

Opinion No. 62-105

August 6, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General F. Harlan Flint, Assistant Attorney General

TO: Mr. Hadley Kelsey, Special Assistant Attorney General, Legal Section, State Highway Department, P.O. Box 1641, Santa Fe, New Mexico

QUESTION

Facts

A person has a trailer for hauling heavy equipment which is in excess of the legal eight foot width. The State Highway Commission is requested by the owner of such trailer to issue a special permit not to exceed one year for such trailer. Assuming that the weight of any load is not excessive, may the permit be issued for such vehicle and the following things done under such permit?

QUESTIONS

1. May the owner of the vehicle transport loads in excess of the legal eight foot limit on such trailer?
2. May the trailer return from the destination empty after depositing such load under such permit?
3. May the trailer be reloaded for the return trip with a load which is not overwidth where such overwidth trailer is not necessary for the transportation of such load?
4. Does Section 64-23-22 (c), N.M.S.A., 1953 Compilation restrict the use of the trailer to specified routes or load purposes?
5. In view of the provisions of Section 64-23-22 (c) supra, would it be an abuse of discretion to flatly refuse to grant any such permits under all circumstances, and if so, who is responsible for establishing the standards to be applied in issuing such permits?
6. May the owner-operator of the over size equipment now under consideration, register such vehicle prior to securing a permit?

CONCLUSIONS

1. Yes, but see analysis.
2. Yes.

3. Yes.
4. No, but see analysis.
5. Yes. State Highway Commission.
6. Yes.

OPINION

ANALYSIS

The questions propounded herein all deal with the issuance by the State Highway Commission of a special permit for the operation of an oversized vehicle pursuant to Section 64-23-22 (C.), N.M.S.A., 1953 Compilation. In construing the above mentioned subsection it is our opinion that it is necessary to also consider Subsection (A) of that section which reads as follows:

"The state highway commission and local highway authorities may, in their discretion, upon application in writing, and good cause being shown, issue a special permit in writing authorizing the applicant to operate or move a vehicle or load of a size or weight exceeding the maximum specified in this act [64-23-12 to 64-23-25] on any highway under the jurisdiction of and for the maintenance of which body granting the permit is responsible. A permit may be granted, in cases of emergency, for the transportation of loads on a certain unit or combination of equipment for a specified period of time not to exceed [1] year, and the permit shall contain the route or routes to be traversed, the type of load or loads to be transported, and any other restrictions or conditions deemed necessary by the body granting such permit. In every other case, the permit shall be issued for a single trip and may designate the route to be traversed and contain any other restrictions or conditions deemed necessary by the body granting the permit. Every permit shall be carried in the vehicle to which it refers and shall be opened for inspection to any peace officer, and shall be a misdemeanor for any person to violate any of the conditions or terms of such special permit."

As we understand the facts upon which the questions are based, the applicant for a permit wishes to operate a vehicle which is in excess of the eight-foot width requirements of Section 64-23-13, and invokes the discretion of the commission for the issuance of a permit under Section 64-23-22 (C), which reads as follows:

"Special permits may be issued for a single vehicle or combination of vehicles by the highway commission for a period not to exceed one [1] year for a fee of ten dollars (\$ 10.00). The permits may allow excessive height, length and width for a vehicle or combination of vehicles or load thereon, and may include a provision for excessive weight if such operation is to be within the vicinity of a municipality. The excessive weight provision, however, shall be limited to an area not to exceed ten [10] miles beyond any municipality limits."

It is our further understanding that except for its excessive width the vehicle in question is otherwise within the statutory limitations on size and weight.

It is first our conclusion that the highway commission may, in its discretion, grant such a permit if the conditions prescribed by Section 64-23-22 (A) have been met to the commission's satisfaction. In other words good cause must be shown why it is reasonably necessary that the applicant operate the subject vehicle on the highways of the State. The Highway Commission may grant such permits and specify the type of loads to be transported, the route or routes to be traversed and may impose such other restrictions or conditions which are reasonably deemed to be necessary. In the present instance the type of load to be carried is not relevant since the applicant only seeks an exception for the vehicle width. It would be inappropriate for us to discuss the standards to be applied by the highway commission in granting such permits since the establishment of these standards has been delegated to the commission itself by the statute now under consideration. It is clear that the Legislature may limit the weight, size, length and load of vehicles using the highways. **Sproles v. Binford**, D. C. Tex., 52 F.2d 730; **City of Ashland v. Ashland Supply Company**, 225 Ky. 123, 7 S.W. 2d 833. Furthermore, the use of the highways by vehicles of excess weight, size, length and load may be regulated or limited in consideration of possible injuries to the highway as well as to those using it. Such statutory limitations must be reasonable and not arbitrary and must be based on the power to exercise police powers for the promotion or protection of public safety and welfare. **State ex rel. Parker v. Frick**, Fla., 7 So. 2d 152.

The question arises as to the legality of the Legislature's delegation of power to the State Highway Commission. It is clear that the functions of legislation may not be delegated by the legislative to the executive department or to any executive or administrative officer, board or commission. **State v. Spears**, 57 N.M. 400, 259 P. 2d 356. However, a certain policy or rule having been prescribed by statute, matters of detail in carrying out the executive duty of giving effect to the legislation may be left to executive or administrative officers, boards or commissions. **State v. Spears**, supra. In this regard it is clear that the Legislature may prescribe general regulations governing motor vehicles and delegate to an executive agency the power to make rules and regulations as to administrative matters. **Johnson v. Sanchez**, 67 N.M. 41, 351 P. 2d 449. It is our view that the Legislature has prescribed general regulations controlling the weight and size of vehicles to be operated on the highways of the State of New Mexico and that the power to administer these rules and to grant exceptions to them, when necessary, has been properly delegated to the State Highway Commission. In **Sofeico v. Hefferman**, 41 N.M. 219, 67 P. 2d 240, the New Mexico Supreme Court stated:

"It is well settled that it is not always necessary that statutes and ordinances prescribe a specific rule of action, but on the other hand, some situations require the vesting of some discretion in public officials, as, for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule, or the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety, and general welfare."

It appears to us that the situation presented by the subject now under consideration is one where it is difficult for the Legislature to lay down definite rules. It also appears that the statute governing weight and size limitations is one dealing with the public safety and welfare. The New Mexico Supreme Court has said in **Johnson v. Sanchez**, supra that

"the public health, safety and general welfare are primary considerations in the regulation and control of the use of public highways."

Based on the above authorities and the reasoning expressed therein, we conclude that the State Highway Commission has broad discretion in the granting or denying of permits provided for under Section 64-23-22 (C).

We shall proceed to consider your specific questions in their stated order. It appears clear to us that the owner of the vehicle in question may transport loads in excess of the legal eight-foot limit if the permit for which he has applied is granted to him. It should be mentioned, however, that the commission may express in such permit limitations on the types of load that may be carried on the trailer.

In answer to your second question, we conclude that a trailer operating under such a permit may return from its destination empty. Assuming that the permit were issued for the maximum period of one year there would be no reason for requiring the operator to use the vehicle only when loaded. Depending upon the specific requirements of the operator's business, it might indeed be impossible to exercise the privilege granted by the permit unless the operator were permitted to return the empty trailer to his place of business.

Question Number 3 asks whether it will be permissible to reload the trailer for the return trip with a load which is not overweight. I think it is clear that the highway commission could permit this practice. Since in the specific case under consideration the applicant desires only an exception to the width requirements for vehicles and does not request any other deviation from the statutory limitations on size or weight of vehicle or load, it would seem to be completely irrelevant what load is carried on the return trip. The permit sought is for the vehicle, not for the load. Of course the permit contemplated will not allow the operator to carry a load of excessive weight.

You have further asked if Section 64-23-22 (C) restricts the use of such trailer to specified routes or load purposes. Your specific question must be answered in the negative since the mentioned subsection does not contain any of the requirements for the issuance of such permit other than the fee to be paid therefor. However, as we have previously stated, it is our conclusion that Subsection (A) and Subsection (C) must be read together in order to determine powers and duties of the commission with regard to the issuance of such permits. It is our conclusion that the commission may properly prohibit the use of specified routes and may prescribe the types of load which may be transported pursuant to the provisions of Subsection (A) of the subject statutory provision. The determination of what limitations should be placed upon the applicant

should be based upon the reasonable necessities of the applicant's business and the concern of the commission for the public health, safety and general welfare.

We now turn to Question Number 5. Recognizing that the State Highway Commission has the power to enforce the statute and to supplement it with rules and regulations, this power to regulate is not absolute but is subject to the constitutional provision that no person shall be deprived of property without due process of law. The test of the validity of all such limitations, under the due process clause, is that of reasonableness, and any regulation is void if it is so arbitrary or unreasonable as to become an infringement of the right of ownership. **Chicago, R.I. & P. Ry. Co., v. United States**, Ill., 284 U.S. 280; **Pa. R. Co. v. Driscoll**, 330 Pa. 97, 198 Atl. 130. The statute under consideration imposes on the highway commission the duty to exercise its discretion upon applications for permits such as that herein contemplated. To consistently refuse to exercise such discretion and to consider the facts which might entitle the applicant to an exception would, in our opinion, be arbitrary and unreasonable. **Nashville, C. & St. L. Ry. Co., v. Walters**, 294 U.S. 405.

Your last question can be answered very briefly. The type of vehicle described is not excepted from the requirement of registration. Section 64 - 3 - 2, N.M.S.A., 1953 Compilation. Furthermore, the Motor Vehicle Division may refuse registration only on the grounds stated in Section 64-3-6. It is therefore clear that the operator may register the oversized equipment prior to securing a permit. It is obvious of course that a special permit must be obtained prior to the operation of the vehicle on the highway.