

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the Petrofund Registration
of Stewart Energy Products Company,
Inc., Registration No. 1088

ORDER ON
PRELIMINARY ISSUES

The hearing on the above-entitled matter was initially scheduled before Administrative Law Judge Howard L. Kaibel, Jr., for January 8, 1996. By joint agreement of the parties, the hearing has been postponed to complete discovery and to deal with certain preliminary legal questions. The record on the legal questions dealt with herein, closed on June 3, 1996, upon receipt of simultaneous final reply memoranda.

Pete Kasal of Keefe & Kasal, 246 Main Street South, P.O. Box 220, Hutchinson, MN 55350, appeared on behalf of the Registrant in this matter, Stewart Energy Products, Inc. (hereinafter: Respondent). Michael A. Sindt, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota appeared on behalf of the staff of the Minnesota Department of Commerce (hereinafter: Department Staff).

IT IS HEREBY ORDERED:

1. That, as previously indicated, Respondent should be allowed to review all of the materials in the Department Staff's investigative file reviewed in-camera except for the Heilman Memorandum and one page of handwritten notes which were non-discoverable work product; and

2) That the hearing will be conducted at a time convenient to the parties and witnesses, on the issues that are not barred by the statute of limitations: the alleged failure to cooperate with the subpoena duces tecum and the alleged "conversion" of the proceeds of the settlement between Respondent and the Reiners.

Dated this 30th day of July 1996.

HOWARD L. KAIBEL, JR.
Administrative Law Judge

MEMORANDUM

Background

The following abbreviated and incomplete tentative rendition of the events leading to this dispute is based on the briefs of the parties and excerpts from relevant documents appended thereto. If the proceeding is not resolved and the hearing proceeds, much more extensive and potentially different Findings of Fact will be developed.

In 1987 the legislature established a "petroleum tank release clean-up fee" which was imposed on storage tanks containing gasoline and other petroleum products and deposited in a "petro fund". The law created procedures for reimbursing landowners from this fund for 90% of the cost of cleaning up leaks and replacing leaky tanks, establishing the Petro Board to administer that program.

On April 29, 1991, Mr. John Hill, the owner of a gas station in Hector, Minnesota, discovered a leak and made immediate arrangements for a proper clean-up. He reported the matter promptly to the Pollution Control Agency and hired Respondent to carry out the clean-up.

Respondent is a consulting company which specializes in environmental clean-up of leaky underground storage tanks in Minnesota and in procuring the 90% reimbursement. Respondent is registered with the Commerce Department and the Petro Board as an approved consultant authorized to contract with site owners to assist them in removing such tanks and in dealing with the numerous PCA and Petro Board requirements, statutes, rules, procedures and paper work involved in procuring reimbursements.

Mr. Hill and Respondent executed a contract on April 29, 1991 giving Respondent complete delegated authority to arrange for and manage the clean-up of the site and to procure the 90% state reimbursement. Respondent moved immediately over the next three days to excavate all six tanks on the Hill property and approximately 2,448 cubic yards of surrounding contaminated soil.

As there was no room on the Hill site to store the contaminated soil after it was removed, Respondent's owners arranged to transport the soil and stockpile it on their own farm site which had been licensed since 1989 by the PCA as a soil disposal facility. Respondent also immediately initiated efforts to obtain a PCA permit to spread the Hill soil on some other site located in or near McLeod County, because the Company had been informed earlier that April that the Agency would not allow any further spreading of soils on this farm site. Ultimate disposal of contaminated soil by spreading it thinly over farm land and tilling it into the top soil is a PCA approved "soil remediation" practice utilized commonly in the leak clean-up process.

At this time, a dispute arose between Respondent and the PCA staff over whether Respondent's soil disposal facility permit authorized interim storage of the Hill soil on that site, pending its remediation at a new site. In September of 1991, PCA ordered Respondent to either remove the Hill soil from its farm by November 7, 1991 or to obtain a proper permit for its storage.

On October 9, 1991, Respondent filed an application for a PCA permit to spread the soil on a farm in McLeod County belonging to the Reiners. That permit was granted by the PCA on October 25, 1991.

On November 5, 1991, Respondent executed contracts with Mr. Reiner to spread the Hill soil on the Reiner farm. Those contracts agreed that the total fair cost for the spreading operation would be \$65 per cubic yard. They further specified that Respondent would perform the lion's share of the tasks associated with the remediation, including testing, monitoring, paper work, dealing with PCA, hauling and uniform spreading. They specified that Respondent should be paid \$56 per cubic yard as fair compensation for these tasks.

Respondent moved immediately to transport the soil to the Reiner farm in an effort to comply with the September order of the PCA. However, after about half of the hauling was completed, the McLeod County Commissioners issued a contradictory order to return the soil to Respondent's farm site, because the County Board had not received proper preliminary notification of the transfer. Although special equipment had to be rented to break up the frozen soil, Respondent subsequently complied with the McLeod County order and trucked the soil back to its own farm site.

In March of 1992 the PCA ordered the Respondent to move the Hill soil from its farm site to the Reiner farm by May 15, 1992. This required transfer of the soil during spring break up when road restrictions and muddy field conditions substantially increased the cost.

Despite the adverse weather conditions, Respondent substantially complied with this order, completing the transfer and spreading of the soil on the Reiner farm site by June 1, 1992. The PCA nonetheless issued an Administrative Penalty Order on May 20, 1992, assessing a fine of \$10,000 against Respondent for stockpiling the soil without a proper permit.

The application for reimbursement, including documentation and invoices, was completed and filed with the Petro Board on April 28, 1992. It requested reimbursement of 90% of the total cost of removing the tanks and disposing of the contaminated soil, \$290,552.

The earliest indication in the record of any action on the application is a PCA "Amended Commissioner's Site Report" dated February 3, 1993, recommending an unspecified reduction in the Hill reimbursement for Respondent's temporary storage of the soil on its premises without a proper permit. Ester Snaza of the Petro Board staff wrote Mr. Hill on February 16, 1993, to inform him that the Petro Board staff would be recommending a 50% reduction in his reimbursement (\$145,276) because of his alleged failure to cooperate fully with the PCA. She enclosed a copy of the PCA Amended Site Report. There is no indication in the record of whether Ms. Snaza was aware that the PCA had already imposed a \$10,000 penalty on Mr. Hill's Consultant for the same alleged storage mistake.

In March of 1993, the Reiners called the Petro Board staff, inquiring when they were going to be paid their share of the costs of spreading the contaminated soil on

their farm the previous spring. Pursuant to those discussions, on March 29, 1993, the Reiners forwarded to Robin Hanson of the Petro Board staff a copy of their contracts with Respondent spelling out which portions of the landspreading operations were to be performed by Respondent and the agreed upon compensation to be paid for those tasks.

The Petro Board staff subsequently raised questions regarding the land spreading arrangement when the reimbursement application was discussed at the June 3, 1993 Petro Board meeting. The Board tabled the reimbursement request at that meeting to allow Respondent to provide staff with further information on that arrangement. On June 11, 1993, Ms. Hanson wrote Mr. Hill notifying him of this delay. She indicated that the Petro staff would present the application to the Board again, once its requests for additional information were answered.

Respondent's Director of Operations sent Ms. Hanson a complete dollar by dollar detailed breakdown of the landspreading costs on June 15, 1993. Ms. Hanson responded on June 25, 1993, with a ten item interrogatory seeking further documentation, including details, timesheets, invoices, equipment descriptions, names, dates and hourly rates. Respondent provided most of the requested information for the ten items on July 1, 1993, requesting to be heard on the matter at the next meeting of the Petro Board, on July 15, 1993.

Although the Board purportedly "approved" Mr. Hill's reimbursement request at the July 15 meeting, in reality it was substantially denied. First, the Board subtracted \$3,821 of the costs as "ineligible" and \$55 per cubic yard (roughly 85%) of the soil disposal charges. Then it further adopted the Petro Board staff recommendation to cut the remainder of the request in half for the alleged illegal storage on Respondent's site. Bottom line, Respondent, as the real party in interest who incurred the expenses and assumed all responsibility for the clean-up, was ultimately to be reimbursed only roughly 25 cents on the dollar.

On August 3, 1993, Respondent and Mr. Hill exercised the applicant's statutory right to request a contested case appeal hearing on the Board's determination. That proceeding (OAH Docket No. 3-1010-8264-2 In the Matter of the Application of John Hill) was thereafter initiated by an order of the Petro Board dated September 13, 1993.

The Petro staff subsequently moved to delay the hearing on that matter indefinitely. Mr. Hill did not oppose a short continuance, but desired to move ahead with discovery so that testimony and other evidence supporting his position could be preserved. In an Order dated December 10, 1993, ALJ Giles agreed that "Mr. Hill's ability to make his case" could be "hampered" by an indefinite delay, setting the hearing for July 18, 1994.

Prior to the scheduled hearing the parties participated in a settlement conference on June 22, 1994. After roughly six hours of mediation, the parties agreed to a compromise that resolved the dispute to their mutual dissatisfaction. Pursuant to that accord, the Petro Board agreed on July 26, 1994 to triple the reimbursement for soil disposal activities to Respondent and the Reiners from \$10 to \$34 per cubic yard and to eliminate two-thirds of the proposed penalty for alleged improper stockpiling, cutting it

from 50% to 20%. This increased the bottom line reimbursement for the costs incurred in this project to roughly 61 cents on the dollar.

After the reimbursement dispute was resolved, Marilyn Robinson of the Commerce Department staff commenced a further investigation into whether some kind of administrative sanction should be imposed against Respondent's status as an officially approved registered clean-up consultant. Such sanctions could range in severity under the law at that time from a public reprimand or censure to removal from the registration list for up to five years and imposition of a civil penalty of up to \$10,000. A Commerce Department subpoena duces tecum was issued on August 2, 1994 for a meeting with one of Respondent's owners and for production of all of Respondent's records relating to the Hill clean-up.

The meeting pursuant to the subpoena was terminated when Ms. Robinson decided not to compel compliance. She wanted to preserve her option to use the information to bring criminal charges, without violating the self-incrimination rights of Respondent's President.

A dispute arose in September of 1994 between Respondent and the Reiners over how to split up the roughly 52 cents on the dollar that was reimbursed for soil disposal. The original Board order "approving" the application had specified that the Reiners should receive the entire \$19,829 they requested for receiving and tilling the soil. This would have left Respondent with only 37 cents per dollar of the costs it incurred, which were most of the expenses, roughly 85% of the soil disposal costs. The dispute was ultimately settled when both parties agreed that the Reiners would accept a ratable share of the reduced reimbursement, \$10,000 or roughly 55 cents on the dollar.

Ms. Robinson's inquiry into Respondent's clean-up activities continued over the next 14 months, culminating in the issuance of a Notice and Order for Hearing Proposing Administrative Sanction which was served upon Respondent on October 10, 1995. After further discovery and exchanges of information, the parties agreed that three legal questions should be resolved prior to scheduling and conducting a fact finding hearing:

- (1) Are sanctions barred by the statute of limitations?
- (2) Did the Commissioner of Commerce have the authority alleged in the Notice of Hearing to initiate the proceeding pursuant to Minn. Stat. § 115C.11, which specified initiation of such proceedings by the Petro Board?
- (3) To what extent would proposed sanctions constitute redundant jeopardy?

On the day that the simultaneous briefs were to be filed on these issues, May 15, 1996, the Commerce Department issued an Amended Order for Hearing which was filed and served as an attachment to its brief. The Amended Order is virtually identical to the original Order, except that all references to Minn. Stat. § 115C.11 have been changed to Minn. Stat. § 115C.111. Minn. Stat. § 115C.111 is included in a newly

enacted revision (Laws of 1996, Chapter 308) of the Petro Fund Law including new provisions relating to consultant registration. It was signed into law on March 13, 1996, five months after the issuance of the original Order initiating the proceeding.

Jurisdiction

This action was brought pursuant to a Notice of and Order for Hearing issued by the Commerce Commissioner in October of 1995 pursuant to Minn. Stat. § 115C.11. The Commerce Commissioner clearly had no jurisdiction to issue that Order. The Petro Board is explicitly identified in that statute as the entity with the authority to impose sanctions, not the Commerce Commissioner or any other entity.

The new law which became effective March 14, 1996, made extensive changes in the law relating to sanctions imposed on consultants and contractors which was contained in Minn. Stat. § 115C.11. It repealed the subdivisions in .11 relating to sanctions and substituted two new sections relating to such sanctions §§ .111 and .112. Section .111 specifically applies to "conduct occurring before the effective date of this section". Section .112 appears to have been enacted in anticipation of the possibility that section .111 might be invalidated by the Courts. It specifically applies to conduct occurring "on or after" the effective date of this section and is virtually identical to section .111 except that it adds five new grounds for imposing sanctions.

The new revisions substantially toughen the available sanctions. The "reprimand" minimum penalty and probation with conditions have been eliminated in the new statute. The maximum penalty of removal from the list for up to five years has been changed to unlimited revocation. The authority of the Petro Board to impose this sanction has been repealed. The new statute gives this responsibility to the Commissioner of Commerce. The new statute also eliminates the express requirement that the Petro Board consider, in weighing what sanction should be imposed: the seriousness of the conduct and "any mitigating factors".

The new "Amended" Notice of Hearing issued May 15, 1996 changes the expressed statutory authority for initiating the proceeding to Minn. Stat. § 115C.111. Therefore the question arises as to whether the new law and the Amended Order can retroactively validate the Commissioner's jurisdiction to proceed with this prosecution.

The Respondent, in its reply brief, dismisses the amended statute and order as reinforcing its initial argument.

The fact that the legislature found it necessary to amend that section confirms that the Commerce Department did not have jurisdiction prior to the amendment of this section to pursue the present case.

There is some authority in cases in other jurisdictions for refusing to apply laws retroactively to validate proceedings that were not authorized by the prior statutes. Central New England Railway Company v. Tax Commission, 26 NYS 2nd 425, 261 App. Div. 416 (N.Y. 1941). There is certainly some legitimate question here as to whether the legislature intended when it adopted the revisions to validate prior invalid prosecutions or whether it simply intended that the Commissioner should take over and continue to prosecute pending cases properly initiated by the Board. The question

becomes more complicated because, in addition to changing the prosecutor, the legislature has revised the penalty and the criteria to be applied.

On balance, cursory research indicates that the courts in Minnesota would probably uphold the retroactive application of Minn. Stat. § 115C.111 to this proceeding. The New York case is not precedent in this jurisdiction and no similar Minnesota cases have been cited or uncovered in research. Indeed, the Minnesota Supreme Court has even allowed retroactive validation of a proceeding after judgment, while the matter was pending appeal in Asch v. HRA of St. Paul, 256 Minn. 146, 97 N.W.2d 656 (Minn. 1959). In that case the Court went so far as to say that anything the legislature may authorize prospectively, they may adopt in retrospect. See, further, In Re: County Ditch #1-A, Yellow Medicine County, 233 Minn. 12, 47 N.W.2d 592 (Minn. 1951) and Peterson v. Minneapolis, 285 Minn. 282, 173 N.W.2d 353, 37 ALR3d 1431 (Minn. 1969).

Note that this proceeding is probably best treated as initiated when the Amended Notice of Hearing was issued. Although it does not appear to make any difference time-wise regarding the statute of limitations, this disciplinary action is properly treated as starting on May 15, 1996, when the state first duly acquired jurisdiction, not October 1995 when the original invalid Notice of Hearing was issued.

Statute of Limitations

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedience, rather than principles. They are practical and pragmatic devices to spare the Courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. Order of Railroad Telegraphers v. Railway Express Agency, 321 US 342, 349, 64 S.Ct. 582, 586, 88 L.Ed. 788. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Chase Securities Corp, v. Donaldson, 325 US 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1994).

The United States Supreme Court made this oft-cited generalization in a case upholding the validity of a revision of a Minnesota statute of limitations. The revision was coincidentally adopted by the Minnesota legislature during the pendency of a Commerce Department securities action and applied retroactively to establish the state's jurisdiction to continue the prosecution.

Respondent contends in this proceeding that the Department Staff's attempt to impose statutory disciplinary sanctions for its alleged acts and omissions during the 1991 clean-up are barred by the statute of limitations. It asserts that those sanctions are penalties or forfeitures based upon a statute, which must be commenced within two years, according to Minn. Stat. § 541.07 (2).

The Department Staff's reply brief basically concedes that sanctions based on events prior to October 5, 1993, including clean-up activities and the dual land spreading contracts, "may" be barred by the two year statute of limitations. However it urges application of the six year statute in Minn. Stat. § 541.05 (6) to those events, contending that they should be interpreted as "fraud" covered by the longer statute. In any case, it argues that the two year statute has not expired on Respondent's alleged "conversion" of funds the Board intended to give solely to the Reiners when the lawsuit was settled in September of 1994 or on the subpoena interview in August of 1994.

The appropriate period of limitations in this statutory forfeiture case is generally the two year period in Minn. Stat. § 541.07 (2). An exception may be the dual contracts, if the state can produce new prima facie evidence of bribery or secrecy.

The rest of the alleged acts and omissions clearly cannot properly be characterized as "fraud" for purposes of limitations. Of course, at base, most actionable complaints of every sort arguably involve some element of fraud such as bad faith, deception or concealment, especially those calling for imposition of statutory penalties and forfeitures pursuant to Minn. Stat. § 541.07 (2). In the words of the Minnesota Court of Appeals last year in a human rights limitation case, this does not mean that the legislature intended the two year limitation "to be without effect." State by Beaulieu v. RSJ., Inc., 532 N.W.2d 610 (Minn. App. 1995).

An illustrative example is the case of Burns v. Ersek, 591 F.Supp. 837 (D.C. 1984) where a similar attempt to apply the longer six year limit was rejected by the Courts. That decision applied the three limitation in the Minnesota Securities Act to a securities fraud case, rather than the six year general fraud limit, because the most significant predicate act involved securities.

Similarly, the two year bar for statutory penalties applies generally to cases where the predicate act is an offense against the public interest as opposed to actions for redress of private wrongs. Estate of Riedel by Mirick v. Life Care Retirement Communities Inc., 505 N.W.2d 78 (Minn. App. 1993).

On the other hand, the dual contracts between Respondent and the Reiners could conceivably involve "fraud" of the sort envisioned in the six year statute, but there is no evidence of that in the current record. If the state has such evidence, application of the six year limitation will be entertained via affidavits and a motion to reconsider. Although the Staff repeatedly calls the Reiner contracts a "kickback" and refers to alleged "fraud" in its briefs and Notice of Hearing, there does not appear to be any concrete evidence to support such a characterization.

An illegal "kickback" is specifically defined by the legislature in the Petro Fund Law (Minn. Stat. § 115C.045) as an agreement "to pay or forgive the non-reimbursable portion of an application." There is no specific allegation anywhere in this record of a violation of that section of the statute. It is not clear on this record how the landspreading contracts could be construed as allowing the applicant to recoup any such nonreimbursable costs.

"Kickback" is not defined in Blacks Law Dictionary. It is defined in Webster's New World Dictionary (3d Coll. Ed.) as a slang term meaning "a giving back of part of money received as a payment." It derives its negative connotation when it refers to the recipient of an award giving back part of that award as a bribe to the donor for being selected. It has accordingly been defined in one federal case as limited to a "secret return to an earlier possessor of part of the sum received." U.S. v. Porter, 591 F.2d 1048, 1054 (C.A. Fla.) The "kickback" label has no application to compensation adjustments openly arrived at between parties in the regular course of business. Horowitz v. LaFrance Industries, 79 N.Y.S.2d 794, 797, 274 App. Div. 46.

There does not appear to be anything secret or devious about the land spreading contracts entered into in this case. They appear to have been contemporaneously negotiated and executed in an above-board fashion. There does not appear to be anything false about the descriptions of the responsibilities to be assumed by the respective parties or the fairness of the proposed compensation for performing those tasks. Nearly all of the actual work involved and the risks of cost-overruns was assumed by Respondent, including: hauling, stockpiling and spreading of the soil (under what proved to be the most expensive and severe weather conditions conceivable) testing, monitoring, reporting and dealing with the state reimbursement processes (which continues to prove to be very expensive). The only major landspreading responsibility assumed by the Reiners (a handwritten revision of the contract initialed by the signatories) was periodic subsequent tilling of the fields. There is no specific allegation that some aspect of this agreed upon division of the reimbursement for those responsibilities was fictitious, inflated or inequitable.

It would appear that conscientious consultants will increasingly resort to such specific contemporaneous contracts in the future, given the Petro Board's repeated insistence in recent cases that consultants should have no standing to litigate specific aspects of disputes over their incurred costs in reimbursement proceedings. It certainly proved to be a prudent practice in this case, where there was subsequent litigation with the Reiners over equitable shouldering of the losses when the Petro Board substantially reduced the contemplated reimbursement.

If there is some evidence here of a surreptitious giving back of part of the compensation received by the Reiners in order to secure the contract, it has not been made part of the record. There is no indication that anyone other than the Reiners ever submitted any formal or informal bids for receipt of Mr. Hill's soils and no evidence that the Reiners intentionally "rigged" or padded their offer with money to be returned under the table for favorable consideration.

Similarly, "fraud" is specifically defined in the Petro Fund Law (in Minn. Stat. § 115C.09, subd. 6) as presentation of a false invoice or demand for payment. There is no specific citation to this section of the law in the Notice of Hearing or in any of the other filings and documentation submitted. There is a general allegation in the Notice of Hearing and in the Department Staff's final reply brief of "false statements and claims" in arguing for the six year statute of limitations, but no specific fictitious invoice or payment demand has ever been identified. This general averment is insufficient to trigger application of that statute.

Accordingly, absent any new compelling evidence of the kind of "fraud" envisioned in Minn. Stat. § 541.05, the two year limitation in Minn. Stat. § 541.07 (2) should be applied to this case. This precludes taking testimony on any of the allegations listed in the Notice of Hearing other than the response to the subpoena duces tecum on August 23, 1994.

Although it is not specifically referenced as an allegation in the Notice of Hearing or the Amended Notice of Hearing, Commerce Department Staff also argue in their reply brief that testimony should be taken herein on Respondent's alleged "conversion" of \$9,829.00 of the \$19,829.00 they allege the Petro Board wanted Respondent to give to the Reiners. The settlement of the dispute between the Reiners and Respondent over how to fairly divide up the Petro Board's reduced landspreading reimbursement occurred in September of 1994, which is within the two year statute of limitations.

The Department Staff describe this settlement as "theft" of funds belonging to the Reiners. Mrs. Reiner describes it (in an excerpt of a deposition included with their reply brief) as "fair and equitable."

The Petro Board evidently has legal authority under Minn. Stat. § 115C.09, subd. 5 (a) (4) to demand and sue for the recovery of allegedly misdirected reimbursement funds after subsequent settlements involving recipients. It is unclear on this record what action, if any, has been taken by the Board pursuant to this statute.

In short, this proceeding cannot be dismissed entirely, based on the statutes of limitations. It must be conducted on the issues that are not barred by limitations: the subpoena duces tecum interview and the alleged "conversion" of the settlement proceeds. It will be scheduled once discovery is completed.

Double Jeopardy

Respondent points out that the government has already imposed separate civil sanctions against the company twice for the same alleged improper stockpiling of the soils removed from the Hill leak site. Another prosecution for the same offense would appear to be barred by former jeopardy provisions of the state and federal constitutions. This is not a case of a remedial civil action following a criminal prosecution such as Marcus v. Hess, 63 S.Ct. 379, 317 US 537, 87 L.Ed. 443 (1943) where the Court held (in an action involving alleged fraudulent claims against the federal government) double jeopardy does not apply to remedial civil sanctions against someone previously criminally prosecuted. Similarly, it is not simply a civil occupational certification forfeiture proceeding after a criminal prosecution, which has been upheld as a non-criminal administrative action to protect the public in Louisiana State Board of Medical Examiners v. Booth, 76 So2d 15. If at some point, citizens have a right to be free from being repeatedly called upon to defend themselves in legal proceedings based on the same course of conduct, this would appear to be that point.

However, it is not necessary to reach this issue in this case because such further prosecutions for soil stockpiling are also clearly barred by the statute of limitations, as previously discussed. On the other hand, the alleged "theft" of the Reiner reimbursement and failure to cooperate with the state's investigation are entirely

separate matters. If those allegations are substantiated, it would not offend multiple jeopardy proscriptions to impose appropriate registration sanctions based upon such separate subsequent conduct.

Alternative Dispute Resolution

A final word is in order to the parties in this long-standing dispute urging renewed efforts at settlement. Doubtless both attorneys have already advised efforts at mediation or a formal settlement conference, particularly now that preliminary discovery has been completed, allowing an assessment of the strengths and weaknesses of respective positions. This case has all the earmarks of becoming a lengthy and expensive hearing, followed by lengthier and more expensive appeals. This may be an excellent time to sit down at least briefly with an independent mediator in an attempt to resolve the dispute informally. There is certainly a great deal of room for fashioning some kind of mutually disagreeable middle ground in this registration controversy, if both sides are sincerely willing to at least consider some compromise. If Respondent is willing to swallow hard, without admitting wrongdoing and accept something short of total exoneration and Department Staff is similarly willing to entertain a result short of the maximum penalty of permanent revocation plus a \$10,000 penalty, it would certainly behoove both sides herein to at least explore the potential middle ground. Perhaps pursuing some form of alternative dispute resolution at this point, such as binding submission of the matter to an abbreviated mini-trial, would assist in settlement.

HLK