

## Opinion No. 62-38

March 2, 1962

**BY:** OPINION OF EARL E. HARTLEY, Attorney General George Schmitt, Assistant Attorney General

**TO:** Dan Sosa, Jr., District Attorney, Third Judicial District County Court House, Las Cruces, New Mexico

### QUESTION

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May the New Mexico State University officials preclude the sale of ice cream by private individuals from a mobile ice cream truck on the University streets?

#### CONCLUSION

Yes, providing the reasons for the regulation directly concern the health, safety, education and welfare of the students and are not so unreasonable and arbitrary as to offend "due process" of law under the Fourteenth Amendment.

### OPINION

#### ANALYSIS

New Mexico State University is a state educational institution, having been confirmed as such by Article XII, Section 11 of the New Mexico Constitution, as amended. Pursuant to Article XII, Section 13 of the Constitution, the Legislature has been given the authority to provide for the **management and control of the institution** through the establishment of a board of regents to be appointed by the Governor with the consent of the Senate. Under Sec. 73-26-3, N.M.S.A., 1953 Comp., it is provided that:

". . . The management of said college and experiment station, the care and preservation of all property, of which such institution shall become possessed, the erection and construction of all buildings necessary for the use of said college and station, and the disbursement and expenditure of all moneys provided for by this act, shall be vested in a board of five [5] regents . . ."

Powers and duties of the board of regents are to be noted in connection with the establishment of a State Institutional Traffic Court upon the board's request, pursuant to Section 37-2-1, N.M.S.A., 1953 Comp. (PS), and spelled out in the following sections, 37-2-2 and 37-2-3, N.M.S.A., 1953 Comp. (PS). These latter two sections of the statutes provide for the court's jurisdiction over all traffic regulations and restrictions

pertaining to speed, traffic control, and parking on all streets, roads and areas of the institution.

In general, powers and duties of the board of regents of the New Mexico State University are to be found under Sec. 73-26-5, N.M.S.A., 1953 Comp., set out as follows:

" **Powers and Duties of Board of Regents.** -- The Board of regents shall direct the disposition of any moneys belonging to or appropriated to the Agricultural College and experiment station and shall make all rules and regulations necessary for the **government** and management of the same, adopt plans and specifications for necessary buildings and superintend the construction of said buildings, and fix the salaries of professors, teachers and other employees, and the tuition fees to be charged in said college." (Emphasis supplied).

A search of New Mexico law shows that the statutory provisions cited above have never been contested or determined by our Supreme Court, in respect to the meaning and scope of **control, management, and government** of New Mexico State University by the board of regents. However, this question has been decided, in other jurisdictions, on numerous occasions.

The Oklahoma Constitution provides for the **government** of the University by the board of regents and in construing this provision, the United States District Court, as affirmed by the United States Supreme Court in 1952 in **Pyeatte v. Board of Regents of the University of Oklahoma, et al.**, 102 F. Supp. 407, Aff'd. 72 Supreme Court 567, 342 U.S. 936, held that:

"The term 'government' is very broad and necessarily includes the power to pass all rules and regulations which the board of regents considers to be for the benefit of the health, welfare, morals and education of the students, so long as such rules are not expressly or impliedly prohibited."

In **Anthony v. Syracuse University**, 223 N.Y.S. 796, 805, 231 N.Y.S. 435, the Court stated:

"So far as infants are concerned, university and college authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and to that end they make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities and in the exercise of that discretion the courts are not disposed to interfere unless the rules and aims are unlawful or against public policy."

The above was followed in a Florida case, **Stetson University v. Hunt**, 102 S. 637. The Florida Supreme Court, in speaking of these rules and regulations, also stated it

was settled that unless such rules and regulations were found to be unauthorized, against common right, or palpably unreasonable, the courts will not annul or revise them.

From a review of the authorities on this subject, as noted by the pertinent decisions cited above, it can be reasonably concluded that the State of New Mexico, by virtue of its interests in the education, well-being, morals, health, safety and convenience of its youth, has the power acting through the New Mexico State University board of regents to provide for their general welfare. The board of regents, acting pursuant to the New Mexico Constitution and statutory provisions cited previously, has wide discretion in the supervision of the students and any rule or regulation they might advance in the interest of the students will be deemed valid and permissible as long as it is not unreasonable or arbitrary so as to result in a clear showing of abuse in the exercise of the board's authority.

It follows therefore that any argument the owners and operators of the ice cream truck might raise concerning the refusal of the University officials to permit them to operate on the campus streets would be based on a violation of the "due process" clause in the State and Federal Constitutions. The ice cream vendors might allege that the ruling by the University officials was unreasonable and arbitrary, invalidly impaired their right to contract with the students in the sale of ice cream, and constituted a denial of equal protection of the laws under the Fourteenth Amendment.

This entire question was raised and disposed of by the Court in **Pyeatte v. Board of Regents of the University of Oklahoma, et al.**, supra. It was held in this case that a regulation of the board of regents which required undergraduate students to live in housing facilities provided by the University was not unreasonable or arbitrary, and did not violate due process of law as to a boarding house operator who was thereby limited in her right to contract with her students for board and room.

In reaching its decision, the Court stated on page 412 of the Federal Supplement:

"When inquiring into reasonableness of an act in order to determine whether the same violates the due process clause of the Fourteenth Amendment to the Federal Constitution, the court must evaluate the benefit to be derived from upholding the statute or regulation and the loss suffered or likely to be suffered by a resulting deprivation of some private interest."

It was subsequently explained that the regulations are not invalid nor do they abridge constitutional rights of the individual simply because they might have an incidental effect upon few individuals. There is a presumption of validity of state statutes or regulations passed by an administrative agency acting by authority delegated to that agency, and if there is any state of facts which tends to support the regulatory measures and such measures are not clearly unreasonable and arbitrary, then the statute or regulation will be upheld as being constitutional.

The Court continued by explaining that the right to contract was both a liberty and a property right with the protection of the Fourteenth Amendment but that it is not an absolute right and a state may, in the exercise of its police power, validly limit, or in some cases, effectively prohibit contractual relations.

With respect to a denial of equal protection of the laws, the Court stated that the equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.

In this instance, the University officials have not informed us of their reasons for prohibiting Mr. Purvis and Mr. Borrego, from selling ice cream from their truck on the campus streets.

Therefore, without knowledge of the facts, we cannot make a specific determination as to whether this regulation violated "due process" on any of the grounds we have heretofore proposed.

However, it can be safely concluded that if this regulation was reasonably related to the welfare of the students, and was not so arbitrary so as to offend individuals' property rights under the Fourteenth Amendment, it would be within the authority invested in the board of regents of New Mexico State University (which includes jurisdiction over the public streets of the institution pursuant to Sec. 37-2-2, N.M.S.A., 1953 Comp. (PS), and valid under our Constitution.