

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Administrative Law Court
Hon. Ralph King Anderson, III, Presiding
Docket No. 23C0543

RECEIVED

SEP 10 2024

SC Court of Appeals

Frank Leach Jr., #187447 -- APPELLANT,

-Vs-

South Carolina Dep't. of Corr. -- RESPONDENT,

Appellate Case No. 2024-001372

APPELLANT'S BRIEF ON APPEAL

Frank Leach, Jr. #187447
Tyger River Corr. Inst.
200 Prison Rd.
Enoree, SC. 29335

Appellant, pro-se

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Statement of the Case

This case is before the Court of Appeals pursuant to the appeal of Frank Leach, Jr. (hereafter "Appellant") an inmate in the South Carolina Department of Corrections (hereafter "SCDC"). This appeal is based on SCDC's denial of a prevailing wage grievance and whether the Administrative Law Judge exercised an unwarranted abuse of discretion by undertaking the litigation when Respondent's abandoned the appeal and did not file a brief in response to Appellant's Initial brief on Appeal.

Standard of Review

In an appeal from an ALC decision, the Administrative Procedures Act provides the appropriate standard of review." See *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). "Section 1-23-610 of the South Carolina Code ([Supp.2021]) 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 an administrative agency). See *S.C. Dep't of Corr v. Mitchell*, 377 S.C. 256, 258, 659 S.E.2d 233, 234 (Ct.App.2008); §1-23-610(B)("[An appellate] court may not substitute it's judgment for the judgment of the [ALC] as to the evidence on questions of fact."); *Id* (stating, however, when reviewing an ALC decision, an appellate court "may reverse the decision is the substantive rights of the petition have been prejudiced 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 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 as an abuse of discretion or clearly unwarranted exercise of discretion."). Id.

Procedural History

On April 18, 2023, Appellant filed a Step 1 grievance asserting the South Carolina Department of Corrections was paying him less than the prevailing wage as required under Torrence v. SCDC, 433 S.C. 633, 636, 861 S.E.2d 36, 38 (Ct.App.2021), reh'g denied (Aug.4, 2021), cert. denied (Aug.3, 2022) and statutory law §24-3-430(2007). Appellant specifically requested he be paid the prevailing wage for the time he worked in the program from July 2018 to the present date. Appellant's Step 1 grievance was denied on April 24, 2024. On April 25, 2024, Appellant filed a Step 2 grievance reasserting the same claims. On October 27, 2023 SCDC denied the Step 2 grievance because the Step 1 grievance was submitted one year and nine months after Torrence and as a result, the grievance was untimely pursuant to SCDC Policy ADM-15.13, Section 12.1.

On November 6, 2023 a timely Notice of Appeal was filed in the Administrative Law Court ("ALC") and the case was assigned on December 1, 2023. The Record on Appeal (hereafter "ROA") was originally due seventy days after the Notice of Assignment was filed, or February 9, 2024. SCALC Rule 59. On February 9, 2024 Respondent filed a Motion for Extension of Time to file the ROA. On February 13, 2024 the Court ordered a forty-five (45) extension was justified and a new deadline for the filing of the ROA was forty-five (45) days from the February 13, 2024 order, or on March 29, 2024. On March 30, 2024, Appellant submitted an Automated request to Staff member (ARTSM) to SCDC addressing his PI gross wage back pay and requesting to settle the matter.

On April 3, 2024 SCDC filed the ROA. On April 25, 2024 Appellant filed his Initial Brief on Appeal. On May 30, 2024 Appellant filed a pro-se Motion to Dismiss asserting SCDC failed to timely file it's brief and thus requested the Court dismiss the appeal his Appellant's favor.

On June 2, 2024, Appellant submitted a second ARTSM to SCDC asserting he was owed over \$100,000 dollars of backpay and was open to a settlement.

On June 13, 2024, the ALC issued an order requiring SCDC to supplement the Record with a copy of any ARTSMs filed by Appellant because whether Appellant utilized this system is necessary for the Court's analysis of SCDC's denial of Appellant's claim under SCDC Policy ADM-15.13, Section 12.1. On June 25, 2024 SCDC supplemented the Record with two ARTSMs, dated March 30, 2024 and June 2, 2024 and also on June 25, 2024 SCDC filed a Motion to Stay further proceedings for 180 days.

Appellant then filed a Motion to Compel and a response to SCDC's Motion to Stay. Appellant requested the Court to "answer" his Motion to Dismiss that was filed May 30, 2024. Respondent never filed a response and nor did SCDC ever file their Initial Brief on Appeal. The ALC concluded that because SCDC did not timely a brief in compliance with SCACL Rule 60, the Court determined it would resolve the case solely based on Appellant's brief and the ROA. The ALC found the appeal should be dismissed for failure to exhaust administrative remedies. ALC order at 3. The ALC correctly held: "There is no dispute that Appellant is entitled to the statutory prevailing wage under section 24-3-430(D) of the South Carolina Code." The ALC concluded the only question is whether Appellant can claim reimbursement for

any difference between what he was paid and the prevailing wage for the entire time he worked in the PI program or whether some of his claim is barred under SCDC policies. See ALC Order at page 3.

A timely Notice of Appeal was filed with this Court and Appellant's Initial Brief on Appeal is as follows:

ISSUE I.

THE ADMINISTRATIVE LAW COURT EXERCISED AN UNWARRANTED ABUSE OF DISCRETION WHEN IT'S UNDERTOOK THE LITIGATION AFTER SCDC ABANDONED THE APPEAL?

FACTS

As noted by the ALC Respondents did not file their Brief on Appeal even after being advised to do so by the ALC numerous times. The deliberate failure to file their Initial Brief on appeal constitutes an implied waiver and abandonment of a known right and the ALC should have resolved the appeal in Appellant's favor.

See Black's Law Dictionary (12th ed. 2024) defines **abuse of discretion** as: "An adjudicator's failure to exercise sound, reasonable, and legal decision-making; specif,, a decision-maker's use of power in a way that denies justice or deprives someone of a substantial right, as when it is based on a misunderstanding of the law. An arbitrary, fanciful, or manifestly unreasonable exercise of authority." Id

A waiver is a presumption that it has been abandoned is considered a waiver. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Eason v. Eason,

384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009). In order for a party to waive a right, the party must have known of the right and known that the right was being abandoned. Id.

The determination of whether one's actions constitutes a waiver is a question of fact. *Laser Supply & Servs. Inc. v. Orchard Park Associs.* 382 S.C. 326, 337, 676 S.E.2d 139, 145 (Ct.App.2009).

In the instant matter it is logically deduced that with Respondent's expertise in the field of legal litigation there can be no doubt Respondent clearly and willfully waived and abandoned their rights and this deliberate neglect to file an appeal brief even after being advised so by the ALC on numerous occasions was no strategic maneuver made in anticipation of litigation, but can only be viewed as a bold; blatant abandonment of their rights and opposition in the matter.

The ALC abused it's discretion when Respondent's abandoned the appeal and the ALC resumed the litigation where Respondents had abandoned it. The question here now begs, "is the ALC now the Respondent in this litigation?" The ALC's order of dismissal appears to be one sided. Appellant against the ALC because Respondents have bailed on the appeal in the early stages of the litigation. In fact almost immediately after the Responsible Official answered the Step 2 grievance and a request for extension of time. The ALC should have dismissed the appeal adversely against Respondent, not take up their role in the litigation. This was an arbitrary and capricious unwarranted abuse of discretion.

When the Respondent's abandoned the appeal the ALC should have dismissed the appeal in Appellant's favor pursuant to SCALC Rule 62 which states in pertinent part:

Upon motion of any party, or on it's own motion, an Administrative Law Judge may dismiss an appeal or resolve the appeal adversely tot he offending party for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided by this section (V).

SCALC Rule 62.

As is noted in the Rule above, the ALJ should have of it's own initiative resolved the adversely to Respondents once they abandoned the appeal and did not file a Brief on appeal... "at all." SCDC just up an left the litigation. Clearly a wilfull abandonment and waiver of a known right and the ALC abused it's discretion in not resolving the appeal in Appellant's favor.

The matter should be remanded with instructions to pay Appellant the prevailing wage as mandated by §24-3-430(D)(2007) or in the alternative this Court should order SCDC to pay Appellant all of the back pay to the present date.

ISSUE II

THE ALC ERRED IN CONCLUDING APPELLANT FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES PRIOR TO FILING HIS PREVAILING WAGE GRIEVANCE.

The ALC erroneously dismissed the appeal adversely to Appellant while erroneously finding that SCDC Policy ADM-15.13, Section 12.1 somehow limits and shields SCDC from their blatant disregard for §24-3-430(D)(2007) Code of Laws.

Before it can be said Appellant failed to exhaust his administrative remedies before filing his prevailing wage grievance it must be determined just what remedies are due.

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 Corr. 373 S.C. 586, 592-93, 646 S.E.2d 866, 869 (2007)(Torrence I); Adkins v. S.C. Dep't of Corr. 360 S.C. 413, 419, 602 S.E.2d 51, 55 (2004); Wicker v. S.C. Dep't of Corr. 360 S.C. at 424-25, 602 S.E.2d at 57-58; S.C. Dep't of Corr. v. Carrette, 387 S.C. 640, 645, 694 S.E.2d 18, 21 (Ct.App.2010); See also Ackerman v. S.C. Dep't of Corr., 415 S.C. 412, 421, 782 S.E.2d 757, 762 (Ct.App.2016), cert. denied (2017); Torrence v. S.C. Dep't of Corr., 433 S.C. 633, 861 S.E.2d 36 (Ct.App.2021), cert. denied (2022), (Torrence II).

As is seen in the above our Supreme Court and this Court of Appeals have held in numerous decisions that inmates wishing to challenge SCDC's failure to pay the prevailing wage the remedy is to file a grievance in the Agency's (SCDC) internal grievance process. Appellant clearly filed a step 1 stating a valid prevailing wage claim. Appellant restated the same position in his step 2, just as direct by our Supreme Court and this Court of Appeals.

ADM-15.13, Section does not apply to prevailing wage grievances filed under SCDC Policy GA-01.12 Inmate Grievance System and nor is ADM-15.13 a prerequisite to filing a grievance under GA-01.12 SCDC's internal grievance policy.

The ALJ's conclusion that ADM-15.13, section 12.1 somehow governs the timeliness of a prevailing wage grievance filed under

SCDC Policy GA-01.12 and allegedly acts as some type of bar to prevent Appellant from successfully raising a prevailing wage claim is arbitrary and capricious.

As previously noted our Supreme Court and this Court has held numerous times that inmates wishing to challenge pays rates (not pay roll error) may do so through SCDC's internal grievance process. Turning to SCDC's Step 1 grievance which comes with instructions on the back and states verbatim:

INSTRUCTIONS FOR COMPLETING STEP 1
GRIEVANCE FORM

1. An informal resolution shall be attempted prior to the filing of Step 1 by sending an Inmate request to Staff Member (RTSM) for 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. *
2. Complete each section in it's entirety writing only in the space provided for inmate use. No additional pages may be permitted.
3. Only one issue is to be addressed on each form.
4. Submit the completed form by placing it in the Grievance Box at your institution within eight (8) working days of the date on the RTSM response; policy grievances can be filed any time. Disciplinary and Classification Review appeals must be submitted within five (5) working days of the hearing/review. Do not write in the space provided for the Warden's response.
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.

After a stringent review of the above cited instructions that is absolutely no mention of SCDC's ADM-15.13 policy at all in the

grievance policy and that is simply because ADM-15.13 does not apply to SCDC's grievance policy GA-01.12.

In the case of Nesbitt v. SCDC 22C0345-AP the Tyger River Grievance Coordinator advised Nesbitt that "an informal resolution cannot be accomplished in a situation such a prevailing wage issue and therefore you do not have to do an informal resolution. See Appellant exhibit (A)(Nesbitt's ARTSM Supplemental ROA at 1) attached hereto. In the second ARTSM of Nesbitt's attached hereto as Appellant's exhibit (B) the Grievance Coordinator went on to inform Nesbitt "at this time there is no informal resolution requirement and no time frame limitations." (emphasis original, added and supplied).

In plain language the Institutional grievance Coordinator said "no informal resolution required on a prevailing wage claim and most importantly "no time frame limitations". Appellant prevailing wage grievance is not untimely.

Now turning to the Step 2 grievance and it's instructions:

INSTRUCTIONS FOR COMPLETING STEP 2
GRIEVANCE FORM

1. Complete form in it's entirety, writing only in the space provided for inmate use.
 2. State your specific reason for further appeal. Do not submit any new issues for review. No additional pages will be permitted.
 3. Submit this completed form by placing in the grievance Box within five (5) days of your receipt of the Warden's decision. Do not write in the space provided for the responsible official.
 4. The decision rendered by the responsible official exhausts the appeal process of the SCDC inmate grievance Procedure.
- Id.

A stringent review of the above cited instructions on SCDC Step 2 grievance sets forth the procedures to be followed in filing a grievance and neither make and mention or reference to ADM-15.13 as a prerequisite to filing a prevailing wage grievance to challenge the pay rates.

The denial of the Step 2 grievance is and was SCDC's last word in the matter and the Responsible Official who answered the Step 2 and the ALC's adoption of SCDC's erroneous conclusion that the Court of Appeals in Torrence v. SCDC (2021) somehow placed a time limit on filing a prevailing wage grievance.

SCDC Policy ADM-15.13 does not purport to construe or elucidate the three statutes quoted below, but instead is an attempt to limit or avoid the clear mandates of the statutes. code Sections §24-3-315; §24-3-40(A); §24-3-430(D)(collectively the Prevailing Wage statutes) repeat in two separate places 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 SCDC's Director [prior to the commencement of inmate labor].

By contrast, Policy ADM-15.13 is a statement of agency policy without the the force of law. (emphasis supplied and added). 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)9internal agency guideline which is not, "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," entitled to only "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)9interpretive 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 opinions 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 Oil Co. at 256-58.

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

The ALJ's interpretation of ADM-15.13 is flawed because ADM-15.13 lacks persuasive power as an interpretation of the statutory scheme supporting the PIECP program because it clearly violates section §24-3-430(D) and is at odds with this Court's decisions in Torrence II and Ackerman. Respectfully the ALJ's findings that an unpromulgated Departmental policy may be somehow interpreted to foreclose prevailing wage claims made pursuant to the Prevailing wage Statutes and Torrence II. Even if ADM-15.13 had somehow been promulgated as a regulation, it would be ineffective to contradict the statutory mandates of the Prevailing Wage Statutes. The ALJ cannot by regulation contradict a statute. SCDC cannot by regulation contradict the statute either, but may only implement 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 and the ALJ's interpretation and this Court should reject both SCDC and the ALJ'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).

CONCLUSION

Based on the above, Appellant's prevailing wage grievance was not untimely and the ALJ exercised an unwarranted abuse of discretion when he undertook the litigation for Respondents even after Respondents abandoned the appeal. The matter should be resolved in Appellant's favor and the matter remanded with instruction to calculate Appellant's hours both regular and over time hours of labor worked and Respondent should be ordered to pay Appellant the prevailing wage and all back pay from July 2018 to the present date without reprisal.

DATED: 9-6, 2024.

Respectfully Submitted,

/s/ Frank Leach, Jr.

Frank Leach, Jr.

Appellant's
Exhibit.

(A)

Inmate Request - General

Today's Date: 1/16/2024 10:15

Name: **NESBITT, JAMES ARTHUR**Booking #: **291377**Permanent #: **291377**Reference #: **22-02821106**Date Requested: **09/27/22 16:48**Request Type: **Grievance**Requested By: **Kiosk**

Request Details: Ms. C rumbly, Do we have to do an informal resolution attempt to do a PI prevailing wage grievance about the Torrence case issues, I was listening when you weretalking to inmates Holloway and Wicker and you said we did not have too. Is it yruwe do not have to do informal resolution attempt???? I went ahead and filed my grievance. Also send me OTR to speak with you, I really need to talk to you, please

Disposition: **Complete**

Officer:

Disposition Date: **09/28/22 08:22****Request Responses**

Date	Author	Note
09/28/22 08:24	c061304	An informal resolution cannot be accomplished in a situation such as the prevailing wage issue, therefore, no you do not have to do an informal resolution. I need to have an idea of what you need to see me about before I will send an OTR.

Appellants
Exhibit (B)

Inmate Request - General

Today's Date: 1/16/2024 10:16

Name: NESBITT, JAMES ARTHUR
Booking #: 291377
Permanent #: 291377

Reference #: 22-02878968
Date Requested: 11/05/22 08:56
Request Type: Grievance
Requested By: Kiosk

Request Details: Ms. Crumbley, Is there a time limit on us filing our paperwork and grievances on SCDC not payinh us our prevailing wages according to state law and the Torrence and Wickers decisions? If there is,what is it?and who do we do our Informal resolution attempts to?,sorry I misspelled paying but that is what I meant above, thank you ,please let me know?

Disposition: Complete
Officer:
Disposition Date: 11/07/22 08:14

Request Responses

Date	Author	Note
11/07/22 08:16	c061304	At this time there is no informal resolution requirement and no timeframe limitations.

STATE OF SOUTH CAROLINA

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-Vs-

South Carolina Dep't. of Corr. -- RESPONDENT,

Appellate Case No. 2024-001372

CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served a true and correct copy of the enclosed Appellant Brief on Appeal on those 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 ___ day of September 2024.

Those Served:

S.C. Court of Appeals
Clerk's Office
P.O. Box 11629
Columbia, SC. 29211

Respectfully Submitted,

/s/ Frank Leach Jr.
Frank Leach, Jr. #187447

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

Appellant, pro-se

Sworn to and Subscribed Before Me

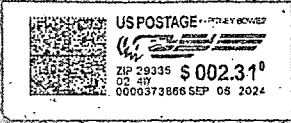
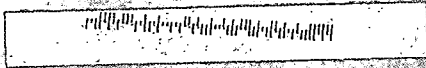
This 10 Day of Sept., 2024

Paul Bernier
NOTARY PUBLIC

MY COMM. EXPIRES Dec. 10, 2024

Leach 187441

B
Corr. Inst.
ison Rd
SC 29335



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