

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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SC Court of Appeals

Justin Velchoff, #377443,)
)
 Appellant,)
)
 v.)
)
 South Carolina Department of Corrections,)
)
 Respondent.)
_____)

Docket No. 23-ALJ-04-0822-AP

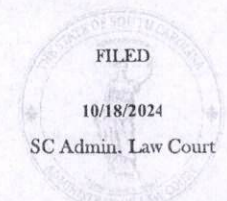
ORDER

This matter is before the South Carolina Administrative Law Court (Court or ALC) on an appeal filed by Justin Velchoff (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (Department). Appellant appeals the Department's final decision denying his claim for the prevailing wage for work performed in the prison industry program from 2019 to 2022 because it was untimely under SCDC Policy ADM-15.13, Section 12.1.

PROCEDURAL HISTORY

Appellant filed a Request to Staff Member (RTSM) on August 9, 2023, requesting the prevailing wage¹ for the time he worked for the prison industries program. Following the staff's response, Appellant filed a Step 1 Grievance on August 14, 2023, in which he asserted the Department was paying him less than the prevailing wage for work in the PI program; he requested the "prevailing wage" for all hours worked from 2019 to 2022. The Department elevated Appellant's Step 1 Grievance to a Step 2 Grievance. On December 7, 2023, the Department denied Appellant's Step 2 Grievance on the ground that it was untimely pursuant to SCDC Policy ADM-15.13, Section 12.1, because Appellant did not file his prevailing wage claim within fifteen days of the issuance of *Torrence v. South Carolina Department of Corrections*, was issued. 433 S.C. 633, 861 S.E.2d 36 (Ct. App. 2021), *reh'g denied* (Aug. 4, 2021), *cert. denied* (Aug. 3, 2022)

¹ "In 1995, the South Carolina legislature enacted section 24-3-430 of the South Carolina Code (2007) to authorize the expansion of the Prison Industries program into the private sector. This expansion allowed qualified private entities to use inmate labor but required the wages for participating inmates to be no less than 'the prevailing wage for work of [a] similar nature in the private sector.' Act No. 7, 1995 S.C. Acts 78. Section 24-3-430 became effective on July 1, 1995. *Id.* at 102." *Gatewood v. S.C. Dep't of Corr.*, 416 S.C. 304, 309, 785 S.E.2d 600, 603 (Ct. App. 2016); *see also Torrence v. South Carolina Department of Corrections*, 433 S.C. 633, 861 S.E.2d 36 (Ct. App. 2021), *reh'g denied* (Aug. 4, 2021), *cert. denied* (Aug. 3, 2022) (affirming inmates are entitled to the prevailing wage and explaining, for the first time, how to calculate the prevailing wage).



(affirming inmates are entitled to the prevailing wage and explaining, for the first time, how to calculate the prevailing wage).

Appellant filed a Notice of Appeal on December 28, 2023. The case was assigned on January 19, 2024. Appellant filed his initial brief on January 26, 2024. The Department filed a Motion to Extend Time to file the Record on March 27, 2024. On April 1, 2024, the Court gave the Department forty-five days to file the Record on Appeal. Thus, the new deadline for filing the Record was 45 days from the date of that order, or May 16, 2024. However, on May 14, 2024, the Department filed a Motion to Dismiss, which stayed the time frame for filings. SCALC Rule 59. The Court denied the Motion to Dismiss on May 30, 2024, and ordered the Department to file the Record within twenty days of the Order, or June 19, 2024. Then, on June 17, 2024, the Department filed a Motion to Stay Further Proceedings for 180 days due to “an overwhelming volume of prison industries pay claim appears are pending before this Court,” and because it recently engaged additional outside counsel, Lake Summers, Esq., to assess the claims at issue. Furthermore, on the same day the Motion was filed, Mr. Summers filed a Notice of Appearance on behalf of the Department.

On July 10, 2024, the Court denied the Motion to Stay and ordered the Department file the Record on Appeal within fifteen days of the order. The Court also ordered that Appellant file his brief within thirty-five (35) days of the date of the order and the Department file its brief within sixty-five (65) days of the date of the order. On July 25, 2024, the Department filed the Record on Appeal. On August 13, 2024, Appellant timely filed his brief. Then, on September 24, 2024, Appellant filed a Motion for Summary Judgment due to the Department’s failure to file its brief.²

As of the date of this Order, the Department has not filed its brief. Pursuant to the Court’s July 10 Order, the Department’s brief was due on September 19, 2024. On October 7, 2024, the Department filed a Motion to File Out of Time and to Extend Time to File Brief. In its Motion, the Department asserts “due to an oversight in calendaring and the overabundance of similar cases in this Court, Respondent did not file its brief in a timely manner.” Yet, instead of immediately filing the brief upon recognizing its untimeliness, the Department requested an additional forty-five days to file its brief when it had already been given multiple extensions of time. This is also

² Summary Judgment is inappropriate in this case because the Court is sitting in its appellate capacity. *Al-Shabazz v. State*, 338 S.C. 354, 377, 527 S.E.2d 742, 754 (2000) (“The ALJ sits in an appellate capacity to review [the] Department’s decisions.”). Therefore, Appellant’s Motion for Summary Judgment is manifestly without merit. See SCALC Rule 65.

not the first case the Department has failed to timely file its brief. In fact, the Court has noted this is becoming a theme in the Department's cases in multiple orders, yet the Department continues to file Motions instead of filing its brief. Finally, this Motion was filed by Ms. Kensey Evans, Deputy Counsel at the Department; importantly, the Court has only received a Notice of Appearance from Lake Summers, Esq. on behalf of the Department. As a result, the Court denies the Motion and finds that because the Department did not timely file a brief in compliance with SCALC Rule 60, the Court will resolve this case solely based upon Appellant's brief and the Record on Appeal.

ISSUE ON APPEAL

Did the Department err in denying Appellant's prevailing wage claim on the ground that it was untimely?

JURISDICTION

The Court's jurisdiction to hear this matter is derived from the South Carolina Supreme Court's decision in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) and *Furtick v. South Carolina Department of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2003). In *Al-Shabazz*, the Supreme Court set forth that the ALC has jurisdiction to review inmate appeals involving state-created liberty or property interests. *Id.* The Court reviews these matters in "an appellate capacity." *Id.* at 388, 527 S.E.2d at 754. Furthermore, in *Wicker v. South Carolina Department of Corrections*, the South Carolina Supreme Court held this Court has jurisdiction to review inmate wage claim grievances in the limited circumstance where the state has created a statutory right to that wage. 360 S.C. 421, 423–24, 602 S.E.2d 56, 57 (2004) ("We find that where, as here, the state has created a statutory right to the payment of a prevailing wage, it cannot thereafter deny that right without affording due process of law.").

"A reviewing court will not disturb findings of [an administrative agency] if its findings are supported by substantial evidence on the record as a whole." *Pearson v. JPS Converter & Indus. Corp.*, 327 S.C. 393, 397, 489 S.E.2d 219, 220 (Ct. App. 1997). A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion as the agency. *Friends of the Earth v. Pub Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219,

226, 467 S.E.2d 913, 917 (1996). Furthermore “the party challenging a[n administrative agency’s] order bears the burden of convincingly proving that the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record.” *Porter v. S.C. Pub. Serv. Comm’n*, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998).

DISCUSSION

Appellant requests to be paid the prevailing wage pursuant to section 24-4-430 for the work he performed from 2019 to 2022. The Department denied Appellant’s claim because it was untimely pursuant to SCDC Policy ADM-15.13, Section 12.1. In his brief, Appellant argues the Department acted arbitrarily and capriciously when it denied his claim based upon the fifteen-day deadline to file a claim concerning a payroll error under SCDC Policy ADM-15.13, Section 12.1. He contends that *Torrence* held that a prevailing wage claim is a complaint about a Department policy or procedure rather than an incident complaint and, therefore, is exempt from timeframes for filing a grievance.

The *Torrence* Decision

In *Torrence*, the Department argued that inmate Torrence’s prevailing wage claim was untimely because he did not file it within fifteen days of the date upon which the Department began paying him for his labor as required by Paragraph 13.1 of Policy GA-01.12. *Id.* at 643, 861 S.E.2d at 42. However, the Court of Appeals nevertheless found the claim to be timely under the Department’s grievance policy. *Id.* at 643-45, 861 S.E.2d at 42-43. Specifically, the Court of Appeals found that under Paragraph 13.9 of Department Policy GA-01.12, there is an exception to the requirement that an inmate file a grievance from an “incident” within fifteen days if the grievance involves a Department policy or procedure. *Id.* at 644-45, 861 S.E.2d at 42-43. Although Torrence never alleged his grievance implicated a policy or procedure, the Court of Appeals found Torrence’s issue implicated a policy or procedure and thus the fifteen-day time limit did not apply because the Department’s characterization of inmate wage grievances as an “incident” was arbitrary and capricious. *Id.* The Court of Appeals apparently reasoned that because the contracts that are negotiated between the Department and prison inmate employers are “enduring” and “have the same effect on numerous inmates,” those contracts are a statement of Department policy.

Accordingly, pursuant to the Court of Appeals’ decision in *Torrence*, Torrence was allowed to claim the difference between the wage he was paid and the prevailing wage, beginning

in 1997, even though he did not initially challenge his wage until the class action in 2001 and did not file his first grievance with the Department until 2007. *Id.* at 637, 861 S.E.2d at 38. The decision therefore suggests that when an inmate files a grievance that implicates a Department policy or procedure, he is not bound by any time limits to initiate the grievance. *See also Ackerman v. S.C. Dep't of Corr.*, 415 S.C. 412, 421, 782 S.E.2d 757, 762 (Ct. App. 2016) (holding inmates wages under a PIECP contract fall within the “policies/procedures” as contemplated 13.9 of Policy GA-01.12. and are not subject to the fifteen-day time limit for filing). However, since there is no time limit for challenging the Department’s policies, the *Torrence* decision left open the question of whether an inmate can claim reimbursement for unlimited years of work for which he was not paid the prevailing wage.

Application of Torrence to This Case

As stated above, in *Torrence*, the Department asserted his Step 1 Grievance was untimely because the inmate failed to file it within fifteen days of “the date upon which the Department began paying Torrence for his labor” as required by Section 13.1 of SCDC Policy GA-01.12.³ 433 S.C. 643-45, 861 S.E.2d 42-43. The Court of Appeals, however, found the inmate’s grievance concerned the agency’s policy and procedure, rather than a grievance involving a specific incident under Section 13.1. *Id.* The Court of Appeals’ blanket policy exception resulted from a narrow interpretation of the implications of Section 13.9 of SCDC Policy GA-01.12⁴ rather than the fifteen-day time limit for filing grievances enumerated in Section 13.1. *Id.*

In contrast to *Torrence*, in this case the Department denied Appellant’s claim pursuant to SCDC Policy ADM-15.13, Section 12.1, not Section 13.1 of SCDC Policy GA-01.12. SCDC Policy ADM-15.13, Section 12.1, sets forth the Department’s general policies governing inmate disputes with pay.⁵ The current version of this policy, which has been in effect since June 2014, provides the following:

³ Notably, this policy was amended in 2014. This amendment articulated the policy in Section 13.2 and removed the requirement that step one grievances be filed within fifteen days of the alleged incident that led to the grievance and instead, required that the inmate “make an effort to informally resolve a grievance.” *See* SCDC Policy GA-01.12, Section 13.2 (2014).

⁴ The Court notes that the exceptions to the fifteen-day filing deadline in the current version of Policy GA 01.12 are now expressed in Section 13.10 instead of Section 13.9.

⁵ The Court takes judicial notice of the Department’s public policies. *See* Rule 201, SCAR; SCDC Policy Listing, <https://www.doc.sc.gov/policy/policy-listing> (last visited June 13, 2024).

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, Section 12.1 (June 3, 2014). Although Policy ADM-15.13 (the agency's inmate pay policy) was in effect at the time Torrance filed his Step 1 grievance, the Court of Appeals in *Torrance* did not analyze the implications of this policy regarding wage disputes. Nevertheless, as explained above, Section 12.1 of Policy ADM-15.13 directly addresses when an inmate may question their inmate pay, and specifically wages earned through PIECP. Therefore, the need to resort to the policy exception in Section 13.09 (or Section 13.10 in the current version of the policy) is inapplicable because Section 12.1 of Policy ADM-15.13 specifically applies to pay incidents or errors. Thus, if an inmate has a question about their pay or believes there is a pay error, he or she must file an initial claim under this policy. If the pay error is not resolved, the inmate may then appeal the Department's decision.

Here, Appellant filed his RTSM⁶ on August 9, 2023, for work that he completed from 2019 to 2022. Therefore, Appellant failed to file his RTSM within fifteen days of the payroll error pursuant to Section 12.1 of Policy ADM-15.13. Accordingly, the Department's decision must be affirmed. *See Porter*, 333 S.C. at 20, 507 S.E.2d at 332 (holding "the party challenging [an administrative agency's] order bears the burden of convincingly proving that the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record").⁷

⁶ Inmates can report a problem to staff through the Automated Request to Staff Member (ARTSM) system or the paper version, which is simply known as a Request To Staff Member (RTSM) system. Appellant used the paper version rather than the automated system.

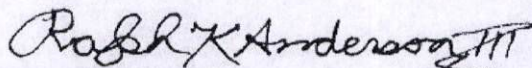
⁷ Although I ultimately affirm the Department's decision, I nevertheless note, as expressed above, the Department's

ORDER

For the reasons set forth in this Order,

IT IS HEREBY ORDERED that the Department's final agency decision is **AFFIRMED**.

AND IT IS SO ORDERED.



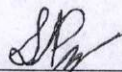
Ralph King Anderson, III
Chief Administrative Law Judge

October 18, 2024
Columbia, South Carolina

failure to file a brief is becoming a theme in the Department's cases.

CERTIFICATE OF SERVICE

I, Stephanie Perez, hereby certify that I have 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).



Stephanie Perez
Judicial Law Clerk

October 18, 2024
Columbia, South Carolina