

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 94-F-13

Date issued: April 6, 1994
Requested by: Cal Hoovestol, Securities Commissioner

- QUESTIONS PRESENTED -

I.

Whether there is any limitations period for the Securities Commissioner to assess civil penalties pursuant to N.D.C.C. ? 10-04-16(1).

II.

Whether there is any limitations period for the Securities Commissioner to suspend or revoke registration pursuant to N.D.C.C. ? 10-04-11.

III.

Whether there is any limitations period for the Securities Commissioner to conduct investigations pursuant to N.D.C.C. ? 10-04-16.1.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that the limitations period for the Securities Commissioner to assess civil penalties under N.D.C.C. ? 10-04-16.1 is two years pursuant to N.D.C.C. ? 28-01-18(2).

II.

It is my further opinion that the limitations period for the Securities Commissioner to suspend or revoke registrations under N.D.C.C. ? 10-04-11 is ten years pursuant to N.D.C.C. ? 28-01-22.

III.

It is my further opinion that there is no limitations period concerning the scope of an investigation under N.D.C.C. ? 10-04-16.1, although the limitations period for any remedy which is available to the Securities Commissioner for violations would be relevant to determine whether the Commissioner's investigation is reasonable.

- ANALYSES -

I.

N.D.C.C. ? 10-04-16(1) permits the Securities Commissioner to issue an order and "collect a civil penalty against any person found in an administrative action to have violated any provision of [N.D.C.C. ch. 10-04], or any regulation, rule, or order adopted or so issued under [N.D.C.C. ch. 10-04]." N.D.C.C. ? 10-04-16(1). There is no statute of limitations in N.D.C.C. ch. 10-04 addressing the Securities Commissioner's authority to collect a civil penalty. The only limitation period specified in N.D.C.C. ch. 10-04 is found in N.D.C.C. ? 10-04-17(1) and is applicable only to an action brought under that section by a purchaser to recover the purchase price of a sale, or contract for sale, which violated the provisions of N.D.C.C. ch. 10-04. See Weidner v. Engelhart, 176 N.W.2d 509 (N.D. 1970); Woodhull v. Minot Clinic, 259 F.2d 676, 677-678 (8th Cir. 1958). This limitations period, therefore would not affect the remedies available to the Securities Commissioner.

In the absence of a specific limitations period set forth in either N.D.C.C. ? 10-04-16 or N.D.C.C. ch. 10-04, the general statute of limitations which addresses civil penalties must be applied. A civil penalty may generally be defined as punishment for specific activities such as the violation of antitrust or securities laws, and is usually in the form of fines or money damages. Black's Law Dictionary 246 (6th ed. 1990). The applicable general statute of limitations is contained in N.D.C.C. ? 28-01-18:

Actions having two year limitations. The following actions must be commenced within two years after the claim for relief has accrued:

. . . .

2. An action upon a statute for a forfeiture or a penalty to the state.

N.D.C.C. ? 28-01-18(2).

Therefore, it is my opinion that pursuant to N.D.C.C. ? 28-01-18(2) a two year statute of limitations applies when the Securities Commissioner seeks to assess a civil penalty pursuant to N.D.C.C. ? 10-04-16(1).

II.

The Securities Commissioner may revoke the registration of any dealer, salesman, investment adviser, or investment adviser representative if, after a hearing or providing an opportunity for a hearing, the commissioner makes certain findings concerning such person's conduct. N.D.C.C. ? 10-04-11(1). There is no specific limitations period defined in N.D.C.C. ch. 10-04 concerning the suspension or revocation of a dealer's, salesman's, investment adviser's or investment adviser representative's registration, therefore, the general statutes of limitations must be consulted.

Although N.D.C.C. ? 28-01-18(2) provides a two year limitations period for commencing an action "upon a statute for a forfeiture or penalty to the state," that section does not apply to a suspension or revocation of registration under N.D.C.C. ? 10-04-11(1). The word forfeiture, including forfeitures to the state, has been defined as "any penalty in money or goods, other than a fine, imposed by law as a punishment for crime." N.D.C.C. ? 32-14-01. A penalty has been generally defined as "pecuniary punishment" or "a sum of money which the law exacts payment of by way of punishment for doing some act which is prohibited or for not doing some act which is required to be done." Black's Law Dictionary 1133 (6th ed. 1990). The suspension or revocation of a registration pursuant to N.D.C.C. ? 10-04-11(1) is not a penalty in money or goods, nor is it imposed by law as punishment for a crime. It is instead a civil administrative action to revoke a license, and does not result in the state obtaining either money or goods from the person subject to the suspension or revocation. The suspension or revocation of registration is not a cause of action for a forfeiture or penalty under section 28-01-18(2).

Because no other specific or general statute of limitations addresses an action for license revocation or suspension, N.D.C.C. ? 28-01-22 applies. "An action for relief not otherwise provided for must be commenced within ten years after the claim for relief has accrued." N.D.C.C. ? 28-01-22.

Therefore it is my further opinion that the ten year statute of limitations provided by N.D.C.C. ? 28-01-22 applies to the revocation or suspension of a dealer's, salesman's, investment adviser's and investment adviser representative's registrations under N.D.C.C. ? 10-04-11(1).

III.

The Securities Commissioner has broad authority to conduct investigations.

The commissioner in his discretion:

- a. May make such public or private investigations within or outside of this state as he deems necessary to determine whether any person has violated or is about to violate any provision of [N.D.C.C. ch. 10-04] or any rule or order hereunder, or to aid in the enforcement of [N.D.C.C. ch. 10-04] or in the prescribing of rules and forms hereunder. In the discretion of the commissioner, the expense reasonably attributed to an investigation under this section must be paid by the dealer, salesman, investment adviser, or investment adviser representative whose affairs are investigated, but the expense so payable may not exceed an amount that the commissioner prescribes by rule.

N.D.C.C. ? 10-04-16.1(1)(a).

A statute of limitations will only operate to bar the remedy to which it applies and does not extinguish or erase the underlying cause of action. Guthmiller v. Dep't of Human Servs., 421 N.W.2d 469, 473 (N.D. 1988). Statutes of limitations apply to actions by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a

public offense. Id., 421 N.W.2d at 471. Internal administrative proceedings conducted before an administrative agency are not actions for which there are statutes of limitations. Id. Therefore, it is my opinion that there is no statute of limitations governing the Securities Commissioner when conducting investigations under N.D.C.C. ? 10-04-16.1(1)(a).

The only limitation upon the commissioner's discretion to conduct an investigation is that which generally governs a state official's discretion. Where an officer has been charged with a legal duty involving the exercise of his or her judgment and discretion, the exercise of such judgment and discretion will not be controlled by mandamus nor otherwise directed by the courts regarding the manner in which such discretion should be exercised. First Am. Bank and Trust Co. v. Ellwein, 198 N.W.2d 84, 106 (N.D. 1972). Where a matter has been left entirely to the discretion of government officials, the courts will not interfere in the absence of fraud, improper influence, or an abuse of discretion. Ophaug v. Hildre, 42 N.W.2d 438, 442 (N.D. 1950). An abuse of discretion in an administrative agency may be found where that administrative agency acts unreasonably. State v. Pub. Serv. Comm'n, 82 N.W.2d 597, 602 (N.D. 1957). In the context of a trial court's discretion, "[a]n abuse of discretion has been defined as an unreasonable, arbitrary, or unconscionable attitude." Kraft v. Kraft, 366 N.W.2d 450, 453 (N.D. 1985). Therefore, in conducting an investigation under N.D.C.C. ? 10-04-16.1(1)(a), the Securities Commissioner has the discretion to reasonably determine the scope of the investigation.

The statute of limitations for a particular remedy which the Securities Commissioner seeks to apply against the subject of an investigation is relevant when determining whether the commissioner is conducting a reasonable investigation. "Generally, the statute of limitations commences to run from the commission of a wrongful act giving rise to the cause of action." Osland v. Osland, 442 N.W.2d 907, 908 (N.D. 1989). However, "[i]t is the essence of the statute of limitations that time begins to run under them as to causes of action only after the right to prosecute them to a successful conclusion has fully accrued." Wittrock v. Weisz, 73 N.W.2d 355, 360 (N.D. 1955). Events which take place prior to the events upon which a cause of action is based may be relevant to placing the cause of action in its full background. See generally,

ATTORNEY GENERAL'S OPINION 94-13
April 6, 1994

State v. Gefroh, 495 N.W.2d 651, 654 (N.D. 1993). Therefore, the scope of an investigation conducted by the Securities Commissioner cannot be strictly limited to events that occur within the applicable limitations period for the remedy or remedies available to the Securities Commissioner.

Therefore, it is my further opinion that there is no limitations period concerning the scope of an investigation under N.D.C.C. ? 10-04-16.1, although the limitations period for any remedy which is available to the Securities Commissioner for violations would be relevant to determining whether the Commissioner's investigation is reasonable.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: Edward E. Erickson
Assistant Attorney General

vkk