Matter of Chinese Staff and Workers Assn. v Reardon
2018 NY Slip Op 32391(U)
September 25, 2018
Supreme Court, New York County
Docket Number: 450789/2018
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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In the Matter of the Application,

CHINESE STAFF AND WORKERS ASSOCIATION, NATIONAL MOBILIZATION AGAINST SWEATSHOPS, IGNACIA REYES, CARMEN CARRASCO, HUI LING CHEN, MARIA GOTAY, and XIAO WEN ZHEN,

Petitioners-Plaintiffs,

For Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and Declaratory Judgment,

-against-

ROBERTA REARDON, in her capacity as the Commissioner of the New York State Department of Labor, and the NEW YORK STATE DEPARTMENT OF LABOR,

Respondents-Defendants.

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Index No. 450789/2018

Decision and Order

Mot. Seq. 1, 2

HON. EILEEN A. RAKOWER, J.S.C.

Petitioners are five home care aides who serve disabled and elderly clients and two not-for-profit organizations that represent the interests of home care aides and other workers.

Petitioners seek an order pursuant to Article 78 and CPLR § 3001 vacating and declaring null and void four emergency rulemakings promulgated in October 2017, January 2018, April 2018, and June 2018 by the New York State Department of Labor ("DOL") and its Commissioner Roberta Reardon (collectively, "Respondents"). These emergency rulemakings, which were issued in response to certain Appellate Division decisions, amend the Wage Order for Miscellaneous

Industries and Occupations, presently codified at 12 NYCRR parts 142 and 143 (the "Wage Order") to exclude sleeping and meal breaks from work hours for which home care attendants working 24-hour shifts in clients' homes are required to be compensated.

Respondents move pursuant to CPLR §§ 3211(a)(1) and (7) and § 7804(f) for an Order dismissing the Amended Verified Petition and Complaint.

Relevant Background

12 NYCRR §142-2.1(b) mandates that the minimum wage must be paid for each hour "an employee is permitted to work, or is required to be available for work at a place prescribed by the employer," except that "a residential employee - one who lives on the premises of the employer" need not be paid "during his or her normal sleeping hours solely because he is required to be on call during such hours" or "at any other time when he or she is free to leave the place of employment" (12 NYCRR §142-2.1[b][1], [2]).

On March 11, 2010, the DOL issued an opinion letter, advising that "live-in employees," whether or not they are "residential employees," "must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals" (N.Y. St. Dept. of Labor, Op. No. RO–09–0169 at 4 [Mar. 11, 2010]).

In or around 2011, individuals, who were employed as home care aides and assigned to work 24 hour shifts at their clients' residences, commenced litigation against their employers. They alleged that as non-residential home care aides, they did not fall within the exception that applied to residential employees and were entitled to be compensated for the full 24 hours worked. Three of the cases reached the Appellate Division.

In *Tokhtaman v. Human Care, LLC*, 149 A.D. 3d 476, 477 [1st Dept 2017], the First Department affirmed the trial court's denial of the defendants' motion to dismiss the Complaint. The First Department held that DOL's opinion letter conflicts with the plain language of the Wage Order because it failed "to distinguish between 'residential' and 'nonresidential' employees." (*Tokhtaman*, 149 A.D. 3d at 477). The Court therefore held that "if plaintiff can demonstrate that she is a nonresidential employee, she may recover unpaid wages for the hours

worked in excess of 13 hours a day." *Id.* Similarly, the Second Department also rejected the DOL's interpretation of the Wage Order in cases before them. *See Andryeyeva v. New York Health Care, Inc.*,153 A.D.3d 1216, 1217 [2nd Dept 2017]) (affirming trial court's decision granting plaintiffs' motion for class certification and rejecting defendants "contention that the DOL's opinion is in accord with the Wage Order); *Moreno v. Future Care Health Services, Inc.*, 153 A.D.3d 1254, 1254 [2nd Dept 2017].

In response to these decisions, Respondents promulgated the October 2017 Rulemaking on October 6, 2018. The October 2017 Rulemaking amended the Wage Order to codify Respondents' interpretation that "non-residential" home care aides were not entitled to be paid minimum wage "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." (NY Reg Oct. 25, 2017 at 6).

On December 7, 2017, Petitioners CSWA, NMASS, and Ignacia Reyes filed a Petition with the Industrial Board of Appeals ("IBA") challenging the October 2017 Rulemaking (the "IBA Petition"). Following a hearing on January 5, 2018, the IBA denied the IBA Petition on January 23, 2018 on the grounds that that it lacked jurisdiction over the matter.

As described in the Amended Petition, while the proceedings before the IBA were ongoing, the October 2017 Rulemaking lapsed on January 4, 2018. On January 5, 2018, Respondents promulgated a substantively identical rulemaking as the October 2017 Rulemaking. After the January 2018 Rulemaking lapsed on April 4, 2018, Respondents promulgated a substantively identical rulemaking on April 5, 2018. The April 2018 Rulemaking expired on June 3, 2018.

Petitioners filed their initial Petition and Complaint on May 4, 2018. After Respondents promulgated a substantively identical emergency rulemaking on June 3, 2018 following the expiration of the April 2018 Rulemaking, Petitioners filed an Amended Petition and Complaint to including additional allegations as to the June 2018 Rulemaking. As described in the Amended Petition, each of the four rulemakings is identical in substance to the original October 2017 emergency rulemaking, and each has expired.[1]

[1] Petitioners contend that Respondents have since filed and published a fifth Emergency Rulemaking in July 2018 that is set to expire on September 27, 2018.

The Amended Petition contains five causes of action. The first cause of action asserts that "Respondents promulgated the Emergency Rules without authority independent of SAPA." The second cause of action asserts that "Respondents failed to adhere to the substantive and procedural protections of the Labor Law and the Minimum Wage Act." The third cause of action asserts that the Emergency Rules "exceed the scope of Respondents' regulatory power and violate separation of powers principle." The fourth cause of action asserts that the Emergency Rules "are arbitrary and capricious." The fifth cause of action assert that the Emergency Rules "violate SAPA."

Respondents contend that they have validly promulgated the Emergency Rules pursuant to SAPA § 202 (6); the Emergency Rules do not contravene the Minimum Wage Act's requirements; and Respondents had a rational basis for finding emergent circumstances warranting their legislative rulemaking. Respondents further argue that they have "substantially complied" with the procedural requirements of SAPA.

Discussion

Respondents adopted the Emergency Rulemakings pursuant to State Administrative Procedure Act ("SAPA") section 202(6). SAPA 202(6) provides, in relevant part as follows:

> "Notice of emergency adoption. (a) 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 the 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

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Petitioners "also challenge the validity of the July 2018 Rulemaking but have not yet sought leave to amend their petition to formally include such challenge in the present proceeding." (Petitioners' response to motion to dismiss, page 5, footnote 2).

> of such requirements and adopt the rule on an emergency basis."

SAPA 202(6)(d)(iv) provides that a notice of emergency adoption shall:

> "contain the findings required by paragraphs (a) and (c) of this subdivision and include a statement fully describing the specific reasons for such findings and the facts and circumstances on which such findings are based. Such statement shall include, at a minimum, a description of the nature and, if applicable, location of the public health, safety or general welfare need requiring adoption of the rule on an emergency basis; a description of the cause, consequences, and expected duration of such need; an explanation of why compliance with the requirements of subdivision one of this section would be contrary to the public interest; and an explanation of why the current circumstance necessitates that the public and interested parties be given less than the minimum period for notice and comment provided for in subdivision one of this section."

SAPA Section 202(6)(d)(iv) "requires, at a minimum, an agency seeking an emergency rule adoption to fully articulate in writing the circumstances which give rise to the adoption on an emergency basis so as to limit this method of rule making to genuine emergencies." (*Law Enf. Officers Union, Dis. Council 82 by Engelhardt v. State*, 168 Misc 2d 781, 784 [Sup. Ct., Albany County,1995]). Through this requirement, "the legislature was attempting to stop the practice of using emergency rule making to avoid the notice and comment period otherwise required by the SAPA." (*Id.*). "As stated in the sponsor's memorandum, '[u]nder this legislation, an agency would have to disclose the specific reason as to the need to adopt the emergency rule and why it was necessary to forgo the required notice and comment period that is required by SAPA.'" (*Id.*) (citing to Bill Jacket, L 1990, ch 850, Sponsor's Mem, Assemblyman Sanders, Assembly Bill 10271-A, at 3).

Courts have upheld emergency rule making under SAPA 202(6)(d) when "necessary for the preservation of the public health, safety or general welfare." *See Korean Am. Nail Salon Ass'n of New York, Inc. v. Cuomo*, 50 Misc. 3d 731, 735 [Sup. Ct., Albany County 2015]. In *Korean Am. Nail Salon Ass'n of New York,*

Inc. v. Cuomo, 50 Misc. 3d at 732, after the DOL undertook an investigation of nail salons that resulted in the finding of 116 wage violations at 29 nail salons, the New York Department of State ("DOS") adopted an emergency rule on September 4, 2015 that authorized the State to enforce a wage bond mandate. Upon a challenge brought by two trade groups representing Korean and Chinese owned nail salons in New York State, the court held "that respondents have sufficiently demonstrated that nail salon workers are being deprived of legally due wages and that immediate adoption of the September 4, 2015 emergency regulation was necessary for the preservation of the public health, safety or general welfare of nail salon workers." (*Id.* at 735).

In response to the requirements of SAPA 206(6)(d)(iv), Respondents provided the following statement in support of the Emergency Rulemakings:

> "The specific reasons underlying the finding of necessity are as follows:
>
> This emergency regulation is needed 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 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, this emergency adoption amends 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." (emphasis added).

At oral argument, Petitioners stated that they "do not challenge, in this proceeding, the ability of the Department of Labor to issue regulations that modified wage orders." (Transcript at 5:25-6:2). Specifically, they challenge "the manner in which the respondents have engaged in rule making … [and] that a valid emergency exists." (Transcript at 7:21-23).

Based on the record before the Court, to justify the Emergency Rulemakings at issue in this case, Respondents relied on a July 14, 2017 Notice from the New York Department of Health ("DOH") to home health providers entitled "Services for Live-in Home Care." The Notice provided that in light of the First Department decision of *Tokhtaman* and other related decisions, "The Departments of Health (DOH) and Labor (DOL) have been monitoring these cases, and will continue to evaluate whether action may be needed to prevent unnecessary disruption to home care services in New York State."

The Notice further advised that "[p]ending a final resolution of this matter by the courts, or until notice is otherwise given, DOH and DOL expect providers to continue staffing and covering live-in cases in accordance with current Managed Care contracts, Medicaid agreements, MLTC Policy 14.08, and all applicable labor requirements." It further advised that "[l]ive-in cases should not be converted to 24-hour continuous split-shift care unless the individual meets the criteria for this higher level of care."

Respondents also relied on a December 22, 2017 letter to Commissioner Reardon from Andrew Segal, Director of DOH's Division of Long-Term Care, "RE: Home Care Aide Hours Worked – Emergency Rulemaking." In that letter, Segal wrote that "[i]t is DOH's understanding, based on conversations with DOL, that moving from a compensation arrangement based on at least 13 hours per day to one that is based on 24 hours per day would significantly increase labor costs for 24-hour live-in personal care aide services." Segal wrote, "A significant shortage in the availability of home care agencies to provide personal care services would endanger the health and safety of those receiving the services who no longer have a personal care aide." Segal further wrote:

> "Since the issuance of this guidance, the impact of the recent court rulings that formed the impetus for DOL's emergency regulation has become clearer. Continued input from MLTC plans, homecare agencies, individual Medicaid recipients, consumer advocates, and other groups has only reconfirmed DOH's concerns about the

> availability and continuity of personal care services, and 24-hour live-in personal care services in particular."

At oral argument, when asked about the basis for the emergency rulemaking, Respondents' counsel stated:

> "The record shows that the Department of Health..., as well as the Department of Labor were going to monitor the industry to make sure that wasn't disruption and chaos as a result" of the Appellate Division decisions ...So I think there is evidence in the record that there was going to be disruption or that disruption was likely enough so that it wasn't required to wait and see if there was an actual break-down; and the cases that we've cited, again the Korean American nail salon case is an example of a case where essentially the department of state said simply bad things are happening, therefore, we believe that as an emergency measure, prior to the effective date of legislation, we are going to put into effect an emergency rule." (Transcript at 18:2-16).

Here, after a review of the record including the July 2017 and December 2017 Notices and hearing from Respondents at oral argument, the Court finds that the record does not support the finding of an emergency justifying the use of SAPA's administrative procedures for emergency rulemaking. Here, although Respondents claim that the "emergency regulation is needed 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," the record is devoid of any facts upon which to base a finding of "immediate necessity, emergency or undue delay." (see *Law Enf. Officers Union*, 168 Misc. 2d at 784). A mere need for the monitoring of the home care service industry in light of the Appellate Division rulings and a potential concern about a disruption is not sufficient to justify the use of SAPA's administrative procedures for emergency rulemaking. It does not constitute a situation where "bad things are happening," as was the case in *Korean Am. Nail Salon Ass'n of New York, Inc. v. Cuomo*, 50 Misc. 3d at 735.

Furthermore, Respondents knew that there may be an issue when litigation was commenced in 2011 challenging their 2010 opinion letter. Yet, Respondents chose to wait until after the Appellate Division decisions were rendered to

promulgate the "emergency" rulemakings rather than to pursue the normal rule making procedure. This further belies Respondents' position that an "emergency" arose in October 2017 that necessitated the promulgation of rules under SAPA 206(6).

Wherefore, it is hereby

ORDERED that the Amended Petition is granted (Mot. Seq. 1); and it is further

ORDERED that the emergency regulations promulgated by Respondents on October 5, 2017, January 5, 2018, April 5, 2018, and June 3, 2018 amending the Minimum Wage Order for Miscellaneous Occupations and Industries (the "Emergency Rules") are declared null, void, and invalid; and it is further

ORDERED that Respondents and any of their agents, officers, and employees are enjoined from implementing or enforcing the Emergency Rules; and it is further

ORDERED that Respondents' motion to dismiss the Amended Petition and Complaint is denied (Mot. Seq. 2).

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: September 25, 2018

EILEEN A. RAKOWER, J.S.C.