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Pursuant to Section 656 of the Labor Law of the State of New York: In the Matter of the Wage Board's Report and Recommendations to the Commissioner of Labor of November 14, 2005.	ACCEPTANCE OF REPORT AND RECOMMENDATION

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WHEREAS on January 1, 2005, there became effective increases in the statutory minimum wage levels set forth in Sections 652(1) and 652(4) of the Labor Law of the State of New York; and

WHEREAS Labor Law Section 652(2) requires that all Minimum Wage Orders in effect be modified upon an increase in the statutory minimum wage in the same proportion as such increase; and

WHEREAS in compliance with that statute, on or about May 4, 2005, all Minimum Wage Orders, including those for the Restaurant and Hotel industries, were modified in accordance with the provisions of the January 1, 2005 statutory increase; and

WHEREAS on June 30, 2005, the Commissioner of Labor appointed a Wage Board, pursuant to Section 653(2) of the Labor Law, to inquire and report upon and recommend any changes to Wage Orders governing wages payable to food service workers; and

WHEREAS the Wage Board engaged in information-gathering activities, including but not limited to holding public hearings; and

WHEREAS upon completion of such information-gathering activities the Wage Board met on October 13, 2005, to consider all relevant views, data, documents and other materials submitted by interested parties; and

WHEREAS after consideration of such materials, its own investigation, and deliberation upon such materials and investigation, the Wage Board submitted a Report and Recommendations (hereinafter referred to as "Report") dated November 14, 2005 to the Commissioner of Labor, by which the Wage Board unanimously recommended no changes to the current Restaurant and Hotel Industry Minimum Wage Orders; and

WHEREAS on September 7, 2006, the Report was filed with the Secretary of the Department of Labor; and

WHEREAS Notice of such filing was published in compliance with Labor Law Section 656; and

WHEREAS numerous objections to the Report have been filed with the Commissioner in the fifteen days following such publication; and

WHEREAS the Commissioner has reviewed and examined the Report, all objections thereto and applicable statutes and case law:

NOW, THEREFORE, upon the findings and reasoning set forth below, the Commissioner hereby accepts the Wage Board's Report and Recommendations and concurs with the Wage Board that no changes should be made in the current language of the Wage Orders for the Restaurant and Hotel Industries (12 NYCRR Parts 137 and 138).

Article III, Section 1 of the New York State Constitution states, in its entirety, that "The legislative power of this state shall be vested in the senate and assembly." It is the long standing interpretation of the courts of this State that "[E]xcept as restrained by the constitution, the legislative power is untrammeled and supreme . . . Nothing is subtracted from the sum of legislative power, except that which is expressly or by necessary implication withdrawn" (*Silver v. Pataki*, 96 NY2d 532, *537* (2001) (citation

omitted). It is well settled that "the Legislature may delegate discretion to an administrative agency to enable it to carry out policy determinations of the Legislature, but in doing so the Legislature is constitutionally required to furnish the agency with 'rules and principles' to guide its exercise of discretion *and to set the outer bounds of such discretion*," (*Matter of Redfield v. Melton*, 57 A.D.2d 491, *495* (3rd Dept. 1977) (citations omitted) (emphasis added)).

2. Labor Law Section 652 was amended by the Empire State Wage Act of 2004 (L. 2004, ch. 747). By such Act, the Legislature provided for increases in the State Minimum Wage, such increases to take effect annually from January 1, 2005 through January 1, 2007. These increases were made, not only in the minimum wage of employees in general (Labor Law §652(1)), but in the minimum wage of food service workers receiving tips (Labor Law §652(4)). The latter increase was made in the same proportion as for employees in general, "provided further that no other cash wage is established pursuant to section six hundred fifty three of this article." Labor Law Section 652(2) required that all Minimum Wage Orders in effect on the effective date of the Act be modified to increase all monetary amounts specified therein in the same proportion as increases in the hourly minimum wage as provided in the Act. According to Section 652(2), such 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." Accordingly, on or about May 4, 2005, all Minimum Wage Orders, including those for the Restaurant and Hotel industries, were modified in accordance with the provisions of the Act.

3. Labor Law Section 653(2) requires the Commissioner, within six months after enactment of any changes to the statutory minimum wage, to appoint a Wage Board to "inquire and report and recommend any changes to wage orders governing wages paid to food service workers." Section 653(2) antedates and was not amended by the Empire State Wage Act of 2004, having been enacted as part of L.2000, ch.14 which first established a statutory minimum cash wage (previously required through Minimum Wage Orders) for food service workers receiving tips. The proviso quoted above from Labor Law Section 652(4), which specifies increases for 2005, 2006 and 2007 in the minimum cash wage for food service workers receiving tips ("provided further that no other cash wage is established pursuant to section six hundred fifty three of this article"), likewise antedates and was not amended by the Empire State Wage Act of 2004. Section 653(2), providing for the appointment of wage boards, concludes with the statement that:

> Any wage order authorizing a lesser wage than the previously and statutorily mandated minimum wage for such employees shall be reviewed by the wage board to ascertain at what level such wage order is sufficient to provide adequate maintenance and to protect the health and livelihood of employees subject to such a wage order after a statutory increase in the mandated minimum wage.

4. Labor Law Section 655, which governs wage boards, provides in subdivision 5(a) that a wage board may recommend a minimum wage not in excess:

> of an amount sufficient to provide adequate maintenance and to protect the health of the employees. In no event, however, shall any minimum wage recommended by the board be less than the wage specified in section six hundred and fifty-two of this chapter, except (1) as expressly authorized in paragraph (c) of this subdivision [dealing with apprentice and similar wages], and (2) where the board finds conditions of employment are such as to make an hourly rate impracticable, in which event the board may recommend a wage rate other than an hourly rate, provided that such recommended rate carries out the purposes of this article and safeguards the minimum wage specified in section six hundred fifty-two of this chapter.

5. As set forth above, while the Legislature may delegate some portion of its legislative authority to an executive agency, such a delegation must be accompanied by guidelines for the agency to follow, which guidelines must include the "outer bounds" of the agency's discretion. For purposes of this decision, the Commissioner assumes that the wage board has been delegated authority to recommend, and she has been delegated authority to set, a minimum cash wage for food service workers that is less than the one specifically mandated by the Legislature in the Empire State Wage Act of 2004. The Commissioner notes, however, that: (1) Labor Law Section 652(4) as amended by the Empire State Wage Act of 2004 expressly requires specified increases in the minimum cash wage to take effect annually from January 1, 2005 through January 1, 2007, with Minimum Wage Orders affected thereby to be automatically modified accordingly; (2) Labor Law Section 655 states with exceptions not here relevant that "In no event, however, shall any minimum wage recommended by the board be less than the wage specified in section six hundred and fifty-two of this chapter;" (3) the proviso to Labor Law Section 652(4) ("provided further that no other cash wage is established pursuant to section six hundred fifty three of this article") was originally enacted prior to enactment of the specific increases included in that subsection as amended, does not purport to override other sections of the statute, and does not state any basis pursuant to which there could be administrative deviation from the statutory increases; and (4) the existence of statutory increases does not render appointment of a wage board nugatory, since the board may make recommendations concerning issues other than the dollar amount of the minimum wage or minimum cash wage. Inasmuch as the Commissioner, as explained below, concurs with the Wage Board that no changes should be made in the current language of the Wage Orders for the Restaurant and Hotel Industries even on the assumption that the Legislature has delegated to the Commissioner authority to set a

service workers that is less than the one specifically mandated

by the Legislature in the Empire State Wage Act of 2004, it is unnecessary to determine whether such an assumption would be correct.

6. The Legislature has set forth two guidelines for the Commissioner to consider when exercising her assumed authority: whether such lesser minimum wage would "provide adequate maintenance" to food service workers and would protect their "health and livelihood." As the Legislature has set forth only these two guidelines, they must constitute the "outer bounds" of the Commissioner's discretion. Therefore, the consideration of any factor other than these two would be outside these bounds and, hence, beyond the authority delegated to the Commissioner. Moreover, in assessing those two factors, the Commissioner must take into account that the Legislature has already determined – as reflected in both L. 2000, ch.14 which first established a statutory minimum cash wage for food service workers receiving tips and the 2004 amendment to the statute – that such level, at least for food service workers, is not limited to that of the general statutory minimum wage. Thus in L. 2000, ch.14, the Legislature expressly "acknowledged that the food and beverage service industry is highly competitive and that tipping employees who serve customers in food and beverage establishments is a common practice," and called it "common that the hourly income earned by employees in this industry in the aggregate, when tips are combined with the wages required under existing wage orders of the department, frequently exceed the mandated minimum wage," but nevertheless established a minimum cash wage for food service workers resulting in a higher total hourly income than is required for either employees in general, or for tipped workers under the federal Fair Labor Standards Act. The Legislature further stated that in doing so, it had considered both "the need to protect the rights and income of workers" and "the prices payable by consumers for food and beverage in restaurants, grills, diners and other establishments."

7. Included in the Wage Board's Report and Recommendations was a Briefing Document on Employment and Wages in New York's Hotel and Restaurant Industries (hereinafter referred to as "Briefing") dated July 26, 2005, prepared by the New York State Department of Labor's Division of Research and Statistics. While the Wage Board's Report does not specifically cite the Briefing, it does state (at pages 4 and 5) that the Board "met on October 13, 2005, to consider all relevant views, data, documents and other materials submitted by interested parties," and that Board members "reviewed all materials available to them." Furthermore, the Report's Table of Contents lists the Briefing among the "Relevant Documents Considered by the Board." According to the data presented in this document, waiters and waitresses in both industries comprised the greatest number of employees but received among the lowest annual pay ($19,751 in the hotel industry and $16,391 in the restaurant industry). The Briefing concluded that:

> Workers in food service and related occupations in the hotel and food service industries are younger and less educated than workers in general. Over one-third have less than a high school education. Fewer workers in food-related jobs in these two industries work full-time than workers in all industries. This is especially pronounced among workers aged 16-24 who comprise nearly forty percent of workers in food-related occupations, but applies to all age groups. (Briefing page 8).

8. The Briefing's data and conclusions provide ample grounds for a conclusion that a lesser minimum wage for food service workers in the hotel and restaurant industries than that set forth in the statute would reduce their already low wages and that no basis has been provided to find a lesser wage than that enacted by the Legislature sufficient to provide adequate maintenance and protect the health and livelihood of employees. All three Wage Board members noted that no data was provided that would lead to a different conclusion (Report and Recommendations pp. 5-6).

9. Although numerous objections to the Report have been filed since September 7, 2006, none provide sufficient grounds for a different conclusion. Almost all objections contained one or more of the following arguments: employees who receive tips receive more than the general statutory minimum wage and, the increase in the statutory minimum wage and the resulting increase in the Wage Orders have imposed additional costs on employers, resulted in increased prices, and adversely effected New York State's competitive relationship with other states.

10. The Commissioner takes no position on the truth of any of these arguments except to note that, even if any are true, none are relevant to the questions of whether a lesser minimum wage for food service workers would "provide adequate maintenance" to them or protect their "health and livelihood." As previously stated, the Legislature has already determined – as reflected in both L. 2000, ch.14 which first established a statutory minimum cash wage for food service workers receiving tips and the 2004 amendment to the statute – that at least with respect to food service workers, such level is not limited to that of the general statutory minimum wage. The Commissioner must respect that general approach, and no basis has been provided to find a lesser wage than that enacted by the Legislature sufficient to provide adequate maintenance and protect the health and livelihood of employees, even assuming that the Commissioner could depart from the level set by the Legislature upon a sufficient factual showing. As the Commissioner is barred by the New York State Constitution from exceeding the outer bounds of the guidelines set by the New York State Legislature in its delegation of this authority, and as any determination based on these arguments would exceed these bounds, these arguments, even if true, cannot be part of this determination.

11 Many objections filed also alleged that many tipped food service workers earn more in tips than non-tipped workers, that tipped food service workers earn many times the minimum wage, and that the increased minimum wage caused greater unemployment among younger and less educated employees. While such allegations might be relevant to this determination, all such statements were either conclusory, anecdotal, or based on unsubstantiated summaries of payroll records. No person or organization objecting to the Report has provided hard data and statistical analysis, on a State-wide basis, similar to that set forth in the Briefing. Accordingly, there is no valid reason to accord these allegations more credibility than the Briefing.

12. The industry representative, the New York State Restaurant Association (NYSRA), both appeared at public hearing and submitted a written objection dated September 20, 2006. The oral statements and written objections were substantially similar. NYSRA argues that the minimum wage increase has done and will continue to do irreparable harm to the hospitality industry, that NYSRA members have been forced to shut down due to increased wage costs, that tipped employees earn more than non-tipped employees, and that wage costs cause price increases. As set forth above, these arguments either concern issues beyond the outer bounds of the Legislature's delegation of authority or lack the Briefing's statistical rigor.

13. The NYSRA, both at public hearing and in its September 20, 2006 objection, makes suggestions for changes to seven regulations. Only two of these suggested changes, to 12 NYCRR Sections 137-1.4 and 137-1.5, even purport to find support in the detailed comments and objections to the report. The remaining suggestions have no

bearing on the issues raised by those comments and objections and no basis for adopting them has been advanced.

14. The suggested change to Section 137-1.5 is hereby rejected for the reasons set forth above. The suggested change to Section 137-1.4, the elimination of the distinction between "service employees" and "food service workers" is based upon the contention, set forth at public hearing, that "(NYSRA has) been unable to think of an employee that would instead (of falling under the definition of food service worker) fall under the definition of service employees." 12 NYCRR Section 137-3.3 defines a "service employee" as one who customarily receives tips at a certain rate. 12 NYCRR Section 137-3.4 defines a food service worker as one who is "primarily engaged in the serving of food or beverages" and "who regularly receive(s) tips." NYSRA contends that all tipped employees in the restaurant industry are food service workers and, therefore, any distinction between such workers and service employees is duplicative and confusing and should be eliminated.

15. The Commissioner takes note that many restaurants employ delivery workers, hat and coat check persons, washroom attendants and valet parking attendants. Although all of these employees "customarily" receive tips, none are "primarily engaged in the serving of food or beverages." Accordingly, any employee employed in such a position who customarily receives tips at or above the rate set forth in 12 NYCRR Section 137-3.3 is a "service employee." Therefore, the Commissioner finds that the definitions of service employees and food service workers are not duplicative and are not (or should not be) confusing to the restaurant industry as alleged and rejects the suggestion that 12 NYCRR Section 137-1.4 be deleted.

16. By reason of the foregoing, the Commissioner hereby accepts the Wage Board's Report and Recommendations and concurs with the Wage Board that no changes should be made in the current language of the Wage Orders for the Restaurant and Hotel Industries (12 NYCRR Parts 137 and 138).

Dated: October 23, 2006
Albany, New York State

LINDA ANGELLO
Commissioner of Labor
State of New York