

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
APPEAL FROM THE ADMINISTRATIVE LAW COURT

Robert L. Reibold, Administrative Law Judge
Appellate Case No. 2024-001745

RECEIVED

OCT 28 2024

SC Court of Appeals

Roy White, # 263221, Appellant,

V.

South Carolina Department of Corrections, Respondent.

RECORD ON APPEAL

Roy White #263221
Allendale Corr. Inst.
F-3-A 40
1057 Revolutionary Trail
Fairfax, S.C. 29827
Appellant pro se

October 24, 2024

MARK

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CERTIFICATE OF APPELLANT

The undersigned hereby certifies that the Notice of Appeal Record is now complete and contains all materials requested, order(s) and/or judgment(s) challenged on appeal.

s/ Roy White

Roy White # 263221

Allendale Corr. Inst.

F3-A 40

1057 Revolutionary Trail

Fairfax, S.C. 29827

Pro Se.

October 24, 2024

RECEIVED

OCT 28 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Roy White, #263221

Docket No. 24-ALJ-04-0598-AP

Appellant,

ORDER DISMISSING APPEAL

vs.

South Carolina Department of Corrections,

Respondent.

STATEMENT OF THE CASE

This matter is pending before the South Carolina Administrative Law Court (the ALC or the Court) pursuant to an appeal filed by Roy White (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (the Department).

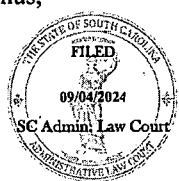
Appellant submitted a Step 1 Grievance, seeking payment of prevailing wages. The Department elevated the matter to a Step 2 Grievance without addressing the merits. On October 25, 2023, the Responsible Official denied the grievance, stating in part that the grievance was untimely under SCDC Policy ADM-15.13. Appellant received the Step 2 decision on October 31, 2024.

On August 28, 2024¹, Appellant filed a Notice of Appeal, restating his demand for payment of prevailing wages. The envelope in which the Notice was filed was date stamped August 26, 2024 by the Department mailroom and hand delivered on August 28, 2024 via inter-agency delivery, as specified on the envelope, to the Court. The case was assigned to the undersigned on August 29, 2024 and the Court has made an initial review of the matter which prompted this Order.

DISCUSSION

SCALC Rule 59 provides that "[t]he notice of appeal from the final decision to be heard by the [ALC] shall be filed with the Court and a copy served on each party, including the agency, within thirty (30) days of receipt of the decision from which the appeal is taken." *Id.* (emphases added); see also *Al-Shabazz v. State*, 338 S.C. 354, 377, 527 S.E.2d 742, 754 (2000) ("The inmate

¹ Although the Notice of Assignment indicates the Notice of Appeal was filed on August 26, 2024, the correct date of filing pursuant to SCALC Rule 53 is August 28, 2024. As described above, the Notice of Appeal envelope was taken to the prison mailroom on August 26th with directions for interagency delivery, *i.e.* – courier / hand delivered. Thus, the Notice of Appeal was filed with the Court upon receipt on August 28, 2024.



must file and serve a notice of appeal upon specified parties *within thirty days* of receipt of written notice of Department's final decision." (emphasis added)). The timely filing of a notice of appeal is a jurisdictional issue for the Court. *See Elam v. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) ("The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."). Additionally, SCALC Rule 62 provides the ALC may dismiss an appeal if the appellant fails to comply with the Court's rules. *See id.* ("Upon motion of any party, or on its own motion, an Administrative Law Judge may dismiss an appeal or resolve the appeal adversely to the 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) . . .").

Appellant was therefore required to file his appeal by November 30, 2023. *See* SCALC Rule 59. Appellant filed his Notice of Appeal on August 2, 2024. Unfortunately, this filing came over 270 days after the applicable deadline. As a result, the Court lacks jurisdiction over this appeal. *See* SCALC Rule 62 and *Elam*.

ORDER

IT IS THEREFORE ORDERED that this appeal is **DISMISSED WITH PREJUDICE.**
AND IT IS SO ORDERED.



The Honorable Robert L. Reibold
Administrative Law Judge

September 4, 2024
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Van Whitehead, hereby certify that I have on this date served this order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



Van Whitehead
Judicial Law Clerk

September 4, 2024
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

(4)

Docket No. 24-ALJ-04-0598-AP

Dear Clerk,

Enclose is A, Rule 59(e) SCRPC Motion. "Will you please return a copy of my Step 2 Grievance that was filed with my Notice of APPEAL, court stamped on 8/26/24, you did not return with copy of Notice of APPEAL." The step 2 Grievance needs to be a part of record for this motion 59(e).

s/ Roy White #203221
Roy White
ACT F3-40-A
1057 Revolutionary Trail
Fairfax, S.C. 29827

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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Roy White, #263221
Appellant,
V.
South Carolina Department
of Corrections,
Respondent.

Docket No. 24-ALJ-~~24-85~~
Hon. Robert L. Reibold
MOTION TO ALTER OR AMEND
ORDER
ALC Rule 68; Rule 59(e), SCRCF

Motions for Reconsideration
are Prohibited.
ALC Rule 65.

The Appellant Roy White, in the above-captioned case moves this Court to:

I. Alter, amend, or reconsider its order dismissing appeal in this case, pursuant to ALC Rule 68 and Rule 59(e) of the SCRCF, filed on September 4, 2024 received by the Allendale Correctional Institution Mailroom on September 9, 2024, (See attach copy of envelope stamped "Received ACI Mailroom September 9, 2024) and signed for and received by the Appellant on Tuesday September 10, 2024 and enter a new Order granting the relief requested by the Appellant.

II. Alter, Amend, or Supplement the findings and conclusion of law contained in its September 4, 2024, final Order.

FINDINGS OF FACT

While the Court has ruled that Appellant case is dismissed for lack of jurisdiction, without reviewing record on appeal (ROA) based on Appellant's failure to exhaust his administrative remedies. The Appellant submits this Motion to ensure that he has "enabled the Court to rule properly after it has considered all relevant facts, LAW and arguments." Staubes V. City of Folly Beach, 529 S.E. 2d 543, 546 (2000) and to preserve issues for appellant review. Home Medo Sys. V. S.C. Dept. of Revenue, 677 S.E. 2d 582, 586 (2009).

Appellant respectfully submits that this Court should amend, alter and reconsider its findings of fact. (6)

The following issues are presented:

Issue 1. The Court erred in dismissing Appellant's appeal for lack of jurisdiction based on Appellant's failure to exhaust his administrative remedies.

Appellant filed a step 1 grievance (Form 10-5) on July 31, 2023, requesting he be paid the prevailing wages for participation in S.C.D.C.'s Prison Industry Program at Ridgeland Correctional (P.I.E.). On August 1, 2023, the Step 1 grievance was denied, and forwarded to step 2 of the appeal process, stating:

"Due to the nature of your appeal, it has been forwarded to the Step 2 appeal process. Please refer to the attached Prevailing Wage Memo provided by S.C.D.C. Office of General Counsel/Inmate Grievance Branch for additional information regarding your appeal." In the Memo, Office of General Counsel states that "Pursuant to S.C.D.C. Policy GA-01.12, "Inmate Grievance System", the S.C.D.C. advocate timely and efficient resolution of complaints and grievances brought to the attention of administrators by inmates. To this end, the Department will develop, administer, and implement an inmate grievance accessible to all inmates. The appeal of your grievance requires further investigation and evaluation. However, due to the volume of incoming prevailing wage grievances and the extenuating nature of your appeal, additional time needed to process your grievance. Consequently, it will be held in abeyance while the authorized personnel complete their investigation and evaluation of your grievance. Upon the conclusion of this investigation and evaluation, your grievance will be processed in accordance with applicable policies and procedures."

Without allowing Appellant to present his arguments and issues on Step 2 grievance (Form 10-5) and the S.C.D.C.'s failure to allow

Appellant to sign Step 2 grievance rendered the grievance system inadequate, null and void as the result of S.C.D.C.'s misconduct, inappropriate handling of grievance process as well as machinations on behalf of S.C.D.C. rendered administrative remedies unavailable. (1)

As step 1, step 2 grievances (Exhibit #1 attached) reveal that S.C.D.C. manipulate the grievance process, operating as a dead end."

"Appellant asserts that he should be exempt from exhausting administrative remedies due to S.C.D.C.'s misconduct, inappropriate handling of the grievance process and remanded back to allow fair procedure.

In Ross v. Blake, 136 S.Ct. 1850 (2016) "the United States Supreme Court set forth three Scenarios where the administrative process is considered unavailable; the Appellant assert that the third scenario applies to this case - (3) the administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation or intimidation, 578 U.S. 632, 643-644.

Appellant asserts that through S.C.D.C.'s machinations and misrepresentation rendered the administrative process unavailable. The forwarding of step 1 grievance to the step 2 appeal level without allowing him to present his argument's on step 2 grievance and adopting his signature [as Appellant's signature is missing where he was required to sign the step 2 grievance as well as put his argument/complaint on the step 2 grievance. Appellant could not exhaust his administrative remedies through no fault of his,

A.) Appellant further assert's S.C.D.C. has violated the state's Vulnerable Adult Law S.C. Code § 43-35-10 (ii) (2015) by the act of financial exploitation and this is a civil and criminal violation.

Issue #2 Appellant asserts that S.C.D.C. has continuously and willfully violated his statutory right's in failing to pay him prevailing wages in violation of §24-3-430(d) in blatant defiance of the South Carolina Legislative mandate that prisoners were to be paid prevailing wages for labor perform in S.C.D.C.'s P.I.E program and as advised in a letter from Deputy Attorney of South Carolina Robert D. Cook advised senator Micheal Fair in a letter dated October 17, 2002 and quotes Memorandum by S.C.D.C.'s General Counsel dated March 23, 2001 provided to Senator Fair that § 24-3-430 was mandatory to be paid prevailing wages. (8)

Appellant should be exempted from exhaustion of administrative remedies for the foregoing reasons.

CONCLUSION

Appellant asserts for the foregoing reasons, that this Court should reconsider it's ORDER and alter or amend its ORDER and Remand back to S.C.D.C. to allow a fair grievance procedure and grant the relief requested. In the alternative, the findings of fact should be supplemented to include the facts set forth herein.

Respectfully Submitted,
s/ Roy White

Roy White # 263221

ACI F3- A 40

1057 Revolutionary Trail
Fairfax, S.C. 29827

Dated this 13th day of September, 2023

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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Roy White, #263221
Appellant,
v.
South Carolina Department
of Corrections,
Respondent.

Docket No. 24-ALJ-04-0598-AP

Hon. Robert L. Reibold

CERTIFICATE OF SERVICE

I, Roy White, declare under the penalty of perjury, that I this 13th day of September, 2024, served a true copy of Appellant's Motion To Alter or Amend ORDER pursuant to Rule 59(e), SCRPC, on Respondent, by placing in an envelope and placing envelope and content's in Inter Department Mail at the Allendale CI Mailroom, properly addressed as follows:

^{cc}/ Charon Hess / Admin. Coord.
S.C. Dept. of Corrections
4444 Broad River Road / P.O. Box 21787
Columbia, S.C. 29221-1787

Dated this 13th day of September, 2024

s/Roy White
Roy white #263221
ACT F-3-A-40
1657 Revolutionary Trail
Fairfax, S.C. 29827

(5)

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Inmate Copy

**SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
OFFICE OF GENERAL COUNSEL | INMATE GRIEVANCE BRANCH
INMATE GRIEVANCE APPEAL**

INMATE: Roy White | SCDC No. 263221
FROM: Office of General Counsel | Inmate Grievance Branch
SUBJECT: Prevailing Wage Appeal | Grievance No. ACI-0232-23
DATE: August 1, 2023

The Office of General Counsel - Inmate Grievance Branch is in receipt of your prevailing wage appeal. Pursuant to SCDC Policy GA-01.12 Inmate Grievance System, the South Carolina Department of Corrections advocates timely and efficient resolution of complaints and grievances brought to the attention of administrators by inmates. To this end, the Department will develop, administer, and implement an inmate grievance system accessible to all inmates.

The appeal of your grievance requires further investigation and evaluation. However, due to the volume of incoming prevailing wage grievances and the extenuating nature of your appeal, additional time is needed to process your grievance. Consequently, it will be held in abeyance while the authorized personnel complete their investigation and evaluation of your grievance. Upon the conclusion of this investigation and evaluation, your grievance will be processed in accordance with applicable policies and procedures.

Cc: SCDC Inmate Grievance Branch

WARDEN'S DECISION AND REASON:

Warden Signature

Date

- I accept the Warden's decision and consider the matter closed.
- I do not accept the Warden's decision and wish to appeal.

Grievant Signature

Date

IGC Signature

Date

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) 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.
2. Complete each section in its entirety writing only in the space provided for inmate use. No additional pages will be permitted.
3. Only one (1) 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 at 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.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

INMATE GRIEVANCE FORM

STEP 2

12

Office Use Only

INMATE NAME: Roy White

SCDC NUMBER: 263221

INSTITUTION: ACI

HOUSING UNIT: _____

WORK ASSIGNMENT: _____

Grievance No. ACI-0232-23

Code: General mylws

Policy _____

Disc. Hear. _____

Class _____

PREA _____

Date Received: _____

IGC Initials: _____

Date Received: 8/4/23

IGA Initials: JGB

RECEIVED

AUG 04 2023

INMATE GRIEVANCE

INMATE'S REASON FOR APPEAL (state specific dissatisfaction):

In accordance with SCDC Policy GA-01.12, "Inmate Grievance System," due to the nature of allegations you have raised in your Grievance, it has been forwarded to the Inmate Grievance Branch Central Office and Office of General Counsel for a response. Inmate's signature has been adopted from SCDC 10-5, Step 1 Inmate Grievance Form.

Grievant Signature _____ Date _____

RESPONSIBLE OFFICIAL'S DECISION AND REASON:

SEE REVERSE SIDE FOR RESPONSIBLE OFFICIAL'S DECISION & REASON

Responsible Official Signature Bartley Vincent Date 10.25.23

The decision rendered by the responsible official exhausts the appeal process of the Inmate Grievance Procedure. I hereby acknowledge receipt of the official's response and understand this is the Agency's final response to this matter.

Roy White 10-31-23

Grievant Signature Date

CBuehan 10.31.2023

IGC Signature Date

(SEE REVERSE SIDE FOR INSTRUCTIONS)

(13)

INSTRUCTIONS FOR COMPLETING STEP 2 GRIEVANCE FORM

1. Complete form in its 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 with your copy of the Step 1 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.

White, Roy 263221, ACI-0232- 23

In your grievance, you are requesting adjustments to your inmate pay pursuant to Torrence v. South Carolina Department of Corrections (2021). The South Carolina Court of Appeals' opinion in Torrence was filed on June 30, 2021. You submitted your Request to Staff Member regarding this matter on July 28, 2023, approximately two years and two months after the Court of Appeals issued its opinion. Accordingly, your grievance is untimely under SCDC Policy ADM-15.13, section 12.1. This policy states as follows:

12. PROBLEMS WITH PAY:

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.

SCDC Policy ADM-15.13 (12.1) (Issue Date June 3, 2014).

Therefore, your grievance is denied.

You may appeal this decision under the South Carolina Administrative Procedures Act to the South Carolina Administrative Law Court. In order to appeal, you must complete the attached Notice of Appeal Form (Form) and submit it as instructed on the Form within 30 days of receipt.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

(14)

Roy White

Appellant,

vs.

South Carolina Department of Corrections,

Respondent.

NOTICE OF APPEAL

DOCKET NO. 24-ALJ-04-0598-AP
GRIEVANCE NO.: ACT-0232-23

Notice is hereby given that Roy White does hereby appeal the final decision of the South Carolina Department of Corrections dated 10/25/2023 and received on 10/31/2023, a copy of which is attached. A **general** statement of the grounds for appeal is (See S.C. Code Ann. § 1-23-380(A)(6)): The Department has violated the State's Vulnerable Adult Law S.C. Code § 43-35-10 (11) 2015, by the act of financial exploitation, in regard to the prevailing wage statute 24-3-430(d). Appellant never was permitted to exhaust administrative remedies in filing and signing a Step 2 Grievance in regard to the deprivations of property right interests encompassed by the Fourteenth Amendment. Appellant was misled to believe that the opinion in "Torrence June 30, 2021" was the final decision pertaining to time limitation, when "August 3, 2022" the Supreme Court issued an order denying certiorari in "Torrence II". The State and United States Constitution guarantee the right to Due Process and Equal Protection of the law to treat similarly situated Prison Inmates alike. S.C. Const. Art. 1, § 22 violated, these civil and criminal violations.

Roy White

Appellant's Name
Attendale Ct

1057 Revolutionary Trail

Mailing Address

Fairfax, S.C. 29827

City, State, Zip Code

Roy White

Signed

August 26, 2024

Dated

CERTIFICATE OF SERVICE

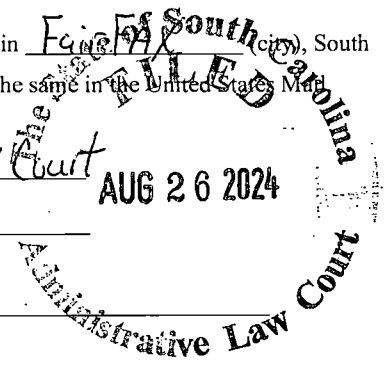
I hereby certify that I, Roy White (your name), on the 26 day of August, 2024, in Fairfax (city), South Carolina, served a copy of the foregoing Notice of Appeal on all parties to this matter by depositing the same in the United States Mail postage paid, or in the mail room of the undersigned's institution and addressed as follows:

Name of person/Agency served: Clerk's office; S.C. Administrative Law Court

Address: 1205 Pendleton Street, Suite 224

City, State, Zip Code: Columbia, South Carolina 29201

AUG 26 2024



Print your name: Roy white
(See reverse side for instructions)

Sign your name: Roy White

COPY

Instructions for filing an appeal of the final agency decision from the South Carolina Department of Corrections:

- 1) You must complete the **Notice of Appeal** on the reverse side of these instructions and mail it to the Administrative Law Court at the following address:

**Clerk's Office
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201**

A copy of the Notice of Appeal must also be forwarded to the Office of General Counsel at the Department of Corrections.

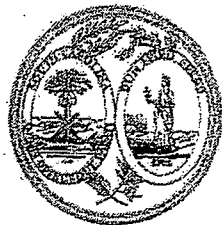
- 2) **In order for your case to be processed by the ALC, a copy of the final decision from the Department of Corrections must be attached to the Notice of Appeal.**

COPIES

15

7357 Julia

~~_____~~



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

October 17, 2002

The Honorable Mike Fair
Chairman, Corrections & Penology Committee
The Senate of South Carolina
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Fair:

You have asked us to outline the applicable federal and state law governing the payment of inmates who perform "certain service work for private sector entities at wage levels below the federal minimum wage." By way of background, you state the following:

[c]urrently, S.C. Code 24-3-430 provides for certain service work to be performed for private sector entities if certain conditions are met. Among those conditions is the requirement that inmates be paid no less than the prevailing wage for work of a similar nature in the private sector. The language mirrors the requirements of the Prison Industries Enhancement Program pursuant to the United States Justice Assistance Act of 1984.

In reviewing the operations of Department of Corrections (SCDC) Prison Industries Division last year, the General Counsel for SCDC realized that the agency was operating outside the authority and requirements of S.C. Code 24-3-430 in that inmates were being paid less than the prevailing wage for work performed for private companies. Several binding contracts were in place, which would require renegotiation in order to meet the Code.

So as to avoid the closure of the programs, the agency sought and was granted temporary authority through Budge Proviso 37.31 to continue the operation at a wage rate less than the prevailing.

Currently, I am examining the propriety of allowing the utilization of inmate labor to perform work for private businesses at a wage rate below the prevailing or even the minimum, as established by federal law for civilian employees. Would you kindly review both state and federal laws and regulations relative to use of inmate labor and fair trade practices, and advise me as to the legality of inmates performing

~~_____~~

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work for private companies at a less than minimum wage, as established by federal laws?

Law / Analysis

Congress authorized the Prison Industry Enhancement (PIE) program through the Justice System Improvement Act of 1979, Pub. L. No. 96-157, § 827. As has been explained in a scholarly article regarding PIE,

[t]he PIE program brings the private sector into prison industry by exempting certified correctional agencies from legislative restrictions on the transportation and sale of prison made goods in interstate commerce provided that prisoners are paid minimum wage and certain other criteria are met The program additionally authorizes deductions of up to eighty percent of gross wages for taxes, room and board, family support, and victim compensation

Misrahi, "Factories With Fences: An Analysis of the Prison Industry Enhancement Certification Program In Historical Perspective," 33 Am.Cr.L.Rev. 411 (Winter 1996). The PIE program "provides limited deregulation of federal prohibitions affecting both the movement of state prison-made goods in interstate commerce and the ability to use prison labor in government contracts in excess of \$10,000" The program does not repeal the longstanding Ashurst-Sumners Act first enacted in 1935, see, 49 Stat. 494 (1935) (now codified at 18 U.S.C. § 1761, Ashurst-Sumners is the federal law which prohibits, with certain exceptions, prison-made goods being transported in interstate commerce). However, the federal law authorizing the PIE program "does negate its [Ashurst-Sumners] application to certain certified prison industries." Id. at 419. The purpose and theory of PIE

... is to remedy the historical concerns of free labor competition and inmate exploitation associated with private sector involvement in prison industry by treating the convict laborer the same as a free worker The program seeks to provide meaningful work for inmates, thereby reducing inmate idleness, increasing job skills, and providing an opportunity for rehabilitation As a result of the success of the program, Congress had gradually expanded the number of allowable certifications from seven to fifty All prison-made products of every state may now, in theory, legally enter the stream of interstate commerce

The PIE program was originally authorized in 1979, revised in 1984 under the Justice Assistance Act, Pub. L. No. 96-157, § 827, and amended again by the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789. Misrahi, Id.



In order to be certified as a PIE program, a prison industry must do all of the following:

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~~XXXXXXXXXX~~

The Honorable Mike Fair
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- pay offenders the prevailing wage in the free market or the minimum wage, whichever is higher;
- provide a financial contribution to victim's compensation or victim's assistance programs;
- consult with organized labor and local businesses that might be affected by the industry prior to start-up;
- provide assurance that inmate labor will not displace workers in the free society;
- provide for worker's compensation;
- provide assurance that offender participation in the program is voluntary and that the workers agree to specific deductions from wages;
- involve the private sector.

Id. The program is intended to provide a strong financial incentive for the State. The goals are to seek to generate goods and services that produce income so that offenders can make a contribution to society, defray their own costs, support their families and aid crime victims. Id.

In 1995, the General Assembly enacted legislation, now codified in § 24-3-430, which authorizes South Carolina's participation in the federal PIE program. As you note, the State legislation closely parallels the federal enabling statute governing PIE. Section 24-3-430 provides as follows:

(A) The Director of the Department of Corrections may establish a program involving the use of inmate labor by a nonprofit organization or in private industry for the manufacturing and processing of goods, wares, or merchandise or the provision of services or another business or commercial enterprise considered by the director to enhance the general welfare of South Carolina. No violent offender shall be afforded the opportunity to perform labor for nonprofit organizations if such labor is outside the confines of a correctional institution. Inmates participating in such labor shall not benefit in any manner contradictory to existing statutes.

(B) The director may enter into contracts necessary to implement this program. The contractual agreements may include rental or lease agreements for state buildings or portions of them on the grounds of an institution or a facility of the Department of Corrections and provide for reasonable access to and egress from the building to establish and operate a facility.

~~XXXXXXXXXX~~



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(C) An inmate may participate in the program established pursuant to this section only on a voluntary basis and only after he has been informed of the conditions of his employment.

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

(E) Inmate participation in the program may not result in the displacement of employed workers in the State of South Carolina and may not impair existing contracts for services.

(F) Nothing contained in this section restores, in whole or in part, the civil rights of an inmate. No inmate compensated for participation in the program is considered an employee of the State.

(G) No inmate who participates in a project designated by the Director of the Bureau of Justice Assistance pursuant to Public Law 90-351 is eligible for unemployment compensation upon termination from the program.

(H) The earnings of an inmate authorized to work at paid employment pursuant to this section must be paid directly to the Department of Corrections and applied as provided under Section 24-3-40. (emphasis added).

It is evident that the touchstone of the PIE program is that inmates participating therein must be paid the prevailing wage. Courts have interpreted the Congressional legislation authorizing the Prison Industries Enhancement program (PIE) as requiring those projects certified thereunder by the Bureau of Justice to insure that inmates are paid either minimum wage or the prevailing local rate for their work. In this regard, for example, the Court in McMaster v. State of Minn., 30 F.3d 976 (8th Cir. 1994) concluded that, pursuant to the Fair Labor Standards Act (FSLA), 29 U.S.C. §§ 201-219, prison inmates are generally not required to be paid minimum wage because they are not "employees" of the state or prison within the meaning of the FSLA. In addition, the Court held that inmates do not possess a private right of action to enforce the Ashurst-Sumners Act. One of the purposes of the FSLA, concluded the Court, is the protection of competition. Thus, Congress has enacted Ashurst-Sumners Act, 18 U.S.C. § 1761-1762 (which prohibits shipping prison-made goods in interstate commerce) to effectuate this important purpose. To that end, noted the Court, only in very limited circumstances are there exceptions to Ashurst-Sumners. One of these exceptions is the PIE program. The Court described how PIE represents an exception to Ashurst-Sumners:

Ashurst-Sumners prevents the shipment of prison-made goods in interstate commerce, thus avoiding the problem of unfair competition based on cheap labor. However, Ashurst-Sumners provides two exceptions to its prohibitions: (1) any goods which are produced for use by federal or state governments; and (2) goods



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~~XXXXXXXXXX~~

The Honorable Mike Fair
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produced as part of a designated pilot project in which inmate workers are paid prevailing wages. § 1761(b)-(c). The government exception was part of the original enactment in 1935; the prevailing wage exception, known as the Justice System Improvement Act, was added in 1979.

The very existence of these exceptions indicates that Congress did not intend for inmates to be covered by the FSLA. If Congress intended for prisoners to be covered by the FSLA, then the entire Ashurst-Sumners Act would be unnecessary; if all inmate workers made minimum wage, there would be no need to protect private businesses from unfair competition.

30 F.3d at 979. Therefore, the Court held, the prevailing wage need not be paid to all inmates. However, as the Court recognized, federal law mandates that the prevailing wage must be paid to inmates who participate in the PIE program.

Likewise, in Harker v. State Use Industries, 990 F.2d 131 (4th Cir. 1993), the Fourth Circuit, ruled that inmates are not covered "employees" under the FSLA and thus are not entitled to minimum wage under that Act. The Court, however, further commented that the Ashurst-Sumners Act provides for the PIE program exception to its requirement that inmate-made goods not be placed in interstate commerce. Noting that the Ashurst-Sumners Act "criminalizes the transport of prison-made goods in interstate competition in ... those situations in which prison labor threatens competition," 990 F.2d at 133, the Fourth Circuit observed that there are certain exceptions to this prohibition because these situations "pose no threat to fair competition." Id. at 134. In addition to prison-made goods for use by federal, state and local governments, the Harker Court described the PIE exception to Ashurst-Sumners this way:

... Ashurst-Sumners exempts the transport of goods produced under the Bureau of Justice Assistance's Private Sector/Prison Industry Enhancement Certification Program. 18 U.S.C. § 1761(c)(1). The Program requires that inmates be paid at least the prevailing local rate for their work, with the FSLA minimum wage as a floor. Id. at § 1761(c)(2); see also 50 Fed. Reg. 12661 (March 29, 1985). This exemption creates a quid pro quo that allows prison-made goods to enter the open market when manufacturers have paid inmates at least the minimum wage to ensure that no unfair competition occurs. Under Harker's interpretation of the FSLA, this Program would be altogether superfluous because the minimum wage already would be paid to inmates, thus eliminating any need for Congress to have ever offered a quid pro quo to manufacturers to avoid unfair competition.

990 F.2d at 134. Thus, federal case law recognizes that Congress intended to provide the PIE program as a clear exception to federal law which provides that prison inmates need not be paid the minimum wage.

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In 1999, the Bureau of Justice issued Guidelines for State participation in the PIE program. Under the heading "Mandatory Program Criteria for PIECP Participation," the Guidelines discuss at length the wage which must be paid inmates as part of the federal PIE criteria. There, it is stated:

(A) Section 1761(c) requires that the PIECP wage amount be set exclusively in relation to the amount of pay received by similarly situated non-inmate workers. In deriving the appropriate PIECP wage 18 U.S.C. 1761(c)(2) does not allow other cost variables to be taken into consideration, such as unique expenses incurred as a result of undertaking production within the prison environment. (emphasis added).

Federal Register: April 7, 1999 (Volume 69, Number 66), pages 17000-17014, 17009-10.

Thus, it is quite evident that the relevant federal statutes, the case law interpreting those statutes, as well as Bureau of Justice Guidelines issued pursuant to those enactments mandate that inmates participating in the PIE program must be paid at least the prevailing wage. As the Bureau of Justice's most recent Guidelines emphasize, "PIECP inmate workers must receive wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work is to be performed." Guidelines, supra at p. 17009. Section 24-3-430 (D) likewise requires that "[n]o inmate participating in the program may earn less than the prevailing wage for work of a similar nature in the private sector." Accordingly, both federal and state law make this wage requirement mandatory.

On its face, the federal statute authorizing the PIE program applies to "goods, wares, or merchandise manufactured, produced or mined by convicts or prisoners" See, 18 U.S.C.A. § 1761 (c). As noted above, this provision constitutes an exception to the Ashurst-Sumners Act. You have advised that Subsection (c) of § 1761 is being interpreted in South Carolina as inapplicable to so-called "service contracts." Pursuant to such interpretation, you note that the requirement that inmates performing work on such "services contracts" need not be paid the prevailing wage. Your concern is that, as a result of this interpretation, the PIE program is being severely undermined by this so-called "loophole."

We agree with your concerns. It is clear that there is no prohibition in the federal PIE program for service industries' participation therein. Indeed, the Bureau of Justice Guidelines note that while service industries "were not a threat to the private sector in 1935 and thus, were not included within the scope of the Ashurst-Sumners prohibition, a number of service industries have elected to comply with the PIECP requirements." Guidelines, supra at 17002.

More significantly, and unrelated to federal PIE requirements, state law makes it clear that there is no such legal "loophole" in South Carolina. Section 24-3-430(A) provides that "[t]he Director of the Department of Corrections may establish a program involving the use of inmate labor by a nonprofit organization or in private industry for the manufacturing and processing of goods, wares or merchandise or the provision of services or another business or commercial enterprise

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considered by the director to enhance the general welfare of South Carolina.” (emphasis added). Moreover, Subsection (D) of § 24-3-430 requires that “[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector.”

Thus, state law requires that “the provision of services” by inmates who otherwise meet the requirements of § 24-3-430 must be paid the prevailing wage. As I understand it, “service” work is work which does not result in the manufacture or production of an item that is sold on the open market by the South Carolina Department of Corrections and does not involve work done for the benefit of other public sector entities.

Of course, as with the interpretation of any statute, the primary purpose is to ascertain the intent of the General Assembly. State v. Martin, 253 S.C. 46, 358 S.E.2d 697 (1987). An enactment should be given a reasonable and practical construction, consistent with the purpose and policy expressed in the statute. Hay v. S.C. Tax Comm., 273 S.C. 269, 255 S.E.2d 837 (1979). Words used therein should be given their plain and ordinary meaning. First South Sav. Bank, Inc. v. Gold Coast Associates, 301 S.C. 158, 390 S.E.2d 486 (Ct. App. 1990).

~~Moreover, the full effect must be given to each part of the statute, and in the absence of ambiguity, words must not be added or taken from the statute. Home Bldg. & Loan Assn. v. City of Sptg., 185 S.C. 313, 194 S.E. 139 (1938). Any interpretation which would render parts of the statute as mere surplusage is to be avoided. Bruner v. Smith, 188 S.C. 75, 198 S.E. 184 (1938).~~

It should be noted that § 24-3-430 was enacted in 1995, while the Ashurst-Sumners Act, which contains the phrase “goods, wares, or merchandise,” was a product of the 1930s. At the time the Legislature enacted § 24-3-430, the service industry in this country had become just as important to the American economy as manufacturing or production. Recognition of that fact is obviously one reason the General Assembly included the broad language “the provision of services” in § 24-3-430. To read that provision out of state law is, in our view, simply incorrect. It is clear that, provided the other requirements of § 24-3-430 are met, the Legislature intended “service contracts” to be so included. Inmates participating in the performance of service contracts for private industry as provided in § 24-3-430 thus must be paid the prevailing wage.

This conclusion is in accord with a Memorandum by the Department of Corrections’ General Counsel (dated March 23, 2001) which you have provided. In that detailed and very helpful Memorandum, the General Counsel advises as follows:

1. The advice that you or your staff may have previously received from my Office concerning prison industry service work was substantially effected by numerous statutory changes in this area in 1993, and by the passage of Section 24-3-430 of the S.C. Code on Laws of July 1, 1995.

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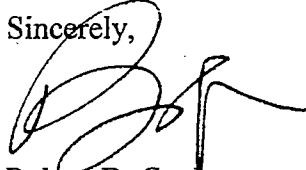
2. SCDC may operate a prison industry service program, but inmates who work in such programs must do so voluntarily, must be paid the prevailing wage for their work, and the work may not result in the displacement of employed workers in the State nor impair existing contracts for services. In other words, if we chose to operate a prison industry service program, we must do so in conformance with Section 24-3-430 of the S.C. Code of Laws.

3. Inmates who work in prison industry service programs must have their wages received by SCDC, with such wages affected and distributed in accordance with Section 24-3-40 of the S.C. Code of Laws. This means that inmate wages for prison industry service work must be handled as other prison industry wages are handled and distributed.

4. Where existing prison industry service programs are in place, SCDC should begin to comply with the above provisions immediately.

I agree that Section 24-3-430 is mandatory and must be followed.

Sincerely,



Robert D. Cook
Assistant Deputy Attorney General

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