

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

Appeal from Administrative Law Court  
Docket No, 23-ALJ-04-0341-AP  
Hon. Robert L. Reibold, Presiding

APR 23 2024

SC Court of Appeals

Appellant Case No. \_\_\_\_\_

Marshall Miller #249557, APPELLANT,

-Vs-

South Carolina Dep't of Corr., RESPONDENT,

\_\_\_\_\_  
**APPELLANT'S INITIAL BRIEF**  
\_\_\_\_\_

Respectfully Submitted,

1st Marshall Miller

Marshall Miller

#249557

TYRCI

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Appellant, pro-se

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ISSUE PRESENTED

DID THE ALC ERR IN DISMISSING THE APPEAL FOR FAILURE  
TO EXHAUST ADMINISTRATIVE REMEDIES

STATEMENT OF THE CASE

COMES NOW, above captioned Appellant Marshall Miller #249557, pro-se, respectfully lodging his Initial Brief on Appeal. Respectfully, this matter is before this Honorable Court pursuant to appeal from the Administrative Law Court ("ALC").

This matter is pending pursuant to appeal of above captioned Appellant, an inmate incarcerated in the South Carolina Department of Corrections ("SCDC or Department"). In the present appeal Appellant asserts the department is and has not been paying Appellant a prevailing wage under §24-3-430(D) and §24-3-315 of the S.C. Code of Laws (2007) and he is seeking to be paid the prevailing wage for his work as a UV Technician in the prison industries program. The Administrative Law Court dismissed the appeal for lack of appellate jurisdiction based upon Appellant's failure to exhaust his administrative remedies.

PROCEDURAL HISTORY

On January 30, 2023, Appellant filed a hand-written Request to Staff Member (RTSM) on Form 19-11. The form states:

according to Torrence v. SCDC case316-000285 Opinion #5829 June 30, 2021, the S.C. Court of Appeals determined that inmates participating in the P.I. programs are to be the prevailing wage as determined the Supreme Court interpretation of policy 24-3-430(D). I am requesting my pay be adjusted to reflect this ruling in Torrence v. SCDC, Case #2016-000285.

On February 2, 2023 Mary Nations, PI Supervisor responded:

I have not received an official ruling on how this matter will be handled. When I receive notification of the procedures that will be followed, I will notify all affected parties. Until I receive that notification, wages will remain the same.

ROA at 5

Appellant filed a Step 1 grievance on February 6, 2023. The grievance is as follows:

Pertaining to Torrence v. SCDC case #2016-, opinion #5829, June 30, 2021. The S.C. Court of Appeals determined that inmates are to be paid the prevailing wages as determined by the Supreme Court interpretation of statute [sic] 24-3-430. My Step 1 Grievance falls within paragraph 13.9 of department policy GA.01.12 which provides exception to the time limit requirement that will be made for grievances concerning policies. The inmate grievance system policy failed to define either incident or policies based upon the plain and ordinary meaning of those words. It is clear that an incident would be a one time specific event and a policy would be a continuing course of action. In my present grievance it is not a one time event in which I was not paid the prevailing wage, therefore the grievance ... is related to policy.

On February 10, 2023, the Warden responded as followed:

I have reviewed your concerns. You allege that pursuant to Torrence v. SCDC you are entitled to prevailing wages and request pay with back pay without reprisal. Inmates voluntarily accept services provided by Prison Industries Private Sector Programs and Prison Industries Service Programs. Pursuant to SCDC policy ADM-15.13 Inmate Pay, it establishes criteria for determining eligibility for inmate pay and ensures proper handling of all matters pertaining thereto. An employee is designated specifically to enter inmate pay data, provided by PI, into the Inmate Pay System. Inmates entering a PI program receives pay at that programs's current rate. Problems in pay must be identified within 15 days of the payroll date error. Record of electronic notification must be retained. Failure to notify the Agency in writing and within 15 days, forfeits back pay. You were provided with wages that were approved by the governing authority of South Carolina at the time and accepted

as such. Any additional information that you require should be addressed to companies outside SCDC. You have failed to prove pertinent staff performed their duties inconsistent with applicable policy and procedure.

On February 15, 2023 Appellant filed his Step 2 grievance.

The grievance is as follows:

Pertaining to Torrence v. SCDC case #2016-000285 opinion #5829 June 30, 2021. The S.C. Court of Appeals determined that inmates are to be paid the prevailing wage as determined by the Supreme Court interpretation of policy 24-3-430. My filing in this grievance falls within paragraph 13.9 of department policy GA 01.12 which provides exception to time limit requirements that will be made for grievances concerning policies. I am asking for prevailing wage as policy 24-3-430 states. Also back pay without reprisal [sic]. This situation has been ruled in Torrence v. SCDC. This program is set up to not negatively effect private sector and pay me the same wage was private sector (prevailing wage) 24-3-430.

On August 25, 2023, the Responsible Official answered:

In your grievance, you are requesting adjustments to your inmate pay pursuant to Torrence v. SCDC (2021). The South Carolina Court of Appeals opinion in Torrence was filed June 30, 2021. You submitted your grievance regarding this matter in February of 2023, approximately one year and seven months after the Court of Appeals issued it's opinion. Accordingly, your grievance is untimely under SCDC Policy ADM 15.13, section 12.1.

It is noteworthy that to date neither the Department or the ALC has shown how Appellant grievance filed under Policy GA.01.12 is untimely under a separate policy ADM 15.13.

## ISSUE PRESENTED

### DID THE ALC ERR IN DISMISSING THE APPEAL FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

In denying and dismissing Appellant's appeal the ALC held:  
Because Appellant failed to exhaust his administrative remedies  
and this failure deprives this Court of jurisdiction. Id.

#### Standard of Review

In an appeal from an ALC decision, the Administrative Procedures Act provides the appropriate standard of review. *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014); also see *S.C. Dep't of Corr. v. Mitchell*, 377 S.C. 256, 258, 659 S.E.2d 233, 234 (Ct.App.2008) ("Section 1-23-610 of the S.C. Code ([Supp.202]1) sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from the administrative agency."); §1-23-610(B) ("[An appellate] court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact."); Id., (stating, however, when reviewing an ALC decision, an appellate court "may reverse or modify the decision if the substantive rights of the petitioner have been prejudice because the finding, conclusion, or decision is (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon an unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

It is necessary to determine just what remedies are required to be utilized in the given circumstance and situation.

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).

Our Courts have made it clear that inmates wishing to challenge their pay rate is to file a grievance. Id. (emphasis added and supplied)..

The Department has a grievance system set up for just the appropriate mechanism, GA.01.12 and on the back of every grievance form the instructions and/or administrative remedies are spelled out:

1. An informal resolution shall be attempted prior to filing of Step 1 by sending an Inmate Request to Staff Member (RTSM) form or kiosk reference number to the appropriate supervisor. A copy of the answered RTSM must be attached to the grievance when the grievance is filed.

5. If you are not satisfied with the Warden's decision, you may appeal to the appropriate responsible official within five (5) days of your receipt of the Warden's decision, by placing your Step 2 appeal form in the Grievance Box at your Institution.

Id.

Appellant filed a request to Staff Member (RTSM) on Form 19-11 as an Informal Resolution. ROA. at 5. After getting the response Appellant timely filed his Step 1 grievance. ROA. at 3. After receiving the denial of the Step 1 Appellant timely filed his Step 2. ROA. at 1-2.

Respondent advanced the erroneous theory that ADM 15.13 is somehow a prerequisite remedy to be exhausted prior to filing a grievance under GA.01.12. Interestingly a complete read of both policies ADM15.13 and GA.01.12 neither makes reference or hint to the other and that is because they do not operate together or in tandem as the Respondent would put it.

The ALC erroneously concluded that ADM15.13 applies to issues related to the correct wage to be paid to an inmate, including prevailing wage. ALC Order at 10.

The Department argued and the ALC adopted the conclusion that Appellant's claim is somehow barred by ADM.15.13 because Appellant failed to raise an issue with the Department regarding his wages within fifteen days of the pay error's occurrence. It is noteworthy that two previous South Carolina Appellate cases have rejected a very similar argument by the Department that back wages can be limited to two weeks immediately preceding the date the grievance is filed, but on a different legal theory. See Torrence II, 433 S.C. at 645; Ackerman, 415 S.C. at 421(holding it was arbitrary and capricious for the Department to attempt to characterize wage grievances as "incident grievance" and dismiss them on timeliness grounds). The Department now seeks to reach the same result under a departmental policy adopted June 1, 2007 (ADM. 15.13). Thus, the policy at issue was adopted prior to the litigation in Torrence and Ackerman and was in effect when those

cases were argued and decided.

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.

The Department erroneously advanced the theory that ADM.15.13 somehow applies to prevailing wage claims because ADM 15.13 cites 24-3-40. ADM 15.13 does not purport to construe or elucidate the three statutes cited above, but instead is an attempt to limit or avoid the clear mandate of the statutes. Code Sections §24-3-315, §24-3-40(A) and 24-3-430(D) (collectively the Prevailing Wage Statutes) repeat in two separate places that inmates shall not be paid less than the prevailing wage for work performed. Furthermore, the prevailing wage statutes place the responsibility for assuring that the prevailing wage is paid on the department's Director prior to the commencement of inmate labor.

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. 2023).

"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 Procedur[e] 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 Skidmor 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 PLECP 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 Departmental 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. Comm'ns Inc. v. S.C. Dep't of Revenue, 388 S.C. 136, 150, 694 S.E.2d 525, 531 (2010).

Appellant clearly timely complied with the administrative grievance system and is therefore entitled to have his issues heard on the merits. The ALC erred in concluding ADM.15.13 applies to prevailing wage claims and further erred in finding Appellant failed to exhaust his administrative remedies and therefore the Court lacked jurisdiction.

CONCLUSION

based on the above, Appellant respectfully asks this Court to remand this case back to the Administrative Law Court with instructions to address the merits of the appeal.

Respectfully Submitted,

/s/ Marshall Miller

Marshall Miller

Appellant, pro-se

DATED April 15, 2024

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Administrative Law Court  
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Hon. Robert L. Reibold

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SC Court of Appeals

C/A No. \_\_\_\_\_

Marshall Miller #249557, APPELLANT,

-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 Appellant's Initial Brief on the persons whose names and addresses appear below, by placing the aforesaid in properly addressed, first-class postage affixed envelopes and placed in the U.S. Mail this 15 day of April, 2024.

Those Served:

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Respectfully Submitted,

15/ Marshall Miller  
Marshall Miller, #249557  
Appellant, pro-se

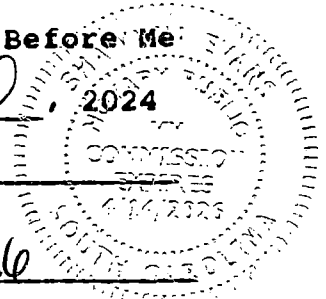
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Sworn to and Subscribed Before Me:

This 15<sup>th</sup> Day of April, 2024

NOTARY PUBLIC

MY COMM. EXPIRES 4/14/26



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