

Opinion No. 69-100

August 25, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Mark B. Thompson, III,
Assistant Attorney General

TO: Floyd Cross, Chairman, State Corporation Commission, P.E.R.A. Building, Santa Fe, N.M. 87501

QUESTIONS

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1. May the Corporation Commission lawfully promulgate rules and regulations interpreting the so-called school bus exemption from the Motor Carrier Act found in Section 64-27-25 (a), N.M.S.A., 1953 Comp. (1967 Supp.), without first holding a hearing at which time all parties who might have an interest in the regulation could be heard?

2. If the answer to question No. 1 is yes, may the Corporation Commission limit school activities covered by the exemption to those in which the transportation is paid for by school funds or public moneys?

CONCLUSIONS

1. Yes.

2. Yes.

OPINION

{*158} ANALYSIS

Section 64-27-61, N.M.S.A., 1953 Comp. provides that:

"The commission shall promulgate and mail to each holder {*159} of a certificate or permit hereunder, such regulations as it may deem necessary properly to carry out the provisions and purposes of this act."

"This act" refers to Laws of 1933, ch. 154. Included in that act is the following exemption:

"Neither this act nor any provisions hereof shall apply or be construed to apply to any of the following:

A. Motor vehicles used exclusively to convey children to and from schools . . ."

Section 64-27-25, N.M.S.A., 1953 Compilation.

It appears clear that if the Commission may promulgate regulations interpreting the act, that power extends to interpreting the exemptions listed in the act. We can see no difference between promulgating regulations interpreting the exemptions and determining whether or not a carrier comes within the regulatory powers of the Commission in a quasi-judicial proceeding, a power already upheld by the courts. See, **State ex rel. State Corp. Comm'n v. Zinn**, 72 N.M. 29, 380 P.2d 182 (1963).

The answer to the first question depends upon the proper interpretation of New Mexico Constitution, Article 11, Section 8. That constitutional provision provides that the Commission "shall determine no question nor issue any order in relation to the matters specified in . . . [N.M. Const., Art. 11, § 7] until after a public hearing held upon ten day's notice to the parties concerned" The provisions of Article 11, § 7 which are pertinent to motor carrier regulation concern the fixing of rates and charges and the making and enforcing of rules requiring reasonable safety appliances in connection with equipment used by the common carrier. In addition to the Constitution, Section 64-27-65, N.M.S.A., 1953 Comp. provides that no order "shall be made by the Corporation Commission effecting any rate or service except as herein otherwise specifically provided, unless or until a public hearing has been held in accordance with provision of this act."

We think it is obvious from a reading of the constitutional and statutory provisions above that the intent was to exclude the promulgation of rules and regulations of general application from the provisions requiring a public hearing before the issuance of orders. Furthermore, under the general rule, the terms order or adjudication usually refer to the judicial functions of administrative agencies whereas the terms rule and rulemaking refer to legislative functions and powers, i.e., the issuing of general or particular regulations which in form or effect are like statutes. **Willapoint Oysters, Inc. v. Ewing**, 174 F.2d 676, 686-87 (9th Cir. 1949), cert. denied, 338 U.S. 860 (1949).

It is true that the New Mexico Supreme Court has described the entire regulation and supervision of motor transportation for hire by the State Corporation Commission as a legislative or administrative function. **State ex rel, State Corp. Comm'n v. Zinn, supra; Harris v. State Corp. Comm'n**, 46 N.M. 352, 129 P.2d 323 (1942). We think it is clear that the Supreme Court would recognize the difference between the promulgation of rules and regulations of general application, and decisions by way of general orders which, although for the protection of the rights and interests of the public in general are directed to individual carriers or specific rates and charges. The Supreme Court has categorized the latter function as being "quasi-judicial." **State ex rel. Hovey Concrete Prod. Co. v. Mechem**, 63 N.M. 250, 360 P.2d 1069 (1957). Orders issued by the Commission in this quasi-judicial capacity must obviously be issued in compliance with the notice and hearing requirements.

{*160} We conclude, therefore, that the State Corporation Commission may promulgate regulations interpreting the school bus exemption in the Motor Carrier Act without holding a hearing prior to the issuance of the regulation. Compliance by the Commission with the State Rules Act is the only prerequisite to making the rule or regulation valid. See Sections 71-7-1 et seq., N.M.S.A., 1953 Comp., 1967 Supp., Laws 1969, ch. 92. We note in passing that the result of this Opinion would be changed if the legislature were to place the State Corporation Commission under the Administrative Procedures Act, which contains very restrictive requirements for the promulgation and application of interpretive rules. See, §§ 4-32-3 to 4-32-8, N.M.S.A., 1953 Comp., 1969 Supp.

The so-called school bus exemption quoted above gives almost no guide to the Commission for the enforcement of that provision. The law describes an activity, the conveyance of students to and from school, and does not use the term school bus. On the other hand, the legislature defined the term school bus in the Motor Vehicle Act and it would not be unreasonable for the Commission to look to that legislative enactment for a guide to interpreting the exemption in the Motor Carrier Act. Section 64-1-6D, N.M.S.A., 1953 Comp. (1967 Supp.), provides:

"School bus means any motor vehicle operating under the jurisdiction of the State Board of Education or private school or parochial school interests which has a permit or temporary seating arrangement or capacity of ten or more persons and which is used to transport children, students or teachers to and from schools or to and from any school activity"

See also, Sections 77-14-1 et seq., N.M.S.A., 1953 Compilation.

Even assuming the reasonableness of adopting the legislative intent as expressed in the Motor Vehicle Act, the Commission is still faced with the problem of defining when a school activity is such that transportation of students to the activity would be included within the school bus exemption. In an earlier attempt at interpretation of the exemption, the Commission issued a "directive" in 1964 in which it was stated that the payment to the school bus contractor must be made from school funds to allow the transportation to come within the school bus exemption. Unfortunately, the use of the term "school funds" did not resolve the issue.

It is unquestioned that when a public school contracts with the school bus company for transportation and the payment is made from appropriated tax money, the payment is being made for an activity from public funds. The problem arises when the payment is made from the so-called school activity funds. We believe that the Commission may legally limit the school bus exemption to school activities paid for out of the public money of the school activities fund as defined by Opinion of the Attorney General No. 67-128, dated October 31, 1967.

In that opinion this office distinguished between school activity funds which were public moneys and those funds which were in fact moneys of the students and held in trust by

the school. The latter, were held not to be public moneys. The opinion held that moneys derived from gate receipts at athletic events, compulsory student fees, etc, were to be construed as public moneys. On the other hand, moneys collected from the students, held in trust, and paid out for such items as class rings or for the activities of student clubs, were held not to be public moneys.

We believe that the Commission can legally interpret the school bus exemption to apply only to the transportation of students and the necessary teachers as sponsors or chairpersons, when the transportation is paid for from public {*161} moneys. This would of necessity eliminate transportation of students by school bus operators when the payment is made out of school activity funds which were in fact collected from the students for the purpose of making the trip. In the latter case, the school bus operator is in effect acting as a common carrier and is hiring out to the individual students, who have used the method of paying into the trust fund and having the school make the actual payment for the transportation. Of course, this opinion, and any regulation issued by the Commission pursuant to this opinion, would have no effect on the so-called single trip, limited exemption for school buses which is found in Section 64-27-25.1, N.M.S.A., 1953 Comp. (1967 Supp.).