



## DEPARTMENT OF MOTOR VEHICLES COUNSEL'S OFFICE

### OPINION OF COUNSEL (#2-08)

**Subject:** Non-Discriminatory Stops of Overweight Vehicles

**Date:** March 19, 2008

---

The question is whether a police officer who testifies that he/she has made a non-discriminatory stop of a truck must establish additional indicia that the truck was overweight in order to make out a prima facie case of an overweight violation.

#### **Discussion**

It has come to our attention that the Appeals Board is reversing Administrative Law Judge findings in overweight truck cases in relation to non-discriminatory stops. The Board has repeatedly concluded that even though the police officer testifies that a non-discriminatory stop was made, this is not sufficient grounds to weigh the vehicle, that is, there must be additional testimony "regarding indicia of an overweight vehicle." (See e.g., Board decision in Quadrozzi Equipment, May 17, 2007).

In light of established case law, Counsel's Office respectfully disagrees with the Board's conclusion. From 2003 to 2006, Counsel's Office assisted the Office of the Attorney General in litigating over 50 overweight truck cases. Many of these cases focused on the issue of whether an overweight truck conviction should be upheld where the sole basis to weigh the vehicle was a non-discriminatory stop. The courts repeatedly upheld such convictions. In New York Paving v. Martinez, 15 AD3d 582 (2d Dept. 2005), the police officer testified that the officers stopped every third commercial vehicle for inspection. The officer testified that he inspected the vehicle and then ordered the driver to pull it onto the weigh station. There was no testimony regarding additional observable indicia of the vehicle being overweight. The Court upheld the conviction, writing:

The seizure of the petitioner's truck, which occurred at a checkpoint, and pursuant to a nondiscriminatory pattern of selection by the officer weighing the vehicles, was constitutional.

A similar decision was reached in Metro Demolition Corp. v. Martinez, 12 AD3d 513 (2d Dept. 2004). In this case, the officer testified that every fourth vehicle was pulled over for inspection. The officer pulled over the vehicle and motioned the driver to proceed onto the scales. The vehicle was determined to be overweight. Again, there was no testimony about additional indicia of the vehicle being overweight.

The Appellate Division only overturned one overweight case involving a non-discriminatory stop. In Casalino Interior Demolition Corp., 29 AD3d 691 (2d Dept. 2006), the Court reversed an overweight conviction because the officer failed to testify that the truck was stopped in conformance with the non-discriminatory plan. The Court wrote:

"[A]bsent reasonable suspicion of a vehicle violation, a routine traffic check' to determine whether or not a vehicle is being operated in compliance with the Vehicle and Traffic Law is permissible only when conducted according to nonarbitrary, nondiscriminatory, uniform procedures for detecting violations" (People v Ingle, 36 N.Y.2d 413, 414-415, 330 N.E.2d 39, 369 N.Y.S.2d 67; see People v Scott, 63 N.Y.2d 518, 524-527, 473 N.E.2d 1, 483 N.Y.S.2d 649). It was the respondent's burden to show in the first instance that not only was there a plan in place to stop trucks at the temporary weigh station in a nondiscriminatory pattern, but that the petitioner's truck was in fact stopped pursuant to this pattern or that the pattern could not be used in that instance because the officers at the weigh station were busy weighing a truck that had already been pulled over (see Matter of Mayrich Constr. Corp. v Martinez, supra; Matter of Ferrara Bros. Bldg. Materials Corp. v Martinez, 11 AD3d 214, 215, 782 N.Y.S.2d 259; Matter of Masons v Martinez, supra; Matter of City Hawk Indus. v Martinez, supra). Here, there was no evidence that the petitioner's vehicle was stopped in conformity with the nondiscriminatory pattern of selection. Accordingly, the Administrative Law Judge's determination was not supported by substantial evidence and should have been annulled ..."

There is simply no court decision, in the holding or dicta, that requires the police officer to testify that in addition to a non-discriminatory stop there is other indicia that the truck is overweight. Although in some cases the officer may indicate such indicia, it is not necessary, according to the Appellate Division, to make out a prima facie case of an overweight violation.

For the reasons stated above, we conclude that if a police officer testifies that he/she made a non-discriminatory stop of a truck, such officer need not establish additional

indicia that the truck was overweight in order to make out a prima facie case of an overweight violation.

NWS/ILT/cs