

**STATE OF NEW YORK
SUPREME COURT, COUNTY OF ALBANY**

**KENNETH J. LEWIS, DENISE A. LEWIS, ROBERT
C. HOUCK, JR., and ELAINE A. HOUCK,**

Plaintiffs,

-against-

**THE NEW YORK STATE DEPARTMENT OF CIVIL
SERVICE and NANCY G. GROENWEGEN,** in her
official capacity as President of the New York
State Department of Civil Service,

Defendants,

-and-

PERI RAINBOW and TAMELA SLOAN,

Defendants-Intervenors.

PLEASE TAKE NOTICE that Kenneth J. Lewis, Denise A. Lewis, Robert C. Houck, Jr., and Elaine A. Houck, the Plaintiffs-Appellants in this action, hereby appeal to the Appellate Division of the Supreme Court, Third Judicial Department, from the Order of the Supreme Court entered in the office of the clerk of Albany County on the 13th day of March, 2008, and from each and every part thereof.

Dated: April 11, 2008.



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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
KENNETH J. LEWIS, DENISE A. LEWIS, ROBERT C.
HOUCK, JR and ELAINE HOUCK,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CIVIL
SERVICE AND NANCY GROENWEGEN, in her official
capacity as the President of the New York State Department
of Civil Service,

Defendants

-and-

PERI RAINBOW and TAMELA SLOAN,

Proposed Defendants-Intervenors.

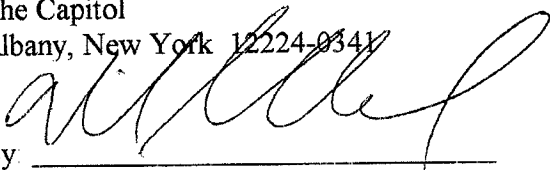
NOTICE OF ENTRY

Index No 4078-07
RJI No. 01-07-090751

PLEASE TAKE NOTICE that the within is a true copy of the Decision & Order in this action
entered in the Office of the County Clerk of Albany County on March 13, 2008.

Dated Albany, New York
April 3, 2008

ANDREW M. CUOMO
Attorney General of the State of New York
Attorney for Defendants
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By 
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TO Brian W. Raum, Esq.
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PRESENT: HON. THOMAS J. McNAMARA
Acting Justice
STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

Albany County Clerk
Document Number 10145693
Rcvd 03/13/2008 11:07:04 AM



KENNETH J. LEWIS, DENISE A. LEWIS, ROBERT C.
HOUCK, JR., and ELAINE A. HOUCK,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CIVIL
SERVICES and NANCY G. GROWENWEGEN, in her
Official Capacity as President of the New York State
Department of Civil Service,

Defendants.

-and-

PERI RAINBOW and TAMELA SLOAN,

Proposed Defendants-Intervenors,

(Supreme Court, Albany County, Motion Term)

APPEARANCES: Culter, Trainor & Cutler, LLP
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Andrew M. Cuomo, Attorney General
Office of the Attorney General
(Richard Lombardo, Esq. Assistant Attorney General)
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DECISION & ORDER

Index No.: 4078-07

RJI No.: 01-07-090751

Lambda Legal Defense & Education Fund
(By: Susan Sommer, Esq.)
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McNamara, J.

In May 2007, the New York State Department of Civil Service Employee Benefits Division issued a revised policy memorandum in which it announced that it would recognize, as spouses, the parties to any same sex marriage performed in jurisdictions where such marriage is legal. The memorandum had the effect of extending all health benefit plans provided under New York State Health Insurance Program (NYSHIP) to such spouses of NYSHIP enrollees. Thereafter, plaintiffs brought this action for a declaratory judgment finding that the recognition of foreign same sex marriages as expressed in the policy memorandum is illegal, unconstitutional, *ultra vires*, void and constitutes an illegal expenditure of State funds.

Peri Rainbow and Tamela Sloan have moved to intervene, and if such leave is granted, to dismiss the amended verified complaint. Defendants New York State Department of Civil Service and Nancy G. Groenwegen have also moved to dismiss and plaintiffs have moved for summary judgment.

Civil Service Law §161 authorizes the President of the Civil Service Commission to establish a health insurance plan for state officers and employees. All persons in the service of the state who elect to participate in the health insurance plan are eligible to participate therein (Civil Service Law §163) and are entitled to have his or her spouse and dependent children included in the coverage

(Civil Service Law §164). Plaintiffs contend in the amended verified complaint that the policy memorandum which recognizes as spouses the parties to certain same sex marriages violates the constitutional principle of separation of powers, violates State Finance Law §123-b, violates New York Constitution article VII, §8 by using public funds to aid Governor Spitzer's political objectives and violates New York Constitution article IV, §8 and State Administrative Procedures Act §202 by promulgating a rule without first satisfying the procedural rulemaking requirements. Plaintiffs also argue that under the doctrine of judicial estoppel defendants should be prohibited from arguing that the term "spouse", as used in Civil Service Law §164, includes partners of same-sex couples who were married outside New York.

Judicial estoppel generally is applied where a party to an action has secured a judgment in its favor by adopting a certain position and then seeks to take a contrary position in the same action or in another action arising from the judgment (*Moore v County of Clinton*, 219 AD2d 131 [1996], lv denied 89 NY2d 851 [1996]). In *Funderburke v New York State Department of Civil Service*, 13 Misc.3d 284 (1996) plaintiff sought spousal health and dental insurance coverage for the man he had recently married in Canada. The court granted summary judgment to the defendants, New York State Department of Civil Service and Uniondale Union Free School District, on the ground that plaintiff's union was not a marriage as that term was defined by the Court of Appeals in *Hernandez v Robles*, 7 NY3d 338 (2006). Plaintiffs, here, contend that the position taken by the Department of Civil Service in this action is inconsistent with the position it took in *Funderburke* and that under the doctrine of judicial estoppel, the Department is prohibited from asserting a contrary position in this action. However, this action is neither the same action as *Funderburke* nor does it arise from the

judgment in Funderburke. Consequently, the doctrine of judicial estoppel does not apply.

The other arguments offered by plaintiffs to invalidate the determination are without merit. The contention that defendants violated the constitutional principle of separation of powers is not based on a belief that defendants do not have the authority to interpret "spouse" as that word is used in Civil Service Law §164. Plaintiffs argument is that the interpretation must be, but is not, consistent with legislative pronouncements and may not, but does, go beyond stated legislative policy (see e.g. *Matter of Campagna v Shaffer*, 73 NY2d 237 [1989]).

In *Martinez v County of Monroe*, 2008 NY Slip Op 909, the Appellate Division, Fourth Department, concluded that a valid same-sex marriage performed in Canada was entitled to recognition in New York. That result was reached by employing the marriage recognition rule which provides that "if a marriage is valid in the place where it was entered, it is to be recognized as such in the courts of this State, unless contrary to the prohibitions of natural law or the express prohibitions of a statute" (id at 3-4, citations omitted). Moreover, the court found that defendants' decision to deny plaintiff's application for spousal health care benefits, based on its refusal to recognize the Canadian marriage, violated Executive Law § 296 (1) (a), which forbids an employer from discriminating against an employee "in compensation or in terms, conditions or privileges of employment" because of the employee's sexual orientation. In the absence of a contrary holding in this Department, the ruling in *Martinez* is binding on this court (*Mountain View Coach Lines v Storms*, 102 AD2d 663, 664 [1984]; see *In re Patrick BB*, 284 AD2d 636 [2002]).

The determination in *Martinez* that recognition of legally performed Canadian same-sex marriages is appropriate under the marriage recognition rule forecloses the arguments that the policy

memorandum is not consistent with legislative pronouncements or goes beyond stated legislative policy.

The assertion that the policy memorandum violates State Finance Law §123-b is based on arguments that the marriage recognition rule and the principal of comity do not apply. Those arguments are also undermined by the holding in Martinez.

The ruling in Martinez also invalidates the claim that the policy memorandum violates New York Constitution article VII, §8 by using public funds to aid Governor Spitzer's political objective of recognizing same-sex marriages. To the extent that the policy memorandum is consistent with a political objective of the governor, that objective, according to the court in Martinez, is consistent with the New York policy regarding recognition of foreign marriages.

The argument that the policy memorandum established a new "rule" without complying with the rule-making procedures in the State Administrative Procedure Act also fails. State Administrative Procedure Act § 102 (2) (b) (iv) excludes from the definition of a rule "forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory." The policy memorandum provides an interpretative statement of the term "spouse" as it relates to eligibility for health plan benefits. As such, it does not constitute an improper unfiled rule.

The motion by Peri Rainbow and Tamela Sloan to intervene is granted.

The motion for summary judgment by plaintiffs is denied and upon searching the record summary judgment is granted to defendants and defendant-intervenors.

The policy memorandum issued by the New York State Department of Civil Service

Employee Benefits Division in which it recognized, as spouses, the parties to any same sex marriage, performed in jurisdictions where such marriage is legal, is both lawful and within its authority.

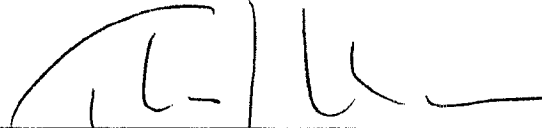
All papers including this Decision and Order are returned to defendant's attorneys. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

This memorandum shall constitute both the Decision and Order of this Court.

SO ORDERED.

ENTER.

Dated: Saratoga Springs, New York
March 3, 2008



Thomas J. McNamara
Acting Supreme Court Justice

Papers Considered:

- 1) Notice of Motion to Intervene dated September 12, 2007;
- 2) Affirmation of Susan L. Sommer, Esq., dated September 12, 2007 with exhibits annexed;
- 3) Notice of Motion dated September 19, 2007;
- 4) Defendant's Memorandum of Law dated September 19, 2007;
- 5) Notice of Motion to Dismiss dated September 26, 2007;
- 6) Affirmation of Susan L. Sommer, Esq., dated September 25, 2007 with exhibits annexed;
- 7) Defendant-Intervenor's Memorandum of Law dated September 25, 2007;
- 8) Notice of Cross-Motion dated November 9, 2007;
- 9) Bryon J. Babione, Esq., dated November 9, 2007 with exhibits annexed;
- 10) Memorandum of Law dated November 9, 2007;
- 11) Defendant-Intervenor's Memorandum of Law dated December 20, 2007;
- 12) Defendant's Memorandum of Law dated December 21, 2007;
- 13) Plaintiff's Memorandum of Law dated January 3, 2008;
- 14) Defendant's Correspondence to the Court dated January 8, 2008.

**PRE-CALENDAR STATEMENT
STATE OF NEW YORK
SUPREME COURT—APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT**

CASE TITLE:

Kenneth J. Lewis, Denise A. Lewis, Robert C. Houck, Jr., and Elaine A. Houck v. The New York State Department of Civil Service and Nancy G. Groenwegen, in her official capacity as President of the New York State Department of Civil Service, and **Peri Rainbow and Tamela Sloan**, Defendant-Intervenors.

County Index No.: 4078/07

RJI No. 01-06-086862

Date of Commencement: May 23, 2007

PARTIES INVOLVED:

Party Name	Original Status	Appellate Status
Kenneth J. Lewis	Plaintiff	Appellant
Denise A. Lewis	Plaintiff	Appellant
Robert C. Houck, Jr.	Plaintiff	Appellant
Elaine A. Houck	Plaintiff	Appellant
The New York State Department of Civil Service	Defendant	Respondent
Nancy G. Groenwegen	Defendant	Respondent
Peri Rainbow	Defendant-Intervenor	Intervenor-Respondent
Tamela Sloan	Defendant-Intervenor	Intervenor-Respondent

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COURT, JUDGE AND COUNTY:

Supreme Court
County of Albany
The Honorable Thomas J. McNamara

NATURE OF OBJECT OF ACTION AND PROCEEDING:

Civil Action
Statutory- Other

APPELLATE ISSUES:

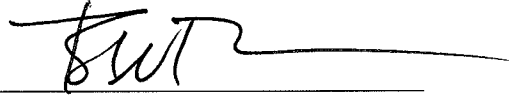
Whether the Supreme Court erred in concluding that “[t]he policy memorandum issued by the New York State Department of Civil Service Employee Benefits Division in which it recognized as spouses, the parties to any same sex marriage, performed in jurisdictions where such marriage is legal, is both lawful and within its authority.”

OTHER RELATED MATTERS:

NA

Dated: April 11, 2008.

Submitted by:



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** Not admitted in this jurisdiction*

AFFIDAVIT OF SERVICE

I, Brian W. Raum, an attorney duly licensed to practice law in the state of New York, affirm under the penalty of perjury that on April 11, 2008, I served a copy of the attached *Notice of Appeal* and *Pre-Calendar Statement* to all parties by sending a true and accurate copy via U.S. First Class Mail to:

Richard Lombardo-Assistant Attorney General State of New York Office of the Attorney General The Capitol Albany, NY 12224	<i>Attorney for Defendants-Respondents</i>
Susan L. Sommer Lambda Legal Defense and Education Fund, Inc. 120 Wall Street, Suite 1500 New York, NY 10005	<i>Attorneys for Defendants-Intervenors- Respondents</i>
Jeffery S. Trachtman Norman C. Simon Kramer Levin Naftalis & Franklin LLP 1177 Avenue of the Americas New York, NY 10036	

Dated: April 11, 2008

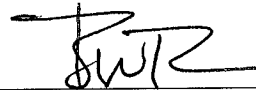
Brian W. Raum, Esq.
ALLIANCE DEFENSE FUND

AFFIRMATION OF SERVICE

I, Brian W. Raum, an attorney duly licensed to practice law in the state of New York, affirm under the penalty of perjury that on April 11, 2008, I served a copy of the attached *Notice of Appeal* and *Pre-Calendar Statement* to all parties by sending a true and accurate copy via U.S. First Class Mail to:

Richard Lombardo-Assistant Attorney General State of New York Office of the Attorney General The Capitol Albany, NY 12224	<i>Attorney for Defendants-Respondents</i>
Susan L. Sommer Lambda Legal Defense and Education Fund, Inc. 120 Wall Street, Suite 1500 New York, NY 10005	<i>Attorneys for Defendants-Intervenors- Respondents</i>
Jeffery S. Trachtman Norman C. Simon Kramer Levin Naftalis & Franklin LLP 1177 Avenue of the Americas New York, NY 10036	

Dated: April 11, 2008



Brian W. Raum, Esq.
ALLIANCE DEFENSE FUND