

**Merrick Union Free School Dist. v Merrick Faculty
Assn., Inc.**

2009 NY Slip Op 32762(U)

November 10, 2009

Supreme Court, Nassau County

Docket Number: 011628/09

Judge: Daniel Martin

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SCAN

SHORT FORM ORDER
 SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
 Acting Supreme Court Justice

 MERRICK UNION FREE SCHOOL
 DISTRICT,

Petitioner,

-against-

MERRICK FACULTY ASSOCIATION,
 INC.,

Respondent.

TRIAL/IAS PART 30
 NASSAU COUNTY

Sequence Nos: 1 & 2
 Index No.: 011628/09

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Petition and Affidavits Annexed</u>	<u>X</u>
<u>Notice of Cross-Motion and Affidavits Annexed</u>	<u>X</u>
<u>Answering Affidavits</u>	<u>X</u>
<u>Reply Affirmation</u>	<u>X</u>

Motion (seq. No. 1) by the attorneys for the petitioner for an order pursuant to CPLR 7511 vacating the arbitrator's award is granted. Cross motion (seq. No. 2) by the attorneys for the respondent for an order confirming the arbitration award is denied.

Respondent is the collective bargaining representative for approximately 189 employees of the petitioner school district. The parties signed a collective bargaining agreement (CBK) for the period July 1, 2004 to June 30, 2008. Pursuant to the CBK, petitioner provides single or family health insurance to its employees pursuant to the New York State Empire Plan. The parties negotiated a provision in the CBK at Article XI § D which limits the petitioner's responsibility to provide health insurance as follows:

Effective July 1, 1993 any new employee whose spouse is working in the District, or is working elsewhere in the State of New York for a public employer and who is afforded family coverage under the Empire Plan or its

successor, shall not be eligible to receive the health insurance benefits hereunder. However, should the spouse be required to contribute to the cost of paying the premium for said coverage, the District will reimburse the employee accordingly, but in no event should that reimbursement exceed the amount of money the District pays employees who exercise the option to change from family coverage to individual coverage, as set forth herein. Should such employee's spouse no longer be afforded the aforesaid coverage, the employee shall be entitled to the health insurance benefits hereunder pursuant to the rules and regulations of the Empire Plan, if applicable.

In the event the employee's spouse has to pay a premium, the employee is reimbursed by petitioner up to the current maximum of \$1,100 per year.

On or about January 4, 2008, petitioner received a letter from the New York State Department of Civil Service dated December 27, 2007, to which is attached Policy Memo 133 dated December 5, 2007. The Memo from the New York State Department of Civil Service provides that no local collective bargaining agreement can limit an employee's entitlement to health insurance benefits.

By letter dated March 14, 2008, respondent union filed a written grievance pursuant to the CBK, based upon Policy Memo 133. The union requested "that effective immediately Article XI Section D be removed from the contract," and in lieu thereof the CBK be deemed amended to provide all employees in accordance with Policy Memo 133 be deemed to have the right to participate in family health coverage, or that those with families have the right to elect single coverage and receive the individual buyback (currently \$1,100 per year), or that those with families have the right to waive all coverage and receive the family buyback (currently \$2,200 per year). Petitioner denied the grievance and respondent demanded arbitration. An arbitrator was appointed to hear the grievance. The arbitrator sustained the grievance, holding Policy Memo 133 does have the force and effect of law, thereby invalidating and refusing to give full effect to Article XI § D of the CBK.

The arbitrator framed the question to be determined is does Policy Memo 133 have the effect of law invalidating all or part of Article XI(D). The arbitrator

found “that the policy memo does have the force and effect of law and that, therefore, the Union’s grievance must be sustained. Section 163(2) of the Civil Service Law permits the Civil Service commission, by its President, to issue regulations concerning the eligibility of employees to participate in NYSHIP provided the appropriate procedures are followed.

The arbitrator acted beyond his authority. The arbitrator should not have accorded Policy Memo 133 the full force and effect of law because in promulgating Policy Memo 133 the New York State Department of Civil Service did not comply with the rule-making procedures of the New York State Administrative Procedure Act. See, SAPA 102(2)(a)(I).

Section 102(2)(a) of SAPA defines a “rule” as follows:

(i) the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof.

Memo 133 appears to have been intended to operate as a rule rather than a policy. A rule is a fixed, general principle applied without regard to the facts and circumstances of the individual case. See *Schwartfigure v Hartnett*, 83 NY2d 296; *Matter of Cordero v Corbisiero*, 80 NY2d 771, 772-773; *Matter of Roman Catholic Diocese v New York State Department of Health*, 66 NY2d 948. SAPA § 102(2)(b)(iv) excludes from the definition of a rule “forms and instructions, interpretative statements and statements of general policy which in themselves have no legal effect but are merely explanatory.” As sought to be applied by the respondent through the arbitrator’s ruling, Memo 133 is a rigid, dispositive rule to determine a result “without regard to the individualized circumstance or mitigating factors” and as such was illegally implemented contravention of the New York Constitution, Article IV § 8 and SAPA § 102(2)(b)(i). See, *Schwartfigure v. Harnett*, *supra*. Memo Policy is not an advisory opinion.

On the other hand, although intended as a rule, Policy Memo 133, along with the cover letter to which it is attached, demonstrate that the document was not properly promulgated by the President of the Department of Civil Service or the Commissioner as required by Civil Service Law § 163(4). The cover letter and


policy memo were issued by a director of the Employee Benefits Division. A position not reposed with the authority the Commissioner and/or the deputy commissioner of said Department, to make rules.

If allowed to stand Memo 133 would substantively change Article XI § D of the CBK in effect since July 1, 1993 and would have significant impacts on the remuneration and pecuniary interests of all parties. Respondent does not refute petitioner's assertion that during the 2007-08 school year, approximately twenty employees were affected by the clause resulting in the District not being contractually obligated to spend approximately \$250,000.00 for health insurance benefits for these employees. The family premium for this school year was approximately \$14,740 and the District pays between 80-85% of this premium. Nor is it disputed that these employees and their families were covered by the Empire Plan through their spouse's plan. It appears that Policy Memo 133 would have had direct impact on the future rates of "wages" of the employees and the "price" the school district pays for health insurance.

Thus, the court concludes that Policy Memo 133 was intended to be a rule subject to proper adoption via SAPA. However, the New York State Department of Civil Service did not comply with the rule-making procedures of the State Administrative Procedure Act § 201 *et seq.* prior to preparing Policy Memo 133. The grievance and arbitration provision of the CBK, at Article XVII.B Step 4.5 states: "It is understood and agreed that the arbitrator shall not have the authority to add to, modify or change any of the expressed provisions of this Agreement, or make any award the implementation of which would be contrary to law." Because Policy Memo 133 can not be afforded the status of a law or a duly promulgated rule, the Arbitrator lacked the authority to rewrite the agreement of the parties to enforce compliance with said policy. The motion to set aside the arbitration award is granted. The motion to confirm the arbitration award is denied.

This decision is the order of the Court and terminates all proceedings under index No. 11628/09.

So ordered.



A.J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Dated: November 10, 2009