

December 1973

The Illinois Environmental Protection Act and the Power of an Administrative Agency to Impose a Fine

Robert C. Stephens

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

Recommended Citation

Robert C. Stephens, *The Illinois Environmental Protection Act and the Power of an Administrative Agency to Impose a Fine*, 50 Chi.-Kent L. Rev. 466 (1973).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol50/iss3/5>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

NOTES AND COMMENTS

THE ILLINOIS ENVIRONMENTAL PROTECTION ACT AND THE POWER OF AN ADMINISTRATIVE AGENCY TO IMPOSE A FINE

I. INTRODUCTION

To meet the rising concern for our environment, the Illinois General Assembly recently passed the Environmental Protection Act.¹ Finding that damage to the environment seriously endangered the public welfare,² two agencies were established to administer a statewide program to make and enforce rules designed to protect the environment. The Pollution Control Board was established to adopt rules and regulations and also to conduct hearings concerning violations of such.³ Upon finding a violation, the Board is empowered to issue a cease and desist order, revoke the violator's emission permit,⁴ or impose a penalty "not to exceed \$10,000" for each violation and in addition a penalty "not to exceed \$1,000 for each day during which [such] violation continues."⁵ A second and separate agency, the Environmental Protection Agency, was created to investigate violations of the Act and prosecute them before the Pollution Control Board.⁶ In short, the general Assembly had set up an environmental police force and an administrative court system capable of imposing fines upon violators.

This scheme presents two basic issues. First, whether the violators of this act are denied due process of law by being fined without having been afforded a judicial trial. Second, whether the Board's power, both to determine whether a violation has occurred for which a monetary penalty will result and also to determine the amount of that penalty, is a grant of judicial power to the executive branch of government. If it is such a grant of judicial powers, it would be an invalid grant because it would violate the Illinois Constitutional provision concerning the separation of powers between the executive, judicial and legislative branches of government.⁷

1. ILL. REV. STAT. ch. 111½, §§ 1001-1051 (1971).

2. *Id.* § 1002(a)(1).

3. *Id.* § 1005.

4. *Id.* § 1033.

5. *Id.* § 1042.

6. *Id.* § 1004.

7. ILL. CONST. art. II, § 1 provides: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."

The requirement of separation of powers is a requirement that is imposed upon the states by their own constitution. The federal doctrine of separation of powers is not a federal constitutional requirement that the states must follow. *See* International Broth-

Before considering the case law concerning these two issues, the Environmental Protection Act should be examined in more detail. When the Act discusses the penalties that may be imposed by the Pollution Control Board, it treats them as civil penalties rather than criminal penalties. It states that anyone who violates the Act shall be liable for a penalty which "may be recovered in a civil action."⁸ However, violations of the Act are also made misdemeanors and the state and local law enforcement authorities are authorized to prevent such violations.⁹ The purpose of these penalties is to assure that "adverse effects upon the environment are . . . borne by those who cause them."¹⁰

The imposition of penalties by the Pollution Control Board is qualified by elaborate procedural safeguards. First, the investigatory and prosecutorial functions are carried out by one agency, the Environmental Protection Agency,¹¹ while the adjudicatory function is carried out by another agency, the Pollution Control Board.¹² The alleged violator is given written notice of the specific charges against him and the right to file a written answer.¹³ Furthermore, the burden of proof is upon the Agency to prove the acts complained of.¹⁴ At a hearing, open to the public, the accused has the right to be represented by counsel, offer oral testimony or written statements, cross-examine witnesses, have all testimony recorded,¹⁵ and the power to subpoena witnesses.¹⁶ Standards are provided to guide the adjudicator in making a decision as to whether there was a violation,¹⁷ and the final order is required to be in writing and state the facts and reasons upon which the decision is based.¹⁸ Finally, judicial review is allowed under the Administrative Review Act.¹⁹

II. THE CONTROVERSY ARISES

The two issues raised by the Act, those of a possible denial of due process and a possible illegal grant of judicial powers to an agency of the executive branch of government, were first considered in Illinois by the

erhood v. Hanke, 339 U.S. 470 (1950). The requirement of due process, however, while being generally self-imposed upon the states through their own constitutions, *see* ILL. CONST. art. I, § 2; is also imposed upon the states by the United States Constitution through the Fourteenth Amendment and upon the federal government through the Fifth Amendment.

8. ILL. REV. STAT. ch. 111½, § 1042 (1971).
9. *Id.* § 1044.
10. *Id.* § 1002(b).
11. ILL. REV. STAT. ch. 111½, §§ 1004, 1034, 1031 (1971).
12. *Id.* §§ 1005, 1031-1033.
13. *Id.* § 1031(a).
14. *Id.* § 1031(c).
15. *Id.* § 1032.
16. *Id.* § 1005(e).
17. *Id.* § 1033(c).
18. *Id.* § 1033(a).
19. *Id.* § 1041.

Third District of the Illinois Appellate Court in *Ford v. E.P.A.*²⁰ The petitioner contested the assessment of a \$1,000 penalty imposed by the Pollution Control Board on two main grounds: (1) that the Act had illegally conferred judicial powers upon the Board, and (2) that the Act had denied his right to a jury trial guaranteed by the Illinois Constitution. While noting that the legislature could not confer judicial powers upon an administrative agency, and that such an agency could not impose criminal penalties, the court found that the penalty here was really a civil sanction and, therefore, constitutional.²¹ The court found this power to be only a quasi-judicial power which could be conferred upon an administrative agency when:

[D]irect immediate judicial action is inexpedient or impractical, . . . laws conferring such powers are complete in their content, are designed to serve a general public purpose, are such as to require a consistent and immediate administration, and . . . all [such] administrative actions are subject to judicial review.²²

The court felt that the distinction between the power to revoke a license, which had long been recognized as a permissible sanction to be employed by the executive branch, and the power to impose a monetary penalty, often held to be an impermissible sanction, was not a meaningful distinction. A license revocation, the court reasoned, could have a much more serious effect upon a violator than a fine. Therefore, if an agency of the executive branch could revoke a license, it should also be allowed to impose a monetary penalty.²³

However, when the Second District of the Illinois Appellate Court considered these same questions in *City of Waukegan v. E.P.A.*,²⁴ it found that this fining power was not a sanction which could lawfully be imposed by an administrative agency. The Second District emphasized that the Pollution Control Board had not only the power to levy a fine, but also the discretion to determine the amount of the fine. The power to impose a discretionary fine was found to be a judicial power and not a quasi-judicial power. Hence, the court held this power to be in violation of the Illinois constitutional provision concerning the separation of powers.²⁵ The court did not decide whether an administrative agency could constitutionally impose a fine whose amount had been fixed by the legislature.²⁶ In a vigorous dissent,²⁷ Justice Seidenfeld agreed with the *Ford* decision and said that the power to impose a flexible monetary penalty should be upheld as a "necessary power to achieve an urgent legislative purpose which is sufficiently circumscribed by

20. 9 Ill. App. 3d 711, 292 N.E.2d 540 (1973).

21. *Id.* at 715, 292 N.E.2d at 542.

22. *Id.* at 716, 717, 292 N.E.2d at 543, 544.

23. *Id.* at 718, 292 N.E.2d at 545.

24. 11 Ill. App. 3d 189, 296 N.E.2d 102 (1973).

25. *Id.* at 195, 296 N.E.2d at 107.

26. *Id.* at 194, 296 N.E.2d at 106.

27. *Id.* at 196, 296 N.E.2d at 108.

standards, procedural safeguards, and meaningful judicial review," all of which he found to be present in this Act.²⁸

III. THREE QUESTIONS

When case law applicable to the issue of whether an administrative agency may impose a monetary penalty is examined, three questions are presented. First, whether such agencies may impose a fixed monetary penalty. Second, whether such agencies may impose a discretionary monetary penalty. And third, the distinction between a civil penalty, which may be imposed by an agency, and a criminal penalty, which may not be imposed by an agency. As these questions are considered, it is important to note the additional factors which have been relied upon by the courts in their determination of the validity of the penalty power in question.

A. *May an Administrative Agency Impose a Fixed Monetary Penalty?*

In Illinois, the first cases which dealt with an agency's power to impose a fixed monetary penalty all held that such a power was unconstitutional.²⁹ This apparent distaste for administratively imposed fines, however, did not last. The tide turned with the case of *Department of Finance v. Cohen*.³⁰ In that case, it was found that the determination of a tax deficiency by the Department of Finance without the taxpayer being afforded a judicial trial was proper, being within the agency's constitutional powers. The taxpayer had been given notice, a hearing before the agency and had a right to judicial review under the act. In finding it a valid administrative function, the court reasoned that the legislature could not be expected to provide for every detail and that it was necessary for them to delegate a reasonable amount of discretion to the executive branch.³¹ Several years later the Illinois Supreme Court said in *Department of Finance v. Gandolji*.³²

28. *Id.* at 202, 296 N.E.2d at 112.

29. The first case was *Beesman v. City of Peoria*, 16 Ill. 484 (1855), in which it was held that the mayor of Peoria, who had levied a \$25 fine for the violation of the town's Sunday blue laws, had improperly exercised judicial powers. In *Cleveland, Cinn., Chic., and St.L. Ry. v. People*, 212 Ill. 638, 72 N.E. 725 (1904), a fixed penalty of \$10 was provided by statute for a person failing to annually clean the bed of any drainage stream of impediments. This was assessed without a hearing by a tax assessor. In holding the statute unconstitutional, the court said at 640, 72 N.E. at 726 that an agency had no power to judge persons guilty of violation a statute and thereupon inflict a penalty. Yet another monetary penalty was found invalid in *Reid v. Smith*, 375 Ill. 147, 30 N.E.2d 908 (1940), this time one of \$10 per day upon state contractors paying their laborers less than the prevailing wage which had been levied by the administrative branch. This power to levy a penalty was found to be judicial in nature and therefore was not to be granted to an administrative agency. Again this penalty was imposed without a hearing.

30. 369 Ill. 510, 17 N.E.2d 327 (1938).

31. *Id.* at 515, 17 N.E.2d at 328.

32. 375 Ill. 237, 30 N.E.2d 737 (1940).

Our decision in *Department of Finance v. Cohen*, supra, that the power to review and revise tax returns under the Retailer's Occupation Tax is ministerial, and not judicial, as requiring merely a calculation or computation from data upon which all minds must ordinarily reach the same result, applies with equal force to the assessment of penalties [levied by the executive branch for violation of this tax act]. (Emphasis added.)³³

Illinois had therefore recognized the power of an administrative agency to impose a monetary penalty, at least one which was a fixed sum or a sum that could be uniformly calculated from a defined formula. While the change in the court's attitude toward administratively imposed fines might be explained as merely reflecting a trend toward granting the executive branch additional power, another factor should be considered. The earlier cases all involved fines which were imposed without a hearing.³⁴ However, in both the *Gandolfi* and *Cohen* cases the agency carried out its assessments only after a full administrative hearing. Therefore, whether an administrative hearing was afforded to the violator is a determinative factor of the validity of an agency's fining power.

The *Gandolfi* court treated fines whose amounts may be calculated uniformly by a formula in the same manner as fines that are fixed in amount. When the United States Supreme Court has considered the power of an agency to impose fines, it has found no more objection to penalties having formula calculated amounts than it has to penalties having fixed amounts. In *Bartlett v. Kane*,³⁵ a penalty imposed by a customs official upon an importer for undervaluing his goods by more than ten percent was found to be within the executive branch's constitutional powers. The penalty, provided by statute, was an additional duty of twenty percent of the assessed value over and above the normal duty. This same penalty has been upheld in several subsequent cases as incidental to the official's duty of collecting tariffs upon the goods.³⁶ Here, as in Illinois cases upholding penalty powers, the violators had all been afforded an administrative hearing before the penalty was imposed.

In adjudicating fines of fixed amounts imposed by the executive branch for violations of the immigration laws, the United States Supreme Court upheld that fining power reasoning that:

[T]he statute imposing fines must be regarded as an *incident to the exercise by Congress of its plenary power* to control the admission of aliens, and due process of law does not require that the courts, rather than administrative officers, be charged . . . with determin-

33. *Id.* at 240, 30 N.E.2d at 739.

34. *Supra* n. 29.

35. 57 U.S. (16 How.) 263 (1853).

36. *Origit v. Hedden*, 155 U.S. 288 (1894); *Passavant v. United States*, 148 U.S. 214 (1893).

ing the facts upon which the imposition of such a fine depends. (Emphasis added.)³⁷

It was further noted in this case that if the Congress had the power to grant such a penal power, the severity or amount of the fine that could be granted was irrelevant and in no way determined the validity of the power.³⁸ The Court stipulated, however, that the violators must be afforded a full administrative hearing before such penalties may be imposed.³⁹

In all the cases in which the United States Supreme Court has upheld an agency's power to fine, either the violators had been afforded an administrative hearing, or the violators did not raise any objection as to the lack of such a hearing. As was the case with the Illinois Supreme Court, the provision for an administrative hearing certainly would undercut the suggestion that due process was lacking. e

A case illustrating the importance of an administrative hearing is *Lipke v. Lederer*.⁴⁰ The National Prohibition Act provided that a double tax rate would be imposed on those engaged in the illegal business of selling or producing liquor, and additional fixed penalties could be imposed. Although part of this Supreme Court decision was based on the determination that the penalty was criminal in nature, the Court stated: "We cannot conclude . . . that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers."⁴¹ However, the statute was later amended to provide a hearing for those assessed such taxes and penalties. When three United States district courts were faced with this change, two of them invalidated the assessments in accordance with *Lipke*, and did not decide whether a hearing remedied the problem.⁴² However, the third court felt that there was no longer any objection to this penalty power now that a fair hearing was afforded, and the court upheld the assessments.⁴³ The importance of procedural due process was further pointed out in a later decision of the Supreme Court, *Helvering v. Mitchell*,⁴⁴ which noted that many

37. *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 335 (1932). See also *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).

38. *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 335 (1932). See also *Helvering v. Mitchell*, 303 U.S. 391, 400 (1938), in which an administratively imposed tax penalty of \$364,354.92 was upheld, the Court noting, "In spite of the comparative severity, such sanctions have been upheld against the contention that they are essentially criminal . . ." Accord, *Wright v. S.E.C.*, 112 F.2d 89, 95 (2d Cir. 1940); *West Romaine Corp. v. Calif. State Bd. of Pharmacy*, 266 C.A.2d 901, 905, 906, 72 Cal. Rptr. 569, 571 (1968).

39. *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 336, 337 (1932).

40. 259 U.S. 557 (1922).

41. *Id.* at 562. Accord, *Regal Drug Corp. v. Wandell*, 260 U.S. 386 (1922).

42. *Dukich v. Blair*, 3 F.2d 302 (D. Wash. 1925), appeal dismissed, 270 U.S. 670 (1926); *Jasper v. Hellmich*, 4 F.2d 852 (E.D. Mo. 1925).

43. *Seligman v. Bowers*, 4 F.2d 1011 (S.D.N.Y. 1925), appeal dismissed, 271 U.S. 642 (1926).

44. 303 U.S. 391 (1938).

cases placed greater emphasis upon the procedural due process aspects of the proceeding in question than on other matters.⁴⁵

The United States Supreme Court has also upheld fixed or formula calculated penalties in a number of other administrative fields.⁴⁶ This pattern of upholding fixed or formula calculated penalties has also been followed in the state courts.⁴⁷

In summary then, the question has not been so much whether fixed or easily calculable fines may be imposed by an administrative agency, as the imposition of many such fines have been upheld. Rather, the question has often been whether the violator has been afforded due process, as by affording him an administrative hearing. As noted before,⁴⁸ the Illinois Environmental Protection Act provides very extensive procedural safeguards surrounding the imposition of any fines imposed under the act.

In addition, the Supreme Court has upheld an agency's fining power where the agency was operating in a field over which the Congress had plenary powers. The presence of such plenary power is another factor to be considered and is very relevant when applied to the Illinois Environmental Protection Act. The field of environmental regulation seems to be clearly within the plenary powers of the General Assembly, for the duty to see that the public's right to a healthful environment is protected is specifically given to the General Assembly in the 1970 Illinois Constitution.⁴⁹ The Illinois Constitution further provides that persons may enforce their right "through appropriate legal proceedings"⁵⁰ which are "meant to include . . . administrative proceedings" in addition to other types of proceedings, such as judicial proceedings.⁵¹

45. *Id.* at 400 n.3.

46. Agency imposed penalties have been upheld when imposed for: tax fraud, *Helvering v. Mitchell*, 303 U.S. 391 (1938); presentment of fraudulent claims upon the United States, *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); fraudulent purchases of government surplus goods reserved for veterans, *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956); and transactions in bituminous coal which resulted in unfair trade practices, *Sunshine Coal Co. v. Adkins*, 310 U.S. 381 (1940).

47. In *Southern Ry. v. Melton*, 133 Ga. 277, 65 S.E. 665 (1909), the court upheld a penalty of one dollar per day to be paid a shipper by a railroad which was guilty of an unreasonable delay in providing a railroad car for the shipper's use. An identical statute was upheld in *Keystone Lumber Yard v. Yazoo and M.V.R.R.*, 97 Miss. 433, 53 So. 8 (1910). In *Jones v. Gordy*, 169 Md. 173, 180 A. 272 (1935), a statute providing that the comptroller could exact a penalty for tax deficiencies which were the result of negligence or fraud was upheld.

48. See text accompanying nn. 11-19 *supra*.

49. ILL. CONST. art. XI, § 1 provides, "The public policy of the State and the duty of each person is to provide and maintain a healthful environment The General Assembly shall provide by law for implementation and enforcement of this public policy."

50. *Id.* § 2.

51. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, RECORD OF PROCEEDINGS, COMMITTEE PROPOSALS, Vol. VI, 705.

The administrative fining power granted by this Act then has two counts in its favor: (1) the power is only exercised within a framework which provides for extensive procedural safeguards, and (2) the Act itself is designed to carry out a function clearly within the legislature's plenary powers.

*B. May an Administrative Agency Impose a
Discretionary Monetary Penalty?*

Whereas monetary penalties which were fixed in amount have encountered little trouble in the courts, statutes which have allowed an agency the discretion to decide the amount of the penalty have been the subject of closer scrutiny.⁵² As noted before, the Environmental Protection Act empowers the Pollution Control Board to impose an initial penalty of up to \$10,000 and subsequent penalties of up to \$1,000 per day while the violation continues.⁵³ The question then is not merely whether the Board may impose a fine, but whether it should have the power to fix the amount of that fine.

The issue has not yet been directly faced by the Illinois Supreme Court. However, there are two cases which have indirectly touched on the issue. The only case in Illinois prior to the *Ford*⁵⁴ case which involved the imposing of a discretionary monetary penalty is *People v. Sholem*.⁵⁵ In that case, the Illinois Supreme Court ruled unconstitutional a statute giving the State Fire Marshall the power to levy a fine from \$10 to \$50 upon anyone who failed to comply with his order to correct fire hazards in the building. However, the primary reason the statute was held invalid was because the statute lacked sufficient standards upon which the Fire Marshall could determine what constituted a fire hazard. The power to impose a discretionary fine was not in itself decided.

The case which comes closest in Illinois to answering the question of whether an administrative agency may impose a discretionary fine is *People v. Wilson Oil Co.*,⁵⁶ which involved a tax on motor fuels. The statute provided that before an application for a retail gasoline dealer's license could be approved by the Illinois Department of Finance, a bond was to be posted. The amount of this bond was to be determined by the Department of Finance by calculating the amount of revenue expected from that individual dealer, and the bond would be forfeited if the dealer failed to pay the coming year's motor fuel tax. The discretionary power to determine the amount of the bond was upheld by the Illinois Supreme Court as incidental to the Department's administrative purpose of protecting the state against the possible loss of revenue.

52. For a comparison of fixed and flexible penalties see Schwenk, *The Administrative Crime, its Creation and Punishment by Administrative Agencies*, 42 MICH. L. REV. 51, 79-85 (1943).

53. ILL. REV. STAT. ch. 111½, § 1042 (1971).

54. *Ford v. E.P.A.*, 9 Ill. 3d 711, 292 N.E.2d 540 (1973).

55. 294 Ill. 204, 128 N.E. 377 (1920).

56. 364 Ill. 406, 4 N.E.2d 847 (1936).

There are no federal cases dealing with the power of an administrative agency to determine the amount of a fine.⁵⁷ However, this question has been directly faced in a number of states. Those jurisdictions are split on the issue of whether administrative agencies should have such a discretionary fining power. Illustrative of the position of those opposed to such power is the case of *Tite v. State Tax Commission*.⁵⁸ In *Tite*, the Utah Supreme Court found unconstitutional a statute which provided that the State Tax Commissioner could levy a penalty of \$10 to \$299 upon any person who failed to affix tax stamps to certain enumerated products, such as cigarettes and margarine. The court's reasoning was that:

Giving to the tax commission the power to determine in its own judgment the amount of the penalty was a legislative function which could not be delegated. It is not the power to enforce or apply a law, but the power to make a law for each particular case, to determine in its judgment the amount of a penalty The infirmity [of this law] lies in the fact that the tax commission can in each case name a different sum. It has not set a standard for all cases which fit the rule, but in each case within its mind at its discretion fixes the amount. Only the courts in imposing a fine as a punishment for a crime have this discretion.⁵⁹

This case, however, has been severely undermined by a more recent decision of the Utah Supreme Court in *Wycoff Co. v. Public Service Commission*.⁶⁰ In *Wycoff*, the statute provided that a regulatory commission could subject public utilities which violated any order of the Commission to a penalty of \$500 to \$2,000. This power to levy a discretionary penalty was found to be within the commission's constitutional powers.

Despite the *Wycoff Co.* case, however, there are other states which agree with *Tite's* reasoning. The Mississippi Supreme Court in *Broadhead v. Monaghan*⁶¹ found unconstitutional, for reasons similar to those in *Tite*, a statute which allowed the Revenue Department to impose a penalty for tax delinquencies ranging in amount from ten percent to twenty-five percent of the deficiency. In that case, no hearing regarding the assessment was afforded the violator. In *State ex rel. Lanier v. Vines*,⁶² a North Carolina case, the executive branch had been given the power to fine an insurance agent for

57. However, there have been several cases which dealt with administrative discretion in determining the severity of penalties that were not of a monetary nature. In *Wong Wing v. United States*, 163 U.S. 228 (1896), a statute was found unconstitutional which allowed immigration officials to imprison any alien at hard labor for up to a year. In *Nadiak v. C.A.B.*, 305 F.2d 588 (5th Cir. 1962), the Civil Aeronautics Board utilized its wide discretionary powers to discipline pilots by temporarily suspending a pilot's license for flying too close to another plane. The court said at 593 that where the decision making is highly technical, the agency must give wide discretion in imposing penalties.

58. 89 Utah 404, 57 P.2d 734 (1936).

59. *Id.* at 416-18, 57 P.2d at 740-741.

60. 13 Utah 2d 123, 369 P.2d 283 (1962), *cert. denied*, 371 U.S. 819 (1962).

61. 238 Miss. 239, 117 So. 2d 881 (1960).

62. 274 N.C. 486, 164 S.E.2d 161 (1968).

certain violations of state law in amounts varying from nominal sums to \$25,000. The right to an administrative hearing was allowed here. However, while the statute was found unconstitutional, this court did not rule out the possibility that some discretionary monetary penalty might be upheld. The court said the test was whether the power was "reasonably necessary as an incident to the accomplishment of the purposes for which . . . [the] agency was created" ⁶³ The *Lanier* court's decision turned on the consideration of two factors: (1) the purpose of the agency, and (2) the nature and extent of the penalty power. ⁶⁴

A special administrative court, the Marine Navigation Court, was considered in *State v. Osborn*,⁶⁵ a New Jersey case. Upon convicting a person for a violation of the navigation rules provided in the statute, the court had the power not only to impose a fine up to \$100, but also the power to jail the violator if he did not pay the fine. Both the statute and a \$100 fine which was imposed under it were set aside as an illegal exercise of judicial powers. Finally, in *State v. Atlantic Coast Line R.R.*,⁶⁶ a Florida statute allowing a state commission to fix a penalty upon a railroad of up to \$500 for violations of its rate and schedule regulations was found invalid, again being deemed an unconstitutional grant of judicial powers.

Although all the above state cases overturned statutes providing discretionary monetary penalties, all the cases except for *Atlantic Coast Line* have certain factors which either distinguish them from the statutory scheme in Illinois or which lessen their precedential value. *Tite* was probably overruled *sub silentio* by the *Wycoff* case, in that *Wycoff's* holding was directly opposite to *Tite* and lacked any distinguishing factors. In *Broadhead*, the penalty was levied without even affording an administrative hearing. As noted before, the Illinois Environmental Protection Act provides for a hearing prior to the imposition of any penalty. The court in *Vines* did not hold that discretionary penalties were invalid in all cases, but only held them invalid in certain cases. Lastly, in *Osborn*, the agency had not only the power to fine, but also the power to imprison upon a default in the payment of the fine. No such power to imprison is given the Pollution Control Board in the Illinois Act.

In addition to *Wycoff*, there have been several other cases which have upheld agency's power to impose a discretionary monetary penalty. In *State Tax Commission v. Stanley*,⁶⁷ an Alabama statute was upheld which allowed the State Tax Commission to levy a penalty of \$25 to \$500 upon anyone failing to affix required tax stamps upon cigarettes and certain other goods. However, the power was limited by the fact that the accused could demand a

63. *Id.* at 497, 164 S.E.2d at 168.

64. *Id.*

65. 32 N.J. 117, 160 A.2d 42 (1960).

66. 56 Fla. 617, 47 So. 969 (1908).

67. 234 Ala. 66, 173 So. 609 (1937).

trial by jury in a civil proceeding rather than submit to the commission's adjudication. In *State v. Public Service Commission*,⁶⁸ a Washington agency's power to impose "reasonable" penalties upon railroads to expedite the movement of freight was considered. The court in that case saw the sanction not as a penalty, but as compensation, similar to liquidated damages, in that they were paid to the injured party, the shipper in that case.⁶⁹ Finally, while not addressing the penalty power issue directly, a fine imposed by an agency under a New York statute allowing a penalty of up to \$1,000 for violations of the state insurance law was upheld in *Old Republic Life Insurance Co. v. Thacker*.⁷⁰

In summary, although the courts are more likely to invalidate a discretionary penalty power than a fixed penalty power, there is no general rule that the courts will always invalidate such discretionary power. In order to determine whether or not a discretionary monetary penalty should be upheld, one must look beyond its discretionary nature to other relevant factors. Whether procedural due process was afforded the violator or whether the activity regulated was within the legislative body's plenary powers, which have already been mentioned as considerations in the section on fixed fines, are relevant when examining discretionary penalties. A number of other factors which have also been utilized to determine whether an agency may impose a fine, either fixed or discretionary in amount, are set forth in the following section.

C. Civil Penalties and Criminal Penalties

As the distinction between fixed monetary penalties and discretionary monetary penalties has failed to clarify whether an agency's fining power should be upheld, many courts and scholars have employed a different test: the distinction between a civil penalty and a criminal penalty. Professor Davis, in his treatise on administrative law,⁷¹ first notes that administrative agencies may not impose criminal penalties and then states: "The problem is therefore to distinguish between criminal penalties and civil or remedial penalties"⁷²

There are four major factors which have been utilized in drawing the line between criminal and civil penalties. The first is the wording in the statute which gave the power to impose a fine to the administrative agency. An Illinois case, *Cleveland, Cinn., Chic., and St.L.Ry. v. People*,⁷³ relied upon

68. 94 Wash. 274, 162 P. 523 (1917).

69. *Id.* at 281, 162 P. at 528.

70. 12 N.Y.2d 481, 186 N.E.2d 554, 234 N.Y.S.2d 702 (1962).

71. K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958).

72. *Id.* § 2.13 at 134.

73. 212 Ill. 638, 72 N.E.2d 725 (1904). The statutes provided such a fine for anyone who failed to annually clean the bed of any drainage stream they owned of impediments.

this factor when it invalidated a \$10 fine imposed under a statute by an agency of the executive branch. The court said that agencies should have:

[N]o power to inflict penalties for violation of laws, or to determine when a law has been violated and adjudge persons guilty. This . . . is a penalty for the violation of law. This is apparent from the wording of the statute, which expressly stated that a penalty shall be inflicted.⁷⁴

This factor has also been found determinative by the United States Supreme Court. In *Wong Wing v. United States*,⁷⁵ the Court considered a statute which stated “[t]hat any such Chinese person . . . convicted and adjudged to be not lawfully entitled to be . . . in the United States, shall be imprisoned at hard labor for a period of not exceeding one year” (Emphasis added.)⁷⁶ The Court found this language to be, in effect, a declaration that the prohibited activity is an infamous crime and, therefore, a penalty for such activity may not be imposed by an administrative agency.⁷⁷ While the harsh nature of the punishment was a factor in the Court’s decision, it is clear that whatever the penalty is, a legislative body cannot both declare the act to be a crime and then leave to the executive branch the power to determine guilt and thereupon mete out the punishment.

It seems clear that the Illinois General Assembly, when enacting the Environmental Protection Act, intended by its wording that the violations adjudicated and the penalties imposed by the Pollution Control Board under the Act were to be considered civil in nature. The Act states that anyone who violates the Act will be “liable” for a penalty which “may be recovered in a civil action.”⁷⁸

The above rule, developed in *Cleveland* and *Wong Wing*, however, must be distinguished from the situation where a statute provides for both civil and criminal penalties for violations of an act. This is the case with the Environmental Protection Act. The Act not only provides for the civil penalty mentioned above, but also states in a separate section that violations of the Act are misdemeanors and state law enforcement officers are empowered to enforce it.⁷⁹ The Act, therefore, provides the state with a choice of enforcement by either criminal or civil means. This scheme of civil and criminal penalties has been faced before. In considering a penalty of \$1,000 recovered by the government in court in a civil action, the Supreme Court in *Hepner v. United States*⁸⁰ found no objection to the recovery of such a fixed penalty in a civil proceeding, even though the penalty was also recoverable in a

74. *Id.* at 640, 72 N.E. at 726.

75. 163 U.S. 228 (1896).

76. *Id.* at 235.

77. *Id.* at 237.

78. ILL. REV. STAT. ch. 111½, § 1042 (1971).

79. *Id.* § 1044.

80. 213 U.S. 103 (1909).

criminal proceeding.⁸¹ That the conduct penalized also happens to constitute a crime does not seem to negate the penalty's civil nature, and a number of cases have upheld such administrative penalties.⁸²

A second factor used to separate civil and criminal penalties is the nature of the penalty itself. As noted before,⁸³ the severity of a penalty will not determine whether an administrative agency may impose it. However, the type of penalty itself, whether it involves a fine or imprisonment, is relevant to the determination of whether an administrative agency may impose it.

It is clear that neither the power to imprison an individual⁸⁴ nor the power to change an imprisoned person's sentence⁸⁵ may lie with an administrative agency. Imprisonment has been traditionally used as a punishment for criminal activity and has, therefore, become criminal in nature. Although fines have also been utilized as criminal penalties they have not been so intertwined with criminality in general as to be automatically characterized as a criminal penalty. This seems apparent from a number of cases already cited which have upheld administratively imposed fines.

A third determining factor is the purpose the penalty is to serve. The issue is whether the penalty's purpose is penal in nature (i.e., intended to punish the violator) or remedial in nature (i.e., intended to reimburse the injured party). The intent of the legislature and the manner in which the penalty operates will determine which of these purposes the statute serves. In defining a penal sanction, the Illinois Supreme Court in *Cleveland, Cinn., Chic., and St.L.Ry. v. People*,⁸⁶ said that imposing a penalty upon the mere finding of a violation of the law is penal in nature.⁸⁷ The United States Supreme Court, in *Lipke v. Lederer*,⁸⁸ found that imposition of penalties for the failure to pay federal income tax on income gained from illegal activities had a penal purpose. The Court reasoned that the penalties were imposed only after finding that a crime had been committed, that of producing or selling liquor outlawed by the prohibition laws then in effect. Therefore, the penalties were really intended to punish those carrying on such illegal activities and were not merely incidental to the Internal Revenue Service's purpose of collecting taxes.⁸⁹ However, as emphasized before, the majority of courts

81. *Id.* at 108.

82. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Cermak Club, Inc. v. Illinois Comm'n*, 30 Ill. 2d 90, 195 N.E.2d 178 (1963); *Appeal of Lewis*, 208 Okla. Crim. 610, 258 P.2d 173 (1953); *State v. Moyers*, 86 Okla. Crim. 101, 189 P.2d 952 (1948).

83. See text at n.38 *supra*.

84. *Wong Wing v. United States*, 163 U.S. 228 (1896); *People v. Mallory*, 195 Ill. 582, 63 N.E. 508 (1902); *State v. Osborn*, 32 N.J. 117, 160 A.2d 42 (1960).

85. *People v. Montana*, 380 Ill. 596, 44 N.E.2d 569 (1942).

86. 212 Ill. 638, 72 N.E. 725 (1904).

87. *Id.* at 640, 72 N.E. at 726.

88. 259 U.S. 557 (1922).

89. *Id.* at 562.

have not found a penalty to be criminal in nature merely because the activity may also be prosecuted as a criminal activity.

Turning to remedial penalties, it seems clear that if the penalty assessed is paid directly to the injured party, then it has a remedial effect. Three state cases⁹⁰ considered administratively imposed penalties which were paid over to the private parties who had been injured. All of the penalties were upheld as being civil in nature. The courts likened these penalties to liquidated damages.

When the monetary penalty is retained by the government, who purports to be the injured party, this does not necessarily negate its remedial nature. Although the Florida Supreme Court in *State v. Atlantic Coast Line R.R.*⁹¹ found a monetary penalty to be criminal and not remedial because it was designed primarily to redress a public wrong and not a private wrong,⁹² the United States Supreme Court has found otherwise. The Court in *Helvering v. Mitchell*⁹³ found that a penalty for a tax deficiency caused by fraud in the amount of fifty percent of the deficiency was civil and not a criminal penalty. It found that this penalty was remedial in nature in that it was intended not only as a safeguard to the government from such fraud, but also as compensation for the heavy expense resulting from losses due to taxpayers' fraud and the expense of investigating such fraud.⁹⁴ The Supreme Court has also found other monetary penalties to be remedial. This included a statute which allowed the government to recover a flat sum of \$2,000 plus double the amount of damages caused by the fraudulent purchase of government surplus goods reserved for veterans,⁹⁵ and another which provided a \$2,000 penalty upon any person who presented a fraudulent claim against the United States.⁹⁶ The fixed recoveries were again compared to liquidated damages.

Although the fines imposed under the Environmental Protection Act are retained by the state rather than payed over to private individuals who may have been injured, there is a remedial intent expressed in the Act. In setting out the purposes for which the Act was designed, the Statute states that the "adverse effects upon the environment are . . . [to be] borne by those who cause them."⁹⁷ The remedial intent is, therefore, clearly expressed. The

90. In *Southern Ry. v. Melton*, 133 Ga. 277, 65 S.E. 665 (1909) and in *Keystone Lumber Yard v. Yazoo & M.V.R.R.*, 97 Miss. 433, 53 So. 8 (1910), a penalty of a dollar per day for railroad cars unreasonably detained by a railroad was upheld. In *State v. Public Serv. Comm'n*, 94 Wash. 274, 162 P. 523 (1917), a penalty which was imposed upon carriers for violation of rules designed to expedite the movement of freight was upheld. In all these cases the penalties were paid over to the injured parties, the shippers in these cases.

91. 56 Fla. 617, 47 So. 969 (1908).

92. *Id.* at 650, 47 So. at 980.

93. 303 U.S. 391 (1938).

94. *Id.* at 401.

95. *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956).

96. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

97. ILL. REV. STAT. ch. 111½, § 1002(b) (1971).

statute also operates to produce a remedial effect in that it compensates the public for both the damage done to the environment as well as for the expenses incurred in protecting the environment against such harmful activities.

The final factor to be considered in delineating between criminal and civil sanctions is whether the fining power granted to an administrative agency is necessary and incidental to that agency's lawful purposes. Here, a relevant consideration is whether the degree of efficiency, speed, and technical expertise gained by granting such a fining power to the administrative agency is necessary for the enforcement of the Act. This factor has been emphasized in a number of cases.⁹⁸

The question of whether this factor is present in the Act (i.e., whether the fining power granted by the Environment Protection Act is necessary and incidental to the Pollution Control Board's purposes) must be answered in the affirmative. Pollution control is undoubtedly a technical field requiring expertise to determine the existence, source and amounts of harmful pollution. These questions are not the proper subject of inquiry for a jury of layman in a criminal or a civil trial. Although expert witnesses may be employed, this method has often failed in other technical areas and is likely to be inadequate here. In considering the relative speed of the administrative and judicial processes, the administrative process is, of course, a faster method of enforcing the Act. It is also a more efficient method, as it places the body which is vested with the policy making powers in a position to tailor the enforcement practices to best meet its policy goals. Furthermore, a statewide agency such as this is more likely to enforce the law uniformly.

In summary, an administrative agency may impose a civil penalty and whether the penalty is characterized as civil, rather than criminal, depends on several factors. Those factors are: (1) how the legislature characterized the penalty, as determined by the statute's wording; (2) the exact type of penalty imposed; (3) whether the penalty serves a remedial or a penal purpose; and (4) whether the penalty is necessary and incidental to the agency's lawful powers.

IV. SUMMARY

There is no general rule that an administrative agency may or may not impose a monetary penalty. There is also no general rule that an administrative agency may impose a fixed monetary penalty, but may not impose a discretionary monetary penalty. Each individual fining power must be examined by the courts.

98. *People v. Wilson Oil Co.*, 364 Ill. 406, 4 N.E.2d 847 (1936); *Dep't of Finance v. Cohen*, 369 Ill. 510, 17 N.E.2d 327 (1938); *Dep't of Finance v. Gandolfi*, 375 Ill. 237, 30 N.E.2d 737 (1940); *State ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968); and *State v. Public Serv. Comm'n*, 94 Wash. 274, 162 P. 523 (1917).

When the Environmental Protection Act is examined in light of these factors, it appears that it has been well tailored to meet these various tests. The Act has provided the violators with elaborate procedural safeguards before any fine may be imposed, the wording of the Act reveals the legislative intent that the penalties are to be civil in nature, the penalties are intended to be remedial in that violators are to bear the cost of the harm they have caused, the fining power is necessary and incidental to the Agency's duty of protecting the environment and the field of activity in which these fines are to be imposed is clearly within the plenary power of the Illinois General Assembly.

The urgency of the problem of environmental protection is a determinative factor in the finding of whether the legislature has plenary powers in this field and whether the granting of such a fining power to an administrative agency is really necessary. The urgency of the problem is well documented in both the Act and the Illinois Constitution. The general Assembly has found that "environmental damage seriously endangers the public health and welfare" ⁹⁹ Every day that there is a delay in enforcing the Act, the damage to the environment continues. ¹⁰⁰ The seriousness and urgency with which the General Assembly viewed the environmental crisis was concurred in very strongly by the framers of the 1970 Illinois Constitution. ¹⁰¹ In the report submitted by the committee responsible for framing the constitutional provision dealing with the environment it was said: "Without exception, there was agreement that pollution of the environment is occurring and that the problem has reached crisis proportions." ¹⁰² The new Illinois Constitution has declared that the right to a healthful environment is a fundamental right. ¹⁰³

The question of whether the Pollution Control Board's power to impose a discretionary fine is constitutional will undoubtedly be resolved soon, as an important provision of a major act can not be left in doubt long. However, when one considers both the urgency of the problem of environmental protection and the careful tailoring of this Act to the tests used by other courts, one must conclude that the Board's fining power should be upheld.

ROBERT C. STEPHENS

99. ILL. REV. STAT. ch. 111½, § 1002(a)(1) (1971).

100. This is probably the reason an additional penalty of up to \$1,000 per day for continuing violations is provided for in the statute. See ILL. REV. STAT. ch. 111½, § 1042 (1971).

101. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, RECORD OF PROCEEDINGS, VERBATIM TRANSCRIPTS, Vol. IV, 2991, 2993, 3012.

102. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, RECORD OF PROCEEDINGS, COMMITTEE PROPOSALS, Vol. VI, 696.

103. ILL. CONST. art. XI, § 2. See also SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, RECORD OF PROCEEDINGS, VERBATIM TRANSCRIPTS, Vol. IV, 2991, where one of the framers stated "Section 3 (now section 2, art. XI) grants each person the right to a healthful environment. We believe that this is a fundamental right."