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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT
Samuel L. Johnson, Administrative Law Court Judge

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Appellate Case No. 2025-002574
Case No. 24-ALJ-04-0156-AP

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Luther B. Marcus, #218408,.....Respondent,

v.

South Carolina Department of Corrections,.....Appellant.

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# INITIAL BRIEF OF RESPONDENT

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## STATEMENT OF THE ISSUES ON APPEAL

I. Did the Administrative Law Court correctly hold that Paragraph 12.1 of SCDC Policy ADM-15.13, a procedure for correcting payroll errors, imposed no fifteen-day reporting requirement that Luther Marcus was obliged to satisfy before grieving the Department's failure to pay him the prevailing wage that former Section 24-3-430(D) of the South Carolina Code required for his historic Prison Industries work?

II. Did the Administrative Law Court decide the case on a ground not before it when it construed the single policy provision the Department itself invoked as the sole basis for its final agency decision, after twice ordering the Department to show cause and receiving two Returns and a respondent's brief?

## STATEMENT OF THE CASE

Luther B. Marcus worked in the South Carolina Department of Corrections' Prison Industries Program at McCormick, Allendale, and Lee Correctional Institutions. He was not paid the prevailing wage. Former Section 24-3-430(D) of the South Carolina Code provided that no inmate participating in the program "may earn less than the prevailing wage for work of similar nature in the private sector." S.C. Code Ann. § 24-3-430(D).[1] The Department does not dispute that Marcus performed the work, does not dispute that he was paid less than the prevailing wage, and has never placed before any tribunal a calculation of what it owes. In more than two years of litigation it has advanced exactly one reason for refusing to pay: that Marcus did not report a "payroll date error" within fifteen days under Paragraph 12.1 of an internal pay-administration policy, ADM-15.13.

On August 24, 2023, Marcus submitted a Request to Staff Member seeking backpay of the prevailing wage for his Prison Industries work, citing *Torrence v. South Carolina Department of Corrections*, 433 S.C. 633, 861 S.E.2d 36 (Ct. App. 2021) ("*Torrence II*"). (Order at 1.) The next day the Department answered him. It did not tell him he had filed in the wrong place, or that he was fifteen days too late, or that an inmate pay designee would review his case. It told him the opposite: "Financial Accounting does not make this determination. You must submit a grievance for your claim to be researched." (Order at 1.)

Marcus did what he was told. On August 28, 2023, he filed a Step 1 Grievance asking the Department to calculate and pay him the difference between what he received and the prevailing

[1] Act No. 192 of 2024, effective May 21, 2024, amended Section 24-3-430(D) to substitute the federal minimum wage for the prevailing wage. It did not amend Section 24-3-315 or Section 24-3-410(B)(7). All work at issue in this appeal predates the amendment, and the prior version of Section 24-3-430(D) governs. Marcus refers to it throughout as *former* Section 24-3-430(D).

wage. (Order at 1.) That same day the Department forwarded the grievance to Step 2. (Order at 1.) In January 2024 the Department denied it. Its stated ground was this:

> Court of Appeals' opinion in *Torrence* was filed on June 30, 2021. You submitted your Request to Staff regarding this matter on August 24, 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. . . . Therefore, your grievance is denied.

(Order at 1-2.) The final agency decision thus measured Marcus's fifteen days from the date this Court filed an opinion. It identified no payroll error, no pay period, and no payroll date. It said nothing about the merits of his claim.

Marcus appealed to the Administrative Law Court on February 2, 2024, without counsel. The procedural history is set out at pages 2 through 5 of the order under appeal and is summarized here only as it bears on the Department's second issue. The Department moved in April 2024 to extend its deadline for filing the Record and obtained an extension to August; moved to stay the appeal in August 2024; filed the Record in October 2024; was ordered in November 2024 to supplement it; sought a further extension stating that it had requested calculations and was seeking authority to negotiate a resolution outside litigation; and filed supplements in February 2025. (Order at 2-3.)

On June 27, 2025, the ALC issued an Order to Show Cause. Its occasion was the Department's own filing in this Court. One month earlier, in *Gibson v. South Carolina Department of Corrections*, Appellate Case No. 2024-001076, the Department had moved this Court to remand a materially identical prevailing wage appeal, telling this Court that it "does not contest that it was error to dismiss these claims pursuant to ADM-15.13." Mot. to Remand, *Gibson v. S.C. Dep't of Corr.*, Appellate Case No. 2024-001076 (filed May 23, 2025); *see* Order at 3 & n.1. The Department responded that *Gibson* was a "strategic decision limited to that case." (Order at 4.)

On July 30, 2025, the ALC issued a Second Order to Show Cause. It told the Department precisely what it wanted briefed if the Department intended to press ADM-15.13: how invoking that policy comported with Sections 24-3-315 and 24-3-430(D) as those statutes stood during the relevant period; whether *Torrence* applied when ADM-15.13 is used to bar such grievances; how the Department reconciled ADM-15.13 with Paragraph 13.2 of Policy GA-01.12; and, if the Department contended ADM-15.13 foreclosed the claim, "specific identification of the 'payroll date error,' including the nature and date(s) thereof, from which the Department contends Appellant's 15-day deadline began to run." (Order at 4.)

The Department filed a Return to the first Order to Show Cause on July 14, 2025, a Return to the Second Order to Show Cause on August 14, 2025, and a respondent's brief on October 8, 2025. (Order at 4-5.) Across all three filings it never identified a payroll date error or the date on which one occurred. (Order at 11.)[2]

By order dated November 25, 2025, the ALC held that it was "not convinced that ADM-15.13 plays any role with respect to prevailing wage grievances seeking backpay for historic work under PIP," that its fifteen-day deadline "does not apply here," and that the Department "erred in denying Appellant's grievance based on ADM-15.13." (Order at 12.) The court remanded with directions that the Department calculate and offer to remit the additional pay owed for the pay periods of September 16, 2011 through February 14, 2012 and March 18, 2019 through July 21, 2021, and issue a corrected, substantive, and appealable Step 2 response setting out its calculations. (Order at 12.) The Department appealed. Marcus, now released and represented by undersigned counsel, has not cross-appealed and asks only that the order be affirmed.

[2] The Department served two Returns to Show Cause and a respondent's brief before the ALC ruled. It does not identify anything it was prevented from saying, nor does it say what it would have argued had it been given still another opportunity.

Two features of the Department's brief frame what is actually in dispute. First, the Department no longer defends the rationale its final agency decision gave. It does not argue in this Court that Marcus's fifteen days ran from the filing of *Torrence II*. It argues instead that he should have complained during the years he worked, from 2011 to 2012 and from 2019 to 2021. (Appellant's Br. 12-13.) That is a different theory, announced for the first time on appeal from an order rejecting the theory the agency actually adopted. Second, the Department states that Paragraph 13.2 of Policy GA-01.12 "has not been asserted as a basis for the denial of the Respondent's claim nor as a basis for an affirmance on appeal," and that this case "is controlled by the law, including policy language, that existed prior to September 1, 2023." (Appellant's Br. 10-11.)[3]

## STANDARD OF REVIEW

The construction of a policy and the application of an exhaustion doctrine are questions of law reviewed de novo. *Murphy v. Owens Corning*, 393 S.C. 77, 82, 710 S.E.2d 454, 457 (Ct. App. 2011). Because review is de novo, this Court is not confined to the reasoning the ALC employed, and the order below "may [be] affirm[ed] . . . upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

Where an agency construes its own policy, deference is not automatic. This Court will not overrule an agency's construction of its own policy unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Torrence II*, 433 S.C. at 642, 861 S.E.2d at 42 (quoting *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (2014)).

[3] The Department's statement that Paragraph 13.2 of Policy GA-01.12 "has not been asserted as a basis for the denial of the Respondent's claim nor as a basis for an affirmance on appeal" is noted. (Appellant's Br. 10.) Marcus accordingly does not understand any question concerning Paragraph 13.2 to be presented to this Court.

## ARGUMENT

This appeal presents one question, and the Department has narrowed it further. The Department does not dispute that Marcus performed Prison Industries work, does not dispute that he was paid less than the prevailing wage former Section 24-3-430(D) required, and does not defend the amount it paid him. It contends only that he forfeited the wage by failing to report a "payroll date error" within fifteen days under Paragraph 12.1 of ADM-15.13, an internal policy never promulgated as a regulation, resting on the statutes that govern how inmate wages are received and distributed rather than on the statute fixing what those wages had to be, and offering as remedies a prospective rate adjustment and two pay periods of backpay.

Three features of the Department's position are undisputed, and together they dispose of this appeal. The Department has never identified the payroll date error from which the fifteen days ran, though the ALC ordered it to do so. It told Marcus, when he asked to be paid, that the office administering that policy "does not make this determination" and that he must file a grievance instead. And it has told this Court, in *Gibson*, that dismissing these claims under ADM-15.13 is error. Underlying all of it is a point this Court has already decided twice. In *Ackerman*, and again in *Torrence II*, the Court held that a prevailing wage grievance concerns the Department's policies and procedures and is not governed by a filing period running from a dated occurrence. This appeal is the Department's third attempt to impose one. The order below should be affirmed.

### I. The ALC correctly held that Paragraph 12.1 of ADM-15.13 has no application to a grievance seeking backpay to the prevailing wage for historic Prison Industries work.

#### A. Section 24-3-430 separates the wage the Department must pay from the disposition of wages once paid, and ADM-15.13 governs only the second.

The statute that creates this claim divides its own subject matter. Section 24-3-430(D) fixed the amount: no inmate participating in the program could earn less than the prevailing wage. Section 24-3-430(H) then addressed what happens to the money: "[t]he 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." S.C. Code Ann. § 24-3-430(H). The operative verb is "applied." Section 24-3-430(H) directs where the money goes. It says nothing about what the money must be.

Section 24-3-40 is not a Prison Industries statute. It provides that "[u]nless 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 Ann. § 24-3-40(A) (emphasis added). A single disbursement statute thus collects the wages of community workers and prison industry workers alike, though the two programs were governed by different wage rules and only one of them carried a prevailing wage requirement. A statute indifferent to what the wage was cannot supply authority for a policy that determines what the wage had to be. The amount owed is one subject. The handling of the amount once earned is another.

ADM-15.13 belongs entirely to the second subject, and it says so. The policy identifies its statutory authority as "Section 24-3-40 and Section 24-1-295, South Carolina Code of Laws, 1976, as amended." Neither statute is in Article 3 of Chapter 3 of Title 24, the Prison Industries article that contains Sections 24-3-315 and 24-3-430. Section 24-3-40 lies in Article 1. Section 24-1-295 lies in a different chapter altogether, and its operative content is a schedule of deductions from the earnings of inmates engaged in prison industry service work: restitution, child support, room and

board, and an escrowed percentage. The policy does not cite Section 24-3-430. It does not cite Section 24-3-390.

The contrast is instructive. Article 3 addressed the amount of an inmate's pay in more than one place. Former Section 24-3-430(D) forbade earning less than the prevailing wage. Section 24-3-315 required the Director to determine, before using inmate labor, that "the rates of pay and other conditions of employment are not less than those paid and provided for work of similar nature in the locality in which the work is performed." S.C. Code Ann. § 24-3-315. Section 24-3-410(B)(7) exempted Prison Industries products from the general prohibition on open-market sale only where the inmate workers "receive comparable wages." S.C. Code Ann. § 24-3-410(B)(7). The two statutes ADM-15.13 does cite say nothing of the kind. They address receipt, deduction, and disbursement. The article that governs what inmates must be paid says so repeatedly. This Court has read the first two together for precisely that purpose, holding that "sections 24-3-315 and 24-3-430(D) compel the Department to ensure inmate workers who are employed under those sections receive the same pay rates and employment conditions as their non-inmate peers." *S.C. Dep't of Corr. v. Cartrette*, 387 S.C. 640, 646, 694 S.E.2d 18, 21 (Ct. App. 2010). The statutes the policy invokes never say it at all.

The body of the policy addresses the same subject its authorities do. Its stated purpose is "[t]o establish criteria for determining eligibility for inmate pay and to ensure proper handling of all matters pertaining thereto." Eligibility and handling. Its policy statement addresses which inmates remain eligible for inmate pay and at what "current rate," taking the rate as a given and administering around it. Its table of contents runs to Responsibility, Eligibility, Ineligibility, Dual Jobs, Inmate Payroll Offices, Pay Periods and Regulations, Indigent Inmates, Deductions, and

Situations That Would Affect an Eligible Inmate's Pay Status. Section 12, "Problems With Pay," sits in that company. Nothing in the policy speaks to what an inmate's wage must be.

The subject matter of a policy determines what it can be a rule about. A policy that implements the disposition of wages received on behalf of the inmate may set the procedures for correcting how they were disbursed. It is not thereby a rule about what the wage had to be. The Department's contrary submission, that Section 24-3-390 clothes ADM-15.13 with the "force of law" and so with authority over this claim, is addressed in Part I.F below.

The Department's reliance on *Adkins* and *Wicker* fails for a related reason. Those decisions hold that an internal policy supplies the framework for pursuing a prevailing wage claim, and from that the Department infers that *any* internal policy may set the claim's "procedural parameters." (Appellant's Br. 8.) The inference does not follow. The policy those cases identified was the grievance system, taken up next. Neither mentions ADM-15.13, and neither suggests that a pay-administration policy resting on distribution statutes may impose a fifteen-day forfeiture on a wage the General Assembly guaranteed.

### B. This Court has twice held that a fifteen-day period running from a dated occurrence does not govern these grievances, and Marcus completed the process that does.

The Department's brief opens from the wrong end. It asks whether Marcus properly exhausted Paragraph 12.1. The prior question is whether Paragraph 12.1 is an administrative remedy for this claim at all. Exhaustion presupposes a remedy directed at the grievance presented. *Woodford v. Ngo*, on which the Department leans, requires "using all steps that the agency holds out" for the claim. 548 U.S. 81, 90 (2006) (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). A litigant does not fail to exhaust a process that was never held out to him.

Two things about *Woodford* limit what it can do for the Department. The first is that it construes a federal statute. The question there was what "exhausted" means in 42 U.S.C. § 1997e(a), a provision of the Prison Litigation Reform Act, and the answer turned on the purposes Congress had in enacting it. Marcus brings no federal claim. He took an agency decision to the Administrative Law Court under Section 1-23-610, in the forum South Carolina law makes his only avenue. South Carolina has its own law of exhaustion, and its own exceptions to it. *See Holman v. S.C. Educ. Lottery Comm'n*, 441 S.C. 18, 32, 891 S.E.2d 701, 708 (Ct. App. 2023).

The second is the kind of grievance *Woodford* concerned. The prisoner there challenged a discrete disciplinary action taken against him on a particular date, and he waited roughly six months to complain of it. A short filing period serves obvious purposes for a complaint of that character, and the Court said so: prompt filing means "witnesses can be identified and questioned while memories are still fresh." *Woodford*, 548 U.S. at 89. Marcus complains of no incident. He complains of a wage the Department set before he began working, applied unchanged throughout, and applied alike to everyone working under the same contract. Nothing about that complaint grows stale, and nothing about the Department's ability to answer it depended on when he wrote. This is the distinction *Ackerman* and *Torrence II* drew, and it is why a period measured from an occurrence cannot govern a grievance that has none.

Paragraph 12.1 also lacks the architecture exhaustion presupposes. Exhaustion describes a preliminary stage in a process that continues: the claimant uses it, and if it does not resolve the matter he proceeds to a further stage, ending in a decision subject to review. Policy GA-01.12 is built that way. A Step 1 grievance goes to the Warden, a Step 2 appeal to the responsible official, and the final answer notifies the inmate that any further appeal lies to the Administrative Law

Court, whose decision is reviewable here. S.C. Code Ann. § 1-23-610(A)(1). That is the path Marcus took.

Paragraph 12.1 has no such structure. The inmate reports to the pay designee, the designee "will review the case and determine whether any additional pay is owed," the designee makes the corresponding entry in the inmate's pay account and keeps the supporting documentation, and there the provision ends. (Order at 11.) It supplies no appeal from the designee's determination, no route into the grievance system, and no mention of GA-01.12 at all. The only continuation such a provision implies is the ordinary one available to an employee whose employer has closed an internal pay inquiry, which is a civil action for the wages owed. That is the one avenue this class of claimant does not have. *Torrence I*, 373 S.C. at 592-93, 646 S.E.2d at 869; *Adkins*, 360 S.C. at 419, 602 S.E.2d at 55. The Department asks this Court to treat as a prerequisite to review a provision that leads nowhere the law permits Marcus to go.

There is a prior difficulty still. Whatever Paragraph 12.1 is called, it does not operate as an exhaustion requirement. Exhaustion goes to the prematurity of a claim, not to its existence; it directs a litigant to a process before seeking review, and it delays a claim rather than destroying it. *See Holman*, 441 S.C. at 32, 891 S.E.2d at 708. Paragraph 12.1 does something else. It fixes a period running from an event and provides that on expiry "no back pay will be given." A rule that permanently forecloses recovery after a fixed interval is a limitation period, whatever heading it is filed under.

The Department has drawn the distinction itself. It tells this Court that Paragraph 13.2 of GA-01.12 "is best characterized as a statute or rule of limitations, while in contrast, Section 12.1 of SCDC Policy ADM-15.13 presents an exhaustion of administrative remedies defense," and that the two "serve two distinct purposes." (Appellant's Br. 10.) Marcus agrees that a rule of limitations and

an exhaustion requirement are different things serving different ends. That is precisely the difficulty. Paragraph 12.1 does the work the Department assigns to the first. It extinguishes the claim, which is what the Department says a limitations rule does and what it says exhaustion does not. The label has changed; the operation has not. That matters because the General Assembly commanded the wage in mandatory terms, and "[a] rule may only implement the law." *S.C. Dep't of Revenue v. McNickel's, Inc.*, 331 S.C. 629, 635, 503 S.E.2d 723, 726 (1998); *see Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490-91, 413 S.E.2d 13, 14-15 (1991).

South Carolina law identifies the process that was held out, at the level of binding precedent. In *Torrence v. South Carolina Department of Corrections*, 373 S.C. 586, 592-93, 646 S.E.2d 866, 869 (2007) ("*Torrence I*"), the South Carolina Supreme Court held that former Section 24-3-430(D) creates a statutory right protected by due process, that no private right of action exists, and that inmates must pursue prevailing wage claims through the Department's grievance procedures. *Wicker* is to the same effect: where "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," and although the inmate had no civil damages action, "he properly filed a grievance with the DOC." 360 S.C. 421, 423-24, 602 S.E.2d 56, 57 (2004). *Adkins* says it in a sentence: inmates "have no private civil cause of action" but "may file an inmate grievance to protest" the Department's failure to pay statutory wages. 360 S.C. 413, 419, 602 S.E.2d 51, 55 (2004). *Torrence II* confirmed that these claims proceed "through the Department's internal grievance procedure." *Torrence II*, 433 S.C. at 638, 861 S.E.2d at 39. *Accord S.C. Dep't of Corr. v. Cartrette*, 387 S.C. 640, 646, 694 S.E.2d 18, 21 (Ct. App. 2010).

That procedure is Policy GA-01.12, the Inmate Grievance System, whose stated purpose is to afford inmates formal review of complaints concerning Department policies, directives, and conditions affecting them. Within it, no filing period runs against a grievance of this character. In the version of GA-01.12 before this Court in *Ackerman* and *Torrence II*, Paragraph 13.9 excepted grievances concerning policies and procedures from the filing deadline. *Ackerman v. S.C. Dep't of Corr.*, 415 S.C. 412, 418, 782 S.E.2d 757, 760 (Ct. App. 2016); *Torrence II*, 433 S.C. at 644-45, 861 S.E.2d at 42-43. The Department's own Form 10-5 instructs inmates that policy grievances may be filed at any time.

This Court has already characterized claims of this kind, and the characterization controls. In *Ackerman*, the Department treated inmate wage grievances as "incidents" subject to a fifteen-day filing rule. This Court held the treatment arbitrary and capricious because Prison Industries wage terms are "enduring" and "have the same effect on numerous inmates" and so "cannot realistically be characterized as 'incidents,' which are temporally limited and rarely affect more than a few inmates." *Ackerman*, 415 S.C. at 420-21, 782 S.E.2d at 761-62. *Torrence II* held that the grievance fell within Paragraph 13.9's exception and that Paragraph 13.1's fifteen-day deadline, which ran from the incident, therefore did not apply. *Torrence II*, 433 S.C. at 644-45, 861 S.E.2d at 42-43. That reasoning was never about the word "incident." It was about what a negotiated wage term is: continuing rather than momentary, and common to a program rather than particular to one worker. What both decisions rejected was a filing period keyed to a dated occurrence, applied to a term that has no occurrence date. Paragraph 12.1 runs from "the payroll date error," which the ALC read as the date a payroll error manifests in an incorrect payment. (Order at 10 n.7.) That is an occurrence date by another name. The Department has changed the policy number and the label of

the triggering event while preserving the one feature this Court twice held could not be applied to these grievances.

The order of reasoning in those decisions matters. Neither began with the text of Paragraph 13.9. Each began by asking what kind of grievance was before it. *Ackerman* held that Prison Industries wage terms are enduring, that they affect numerous inmates alike, and that they involve "a topic governed by statute and, thus, an expression of the legislature's policy on inmate pay," and concluded from those features that such grievances "cannot realistically be characterized as 'incidents.'" *Ackerman*, 415 S.C. at 420-21, 782 S.E.2d at 761-62. *Torrence II* reasoned identically: "[b]ecause Torrence's claims involve continuous conditions potentially affecting numerous inmates, we find Torrence's grievance involves Department policies and procedures, rather than an isolated incident." *Torrence II*, 433 S.C. at 644-45, 861 S.E.2d at 42-43. The conclusion about the deadline came afterward, and followed from the classification. What the Court announced was a rule. Paragraph 13.9 was the occasion for stating it, not its boundary.

What this Court held, then, was not that the Department had cited the wrong paragraph. It held that the Department's *characterization* of these grievances was arbitrary and capricious. *Ackerman*, 415 S.C. at 421, 782 S.E.2d at 762. A holding about what a grievance is does not depend on which policy happens to contain the deadline, and it is not answered by moving the deadline to another manual. A claim classified as continuous has no occurrence from which any period can run. That is why the Department has never been able to identify one.

The Department's own brief supplies the confirmation. It observes that in his request to staff member Marcus "did not explicitly raise any payroll error or challenge to his pay rate," and that he instead "made a general inquiry about back wages for prior Prison Industries work that he performed in the past." (Appellant's Br. 5-6.) That is accurate, and it is fatal to the defense rather

than supportive of it. Marcus did not report a payroll error because he had no payroll error to report. What he raised was that the Department was paying below the wage a statute required, which is a complaint about the Department's policies and its contracts, and which is exactly the category to which this Court has twice assigned these grievances. An inmate cannot report an occurrence that did not occur, and a provision triggered by one has nothing to operate on.

The Department answers that neither *Ackerman* nor *Torrence II* addressed ADM-15.13, that appellate courts "do not speak unless spoken to and do not answer questions they are not asked," and that there is therefore "no binding precedent on this issue." (Appellant's Br. 9-10.) The premise is true and the conclusion does not follow. Neither decision construed ADM-15.13, and Marcus does not contend otherwise. But this Court was asked what kind of grievance a prevailing wage claim is, and it answered that question twice, on the merits, in published opinions. Silence about a policy is not silence about a classification. The Department needs the second, not the first, because Paragraph 12.1's fifteen days cannot begin to run against a claim this Court has held is not measured from an occurrence.

The fifteen-day interval also serves none of the purposes exhaustion exists to serve. The Department's own authority states them: exhaustion allows an agency to correct its own errors, to bring its expertise to bear, and to compile a record adequate for judicial review. *Holman*, 441 S.C. at 32, 891 S.E.2d at 708 (quoting *Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000)). Applied to an ordinary payroll mistake, a short reporting period advances every one of them, because timesheets, shift records, and recollections go stale and a pay designee must reconstruct what happened. Applied to this claim it advances none. What the Department owes Marcus is computed from the mean average wage for his occupation, drawn from data the Department of Employment and Workforce compiled and published for each year at

issue, together with hours recorded in the Department's own payroll files and rates fixed in its own contracts. Every one of those sources is as available today as it was in 2011. Whether Marcus wrote on the fourteenth day or the four hundredth changes nothing about the Department's ability to determine what it owes. The interval does no work except forfeiture, which is the office of a limitation period and not of an exhaustion requirement.

The Department did not regard Paragraph 12.1 as applicable to these grievances until this litigation, and its own conduct in the two decisions it now seeks to confine shows it. In *Ackerman* the Department argued that wage grievances were "incidents" governed by Paragraph 13.1 of GA-01.12. *Ackerman*, 415 S.C. at 418-20, 782 S.E.2d at 760-61. In *Torrence II* it argued that the grievance was untimely under Paragraph 13.1 because it was not filed within fifteen days of the date the Department began paying for the labor, that Paragraph 13.9's exception did not apply, and that equitable tolling was unavailable. *Torrence II*, 433 S.C. at 643-44, 861 S.E.2d at 42. Those are the contentions the opinions recite. Paragraph 12.1 appears in neither.

That silence is difficult to reconcile with the Department's present position. It now describes Paragraph 12.1 as a mandatory precondition to relief, a threshold defeating the claim before timeliness is reached at all. If the Department had thought so then, both appeals were over at the threshold, and there was no occasion to litigate what an "incident" is, whether Paragraph 13.9's exception applied, or whether the limitations period was tolled. The Department instead contested those questions through two appeals and lost both. A litigant does not press the difficult ground while holding the easy one in reserve. The more natural reading is that the Department did not consider Paragraph 12.1 to reach prevailing wage grievances, and turned to it only after the arguments it did press had failed.

That is the answer to this appeal, and the Department has heard it twice. In *Ackerman* the deadline was Paragraph 13.1 of GA-01.12 and the triggering event was called an incident. Here the deadline is Paragraph 12.1 of ADM-15.13 and the triggering event is called a payroll date error. The policy number is different, the label is different, and the interval, the trigger, and the consequence are the same. A holding that a class of grievances is not measured from a dated occurrence is not confined to the particular policy that first imposed the deadline. If it were, the Department could impose the same bar in a third policy after losing here, and in a fourth after that.

Paragraph 12.1's fifteen-day period, applied to a grievance of this kind, brings no order to the process and affords no avenue of administrative relief. The Department can determine what it owes as readily today as it could in 2011, and the interval changes nothing about that. What the period accomplishes, and all it accomplishes, is to relieve the Department of a wage the General Assembly required it to pay and to set aside a classification this Court has twice made. A provision that serves no administrative purpose and disables both the statute and the decisions construing it is not a procedure for obtaining relief.

Marcus did what was required of him. He filed a Step 1 Grievance. The Department forwarded it to Step 2 the same day. The Department issued a Step 2 decision. On the form bearing that decision, the Department printed its own statement of what had occurred: "[t]he decision rendered by the responsible official exhausts the appeal process of the SCDC Inmate Grievance Procedure." (Order at 12.) The Department told Marcus his administrative remedies were exhausted and now tells this Court they were not.

Exhaustion serves the ends *Holman* identifies: allowing the agency to correct its own errors, to bring its expertise to bear, and to compile a record adequate for review. *Holman*, 441 S.C. at 32, 891 S.E.2d at 708. Marcus afforded the Department every one of those opportunities. It took

none of them. Two and a half years later no calculation of what it owes has been produced in this proceeding.

### C. The grievance concerns the wage the Department negotiated and applied across the program, and Paragraph 12.1 offers no remedy for that in either direction.

Paragraph 12.1 is captioned "PROBLEMS WITH PAY." It requires an inmate to report "any problems in their pay" to "their institution's inmate pay designee" within fifteen days "of the payroll date error," and it then limits what may be done:

- 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.

(Order at 9.) Every operative feature of that provision presupposes an individual inmate presently on a payroll at an institution with a pay designee, whose problem began on an identifiable date, whose rate can be corrected going forward, and whose loss is small enough and recent enough that two pay periods will cure it. That is a mechanism for fixing a miscounted shift or a wrong figure keyed into a payroll system, and for that purpose it works.

Marcus does not complain of a figure keyed into a payroll system. He complains of the wage the Department negotiated and then applied to his work. Former Section 24-3-430(B) authorized the Director to "enter into contracts necessary to implement this program." S.C. Code Ann. § 24-3-430(B). The wage paid for Prison Industries labor was fixed in that setting rather than at an institution. The ALC so found, describing the rates at issue as "agreed upon between the Department and PIP sponsors for numerous inmates." (Order at 10.) This Court has described the

arrangement the same way, observing that the Department "expresses its own, more specific policies regarding pay rates and other working conditions for inmates in its contracts with [Prison Industries] sponsors," *Torrence II*, 433 S.C. at 643, 861 S.E.2d at 42, and holding elsewhere that a failure of "the Department's contracts with PIP sponsors" to match private-sector terms would create an impermissible advantage for inmate labor, *Cartrette*, 387 S.C. at 646, 694 S.E.2d at 22. A rate so fixed is not an event with a date. It was the same on the first day of the contract as on the last, and the same for every inmate working under it. That is why, when the ALC ordered the Department to identify the "payroll date error" and the date it occurred, the Department could not. (Order at 4, 11.) The omission is not a gap in its briefing. It reflects the nature of what is being complained of.

The statutory scheme confirms where responsibility lay. Section 24-3-315 required that the Director "must determine *prior to using inmate labor* in a prison industry project that it will not displace employed workers, that the locality does not have a surplus of available labor for the skills, crafts, or trades that would utilize inmate labor, and that the rates of pay and other conditions of employment are not less than those paid and provided for work of similar nature in the locality in which the work is performed." S.C. Code Ann. § 24-3-315 (emphasis added). The duty was the Director's, and it was to be discharged before the work began. The analysis it called for is the one *Torrence II* later described: the mean average wage for the occupation, drawn from DEW data. *Torrence II*, 433 S.C. at 648-49, 861 S.E.2d at 45. Nothing in this record suggests the Director ever performed it. The Department instead contested the obligation itself until this Court resolved the question.

That is what makes the Department's construction of Paragraph 12.1 untenable. The statute assigned three things to the Director, all of them before any work began. He was to determine the

prevailing rate. He was to ensure the inmate received it. And he was to do both as a precondition to using the labor at all. *See* S.C. Code Ann. §§ 24-3-315, 24-3-430(D); *Cartrette*, 387 S.C. at 646, 694 S.E.2d at 21. Paragraph 12.1, as the Department reads it, reassigns all three. The inmate must know what he should have been paid, which requires the occupational wage analysis the statute gave the Director. He must detect that he did not receive it, from a payroll that accurately reflected the contracted rate. And he must object within fifteen days of each payment or lose the wage entirely. Neither statute says any of that. Neither contains a forfeiture provision at all. The forfeiture appears only in the Department's own policy.

The policy allocates the same burden unevenly in its own terms. When the Department overpays an inmate, Paragraph 12.2 provides that it may recover the money, and that the inmate "will be notified of the overpayment and will be provided with the calculation information and the date and amount of the overpayment." When the Department underpays, its position is that the inmate must discover the shortfall himself and report it within fifteen days or lose it. The Department owes notice and a calculation when the error runs in its favor. It owes neither when the error runs the other way.

The reallocation is not merely misplaced; it is impossible to satisfy. The Department had its payroll records, its contracts with sponsors, its pay designees, and a direct order from the ALC to identify the nature and dates of the payroll error on which its defense depends. With all of that, across two Returns and two briefs, it could not name one. (Order at 4, 11.) Marcus had none of those things. The Department's position is that his claim expired because he failed to identify, within fifteen days of each payday, what the Department itself has been unable to identify in two and a half years of litigation under compulsion.

Nor was the obligation Marcus's to lose by silence. The right is his, and it is substantial: the Supreme Court has held that because the State created a statutory right to the prevailing wage, it "cannot thereafter deny that right without affording due process of law." *Wicker*, 360 S.C. at 423-24, 602 S.E.2d at 57. But the duty the General Assembly imposed reached further than any single inmate. This Court has explained that Section 24-3-430(D) was enacted "as a safeguard to prevent inmates from becoming a cheaper alternative to their counterparts in the private realm," and Section 24-3-430(E) forbids inmate participation from displacing employed workers. That is why the determination was assigned to the Director and required before the labor was used, rather than made contingent on an objection afterward. An internal policy that relieves the Director of that duty by transferring it to the inmate does not administer the statute. It inverts it.

Paragraph 12.1 offers nothing for such a claim in either direction. Looking backward, the recovery is capped at two pay periods, which cannot redress an underpayment that ran for years. Looking forward, the provision promises that "[t]he pay rate will be adjusted to the proper rate amount for future payrolls." But an institution's inmate pay designee cannot adjust a rate he did not set. He has no authority over the terms on which the Department contracted, and nothing in ADM-15.13 purports to give him any. The consequence is that even an inmate who complied with Paragraph 12.1 perfectly, reporting on the fourteenth day, would obtain nothing. The two pay periods of back pay the provision allows are payable at "the proper rate amount" once the rate is corrected. Where no designee can correct the rate, there is no proper rate amount for the payroll to apply and no differential to pay for the two periods that preceded it. The retrospective remedy depends on the prospective one, and neither was available here. A procedure that cannot cure the violation even when properly invoked is not an administrative remedy that must be exhausted before the violation may be reviewed.

Exhaustion was not required in these circumstances. A party need not exhaust a remedy where doing so "would be a vain or futile act." *Robinson v. S.C. Dep't of Emp't & Workforce*, 443 S.C. 63, 75, 902 S.E.2d 41, 47 (Ct. App. 2024); *see Andrews Bearing Corp. v. Brady*, 261 S.C. 533, 536, 201 S.E.2d 241, 243 (1973). The showing required is a "definitive statement by the agency administrator," *Smith v. S.C. Ret. Sys.*, 336 S.C. 505, 526-27, 520 S.E.2d 339, 350-51 (Ct. App. 1999), and the Department made one. It told Marcus in writing that the office administering Paragraph 12.1 "does not make this determination." (Order at 1, 11.) That is not an inmate's surmise about how the agency would rule. It is the agency stating what it does not decide. A party is likewise "not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Robinson*, 443 S.C. at 76, 902 S.E.2d at 47 (quoting *Charleston Trident Home Builders, Inc. v. Town Council of Summerville*, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006)).

The Department's principal textual argument fails for the same reason. The Department contends that Paragraph 12.1 "by its very terms" covers "adjustments of the pay rate," and so covers precisely this claim. (Appellant's Br. 12.) What it relies on is the one part of the provision that could not have operated here. It is also, in any event, a forward-looking correction of the rate a payroll is applying, not a determination of what the prevailing wage is. That determination, as *Torrence II* explains, requires the Department to "determine the mean average wage for the occupation at issue using records and data from DEW." *Torrence II*, 433 S.C. at 648-49, 861 S.E.2d at 45. Nothing in ADM-15.13 equips an inmate pay designee to make it. Across two Returns to Show Cause, a brief below, and its brief in this Court, the Department has never identified a single occasion on which an inmate pay designee determined a prevailing wage or adjusted a rate to meet one, for Marcus or for anyone.

It may be said that the designee need not have reached any contract, because under Section 24-3-430(H) the sponsor's payments go to the Department and the Department pays the inmate, so the Department could simply have paid more than it received. That answer defeats itself. Paying above a negotiated rate across a program is a decision of the agency with consequences for its budget and its contracts. It is not something an inmate pay designee does upon receiving a request to staff member. The Department has demonstrated as much by its own conduct. When it confronted this precise problem, it did not direct the matter to inmate pay designees. It went to the General Assembly and obtained a budget proviso. *See Gatewood v. S.C. Dep't of Corr.*, 416 S.C. 304, 310-11, 785 S.E.2d 600, 603-04 (Ct. App. 2016); *infra* Part I.E.

None of this makes Paragraph 12.1 an idle provision. It does real work, and two kinds of error fall squarely within it. Where an inmate works directly for the Department, the Department sets the rate, runs the payroll, and pays from its own funds; a mistake at any of those points is within the pay designee's control, and every remedy Paragraph 12.1 offers fits. Prison Industries pay is different in origin. The money does not come from the Department. A private sponsor pays it, the Department receives it, and Section 24-3-430(H) then directs that it be "applied as provided under Section 24-3-40," which is to say deducted and disbursed. The Department's statutory role in that pay begins after the money arrives. So where the Department receives the correct amount but mishandles it, taking a wrong deduction or crediting an account incorrectly, that is within the designee's control, and it is precisely the subject Section 24-3-40 commits to the Department. Paragraph 12.1 does apply to Prison Industries pay, as the Department says. It applies to the disposition of that pay.

What Paragraph 12.1 cannot reach is the rate. The question Marcus raised was not what the Department did with the money after it arrived, but how much arrived, and that was fixed by

agreement with a private sponsor before any payroll ran. A pay designee can correct anything the Department did with wages it received on the inmate's behalf. He cannot change what the sponsor agreed to pay. Under the statutory scheme only the Director had authority over that figure, and only before the work began. That is the one category of complaint the provision does not reach, and it is the category into which Marcus's grievance falls. It is also, as set out in Part I.B above, a complaint this Court has twice held is not measured from a dated occurrence at all.

The Department's brief concedes the remaining difficulty: "the record contains no evidence that the Respondent was even working a Prison Industries job in 2023." (Appellant's Br. 6.) If Marcus held no Prison Industries job, there was no rate to adjust for future payrolls and no designee with anything to review. And when he asked, the Department told him Financial Accounting "does not make this determination." (Order at 1, 11.) The ALC did not speculate about the designee's role. It read the Department's own response, which was an accurate statement of what that office could and could not do. The Department asks who, other than the inmate pay designee, an inmate should raise such a question with. (Appellant's Br. 12.) Its own answer to Marcus was the grievance system, and the record shows he took it.

Two things this argument does not require. It does not require any conclusion about the validity of any contract between the Department and any sponsor, and Marcus asks the Court to draw none. The point is only that the wage was set where an inmate pay designee could not reach it. Nor does it enlarge the relief sought. Marcus seeks the backpay owed to him, which is what the ALC ordered the Department to calculate.

### D. The Department directed Marcus away from the payroll process, and it has never identified the payroll date error on which its defense depends.

Marcus used the very instrument Paragraph 12.1 prescribes. On August 24, 2023, he submitted a Request to Staff Member seeking prevailing wage backpay. The Department's response was not "you are late" and not "the pay designee will review this." It was that Financial Accounting "does not make this determination" and that Marcus "must submit a grievance for [his] claim to be researched." (Order at 1.) He complied four days later. An agency may not route an inmate out of one internal process and into another and then dismiss him for having taken the route it prescribed.

Nor has the Department ever supplied the fact its defense requires. Paragraph 12.1's clock starts at "the payroll date error." The final agency decision measured Marcus's fifteen days instead from the filing of this Court's opinion in *Torrence II*, finding him untimely because he wrote "approximately two years and two months after the Court of Appeals issued its opinion." (Order at 1-2.) A judicial opinion is not a payroll error. The ALC put the consequence plainly: the Department's reading "would lead to the absurd result of rendering all inmate issues with pay, no matter their genesis, untimely unless they were filed within fifteen days of the *Torrence* decision." (Order at 10 n.8.) Every inmate in South Carolina with a prevailing wage claim would have had until July 15, 2021 to assert it, whether or not he had heard of the case.

The premise is mistaken even on its own terms. *Torrence II* was filed June 30, 2021, but it did not become final on that date. Rehearing was denied August 4, 2021, and the Supreme Court denied certiorari August 3, 2022. The remittitur, which returns jurisdiction to the tribunal below and marks the point at which an appellate decision becomes final, issued August 4, 2022. *See* Rule 221(b), SCACR. The Department's arithmetic thus ran from a date on which the decision it invoked remained subject to review. Marcus does not suggest that some other date in that history would have started a fifteen-day clock, because none would. The point is that the Department

cannot say which date it means. The difficulty is not that it selected the wrong date. It is that the category it invoked contains none. And a deadline measured from any date would fail for the reason *Ackerman* and *Torrence II* gave: a filing period keyed to a dated occurrence cannot govern a grievance about a continuing wage term.

Marcus does not dispute what the Department appears to be reaching for. *Torrence II* did give notice. It held that inmates in the program were owed the prevailing wage, and it identified how that wage is determined. Marcus wrote when he did because of it. But notice of a right is not a payroll error. Paragraph 12.1 does not run from the date an inmate learns he has been underpaid, or from the date a court settles the meaning of a statute. It runs from "the payroll date error." Whatever *Torrence II* began, it was not that. And if the Department's theory is that the claim arose when the law became settled, its own decision picked the wrong end of the case: until certiorari was denied on August 3, 2022, *Torrence II* was subject to review and settled nothing.

There is a further difficulty with taking *Torrence II* as authoritative for its date. The decision did not merely announce that inmates were owed the prevailing wage. It held that a grievance of this character falls within Paragraph 13.9's policies-and-procedures exception, and that a filing period running from a dated occurrence therefore does not apply to it. The Department cannot take the date and leave the holding. If *Torrence II* is authoritative enough to start a clock against Marcus, it is authoritative enough to say what kind of grievance he filed, and it says this one is not measured from an occurrence at all.

What the Department did with *Torrence II* is the more telling thing. This Court held that inmates in the program were owed the prevailing wage and that no occurrence-based deadline governed their grievances. The Department's response was to build another occurrence-based deadline, using the opinion's filing date as the occurrence. Its final agency decision does not

dispute that Marcus was owed the wage, sets out no calculation, and does not reach the merits at all. Neither Return supplied one, and none appears anywhere in this record. The ALC had to order the Department to produce one. (Order at 12.)

The ALC ordered the Department to identify the payroll date error and the date it occurred. The Department filed two Returns and a brief and did not do so. (Order at 4, 11.) In this Court it has abandoned the theory its own decision gave and substituted another: that Marcus "could have presented a RTSM or ARTSM reporting a payroll error or challenging his 'pay rate' at any time from September 16, 2011 to February 14, 2012, and from March 18, 2019 to July 21, 2021, but he did not do so." (Appellant's Br. 13.) That defense still identifies no error and no date. It says only that the fifteen days ran from every payday, so that the claim expired fifteen days after each check, in perpetuity. That is the *Ackerman* argument in its purest form.

The two theories also contradict each other. The final agency decision says the window closed fifteen days after June 30, 2021, a single deadline for everyone keyed to an opinion. The brief in this Court says Marcus could have reported "at any time" during work periods running from 2011 to 2012 and from 2019 to 2021. Paragraph 12.1 says neither: fifteen days from the payroll date error, whenever that was. If Marcus could have reported at any time across those years, no fifteen-day period was running during them, which concedes that the provision the Department invokes was not operating. If a fifteen-day period was running from each payroll, he could not have reported at any time, and the claim expired repeatedly long before the date the final agency decision selected. The Department must choose, and neither choice sustains the denial. An exhaustion defense whose proponent cannot say what had to be done, or when, does not bar anything.

The Department adds that its determination "is undisputed or at least supported by substantial evidence." (Appellant's Br. 13.) There is no such determination. The final agency decision made no finding about what Marcus did or did not report between 2011 and 2021. It found only that he wrote too long after *Torrence II*. A ground the agency never adopted cannot be sustained on substantial evidence review, and the absence of evidence in a record the Department compiled, and was ordered to supplement, is not a finding in the Department's favor.

### E. The Department's own characterization of the underpayment places it outside Paragraph 12.1.

The Department argues that the ALC wrongly read intent into the word "error," and that the underpayment was an innocent misreading, since "errors of law are not necessarily intentional; they can result from a different reading or interpretation of statutory language." (Appellant's Br. 11-12.) The argument depends on using one word for two things. What Paragraph 12.1 addresses is a *payroll error*: an event with a date, reported to an inmate pay designee, cured by adjusting a rate for future payrolls and paying two pay periods. What the Department's brief defends is an *error of law*: a mistaken reading of former Section 24-3-430(D), of the kind appellate courts correct without imputing fault. The Department needs the innocence of the second to protect the applicability of the first.

The two cannot be joined. An error of law about the meaning of a wage statute is not something an institution's pay designee can find or fix. It is not a payroll function at all. Resolving it requires construing the statute, which is why complaints of this kind are directed to the grievance system and reviewed by the Office of General Counsel, and why the Department told Marcus that Financial Accounting "does not make this determination" and that he "must submit a grievance for [his] claim to be researched." (Order at 1, 11.) If the underpayment was an error of law, Paragraph

12.1 was never the mechanism for it. If it was a payroll error, the Department should have been able to say what it was and when it occurred, and it never could. The defense requires the underpayment to be legal enough to be innocent and clerical enough to fall within the pay designee's ambit. It cannot be both.

There is a more basic reason the underpayment was not a payroll error. Section 24-3-315 required that the Director "must determine *prior to using inmate labor* in a prison industry project that . . . the rates of pay and other conditions of employment are not less than those paid and provided for work of similar nature in the locality in which the work is performed." S.C. Code Ann. § 24-3-315 (emphasis added). The statute assigned an analysis, to a named official, to be performed before the work began. The wage was not an incidental term. Section 24-3-410(A) made it unlawful to sell inmate-made articles on the open market, and Section 24-3-410(B)(7) exempted Prison Industries products only where the inmate workers received comparable wages. S.C. Code Ann. § 24-3-410. Paying the correct wage was thus a condition on which the lawfulness of the program's sales depended, not a detail of payroll administration. What went wrong here went wrong at that stage. The rate was set without the determination the statute required, or the determination was made and was wrong. The payroll that followed executed the rate faithfully; every payment was correct as against the rate that governed it. A payroll error is a departure from the governing rate. This is a defect in the governing rate itself, which is why Paragraph 12.1's remedies read as they do. Adjusting the rate a payroll is applying and paying two periods presupposes a correct rate incorrectly applied. That machinery has nothing to operate on when the rate itself is the defect. The Department's position is that the consequence of the Director's failure falls on the inmate, who forfeits the wage unless he identifies it within fifteen days of a payroll that accurately reflected it.

The claim of innocence fails on its own terms as well, for reasons that appear in published authority and require no resort to the record.

In 2002 the Attorney General issued an opinion at the request of the chairman of the Senate Corrections and Penology Committee, addressing whether inmates performing work for private entities must be paid the prevailing wage. S.C. Op. Att'y Gen., 2002 S.C. AG LEXIS 204 (Oct. 17, 2002). The opinion quotes a memorandum of the Department's own General Counsel, dated March 23, 2001, advising that inmates who work in prison industry service programs "must be paid the prevailing wage for their work"; that their wages must be "received by SCDC, with such wages affected and distributed in accordance with Section 24-3-40"; and that "[w]here existing prison industry service programs are in place, SCDC should begin to comply with the above provisions immediately." The Attorney General agreed, and stated the conclusion without qualification as to the kind of work: "I agree that Section 24-3-430 is mandatory and must be followed." The request itself recited that, on review of the Department's Prison Industries operations, its General Counsel "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," and that several binding contracts would require renegotiation to comply.

Two things follow. The first is that the Department's General Counsel had drawn, by 2001, precisely the distinction described above: the prevailing wage obligation under Section 24-3-430(D) is one duty, and the receipt and distribution of wages under Section 24-3-40 is a separate one. The memorandum treats them as separate numbered items, and Section 24-3-40 is the statute on which ADM-15.13 rests.

The second concerns what the Department did next, and it is a matter of public record. Effective for the fiscal year beginning July 1, 2001, the General Assembly enacted a budget

proviso permitting the Department to pay less than the prevailing wage, but only for a defined category of work. The proviso provided that "[t]he department may negotiate the wage to be paid for inmate labor provided under prison industry *service work* contracts, and such wages may be less than the prevailing wage for work of a similar nature in the private sector," and defined service work as "any work such as repair, replacement of original manufactured items, packaging, sorting, labeling, or similar work that is *not original equipment manufacturing*." H. 3687, Appropriation Bill 2001-2002, Part IB § 37.31 (Act No. 66, 2001 S.C. Acts 738), quoted in *Gatewood v. S.C. Dep't of Corr.*, 416 S.C. 304, 310-11, 785 S.E.2d 600, 603-04 (Ct. App. 2016), and in *Ackerman*, 415 S.C. at 416-17, 782 S.E.2d at 759 (emphasis added). Substantially identical provisos followed each year until the exception was codified at Section 24-1-295, effective August 1, 2007. S.C. Code Ann. § 24-1-295. *Gatewood*, 416 S.C. at 311, 785 S.E.2d at 604.

The line was not a legislative preference. It was the boundary of what a state proviso could reach. As the Attorney General's opinion explains, the federal Ashurst-Sumners Act has since 1935 barred the shipment of prison-made goods in interstate commerce, subject to limited exceptions, one of which is the prison industry enhancement program, and that program conditions the exemption on payment of at least the prevailing local rate. Service operations were never within the Act's prohibition at all, having posed no threat to private industry in 1935. Original equipment manufacturing was within it. The Department could therefore obtain state relief as to service work, and no act of the General Assembly could have obtained it as to the rest. What the Department secured in 2001 was everything a proviso could give, and it stopped where it did because that is where it had to stop.

An agency that identifies a compliance problem and obtains relief to the outer limit of what state law could give has not misread the statute. It has read the statute accurately enough to know

precisely what relief to request, and to know which part of its operations no relief could reach. And the relief it obtained did not reach Marcus. The exception was confined to service work that is not original equipment manufacturing, and it remained so confined when codified. Marcus performed Prison Industries work in 2011 and 2012 and again from 2019 to 2021, outside the exception and squarely within former Section 24-3-430(D). Whatever else may be said of the Department's decision to pay him below the statutory floor across those years, it cannot be said that the Department did not know what the floor was.

This confirms the ALC's reading of "payroll error" as connoting an administrative mistake rather than a wage policy deliberately maintained. It also answers the Department's complaint that the ALC addressed intent "with no record on which to make such a decision." (Appellant's Br. 11.) But the point is not indispensable. The Department's construction fails without any inquiry into intent at all: a provision resting on distribution statutes, remedied by prospective adjustment and two pay periods, and administered by an official the Department says does not make this determination, does not reach a multi-year statutory wage claim whatever produced the underpayment.

### F. Section 24-3-390 confers a power to promulgate, and the Department did not promulgate.

For the reasons already given, Paragraph 12.1 has no application to this grievance, and the Court need go no further. The Department now contends, however, that the provision governs these claims. Taken at face value, that contention defeats itself. Reduced to essentials, the Department's position is that an internal policy never promulgated as a regulation can extinguish a statutory entitlement fifteen days after it accrues. Former Section 24-3-430(D) commanded that no inmate in

the program earn less than the prevailing wage.[4] Paragraph 12.1 provides that if an inmate does not write within fifteen days, "no back pay will be given." Read as the Department reads them, the two cannot both stand. What the Department has done, in substance, is impose a period of limitation upon a statutory obligation owed by the Department itself, running from an event the Department cannot identify, in a document it never promulgated. The Department's answer is that ADM-15.13 carries the "force of law." (Appellant's Br. 7.) Its sole authority for that proposition is Section 24-3-390, which provides that the Department "shall have power and authority to prepare and promulgate rules and regulations which are necessary to give effect to the provisions of this article with respect to matters of administration and procedure respecting it." S.C. Code Ann. § 24-3-390; *see* Appellant's Br. 8.

Section 24-3-390 is not the difficulty; the Department's use of it is. The section works as written. It grants a rulemaking power and bounds that power twice over. The Department's reliance on it fails at the threshold. What Section 24-3-390 grants is a power to *promulgate*. Promulgation is not a description of any document an agency happens to produce; it is a defined process, culminating in a regulation having the force of law. The Department concedes that ADM-15.13 "has never been promulgated as a regulation under the Administrative Procedures Act." (Appellant's Br. 7.) The very statute on which it relies therefore describes the route the Department did not take. The power to promulgate a binding regulation is not the power to make an unpromulgated policy binding.

The Department's present characterization of Paragraph 12.1 confirms the difficulty. On its account the provision dictates the result mechanically: the inmate reports within fifteen days or, in the policy's words, "no back pay will be given." That is how the Department applied it to Marcus,

[4] Section 24-3-40(A) likewise directed that the employer of a prisoner working in a prison industry program under Article 3 "shall pay the prisoner's wages directly to the Department of Corrections." S.C. Code Ann. § 24-3-40(A). The statutory scheme thus addressed the wage in one place and its disposition in another.

as the sole ground of denial, with no exercise of judgment on its part. A policy so applied is a binding norm. It "so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion," and under the Administrative Procedures Act it "has the effect of a regulation." *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 454, 790 S.E.2d 763, 772 (2016). An agency that adopts such a norm without promulgating it engages in "administrative overreach that attempts to end run the legislative process." *Id.* at 455, 790 S.E.2d at 773. Nor does the Administrative Procedures Act exempt this subject from promulgation. The exclusion for orders of a penal institution reaches those made "in respect to the institutional supervision, custody, control, care, or treatment of inmates." S.C. Code Ann. § 1-23-10(4). A wage owed for labor performed for a private company is none of those things. And Section 24-3-390 directs the Department to promulgate rules and regulations giving effect to Article 3, which the General Assembly would not have required for a subject it had placed beyond the reach of the Act. An unpromulgated criterion applied to individual determinations is invalid for that purpose. *Captain's Quarters*, 306 S.C. at 490-91, 413 S.E.2d at 14-15.

The Department is therefore caught between two positions. If Paragraph 12.1 is what the Department treated it as for two decades, a payroll-correction procedure administered by an office that told Marcus it "does not make this determination," it does not reach this grievance. If it is what the Department now says it is, a rule that resolves prevailing wage claims by its own terms, it is a regulation in substance that was never promulgated. Neither reading sustains the denial.

The Department seeks to bridge the gap by observing that Section 24-3-390 refers to "rules" as well as "regulations," and by reasoning that because the grievance system is itself a policy rather than a promulgated regulation, an internal policy may set the procedural parameters of a prevailing wage claim. (Appellant's Br. 8.) The premise does not carry the conclusion. That an

agency may adopt internal rules is not in dispute; the Department adopts a great many, and ADM-15.13 is one of them. The question is whether an unpromulgated internal rule may override a statute, and calling the document a rule rather than a regulation does not answer it, especially when Section 24-3-390 indicates that both rules and regulations may be promulgated. Whatever Section 24-3-390 permits the Department to adopt without promulgation, it does not permit the Department to adopt something that operates as a repeal of Section 24-3-430(D).

That an agency may not do by policy what the statute forbids is settled. "[W]here, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 150, 694 S.E.2d 525, 531 (2010). The plain language of former Section 24-3-430(D) forbade paying a participating inmate less than the prevailing wage. Paragraph 12.1, as the Department construes it, permits exactly that whenever fifteen days pass without a written complaint.

The Administrative Law Court has applied that principle to this precise policy. In *Tucker v. South Carolina Department of Corrections*, Docket No. 24-ALJ-04-0328-AP (S.C. Admin. Law Ct. June 26, 2025), the court held that 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 our appellate courts' decisions in *Torrence II* and *Ackerman*." The court was "not persuaded that an unpromulgated Department policy may be interpreted to foreclose prevailing wage claims," and added that "[e]ven if Policy 15.13 had been promulgated as a regulation, it would be ineffective to contradict the statutory mandates." It described Policy 15.13 as "a statement of agency policy without the force of law" that "has not been promulgated as a regulation in compliance with the rule-making provisions of the Administrative Procedures Act." The court reversed and ordered the Department to disburse the backpay owed. The Department did

not appeal. Dismissing a later appeal brought by the inmate, this Court described the June 26, 2025 order as "a final decision of the ALC in favor of Appellant" that the Department, as respondent in that case, had not appealed. *Tucker v. S.C. Dep't of Corr.*, Appellate Case No. 2025-002168 (S.C. Ct. App. Nov. 26, 2025).

The reliance fails a second time on the terms of the grant. The rules Section 24-3-390 authorizes must satisfy two limits at once. They must be "necessary to give effect to the provisions of this article," and they must be "with respect to matters of administration and procedure respecting it." Paragraph 12.1, as the Department construes it, satisfies neither. A rule that extinguishes the wage entitlement Section 24-3-430(D) created does not give effect to the article; it repeals part of it. And the permanent forfeiture of a statutory wage is not a matter of administration or procedure. It is the substance of the right. The reliance fails a third time as a matter of fit. A regulation is valid only so long as it is "reasonably related to the purpose of the enabling legislation," and "[a]lthough a regulation has the force of law, it must fall when it alters or adds to a statute." *McNickel's*, 331 S.C. at 635, 503 S.E.2d at 726. Even promulgation would not have saved a rule that adds a forfeiture Article 3 does not contain. As set out above, ADM-15.13 claims no Article 3 authority. It identifies its statutory authority as Sections 24-3-40 and 24-1-295, neither of which is in the article Section 24-3-390 addresses. The Department now says the force of law comes from Section 24-3-390. The policy says otherwise on its face. The argument thus rests on a statute the document itself does not invoke.

Deference to an agency's reading of its own policy would not rescue the argument. This Court will not overrule such an interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Torrence II*, 433 S.C. at 642, 861 S.E.2d at 42. A reading under which the Department may pay a participating inmate less than the statutory floor, and be relieved of the

shortfall because he did not object within fifteen days of each payday, is manifestly contrary to the statute.

The constitutional difficulty is not incidental to the Department's position; it is that position. *Torrence I* holds that no private right of action exists and that the prevailing wage may be enforced only through the grievance procedures. *Wicker* holds that the right, being state-created, cannot be denied "without affording due process of law." *Wicker*, 360 S.C. at 423-24, 602 S.E.2d at 57. If Paragraph 12.1 means what the Department says, the sole forum South Carolina law makes available closes fifteen days after each payday, and the recovery it could have yielded is two pay periods. A State may not use procedural restrictions to destroy an entitlement its own law has created. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-34 (1982). Where one construction of an agency policy would raise that question and another avoids it, the latter is to be preferred. The construction the ALC adopted avoids it.

### G. The Department has told this Court that dismissal of these claims under ADM-15.13 is error.

The Department has also told this Court the opposite of what it argues here. On May 23, 2025, in *Gibson v. South Carolina Department of Corrections*, Appellate Case No. 2024-001076, the Department moved this Court to remand a materially identical prevailing wage appeal, telling this Court that it "does not contest that it was error to dismiss these claims pursuant to ADM-15.13," and asking that the matter be sent back to the Department "for issuance of an appealable corrected Step 2 response which specifically sets forth the Department's wage calculations." Mot. to Remand, *Gibson v. S.C. Dep't of Corr.*, Appellate Case No. 2024-001076 (filed May 23, 2025); *see* Order at 3 & n.1. That is the same policy, the same use of it, and substantially the relief the ALC ordered here.

The Department characterizes *Gibson* as "a strategic decision limited to that case." (Order at 4.) The characterization is difficult to reconcile with the Department's conduct elsewhere. The Department also declined to appeal *Tucker*, where it had lost on this same policy, and allowed that decision to become final. *See supra* Part I.F. In any event, whether or not the Department's account of its litigation choices is accurate, it is not a legal distinction. The Department has identified nothing about Marcus's grievance that makes ADM-15.13 a valid ground of dismissal here when it concedes the same use of the same policy was error there. The Department has not attempted to distinguish the two cases, and on this record there is nothing to distinguish.

## II. The ALC decided the only ground the Department raised, after twice ordering the Department to be heard on it.

The Department's second contention is that the ALC "improperly interjected itself as an advocate" by addressing arguments Marcus had not made. (Appellant's Br. 7.) The contention misdescribes both the issue below and what the ALC did.

The issue below was the Department's own. It denied Marcus's grievance under Paragraph 12.1 and defended that denial on appeal. The single question the ALC had to answer was whether Paragraph 12.1 barred the claim, and answering it required deciding what Paragraph 12.1 means. A court that must decide whether a policy applies is not confined to the constructions the parties happen to offer, and it does not become an advocate by supplying reasons for rejecting the defense the moving party asserted. The reasons the ALC gave, that the ordinary sense of "error" excludes deliberate wage-setting, that the pay designee disclaimed the determination, that the remedies available under Paragraph 12.1 are prospective and capped, are reasons for rejecting the Department's defense. They are not new grounds of decision.

*City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 599 S.E.2d 462 (Ct. App. 2004), does not hold otherwise. Its principle, drawn from *Griffin v. Capital Cash*, 310 S.C. 288, 294, 423 S.E.2d 143, 147 (Ct. App. 1992), is that a court errs by deciding "a case on a ground not before it." *Lewis-Davis*, 360 S.C. at 230, 599 S.E.2d at 464. What the case held is narrower than the sentence. The trial judge there granted the respondents relief on a theory they had never advanced, and and the panel, having examined the record for any trace of it, found they "made no claim for relief based on" that theory at all. *Id.* at 229, 599 S.E.2d at 464. Reversal follows, the Court explained, when a ruling "exceeds the limits and scope of the particular motion before it." *Id.* at 230, 599 S.E.2d at 464 (citing *Skinner v. Skinner*, 257 S.C. 544, 550, 186 S.E.2d 523, 526 (1972)).

The record here is the opposite. The ALC granted Marcus relief on the only ground before it, which was the Department's own. Paragraph 12.1 was not merely before the ALC; it was the whole of what was before the ALC. The Department put it there, defended it in two Returns filed under order, and pressed it again in a brief. The ALC did not exceed the scope of anything. It rejected the single defense presented. *Lewis-Davis* forbids granting a party relief on a claim that party never made. It does not require a court to accept an agency's construction of its own policy because the opposing party, a pro se inmate, did not contest it in the terms the court found dispositive.

The due process objection fails on the record. The Department says the ALC ruled "without even first raising it in its Rule to Show Cause Orders to allow SCDC the opportunity to be heard." (Appellant's Br. 11.) The Second Order to Show Cause did precisely that. It asked whether the Department contended ADM-15.13 foreclosed the claim and, if so, for "specific identification of the 'payroll date error,' including the nature and date(s) thereof." (Order at 4.) The nature of the asserted payroll error is the whole of what the Department now says it was not heard on. The same

order raised the statutory question under Sections 24-3-315 and 24-3-430(D), the effect of *Torrence*, and the relationship to Paragraph 13.2, which are the other three matters the Department calls sua sponte. Every subject it identifies was noticed in advance and briefed. The Department filed two Returns and a respondent's brief. It was heard. It had no answer.

As to Paragraph 13.2, the complaint has been overtaken by the Department's own position in this Court. It tells this Court that Paragraph 13.2 was not asserted as a basis for denial or for affirmance, and that pre-September 2023 policy governs. (Appellant's Br. 10-11.) Marcus accepts both propositions. The ALC's discussion of Paragraph 13.2 was corroborative reasoning, not a holding, and the order below stands or falls on its construction of Paragraph 12.1.

Finally, this issue cannot change the outcome. Review of the ALC's legal conclusions is de novo, and this Court may affirm on any ground appearing in the Record. Rule 220(c), SCACR. If some portion of the ALC's reasoning went further than the case required, the remedy is to disregard it, not to reinstate a final agency decision resting on the proposition that a prevailing wage claim expires fifteen days after this Court publishes an opinion.

## CONCLUSION

The Department paid Marcus below a floor the General Assembly established. When he asked to be paid, it told him Financial Accounting could not decide the question and directed him to file a grievance. He filed one within four days. The Department denied it because he had not written within fifteen days of an appellate decision, and in the two and a half years since it has never identified any other date from which fifteen days could run. No calculation of what it owes appears anywhere in this record.

The Administrative Law Court held that ADM-15.13, a policy resting on the statutes that govern how inmate wages are received and distributed, offering remedies of prospective rate

adjustment and two pay periods of backpay, and administered by an official the Department says does not make this determination, is not the mechanism South Carolina law provides for enforcing former Section 24-3-430(D). That holding follows from *Torrence I*, *Wicker*, *Adkins*, *Ackerman*, and *Torrence II*, and it is the conclusion the Department itself pressed on this Court in *Gibson*. This Court may affirm on the reasoning of the order below or on any ground appearing in the Record. Rule 220(c), SCACR.

The simplest statement of the case is the shortest. Marcus filed a grievance under the procedures South Carolina law directed him to use. The grievance concerned the Department's policies and procedures, as this Court has twice held grievances of this character to be. A filing period measured from the date of an occurrence does not govern such a grievance, whether the occurrence is called an incident or a payroll error.

Respondent Luther B. Marcus respectfully requests that the order of the Administrative Law Court be affirmed.

Respectfully submitted,

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