

**OPINION
68-81**

March 21, 1968 (OPINION)

Mr. Martin N. Gronvold, Executive Director
Employment Security Bureau

RE: Employment security bureau - Unemployment contributions - Compromise

This is in response to your letter in which you refer to Chapter 52-04, and more specifically to Section 52-04-06, of the North Dakota Century Code, relating to payment of contributions under the Unemployment Act.

You also state that occasionally offers are made to compromise the contributions due. You then ask for an opinion under what conditions, if any, the law permits a compromise.

Basically the statutes set forth the standard rates for contributions by employers. Section 52-04-06 sets forth a detailed schedule of rates and the conditions under which the rates set forth therein will apply. Section 52-04-05 states that the standard rate shall be 4.2 percent. It also sets forth under what conditions the rate may be reduced. Section 52-04-09 sets forth the criteria for classifying employers for purposes of establishing experience to be applied to the rate schedule. From these and related statutory provisions, it becomes quite apparent that no allowance is made for negotiating or compromise. The statutes are specific as to the rate to be charged and under what conditions the rate may be reduced.

To determine which specific rate will apply to any specific employer during any given period, it is necessary to establish and examine the facts involved. In almost every instance such facts can readily be established from the employment records of the employer. However, should there be a dispute on facts to the extent that reasonable minds might differ, then a compromise as to the facts can be entertained. Such compromise can be only on the facts upon which the determination is made as to which rate will apply. The compromise is not on the rate per se but on the facts which determine the rate that will apply.

Section 52-04-11 provides for a rate of interest of one-half of one percent per month, plus \$10.00 on unpaid contributions until paid. The statute provides: " * * * in case of willful failure to file the reports and pay the contributions required by this chapter, there shall be added in addition to the interest, five per centum of the contributions if the failure is for not more than sixty days with an additional five per centum for each additional sixty days or fraction thereof during which such failure continues but not exceeding twenty-five per centum in the aggregate, exclusive of interest. * * *."

To implement this provision it requires independent action by the Unemployment Division. It presupposes an informal "finding", judgment or conclusion by the Unemployment

Division that there was a willful failure to file reports and make payments. Even though such "finding" or judgment was made, if the matter goes into litigation it would require the same proof as is required in any other contested issue of fact. It is in this area where independent judgment may be exercised, based on facts available.

Thus, in direct response to your question, it is our opinion that you may not compromise in those areas pertaining to the law or rates, but as to the facts, where reasonable minds may differ, you may compromise. You may also compromise on the proposition whether or not a penalty should apply for willful failure to file reports and make payments, if the facts are such that reasonable minds can reach different conclusions.

We might also advise that the facts in dispute should be such which are not readily ascertainable and upon which it would be difficult to predict, with any reasonableness, the result of a trial, before a compromise should be entertained. The cost of a trial, available testimony and evidence, and the uncertainty of the outcome would be factors to consider in determining whether or not a compromise should be entered into. The Bureau may also prescribe further under which a compromise can be entertained.

HELGI JOHANNESON
Attorney General