

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appellate Case No.2024-000277

RECEIVED
APR 19 2024
SC Court of Appeals

James Nesbitt, #291377, Appellant

-vs-

South Carolina Dep't of Corr., Respondent,

MOTION AND REQUEST TO REINSTATE THE APPEAL

COMES NOW, above captioned Appellant, James Nesbitt, #291377, pro-se, respectfully moving this Honorable Court to reinstate the appeal in the above captioned. In support of this request Appellant, would respectfully show unto this Court the following:

(1). On April 8, 2024 Appellant received an order from this Court dismissing the appeal for failure to serve the notice of appeal on the ALC within 30-days.

(2). Appellant is informed and believes this Court may have overlooked the critical fact that the ALC issued the Order of dismissal on January 26, 2024 and was received by Appellant via institutional legal mail January 30, 2024.

(3). On February 23, 2024 Appellant placed his Notice of Appeal in the U.S. Mail Box to the South Carolina Court of

Appeals and General Counsel for SCDC.

(4). Immediately thereafter this Court issued an Order stating that there was a \$250.00 two hundred and fifty dollar filing fee. Appellant complied with the filing fee.

(5). After paying the filing fee and being given a case number, the next thing Appellant receives correspondence from this Court advising Appellant he also needs to serve a copy of the notice of appeal on the Administrative Law Court. So Appellant diligently complied and served a copy on the ALC.

(6). Next thing Appellant receives the instant order dismissing the appeal for not complying with a time from.

(7). Appellant filed the instant Notice of Appeal February 23, 2024. See exhibit (A). This should have stopped the clock and tolled any time on the appeal. Appellant is pro-se and unrepresented by counsel in this matter,

(8). In the interest of fundamental fairness the appeal should be reinstated. According to the time frame Appellant's deadline should actually be Friday April 13, 2024.

CONCLUSION

Based on the above, Appellant respectfully move this Court to reinstate the appeal in the instant matter.

Dated April 13, 2024.

Respectfully Submitted,

/s/ James Nesbitt

James Nesbitt

Appellant, pro-se

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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FEB 28 2024

SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Hon. Ralph King Anderson, III., Administrative Law Judge

Administrative Law Court Docket No. 22-ALJ-04-0346-AP

Case No. _____

James Nesbitt, #291377.....Appellant,

v.

South Carolina Department Corrections.....Respondent.

NOTICE OF APPEAL

Inmate James Nesbitt, #291377, appeals the Order Of Dismissal of the Honorable Ralph King Anderson, III., dated January 26, 2024. Appellant received written notice of entry of this Order of Dismissal on January 30, 2024.

February 23, 2024

/s/ James Nesbitt
James, Nesbitt
Appellant, Pro Se
Tyger River Correctional
Institution Unit- 3/111
200 Prison Road
Enoree, S.C. 29335

Other Counsel of Record:

Department of General Counsel
South Carolina Department of Corrections
P.O. Box 21787
Columbia, S.C. 29221

Attorney for Respondent

Received

FEB 23 2024

Tyger River Mailroom

Exhibit (A)

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appellate Case No.2024-000277

James Nesbitt, #291377, Appellant,

-vs-

South Carolina Dep't of Corr., Respondent,

APPELLANT INITIAL BRIEF

COMES NOW, above captioned Appellant, James Nesbitt, #291377, pro-se, respectfully lodging his Initial Brief on Appeal..

This matter comes by way of James Nesbitt, Appellant, pro-se an inmate in the South Carolina Department of Corrections appealing the denial of Appellant prevailing wage grievance that was filed in this matter.

Appellant filed A Step 1 Grievance on September 26, 2022 asserting the Department was paying him less than the prevailing wage. required under Torrence v. SCDC, 433 S.C. 633, 861 S.E.2d 36, 38 (2021). Specifically alleging the Department paid Appellant less than the prevailing wage for the time he worked at TRCI begining March 2, 2017. Appellant asserted he was entitled to approximately \$36,405.01 in back pay.

Before Appellant received a response to his Step 1 Grievance he filed a Request to Staff (RTSM) on September 27, 2022 in which he requested information on SCDC policy and procedures regarding filing a grievance on the prevailing wage issue. The Department answered the next and told Appellant that an informal resolution cannot be accomplished in a situation such as prevailing wage and therefore you do not have to do an informal resolution. Supplemental ROA at 1 and 2.

However, on September 28, 2022 the Warden denied the Step 1 Grievance and stated that "You have been provided with the wages approved by the governing authority of South Carolina. On October 5, 2022, Appellant filed a Step 2 Grievance, in which he again requested to be paid the prevailing wage. Before the Department issued a decision on the Step 2 Grievance, On November 5, 2022, Appellant again submitted a RTSM but this time, specifically mentioned he was not receiving the prevailing wage and requested back pay for his last two pay periods. The Department then denied the Step 2 Grievance on November 7, 2022 stating SCDC paid him the properly hourly rate of pay that conformed to the federal guideline applicable to the project for the labor he voluntarily provided to the prison industries project.

Appellant filed a Notice of Appeal to the Administrative Law Court (ALC) on December 13, 2022. The case was assigned on January 17, 2023. Appellant filed his brief on February 10, 2023. The Department filed the Record on Appeal on March 28, 2023. The case was held in abeyance on May 18, 2023. It was subsequently restored to the docket on September 15, 2023. The Department filed it's brief.

On January 26, 2024 The ALC issued an Order denying relief finding: Based upon Appellant's failure to follow proper order of procedures for submitting a wage claim and the discrepancy between the relief requested in his Step 1 and his request on the RTSM, I find Appellant failed to exhaust his administrative remedies and this matter is not ripe for this Court's review.

Jurisdiction

Section 1-23-610(B) of the South Carolina Code (Supp.2015) sets forth the standard of review when this Court is sitting in review of a decision by the ALC on appeal from an administrative agency. The issues here involve questions of law. Therefore the ALC decision is governed by item (d) of sections 1-23-610(B), which allows this Court to reverse the ALC's decision if it is affected by an error of law.

ISSUES PRESENTED

I.

Did the ALC err in dismissing the appeal for failure to exhaust Administrative Remedies ADM 15.13 prior to filing a grievance under SCDC Policy GA.1.12?

Discussion

Appellant filed his grievance alleging a prevailing wage violation, the statute violated by the Department is §24-3-430(D). In reviewing Appellant's Step 1 and Step 2 grievance ROA at 1-4, nowhere in the Warden's response or the responsible official's answers will this Court see any mentioned or reliance on ADM15.13. Yet, when the Agency filed their brief with the ALC they advance on whole new argument on appeal.

A party may not argue one ground at trial and an alternative ground on appeal. *State v. Prioleav*, 345 S.C. 404, 548 S.E.2d 213 (2011).

SCDC's attempt to characterize SCDC Policy ADM 15.13 as some type of a prerequisite administrative remedy to filing a grievance under SCDC Policy GA.1.12. SCDC's attempt and the ALC's erroneous adoption of such a procedure is arbitrary, capricious and an unwarranted abuse of discretion. Cf. *Kiawah Dev. Partners II v. SC. Dep't of Health & Environ't Control*, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (2014)(we defer to an agency interpretation unless it is arbitrary, capricious or manifestly contrary to the statute.

Our Courts have repeatedly held that an inmate's statutory right to compensation as a prison industries worker gives rise to a state-created liberty interest and the right to a grievance. See e.g. *Torrence v. S.C. Dep't of Corrs.*, 373 S.C. 586, 592-93, 646 S.E.2d 866, 869 (2007)(*Torrence I*); *Adkins v. S.C. Dep't of Corrs.*, 360 S.C. 413, 419, 602 S.E.2d 51, 55 (2004); Wicker, 360 S.C. at 424-25, 602 S.E.2d at 57-58; *SCDC v. Carrette*, 387 S.C. 640, 645, 694 S.E.2d 18, 21 (Ct.App.2010); see also *Ackerman v. SCDC*, 415 S.C. 412, 421, 782 S.E.2d 757, 762 (Ct.App.2016), cert. denied 2017; *Torrence v. SCDC*, 433 S.C. 633, 861 S.E.2d 36 (Ct.App.2021), cert. denied 2022, (*Torrence II*).

Nowhere in any of the controlling decisions listed above is there any reference or mention of ADM 15,13 and that is because ADM 15.13 is not a prerequisite to filing a grievance under GA.1.12 Inmate Grievance Policy. (emphasis supplied and added).

ADM 15. 13, section 12.1 does not apply to prevailing wage grievances filed under GA.1.12. In support of Appellant's position one only need to compare ADM.15.13 to the statutorily mandated prevailing wage statutes and the Court will see ADM 15.13 is contrary to and runs afoul of the prevailing wage statutes!

SCDC Policy ADM-15.13 states:

12.1 Inmates must report any problems in their pay to their institution's inmate pay designee utilizing the Automated Request to Staff Member (ARTSM) within 15 days of the payroll date error. The inmate should maintain a record of the ARTSM reference number. The inmate pay designee will review the case and determine whether any additional pay is owed. Payroll corrections will be limited to the following: If the inmate fails to notify the Agency in writing and within 15 days, no back pay will be given. The pay rate will be adjusted to the proper rate amount for future payrolls in accordance with these procedures. The inmate may receive additional pay owed for the previous two (2) pay periods only.

S.C. Code Ann. §24-3-315 (2007) states:

The Department of Corrections shall ensure that inmates participating in any prison industry program pursuant to the Justice Assistance Act of 1984 is on a voluntary basis. The director must determine prior to using inmate labor in a prison industry project that ... the rates of pay and other conditions of employment are not less than those paid and provided for work of similar nature in the locality in which the work is performed.

S.C. Code Ann. §24-3-315(2007)(emphasis added).

S.C. Code Ann. §24-3-40(A)(Supp.2023)

states:

Unless otherwise provided by law, the employer of a prison authorized to work at paid employment in the community under Section 24-3-20 to 24-3-50 or in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages directly to the Department of Corrections.

S.C. Code Ann. §24-3-430(D)(2007)
states:

"No inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector.

By contrast, Policy 15.13 is a statement of agency policy without the force of law. It has not been promulgated as a regulation in compliance with the rule-making provisions of the Administrative Procedures Act. See generally, S.C. Code Ann. §1-23-10 to -160 (2005 & Supp. 2025).

"interpretations such as those in opinion letters -- like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant Chevron-style deference." See e.g., *Reno v. Koray*, 515 U.S. 50, 61, 115 S.Ct. 2021 (1995) (internal agency guideline, which is not, "subject to the rigors of the Administrative Procedure Act, including public notice and comment," entitled only to "some deference" (internal quotation marks omitted); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-58, 111 S.Ct. 1227 (1991) (interpretive guidelines do not receive Chevron deference); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157, 111 S.Ct. 1171 (1991) (interpretive rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of

the Secretary's delegated lawmaking powers"). See generally, 1 K. Davis & R. Pierce, Administrative Law Treaties §3.5. (3d ed.1994). "Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161 (1944), but only to the extent that those interpretations have the "power to persuade", See Arabian American Oil Co., at 256-58.

Christensen v. Harris Cty., 529 U.S. 576, 587 (2000).

Policy 15.13 lacks persuasive power as an interpretation of the statutory scheme supporting the PIECF program because it clearly violates section 24-3-430(D) and is at odds with this Courts' decisions in Torrence II and Ackerman. Spectfully this Honorable Court should not be persuaded that an unpromulgated Department policy may be interpreted to foreclose prevailing wage claims made pursuant to the Prevailing Wage Statutes and Torrence II. Even if Policy 15.13 had been promulgated as a regulation, it would be ineffective to contradict the statutory mandates of the Prevailing Wage Statutes. An agency cannot by regulation contradict a statute, but only supplement it. Keys v. Barnhart, 347 F.3d 990, 993 (7th Cir.2003). Where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation. Media Gen. Commc'ns Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 150, 694 S.E.2d 525, 531 (2010).

ADM 15.13 has never been a prerequisite administrative remedy before filing a grievance. The Department has departed from the defense they asserted in the Step 1 and Step 2 grievance responses and should be precluded from switching horses in the

middle of the race and the Department should not be allowed to dodge this issue now that they have been exposed.

A party cannot complain of an error which his own conduct has induced, State v. Meggett, 398 S.C. 516, (2012); State v. Sawyer, 409 S.C. 475 (" party cannot complain of an error it invited").

The ALC erred in accepting the Department's position that ADM 15.13 somehow applies to SCDC's grievance policy GA.1.12. ADM 15.13 is not an administrative remedy prerequisite to filing a prevailing wage grievance.

CONCLUSION

Based on the above, Appellant respectfully prays this Court will reverse the ALC's Order and remand with instructions to comply with the mandates of §24-3-430(D) and charge the Department with the task of calculating Appellant's back pay in this matter.

DATE: April 13th, 2024.

Respectfully Submitted,

/s/ James Nesbitt

James Nesbitt

Appellant ,pro-se

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SC Court of Appeals

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-vs-

South Carolina Dep't of Corr., Respondent,

CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served a true and correct copy of the enclosed Motion to Re-Instate the Appeal and Conjunctive Appellant's Brief on Appeal, by enclosing the aforesaid and properly placed in correct addressed envelopes, proper postage affixed and placed in the U.S. Mail this 13 day of Apr., 2024.

Those Served:

South Carolina Court of Appeals
Clerk's Office
Jenny Abbott Kitchings
P.O. Box 11629
Columbia, SC. 29211

Respectfully Submitted,

/s/ James Nesbitt
James Nesbitt
Appellant, pro-se

South Carolina Administrative Law Court
Hon. Ralph King Anderson, III.
Edgar A. Brown Building, suite 224
1205 Pendleton St.
Columbia, SC. 29201

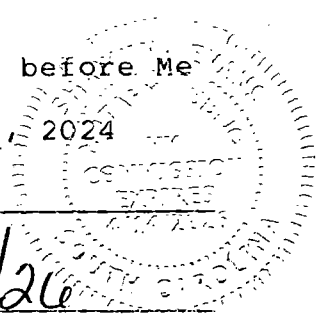
General Counsel
SCDC
P.O. Box 21787
Columbia, SC. 29221-1787

Sworn to and Subscribed before Me

THIS 13th DAY OF April, 2024

[Signature]
NOTARY PUBLIC

MY COMM. EXPIRES 4/14/26



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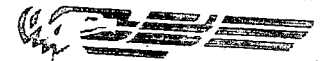
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