

**OPINION  
60-294**

June 2, 1960 (OPINION)

WEIGHTS AND MEASURES

RE: Dept. of - Licensing Coin - Weighing Machines and Public  
Gasoline Pumps

This is in response to your request for an opinion on the following question:

Pursuant to 64-0216, as amended, an individual tenders the license fee due for the coming year. At the time of the application there is a penalty due for failure to have the machine licensed after September first. The individual does not include the amount owing for the penalty, or includes only a part of the amount due. May the Commission withhold issuing the license until the penalty is paid (and, if necessary, lock the pumps) or must it issue the license and adopt some other means of collecting the penalty that has accrued by reason of the provisions of Section 64-0218?"

The penalty, as you state, is provided for under section 64-0218 as amended by chapter 416 of the 1959 Session Laws. This chapter permits the assessment of a penalty of ten cents per day for each day after September first for the entire licensing period or until such license is purchased and displayed as provided for in this section.

Section 64-0212 of the N.D.R.C. of 1943 provides that all fees and charges collected by the Commission under the provisions of section 64-0210 shall be paid into the general fund of the state treasury.

Section 64-0210 as amended sets forth the fee schedule. It is noted that the statute referring to the collection of fees and paying same into the treasury does not cover the penalties assessed under section 64-0218.

Where the statute assesses a penalty but does not provide who shall be the recipient of such penalty, the penalty may be recovered by the state. See 9 N.D. 186; also 70 C.J.S. penalties.

A penalty cannot be recovered summarily in absence of special statutory provisions. It can be recovered only by proper judicial proceedings. In recovering a penalty due consideration must be given to the Constitutional provision that no property shall be taken without due process of law. Assuming the Legislature were to enact a statute permitting summary recovery of penalty, such statute would have to incorporate provisions assuring due process of law. Chapter 32-14 of the N.D.R.C. of 1943 sets forth the manner and process by which a penalty may be recovered.

In your specific instance, the penalty may be recovered by the State of North Dakota either by the Attorney General or by the State's

Attorney in the name of the state. The withholding of a license until the penalty is paid would not be in conformity with the existing statutes and announced rules of law. Such procedure could be accomplished only by first having specific legislation permitting same.

In an action to recover the penalty, the prevailing party may have its cost and other items upon obtaining a judgment. The court may also direct that the defendant be committed to the county jail of the proper county not to exceed six months unless or until the judgment for the penalty and costs is paid.

It is, therefore, our opinion that the Public Service Commission may not withhold the issuing of a license under chapter 64-02, as amended, until the penalty is paid. The issuing of a license and the collection of a penalty, under the existing statutes, are two separate items and must be treated as such.

It is also observed that in lieu of assessing a penalty the Public Service Commission through its chief inspector or other employee may confiscate, seize, or seal all unlicensed coin-weighing machines and lock and seal any licensed gasoline pumps.

LESLIE R. BURGUM

Attorney General