NEW YORK STATE DEPARTMENT OF LABOR

INTER-OFFICE MEMORANDUM

Date: May 1, 1991

TO: Barbara C. Deinhardt Office: Counsel's Office Brooklyn

FROM: Jerome Tracy Office: Counsel's Office Albany

SUBJECT: Labor Standards Claim Refusals, Rule Making

Question Presented

Is the Department's policy that it will not investigate supplement claims from individuals who earn $45,000 or more per year a rule subject to the State Administrative Procedures Act?

Answer

Yes.

Relevant Law

McKinney's Const. Art. 4, Section 8
Executive Law, Section 102
State Administrative Procedures Act, Section 102.2(a)
Labor Law, Section 196.2

Discussion

The question of the nature of a rule is one that the courts have wrestled with ever since the adoption of New York State Constitution Article 4, Section 8 which states that "No rule or regulation made by any state department...except such as relates to the organization or internal management of a state department...shall be effective until it is filed in the office of the Department of State." SAPA gives a definition of a rule that is only marginally useful; it states in Section 102.2(a)(i) that a rule is "...the whole or part of each agency statement, regulation or code of general applicability that implements or applies law..." (emphasis added).

While case law is scant, People v. Culi, 10 NY2d 123, 1961 is of use. In what was a unanimous decision Judge Fuld states at page 126 that, although the term rule is not subject to precise definition "...there can be little doubt that, as employed in the constitutional provision, it embraces any kind of legislative or quasi-legislative norm or prescription which establishes a pattern or course of

conduct for the future." Furthermore, at page 129, Judge Fuld states that "We should not strive to read exceptions into the [constitutional] section or construe it so as to permit the official in charge of the bureau, commission or authority to avoid the necessity of filing by attaching the label 'order' or 'statement of policy' or some other term to what is essentially a rule or regulation."

Other cases concerning rules generally involve either tax laws or the health field. However, in cases such as Matter of Swalbach v. State Liquor Authority, 7 NY2d 518, Matter of Sturman v. Ingraham, 52 AD2d 882, and Dubendorf v. New York State Education Department, 97 Misc.2d 382, courts generally found that where an agency issued statements of general applicability which prescribe procedures or requirements, such statements were rules subject to promulgation pursuant to the State Constitution and SAPA.

In this particular case, the Division of Labor Standards apparently has made a decision that it will not examine Article 6 claims for any type of supplemental benefits from individuals who earn more than $45,000. While Section 196.2 grants the Commissioner discretion in enforcing Article 6, it does not obviate the need for a rule in this situation. The $45,000 per year limit clearly establishes a class beyond any described within the Labor Law itself. This type of generally applicable denial appears to be more than mere discretion exercised on a case-by-case basis and, as such, should be considered a rule.

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