STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC.,	:	
Petitioner,	:	DOCKET NO. WB 17-001
To Review Under Section 657 of the Labor Law: The Minimum Wage Order for the Building Service Industry, published on December 28, 2016,	:	RESOLUTION OF DECISION AND ORDER
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Greenberg Traurig LLP, New York City (*Jerrold F. Goldberg* of counsel), for petitioner.

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

SEIU Local 32BJ, New York City (*Eyad Asad* of counsel), amicus curiae.

WHEREAS:

This is an appeal of a minimum wage order for the building service industry, modified and adopted by respondent Commissioner of Labor on December 28, 2016, in order to comply with chapter 54 of the Laws of 2016 that increased the state minimum wage. Petitioner Community Housing Improvement Program, Inc. alleges that the modified order is contrary to law because respondent did not raise the building service industry apartment allowance when updating the existing order to comply with the increases made to the minimum wage by the legislature. We have jurisdiction over this appeal under Labor Law § 657 (2), which provides that, "[a]ny person in interest, including a labor organization or employer association, in any occupation for which a minimum wage order . . . has been issued under the provisions of [Article 19 of the Labor Law] who is aggrieved by such order . . . may obtain review before the [Industrial Board of Appeals]." Petitioner Community Housing Improvement Program, Inc. has standing as its members are persons in interest in the occupation being regulated and are aggrieved because they must comply with the minimum wage order (*id.*; *see also Dental Society of New York v Carey*, 61 NY2d 330 [1984]). Our standard of review in this proceeding is limited to determining whether the minimum wage order under review is "contrary to law" (Labor Law § 657 [2]).

We find that the modified wage order is not contrary to law because the building service industry apartment allowance is not a monetary amount that respondent must automatically raise when the legislature increases the minimum wage.

The existing wage order for the building service industry that respondent was required to modify to comply with chapter 54 of the Laws of 2016 contains an "allowance for apartment," which provides that:

> "An apartment furnished by an employer to an employee in a residential building, and occupied by him, may be considered part of the minimum wage, but the allowance for such apartment shall not exceed:
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> "(a) For buildings with nine or more dwelling units, in which the employee's apartment is:
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> "(1) on the ground or top floors of the building: the lowest rental on June 1, 1975 for apartments having the same number of rooms in the building. Where the building does not have an apartment of comparable size, the allowance per room may not exceed the per-room value of the lowest rented apartment of the next larger or smaller size, whichever is lowest;
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> "(2) above the ground and below the top floors of the building: the average rental on June 1, 1975 of apartments with the same number of rooms, in the same line of the building, including the apartments on the ground and top floors;
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> "(3) below curb level (in whole or in part):
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> "(i) apartments for permanent occupancy: 85 percent of the lowest rental on June 1, 1975 for curb-level or above-curb-level apartments having the same number of rooms in the building. Where the building does not have an apartment of comparable size, the allowance per room may not exceed 85 percent of the per-room value of the lowest rented apartment of the next larger or smaller size, whichever is lowest;
>
> "(ii) apartments for temporary occupancy: 50 percent of the lowest rental on June 1, 1975 for curb-level or above-curb-level apartments having the same number of rooms in the building, whichever is lowest. Where the building does not have an apartment of comparable size, the allowance per room may not exceed 50 percent of the per-room value of the lowest rented apartment of the next larger or smaller size, whichever is lowest.
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> "(b) For buildings with fewer than nine dwelling units, in which the employee's apartment is:

> "(1) at or above curb level: the legal rental in effect on June 1, 1975 as established by the appropriate housing or rent commission for said apartment. Where the housing or rent commission has not established a ceiling rental for said apartment, the allowance may not exceed the average rental for apartments of comparable size (number of rooms) in the building;
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> "(2) below curb level (in whole or in part):
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> "(i) apartments for permanent occupancy: 85 percent of the lowest ceiling rental in effect on June 1, 1975 as established by the appropriate housing or rent commission for a comparable size (number of rooms) curb-level or above-curb-level apartment in the building, whichever is lowest. Where the appropriate housing or rent commission has not established a ceiling rental for a comparable size curb-level or above-curb-level apartment in the building, the allowance may not exceed 85 percent of the average rental for curb-level or above-curb-level apartments of comparable size in the building, whichever is lowest;
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> "(ii) apartments for temporary occupancy: 50 percent of the lowest ceiling rental in effect on June 1, 1975 as established by the appropriate housing or rent commission for a comparable size (number of rooms) curb-level or above-curb-level apartment in the building, whichever is lowest. Where the appropriate housing or rent commission has not established a ceiling rental for a comparable size curb-level or above-curb-level apartment in the building, the allowance may not exceed 50 percent of the average rental for curb-level or above-curb-level apartments of comparable size in the building, whichever is lowest.
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> "(c) In no event shall an employer who gives an employee a cash wage in addition to the occupancy of an apartment, reduce the cash wage to such employee or his successor, by offsetting it by an increase in the rent allowance for such apartment in an amount greater than that allowed on June 1, 1975"

(12 NYCRR 141-1.5). Respondent did not increase the apartment allowance set forth by 12 NYCRR 141-1.5. Petitioner alleges in this appeal that the modified wage order is therefore contrary to law because respondent is required to raise the apartment allowance when raising all other allowances in the existing wage order following the legislature's increase of the minimum wage. We disagree and confirm the modified minimum wage order under review.

Labor Law § 652 provides the procedure respondent must follow when adjusting the minimum wage orders following a statutory increase of the minimum wage. Labor Law § 652 (2) states:

> "Existing wage orders. The minimum wage orders in effect on the effective date of this act shall remain in full force and effect, except as modified in accordance with the provisions of this article.
>
> "Such minimum wage orders shall be modified by the commissioner to increase all monetary amounts specified therein in the same proportion as the increase in the hourly minimum wage as provided in subdivision one of this section, including the amounts specified in such minimum wage orders as allowances for gratuities, and when furnished by the employer to its employees, for meals, lodging, apparel and other such items, services and facilities. All amounts so modified shall be rounded off to the nearest five cents. The modified orders shall be promulgated by the commissioner without a public hearing, and without reference to a wage board, and shall become effective on the effective date of such increases in the minimum wage except as otherwise provided in this subdivision, notwithstanding any other provision of this article."

The statute mandates respondent to perform certain ministerial functions with respect to existing minimum wage orders upon the legislature increasing the minimum wage rate. Respondent is required by the statute to "increase all monetary amounts" specified in the existing wage orders "in the same proportion as the increase in the hourly minimum wage," including the "amounts specified" in the orders as "allowances for . . . lodging" (*id*). The statute additionally requires that the "amounts so modified shall be rounded off by the nearest five cents" (*id*). Significantly, when making these ministerial adjustments to existing minimum wage orders, respondent must promulgate the modified orders "without a public hearing, and without reference to a wage board" (*id*). Respondent, therefore, retains no discretion when adjusting the minimum wage orders pursuant to Labor Law § 652 (2), and merely makes formulaic, proportional increases according to the new rate or rates set by the legislature and rounds the end product to the nearest nickel.

The record before us demonstrates that respondent, as required by Labor Law § 652 (2), made numerous ministerial increases to the allowances provided by the existing minimum wage orders in various industries, including the building service industry. For example, respondent increased the allowance for utilities from $25.20 a month in the building service industry to $30.80 per month for the time period from December 31, 2016, to December 30, 2017, for large employers of 11 or more employees located in New York City, and $29.40 per month for small employers of 10 or fewer employees located in New York City for the same time period (*see* 12 NYCRR 141-1.6 [effective December 31, 2016]). The record is replete with similar examples of respondent proportionally increasing the monetary amounts of allowances contained in the existing minimum wage orders. The building service industry apartment allowance, however, is not a monetary amount that respondent must automatically raise because it is not expressed in dollars and cents subject to rounding to the nearest nickel. The building service industry apartment allowance is instead defined by the minimum wage order as the rental value of an apartment on the specific date of June 1, 1975. As such, it cannot be proportionally raised by application of the simple accounting of dollars and cents as Labor Law § 652 (2) contemplates.

The legislative history of Labor Law § 652 (2) supports our reading of the plain language of the statute that the building service industry apartment allowance is not a monetary amount subject to automatic adjustment. The apartment allowance has been expressed as the rental value of an apartment on a specified date since it was first adopted by respondent pursuant to recommendations made by the 1961 building service industry wage board (Report of Building Service Industry Minimum Wage Board to the Industrial Commissioner, March 10, 1961; 12 NYCRR 143-1.0 [1962]).

In 1970, concurrent with a statutory increase to the state minimum wage, the legislature added the current language to Labor Law § 652, directing respondent to increase the monetary amounts for the various allowances specified in existing minimum wage orders in the same proportion as any increase in the minimum wage, rounded to the nearest nickel, when the legislature raises the statutory minimum wage (Laws of 1970, Chapter 282, § 1). At the same time, however, the legislature directed respondent to separately set the building service industry apartment allowance to the rental value of an apartment on a date specified by the legislature, June 1, 1970 (*see* memorandum in support of 1970 Senate Bill 8534A). The legislature thereby demonstrated that the apartment allowance is not encompassed within those monetary amounts that must be proportionally increased with every statutory increase to the minimum wage. As further evidence of its intention, in 1974, the legislature changed the date specified to an earlier historical date in 1971, despite also scheduling multiple increases in the minimum wage to take place in 1974, 1975, and 1976 (Laws of 1974, Chapter 280, § 1). In 1978, the legislature fixed the allowance to its current specified date of June 1, 1975, despite several mandated increases in the minimum wage to take place between 1978 and 1981 (Laws of 1978, Chapter 747, § 2). Finally, in 1990, it twice more raised the minimum wage and deleted the statutory language directing respondent to modify the building service industry apartment allowance to a specified date (Laws of 1990, Chapter 38, § 2). From 1990 to the present, the legislature has left any adjustment of the allowance to respondent's discretion and has not directed her to change the date specified, despite several more increases to the minimum wage during such period (*compare* Laws of 1990, Chapter 38, § 2 *with* Laws of 1999, Chapter 3, § 3; Laws of 2004, Chapter 747, § 2; Laws of 2013, Chapter 57, Part P, § 1; *and* Laws of 2016, Chapter 54, Part K, § 1).

The legislative history supports our finding that the building service industry apartment allowance is the rental value of an apartment set at a specified date and is not a monetary amount subject to proportional increase as contemplated by Labor Law § 652 (2). The statute, therefore, did not require respondent to modify the apartment allowance when the legislature increased the state-wide statutory minimum wage in 2016. Accordingly, the modified minimum wage order is not contrary to law.

Petitioner's allegations that the apartment allowance is unconstitutional are outside the scope of our review of whether respondent acted contrary to Labor Law § 652 (2)'s mandate to perform non-discretionary modifications to allowances contained in existing wage orders when the legislature increases the minimum wage (*see* Labor Law § 657 [2]). We confirm the modified minimum wage order under review.

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

1. The modified minimum wage order for the building service industry published on December 28, 2016 under review, is confirmed; and

2. 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 March 24, 2017.

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

1. The modified minimum wage order for the building service industry published on December 28, 2016 under review, is confirmed; and

2. 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 Albany, New York
on March 24, 2017.