISC is not permitted to do so, or does the rule restrict them as well?

2) If the answer to the above question is that neither OISC nor the Board is allowed to mitigate the amount of the penalty, could either or both hold part of the total penalty in abeyance and not impose it assuming the negotiated terms of the "abeyance" are complied with by the violator?

In this case, the genie is already out of the bottle with respect to OISC imposing/assessing the penalty, but the Board needs to know what their legal options may be if, in their opinion, the penalty amount seems excessive.

Please let me know if you have questions.

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