[J-26A-2019 and J-26B-2019] [MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

TAWNY L. CHEVALIER AND ANDREW HILLER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Appellees v.	:	No. 22 WAP 2018 Appeal from the Order of the Superior Court entered December 22, 2017 at No. 1437 WDA 2016, affirming in part and reversing in part the Judgment of the Court of Common Pleas of Allegheny County entered December 29, 2016 at No. GD 13-017194 and remanding
GENERAL NUTRITION CENTERS, INC. AND GENERAL NUTRITION CORPORATION, Appellants	:	ARGUED: April 10, 2019
TAWNY L. CHEVALIER AND ANDREW HILLER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Appellees v.	:	No. 23 WAP 2018 Appeal from the Order of the Superior Court entered December 22, 2017 at No. 92 WDA 2017, affirming in part and reversing in part the Judgment of the Court of Common Pleas of Allegheny County entered December 29, 2016 at No. GD 13-017194 and remanding
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CONCURRING AND DISSENTING OPINION

JUSTICE DONOHUE **DECIDED: NOVEMBER 20, 2019**

Section 4(c) of the Minimum Wage Act of 1968 ("MWA") provides, in relevant part, that "[e]mploye[e]s shall be paid for overtime not less than one and one-half times the employe[e]'s regular rate **as prescribed in regulations promulgated by the secretary**." 43 P.S. § 333.104(c) (emphasis added).[1] The statute is explicit in its direction to the secretary of the Department of Labor and Industry ("the Department") to establish regulations detailing the calculation of overtime compensation for the employees that fall within the ambit of this provision, including salaried employees who work fluctuating schedules, like Appellees here. Despite the decades that have passed since this provision's enactment, the Department has not fulfilled this legislative mandate. While the Department has promulgated a regulation that provides specific guidance for overtime compensation calculations in the case of day and job rate calculations, *see* 34 Pa. Code § 231.43(b), it has not done so for employees that work under other compensation agreements, like Appellees.

Instead of promulgating regulations to provide guidance to industry and labor, the Department promulgated opaque regulations that merely echo the statutory language without providing any additional detail or guidance. *See* 34 Pa. Code §§ 231.41, 231.43(c). It is agreed by all parties that for employees with compensation arrangements like Appellees, the statute and regulation are ambiguous as to how to determine the employee's "regular rate" and whether the regular rate shall be multiplied by 0.5 or 1.5 for purposes of calculating overtime compensation. Majority Op. at 23.

As to the first facet of this inquiry, i.e., the definition of "regular rate," the parties agree with the Superior Court's unappealed holding that Appellees' regular rate should

[1] Act of Jan. 17, 1968, P.L. 11, as amended, 43 P.S. § 333.104.

be based upon the actual hours worked. The Majority notes this agreement. *Id.* I emphasize that in light of this agreement, our disposition should not be read as adopting, as a settled principle, that the "actual hours worked" formula is the proper variable for this equation. As the Majority observes, the question of whether the regular rate should be based on actual hours worked or a forty-hour work week is not before us. *Id.* at 12 n.12.

As to the determination of the appropriate multiplier (0.5 or 1.5), the Majority recognizes that the Department has promulgated scant regulations to guide the calculation of overtime compensation in general, and that the few existing regulations contain no guidance for cases involving salaried employees like Appellees. Majority Op. at 30-32. In light of that void, the Majority appropriately looks to the intent and purpose of the MWA and adopts the use of the 1.5 multiplier because it will always result in greater compensation for the worker than the use of the 0.5 multiplier, and therefore effectuate the General Assembly's intent, as expressed in the Declaration of Policy,[2] to increase employee wages. *Id.* at 36. I agree with this analysis.

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[2] The MWA Declaration of Policy provides as follows:

> Employe[e]s are employed in some occupations in the Commonwealth of Pennsylvania for wages unreasonably low and not fairly commensurate with the value of the services rendered. Such a condition is contrary to public interest and public policy commands its regulation. Employe[e]s employed in such occupations are not as a class on a level of equality in bargaining with their employers in regard to minimum fair wage standards, and "freedom of contract" as applied to their relations with their employers is illusory. Judged by any reasonable standard, wages in such occupations are often found to bear no relation to the fair value of the services rendered. In the absence of effective minimum fair wage rates for employe[e]s, the depression of wages by some employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and

The Majority then attempts to bolster its decision by explaining that its conclusion is "supported by" the Department's intent that the 1.5 multiplier be used in this instance. *Id.* at 36-37. The Majority divines this intent from the Department's failure to promulgate an appropriate regulation. *See id.* at 36 (citing the express adoption of the 0.5 multiplier for other classes of employees as support for its conclusion that the 1.5 multiplier applies here); *id.* at 37 ("[W]e view the Secretary's silence as an intent to reject the 0.5 [m]ultiplier of the FFW Method in favor of the 1.5 [m]ultiplier."). I acknowledge that statutory interpretation requires listening acutely to words not used by the General Assembly as well as to the words chosen. *See Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co.*, 788 A.2d 955, 962 (Pa. 2001). However, I know of no instance, nor has my research revealed any such instance, in which this Court has equated an administrative agency's silence – its failure to act (as directed by the General Assembly) – with the interpretive precept of attention to "words not chosen." Yet, that is what the Majority does here, as it purports to glean the Department's intent from its failure to follow a legislative directive to enact regulations detailing the manner in which overtime compensation is to be calculated. In my view, this inference is unsound jurisprudentially. There is nothing for this Court to glean from the Department's abdication of the responsibility conferred on it by the General Assembly, other than that it did so abdicate. Further, the Majority's effort to divine the

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> threatens the stability of the economy. The evils of unreasonable and unfair wages as they affect some employe[e]s employed in the Commonwealth of Pennsylvania are such as to render imperative the exercise of the police power of the Commonwealth for the protection of industry and of the employe[e]s employed therein and of the public interest of the community at large.

43 P.S. § 333.101.

intent of the Department is all the more puzzling where, as here, the Department has affirmatively refused to assert a position on the ambiguities created by its failure to adopt clarifying regulations. *See Chevalier v. General Nutrition Centers*, 177 A.3d 280, 289 (Pa. Super. 2017) (explaining the Department's refusal to accept the Superior Court's request to explain its views on the proper method for overtime calculation).

Despite my reservations about this aspect of the lead opinion, I concur in the result reached by the Majority. This case is fundamentally one of statutory interpretation, and so our task is to give effect to the intent of the General Assembly. 1 Pa.C.S. § 1921(a). As explained by the Majority, the General Assembly included a policy statement in the MWA, in which it clearly articulates that it intends the Act to benefit workers and to increase their wages. *See* Majority Op. at 29-30 (discussing 43 P.S. § 333.101). The use of the 1.5 multiplier undoubtedly achieves that purpose.