STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:

CHINESE STAFF AND WORKERS ASSOCIATION, NATIONAL MOBILIZATION AGAINST SWEATSHOPS, AND IGNACIA REYES,

Petitioners,

To Review Under Section 657 of the Labor Law: Emergency Rulemaking to add language to the Minimum Wage Order for Miscellaneous Industries and Occupations, effective October 6, 2017,

- against -

THE COMMISSIONER OF LABOR,

Respondent.

DOCKET NO. WB 17-002

RESOLUTION OF DECISION AND ORDER

APPEARANCES

Urban Justice Center, New York City (*Carmela Huang* of counsel), and *National Center for Law and Economic Justice*, New York City (*Travis England, Katherine Deabler-Meadows, and Leah Lotto* of counsel), for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Pico Ben-Amotz* of counsel), for respondent.

Make the Road New York and the National Employment Law Project, New York City (*Deborah Axt and Catherine Ruckelshaus* of counsel), amici curiae.

Littler Mendelson, P.C., Melville (*Lisa M. Griffith* of counsel), for *Save New York Home Care Coalition and Home Care Association of America*, amici curiae.

Hodgson Russ LLP, Buffalo (*Emina Poricanin* of counsel), for *New York Health Care Providers Association, Inc. and the Home Care Association of New York State*, amici curiae.

WHEREAS:

On December 13, 2017, petitioners Chinese Staff and Workers Association, National Mobilization Against Sweatshops, and Ignacia Reyes, filed a petition pursuant to Labor Law § 657 with the Industrial Board of Appeals for review of emergency rulemaking filed by respondent Commissioner of Labor on October 6, 2017 that added language to portions of the Minimum Wage Order for Miscellaneous Industries and Occupations, presently codified at 12 NYCRR Parts 142 and 143.

Respondent filed her answer on December 26, 2017, and upon notice to the parties, oral argument was held before the Board on January 5, 2018. Additionally, the parties filed legal briefs, including on the question of whether the Board has jurisdiction over the emergency rulemaking.

The Emergency Rulemaking

The emergency rulemaking added language to 12 NYCRR 142-2.1 (b) (text added by the emergency rulemaking is underscored) to read as follows:

> "The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee--one who lives on the premises of the employer--shall not be deemed to be permitted to work or required to be available for work:
> "(1) during his or her normal sleeping hours solely because he is required to be on call during such hours; or
> "(2) any other time when he or she is free to leave the place of employment.
> Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more."

The emergency rulemaking added language to 12 NYCRR 142-3.1 (b) (text added by the emergency rulemaking is underscored) to read as follows:

> "The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee--one who lives on the premises of the employer--shall not be deemed to be permitted to work or required to be available for work:

> "(1) during his or her normal sleeping hours solely because such employee is required to be on call during such hours; or
> "(2) at any other time when he or she is free to leave the place of employment.
> Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more."

The emergency rulemaking added language to 12 NYCRR 143.7 (text added by the emergency rulemaking is underscored) to read as follows:

> "The term *an hour* shall include each hour an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee--one who lives on the premises of the employer--shall not be deemed to be permitted to work or required to be available for work:
> "(a) during such employee's normal sleeping hours solely because he or she is required to be on call during such hours;
> "(b) at any other time when he or she is free to leave the place of employment.
> Notwithstanding the above, the term *an hour* shall not be construed to include meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more."

The respondent alleges that as authorized by the State Administrative Procedure Act § 202 (6):

> "[T]his emergency regulation is necessary to preserve the status quo, prevent the collapse of the home care industry, and avoid institutionalizing patients who could be cared for at home, in the face of recent decisions by the State Appellate Divisions that treat meal periods and sleep time by home health care aides who work shifts of 24 hours or more as hours worked for purposes of state (but not federal) minimum wage. As a result of those decisions, home care agencies may cease to provide home care aides thereby threatening the continued operation of this industry that employs and serves thousands of New Yorkers by providing vital, lifesaving services and averting the institutionalization of those who could otherwise be cared for at home. Because those decisions relied upon the Commissioner's regulation and rejected the Department's

> opinion letters as inconsistent with that regulation, I am amending the relevant regulations to codify the Commissioner's longstanding and consistent interpretations that such meal periods and sleep times do not constitute hours worked for purposes of minimum wage and overtime requirements."[1]

(Certification of Roberta Reardon, Commissioner, Department of Labor, dated October 6, 2017).

The Board Does Not Have Jurisdiction to Review the Emergency Rulemaking

Labor Law § 101 (1) provides the general jurisdiction of the Board to review orders, rules, and regulations issued by respondent "except where otherwise prescribed by law." Labor Law § 101 does not apply to Article 19 of the Labor Law, entitled "the Minimum Wage Act," where the Board's review is "otherwise prescribed" by Labor Law § 657. The petition, which was brought under Article 19, alleges the emergency rulemaking is "contrary to law"[2] on several grounds, including that it violates the Labor Law because meal periods and sleep time for home health aides are compensable time and the emergency rulemaking violates the separation of powers doctrine. We do not reach the merits of the allegations raised by the petition, because, as discussed below, we do not have jurisdiction over the emergency rulemaking, and, as such, the petition is denied.

The petition was brought pursuant to Labor Law § 657, which provides in relevant part that:

> "1. Finality. Any minimum wage order and regulation issued by the commissioner pursuant to this article shall, unless appealed from as provided in this section, be final. The findings of the commissioner as to the facts shall be conclusive on any appeal from an order of the commissioner issued pursuant to sections six hundred fifty-two, six hundred fifty-six, or six hundred fifty-nine.
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> "2. Review by board of standards and appeals.[3] Any person in interest, including a labor organization or employer association, in any occupation for which a minimum wage order or regulation has been issued under the provisions of this article who is aggrieved by such order or regulation may obtain review before the board of

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[1] The papers filed before the Board indicate that the appellate division cases referred to in the Certification of Roberta Reardon are: *Tokhtaman v Human Care, LLC,* 2016 NY Slip Op 31606 (U) (Sup Ct, N Y County 2016), *aff'd* 149 AD3d 476 (1st Dept 2017); *Andryeyeva v New York Health Care, Inc.*, 45 Misc 3d 820 (Sup Ct, N Y County 2014), *aff'd* 153 AD3d 1216 (2d Dept 2017); and *Moreno v Future Care Health Services, Inc.*, 2015 NY Slip Op 31752 (U) (Sup Ct, Kings County 2015), *vacated* 153 AD 3d 1254 (2d Dept 2017).

[2] "Contrary to law" is the Board's standard of review under Labor Law § 657 (2); *National Restaurant Assn v Commissioner of Labor*, 141 AD3d 185, 190 (3d Dept 2016).

[3] The Industrial Board of Appeals is the successor to the Board of Standards and Appeals (L1975, c 756, § 2, as amended L1975, c 758, § 2).

> standards and appeals by filing with said board, within forty-five days after the date of the publication of the notice of such order or regulation, a written petition requesting that the order or regulation be modified or set aside. A copy of such petition shall be served promptly upon the commissioner. On such appeal, the commissioner shall certify and file with the board of standards and appeals a transcript of the entire record, including the testimony and evidence upon which such order or regulation was made and the report of the wage board. The board of standards and appeals, upon the record certified and filed by the commissioner, shall, after oral argument, determine whether the order or regulation appealed from is contrary to law. Within forty-five days after the expiration of the time for the filing of a petition, the board of standards and appeals shall issue an order confirming, amending or setting aside the order or regulation appealed from. The appellate jurisdiction of the board of standards and appeals shall be exclusive and its order final except that the same shall be subject to an appeal taken directly to the appellate division of the supreme court, third judicial department, within sixty days after its order is issued. The commissioner shall be considered an aggrieved party entitled to take an appeal from an order of the board of standards and appeals."

To trigger our jurisdiction under Labor Law § 657, the emergency rulemaking must have been promulgated pursuant to Article 19 of the Labor Law. The parties assert that we have jurisdiction and respondent alleges that, as stated in the Notice of Emergency Adoption, the emergency rulemaking was authorized, at least in part, under Labor Law § 659 (2). We disagree.

Labor Law § 659, entitled "reconsideration of wage orders and regulations," states:

> "(1) By wage board. At any time after a minimum wage order has been in effect for six months or more, the commissioner, on his own motion or on a petition of fifty or more residents of the state engaged in or affected by the occupation or occupations to which an order is applicable, may reconvene the same wage board or appoint a new wage board to recommend whether or not the minimum wage and regulations prescribed by such order should be modified, and the provisions of section six hundred fifty-five through six hundred fifty-seven shall thereafter apply.
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> "(2) By commissioner. The commissioner, without referral to the wage board, may, at any time after public hearing, by order propose such modifications of or additions to any regulations as he may deem appropriate to effectuate the purposes of this article. Notice of hearing and promulgation of any such order shall be published in accordance with the provisions contained in section six hundred fifty-six. Such order shall be effective thirty days after

> such publication and section six hundred fifty-seven shall thereafter apply."

Under Labor Law § 659, our jurisdiction to review amendments to wage orders and regulations is triggered by respondent reconvening or appointing a new wage board to reconsider whether a minimum wage order and its regulations should be modified, or by order of respondent after a public hearing. None of these preconditions to our jurisdiction have been satisfied by the emergency rulemaking. A new wage board was not appointed by respondent pursuant to Labor Law § 653, a wage board was not reconvened, nor was there a public hearing held prior to the emergency rulemaking. Because none of the requirements of Labor Law § 659 have been satisfied, the emergency rulemaking is not reviewable by the Board under Labor Law § 657, nor appropriate for our review where we do not have a record before us consisting of testimony and evidence or the report of a wage board (Labor Law § 657 [2]).

SAPA § 202 (6) (a) provides that:

> "Notwithstanding any other provision of law, if an agency finds that the immediate adoption of a rule is necessary for the preservation of the public health, safety or general welfare and that compliance with the requirements of subdivision one of this section would be contrary to the public interest, the agency may dispense with all or part of such requirements and adopt the rule on an emergency basis."

We find that the emergency rulemaking was promulgated "notwithstanding" the provisions of Article 19 of the Labor Law that form the basis of our jurisdiction to review minimum wage orders (*see also* SAPA §§ 103 [1] [a], [2]). This is consistent with Labor Law § 657 (2), which limits our jurisdiction to minimum wage orders or regulations issued under the provisions of the Minimum Wage Act. The emergency rulemaking was not a minimum wage order or regulation issued under Article 19 of the Labor Law. It was an emergency regulation allowed by SAPA to suspend other rulemaking requirements when an agency finds that the "immediate adoption of a rule is necessary for the preservation of the public health, safety or general welfare" (SAPA § 202 [6] [a]), and for which SAPA provides judicial review (SAPA §§ 202 [8], 205; *see e.g. Law Enforcement Officers by Engelhardt v State*, 168 Misc 2d 781 [Sup Ct, Albany County 1995]; *Matter of Gill v New York State Racing and Wagering Bd*, 8 Misc 3d 1027 [Sup Ct, N Y County 2005]; *Matter of Gill v New York State Racing and Wagering Bd*, 11 Misc 3d 1068 [Sup Ct, N Y County 2006]). In this case, because we find the emergency rulemaking is pursuant to SAPA and beyond our jurisdiction, judicial review of the emergency rulemaking is not precluded by Labor Law § 103 (1).

We likewise do not retain residual jurisdiction over the emergency rulemaking under our general jurisdiction pursuant to Labor Law § 101 (1) to review the validity or reasonableness of any rule, regulation or order made by respondent "[e]xcept where otherwise prescribed by law." As discussed above, our jurisdiction to review minimum wage regulations is "otherwise prescribed" by specific provisions of the Minimum Wage Act related to our review of "wage orders and regulations" such that Labor Law § 101 is not applicable to emergency rulemaking to amend minimum wage orders (*see e.g. National Restaurant Assn v Commissioner of Labor,* 141 AD3d 185 [Board confirmed order and recommendation on report of the fast food wage board];

Matter of Community Housing Improvement Program, Inc., WB 17-001 [March 24, 2017] [Board has jurisdiction under Labor Law § 657 to review ministerial modifications by Commissioner of Labor to wage orders required by Labor Law § 652 following legislative amendment to the state minimum wage]; *compare Matter of Global Cash Card, Inc.*, PR 16-120 [February 16, 2017] [Board has jurisdiction under Labor Law § 101 to review regulations promulgated by petitioner under Article 6 of the Labor Law). Because we do not have jurisdiction to review the emergency rulemaking, the petition is denied.

NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

1. The petition for review be, and the same hereby is, denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York
on January 23, 2018.

Matter of Community Housing Improvement Program, Inc., WB 17-001 [March 24, 2017] [Board has jurisdiction under Labor Law § 657 to review ministerial modifications by Commissioner of Labor to wage orders required by Labor Law § 652 following legislative amendment to the state minimum wage]; *compare Matter of Global Cash Card, Inc.*, PR 16-120 [February 16, 2017] [Board has jurisdiction under Labor Law § 101 to review regulations promulgated by petitioner under Article 6 of the Labor Law). Because we do not have jurisdiction to review the emergency rulemaking, the petition is denied.

NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

1. The petition for review be, and the same hereby is, denied.

Vilda Vera Mayuga, Chairperson

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Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York
on January 23, 2018.