STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 12, 2013)

FRITO-LAY, INC.	:	
	:	
V.	:	**C.A. No. PC-2012-1488**
	:	
RHODE ISLAND DEPARTMENT OF LABOR AND TRAINING, LABOR STANDARDS DIVISION, through its Director, CHARLES J. FOGARTY; ROBERT E. HORDERN; JOSEPH F. COSTA; RANDY N. PROULX; STEVEN POTRZEBA; SUZANNE MORRA; MICHAEL MORRA; ALBERT LOBO; and JONATHAN SWICKER	:	

DECISION

TAFT-CARTER, J. In this administrative appeal, Appellant Frito-Lay, Inc. (Frito-Lay) challenges a decision by the Rhode Island Department of Labor and Training (DLT), finding it liable for unpaid overtime to claimants Robert Hordern, Joseph Costa, Randy Proulx, Steven Potrzeba, Suzanne Morra, Michael Morra, Albert Lobo, and Jonathan Swicker (collectively, "Claimants"). Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

A

Background

Minimum wage rates and the payment of overtime compensation are governed by the Rhode Island Minimum Wage Act, §§ 28-12-1 et seq. The regulation of overtime pay is dictated by statute. The law requires employers to pay employees who are not otherwise exempt, a

premium for all hours worked in excess of forty per week. See Sec. 28-12-4.1(a). Effective June 1, 2011, the Legislature amended § 28-12-4.1(a) to read as follows:

> Except as otherwise provided in this chapter, no employer shall employ any employee for a workweek longer than forty (40) hours unless the employee is compensated at a rate of one and one-half (1 1/2) times the regular rate at which he or she is employed for all hours worked in excess of forty (40) hours per week. Provided however, employers that pay any delivery drivers or sales merchandisers an overtime rate of compensation for hours worked in excess of forty (40) hours in any one week shall not calculate such overtime rate of compensation by fluctuating workweek method of overtime payment under 29 C.F.R. § 778.114.

Sec. 28-12-4.1(a).

The Minimum Wage Act provides for exemptions to the overtime pay statute. See Sec. 28-12-4.3(a). One such exemption, contained in § 28-12-4.3(a)(7), exists for those employees whose hours of service are subject to regulation by the Federal Department of Transportation (DOT).[1] That section, known as the motor carrier exemption, provides:

[1] The category of employees whose hours and qualifications are subject to DOT regulation has recently undergone several revisions. Prior to August 10, 2005, the Motor Carrier Act gave the DOT jurisdiction over those persons who provide motor vehicle transport for compensation in interstate commerce and whose operations affect safety, regardless of the weight of the vehicles that they operate. See Cerutti v. Frito Lay, Inc., 777 F. Supp. 2d 920, 927 (W.D. Pa. 2011). The DOT, however, has historically chosen to exercise its authority to make regulations for only those drivers who operate vehicles with a gross vehicle weight of 10,001 pounds or more. See 49 C.F.R. § 390.5.

Like R.I. Gen. Laws § 28-12-4.3(a)(7), the Federal Fair Labor Standards Act (FLSA) provides an overtime pay exemption for "any employee with respect to whom the [DOT] has power to establish qualifications and maximum hours of service pursuant to the provisions of [the Motor Carrier Act]." 29 U.S.C. § 213(b)(1). The United States Supreme Court has stated that the test for when the FLSA's motor carrier exemption applies is the existence of the DOT's power to regulate a particular driver's hours and qualifications, "rather than the precise terms of the requirements actually established by the [DOT] in exercise of that power[.]" Morris v. McComb, 332 U.S. 422, 434 (1947). As a result, drivers of trucks with a gross vehicle weight of less than 10,001 pounds were not subject to the DOT's hours of work regulations but also did not receive the protection of the FLSA's overtime pay requirements. See Marguerite M. Longoria, Technical Amendments to SAFETEA-LU Reaffirm Overtime Protection for Light Weight Truck

> (a) The provisions of []§ 28-12-4.1 . . . do not apply to the following employees:
>
> (7) Any employee, including drivers, driver's helpers, mechanics, and loaders of any motor carrier, including private carriers, with respect to whom the U.S. secretary of transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of 49 U.S.C. § 3102.[2]

Sec. 28-12-4.3(a). The Legislature has not altered, amended, or repealed § 28-12-4.3(a)(7).[3]

Drivers, 83 Fla. Bar. J. 47, 48 (May 2009). Effective August 10, 2005, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) closed this gap. See id. The SAFETEA-LU narrowed the DOT's jurisdiction under the Motor Carrier Act so that the DOT only had statutory authority over those employees driving trucks with a gross vehicle weight of 10,001 pounds or more. See id. As a result, the SAFETEA-LU effectively removed the overtime exemption in the FLSA for drivers of trucks weighing less than 10,001 pounds. See id.

On June 8, 2008, the SAFETEA-LU Technical Corrections Act (SAFETEA-LU TCA) restored the DOT's statutory authority to regulate vehicles weighing less than 10,001 pounds. See id. at 48-49. The SAFETEA-LU TCA, however, specifically provided that those employees operating trucks weighing less than 10,001 pounds would continue to be entitled to overtime compensation under the FLSA. See id. at 49. In general, the FLSA pre-empts state wage and overtime laws to the extent that it is more favorable to an employee than state law. See 48B Am. Jur. 2d Labor and Labor Relations § 3111 (2012).

A federal district court recently held that a state law overtime exemption—nearly identical to Rhode Island's motor carrier exemption—incorporated these changes to the DOT's jurisdiction. See Cerutti, 777 F. Supp. 2d at 936. The court therefore concluded that the weight of the vehicle that a driver operated during the period of time between the enactment of the SAFETEA-LU and the SAFETEA-LU TCA was relevant to determine if the driver was exempt from state law overtime requirements during that time period. Id.

It appears that the Rhode Island Supreme Court has not had occasion to address whether the Rhode Island motor carrier exemption in § 28-12-4.3(a)(7) incorporates the recent changes to the DOT's jurisdiction under the SAFETEA-LU and the SAFETEA-LU TCA. For the purposes of this case, however, resolution of this question is unnecessary. Here, the parties are only concerned with the time period from June 1, 2011 onward. Furthermore, the parties have stipulated that as of that date, all of the Claimants were actually regulated by the DOT and were driving trucks weighing 10,001 pounds or more. See Agreed Statement of Facts, ¶¶ 5, 7.

[2] The relevant provisions of the Motor Carrier Act, formerly codified at 49 U.S.C. § 3102, are currently codified at 49 U.S.C. § 31502.

[3] Section 28-12-4.3(a)(7) has remained substantially unaltered since 1981. See P.L. 1981, ch. 22, § 1.

B

Procedural History

The material facts in this matter are largely undisputed.[4] All of the Claimants work for Frito-Lay as Route Sales Representatives (RSRs). See Agreed Statement of Facts, ¶ 1. As RSRs, the Claimants transport products, manufactured outside of Rhode Island, from warehouses located within Rhode Island, and deliver those products to retail establishments throughout the State. Id. at ¶ 4. It is undisputed that Claimants' maximum hours and qualifications are subject to DOT regulation under 49 U.S.C. § 31502. Id. at ¶ 7. Frito-Lay has paid Claimants using a three-part compensation structure, consisting of a regular base salary, plus sales commissions, plus variable rate overtime compensation for hours worked in excess of forty per week.[5] Id. at ¶ 9; Tr. 19-20. Frito-Lay's variable rate method of calculating overtime is equivalent to the fluctuating workweek (FWW) method, as described in 29 C.F.R. § 778.114.[6] See Tr. at 19; Appellant's Reply Brief at 4.

Between June 8 and August 13, 2011, each of the Claimants filed a claim for non-payment of overtime wages with the DLT, asserting that as of June 1, 2011, the amendment to § 28-12-4.1(a) prohibited Frito-Lay from compensating them using variable rate overtime. See Hearing Officer Decision at 1; Tr. at 19. Pursuant to § 28-14-19, the DLT held a consolidated

[4] Frito-Lay and the Claimants submitted an Agreed Statement of Facts to the DLT Hearing Officer. See Agreed Statement of Facts, Appellant's Compl., Ex. 2.

[5] It is not explicitly stated in the Agreed Statement of Facts or in the transcript from the February 1, 2011 hearing that the Claimants actually worked more than forty (40) hours in any given week. Nonetheless, the Hearing Officer expressly found in his written decision that "there is no question that the [Claimants] worked more than forty (40) hours per week on [sic] various times[.]" (Hearing Officer Decision at 3.) Frito-Lay does not appear to dispute this finding.

[6] At the hearing held on this matter on February 1, 2012, Frito-Lay's counsel generally stated that Frito-Lay's variable rate overtime is the same as FWW overtime. See Tr. at 19. In its Reply Brief, Frito-Lay more specifically states that it follows the FWW method as defined in 29 C.F.R. § 778.114. See Appellant's Reply Brief at 4.

hearing on all eight claims on February 1, 2012, before hearing officer Valentino Lombardi, Esq. (Hearing Officer). (Tr. at 2.) Before the hearing, the Parties submitted an Agreed Statement of Facts, photographs of one of the trucks operated by Claimants, a copy of the job description for RSRs, and memoranda to the Hearing Officer. See id.; Agreed Statement of Facts, Exs. A, B, and C. At the hearing, Michael Chittick, Esq. represented Frito-Lay, and Elizabeth Wiens, Esq. represented the Claimants. See Hearing Officer Decision at 1.

Frito-Lay's Senior Human Resources Director, Robert Sanchez, was the only witness to testify at the hearing. (Tr. at 9.) Mr. Sanchez generally confirmed that each of the Claimants has operated a DOT-regulated truck at all times relevant to this matter. See id. at 13-18. Mr. Sanchez explained that as Human Resources Director, he is responsible for ensuring that Frito-Lay complies with all applicable employment laws. Id. at 10. Mr. Sanchez testified that he is familiar with the types of trucks that the Claimants operate in performance of their duties as RSRs. Id. at 11. He explained that DOT regulations govern trucks with a gross vehicle weight of 10,001 pounds or more. Id. at 12; see supra note 1. Prior to April 17, 2011, Frito-Lay's Rhode Island fleet of trucks included vehicles with a gross vehicle weight of 10,001 pounds or more, as well as vehicles with a gross vehicle weight of less than 10,001 pounds. Id. at 14. Thus, Frito-Lay's Rhode Island fleet had previously contained both DOT-regulated and non-DOT-regulated trucks. Id.; see supra note 1. According to Mr. Sanchez, between February 2011 and April 2011, Frito-Lay had undertaken to convert its entire fleet of trucks to DOT-regulated vehicles. Id. at 13. He testified that Frito-Lay had completed the conversion on April 17, 2011 and therefore, as of that date, one hundred percent of the trucks in Frito-Lay's Rhode Island fleet are subject to DOT regulation. Id. at 14, 17-18.

At the close of testimony, Frito-Lay, through counsel, argued that since the Claimants are subject to DOT regulation, they are exempt under § 28-12-4.3(a)(7) from the overtime requirements of § 28-1-4.1, including the prohibition on use of the FWW method. See Tr. at 20. Thus, according to Frito-Lay, it is under no obligation to pay the Claimants overtime. In the event that it chooses to provide Claimants overtime pay, it is free to calculate that overtime pay using variable rate overtime. See id. It was the Claimants' position that the June 1, 2011 amendment to § 28-12-4.1(a) applied to them, irrespective of their regulation by the DOT.[7] See id. Thus, according to the Claimants, as of June 1, 2011, Frito-Lay is no longer allowed to compensate them using variable rate overtime.[8] Id.

[7] At the hearing, Ms. Wiens sought a continuance to present live testimony on legislative intent from one or more of the legislators who sponsored and drafted the amendment to § 28-12-4.1(a). See Tr. at 4, 21-23. Mr. Chittick objected to the introduction of such testimony. Id. at 4, 23-26. He argued that since the statute was unambiguous, the proposed testimony was unnecessary and inappropriate. Id. at 26. The Hearing Officer stated on the record that his office had received a phone message from one of the legislators but indicated that he had not returned the legislator's call or spoken with the legislator directly. Id. at 6. The Hearing Officer reserved ruling on the admissibility of the proposed testimony. Id. at 29-30.

On February 22, 2012, the Hearing Officer issued a written order denying the Claimants' request for a continuance to present additional testimony. See Order, Appellant's Compl., Ex. 3. Relying on LaPlante v. Honda N. Am., Inc. 697 A.2d 625 (R.I. 1997), the Hearing Officer reasoned that "cannons of statutory construction do not allow for . . . post hoc recollections, whether they be by affidavit or personal testimony, to be admitted into evidence." Id. at 2. He concluded that his review of this matter should be limited to the "language, structure and evident purpose" of the relevant statutes. Id.

[8] During the hearing, Mr. Chittick attempted to clarify the Claimants' position in the following exchange with the Hearing Officer:

> CHITTICK: The . . . Claimants . . . argument is, and [Ms. Wiens] will correct me if I'm wrong is that they . . . should not be paid at the variable rate overtime and that they're entitled to time and a half –
>
> [HEARING OFFICER]: Straight overtime?
>
> CHITTICK: . . . straight time and a half for all hours over 40.

On March 8, 2012, the Hearing Officer issued a written decision finding Frito-Lay liable to Claimants for unpaid overtime.[9] (Hearing Officer Decision at 5-6.) In his decision, the Hearing Officer found that since prior to June 1, 2011, all of the Claimants had operated DOT-regulated trucks. Id. at 2. He stated that the DLT has historically allowed an exemption to § 28-12-4.1(a)'s overtime requirement for those employers whose employees fell within the motor carrier exemption contained in § 28-12-4.3(a)(7). Id. He determined, however, that as of June 1, 2011, Frito-Lay is no longer exempt from the requirements of § 28-12-4.1(a). Id. at 5. In reaching this conclusion, the Hearing Officer noted that it is a principle of statutory construction that "when two statutes are irreconcilably repugnant, the court shall imply a repeal and give effect to the more recently passed statute." Id. He found that §§ 28-12-4.1(a), as amended, and 28-12-4.3(a)(7) are "difficult if not impossible to harmonize[.]" Id. He further concluded that in amending § 28-12-4.1(a) to prohibit use of the FWW, "the General Assembly intended in a more comprehensive and specific manner to allow all delivery drives [sic] . . . to be covered by RIGL

> [HEARING OFFICER]: Hm.
>
> CHITTICK: . . . Frito Lay's argument, obviously, is that . . . all of the Claimants are exempt under . . . the Motor Carrier Act exemption as recognized in Rhode Island.

(Tr. at 20.)
Ms. Wiens did not object to Mr. Chittick's characterization of the Claimants' argument. See id. at 20-21.

[9] Although the Hearing Officer expressly found in his written decision that "none [of the Claimants] were paid overtime[,]" the Agreed Statement of Facts, submitted to the Hearing Officer, clearly states that "Claimants[] are paid . . . variable rate overtime compensation for hours worked over 40 in a week." (Hearing Officer Decision at 3; Agreed Statement of Fact, ¶ 9.)

§ 28-14-4.1(a) [sic] regardless of their regulation by the USDOT." Id. Thus, the Hearing Officer determined that the Claimants are "due overtime wages from [Frito-Lay.]"[10] Id. at 5-6.

Frito-Lay timely filed an appeal to this Court for review on March 3, 2012. By stipulation of all Parties, the Court held oral arguments on this matter on January 25, 2013.[11]

II

Standard of Review

The Rhode Island Administrative Procedures Act, G.L. §§ 42-35-1, et seq. governs this Court's review on appeal from an agency decision. See Rossi v. Employees' Ret. 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:

> [S]ubstantial 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.

[10] The Hearing Officer's decision indicates that the DLT will compute the wages due. (Hearing Officer Decision at 6.) The Hearing Officer assessed Frito-Lay a penalty equal to fifty percent of the amount that is determined to be owing, and ordered Frito-Lay to make payment within thirty days of the DLT completing its computation. Id. The decision does not indicate the method the DLT will use to calculate the exact amount that Frito-Lay owes the Claimants.

[11] At oral arguments, the Parties largely reiterated the arguments made in their respective memoranda.

Sec. 42-35-15(g).

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). On review, 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 of record. Town of Burrillville v. R.I. State Labor Relations Bd., 921 A.2d 113, 118 (R.I. 2007).

In contrast to an agency's findings of facts, an agency's determinations of law "are not binding on the reviewing court." Pawtucket Transfer Operations, L.L.C. v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008). Instead, this Court reviews the agency's interpretation de novo "to determine what the law is and to determine its applicability to the facts." Id. This Court will afford deference to an agency's reasonable construction of an ambiguous statute whose administration and enforcement have been entrusted to the agency. Labor Ready Northeast, Inc. v. McConaghy, 849 A.2d 340, 345-46 (R.I. 2004). No deference is warranted, however, when the statute is not susceptible to multiple reasonable meanings. See Unitrust Corp. v. State Dep't of Labor and Training, 922 A.2d 93, 101 (R.I. 2007). Likewise, an agency's interpretation "will not be considered controlling by reviewing courts if the construction is clearly erroneous or unauthorized." See Flather v. Norberg, 119 R.I. 276, 283 n.3, 377 A.2d 225, 229 (1977).

III

Analysis

Frito-Lay argues that the decision of the Hearing Officer finding it liable to Claimants for unpaid overtime was affected by error of law. In support of its administrative appeal, Frito-Lay

argues that the Hearing Officer violated established principles of statutory construction when he found that the amendment to § 28-12-4.1(a) impliedly repealed the motor carrier exemption contained in § 28-12-4.3(a)(7).

A

Implied Repeal of Exemption for DOT-Regulated Drivers

It is well settled in Rhode Island that there is a presumption against implied repeals. See, e.g., Horn v. S. Union Co., 927 A.2d 292, 296 (R.I. 2007) (quoting Providence Elec. Co. v. Donatelli Bldg. Co., 116 R.I. 340, 344, 356 A.2d 483, 486 (1976)); Berthiaume v. School Comm. of City of Woonsocket, 121 R.I. 243, 248, 397 A.2d 889, 893 (1979). "The presumption against implied repeals is founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation." 1A Sutherland Statutory Construction § 23:10 (7th ed. 2009). "Where there are two acts upon the same subject, effect should be given to both if possible." Posadas v. Nat. City Bank of N.Y., 296 U.S. 497, 503 (1936). "[T]he intention of the legislature to repeal must be clear and manifest; otherwise . . . the later act is to be construed as a continuation of, and not a substitute for, the first act . . . ." Id.

Mere inconsistency is insufficient to find an implied repeal. See Blanchette v. Stone, 591 A.2d 785, 787 (R.I. 1995) ("Although the statutes . . . are inconsistent, they are not irreconcilably repugnant."); see also 1A Sutherland Statutory Construction § 23:10 (7th ed. 2009) ("[I]f the inconsistency between a later act and an earlier one is not fatal to the operation of either, the two may stand together and no repeal is effected."). Two conflicting statutes must be construed "so that, if at all reasonably possible, they both may stand and be operative." Blanchette, 591 A.2d at 787; see also § 43-3-26 (conflicting special and general statutes "shall be construed, if possible, so that effect may be given to both"). "Only when two statutory provisions are

irreconcilably repugnant will a repeal be implied and the last enacted statute preferred." State v. Souza, 456 A.2d 775 (R.I. 1983). "The conflict or repugnancy must be such as to show that the legislature intended the later act to repeal the former." 82 C.J.S. Statutes § 347 (2009); see also Posadas, 296 U.S. at 503 ("intention of the legislature to repeal must be clear and manifest"). Thus, "[w]hen the repealing effect of a statue is doubtful, the statute will be strictly construed to effectuate its consistent operation with previous legislation." Berthiaume, 121 R.I. at 248, 397 A.2d at 893 (citation omitted).

In his written decision, the Hearing Officer correctly stated that principles of statutory construction require "construing . . . apparently inconsistent statutory provisions . . . so that, if . . . possible, both statutes may stand and be operative[.]" (Hearing Officer Decision at 5.) After announcing this principle, however, he reasoned as follows:

> In reviewing the language of both the amendment to RIGL §28-14-4.1(a) [sic] and the exemption contained in RIGL §28-14-4.3(a)(7), [sic] it is difficult if not impossible to harmonize them. Since the rules of construction and interpretation of acts in pari materia apply with singular force to enactments promulgated by the same legislative body in order to strengthen the presumption against implied repeals [citing Such v. State, 950 A.2d 1150, 1156 (R.I. 2008)],[12] it must be concluded that the legislature intended to give by the enactment of the amendment to RIGL §28-14-4.1(a) [sic] all delivery drivers and sales merchandisers the ability to receive an overtime rate of compensation for hours worked in excess of forty (40) in any one week, even those regulated by the USDOT. This fact is made obvious by the statutory reference to 29 C.F.R. § 778.114. Further, as the petitioners argued, when two statutes are irreconcilably repugnant, the court shall imply a repeal and give effect to the more recently passed statute . . . .

[12] In the portion of Such v. State, 950 A.2d 1150 (R.I. 2008) that the Hearing Officer references in his decision, our Supreme Court indicated that the presumption against implied repeals is even stronger when "'the same legislative session enacts two or more acts on the same subject.'" Id. at 1156 (quoting 1A Sutherland Statutory Construction § 23:10 (6th ed. 2002)). In this case, however, the amendment to § 28-12-4.1(a) was passed during the General Assembly's 2010 session while § 28-12-4.3(a)(7) was enacted in 1981 and has remained substantially unaltered since then. See P.L. 2010, ch. 254, § 1; P.L. 1981, ch. 22, § 1.

> Based on the above, it must be concluded that the General Assembly intended in a more comprehensive and specific manner to allow all delivery drives [sic] . . . to be covered by RIGL §28-14-4.1(a) [sic] regardless of their regulation by the USDOT.

Id.

Frito-Lay argues that the failure of the Hearing Officer to reconcile the amendment to § 28-12-4.1(a) with the motor carrier exemption in § 28-12-4.3(a)(7) was clear error. According to Frito-Lay, the two statutes are easily reconciled if the language in § 28-12-4.1(a) prohibiting the use of the FWW method is interpreted to apply exclusively to non-exempt delivery drivers. In other words, the motor carrier exemption remains in full force and effect as to those drivers who are subject to DOT regulation. In addition, the amended provision continues to direct that all non-exempt delivery drivers receive a premium for hours worked in excess of forty per week. The only effective change concerns the calculation of overtime pay for those non-exempt, non-DOT-regulated, delivery drivers. Frito-Lay argues that under such an interpretation of the two provisions, § 28-12-4.3(a)(7) continues to provide it with an exemption from § 28-12-4.1, and therefore, it is allowed to calculate overtime pay based on the FWW. Alternatively, Frito-Lay argues that, even if the two provisions are irreconcilably repugnant, the Hearing Officer was required to give effect to § 28-12-4.3(a)(7) as the more specific of the two statutory provisions.

In response, Claimants argue that Frito-Lay's attempt to reconcile the two provisions renders the amendment superfluous. According to Claimants, the Legislature's clear intent in amending § 28-12-4.1(a) was to do away with the motor carrier exemption. Claimants also disagree with Frito-Lay's assertion that § 28-12-4.3(a)(7) is more specific than the amendment to § 28-12-4.1(a).

In support of the Hearing Officer's decision, the DLT asserts that the two provisions are irreconcilable. It maintains that the Hearing Officer sensibly interpreted the conflicting statutes by giving effect to § 28-12-4.1(a), as the more recently enacted of the two provisions.

1

Reconciliation of § 28-12-4.1(a) and § 28-12-4.3(a)(7)

Although Frito-Lay presented its interpretation of § 28-12-4.1(a) and § 28-12-4.3(a)(7) to the Hearing Officer during the February 1, 2012 hearing, the Hearing Officer did not explicitly address Frito-Lay's proposed reconciliation in his written decision. (Tr. 20-21.) While the Hearing Officer makes the conclusory statement that the two provisions are impossible to harmonize, nowhere in his decision does he explicitly attempt to reconcile them. (Hearing Officer Decision at 5.)

The process of statutory interpretation begins with the plain language of the statute. See Matter of Falstaff Brewing Corp. re: Narragansett Brewery Fire, 637 A.2d 1047, 1050 (R.I. 1994). As Our Supreme Court has repeatedly observed, "'[t]he plain statutory language is the best indicator of [Legislative] intent.'" Mut. Dev. Corp. v. Ward Fisher & Co., LLP, 47 A.3d 319, 328 (R.I. 2012) (quoting DeMarco v. Travelers Ins. Co., 26 A.3d 585, 616 (R.I. 2011)) (internal quotation omitted). "The presumption against implied repeals is founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation." 1A Sutherland Statutory Construction § 23:10 (7th ed. 2009). Thus, "[w]here a newly enacted statute is silent on a previous existing one, the indication is that the legislature did not intend to repeal the existing one." Id.

In this case, the plain language of § 28-12-4.3(a)(7) clearly states that "[t]he provisions of []§ 28-12-4.1 . . . do not apply to . . . any employee . . . of any motor carrier . . . with respect to

whom the [DOT] has power to establish qualifications and maximum hours of service[.]" Sec. 28-12-4.3(a)(7). The Legislature made no alterations to the language of § 28-12-4.3(a) after amending § 28-12-4.1(a).

Likewise, the amendment to § 28-12-4.1(a) is silent with respect to the motor carrier exemption contained in § 28-12-4.3(a)(7). This omission is a clear indication that the Legislature did not intend to repeal that provision. See 1A Sutherland Statutory Construction § 23:10 (7th ed. 2009). The amendment to § 28-12-4.1(a) contains no reference to the motor carrier exemption, the DOT, DOT regulations, the U.S. Secretary of Transportation, or the Motor Carrier Act. See Pizza Hut of Am., Inc. v. Pastore, 519 A.2d 592, 593-94 (R.I. 1987) (statute will not be extended to reach matter not clearly encompassed by language). The plain language of the amendment states that it applies to "delivery drivers" and "sales merchandisers." See Sec. 28-12-4.1(a). The Court finds of great significance the fact that nowhere in chapter 12 do these terms appear, except in § 28-12-4.1(a).[13] Moreover, the amendatory sentence in § 28-12-4.1(a) begins with the words "provided however," which suggests that it operates as a proviso to the general overtime rule contained in the first sentence of that provision, not an abrogation of an exception contained in a separate provision. See 1A Sutherland Statutory Construction § 20:22 (7th ed. 2009) (describing a proviso as "an added clause limiting the operation of a [general] rule" that "is usually a part of the section establishing [the] general rule," and "being introduced by the words 'provided, however[]'").

Thus, based on the plain language of § 28-12-4.3(a)(7), that statute continues to exempt DOT-regulated drivers from the provisions of § 28-12-4.1. In addition, § 28-12-4.1(a) continues to require that non-exempt employees receive a premium for hours worked in excess of forty;

[13] There is no definition for either "delivery driver" or "sales merchandiser" in the definition section of chapter 12 of title 28. See Sec. 28-12-2.

provided however, that after June 1, 2011, employers cannot satisfy the overtime requirements of § 28-12-4.1(a) by using the FWW method to compensate non-exempt delivery drivers. This interpretation allows both provisions to have operative effect and construes the amendment "to effectuate its consistent operation with previous legislation." Berthiaume, 121 R.I. at 248, 397 A.2d at 893.

Despite that, the Hearing Officer reasoned that the Legislature's intent to repeal the motor carrier exemption "is made obvious by the statutory reference to 29 C.F.R. § 778.114" in the amendment to § 28-12-4.1(a). (Hearing Officer Decision at 5.) The nexus between 29 C.F.R. § 778.114 and DOT-regulated drivers is not, however, self-explanatory. As discussed infra, the United States Department of Labor, not the DOT, promulgated 29 C.F.R. § 778.114. See 33 Fed. Reg. 986 (1968). That regulation generally explains how employers can use the FWW method to calculate overtime for salaried employees with fluctuating hours in a manner that complies with the overtime requirements of the Fair Labor Standards Act (FLSA). See 29 C.F.R. § 778.114(a). There is no reference to the DOT or delivery drivers in 29 C.F.R. § 778.114. This is likely so because there is a long-standing exemption from the FLSA's overtime requirements for those drivers subject to DOT regulation. See 29 U.S.C. § 213(b)(1). The fact that Frito-Lay, or other employers, use the method described in 29 C.F.R. § 778.114 to pay their DOT-regulated drivers overtime is not a result of any requirement in that regulation, rather, it appears to be a result of their own choice. Neither the Hearing Officer nor the Claimants have pointed to any other link between 29 C.F.R. § 778.114 and § 28-12-4.3(a)(7). Thus, the textual reference to 29 C.F.R. § 778.114 does not clearly evince a legislative intent to repeal the motor carrier exemption. See Posadas, 296 U.S. at 503 (implied repeal requires "clear and manifest" legislative intent).

Furthermore, the presumption against repeals has "special application to important public statutes of long standing." 1A Sutherland Statutory Construction § 23:10 (7th ed. 2009). As the Hearing Officer noted in his decision, the DLT has historically allowed an overtime exemption for employers of drivers subject to DOT regulation. (Hearing Officer Decision at 3.) Rhode Island is not alone in offering such an exemption: At least fifteen other states offer some sort of exemption from their respective overtime laws for drivers subject to DOT regulation. See 3 Employment Coordinator Compensation § 6:27 (2013); Cerutti, 777 F. Supp. 2d at 926.

Another court has ruled on a similar question as presented before this Court. In Collins v. Overnite Transportation Co., 129 Cal. Rptr. 2d 254 (Cal. Ct. App. 2003), truck drivers brought an action against their employer for unpaid overtime. The employees essentially argued that a state statute, enacted in 1999, abrogated a previous state law that, since the 1970s, had provided an exemption to California's overtime pay requirements for those "employees whose hours of service are regulated by the [DOT.]" 129 Cal. Rptr. at 256. In rejecting the employees' claim, the California Court of Appeal explained that the DOT's regulations "establish a unique regulatory scheme regulating the driving hours of truck drivers, which is designed to balance safety considerations against the demands of the trucking industry." Id. The court stated that the presumption against implied repeals

> applies with particular force in the case of the motor vehicle exemption which is derived from a long-standing statutory scheme, found in both state and federal law, that reflects the peculiar circumstances of the trucking industry. It should not be inferred that the Legislature intended to repeal the exemption without an express declaration of intent.

Id. at 259-60.

Like California, Rhode Island has long recognized an exemption from its overtime requirements for truck drivers subject to DOT regulation: The exemption in § 28-12-4.3(a)(7)

was originally enacted in 1981 and has remained substantially unaltered for the past three decades. See P.L. 1981, ch. 22, § 1. The repeal of this long-standing and widely recognized exemption requires a clearer showing of Legislative intent than the generic reference to "delivery drivers" found in the amendment to § 28-12-4.1(a). See Irons v. Rhode Island Ethics Comm'n, 973 A.2d 1124 (R.I. 2009) (declining to "abridge . . . a long-standing and widely accepted" provision in absence of express and manifest intent).

a

Purpose and Effect of the Amendment to § 28-12-4.1(a)

Notwithstanding the lack of language evidencing an intent to repeal, Claimants insist that the Legislature, in amending § 28-12-4.1(a) to prohibit use of the FWW for delivery drivers, must have been motivated by a desire to repeal the motor carrier exemption. According to Claimants, the pre-amendment version of § 28-12-4.1(a) prohibited employers from using the FWW method to compensate non-exempt employees for work in excess of forty hours per week. In essence, it is argued that requiring non-exempt employees to be compensated for overtime at one and one-half times their regular rate makes the FWW method unlawful in Rhode Island. Thus, Claimants argue that Frito-Lay's reconciliation of the two provisions fails because it renders the amendment to § 28-12-4.1(a) superfluous.

In response, Frito-Lay asserts that not only does the first sentence of § 28-12-4.1(a) allow for use of the FWW method, but, in fact, employers across Rhode Island have historically used the FWW method to compensate non-exempt employees for overtime. There is no evidence in

the record, however, to substantiate this assertion. Neither party cites any law addressing the lawfulness of the FWW in Rhode Island prior to June 1, 2011.[14]

"The necessary effect of a later enactment, construed in light of existing law, ultimately determines the existence of an implied repeal." 1A Sutherland Statutory Construction § 23:10 (7th ed. 2009). Since the presumption against implied repeals requires reconciliation of two provisions in a way that gives effect to both, see Blanchette, 591 A.2d at 787, neither provision should be read in a way that renders it meaningless. See Police and Firefighter's Ret. Assoc. v. Norberg, 476 A.2d 1034, 1036 (R.I. 1984). In particular, this Court "will not ascribe to the General Assembly an intent to enact legislation which is devoid of any purpose, inefficacious or nugatory." Kingsley v. Miller, 120 R.I. 372, 376, 388 A.2d 357, 360 (1978). Thus, an understanding of existing law is of paramount importance in discerning whether new legislation has impliedly repealed a preexisting provision. See 1A Sutherland Statutory Construction § 23:10 (7th ed. 2009).

i

The FWW Method under Rhode Island Law Prior to June 1, 2011

The FWW method of overtime compensation is an alternative to the traditional method of overtime compensation for those employees whose hours vary from week to week but who are compensated with a fixed weekly salary, rather than a per hour wage. See 29 C.F.R. § 778.114(a); Anthony J. Galdieri, The Fluctuating Workweek: How it Works, How it's Treated, How it's Perceived, 8 Pierce L. Rev. 157, 159 (Feb. 2010). The employee's fixed salary represents straight-time compensation for all hours actually worked in a given week, regardless

[14] The DLT, in its memorandum, does not address whether it considered use of the FWW method lawful under the pre-amendment version of § 28-12-4.1(a), or whether Rhode Island employers have historically used the FWW method.

of whether the employee works more or less than forty hours. See 29 C.F.R. § 778.114(a). Thus, to calculate the employee's "regular rate" of pay for a given week, the fixed weekly salary is divided by the actual number of hours worked. See id. To provide overtime compensation for weeks when an employee works more than forty hours, the employee's regular rate is divided in half and multiplied by the number of hours worked in excess of forty. See id. This amount is then added to the employee's fixed salary. See id. For example, an employee who works fifty hours in a given week and whose fixed salary is $600 will receive $660: forty hours at his or her regular rate of $12.00, plus ten hours of overtime at $18.00, one and one-half times his or her regular rate.[15] See 29 C.F.R. § 778.114(b).

The Rhode Island Supreme Court has not addressed the issue of whether the FWW method is consistent with the first sentence of § 28-12-4.1(a). The United States Supreme Court, however, has held that the FWW method satisfies the FLSA's requirement that an employee receive compensation for hours worked in excess of forty "at a rate not less than one and one-half times the regular rate at which he [or she] is employed." Overnight Motor Transp. Co. v.

[15] The Department of Labor provides a more comprehensive illustration of how the FWW method works at 29 C.F.R. § 778.114(b). That regulation explains that if an employee receives a fixed weekly salary of $600, and:

> If during the course of 4 weeks this employee works 40, 37.5, 50, and 48 hours, the regular hourly rate of pay in each of these weeks is $15.00, $16.00, $12.00, and $12.50, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $600; for the second week $600.00; for the third week $660 ($600 plus 10 hours at $6.00 or 40 hours at $12.00 plus 10 hours at $18.00); for the fourth week $650 ($600 plus 8 hours at $6.25, or 40 hours at $12.50 plus 8 hours at $18.75).

29 C.F.R. § 778.114(b).

Missel, 316 U.S. 572 (1942) (superseded by statute on other grounds). In so holding, the Court interpreted the statutory term "regular rate" as "[w]age divided by hours[.]" Id. at 580 n.16. In 1968, the Federal Department of Labor ("DOL") specifically allowed by regulation for use of the FWW method. See 33 Fed.Reg. 986 (1968). Under current DOL regulations, as codified at 29 C.F.R. § 778.114, an employer who wishes to utilize the FWW method must have a clear mutual understanding with his or her employee that the employee's fixed weekly salary represents straight-time compensation for all hours worked, including those in excess of forty. See 29 C.F.R. § 778.114(c). Where this is clearly understood, "[p]ayment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement of the [FLSA] because such hours have already been compensated at the straight time regular rate, under the salary arrangement." 29 C.F.R. § 778.114(a). Thus, federal law has long recognized the FWW method as a lawful method for calculating overtime compensation. See Jeffrey L. Hirsch, Labor and Employment Law in Rhode Island, § 2.06(11) (2012) (discussing the FWW method under federal law); Galdieri, supra, at 167.

State courts have reached differing conclusions concerning whether the FWW method is consistent with their respective wage and hour laws. See Galdieri, supra, at 167-171. For example, the Massachusetts Supreme Court has held that the FWW method is consistent with Massachusetts Gen. Laws c. 151, § 1A, which requires an employee to "receive[] compensation for his employment in excess of forty hours at a rate not less than one and one half times the regular rate at which he is employed." Goodrow v. Lane Bryant, Inc., 732 N.E.2d 289 (Mass. 2000). The Massachusetts statute did not define the term "regular rate of pay." Id. at 296. The regulatory definition of "Regular Hourly Wage Rate," however, stated that "[w]hen an employee is paid on a . . . salary . . . basis other than an hourly rate, the regular hourly rate shall be

determined by dividing the total hours worked during the week into the employee's total earning." Id. at 296. The court concluded that the FWW method is consistent with the statutory requirement that employees receive a one and one-half premium for overtime work. The court reasoned that under the FWW method, "the employee's salary is considered to include 'straight-time' for all hours worked, including the overtime hours. Had this not been the case[,] the regulation would have provided that the regular hourly rate be determined by dividing weekly salary by forty hours."[16] Id. at 297; accord Inniss v. Tandy Corp., 7 P.3d 807, 814 (Wa. 2000) (holding that the FWW method is consistent with the Washington Minimum Wage Act's requirement that employees be compensated for hours worked in excess of forty "at a rate not less than one and one-half times the regular rate at which he is employed[]").

In contrast, the New Mexico Appellate Court found the FWW method of overtime inconsistent with the New Mexico Minimum Wage Act's requirement that an employee be "paid one and one-half times the employee's regular hourly rate of pay for all hours worked in excess of forty hours[.]" N.M. Dep't of Labor v. Echostar Commc'n Corp., 134 P.3d 780 (N.M. Ct. App. 2006). Although there was no statutory or regulatory definition of "regular hourly rate of pay," the court held that an employee's "regular rate" must be calculated by dividing the employee's weekly salary by forty hours, rather than the actual number of hours worked.[17] Id. at

[16] In Goodrow, the Massachusetts Supreme Court went on to hold that to the extent that Massachusetts law did not require employers using the FWW method to have a "clear mutual understanding" with their employees about the employee's compensation structure, Massachusetts law was pre-empted by 29 C.F.R. § 778.114. See 732 N.E.2d at 299.

[17] The New Mexico Appellate Court, in Echostar, based its holding primarily on policy reasons. The court reasoned, in part, that the FWW method results in unfairness to the employee because under that method, an employee's "regular rate" decreases as the number of hours that he or she works increases. See 134 P.3d at 781.

Under certain circumstances, an employee will receive the same total compensation under the FWW method as under a method that uses a denominator of forty hours to calculate the regular rate. See Galdieri, supra, at 172-73. The New Mexico Court correctly states,

781; accord James v. Otis Eng'g Corp., 757 P.2d 50 (Alaska 1988) (holding that "regular rate" for purposes of calculating overtime under state law, must be calculated using a denominator of forty hours).

The Rhode Island Minimum Wage Act does not define "regular rate" as used in § 28-12-4.1(a).[18] See Sec. 28-12-2. Nor has the DLT promulgated a regulatory definition of that term.[19] Nevertheless, the language of § 28-12-4.1(a) requiring employees to receive compensation for hours worked in excess of forty "at a rate of one and one-half (1 1/2) times the regular rate at which he or she is employed," is substantially similar to the FLSA's requirement that non-exempt employees receive compensation for hours worked in excess of forty "at a rate not less than one and one-half times the regular rate at which he is employed." Compare § 28-12-4.1(a) with 29 U.S.C. § 207(a)(2). Where Rhode Island's statutes are substantially similar to federal statutes, this Court may look to interpretation of federal law for guidance. See Furtado v.

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however, that under the FWW method, as the number of hours that a salaried employee works increases, his or her regular rate will decrease and consequently, so will the premium he or she receives for overtime work. See id. at 173-74. Nonetheless, as one commentator points out, it is misleading to conclude on this basis alone that the FWW method somehow exploits or cheats employees: An employer who is prohibited from using the FWW method to compensate an employee whose hours predictably fluctuate above forty per week, but who wishes to pay the employee the same total compensation as under the FWW method, can achieve this result by hiring the employee at a lower hourly rate. See id. at 174-75. For example, if an employee works forty-eight hours one week and seventy-two during the second week, and he or she receives a fixed weekly salary of $500, under the FWW method, the employee will receive a total of $1152.74 for the two weeks. Id. at 173. The employee's regular rate is $10.42 for the first week and $6.94 for the second. Id. If the employer is not allowed to use the FWW method to compensate the same employee but still wishes to pay a total of $1152.74 for the two weeks, he or she would hire the employee at an hourly rate of $8.23. Id. at 174.

[18] The Rhode Island Supreme Court had occasion to interpret § 28-12-4.1(a) in Narragansett Food Services, Inc. v. R.I. Dep't of Labor, 420 A.2d 805 (R.I. 1980). The issue in that case, however, was whether employees who worked overtime on Sundays and Holidays were entitled to a premium for Sunday and Holiday work, in addition to the premium for overtime work required under § 28-12-4.1(a). The court answered this question in the affirmative but did not expressly define "regular rate" as used in § 28-12-4.1(a).

[19] It appears that the only regulation that the DLT has promulgated for chapter 12 of title 28 is not related to that chapter's overtime requirements. See R.I. Admin. Code 42-5-3:1(4).

Laferriere, 839 A.2d 533, 540 (R.I. 2004); State v. Rodriguez, 822 A.2d 894, 908 n.16 (R.I. 2003); see also Urnikis-Negro v. Am. Family Prop. Servs., 616 F.3d 665, 672 n.3 (7th Cir. 2010) (noting that Illinois courts apply the FWW formula to overtime provisions of the Illinois Minimum Wage Law); Goodrow, 289 N.E.2d at 294 (looking to FLSA for guidance in interpreting Massachusetts' overtime requirements). Since federal law has long allowed for use of the FWW method, and since neither our Supreme Court nor our Legislature has declared the FWW method unlawful under Rhode Island law, this Court concludes that the FWW method is consistent with the pre-amendment version of § 28-12-4.1(a).[20] Thus, by reading the amendment to apply only to non-exempt delivery drivers, the Court can reconcile §§ 28-12-4.1(a) and 28-12-4.3(a)(7) so as not to render the amendment meaningless, to give effect to both provisions, and to maintain consistency with previous law.[21] See Berthiaume, 121 R.I. at 248, 397 A.2d at 893.

Since there is no irreconcilable repugnancy manifesting a clear intent to repeal the motor carrier exemption, established principles of statutory construction require that both § 28-12-4.1(a) and § 28-12-4.3(a)(7) be given effect. See Blanchette, 591 A.2d at 787. Thus, the Hearing Officer's conclusion that the amendment to § 28-12-4.1(a) impliedly repealed the motor

[20] In addition to a clear mutual understanding between employer and employee, there are several other requirements that an employer must satisfy under federal law in order to use the FWW method. See Jeffery L. Hirsch, Labor and Employment Law in Rhode Island, § 2:06(11) (2012). For example, the employee's hours must actually fluctuate from week to week, and the weekly salary must be high enough so that the employee's "regular rate" never drops below the minimum wage. See id. For the purposes of reconciling the amendment to § 28-12-4.1(a) with the motor carrier exemption in § 28-12-4.3(a)(7), however, it is sufficient for this Court to determine that the first sentence of § 28-12-4.1(a) allows on its face for use of the FWW. Since this Court finds that Frito-Lay is exempt from the requirements of § 28-12-4.1(a), it is beyond the scope of this decision to address whether Frito-Lay has satisfied the other requirements for use of the FWW.

[21] Since the Court finds that there is no irreconcilable repugnancy between §§ 28-12-4.1 and 28-12-4.3(a)(7), it need not address the parties' arguments as to which statute is more specific. See Sec. 43-3-26 ("[I]f effect cannot be given to both, the special provision shall prevail and shall be construed as an exception to the general provision.") (emphasis added).

carrier exemption in § 28-12-4.3(a)(7) was not a reasonable interpretation of a statute susceptible to more than one reasonable meaning. See Unitrust Corp., 922 A.2d at 101 (no deference warranted when statute is not susceptible to more than one reasonable meaning); see also Flather, 119 R.I. at 281, 377 A.2d at 228 (1977) (overturning agency interpretation that would violate principle of statutory construction). Accordingly, the Court finds that the Hearing Officer's determination that Frito-Lay is subject to the overtime requirements of § 28-12-4.1 was affected by error of law.

IV

Conclusion

After carefully reviewing the record and considering the Parties' arguments, the Court finds that Frito-Lay's substantial rights have been prejudiced because the Hearing Officer's decision was affected by error of law. Accordingly, the Hearing Officer's decision finding Claimants entitled to unpaid overtime is reversed. Counsel shall prepare an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Cover Sheet

TITLE OF CASE:	Frito-Lay, Inc. v. Rhode Island Department of Labor and Training, Labor Standards Division, through its Director, Charles J. Fogarty; Robert E. Hordern; Joseph F. Costa; Randy N. Proulx, Steven Potrzeba; Suzanne Morra; Michael Morra; Albert Lobo; and Jonathan Swicker
CASE NO:	PC 2012-1488
COURT:	Providence Superior Court
DATE DECISION FILED:	April 12, 2013
JUSTICE/MAGISTRATE:	Taft-Carter, J.
ATTORNEYS:	
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