

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
Ralph K. Anderson, III, Chief Administrative Law Judge

Docket No. 07-ALJ-04-00517-AP

Fred Gatewood..... Appellant,

v.

South Carolina Department of Corrections..... Respondent.

Appellate Case No. 2014-001199

---

INITIAL REPLY BRIEF OF APPELLANT

---

Douglas H. Westbrook, #6039  
23 Broad St.  
Charleston, SC 29401  
(843) 853-9600  
Attorney for Appellant

**RECEIVED**

OCT 29 2014

**SC Court of Appeals**

TABLE OF CONTENTS

	page
Table of Authorities.....	iii
Statement of Issues on Appeal.....	1
Statement of the Case.....	1
Standard of Review.....	2
Argument.....	2
1. The ALC erred in denying Gatewood's Motion to Supplement the Record for section II(A)(C) of the motion because the documents proposed in those subsections had been received or considered by SCDC, or proffered but excluded, pursuant to ALC Rules 58B and D.....	2
2. The ALC erred in holding §24-1-295 governed deductions from Gatewood's gross wages because §24-3-40 was the governing statute.....	3
3. The ALC erred in holding §24-1-295 governed deductions from Gatewood's gross wages because §24-1-295 does not apply retroactively to Gatewood's pre-August 1, 2007 work.....	7
4. The ALC erred in applying §24-1-295 to Gatewood's pre-August 1, 2007 work because it violated due process..	9
5. The ALC erred in applying §24-1-295 to Gatewood's pre-August 1, 2007 work because it impaired the obligations of contracts.....	9
6. The ALC erred in holding, pursuant to §24-1-295, that security and overhead were "other required deductions" in the contract because the clear and unambiguous terms of the contract indicate that these costs were to be paid by SCDC at its expense.....	10
7. The ALC erred in ruling that overtime was not preserved for review because it was preserved, SCDC waived the issue preservation argument, the ALC raised the issue <u>sua sponte</u> , and Gatewood was entitled to overtime on the merits.....	14

8. The ALC erred in not granting Gatewood's request for pre and post-judgment interest, and to petition the ALC for costs and attorney fees, because this ruling was based on the ALC's erroneous ruling that SCDC could deduct security and overhead costs from Gatewood's \$4.00 gross wage under §24-1-295..... 16

9. The ALC erred in declining to consider the issue of whether SCDC should have to process grievance for all workers even if they had not personally filed because this was a stated issue in Gatewood's appeal and the ALC did not state that it was manifestly without merit 16

10. The ALC erred in declining to enjoin SCDC from further wage violations because such ruling was appropriate in the circumstances..... 17

Conclusion..... 17

TABLE OF AUTHORITIES

	page
Cases	
<u>Charlotte-Mecklenburg Hosp. Auth. v. SCDHEC</u> 692 S.E. 2d 894 (S.C., 2010).....	8
<u>Darrell Williams, Class Rep., et al. v. SCDC, et al.</u> 641 S.E. 2d 885 (S.C., 2007).....	6,8,13
<u>First Union Nat. Bank v. FCVS Comm.</u> 469 S.E. 2d 613 (S.C. App., 1996).....	3
<u>Mathis v. Brown &amp; Brown of South Carolina, Inc.</u> 698 S.E. 2d 773 (S.C., 2010).....	13
<u>S.C. Dept. of Probation, Parole &amp; Pardon Serv. v. Reynolds</u> 343 S.C. 465, 540 S.E. 2d 480 (S.C. App., 2000).....	5
<u>SCDC v. Cartrette</u> 694 S.E. 2d 18 (S.C. App., 2010).....	13-15
<u>Southern Atlantic Financial Services, Inc. v. Middleton</u> 356 S.C. 444, 590 S.E. 2d 27 (2003).....	11
<u>Torrence v. SCDC</u> 646 S.E. 2d 866 (S.C., 2007).....	7-8, 13
<u>Wilkinson ex rel Wilkinson v. Palmetto State Trans. Co.</u> 371 S.C. 365, 638 S.E. 2d 109 (S.C. App., 2006).....	13
Statutes	
18 U.S.C. §1761.....	5
S.C. Code §1-23-610.....	2,8
S.C. Code §14-18-200.....	8
S.C. Code §24-1-295.....	3-11, 14, 16
S.C. Code §24-3-40.....	3-8, 12-13
S.C. Code §24-3-310.....	5, 12-13
S.C. Code §24-3-315.....	14

S.C. Code §24-3-410.....	5-6
S.C. Code §24-3-430.....	1, 4-5, 15
S.C. Code §41-10-10.....	6
Statutes at Large, No. 66, §37.31.....	1,3
Other	
SCACR 203.....	14
SCACR 208.....	2
ALC Rule 58.....	2
J. Toal, <u>Appellate Practice in South Carolina</u> , Second Ed...	7

## STATEMENT OF ISSUES ON APPEAL

The Department of Corrections (SCDC) modifies the Statement of Issues made by Appellant (Gatewood) in his initial brief (Gatewood's brief, 1-2; SCDC brief, 1). This reply brief will address SCDC's points under the issue number and in the order presented in Gatewood's brief.

## STATEMENT OF THE CASE

SCDC states the ALC's November 12, 2013 order denying Gatewood's Motion to Supplement was a "final order" (SCDC brief, 1). As explained in Gatewood's notice of appeal filed on June 2, 2014, Gatewood contends the order was not a final, appealable order, but appeal was nevertheless attempted for reasons stated therein (Notice of Appeal; R, ).

SCDC states Gatewood's grievance claimed entitlement to the prevailing wage under §24-3-430(D) (SCDC brief, 3). Gatewood's grievance and Amendment were forms counsel drafted for large numbers of inmates who worked at different times. The forms claimed the prevailing wage rate from 1999 to 2001 under §24-3-430, and the negotiated wage of \$4 per hour after July 2001 under the budget provisos (Gatewood step 1; R, ; Amendment; R, ). Gatewood worked after July 2001. Thus, in the ALC Gatewood contended he was entitled to the \$4 per hour negotiated wage rate, not the prevailing wage (Gatewood ALC brief, 4; R, ).

SCDC states Gatewood lacks understanding of the budget provisos, statutes, projects and parties, which undermines his claim to the \$4 wage rate (SCDC brief, 4-5). Gatewood contends this statement is argumentative, contributes nothing to a "concise history of the proceedings", and should be disregarded

by the Court (SCACR 208(b)(1)(C)(2)).

#### STANDARD OF REVIEW

SCDC states this Court may reverse the ALC only if the ALC decision falls within §1-23-610(B)(d)(e)(f) grounds (SCDC brief, 5-6). Gatewood contends §1-23-610(B)(a)(b)(c) grounds may also apply in a given situation.

SCDC states Gatewood must prove the ALC decision is unsupported by substantial evidence, and is arbitrary and otherwise characterized by abuse of discretion (SCDC brief, 6). Gatewood contends §1-23-610(B)(a)-(f) is phrased in the disjunctive, and thus any one ground is sufficient.

#### ARGUMENT

1. **The ALC erred in denying Gatewood's Motion to Supplement the Record for section II(A)(C) of the motion because the documents proposed in those subsections had been received or considered by SCDC, or proffered but excluded, pursuant to ALC Rules 58B and D.**

SCDC contends Gatewood has shown no prejudice from the ALC's denial of his motion (SCDC brief, 8). Gatewood noted in his initial brief, p. 5, the ALC's statement that it would not consider back wage calculations, which SCDC would probably have to make on remand. Such calculations would require knowledge of Gatewood's work dates, hours and wages paid. However, pay rate and hours entries on SCDC spreadsheets have been said to be inaccurate after July 2000 and inmates' pay stubs and time cards must be considered for that information (Sept. 1, 2004 SCDC response 3(g) to Fourth Request for Admission; R, ).

Appendix 1, page 12, is a spreadsheet with Gatewood's start/stop work dates derived from various SCDC sources (App. 1; R, ). Gatewood's initial

brief, p. 5, also notes his ALC brief requested a remand to SCDC to calculate his back wages at a gross wage rate of \$4 per hour. We are currently in Level 3 merits briefing in the ALC. There is no Level 4. Level 3 is the correct and only time for the ALC to order wage calculations and guidelines for SCDC on remand. Moreover, SCDC will need Gatewood's pay stubs and time cards in the record to make those calculations. Thus, Gatewood contends these records are relevant and necessary to calculate back wages and he is prejudiced if they are not produced.

Gatewood notes SCDC did not respond to his arguments that SCDC considered his pay stubs and time cards during pendency of his administrative hearing under ALC Rule 58B; and that Gatewood's ALC appeal was a "contested case" and he proffered Appendix 1 for the ALC record under Rule 58D (Gatewood brief, 7-9). For that reason, Gatewood contends SCDC's failure to respond can amount to a conclusion that the ALC ruled incorrectly (First Union Nat. Bank v. FCVS Comm. 469 S.E. 2d 613, 617 (S.C. App., 1996)).

**2. The ALC erred in holding §24-1-295 governed deductions from Gatewood's gross wages because §24-3-40 was the governing statute.**

SCDC states the ALC correctly determined that §24-1-295, not §24-3-40, applied to Gatewood's work (SCDC brief, 9). However, this contradicts SCDC's later position that §24-1-295 cannot apply (SCDC brief, 23).

SCDC states nothing in the budget provisos or §24-1-295 mandates a specific wage or wage range (SCDC brief, 11). The budget proviso (Statutes at Large, No. 66, §37.31, eff. July 2001) allowed SCDC to:

..negotiate the **wage** to be paid for inmate **labor** provided under prison industry work **contracts**, and such **wages** may be less than the prevailing wage..

Substantially the same language is found in §24-1-295.

Section 3.3.1 of the 1998 contract provided, "..Williams agrees to pay SCDC **\$4.00 per hour** per inmate for **work performed..**" (contract §3.3.1; R, ). Gatewood contends that, while these provisions in the proviso did not mandate a specific wage, the proviso coupled with the contract mandated a \$4 per hour gross wage, which was for "work" or "labor" and nothing else.

SCDC contends that just because the hourly labor rate was \$4 does not mean it was required to pay inmates \$4 (SCDC brief, 12). However, §24-3-430(A)(B) applies to service work programs like the one here, and allowed SCDC to enter into contracts to implement the program. Moreover, earnings from work in the program must be paid directly to SCDC and applied as provided in §24-3-40 (§24-3-430(H)).

Section 3.1.6 of the contract states, "6. Payment for Inmate Services: SCDC will invoice Williams on a bimonthly basis for inmate **labor**" (contract §3.1.6; R, ). In addition, §3.3.1 (contract §3.3.1; R, ) provides:

1. Payment for Services: ..**SCDC shall be responsible** to pay inmate workers, **cover security costs and P.I. overhead**, including any costs for health, safety and welfare of the inmates, taxes or other payroll deduction..

Finally, §3.2.4 states, "4. Security: **At its expense**, SCDC shall be responsible for the security of the inmate labor force and the security of Williams' employees and agents" (contract §3.2.4; R, ).

From the above, it seems apparent the \$4.00 payment was for "labor", not

labor plus security and overhead. Security is paid by SCDC "at its expense", and SCDC is responsible to "cover" security and overhead.

SCDC states the ALC accurately explained that §24-3-40 applies to PIECP projects, not service projects. SCDC also states §24-1-295, not §24-3-40, applies to service projects like the one here (SCDC brief, 12; ALC 4-29-14 order, p. 5, note 6). However, the ALC's explanation, discussed in Gatewood's initial brief, p. 14, did not mention "PIECP" projects. PIECP projects are federally certified by the Department of Justice under 18 U.S.C. §1761(c).

First, Gatewood contends SCDC provided no authority for its conclusory argument that §24-3-40 applies to PIECP but not service projects, and this Court should not consider it (S.C. Dept. of Probation, Parole & Pardon Serv. v. Reynolds 343 S.C. 465, 540 S.E. 2d 480 (S.C. App., 2000)).

Gatewood contends §24-3-40 does apply to service projects. Section 24-3-40 applies to prisoners "...in a prison industry program provided under **Article 3**" of chapter 24 (§24-3-40(A)). "Article 3" means the "Prison Industries" section which includes **§§24-3-310 to 24-3-430**. Section 24-3-430(A) states SCDC may establish a program using inmate labor in private industry for "the provision of **services**". And, §24-3-430(H) requires that inmate earnings "pursuant to this section" be paid to SCDC and "applied as provided under **Section 24-3-40**".

Title 18 U.S.C. §1761(c) excepts from the normal prohibition on transporting goods in commerce made by prisoners (§1761(a)), where the prisoner is employed in one of the federally certified projects. S.C. Code §24-3-410 has a prohibition similar to 18 U.S.C. §1761(a), and in §24-3-410(B)(7) an exception for prisoner made goods in a "**federally certified private sector/prison industry**

program". Thus, because §24-3-40 applies to Article 3 projects and projects in §24-3-410(B)(7) fall under Article 3, then §24-3-40 may also apply to §24-3-410(B)(7) projects.

Finally, while §24-1-295 covers "service work", it could only apply to Gatewood after August 1, 2007 (issues 3-5) or not at all (issue 6).

SCDC states that Williams cited §24-3-40 as evidence of the legislature's intent as to the entity responsible for paying inmate wages (SCDC brief, 13). However, as Williams stated, "(o)f even greater significance.." was that the legislature mandated **how** wages were to be handled and deductions made under §24-3-40 (Darrell Williams, Class Rep., et al. v. SCDC, et al. 641 S.E. 2d 885, 887 (S.C., 2007)).

SCDC states Williams did not consider whether §24-3-40 applied to service projects (SCDC brief, 13). However, Williams did decide that the Payment of Wages Act, §41-10-10, et seq., was concerned with the payment of wages and is directed to the entity responsible for payment. This was because the 1998 contract provides a \$4 flat rate per inmate and SCDC is responsible to pay inmate workers and handle deductions. And, §24-3-40 mandated the employer to pay inmate wages to SCDC which makes specific deductions provided in §24-3-40 (Williams, 641 S.E. 2d at 887).

SCDC states if §24-3-40 applies to service and PIECP projects, then §24-1-295 has no meaning (SCDC brief, 13). Section 24-1-295 apparently broadened coverage in the provisos to include "export work". It also allows "any other required deductions", in its catch-all phrase, to be deducted from gross wages. Gatewood contends §24-1-295 has plenty of meaning, as shown by the ALC's application of the statute in this case, incorrect though it was.

Finally, Gatewood notes SCDC did not respond to his argument that §24-1-295 cannot apply to Gatewood's pre-August 1, 2007 work because that was the effective date of the statute (Gatewood brief, 13).

**3. The ALC erred in holding §24-1-295 governed deductions from Gatewood's gross wages because §24-1-295 does not apply retroactively to Gatewood's pre-August 1, 2007 work.**

SCDC contends issues 3-5 (retroactive application, due process, and impairment of contracts) are not preserved for review because Gatewood did not raise them in the ALC nor did it rule on them (SCDC brief, 13-14). Obviously, Gatewood did not raise §24-1-295 as the authority for Gatewood's deductions since §24-3-40 was the governing statute and the ALC raised §24-1-295 on its own without briefing or prompting by the parties (ALC 4-29-14 order, p. 7, note 8; R, ).

In the ALC, the parties briefed the budget proviso and §24-1-295 in context of SCDC's ability to negotiate a wage and Gatewood's entitlement to it (Gatewood's ALC initial brief, 4; R, ; SCDC ALC brief, 6; R, ). Gatewood also briefed SCDC's obligation on remand to make only deductions authorized in §24-3-40 and Torrence (Gatewood ALC initial brief Conclusion, 12; R, ). The ALC ruled §24-3-40 did not apply to Gatewood's deductions, but §24-1-295 did (ALC 4-29-14 order, 7-9; R, ).

A party need not use the exact name of a legal doctrine to preserve it for review, but it must be clear the argument has been made on that ground (J. Toal, Appellate Practice in South Carolina, Second Edition, pp. 57-59). Here, the issue is the correct statutory basis for wage deductions. Gatewood

contends he adequately raised the issue in the ALC. Finally, Gatewood contends it would be unreasonable to require him to raise a statute which was not even effective until almost three years after he started work, and where the Supreme Court has strongly indicated in Williams and Torrence that §24-3-40 is the governing statute anyway.

Finally, the ALC's decision applying §24-1-295 is part of the ALC's Level 3 final decision denying Gatewood's grievance on the merits. Gatewood contends that entire decision was a final, appealable order, and any finding that the part of the order regarding §24-1-295 was not preserved in issues 3-5 would deny Gatewood his right to appeal (§§1-23-610(A)(1), 14-18-200(a), and Charlotte-Mecklenburg Hosp. Auth. v. SCDHEC 692 S.E. 2d 894-895 (S.C., 2010)).

SCDC contends the ALC did not apply §24-1-295 retroactively because before 2007, no statute, but the 1998 contract, required that security and overhead be deducted from Gatewood's \$4.00 negotiated wage. SCDC also stated the ALC concluded that security and overhead were contractually required deductions before §24-1-295 was enacted (SCDC brief, 14). Gatewood respectfully refers the Court to his initial brief, pp. 10-14 (§24-3-40 governed) and pp. 21-24, 26-28 (contract).

In addition, Gatewood notes the ALC's express language applying §24-1-295 to Gatewood's deductions (ALC 4-29-14 order, 7-8; R, )::

As discussed in footnote 6, supra, the Court disagrees that Section 24-3-40 applies in this case, because the contract at issue in this case was a service work contract, and deductions from wages resulting from service work provided to private industries by inmates is **governed by Section 24-1-295**, not Section 24-3-40.

..

However, the Court finds that based on the terms of the Contract, security costs and overhead, including costs for health, safety, and welfare, constituted "other required deductions" pursuant to Section 24-1-295.

The ALC made numerous other references to its reliance on §24-1-295 in its order at pages 7-9.

Gatewood submits the above quote is clear and dispositive that the ALC retroactively applied §24-1-295's "other required deductions" clause as its basis for deducting security and overhead from Gatewood's \$4 gross wage. For that reason, the ALC's order also violated Gatewood's due process rights, as discussed in issue 4, and impaired the obligations of the 1998 contract, as discussed in issue 5.

**4. The ALC erred in applying §24-1-295 to Gatewood's pre-August 1, 2007 work because it violated due process.**

SCDC responds to issue 4 in SCDC's brief issue 3, page 15. Gatewood has addressed SCDC's points regarding due process in issue 3 above. Otherwise, Gatewood respectfully refers the Court to his initial brief, pp. 16-18.

**5. The ALC erred in applying §24-1-295 to Gatewood's pre-August 1, 2007 work because it impaired the obligations of contracts.**

SCDC responds to issue 5 in SCDC's brief issue 3, page 15. Gatewood has addressed SCDC's points regarding impairment of contracts in issue 3 above. In addition, Gatewood notes SCDC's apparent admission elsewhere in its brief that, "(A)s essentially argued by the Appellant, §24-1-295 cannot apply to the 1998 Contract because it violates the contract clause from the South Carolina Constitution" (SCDC brief, 23). However, this statement is to be contrasted with SCDC's statements at pp. 9, 12, and 13 that §24-1-295 does apply to Gatewood's work and this Court should affirm the ALC's ruling to

that effect. Otherwise, Gatewood respectfully refers the Court to his initial brief, pp. 18-21.

6. **The ALC erred in holding, pursuant to §24-1-295, that security and overhead were "other required deductions" in the contract because the clear and unambiguous terms of the contract indicate that these costs were to be paid by SCDC at its expense.**

SCDC responds to issue 6 in SCDC's brief issue 4, pp. 15-25. SCDC contends the ALC correctly determined that Gatewood was never entitled to receive \$4 per hour (SCDC brief, 15). The ALC stated the question for decision was whether Gatewood "...was entitled to be paid at a gross wage rate of \$4.00 per hour for his labor" (ALC 4-29-14 order, 4; R, ). The ALC responded, "(T)he Court agrees with Appellant that the gross amount of the wages paid to the Appellant for his labor was \$4.00 per hour" (Id, 8; R, ).

SCDC contends the 1998 contract required SCDC to deduct security/overhead from the \$4 negotiated wage before and after §24-1-295 was enacted, and irrespective of the "other required deductions" clause in §24-1-295 (SCDC brief, 15). In support, SCDC refers to §3.3.1 of the contract which required WTI (Williams) to pay SCDC a flat rate of \$4 per inmate hour, **from which** SCDC was required to pay inmates **as well as** cover security costs, overhead, etc. (SCDC brief, 19). This point is addressed in Gatewood's initial brief, pp. 21-24, and the within brief, pp. 4, 11-13.

SCDC states the ALC agreed that SCDC was contractually obligated to pay these expenses out of the \$4 per hour wage (SCDC brief, 19; ALC 4-29-14 order, 8; R, ). However, SCDC states only part of the ALC's finding, which is at page 8 of the order (R, ):

However, the Court finds that based on the terms of the Contract, security costs and overhead, including costs for health, safety, and welfare, constituted "other required deductions" pursuant to Section 24-1-295.

SCDC states the contract's "bullet sheet", along with §3.1.6, reflects that SCDC invoiced WTI at \$4 per hour and SCDC paid inmates a base rate of \$.35 per hour (SCDC brief, 19 and 21). Gatewood contends the bullet sheet entry of "**Wage** rate: \$4.00 per hour/per inmate" (bullet sheet; R, ) supports Gatewood's contention that the \$4 gross wage rate is correct.

SCDC states no provision in the contract states WTI and SCDC agreed SCDC would pay inmates at the rate of \$4 per hour for labor (SCDC brief, 20-21). This matter is addressed in Gatewood's initial brief, pp. 21-24.

SCDC contends that common sense dictates SCDC would not have, in light of contract §3.3.1, contracted to invoice WTI at a flat rate of \$4 per hour and then have to pay inmates at that rate without reimbursement (SCDC brief, 20-21). The parties agree the contract is plain and unambiguous. Thus, Gatewood contends the contract terms should be followed regardless of its wisdom or folly (Southern Atlantic Financial Services, Inc. v. Middleton 356 S.C. 444, 590 S.E. 2d 27, 29 (2003)).

SCDC contends contract §3.3.1 clearly explains the \$4 per hour rate "encompasses payment for SCDC's overhead" (SCDC brief, 20). As quoted on page 21 of SCDC's brief, §3.3.1 states that any negotiated increase in the per hour rate "...shall reflect (SCDC's) increased cost of **prison** overhead". SCDC contends this allows them to deduct "overhead" from the \$4 per hour (SCDC brief, 21). Gatewood contends this depends on what is meant by the

term "overhead".

The contract's purpose was to fulfill the Article 3 Declaration of Intent in §24-3-310 (contract, 1; R, ). Section 24-3-310(2) states the intent, in part, is to utilize convict labor "...for reimbursing this State for expenses incurred by reason of their crimes and imprisonment". Section 24-3-40(A)(3) allowed a deduction of 25% to defray cost of the "prisoner's room and board" assuming no child custody obligations. Gatewood contends, in light of the above history, that §3.3.1 was drafted with §24-3-40 in mind to reimburse the State for room and board.

SCDC contends that, by §3.3.1, the \$4 per hour is "meant to offset" SCDC's overhead costs (SCDC brief, 21). If, by this, SCDC means expenses beyond room and board allowed in §24-3-40(A)(3), Gatewood contends SCDC is reading into the contract a meaning that is not expressed. Otherwise, Gatewood respectfully refers the Court to his initial brief, pp. 21-24, 26-28.

SCDC contends certain "bonus plan" materials state a base rate of \$.35 per hour, which is consistent with the "bullet sheet" (SCDC brief, 19, 21-22). However, as held by the ALC, the gross wage rate is \$4 per hour, not \$.35 (ALC 4-29-14 order, 9; R, ).

SCDC states, even if the contract was ambiguous, the intent of the parties under §3.3.1 was that the \$4 flat rate would include security and overhead (SCDC brief, 22). Gatewood contends the contract was not ambiguous. Moreover, as discussed above, it is just as plausible that the parties meant to reimburse the State for room and board. Also, even if the intent was as SCDC

says, Gatewood contends those expenses beyond room and board would violate §24-3-40(A) and the decisions in Williams and Torrence.<sup>\*</sup> Finally, Gatewood notes that since SCDC is a probable drafter or co-drafter of the contract, any ambiguity must be construed against it (Mathis v. Brown & Brown of South Carolina, Inc. 698 S.E. 2d 773, 778 (S.C., 2010)).

SCDC contends this Court cannot reconcile the statutory intent in §24-3-310 with Gatewood's argument against making these deductions for overhead and security. This point is partially addressed in the discussion of §3.3.1 above, page 11.

In addition, Gatewood notes this Court responded to a similar argument in SCDC v. Cartrette 694 S.E. 2d 18, 22, note 6 (S.C. App., 2010). The Court stated the purpose of §24-3-310 harmonizes with the legislature's mandate that, by statute, 70% or more of inmate pay is diverted for room and board and other matters, citing §24-3-40 (2007). Further, the Court stated that increased pay, including overtime, ultimately benefits SCDC by increasing the funds available to relieve the burden of inmates' housing and care, and other matters.

SCDC states Gatewood's argument is primarily derived from the "at its expense" provision in §3.2.4 of the contract (SCDC brief, 24). However, the primary sections are §3.1.6 (R, ) and §3.3.1 (R, ).

SCDC states that it paid overhead and security and other related costs "at its expense" after those expenses were reimbursed by WTI (SCDC brief, 25). However, if WTI ultimately paid these costs, Gatewood contends it would be violative of §24-3-40, Williams, and Torrence.

---

<sup>\*</sup> If a contract term violates a statute, the term is invalid and the statute prevails (Wilkinson ex rel Wilkinson v. Palmetto State Trans. Co. 371 S.C. 365, 638 S.E. 2d 109, 116 (S.C. App., 2006)).

Finally, SCDC asks the Court to (1) affirm the portion of the ALC's ruling that held SCDC was contractually required to deduct security and overhead costs from the \$4 per hour wage; and (2) reject Appellant's assertion that he was entitled to a \$4 per hour wage rate for the labor he provided (SCDC brief, 25). First, the ALC did not hold as SCDC states. The ALC found that, "...based on the terms of the contract, security costs and overhead, including costs for health, safety, and welfare, constituted 'other required deductions' pursuant to Section 24-1-295" (ALC 4-29-14 order, 8; R, ). Gatewood contends this is the ruling before the Court.

Second, Gatewood did not contest the ALC's ruling that Gatewood was entitled to the \$4 per hour gross wage rate (ALC 4-29-14 order, 9; R, ). Also, SCDC did not cross-appeal the ruling (SCACR 203(c)). Finally, Gatewood notes that SCDC asks this Court to reject the \$4 wage rate, when SCDC's brief contends that security and overhead were to be deducted from "the \$4.00 per hour rate it negotiated with WTI" (SCDC brief, 23). Gatewood contends that in these circumstances the ALC's ruling agreeing with Gatewood's entitlement to the \$4 wage rate is the law of the case.

- 7. The ALC erred in ruling that overtime was not preserved for review because it was preserved, SCDC waived the issue preservation argument, the ALC raised the issue sua sponte, and Gatewood was entitled to overtime on the merits.**

SCDC responds to issue 7 in SCDC's brief issue 5, pp. 25-28. SCDC contends this Court should affirm the ALC decision that Gatewood did not preserve overtime for review (SCDC brief, 26). First, Gatewood contends he did not have to expressly raise overtime in these circumstances. In SCDC v. Cartrette 694 S.E. 2d 18, 21-23 (S.C. App., 2010), this Court held 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 non-inmates. And further, these statutes supported Cartrette's argument for overtime pay. Although Cartrette was limited to the program in which Cartrette was employed (694 S.E. 2d at 21, note 5), Gatewood contends it was not a memorandum opinion without precedential value (SCACR 220).

Gatewood's step 1 and Amendment to grievance alleged entitlement to the prevailing wage under §24-3-430, and to the \$4 rate under the budget proviso after July 2001 (step 1; R, ; Amendment; R, ). Gatewood contends that under Cartrette, his right to overtime is statutorily "ensured" under §24-3-430. Thus, the allegation of wage entitlement under the statute in his grievance should be sufficient for issue preservation purposes.

Even if Gatewood had to expressly raise overtime, he contends the allegations were sufficient. SCDC's brief notes that its grievance decisions stated "to the extent" Gatewood had demanded overtime wages the request was denied and thus there was no extent to which SCDC could consider his overtime wages (SCDC brief, 26). Gatewood's step 1 requested back wages at the prevailing wage rate from 1999 to July 2001, and at the \$4 rate from July 2001 to present, "...all as determined from Exhibits A-H..." These exhibits were incorporated by reference from Darrell Williams' grievance (Gatewood step 1; R, ; Amendment; R, ). Exhibit C is the 1998 contract which allows overtime to be worked in this program (contract §3.0; R, ). Exhibits D-E are memos allowing overtime to be worked at time and a half the base wage rate (Exh. D; R, ; Exh. E; R, ). Gatewood contends these incorporated exhibits adequately raised overtime...

SCDC states it did not address the merits of Gatewood's overtime claim in the ALC (SCDC brief, 26). However, in SCDC's ALC brief it acknowledged from file memos and the contract that "inmates could perform overtime labor" (SCDC ALC brief, 20).<sup>\*</sup> Also, in its brief to this Court, SCDC concedes the same point (SCDC brief, 27). Gatewood contends the issue is resolved by SCDC's admission to both courts. As a result, Gatewood respectfully contends that this Court should find that he is entitled to overtime pay for time worked in excess of his normal shift.

8. The ALC erred in not granting Gatewood's request for pre and post-judgment interest, and to petition the ALC for costs and attorney fees, because this ruling was based on the ALC's erroneous ruling that SCDC could deduct security and overhead costs from Gatewood's \$4.00 gross wage under §24-1-295.

SCDC responds to issue 8 in SCDC's brief issue 6, pp. 28-29. SCDC states the ALC correctly ruled that §24-1-295 applied to Gatewood's wages, SCDC was bound by §24-1-295 and its 1998 contract, and Gatewood was not entitled to the \$4 wage (SCDC brief, 28). This statement seems to contradict earlier statements that §24-1-295 did not apply to Gatewood's work (SCDC brief, 23).

9. The ALC erred in declining to consider the issue of whether SCDC should have to process grievance for all workers even if they had not personally filed because this was a stated issue in Gatewood's appeal and the ALC did not state that it was manifestly without merit.

SCDC responds to issue 9 in SCDC's brief issue 7, pp. 29-30. SCDC states the ALC did not consider this issue because this case does not involve other workers' grievances (SCDC brief, 29). However, as argued in Gatewood's ALC brief, p. 11, and referenced in Gatewood's initial brief to this Court, p. 33, Gatewood's step 1 was filed "individually, and on behalf of all inmate

---

<sup>\*</sup> SCDC ALC brief, R,

employees (IE's) listed on attached Exh. A" (step 1; R,     ). Moreover, SCDC grievance decisions denied "class" grievance status to the grievance (step 1 response; R,     ; step 2 decision; R,     ). Thus, Gatewood's grievance requested that it be a grievance for all workers in the program.

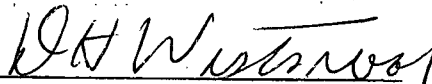
**10. The ALC erred in declining to enjoin SCDC from further wage violations because such ruling was appropriate in the circumstances.**

SCDC responds to issue 10 in SCDC's brief issue 8, pp. 30-31. Gatewood respectfully refers the Court to his comments in his initial brief, pp. 34-35.

**CONCLUSION**

Gatewood respectfully requests reversal of the ALC order; rulings on each issue as summarized in Gatewood's initial brief, pp. 35-36, based on the applicable standard of review in that brief on pp. 6, 9, 14-16, 18, 21, 28, 31, 33-35; and remand to the ALC and SCDC as stated on page 36.

Respectfully submitted,



Douglas H. Westbrook, #6039  
23 Broad St.  
Charleston, SC 29401  
(843) 853-9600  
Attorney for Appellant

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
Ralph K. Anderson, III, Chief Administrative Law Judge

Docket No. 07-ALJ-04-00517-AP

Fred Gatewood..... Appellant,

v.

South Carolina Department of Corrections..... Respondent.

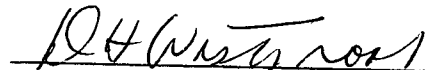
Appellate Case No. 2014-001199

---

PROOF OF SERVICE

---

I certify that I have served the Initial Reply Brief of Appellant on the South Carolina Department of Corrections by depositing a copy of it in the U.S. Mail, first class postage pre-paid, on *10-27-14*, addressed to its attorneys of record, Lake Summers and Katherine Phillips, of Malone, Thompson, Summers & Ott, LLC, 339 Heyward St., Suite 200, Columbia, SC 29201.

  
Douglas H. Westbrook, #6039  
23 Broad St.  
Charleston, SC 29401  
(843) 853-9600  
Attorney for Appellant

**RECEIVED**  
OCT 28 2014  
SC Court of Appeals