

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Administrative Law Court
Hon. Crystal M. Rookard, Presiding
Docket No. 23-ALJ-04-0551-AP

APPELLATE CASE NO. 2024-002045

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SC Court of Appeals

Sandatonyo Barber -- APPELLANT, pro-se

-Vs-

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

APPELLANT'S INITIAL BRIEF

ON APPEAL

COMES NOW, above captioned Appellant, Santonyo Barber, pro-se, an inmate housed in the South Carolina Department of Corrections appealing the Order of Dismissal entered in the above captioned in the South Carolina Administrative Law Court upholding SCDC's denial of Appellant's Step 2 prevailing wage grievance.

Standard of Review

In an appeal from an ALC decision, the Administrative Procedures Act provides the appropriate standard of review. see *Kiawah Dev. partnerss II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014); *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 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."); §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 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 by abuse of discretion or clearly unwarranted exercise of discretion"); Torrence v. SCDC 433 S.C. 633 (2021): S.C. Code §24-3-430(D)(2007).

ISSUES PRESENTED

ISSUE (I).

DID THE ADMINISTRATIVE LAW JUDGE (ALJ) ABUSE IT'S DISCRETION WHEN THE ALJ RULED IN FAVOR OF RESPONDENT EVEN AFTER RESPONDENT ABANDONED THE APPEAL WHEN RESPONDENT INTENTIONALLY FAILED TO FILE A BRIEF ON APPEAL, THUS CONSTITUTING AND ABANDONMENT AND WAIVER OF THAT RIGHT AND THE APPEAL SHOULD HAVE BEEN RULED IN APPELLANT'S FAVOR?

ISSUE (II).

DID THE ALJ ERR IN FINDING SCDC CORRECTLY DENIED APPELLANT'S GRIEVANCE FILED UNDER GA.01-12 WAS UNTIMELY UNDER ADM-15.13?

ISSUE (III).

DID THE ALJ ERR IN FINDING ADM-15.13, SECTION 12.1 IS A PREREQUISTE ADMINISTRATIVE REMEDY TO INMATES FILING A GRIEVANCE IN ACCORDANCE WITH SCDC GRIEVANCE POLICY GA-01.12, AND THAT ADM-15.13, Sec.12.1 SOMEHOW BARS APPELLANT'S PREVAILING WAGE CLAIM?

To save the Court's time Appellant will address these issues together since the facts of one encompasses the other.

Relevant Facts

Appellant earned wages for work performed in the Prison Industries (PIECP) Program. After learning of the Torrence (II) v. SCDC, 433 S.C. 633 (2021) decision and SCDC's failure to pay inmates the prevailing wage as mandated by S.C. Code Ann. §24-3-430(D)2007) Appellant filed his step 1 grievance. ROA at 3-4. In denying the step 1 the Warden stated: "You were provided with wages that were approved by the governing authority of South Carolina at the time and you accepted as such." ROA at 4.

Appellant timely filed his Step 2 grievance appealing the Warden's decision and SCDC denied the Step 2 by stating: "your grievance is untimely under SCDC policy ADM-15.13, Section 12.1 ROA at 2. Specifically SCDC asserted that Appellant failed to identify any payroll error within fifteen days of the date of the error pursuant to policy 15.13, without addressing the merits of the underlying prevailing wage claim.

Appellant timely appealed SCDC denial of the Step 2. The Respondent filed the Record on Appeal and Appellant timely filed his Brief on appeal. Respondent did not file a brief and the ALJ ruled:

"As of the date of this Order, the Department has not filed it's brief. Thus, due to the Department's failure to timely file a brief, the Court will resolve this matter based upon the Appellant's brief and the Record on Appeal pursuant to SCACL Rule 60. See ALJ's Order at page 2. The ALJ Judge ultimately ruled that Appellant's appeal be dismissed for failure to exhaust administrative remedies, without addressing the merits of the underlying prevailing wage claim. Id.

Before Appellant's grievance can be deemed untimely for failure to exhaust administrative remedies, one must first determined "what remedies are due to be exhausted prior to filing an inmate grievance under Policy GA-01.12 in order to address a prevailing wage claim:

Our Courts have repeatedly held that an inmate's statutory right to compensation as a prison industries worker gives rise to a state-created interest and right to a grievance. See e.g. Torrence v. SCDC, 373 S.C. 586, 592-93, 646 S.E.2d 866, 869 (2007)(Torrence I); Adkins v. SCDC, 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. Cartrette, 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 Supreme and Appellate Court have made it very clear that "inmates wishing to challenge the DOC's failure to pay the prevailing wage must do so through SCDC's internal grievance system." Id. One then moves on to the next step to filing and/or prerequisite to filing a grievance. The prerequisite remedy and instructions for filing an inmate grievance is listed on the back of the Step 1 grievance, as follows:

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 answer 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 will be permitted.
3. only one (1) issue is to be addressed on each form.
4. Submit the completed form by placing the aforesaid in the Grievance Box at your Institution within (8) eight working days of the date on the RTSM

response; policies, grievances can be filled out 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 our institution.

A stringent review of the instructions prior to and the filing of an inmate grievance omits any reference whatsoever, clue or inclination that ADM-15.13 somehow applies to the timeliness of a prevailing wage grievance. One then turns to the Step 2 Grievance for instructions on filing a Step 2 as follows:

INSTRUCTIONS FOR COMPLETING STEP 2
GRIEVANCE FORM

1. Complete the 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 complete 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.

Again, a stringent review of the instructions and requirements for filing an inmate grievance omits any references to ADM-15.13 as some sort of prerequisite to filing a grievance as part of the exhaustion of administrative remedies requirement. Our Supreme Court's holding in Wicker supra is clear. An inmate

wishing to challenge the DOC's failure to pay the prevailing wage must do so through the DOC's internal grievance system. Id (emphasis original and added).

The ALJ claims that Appellant's claim is somehow barred by SCDC Policy ADM-15.13 because Appellant failed to raise an issue with SCDC regarding his wages within fifteen days of the pay error's occurrence and as a result somehow forfeits any monies including back pay. It is noteworthy that two previous South Carolina Appellate Court cases have rejected a very identical argument by SCDC that back wages can somehow be limited to only two weeks immediately proceeding the date of the grievance is filed, but on a different legal theory. See Torrence II, 433 S.C. at 645; Ackerman, 415 S.C. at 412 (holding it was arbitrary and capricious for the Department to attempt to characterize wage grievance as "incident grievances" and dismiss them on timeliness grounds). SCDC Now seeks to reach the same result under Departmental policy adopted June 1, 2007. Policy ADM-15.13 was amended on June 11, 2014, but those amendments do not affect the issues presented in the underlying grievance. The policy quoted here is the most current version. 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 problems. The inmate may receive additional pay owed for the previous two (2) pay periods only.

S.C. Code §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 §24-3-40(A)(Supp.2023) states:

Unless otherwise provided by law, the employer of a prisoner authorized to work at paid employment in the community under sections §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 §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."

As is clearly seen, Policy ADM-15.13 not only doesn't apply to SCDC's Grievance Policy GA-01.12 and it also doesn't comply with the applicable statutes defining SCDC's duty with respect to PIECP pay. Specifically, SCDC's reliance on ADM-15.13 as some sort of new prerequisite to filing a grievance is misplaced, arbitrary and capricious. Policy ADM-15.13 does not purport to construe or elucidate the three statutes quoted above, but

instead is an attempt to limit or actually trying to avoid the clear mandates of the statute[s]. Code Sections §24-3-315; §24-3-40(A) and §24-3-430(D)(2007)(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 places the responsibility for assuring that the prevailing wage is paid on SCDC's Director [prior] to the commencement of inmate labor.

The ALJ would have ADM-15.13 negate SCDC's obligation and limit the scope of section §24-3-430(D)(2007). However, the statutory remedy offered for that issue is for SCDC to take measures to ensure inmates participating in PIECP do not earn less than the prevailing wage and to enter into contracts that require the participating employer to pay the prevailing wage. See §24-3-430(B)("[t]he director may enter into contracts necessary to implement this program.").

By contrast, Policy ADM-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-Koray, 515 U.S. 50, 61, 115 S.Ct. 2021 (1995)(internal agency guideline, which is not subject to the rigors of Administrative Procedures 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 Treatises §3.5. (3d ed 1994). "Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in Skidmore v. Swift & Co. 323 U.S. 134, 140, 65 S.Ct. 161 (1944), but only to the extent that those interpretations have the "power to persuade". See Arabian American Oil Co. at 256-58

Chistensen v. Harris Cty., 529 U.S. 576, 587 (2006).

Policy ADM-15.13 lacks persuasive power as an interpretation of the statutory scheme supporting the PIEP program because it clearly violates sections §24-3-430(D)(2007) and is at odds with our Appellate Court's decisions in Torrence II and Ackerman. SCDC has erroneously found that an unpromulgated Departmental policy may be interpreted to foreclose prevailing wage claims made pursuant to the existing Prevailing Wage Statutes and Torrence II. Even if policy ADM-15.13 had been promulgated as a regulation, which it hasn't, but had it, it would still be ineffective to contradict the statutory mandates of the Prevailing Wage Statutes. An Agency cannot by regulation contradict a statute, but may 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 SCDC's interpretation, the Court will reject the agencies interpretation, Media Gen. Comm'ns Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 150, 694 S.E.2d 525, 531 (2010).

The ALJ's claim that Appellant's properly filed inmate prevailing wage grievance filed under SCDC Policy GA-01.12 Inmate Grievance Policy is somehow untimely under SCDC Policy ADM-15.13, Section 12.1 is clearly erroneous and an abuse of discretion as a matter of law. Our Supreme and Appellate Courts have both held inmates wishing to challenge SCDC's failure to pay the prevailing wage must do so through SCDC internal grievance system because this is a due process challenge. Interestingly, ADM as previously noted does not carry the force of law and the ALJ abused it's discretion in ruling otherwise.

Appellant submits that (1) SCDC's failure to give notice combined with the failure to correct the inmate PI pay rates contributes to an exacerbates a "continuous course of daily operations." In *Wicker v. SCDC*, 602 S.E.2d 36 (2004), our Supreme Court unequivocally held inmates may not be deprived of their property interest without due process of law and inmates were directed to file a grievance who wish to challenge SCDC's failure to pay the prevailing wage...." and (2) that policy ADM-15.13, sections 12.1 does not apply to inmate wages under §24-3-430(h) but Polciy ADM-15.13 has not been promulgated as a regulation in compliance with the rule-making provisions of the Administrative procedures Act and therefore does not carry the force of law.

it is undisputed that SCDC must pay Appellant the prevailing wage as mandated by §24-3-430(D)(2007). All courts are bound to follow clear and unambiguous statutory law. *State v. Price*, 441 S.C. 423, 895 S.E.2d 633 (2023)(internal citation omitted).

Appellant participated in the PIECP program and performed over thirteen (1,300) hundred documented regular and overtime hours (ROA at 10-11) and was only paid \$7.25 per hour for each hour of labor peformed instead of the prevailing and/or means

wage as determined by D.E.W.. Appellant is entitled to be fully compensated for the hours worked and the wages that were unlawfully withheld by SCDC.

The ALJ Clearly abused it's discretion in litigating this matter for Respondents.

An "abuse of discretion" occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law. *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (Ct.App.2017).

An abuse of discretion" occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *State v. Oates*, 421 S.C. 1, 803 S.E.2d 911 (Ct.App.2017).

Clearly as stated by the ALJ's Order the Department failed to not only timely file a brief, the Department never filed a brief at all. The ALJ claimed it was going to decide the matter based on Appellant's Brief and Record on Appeal. However, the ALJ never even referenced, cited or acknowledged Appellant's brief or it's contentions and legal authorities relied on. Instead the ALJ has merely assumed the litigation where Respondent's waived and abandoned that right. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. *Eason v. Eason*, 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 the right was being abandoned. Id The determination of whether one's actions constitutes waiver is a question of fact. *Laser Supply & Servrs. Inc. v. Orchard Park Assocs.* 676 S.E.2d 139, 145 (Ct.App.2009). Clearly Respondents are a team of well trained lawyers (SCDC General Counsel) and are very familiar with the rules and it is very obvious from their silence in filing a brief that they intended on abandoning the appeal and that is simply

because they too took the ethical oath and obligation to never argue something to a tribunal that they know is not law and for them to argue that SCDC Policy ADM-15.13, Section 12.1 somehow carries the force of law and abrogates SCDC Policy GA-01.12 Grievance Policy is grossly in error.

When SCDC waived and abandoned their right to file a brief on appeal the appeal should have been dismissed in Appellant favor and as a matter of law.

CONCLUSION

BASED on the above Appellant respectfully asks that the case be remanded back to SCDC with instructions to properly calculate the difference between the prevailing and/or means wage and the back pay owed to Appellant including any and all over time plus interest, or in the alternative that this Court will affix the relief deemed just and appropriate in this matter.

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-Vs-

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served a true and correct copy of the enclosed Appellant's Brief on Appeal 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 28th day of February 2025.

This Served:

S.C. Court of Appeals
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Respectfully Submitted,

/s/ Sandatonyo Barber
Sandatonyo Barber
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Sworn to and Subscribed Before Me

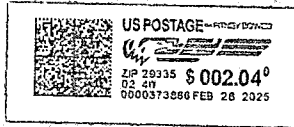
This 28 day of February, 2025

Paul Dennis Crider
NOTARY PUBLIC

MY COMM. EXPIRES

PAUL DENNIS CRIDER
Notary Public, State of South Carolina
My Commission Expires 1/24/2035

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