STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED – NOVEMBER 8, 2012)

PARK ROW PROPERTIES, LTD., METROPARK	:	
V.	:	**C.A. No. PC-2011-5077**
RHODE ISLAND DEPARTMENT OF LABOR AND TRAINING, LABOR STANDARDS DIVISION, through its Director, CHARLES J. FOGARTY; GEORGE KLANIAN; and CARLO ACQUISTO	:	

DECISION

CARNES, J. In this administrative appeal, Appellant Park Row Properties, Ltd. ("Appellant" or "Park Row") challenges a decision ("decision") by the Rhode Island Department of Labor and Training ("D.L.T." or "Department"), finding Park Row liable for back-wages to George Klanian ("Mr. Klanian") and Carlo Acquisto ("Mr. Acquisto") under G.L. 1956 § 25-3-3, as amended 1998. Jurisdiction is pursuant to G.L. 1956 §§ 25-3-5 and 42-35-15.

I
Facts and Travel
A
Background

A brief history of § 25-3-1, et seq. is necessary. In the statutory scheme in effect prior to 1998 ("Old Statute"), § 25-3-2 prohibited employers from requiring employees to work on Sundays except for work that (1) was "of absolute necessity" or (2) was "performed pursuant to a permit issued under the provisions of section 25-3-3."[1] Section 25-3-3 authorized the director of

[1] Section 25-3-2 of the Old Statute, in pertinent part, read:

the D.L.T. to issue such permits in cases of "economic necessity." The statute defined "Economic Necessity" by providing an exhaustive list of seven instances in which the director might find that it was economically necessary for an employer to require his or her employees to work on a Sunday. Sec. 25-3-1(2). In particular, § 25-3-1(2)(vii) provided that "Economic Necessity" exists where the director determines that "[c]ircumstances, temporary in nature, are such that undue economic hardship would result from the inability to operate on one or more Sundays or holidays."[2] The Old Statute also addressed the rate at which employers were

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> "Permits Required—Exemptions. It shall be unlawful for any employer to require or permit an employee to work on Sundays or holidays except for work of absolute necessity or work performed pursuant to a permit issued under the provisions of section 25-3-3 . . . ."

[2] The definition of "Economic Necessity" in the Old Statute § 25-3-1, in its entirety, read:

> "(2) 'Economic necessity' shall mean and refer to any case where the director determines that:
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> (i) Both the economics and technology of manufacture of the product or a component thereof requires continuous conversion or processing of raw materials, intermediates, or components without interruption to avoid disproportionate loss of production capacity;
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> (ii) The economics and technology of data processing requires the continuous operation of data processing equipment to avoid deterioration of equipment or a disproportionate loss of computer capacity or where customer requirements are such that data processing equipment must be available for input or output on a continuous basis;
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> (iii) Because prevailing industry practice in the manufacturing or processing of the product or in the provision of banking or financial services is to operate facilities within that industry seven (7) days per week, the failure to operate on one or more Sundays or holidays will subject the employer to a competitive hardship within the industry in which the employer competes;

required to compensate their employees for work on Sundays. Specifically, § 25-3-3 provided that "[w]ork performed by employees on Sundays . . . pursuant to [a] permit . . . must be paid for at least one and one half (1 1/2) times the normal rate of pay for the work performed" (the "Sunday premium pay requirement").[3] Section 25-3-7 gave the D.L.T. the authority to exempt by regulation, "any class of employers" who "in the opinion of the Director . . . either because of the nature of their operations or their size, should be exempted from the provisions of this chapter." Sec. 25-3-7.

> (iv) Maintenance or improvement of plant or equipment cannot practically or efficiently be performed while production is in process;
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> (v) The scheduling of production on Sundays or holidays is necessitated by interrupted or allocated energy supplies, or shortages of raw materials or component parts;
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> (vi) An employer has been deprived of its normal production schedule by fire, flood, power failure, or other circumstances beyond its control; or
>
> (vii) Circumstances, temporary in nature, are such that undue economic hardship would result from the inability to operate on one or more Sundays or holidays . . . ."

[3] Section 25-3-3 of the Old Statute, in relevant part, read:

> "Work on Sundays or holidays. Work on Sundays or holidays which would otherwise be unlawful, may be performed hereunder only pursuant to permit issued by the director. Permits shall be issued only in cases of economic necessity and shall be effective for more than one year. Work performed by employees on Sundays and holidays pursuant to permit issued by the director must be paid for at least one and one half (1 1/2) times the normal rate of pay for the work performed . . . ."

Since the statute did not define the terms "absolute necessity" or "economic hardship," the D.L.T., pursuant to its statutory authority under § 25-3-6,[4] promulgated regulations defining those terms. In its "Rules and Regulations Relating to the Work Permit Law" ("Old Regulations"), the D.L.T. defined the term "absolutely necessary" as used in § 25-3-2 as

> "any work intended to protect or maintain life or property, or to promote the health, safety, and welfare of the general public. Such work shall include, but not be limited to, police, and fire services, hospitals, nursing homes or other institutions devoted to health care, public utilities . . . and activity similar in nature." R.I. Admin. Code 42-5-4:1 ¶ 2.

The D.L.T. also provided in the Old Regulations that "[e]conomic hardship . . . shall mean that, because of events over which an employer has no control, the employer would lose a substantial amount of business if unable to operate on a particular Sunday or holiday." R.I. Admin. Code 42-5-4:1 ¶ 6. Pursuant to its authority under § 25-3-7 to exempt classes of employers through regulations, the D.L.T. provided that those "employer[s] whose business is licensed or regulated by the federal government . . . shall not be required to obtain a work permit to conduct said business on a Sunday . . . ." R.I. Admin. Code 42-5-4:1 ¶ 5.[5]

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[4] Section 25-3-6 provides:

> "The director may promulgate any regulations as shall be necessary for the full and proper implementation of this chapter. The regulations shall be adopted only in accordance with the procedures established by chapter 35 of title 42. The director shall also be empowered to enforce and administer the provisions of this chapter and to prosecute violations of any of the provisions of this chapter."

[5] Rhode Island Admin. Code 42-5-4:1 ¶ 5, in its entirety, provides:

> "Pursuant to G.L. 25-3-7, an employer whose business is licensed or regulated by the federal government, the state, city or town or a political subdivision thereof shall not be required to obtain a work permit to conduct said business on a Sunday or holiday, but does

In 1998, the Rhode Island General Assembly substantially amended §§ 25-3-2 and 25-3-3 ("New Statute"). The amendments eliminated any reference to a permit in either section.[6] See §§ 25-3-2 and 25-3-3. The term "absolute necessity" also no longer appears in § 25-3-2 of the New Statute. Therefore, as of 1998, employers no longer need to show "absolute necessity" or obtain a permit in order to require their employees to work on Sundays. With regard to the rate at which employers are required to compensate employees for work on Sundays, § 25-3-3(a) of the New Statute, in pertinent part, reads: "[w]ork performed by employees on Sundays and holidays must be paid for at least one and one-half (1 1/ 2) times the normal rate of pay for the work performed." Notably, the word "economic necessity" no longer appears in § 25-3-3. See § 25-3-3. However, the Legislature retained the definitions of "economic necessity" in § 25-3-1(2)(i) – (vii) of the New Statute.[7]

Despite the Legislature's removal of any reference to a permit requirement in §§ 25-3-2 and 25-3-3, the D.L.T. re-filed its Old Regulations, "Rules and Regulations Relating to the Work Permit Law" in 2002 and 2007.[8] (Appellant's Br. in Supp. of Appeal, Ex. D.) Thus, the regulatory definition of "absolutely necessary" contained in R.I. Admin Code 42-4-4:1 ¶ 1, the exemption for federally regulated businesses in 42-5-4:1 ¶ 5, and the definition of "economic

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> not include motor transportation having its point of origin in Rhode Island."

[6] Section 25-3-2 of the New Statute exclusively addresses the pari-mutuel industries. Sec. 25-3-2.
[7] To be precise, in 2002, the Legislature deleted the word "such" from § 25-3-1(2)(vii) so that the provision in effect at the time Mr. Acquisto and Mr. Klanian filed their claims read, "[c]ircumstances, temporary in nature, are that undue economic hardship would result from the inability to operate on one or more Sundays or holidays . . . ."
[8] Section 42-35-4.1(a) of the Rhode Island General Laws provides that "[e]ach agency shall, on or before January 2, 2002, according to a schedule specified by the secretary of state, file with the secretary of state a certified copy of all its lawfully adopted rules which are in force on the date of the filing." Section 42-35-4.2 states that "[a]ll rules on file with the secretary of state pursuant to § 42-35-4.1 shall be re-filed on the first Tuesday in January and on the first Tuesday of every successive fifth year." Sec. 42-35-4.2.

hardship" in 42-5-4:1 ¶ 6, remained on file subsequent to the 1998 amendments and at the time when Mr. Acquisto and Mr. Klanian filed their complaints. Moreover, the New Statute did not state that the Old Regulations were expressly repealed. Subsequent to the 1998 legislative amendments, the D.L.T. promulgated new regulations ("New Regulations"), entitled "Rules and Regulations Relating to Exemptions for Work on Holidays and Sundays," pursuant to its authority under § 25-3-7 to grant exemptions to classes of employers. See R.I. Admin. Code 42-5-6:1. Proposed in 2007 and effective in 2008, the New Regulations provide a procedure whereby an employer may petition the D.L.T. for an exemption from paying time and one-half for Sunday work by submitting a written statement containing, among other things, "a statement of the economic necessity, as defined by § 25-3-1, justifying the exemption." R.I. Admin. Code 42-5-6:1 ¶ 2.[9] The New Regulations did not expressly repeal the Old Regulations. See R.I. Admin. Code 42-5-6:1.[10]

B
Procedural History

Park Row owns and operates a parking garage ("Garage") located adjacent to, and primarily serving, the Providence Train Station. (Tr. 6/10/2011 at 14.) Pursuant to an agreement with Amtrak ("Agreement"), the Garage remains open seven days a week from approximately 4:30 a.m. to approximately 12:30 a.m. (Park Row Memorandum to Helen Gage, Nov. 23, 2010, 3.) The Appellant hired Mr. Klanian in December 2007, and Mr. Acquisto in August 2009, as

[9] To date, the D.L.T. has exempted manufacturers of monoclonal antibodies and fueling operators at Rhode Island Airport Corporation airports under the New Regulations. See R.I. Admin. Code 42-5-6:1 ¶¶ 6-7.

[10] As of the time Mr. Klanian and Mr. Acquisto filed their complaints, the D.L.T. had not proposed repealing the Old Regulations. The D.L.T. proposed repealing the Old Regulations in November 2011 but then re-filed them in January 2012. See Notice of Proposed Repeal, available at 2011 R.I. Reg. Text 275967 NS.

attendants at the Garage. (Tr. 5/13/2011 at 3, 15.) The Appellant paid Mr. Klanian and Mr. Acquisto $11.25 per hour and $12.00 per hour, respectively, and required both employees to work on Sundays. (Tr. at 4, 16.)

Mr. Acquisto filed a Complaint for Non-Payment of Wages with the D.L.T. on August 24, 2010, claiming that Park Row owed him back-wages for failing to pay him time and one-half for his work on Sundays. Mr. Klanian filed a similar complaint on November 7, 2010. They alleged that Park Row was required to pay them time and one-half for their work on Sundays under § 25-3-3, as amended 1998. On November 23, 2010, Park Row submitted a legal memorandum ("Memo") to the D.L.T. in opposition to Mr. Acquisto's and Mr. Klanian's complaints. The administrative record includes Park Row's Memo. (Decision 2.) After investigating the complaints and after giving notice, the Department held a formal hearing on this matter before a D.L.T. hearing officer ("Hearing Officer") on May 13 and June 10, 2011, in compliance with G.L. § 28-14-19 (amended 2012).

On May 13, 2011, Mr. Acquisto and Mr. Klanian testified generally about their hours worked, dates of employment, and compensation received. (Tr. 7-19.) The Hearing Officer gave Michael Chittick, Park Row's counsel, an opportunity to cross-examine Mr. Acquisto. (Tr. 12-15.) On cross-examination, Mr. Acquisto clarified that some of the hours he worked during his Sunday shifts actually went past 12 a.m. and therefore ran into Monday morning. (Tr. 13.) After hearing from Mr. Klanian, the Hearing Officer continued the matter to a later date to allow Park Row time to obtain necessary copies of Mr. Acquisto's and Mr. Klanian's payroll records. (Tr. 28.)

When the hearing continued on June 10, 2011, Charles Meyers, the owner of Park Row, testified concerning the Agreement with Amtrak. Mr. Meyers stated that the Agreement was

between the Federal Railroad Administration[11] and the Providence and Worcester Realty Co., the two entities which originally built the Garage and the Providence Train Station. (Tr. 15.) He explained that Park Row is bound by the Agreement because it is part of Park Row's lease with Capital Properties, the owner of the land upon which the Garage sits. (Tr. 15.) Mr. Meyers testified that under the terms of the Agreement, Park Row is required to keep the Garage open seven days a week and that Amtrak also controls the Garage's operating hours. (Tr. 18.) Additionally, Mr. Meyers stated that the Agreement limits the rates that Park Row may charge users of the Garage, and those rates are significantly lower than the rates of other garages in the vicinity. (Tr. 19-20.) Mr. Meyers averred that he would not be permitted to raise rates to cover the additional expense of paying his employees time and one-half on Sundays. (Tr. 20.) According to Mr. Meyers, he has never paid employees time and one-half for Sunday work at any parking facility that he has run. (Tr. 16.) Mr. Meyers clarified, however, that it was company policy to pay workers double time or time and one-half for work on holidays and accordingly, Park Row had paid Mr. Acquisto and Mr. Klanian double time or time and one-half for work on Sundays that happened to fall on holidays. (Tr. 23-24.)

In its closing statement at the hearing and in its Memo, submitted to the D.L.T. prior to the hearing, Park Row—through its counsel, Mr. Chittick—argued that it is exempt from the Sunday premium pay requirement under the terms of the New Statute itself and/or under the D.L.T.'s re-filed Old Regulations. (Tr. 24-27.) First, Park Row argued that the definition of "economic necessity" in § 25-3-1(2) provides an exemption to the Sunday premium pay

[11] The Agreement provides that the "[Federal Railroad Administration] shall have the right at any time to designate . . . the National Railroad Passenger Corporation ("Amtrak") to exercise some or all of F.R.A.'s rights and responsibilities under this Parking Agreement." (Agreement, Appellant's Br., Ex. A, ¶ 4.) Park Row's Memo explains that Amtrak is a federally owned and operated intercity passenger railway company. (Memo 3.)

requirement and that Park Row meets this definition because it is required to operate seven days per week. (Memo 3; Tr. 26.) Second, Park Row argued that it is exempt under provisions 1, 5, and 6—the provisions relating to absolute necessity, federal regulation and economic hardship, respectively—of the Old Regulations. (Memo 3-5; Tr. 25-27.) In support of its latter argument, Park Row contended that these regulations remain in effect, despite the fact that the 1998 legislative amendments eliminated any reference to a permit in §§ 25-3-2 and 25-3-3, eliminated the term "absolute necessity" in § 25-3-2 and eliminated the term "economic necessity" in § 25-3-3. (Memo 1-3; Tr. 26.) Park Row further explained that since it began operating the Garage in 1985, it has not paid time and one-half to Sunday workers in reliance on what it alleged was the D.L.T.'s "longstanding position . . . that parking facilities are exempt from the premium pay requirement." (Memo 5; Tr. 27)

Mr. Acquisto, Mr. Klanian and Park Row also presented documentary evidence, including copies of Mr. Acquisto's and Mr. Klanian's pay records, the Agreement, a certified copy of the re-filed Old Regulations, and the session laws showing the 1998 amendments to §§ 25-3-2 and 25-3-3.

On August 5, 2011, the Hearing Officer issued a written decision in which he specifically concluded that the Sunday premium pay requirement applied to Park Row and that the Old Regulations did not provide Park Row with an exemption to that requirement. (Decision 8, 4-7.) In support of this conclusion, the Hearing Officer reasoned that the 1998 statutory amendments impliedly repealed the Old Regulations because the Old Regulations directly and materially conflicted with the amended statute. Id. at 4. He also expressly rejected Park Row's argument that the Legislature's retention of the statutory definition of "economic necessity" in § 25-3-1(2) provided an exemption, reasoning that a statutory definition in and of itself does not create a

substantive right. Id. at 5-6. Accordingly, the Hearing Officer found Park Row liable for back wages to Mr. Klanian and Mr. Acquisto in the amounts of $7234.69 and $4589.50, respectively, and ordered Park Row to pay the D.L.T. a penalty in the amount of $2956.04.[12] Id. at 8.

On September 1, 2011, Park Row timely filed an appeal to this Court for review.

II
Standard of Review

This Court's review on appeal from a decision of an administrative agency is governed by the Rhode Island Administrative Procedures Act, G.L. § 42-35-1, et seq. See Rossi v. Employees' Retirement Sys. of R.I., 895 A.2d 106, 109 (R.I. 2006). Pursuant to § 42-35-15, "[a]ny person, . . . who has exhausted all administrative remedies available to him or her within [an] agency, and who is aggrieved by a final order in a contested case is entitled to judicial review" by this Court. Sec. 42-35-15. This Court "may affirm the decision of the agency or remand the case for further proceedings." Sec. 42-35-15(g). This Court may reverse or modify an agency's decision if:

> "substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error or law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. § 42-35-15(g).

[12] The Statute in effect at the time the Hearing Officer issued his decision required the employer to pay a fee to the D.L.T. of 25% of any payment made to employees. Sec. 28-14-19(b), amended by Pub. L. 2012, ch. 344 § 2.

This Court's review of an agency decision is, in essence, "an extension of the administrative process." R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd., 650 A.2d 479, 484 (R.I. 1994).

In reviewing an agency decision, this Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Sec. 42-35-15(g). This Court will defer to an agency's factual determinations so long as they are supported by legally competent evidence. Town of Burrillville v. R.I. State Labor Relations Bd., 921 A.2d 113, 118 (R.I. 2007). Our Supreme Court has defined legally competent evidence as "some or any evidence supporting the agency's findings." Auto Body Ass'n of R.I. v. State of R.I. Dep't of Bus. Regulation, 996 A.2d 91, 95 (R.I. 2010) (citation omitted). "[I]f 'competent evidence exists in the record, [this] Court is required to uphold the agency's conclusions.'" Auto Body Ass'n, 996 A.2d at 95 (quoting R.I. Pub. Telecomms. Auth., 650 A.2d at 485).

In contrast to its review of findings of facts, this Court reviews agency determinations of law de novo. Arnold v. R.I. Dep't of Labor & Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003). In general, this Court will accord deference to an agency's interpretation of "a statute whose administration and enforcement have been entrusted to the agency." Town of Richmond v. R.I. Dep't of Envtl. Mgmt., 941 A.2d 151, 157 (R.I. 2008) (quoting Murray v. McWalters, 868 A.2d 659, 662 (R.I. 2008)). However, "an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) (quoting Watt v. Alaska, 451 U.S. 259, 273 (1981)); accord R.I. Hosp. v. Sebelius, 670 F. Supp.2d 148, 155 (D. R.I. 2009). When an agency departs from its prior interpretations without providing a reasoned explanation, the reviewing court may find the agency's action to be

arbitrary and capricious. Harrington v. Chao, 280 F.3d 50, 58-59 (1st Cir. 2002) (citations omitted).

III
Analysis

In support of its appeal, Park Row argues, inter alia, that the D.L.T. abandoned its previous interpretation of the 1998 amendments to §§ 25-3-2 and 25-3-3, and consequently, abandoned its previous position on the status of the Old Regulations. Appellant submits two letters ("D.L.T. Letters") in which the D.L.T. appears to take the position that prior to the 1998 amendments, the Old Regulations provided exemptions to the Sunday premium pay requirement for certain employers and that the 1998 statutory amendments did not eliminate these exemptions.

In response, the D.L.T. does not acknowledge that it has changed its interpretation or offer an explanation of any change, but rather asserts that this Court may not consider the Appellant's argument because the D.L.T. letters were not made part of the administrative record.

A
Consideration of the D.L.T. Letters

Although § 42-35-15(f) of the Rhode Island General Laws states that this Court's review of an administrative decision is "confined to the record," this rule is not an absolute bar on this Court's ability to take notice of certain relevant materials. Nor is it a shield behind which an agency may hide its unfavorable documents.

Rhode Island Rule of Evidence 201 allows this Court to take judicial notice of certain readily verifiable adjucative facts. Rhode Island is one of eleven states that have adopted a

verbatim copy of Federal Rule of Evidence 201.[13] See Wright & Graham, Federal Practice and Procedure: Evidence § 5101.2 (2d 2005). It is well established that under F.R.E. 201, courts may take judicial notice of agency orders, decisions, reports, records, rules and regulations issued pursuant to the agency's statutory authority. See, e.g., Carter v. Am. Telephone, 365 F.2d 486, 491 (5th Cir. 1996); International Broth. of Teamsters v. Zantrop, 394 F.2d 36, 40 (6th Cir. 1968) (taking judicial notice of decisions and orders of National Mediation Board); Interstate

[13] Rhode Island Rule of Evidence 201, in its entirety, provides:

> "(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.
>
> (b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (c) When Discretionary. A court may take judicial notice, whether requested or not.
>
> (d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> (e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
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> (f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.
>
> (g) Instructing Jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." R.I.R. Evid. 201.

Natural Gas v. So. California Gas Co., 209 F.2d 380, 385 (9th Cir. 1953) (taking judicial notice of administrative reports and records); U.S. v. Rice, 176 F.2d 373, 374 n.3 (3rd Cir. 1949) (taking judicial notice of official memorandum); Fletcher v. Jones, 105 F.2d 58, 61 (D.C. Cir. 1939). Additionally, state courts have often judicially noticed agencies' and officers' "official decisions, acts, orders, reports, and records . . . ." 29 Am. Jur. 2d Evidence § 164 (2012) (citing Echavarria v. Nat'l Grange Mut. Ins. Co., 880 A.2d 882 (Conn. 2005); and others). In particular, one state court has taken judicial notice of agency letters that reflect an official opinion of the agency and that are a matter of public record, notwithstanding a provision of the state's administrative procedures act limiting review to evidence before the agency. See Muller v. Zollar, 642 N.E.2d 860, 862 (Ill. App. Ct. 1994).[14]

The letter contained in Park Row's Exhibit F is a response by D.L.T. official Margaret Riley[15] ("Ms. Riley") to a Non-Payment of Wages Complaint Form filed by United Steelworkers Local 12431. (Appellant's Br., Ex. F.) The D.L.T. is statutorily obligated to investigate and respond to such complaints by § 28-14-19. The other D.L.T. letter, in Park Row's Exhibit E, appears to be a response by Ms. Riley to an attorney's inquiry about the applicability of the Old

[14] In a slightly different context, our Supreme Court, in Hooper v. Goldstein, held that while a reviewing court is "ordinarily confined to the record on appeal," it could, nonetheless, take judicial notice of those rules and regulations which an agency's administrative tribunal could have properly noticed. 104 R.I. 32, 37-38, 241 A.2d 809, 811-812 (1968) (citations omitted). In Hooper, the court took judicial notice of the rules and regulations of the City of Providence Police Department, despite the fact that the record from the Department's hearing board contained no evidence of those regulations. See id. The court reasoned, in part, that an administrative tribunal stands in a special relationship to its own rules. Id. at 37, 241 A.2d at 812. The agency documents at issue in the instant case are letters rather than rules and regulations. Nonetheless, as discussed infra, the D.L.T. stands in a similar special relationship to the letters in that the letters were issued by the D.L.T. pursuant to its statutory authority.

[15] According to the D.L.T. letters, Margaret Riley was the Chief Examiner for the D.L.T.'s Labor Standards Unit. (Appellant's Br., Exs. E and F.) The Labor Standards Unit is a division of the D.L.T.

Regulations to his client in the wake of the 1998 amendments to § 25-3-3.[16] (Appellant's Br., Ex. E.) Furthermore, pursuant to Rule 16 000 002-4, members of the public, upon written request, may obtain copies of "all rules, final orders, decisions, opinions and all other written statements of policy or interpretations formulated, adopted or used by the Labor Department in the discharge of its functions." See R.I. A.D.C. 16 000 002-4. Accordingly, this Court is satisfied that it can take judicial notice of the D.L.T. letters under R.I. R. Evid. 201.

This Court notes that some courts have allowed an even broader exception to the general rule confining review to the administrative record. The standard of review provided in Rhode Island's Administrative Procedures Act, G.L. § 42-35-15(g) is similar to the standard of review provided in the Federal Administrative Procedures Act, 5 U.S.C. § 706. See Herald Press, Inc. v. Norberg, 122 R.I. 264, 271, 405 A.2d 1171, 1176 n.3 (1979). In applying the Federal Administrative Procedures Act, other courts have allowed supplementation of the administrative record to consider documents that the agency was aware of at the time of decision-making and that are adverse to the agency's position. See Fund for Animals v. Williams, 391 F. Supp.2d 191, 198 (D. D.C. 2005) (citing Public Citizen v. Heckler, 653 F. Supp. 1229, 1237 (D. D.C. 1987) (internal citation omitted)); see also, Harvard Pilgrim Healthcare of New England v. Thompson, 318 F. Supp.2d 1, 9 (D. R.I. 2004) (articulating similar exceptions). Likewise, federal courts have allowed supplementation of the record where there is a failure to explain administrative action. See Sierra Club v. Marsh, 976 F.2d 763, 772 (1st Cir. 1992) (citation omitted); Manhattan Tankers, Inc. v. Dole, 787 F.2d 667, 672 n.6 (D.C. Cir. 1986)). In the instant case, however, this

[16] Section 42-35-8 requires all agencies to provide "by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. Rulings disposing of petitions have the same status as agency orders in contested cases." Sec. 42-35-8. Ms. Riley, however, in the letter contained in Exhibit E does not clearly state if this is the type of submission to which she is responding. See Appellant's Br., Ex. E.

Court finds that supplementation is not necessary since judicial notice of the D.L.T. letters will suffice.

This Court remains mindful of the general policy considerations—namely fairness, efficiency and competence—that counsel against allowing litigants to raise arguments or present evidence in the reviewing court that the agency did not have a chance to consider. See Pilgrim Health, 318 F. Supp.2d at 9 (citing Bradley v. Weinberger, 483 F.2d 410, 415 (1st Cir. 1973)). These policies recognize that an agency is possessed of certain expertise and oblige a reviewing court to take care not to usurp an agency's authority. See id. (citation omitted). However, these concerns are not as salient in the instant case. First, there is no danger here that the D.L.T. would be unfairly surprised by the Appellant's argument since the Appellant specifically argued in its Memo, submitted to the D.L.T. prior to the hearing, that it was relying on the D.L.T.'s longstanding policy of exempting parking garages from the Sunday premium pay requirement. (Memo 5.) Additionally, there is no fear of unwarranted intrusion in the D.L.T.'s internal matters since these letters are available for public inspection, and are not internal agency planning documents. See Public Citizen, 653 F. Supp. at 1237 (rejecting agency's objection that documents were "internal agency memoranda.") Finally, there is little risk of engaging in unauthorized fact finding since this Court is performing a de novo review of a question of law. See Stockton v. Ind. Dep't of Pub. Welfare, 533 N.E.2d 148, 151 (Ind. Ct. App. 1989) (holding that agency letters could be entered into evidence in trial court where court was reviewing question of law de novo); see also, 73A C.J.S. Public Administrative Law and Procedure § 407 (2012) ("Usually, a court trying the issues de novo may receive and consider evidence other than that offered before the administrative body.")

In sum, this Court is satisfied that taking judicial notice of the D.L.T. letters will not undermine the important policy considerations underpinning the general prohibition against considering evidence not contained in the administrative record. Accordingly, this Court will take judicial notice of the D.L.T. letters contained in Appellant's Exhibits E and F.

B
Change in Interpretation

This Court will generally defer to an agency's interpretation of a statute which the agency is charged with administering and enforcing. Town of Richmond, 941 A.2d at 157 (quotation omitted). If a statute is ambiguous and subject to more than one reasonable interpretation, this Court will uphold an agency's construction so long as it is not clearly erroneous or unauthorized. Gallison v. Bristol Sch. Comm., 493 A.2d 164, 166 (R.I. 1985). Moreover, an agency must be given latitude to adapt to changing circumstances and is free to change its position if it believes its previous position was based on a mistaken interpretation. See 2B Sutherland Statutory Construction § 49:4 (7th ed. 2012) (citing Sante Fe Pacific R. Co. v. U.S., 294 F.3d 1336 (Fed. Cir. 2002)). Nevertheless, "[c]ourts value an agency's consistency." Id. Therefore, an agency interpretation that departs from prior interpretations is "entitled to considerably less deference" than a consistently held position. Cardoza-Fonseca, 480 U.S. at 446 n.30 (1987) (quotation omitted). It is a tenet of administrative law that an agency must provide a "reasoned analysis" when it chooses to change its interpretation. See 2B Sutherland Statutory Construction § 49:4 (7th ed. 2012). Our Supreme Court has aptly noted:

> "'[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.'" New England Tele. & Tele. Co. v. Pub. Utilities Comm'n, 446 A.2d

> 1376, 1389 (R.I. 1982) (footnotes omitted) (quoting Greater Boston Television Corp. v. Federal Commcns. Comm'n, 444 F.2d 841, 852 (D.C. Cir. 1970)).

More specifically, a reviewing court "should be satisfied both that the agency was aware it was changing its views and has articulated permissible reasons for that change, and also that the new position is consistent with the law.'" R.I. Hosp., 670 F. Supp.2d at 156 (citing Public Citizen v. Steed, 773 F.2d 93, 99 (D.C. Cir. 1984)). This requirement to provide a reasoned explanation applies to changes in interpretations, rules, applications of rules, policies and practices. See id. at 155-156 (citation omitted). An agency's departure from a prior interpretation or precedent without providing a reasoned analysis may require the reviewing court to vacate the agency's action as arbitrary and capricious. See Harrington, 280 F.3d at 58-59 (citations omitted); 73A C.J.S. Public Administrative Law and Procedure § 419 (2012).

In this case, Park Row presents a 2005 letter allegedly from an attorney, James Bucking, addressed to Ms. Riley, in which Mr. Bucking addresses the status of the Old Regulations in the wake of the 1998 statutory amendments. See Appellant's Br. 12. Referencing the D.L.T.'s definition of "absolutely necessary" in the Old Regulations, R.I. Admin. Code 42-5-4:1 ¶1, Mr. Bucking reasons as follows:

> "This regulation is consistent with our understanding of the intent of the 1998 amendments, which was to remove the work permit requirement for those employers that were subject to that requirement, but not to impose a new requirement on those employers that were not subject to the work permit requirement (i.e., the employers whose operations are absolutely necessary).
>
> We understand that employers whose operations satisfy the definition of 'absolutely necessary' in this regulation have continued, post-1998, not to pay employees time-and-a-half for work performed on Sunday or holidays." (Appellant's Br. 12.)

Appellant submits a letter dated September 9, 2005, authored by Ms. Riley, allegedly in response to Mr. Bucking's above inquiry. (Appellant's Br., Ex. E). In this reply letter, Ms. Riley responds to Mr. Bucking as follows:

> "I have read your letter . . . and find it to be an excellent nomenclature of our R.I.G.L. 25-3.
>
> This office continues to enforce the term 'absolutely necessary' as used in G.L. 25-3-2, [sic] shall mean any work intended to protect or maintain life or property, etc.
>
> As you have described your client as a public utility company this office would find them exempt from paying time and on half for hours worked on a Sunday or Holiday." (Appellant's Br., Ex. E.)

From Ms. Riley's endorsement of Mr. Bucking's analysis, it appears that the D.L.T., prior to 1998, was interpreting the Old Regulations "reasonably necessary" provision as granting an exemption to the Sunday premium pay requirement for public utilities. Moreover, it also appears that after the 1998 amendments, the D.L.T. continued to interpret the Old Regulations as offering such an exemption. Based on the above correspondence, it appears that Ms. Riley, writing in her official capacity, agrees with the position that the 1998 amendments to §§ 25-3-2 and 25-3-3 did not affect the continued validity of the Old Regulations, notwithstanding the fact that the New Statute no longer contains the term "absolute necessity."

The Appellant also presents another letter authored by Ms. Riley, dated April 30, 2007, in which Ms. Riley responds to a Non-Payment of Wages Complaint Form filed by United Steelworkers Local 12431. (Appellant's Br., Ex. F.) In this second letter, Ms. Riley writes:

> "Please be advised according to the Rules and Regulations pursuant to the Administrative Procedures Act, public utilities are exempt from the time and one half premium pay for work performed on Sundays and/or Holidays." (Appellant's Br., Ex. F.)

In this letter, the analysis behind Ms. Riley's conclusion that public utilities are exempt from the Sunday premium pay requirement is less clear than the analysis in the first letter. Nonetheless, from reading this letter together with the 2005 letter, this Court can logically infer that the regulation to which Ms. Riley refers in this second letter is the same as in the first, namely the "reasonably necessary" provision in the Old Regulations. Therefore, these letters show that as recently as April 30, 2007, the D.L.T. was interpreting the Old Regulations' "absolutely necessary" provision as granting certain employers exemptions from the Sunday premium pay requirement.

In the instant case, Mr. Acquisto and Mr. Klanian, like United Steelworkers Local 12431, filed Non-Payment of Wages Complaint Forms seeking time and one-half premium pay for work on Sundays. Additionally, Park Row's argument in the instant case is substantially similar to the position that Mr. Bucking articulates in his letter to Ms. Riley: Park Row argued at the hearing, in its Memo, and in the instant appeal that the 1998 amendments did not repeal the Old Regulations, which Park Row points out, the D.L.T. re-filed in 2002 and 2007. Park Row alleged that it is entitled to an exemption from the Sunday premium pay requirement under the provision of the Old Regulations defining "absolutely necessary" work, the same provision that Mr. Bucking analyzes in his above letter to Ms. Riley.

Yet, here, the D.L.T. appeared to take a contrary position to the one expressed by Ms. Riley in the above letters. The D.L.T. Hearing Officer in Park Row's case expressly found that the Old Regulations were impliedly repealed with the 1998 amendments to § 25-3-1, et seq. because the Old Regulations materially conflict with the New Statute. (Decision 4.) The Hearing Officer reasoned that the Old Regulations and the New Statute conflicted because the Old Regulations "established a scheme for the granting of work permits under the pre-1998 version

of the statute" while "[t]he 1998 amendment abolished work permits." (Decision 5.) The Hearing Officer concluded that since the Old Regulations were implementing a statutory scheme that no longer existed, they were impliedly repealed. Id.

With regard to the provision in the Old Regulations defining "absolutely necessary"—referenced by Mr. Bucking and Ms. Riley—the Hearing Officer specifically found as follows:

> "I find that respondent's reliance on the Old Regulations' definition of 'absolutely necessary' is misplaced because the 1998 amendment deleted reference to the term. Moreover, the Old Regulations merely defined 'absolutely necessary' but the definition in and of itself does not specifically create an exemption from Sunday premium pay requirements." (Decision 7.)

In other words, the Hearing Officer specifically found that the "absolutely necessary" provision of the Old Regulations could not provide Park Row with an exemption to the Sunday premium pay requirement because the 1998 amendments deleted the term "absolute necessity" from § 25-3-2.

Placing the Hearing Officer's decision in this case side by side with the D.L.T. letters that Park Row has submitted, it appears to this Court that the D.L.T. has changed course sometime between April 2007 and August 5, 2011, when the Hearing Officer issued his decision. Put differently, it appears that for at least nine years immediately following the 1998 amendments, the D.L.T. interpreted the 1998 amendments as not affecting the validity of the Old Regulations' "absolutely necessary" provision, and continued to apply that regulation to grant certain employers exemptions from the Sunday premium pay requirement subsequent to the 1998 amendments. Then, the D.L.T. concluded expressly opposite in the instant case. See Watt, 451 U.S. at 273 (agency's interpretation of amended statute entitled to considerably less deference where for first ten years immediately following amendment, agency took opposite position). The D.L.T. has failed to provide an explanation for this change, or even to confirm that it has, in fact,

departed from precedent. Instead, the D.L.T. states that it has "counter-arguments" to Park Row's argument that it changed course but the D.L.T. does not make these counter-arguments to this Court. Accordingly, this Court cannot be satisfied, as it must, that the D.L.T. is aware that it is changing its view or that the D.L.T has articulated permissible reasons for the change. See R.I. Hosp., 670 A.2d at 156 (citation omitted).

C
Remedy

Although a reviewing court may be required to vacate an agency's decision as arbitrary and capricious when the agency changes course without giving a reasoned explanation, a reviewing court should not vacate prematurely. See Harrington, 280 F.3d at 58, 60. The United States Supreme Court has admonished courts reviewing agency decisions:

> "It will not do for a court to be compelled to guess at the theory underlying the agency's action . . . . In other words, [w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong." S.E.C. v. Chenery Corp., 332 U.S. 194, 196-97 (1947) (internal quotation omitted).

More specifically, reversing an agency's decision may be premature in cases where substantial questions are raised but where an agency fails to provide an adequate explanation to resolve those questions. See Harrington, 280 F.3d at 58.

In the instant case, it appears that the D.L.T. changed its interpretation sometime between 2007 and the time of Mr. Acquisto's and Mr. Klanian's hearing, but the D.L.T. has neither confirmed nor denied this. Instead, the D.L.T. indicates that it has counter-arguments but has not made them to this Court. While this Court cannot countenance a casual departure from previous policy, New England Tele., 446 A.2d at 1389, it finds that it would be premature to reverse the D.L.T.'s decision, since this Court cannot decide, based on the record, whether the agency is

repudiating a previous interpretation; whether its explanation for the change is adequate; and consequently, whether its actions are arbitrary and capricious. See R.I. Hosp., 670 F. Supp.2d at 156. To hold otherwise at this time would be engaging in the kind of guesswork that the U.S. Supreme Court has expressly warned courts to avoid. See Chenery Corp., 332 U.S. at 196-197.

The Rhode Island Supreme Court has stated that this Court has broad powers to remand for further proceedings under § 42-35-15(g). Champlin's Realty Assocs. v. Coastal Res. Mgmt. Council, 989 A.2d 427, 448-49 (R.I. 2010). Moreover, a review of relevant case law shows that in situations analogous to the instant case—where an agency appears to have changed course but where substantial questions remain—other courts have remanded to the agency to provide an explanation. See R.I. Hosp., 670 A.2d at 158 (remanding to give agency opportunity to fulfill "reasoned explanation" requirement where agency abandoned prior reimbursement practice); Harrington, 280 F.3d at 61.

In remanding this matter, this Court is ever mindful of unnecessarily protracting litigation and is cognizant of the fact that Mr. Acquisto and Mr. Klanian are awaiting a final resolution of their claims. This Court further acknowledges that it must give due deference to D.L.T's expertise by giving the agency the latitude to change its policies. See Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (citation omitted). Nevertheless, this Court must also give due regard to the value of consistency, particular in a situation like this one where Rhode Island employers may have been relying on the agency's previous interpretation. See 2B Sutherland Statutory Construction § 49:4 (7th ed. Year) (citing Heverly v. C.I.R., 621 F.2d 1227 (3rd Cir. 1980)). Finally, in weighing all of these competing considerations, this Court cannot overlook its duty to ensure that an agency gives a reasoned analysis when it changes a previously held position. Therefore, this Court cannot ignore the fact

that significant questions have been raised about the consistency of the D.L.T.'s interpretation of the 1998 amendments to §§ 25-3-2 and 25-3-3. See Harrington, 280 F.3d at 61 ("A serious question has been raised about the [agency's] adherence to [its] own articulated policies. Any delay and uncertainty occasioned by remand is justified by the need for clarity . . . as to [agency's] present interpretation of [its] statutory obligations.") (citation omitted). Accordingly, this Court remands this matter to the D.L.T. with the specific instructions that the D.L.T. provide a clear explanation of whether or not it is repudiating its previous interpretation of the 1998 amendments to §§ 25-3-2 and 25-3-3, and the validity of the Old Regulations in the wake of those amendments, and if so, to provide a reasoned analysis of the change.

IV
Conclusion

After review of the entire record, this Court remands the matter to the D.L.T. with the instructions that the D.L.T. explain if it is changing its interpretation and provide a reasoned analysis of any change. This Court will retain jurisdiction. Counsel shall confer and submit an appropriate order for entry consistent with this Decision.