

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Francis Ackerman, #266928, Malik Aljalil, #219551,
Linso Allen, #269378, Michael Benninger, #264212,
Frederic Brown, #289602, Timothy Brown, #238461,
Terrell Buchanon, #277262, Christopher Buch, #200690,
Rudy Cassady, #238732, Sheldon Clark, #264772,
Zawaski Cobb, #187136, Kamathene Cooper, #145333,
Gladstone Cummings, #267450, Patrick Curtis, #175139,
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Heyward Dempsey, #134171, Phillip Denney, #240678,
Paul Durham, #219573, Jerome Durham, #270393, Keith
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Goff, #177506, Gregory Grant, #109656, Nelson
Hampton, #286427, James Hartman, #219770, Gary
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#249996, Herbert McFadden, #184297, Michael
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#251957, Jerome Scott, #153381, Roosevelt Scott,
#275631, Archie Simmons, #161419, Robert Smith,
#199324, James Williams, #282929, Gary Bryant,
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#245199, Don Hughes, #256862, Michael Key, #266890,
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v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2012-210588

RESPONDENT'S PETITION FOR REHEARING

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I. SCDC'S PETITION FOR REHEARING

The Respondent, the South Carolina Department of Corrections ["SCDC"] respectfully petitions the Court, under South Carolina Appellant Court Rule ["SCACR"] 221(a), to rehear and, obviously, reconsider its opinion in this matter. *See -- S.E.2d --*, 2016 WL 516641 (S.C. Ct. App. Feb. 10, 2016).

A. OVERVIEW OF THE COURT'S FEBRUARY 10, 2016 OPINION

The Court, 2016 WL 516641 at *3, considered only the following issue in its review of the decision rendered by the South Carolina Administrative Law Court ["ALC"]: "Did SCDC's fifteen-day filing deadline apply to Inmates' grievances?"

The Court ultimately ruled that the fifteen-day filing deadline, which appeared in paragraph 13.1 of SCDC Policy Number GA-01.12, did not apply to the grievances filed by the inmates. In so ruling, 2016 WL 516641 at *3, the Court declared the following:

Inmates argue the fifteen-day filing deadline did not apply to them because their grievances did not concern an "incident" but rather concerned SCDC "policies/procedures," which are exempt from the filing deadline pursuant to paragraph 13.9 of Policy GA-01.12. We agree.

SCDC determined that the prison industries pay claims articulated by the Inmates in the administrative grievances they filed concerned "incidents" in which the Inmates challenged the wage at which SCDC paid them for the voluntary labor they provided to the prison industries project SCDC operated at Lieber Correctional Institution ["Lieber"]. Therefore, under paragraph 13.1, SCDC determined that the Inmates, all of whom filed grievances in which they challenged the rate at which SCDC paid them more than fifteen days after SCDC first paid them for their labor, had not timely filed their grievances.

In the decision it issued July 26, 2012 (R. pp. 152 – 180), the ALC affirmed SCDC's determination. In affirming SCDC's determination, the ALC rejected the Inmates' argument that

the fifteen-day filing deadline did not apply to their grievances, because, under the Inmates' interpretation, their grievances concerned SCDC "policies/procedures," and, therefore, no time limit applied to the filing of their grievances under paragraph 13.9 of Policy Number GA-01.12. (R. pp. 157 – 162).

In ruling in Inmates' favor on this issue, this Court, 2016 WL 516641 at *3, relied upon S.C. Code Ann. § 1-23-610(B), which permitted the Court to reverse the ALC's July 26, 2012 decision if the ALC's decision "is affected by an error of law." Thus, the Court ultimately ruled as follows, 2016 WL 516641 at *5:

Based on the foregoing, the wage set forth in the WTI contract logically falls within "policies/procedures" as contemplated in paragraphs 7.1 and 13.9 of Policy GA-01.12. Therefore, SCDC's attempt to characterize Inmates' wage grievances as incident grievances was arbitrary and capricious. *Cf. [Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 766 S.E.2d 707, 718 (S.C. 2014)]* ("We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984))).

B. OVERVIEW OF SCDC'S PETITION FOR REHEARING

SCACR 221(a) provides that a petition for rehearing "shall state with particularity the points supposed to have been overlooked or misapprehended by the court."

SCDC respectfully submits that the Court misapprehended the provisions of paragraph 13.9 when the Court effectively – if not explicitly – ruled that administrative grievances which challenge SCDC "policies/procedures" are inherently exempt from the fifteen-day filing deadline established by paragraph 13.1.

SCDC also respectfully submits that the Court overlooked or otherwise misapprehended the reality that instances in which SCDC purportedly failed to pay the Inmates lawful wages for their prison industries labor constituted "incidents" in which SCDC purportedly deprived them of

their property, and, therefore, the fifteen day filing deadline from paragraph 13.1 applied to the Inmates' grievances.

SCDC further respectfully submits that the Court misapprehended the provisions of paragraph 7.1 of Policy GA-01.12 by determining that the wages paid by SCDC to the Inmates for their voluntarily prison industries labor constituted an SCDC "policy/procedure" rather than "conditions" of their imprisonment. As the wages remitted by SCDC to them constituted "conditions" of their imprisonment, the fifteen-day filing deadline from paragraph 13.1 applied to the Inmates' grievances.

Finally, SCDC respectfully submits that the Court misapprehended or otherwise overlooked the definition of "policies/procedures" adopted by the ALC in its July 26, 2012 order (R. p. 160), and, consequentially, the fifteen-day filing deadline from paragraph 13.1 applied to the Inmates' grievances.

**C. SUGGESTION FOR THE COURT TO REHEAR ITS FEBRUARY 10, 2016
OPINION EN BANC UNDER SCACR 219**

SCDC respectfully suggests, in accordance with the provisions of SCACR 219(b), that this Court rehear its instant opinion en banc. SCACR 219(a) provides that six (6) members of this Court must affirmatively vote to rehear an appeal en banc, and it further provides as follows:

A ... rehearing en banc is not favored and ordinarily will not be ordered except ... **(2) when the proceeding involves a question of exceptional importance.** [emphasis supplied].

SCDC respectfully submits that the exception to the fifteen day filing deadline from paragraph 13.1 fashioned by the Court under its interpretation of paragraph 13.9 completely swallows the deadline established by paragraph 13.1. The ALC recognized the perils of such an interpretation in its July 26, 2012 order (R. p. 159).

By its ruling, the Court has swept away any limitations period applicable to the pay claims articulated by the Inmates in their grievances, and, by extension, the Court has given a “green light” to other inmates to fashion creative arguments as to how the exception from paragraph 13.9 trumps the fifteen day filing deadline established by paragraph 13.1 for a myriad of other instances separate and apart from prison industries pay disputes.

Thus, SCDC respectfully argues that the rehearing of this appeal “involves a question of exceptional importance” under SCACR 219(a)(2), and, accordingly, SCDC respectfully urges this Court to rehear its February 10, 2016 opinion en banc.

II. ARGUMENT

A. GRIEVANCES CONCERNING “POLICIES/PROCEDURES” ARE NOT INHERENTLY EXEMPT FROM THE FIFTEEN-DAY FILING DEADLINE ESTABLISHED BY PARAGRAPH 13.1

As stated above, the Court agreed with the Inmates’ argument that “the fifteen-day filing deadline did not apply to them because their grievances did not concern an ‘incident’ but rather concerned SCDC ‘policies/procedures,’ **which are exempt** from the filing deadline pursuant to paragraph 13.9 of Policy GA-01.12.” [emphasis supplied]. 2016 WL 516641 at *3.

By so ruling, the Court explicitly concluded that grievances concerning SCDC “policies/procedures” are inherently exempt from the filing deadline established by paragraph 13.1. However, such grievances are not inherently exempt from the fifteen-day filing deadline from paragraph 13.1. Instead, inmates who file grievances by which they challenge SCDC “policies/procedures” must, under the final sentence of paragraph 13.9, affirmatively seek an exemption from the fifteen day filing deadline.

In its analysis, 2016 WL 516641 at *3, the Court reviewed paragraph 13.1, which is the provision in which the fifteen-day filing deadline appears:

Paragraph 13.1 states, in pertinent part: “If informal resolution is not possible, the grievant will complete Form 10-5, Step 1 ... and will submit the Form to *an employee designated by the Warden* ... within 15 days of the alleged incident. *An inmate will submit a grievance within the time frames established in the policy.*” [footnote omitted and italicized emphasis supplied by the Court].

The Court, 2016 WL 516641 at *3, continued its analysis of paragraph 13.1, but within the context of paragraph 13.9:

Paragraph 13.1 of Policy GA-01.12 requires an inmate to file a Step 1 Inmate Grievance Form within fifteen days of the alleged “incident.” Policy GA 01.12 does not define the term “incident,” but paragraph 13.9 provides for exceptions to the filing deadline:

13.9 Exceptions to the [fifteen] day time limit requirement will be made for grievances concerning policies/procedures. Exceptions may also be made for incident grievances by the Chief/designee, Inmate Grievance Branch, provided that documented reasonable cause can be demonstrated as to why the original time frame was not met, e.g., inmate physically unable to initiate grievance due to hospitalization, court appearance, etc. **The waiver must be requested by the grievant.** [emphasis supplied].

1. The Final Sentence of Paragraph 13.9 Requires an Inmate to Request an Exception to Paragraph 13.1’s Fifteen-Day Deadline.

SCDC respectfully argues that the Court overlooked the final sentence of paragraph 13.9. More specifically, SCDC respectfully submits that the Court never reconciled the final sentence of paragraph 13.9 with its analysis of the first two (2) sentences of paragraph 13.9. However, the ALC did so (R. p. 163):

Paragraph 13.9 clearly states that “documented reasonable cause” must be shown as to why the fifteen-day time limit “was not met,” and that **any such waiver of the time limit must be “requested by the grievant.” Thus, exceptions to the fifteen-day filing deadline are not automatic or guaranteed. Instead, the grievant must affirmatively request a waiver to the fifteen-day time limit and provide documented reasonable cause in support for such a request.**

As reflected by the record, no [Inmate] requested a waiver to the fifteen-day time limit in his Step 1 grievance by which he asserted “reasonable cause” as permitted by Paragraph 13.9. Also, no [Inmate] provided

“documented reasonable cause” in the manner required by Paragraph 13.9. Therefore, no [Inmate] satisfied the procedural requirements set forth in Paragraph 13.9.

Instead, the vast majority of the [Inmates] first explicitly invoked such a “reasonable cause” exception in their Notices of Appeal to [the ALC]. By only invoking this exception within their Notices of Appeal, the [Inmates] failed to afford [SCDC] an opportunity to consider their request.¹ [emphasis supplied].

2. Inmate Ackerman did not Request an Exception as Required by the Final Sentence of Paragraph 13.9.

The grievance submitted by Francis Ackerman, the lead inmate in this consolidated matter, illustrates the impact of the final sentence from paragraph 13.9 as observed by the ALC. The following directions appear in parenthesis on the Step 1 form submitted by Inmate Ackerman after the words “STATE GRIEVANCE” (R. p. 314):

include documentation, and date of incident; if SCDC Policy, indicate which policy

In the section of the Step 1 labeled “STATE GRIEVANCE,” Inmate Ackerman stated the following (R. p. 314):

[SCDC] is asked to review and determine whether I am entitled to receive back wages which are due to me from working at [Lieber] when they only paid me .35 an hour and not prevailing wage as under S.C. Code Ann. Sec. 24-3-430(A – F) as well as [the] fact they were getting \$4.00 an hour and still did not give me my money from 10/01 to 10/02.

In the section of the form labeled “ACTION REQUESTED,” Inmate Ackerman stated the following (R. p. 314):

¹ After articulating the above-quoted findings, the ALC then ruled as follows (R. p. 163):

Accordingly, this issue has not been properly preserved by the [Inmates]. [*See Brown v. S.C. Dep't of Health & Envtl. Control*, 560 S.E.2d 410, 417 (S.C. 2002)] (“[I]ssues not raised to and ruled on by the agency are not preserved for judicial consideration.”); [*Kiawah Resort Assocs. v. S.C. Tax Comm'n*, 458 S.E.2d 542, 544 (S.C. 1995)] (holding that a court reviewing a decision of an administrative agency on appeal cannot consider issues that were not raised to and ruled upon by the agency).

That all money due to me paid at prevailing wage as well as overtime rate, moreover the prevailing wage be paid now.

In the section labeled “SPECIFY HOW AND WHEN INFORMAL RESOLUTION WAS ATTEMPTED BY GRIEVANT,” Inmate Ackerman stated the following (R. p. 314):

Lawsuit was filed, ordered to file grievance by Court. Wicker v. SCDC, Adkins v. SCDC.

Inmate Ackerman provided only the following grounds in the section of his Step 2 appeal form labeled “INMATE’S REASON FOR APPEAL (state specific dissatisfaction)” (R. p. 318):

I am not [satisfied] with the [warden’s] decision and wish to take it out of his hands.

As directed by the instructions on the Step 1 form, Inmate Ackerman stated his grievance, and, as per the instructions associated with this section of the form, Inmate Ackerman provided the “date of incident” as between October 2001 to October 2002.²

Inmate Ackerman never stated that he intended the claim he articulated in his grievance to constitute a challenge to SCDC “policies/procedures,” nor did he indicate a particular SCDC policy challenged by his grievance. Moreover, to the extent that he actually indicated or otherwise identified a particular SCDC policy he intended to challenge, Inmate Ackerman did not request SCDC to provide him an exception or waiver for the fifteen-day filing deadline as required by the final sentence of paragraph 13.9.

SCDC respectfully submits that the Court overlooked the impact of the final sentence of paragraph 13.9 on its analysis, and, as exemplified by Inmate Ackerman’s filings, SCDC also

² SCDC first paid Inmate Ackerman for his prison industries labor on or about October 22, 2001, and it last paid him on or about September 9, 2002. (R. p. 4602). The date stamp appearing in the top right corner of his Step 1 form reflects that SCDC officials received Inmate Ackerman’s grievance on September 22, 2004. (R. p. 314). Thus, Inmate Ackerman filed his grievance nearly three (3) years after SCDC first paid him for his prison industries labor and over two (2) after it last paid him. As an aside, Inmate Ackerman began voluntarily participating in the prison industries project at Lieber after the effective date of the first budget proviso enacted by our General Assembly which explicitly permitted SCDC to pay inmates who participated in prison industries service work projects, the precise type of project in which Inmate Ackerman participated, less than the “prevailing wage” for their labor.

respectfully submits that nothing in the record demonstrates or otherwise confirms that any of the Inmates affirmatively sought such an exemption.

Consequentially, by applying the final sentence of paragraph 13.9 to the Inmates' grievances, SCDC did not act in an arbitrary and capricious fashion as determined by the Court. 2016 WL 516641 at *5. SCDC respectfully urges this Court to rehear and reconsider its opinion, and, in doing so, this Court should, under *Kiawah Dev. Partners, II*, defer to SCDC's interpretation of paragraph 13.9.

B. INSTANCES IN WHICH SCDC PURPORTEDLY FAILED TO PAY THE INMATES LAWFUL WAGES FOR THEIR PRISON INDUSTRIES LABOR CONSTITUTED "INCIDENTS" IN WHICH SCDC PURPORTEDLY DEPRIVED THEM OF THEIR PROPERTY, AND, THEREFORE, THE FIFTEEN-DAY FILING DEADLINE FROM PARAGRAPH 13.1 APPLIED TO THE INMATES' GRIEVANCES

The Court, 2016 WL 516641 at *1, ruled as follows regarding the ALC's decision to affirm SCDC's determination that the fifteen-day filing deadline applied to the administrative grievances filed by the Appellants:

Inmates argue their grievances invoking the Prevailing Wage Statute were not subject to SCDC's fifteen-day filing deadline because these grievances concerned SCDC policy rather than an "incident." We reverse and remand for consideration of Inmates' grievances on the merits.³

However, the wages remitted by SCDC to inmates who participate in prison industries projects constitutes the Inmates' property, and SCDC may not take or otherwise deprive inmates of their property without the process afforded them under Policy GA-01.12. Instances in which SCDC purportedly failed to pay the Inmates lawful wages for their prison industries labor constituted "incidents" in which SCDC purportedly deprived them of their property, and, therefore, the fifteen day filing deadline from paragraph 13.1 applied to the Inmates' grievances.

³ In the footnote associated with this passage, 2016 WL 516641 at *1, n. 1, the Court quoted S.C. Code Ann. § 24-3-430(D) (2007). The Court quoted § 24-3-430(D) again towards the end of its opinion. 2016 WL 516641 at *5.

1. **Precedent from our Supreme Court Establishes that Inmates' Prison Industries Wages Constitute Their Property.**

In *Wicker v. S.C. Dep't of Corr.*, 602 S.E.2d 56 (S.C. 2004), our Supreme Court acknowledged that inmates could challenge the wage at which SCDC paid them for the labor they voluntarily provided to prison industries projects by filing administrative grievances in conformity with the provisions of Policy GA-01.12.

In *Wicker*, 602 S.E.2d at 57, our Supreme Court declared as follows:

We find that where, as here, the state has created a statutory right to the payment of a prevailing wage, **it cannot thereafter deny that right without affording due process of law.** *Cf. Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir.1985) (where state has established, by statute, a right of inmates to compensation for work performed for private parties, it cannot deny that right after they earned the wages, without affording due process of the law); *Borror v. White*, 377 F.Supp. 181 (W.D.Va. 1974) (although there was no federal constitutional right to payment, inmate might be entitled to such compensation under state statute). [emphasis supplied].

The *Wicker* Court, 602 S.E.2d at 57 – 58, then reconciled its holding with the opinion from *Sullivan v. S.C. Dep't of Corr.*, 586 S.E.2d 124 (S.C. 2003):

We are not unmindful of our opinion in [*Sullivan*], in which we held the [ALC] has jurisdiction to review [SCDC] grievance proceedings only if they involve the denial of “state created liberty interests.” There, we recognized that our opinion in [*Al-Shabazz v. State*, 368, 527 S.E.2d 742, 750 (S.C. 1999)], held that administrative matters typically arise in two ways: (1) when an inmate is disciplined and punishment is imposed and (2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits, or custody status. However, we did not limit *Al-Shabazz* to these two instances. **The *Al-Shabazz* Court explained that procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment’s protection of liberty and property.** [527 S.E.2d at 750].

We find the state's statutory mandate that inmates be paid the prevailing wage creates such an interest, which may not be denied without due process. *Piatt v. MacDougall*, *supra*. Accordingly, in this very limited circumstance, we hold [SCDC's] failure to pay in accordance with the statutes is reviewable by the [ALC]. [footnote omitted and emphasis supplied].

The *Al-Shabazz* Court, 527 S.E.2d at 750, explained the following:

The requirements of procedural due process apply only to the deprivation of interests encompassed by **the Fourteenth Amendment's protection of liberty and property.**" [*Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972)]. [emphasis supplied].

The *Sullivan* Court, 586 S.E.2d at 126, acknowledged *Al-Shabazz*:

In *Al-Shabazz*, the Court recognized that the administrative matters entitled to review by the [ALC] "typically arise in two ways: (1) when an inmate is disciplined and punishment is imposed and (2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits, or custody status." [527 S.E.2d at 750]. The Court explained further that procedural due process was guaranteed only **when an inmate was deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property.** *Id.* [emphasis supplied].

As first established in *Al-Shabazz* and *Sullivan* and as precisely defined in *Wicker*, instances in which SCDC purportedly failed to pay the Inmates a lawful hourly wage for their prison industries labor constituted "incidents" in which SCDC purportedly deprived them of their property, and, therefore, the fifteen day filing deadline from paragraph 13.1 applied to the Inmates' grievances. In the grievances at issue in the case at bar, the Inmates claimed that SCDC, by purportedly failing to pay them lawful wages for their prison industries labor, deprived them of their property, namely their lawful wages.

Our Supreme Court, in its decision in *Williams v. S.C. Dep't of Corr. & Williams Technologies, Inc.*, 641 S.E.2d 885, 886, n. 1, explicitly recognized *Wicker's* holding that a

prison industries pay claim articulated in an administrative grievance filed by an inmate under Policy GA-01.12 animates a property interest attributable to the inmate by declaring as follows:

In [*Wicker*], we further held that inmates may not be deprived of **this property interest** without due process; accordingly, inmates were directed to file grievances **if they wished to protest [SCDC's] failure to pay a prevailing wage.**⁴ [emphasis supplied].

In its opinion, 2016 WL 516641 at *4, the Court determined that “the substance of the Inmates’ grievances challenged the specific pay rate in the WTI contract, ..., on the ground that the pay rate is less than the prevailing wage, a topic governed by statute and thus, an expression of the legislature’s policy on inmate pay.” However, the Court overlooked the reality that by purportedly failing to pay them the lawful wage (i.e. “the prevailing wage”), the substance of the Inmates’ grievances challenged, under § 24-3-430(D), *Al-Shabazz*, *Sullivan*, *Wicker*, and *Williams*, SCDC purportedly deprived the Inmates of their property, namely their wages.

2. The Inmates’ Claims were “Inmate Property Complaints” under Paragraph 7.4, and Their Grievances were not Exempt from Paragraph 13.1’s Fifteen-Day Filing Deadline.

Paragraph 7.4 provides that “Inmate property complaints” will be considered grievable issues. (R. p. 685). In its opinion, 2016 WL 516641 at *4, the Court reasoned as follows:

It logically follows that the remaining items in paragraph 7, i.e., 7.2 through 7.7, **were meant to serve as “incidents”** for purposes of paragraphs 13.1 and 13.9. [emphasis supplied].

Thus, under the Court’s own reasoning, “Inmate property complaints” under paragraph 7.4, like the grievances in which the Inmates claimed that SCDC failed to pay them lawful wages and, by doing so, deprived them of their property, constitute “incidents” under paragraph 13.1. Consequentially, the Inmates’ grievances, as “Inmate property complaints,” were not exempt from paragraph 13.1’s fifteen-day filing deadline under paragraph 13.9. *See Broadhurst v. City of*

⁴ As the Court recognized, 2016 WL 516641 at *2, the litigation in *Williams* spawned the instant controversy.

Myrtle Beach Election Comm'n, 537 S.E.2d 543, 548 (S.C. 2000) (“In construing a statute, its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.”)

3. **In *Patterson*, this Court Affirmed the Application of Paragraph 13.1’s Fifteen-Day Filing Deadline to a Grievance in which an Inmate Complained that SCDC Deprived him of his Property.**

Moreover, in its unpublished decision in *Patterson v. S.C. Dep’t of Corr.*, -- S.E.2d --, 2010 WL 10080031 (No. 2010-UP-292) (S.C. Ct. App. 2010), this Court considered whether paragraph 13.1’s fifteen-day deadline applied to a grievance filed by an inmate in which the inmate apparently articulated an “Inmate property complaint.” In affirming SCDC’s denial of the inmate’s grievance, the *Patterson* Court reasoned as follows:

Patterson argues the ALC erred in finding his grievance was not timely filed. We disagree. [SCDC] denied Patterson’s grievance based on [paragraph 13.1], which states an inmate must file a grievance within fifteen days of the alleged incident. **Here, Patterson filed his grievance complaining of loss of his inmate property on December 4, 2006.** Even if we construed the requirements for filing liberally in Patterson’s favor, **Patterson should have filed his grievance within fifteen days of December 6, 2004, when he originally discovered that the Department lost his inmate property.** However, he did not file his grievance until almost two years later. The ALC did not err in relying on [SCDC’s] internal policy in finding Patterson failed to timely file his grievance because “[t]he adoption and execution of policies and practices necessary to preserve internal order and discipline, and to maintain institutional security in the prison are within the province and expertise of correctional officials.” [*State v. Blick*, 481 S.E.2d 452, 455 (S.C. Ct. App. 1997)].⁵ **Accordingly, the ALC did not err in affirming the denial of Patterson’s grievance.** [emphasis supplied].

Under *Patterson’s* example, as well as the explicit language from our Supreme Court’s decision in *Williams*, SCDC respectfully submits that, under *Wicker*, this Court should have applied the fifteen-day filing deadline to the Inmates’ grievances. However, this Court overlooked its earlier, albeit unpublished, opinion in *Patterson*, as well as the impact of the

⁵ This Court’s decision in *State v. Blick* is discussed in more detail further below.

above-quoted footnote from *Williams*, in considering whether the fifteen-day filing deadline applied to the grievances filed by the Inmates in the case bar.

4. In *Okera*, our Supreme Court Implicitly Upheld the Application of Paragraph 13.1's Fifteen-day Deadline to a Grievance in which an Inmate Claimed that SCDC Deprived Him of His Property by Failing to Pay Lawful Wages for his Prison Industries Labor.

Likewise, SCDC respectfully submits that this Court overlooked a compelling, albeit unpublished, memorandum opinion issued by our Supreme Court in *Okera v. S.C. Dep't of Corr.*, -- S.E.2d --, 2012 WL 10907962 (No. 2012-MO-042) (S.C. 2012). In its per curiam opinion in *Okera*, our Supreme Court ruled as follows:

This is a direct appeal from an order of the [ALC] dismissing the appeal from [SCDC's] denial of Appellant's inmate grievance based on **his failure to comply with the relevant statute of limitations** set forth in [Policy GA-01.12]. **We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: [Al-Shabazz] (approving [SCDC's] internal procedures for discipline and grievances, which specify a fifteen-day time limit for filing for grievances).** [emphasis supplied].

Like the Inmates in the case at bar, Inmate Okera participated in prison industries project operated by SCDC.⁶ Like the Inmates in the case at bar, Inmate Okera filed an administrative grievance with SCDC in which he claimed that SCDC did not pay him lawful wages for the labor he provided to the prison industries project in which he voluntarily participated. As it did to the grievances filed by the Inmates in the case at bar, SCDC applied the fifteen-day filing deadline from paragraph 13.1 to Inmate Okera's grievance, and it denied Inmate Okera's grievance. Inmate Okera appealed SCDC's denial of his grievance to the ALC, and the ALC

⁶ Inmate Okera voluntarily participated in a prison industries project operated by SCDC at Evans Correctional Institution, and the project in which he participated was certified by the United States Department of Justice's Bureau of Justice Assistance ["BJA"] under BJA's Prison Industries Enhancement Certification Program ["PIECP"].

affirmed SCDC's decision.⁷ Inmate Okera then appealed the ALC's decision to this Court, but our Supreme Court accepted Inmate Okera's appeal on direct appeal.

The following passage from our Supreme Court's decision in *Toth v. Square D Co.*, 377 S.E.2d 584, 586 – 87 (S.C. 1989), impacts SCDC's analysis and argument on this point:

Finally, we point out that this Court has already given retroactive effect to the [*Small v. Springs Industries, Inc.*, 357 S.E.2d 452 (S.C. 1987)] decision through our holding in *Francisco v. Black River Electric Cooperative*, Mem. Op. 87-MO-325 (S.C. filed July 27, 1987). In *Francisco*, the plaintiff filed suit alleging breach of contract based on violations of employee handbook provisions. The *Small* case had not yet been decided. The trial judge sustained the defendant-employer's demurrer to the breach of contract cause of action. *Small* was subsequently filed, and Francisco appealed, arguing that he was entitled to proceed because he had stated a cause of action as recognized by *Small*. We agreed and reversed the trial judge's decision. **Although we recognize that *Francisco* is a memorandum opinion without precedential value (footnote omitted), it nonetheless indicates that we have already implicitly allowed retroactive application of *Small*.** By our holding today, we explicitly hold that *Small* is to be retroactively applied to causes of action arising prior to the date it was filed. [emphasis supplied].

Under the above-quoted language from *Toth*, our Supreme Court, by its memorandum opinion in *Okera*, has already implicitly affirmed SCDC's application of the fifteen-day filing deadline from paragraph 13.1 to a grievance in which the inmate claimed that SCDC deprived

⁷ The ALC designated Inmate Okera's appeal with the following docket number: 08-ALJ-04-00887-AP. In its June 29, 2009 order, the ALC ruled as follows:

This matter was remanded to [SCDC] on July 17, 2008 to determine if [Inmate Okera] filed his grievance in the instant matter while he was employed under the prison industries program or within fifteen days of the time he completed, terminated, or cease employment under the prison industries program. The Record on Appeal was supplemented on December 29, 2008. In the record, it appears [Inmate Okera] failed to file his step one grievance [until] six years after his last day of work in the prison industries. Therefore, [Okera's] Appeal was untimely.

Based on the Record on Appeal, this appeal must be dismissed because [Inmate Okera] failed to file his grievance in the instant matter while he was employed under the prison industries program, or within fifteen days of the time he completed, terminated, or ceased employment under the prison industries program.

him of his property by failing to pay him the lawful hourly wage for his prison industries labor. The above-quoted language from *Toth* also applies to this Court's earlier decision in *Patterson*.

SCDC respectfully submits that in light of § 24-3-430(D), *Al-Shabazz*, *Sullivan*, *Wicker*, and *Williams*, as well as *Patterson*, *Okeru*, and *Toth*, the Court overlooked the impact of paragraph 7.4 in its analysis, and, consequentially, SCDC characterization of the Inmates' grievances as "incident grievances" was not arbitrary and capricious as determined by the Court. 2016 WL 516641 at *5. SCDC again respectfully urges this Court to rehear and reconsider its opinion, and, in doing so, this Court should, under *Kiawah Dev. Partners, II*, defer to SCDC's interpretation of paragraphs 7.4, 13.1, and 13.9.

C. INSTANCES IN WHICH SCDC PURPORTEDLY FAILED TO PAY THE INMATES LAWFUL WAGES FOR THEIR PRISON INDUSTRIES LABOR AFFECTED "CONDITIONS" OF THEIR IMPRISONMENT, AND, THEREFORE, THE FIFTEEN-DAY FILING DEADLINE FROM PARAGRAPH 13.1 APPLIED TO THE INMATES' GRIEVANCES

Paragraph 7 of Policy GA-01.12 is entitled "GRIEVABLE ISSUES," and paragraph 7.1 provides that "Department policies/procedures, directives or conditions which directly affect an inmate" constitute issues which "will be considered grievable." (R. p. 685).

In rendering its decision in favor of the Inmates, this Court, 2016 WL 516641 at *4, focused on the term "Department policies/procedures," and it reasoned as follows:

Paragraph 7.1 (quoted above) includes the same reference to "policies/procedures" found in paragraph 13.9 as an exception to the fifteen-day deadline, i.e., "Exceptions to the [fifteen] day time limit requirement will be made for grievances concerning *policies/procedures*." (emphasis added). **Therefore, the words "policies/procedures" in paragraph 13.9 was meant to serve as shorthand for the language in paragraph 7.1, i.e., "Department policies/procedures, directives, or conditions [that] directly affect an inmate."** *Cf. Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 100, 705 S.E.2d 28, 34 (2011) ("As a general rule, 'identical words and phrases within the same statute should normally be given the same meaning.'" (quoting *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007)); *id.* at 101, 705 S.E.2d at

34 (“[W]ords in a statute must be construed in context, and their meaning may be ascertained by reference to words associated with them in the statute.”); *Murphy v. S.C. Dep’t of Health & Env’tl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012) (holding regulations are interpreted using the rules of statutory construction). [emphasis supplied].

However, the ALC, its July 26, 2012 order (R. p. 162, n. 7), concluded that the wages SCDC paid to the Inmates constituted “conditions” affecting their participation in the prison industries project operated by SCDC at Lieber rather than SCDC “policies/procedures,” and it so concluded in reliance upon the explicit language of S.C. Code Ann. § 24-3-315:

In this court’s view, the [Inmates’] wage rates were “**condition(s)**” affecting their participation in the prison industries project operated at Lieber. **Indeed, the Prison Industries Act specifically refers to inmates’ “rates of pay” as “conditions of employment.” See [§ 24-3-315]** (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.”) [emphasis supplied].

1. The Operative Statutes and Applicable Precedent Establish that the Wages SCDC Paid to the Inmates for their Prison Industries Labor Constituted “Conditions” rather than “Policies/Procedures.”

In the above-quoted passage from its July 26, 2012 order, the ALC quoted the second sentence of § 24-3-315 in its entirety, and the ALC emphasized the language from the second sentence of § 24-3-315 in which our General Assembly clearly coupled the inmates’ “rates of pay” with “other conditions of employment.” The provisions of § 24-3-430 further support the ALC’s determination. Read together, §§ 24-3-430(C), (D), and (E) provide as follows:

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

No inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector.⁸

Inmate participation in the program may not result in the displacement of employed workers in the State of South Carolina and may not impair existing contracts for services. [emphasis supplied].

Sections 24-3-430(C), (D), and (E) echo the second sentence of § 24-3-315, upon which the ALC relied when that “the Prison Industries Act specifically refers to inmates’ ‘rates of pay’ as ‘conditions of employment.’” The title of § 24-3-430 itself supports the ALC’s determination, as § 24-3-430 is entitled “Inmate labor in private industry authorized; requirements and **conditions.**” [emphasis supplied]. Thus, both § 24-3-315 and § 24-3-430 couple the wages paid by SCDC to an inmate participating in a prison industries project with the “conditions” of the inmate’s employment.

As shown above, our Supreme Court acknowledged in *Wicker* that inmates could challenge the wage at which SCDC paid them for the labor they voluntarily provided to prison industries projects by filing grievances in conformity with Policy GA-01.12.

As also shown above, our Supreme Court anchored its decision in *Wicker* upon its decision in *Al-Shabazz*. The *Al-Shabazz* Court, 527 S.E.2d at 749 – 50, ruled as follows:

We previously have held that the issues of solitary confinement and downgrading of custody status are not properly raised in a PCR proceeding. [*Tutt v. State*, 290 S.E.2d 414 (S.C. 1982)]; [*Crowe v. Leeke*, 259 S.E.2d 614 (S.C. 1979)]. Today we add credits-related issues **and other conditions of imprisonment** to the list of administrative matters. We overrule [*Busby v. Moore*, 498 S.E.2d 883 (S.C. 2000)]; [*Harris v. State*, 424 S.E.2d 509 (S.C. 1992)]; [*Elmore v. State*, 409 S.E.2d 397 (S.C. 1991)], and [*Simmons v. State*, 446 S.E.2d 436 (S.C. 1994)], to the extent they stand for the proposition that credits-related issues or conditions of imprisonment may be raised in a PCR proceeding. [emphasis supplied].

The *Al-Shabazz* Court, 527 S.E.2d at 752 – 53, later declared the following:

⁸ As stated above in note 3, the Court twice quoted § 24-3-430(D) in its opinion. The Court also discussed the enactment of § 24-3-430 in its opinion. 2016 WL 516641 at *1.

We agree in part with courts in other states that have found many [Administrative Procedures Act] provisions obviously were not written with the unique concerns of a prison disciplinary system in mind. [footnote omitted]. **Given our conclusion that [SCDC's] disciplinary and grievance procedures comply with the minimal due process required in such proceedings,** we decline to apply the following APA provisions to the internal prison disciplinary process: S.C. Code Ann. § 1-23-320 (Supp. 1999) (notice and hearing in contested case, depositions, subpoenas, informal disposition, content of record); S.C. Code Ann. § 1-23-330 (1986) (evidentiary matters in contested cases); S.C. Code Ann. § 1-23-340 (1986) (procedure in contested case where majority of those who are to render final decision are unfamiliar with the case); and S.C. Code Ann. § 1-23-360 (1986) (communication by members of agency assigned to decide contested case).

We also decline to apply those same APA provisions to the internal decision-making process used when an inmate alleges [SCDC] has miscalculated his sentence, sentence-related credits, or custody status. **Initiating a grievance is the method an inmate uses to challenge such decisions within the prison system. The grievance procedure [SCDC] has established is sufficient to give an inmate a method to raise the matter to prison officials and create a reviewable record.**⁹

We find this approach appropriate because [SCDC] is an agency for purposes of the APA. S.C. Code Ann. § 1-23-310(2) (Supp. 1999) (“[a]gency’ means each state board, commission, department or officer, other than the legislature or the courts, but to include the administrative law judge division, authorized by law to determine contested cases”). An inmate brings a contested case for purposes of judicial review when he challenges a disciplinary outcome, calculation of sentence-related credits, custody status, **or other condition of imprisonment.** S.C. Code Ann. § 1-23-310(3) (Supp. 1999) (“[c]ontested case’ means a proceeding ... in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing”). [emphasis supplied].

⁹ In the footnote associated with this sentence, the *Al-Shabazz* Court, 527 S.E.2d at 753, n. 11, stated the following:

Further support for not applying these APA provisions to [SCDC's] internal disciplinary or decision-making processes is evident in the Legislature's decision to exempt [SCDC] from submitting its internal regulations on the care and custody of inmates for legislative review and approval. S.C. Code Ann. § 1-23-10(4) (Supp. 1999). **That exemption indicates the Legislature intended to give [SCDC] ample latitude to control its internal affairs.** [emphasis supplied].

2. The Inmates' Claims Challenged "Conditions" Rather than "Policies/Procedures," and Their Grievances were not Exempt from Paragraph 13.1's Fifteen-Day Filing Deadline.

As illustrated above, the ALC, relying upon the second sentence from § 24-3-315, concluded that "the [Inmates'] wage rates were 'condition(s)' affecting their participation in the prison industries project operated at Lieber." Rather obviously, the Inmates would not have been able to participate or otherwise be employed in the prison industries project operated by SCDC at Lieber but for their imprisonment. Therefore, instances in which SCDC purportedly failed to pay the Inmates a lawful wage for their prison industries labor in the case at bar impacted "conditions" of their imprisonment rather than "policies/procedures," and, accordingly, the fifteen day filing deadline from paragraph 13.1 applied to the Inmates' grievances.

The ALC's conclusion is supported not only by a plain reading of § 24-3-315, but also a plain reading of § 24-3-430, as well as our Supreme Court's decisions in *Al-Shabazz* and *Wicker*. SCDC respectfully submits that the Court overlooked or otherwise misapprehended the applicable statutes and precedent.

Moreover, a comparison of paragraph 7.1 to paragraph 13.9 further supports the legitimacy of the ALC's ruling on this point. Paragraph 13.9 only contains the term "policies/procedures which directly affect an inmate" from paragraph 7.1 (R. p. 689); it does not contain the term "conditions which directly affect an inmate" from paragraph 7.1. (R. p. 685). Had SCDC intended for grievances concerning "conditions which directly affect an inmate" not to be subject to the fifteen-day filing deadline from paragraph 13.1, paragraph 13.9 would have included the terms "conditions" or "conditions which directly affect an inmate" from paragraph 7.1. Therefore, contrary to this Court's conclusion, 2016 WL 516641 at *4, SCDC intended for grievances concerning "conditions which directly affect an inmate," as well as the remaining

issues identified as grievable by paragraphs 7.2 through 7.7, to all serve as “incidents” for purposes of paragraphs 13.1 and 13.9.

By the same logic, this Court’s conclusion that SCDC intended for the term “policies/procedures” from paragraph 13.9 to serve as shorthand for the language in paragraph 7.1, i.e., “Department policies/procedures, directives, or conditions [that] directly affect an inmate” is untenable.¹⁰ Instead, the term “*conditions of employment*,” from § 24-3-315 and § 24-3-430(C), is synonymous with “*conditions of imprisonment*,” from *Al-Shabazz*, and the term “conditions which directly affect an inmate,” which appears in paragraph 7.1 but does not appear in paragraph 13.9, is shorthand for both of these terms. SCDC respectfully submits that this Court overlooked or otherwise misapprehended paragraph 7.1 and its relationship to paragraph 13.9. *See Broadhurst v. City of Myrtle Beach Election Comm'n, supra.*

In light of § 24-3-315, §§ 24-3-430(C), (D), and (E), *Al-Shabazz*, and *Wicker*, SCDC respectfully submits that its application of the fifteen-day filing deadline to the Inmates’ “incident grievances,” as affirmed by the ALC in its July 26, 2012 order, was not arbitrary and capricious as determined by the Court. 2016 WL 516641 at *5. SCDC again respectfully urges this Court to rehear and reconsider its opinion, and, in doing so, this Court should, under *Kiawah Dev. Partners, II*, defer to SCDC’s interpretation of paragraphs 7.1, 13.1, and 13.9.

¹⁰ Among the first paragraphs to appear in Policy GA-01.12 is the paragraph entitled “PURPOSE” (R. p. 682):

To establish guidelines for the development and implementation of an inmate grievance system whereby inmates may seek formal review of complaints relative to **disciplinary hearing appeals, classification appeals, Department policies/procedures, directives, or conditions which directly affect an inmate.** [emphasis supplied].

Obviously, the phrase “Department policies/procedures, directives, or conditions which directly affect an inmate” appears in both the “PURPOSE” paragraph and paragraph 7.1.

D. THE WAGES SCDC PAID THE INMATE FOR THEIR PRISON INDUSTRIES LABOR DO NOT CONSTITUTE SCDC “POLICIES/ PROCEDURES,” AND, THEREFORE, THE FIFTEEN-DAY FILING DEADLINE FROM PARAGRAPH 13.1 APPLIED TO THE INMATES’ GRIEVANCES

As discussed above, the Court, 2016 WL 516641 at *4, reasoned as follows regarding paragraphs 7.2 through 7.7 and their relationship with paragraphs 13.1 and 13.9:

It logically follows that the remaining items in paragraph 7, i.e., 7.2 through 7.7, were meant to serve as "incidents" for purposes of paragraphs 13.1 and 13.9.

Immediately after this sentence, 2016 WL 516641 at *4, the Court stated the following:

This is consistent with SCDC’s proposed definition of “policies/procedures,” which was adopted by the ALC:

[T]he terms “policies” and “procedures” constitute approved guidelines for handling the agency’s day-to-day operations as well as statements expressing the basic expectations of conduct for agency staff and inmates. More formally stated, the terms “policies” and “procedures” constitute agency directives deemed by the responsible agency officials as “necessary to preserve internal order and discipline, and to maintain institutional security in the prison.¹¹”

Inmates’ grievances naturally fall within this definition because SCDC has operated the prison industries service project as one of its day-to-day operations pursuant to guidelines and statements expressed in its contracts with prison industries sponsors, such as those in the WTI contract that (1) set the pay rate at \$4.00 per hour per inmate, to be paid directly to SCDC and from which SCDC is to make certain deductions, (2) prohibit WTI from exposing inmates to environmental hazards, (3) establish the duties of the parties regarding screening, training, supervision, scheduling, removal and replacement of inmate workers, (4) require WTI to provide adequate security, (5) provide for future renegotiation of the pay rate to reflect SCDC's increased overhead costs, (6) allow for the parties to create a bonus plan for inmates based on productivity and quality control, and (7) prohibit discrimination.

As also discussed above, the Court continued its analysis, 2016 WL 516641 at *5:

¹¹ See R. p. 160. As observed above in note 5 and as discussed below, the entirety of the above-quoted paragraph came from this Court’s opinion in *State v. Blick*.

Further, the substance of Inmates' grievances challenges the specific pay rate in the WTI contract, rather than SCDC's act of giving notice of this rate to inmates, on the ground that the pay rate is less than the prevailing wage, a topic governed by statute and, thus, an expression of the legislature's policy on inmate pay. *See* S.C. Code Ann. § 24-3-315 (2007) ("The director [of SCDC] 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 [a] similar nature in the locality in which the work is performed."); § 24-3-430(D) ("No inmate participating in the [Prison Industries P]rogram may earn less than the prevailing wage for work of [a] similar nature in the private sector."); *see also* S.C. Code Ann. § 24-1-295 (Supp. 2015) ("[SCDC] may negotiate the wage to be paid for inmate labor provided under prison industry *service work* contracts and *export work* contracts, and these wages may be less than the prevailing wage for work of a similar nature in the private sector." (emphases added)). As SCDC is mandated to carry out these legislative policies, SCDC, in turn, expresses its own, more specific policies regarding pay rates and other working conditions for inmates in its contracts with prison industries sponsors pursuant to § 24-3-430(B) or § 24-1-295.

Thus, the Court ultimately ruled as follows, 2016 WL 516641 at *5:

Based on the foregoing, the wage set forth in the WTI contract logically falls within "policies/procedures" as contemplated in paragraphs 7.1 and 13.9 of Policy GA-01.12. Therefore, SCDC's attempt to characterize Inmates' wage grievances as incident grievances was arbitrary and capricious.

1. The Wages SCDC Pays Inmates for their Prison Industries Labor are not "Necessary to Preserve Internal Order and Discipline, and to Maintain Institution Security in the Prison."

SCDC, however, respectfully submits that the Court misapprehended the concept that the prison industries projects operated by SCDC are "necessary to preserve internal order and discipline, and to maintain institutional security in the prison."

The ALC specifically focused on the definition of "policies/procedures" as it considered the Inmates' appeal of SCDC's final decision, and, by an e-mail message it transmitted to them on December 16, 2011, the ALC directed the parties' counsel as follows (R. p. 5116):

One of the issues presented in the Level 2 stage of this appeal is whether [the Inmates'] grievances concern "policies/procedures" under [paragraph 13.9 of Policy GA-01.12]. [Paragraph 13.9] provides in pertinent part that "[e]xceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures."

[The ALC] has read the briefs from both parties on this issues, and [it] would like each party to supplement its brief by describing, in specific terms, what it contends the term "policies/procedures" means in [paragraph 13.9].

The parties' counsel complied with the ALC's instructions (R. pp. 5110 – 5114 and 5115 – 5131). The Inmates offered separate definitions of the terms "policy" and "procedure." (R. pp. 5110 – 5111). The definition(s) of "policies and procedures" offered by SCDC,¹² which the ALC ultimately adopted and which this Court quoted in its instant opinion, 2016 WL 516641 at *4, came from this Court's decision in *State v. Blick*, 481 S.E.2d at 455. The Court adopted the definition of "policies and procedures" articulated in *State v. Blick* from *United States v. Newby*, 11 F.3d 1143 (3rd Cir. 1993).¹³

During oral argument, the Court asked SCDC's counsel whether SCDC had clearly determined that the wage at which SCDC pays inmates for their prison industries labor constituted a "policy." SCDC's counsel replied by asserting that the prison industries pay claims articulated by the Inmates in their grievances did not fall within the definition of "policies and procedures" provided by this Court in *State v. Blick*.

As illustrated above,¹⁴ this Court in *Patterson* relied upon *State v. Blick* and its definition of "policies and procedures" when it affirmed a decision by the ALC which upheld SCDC's application of the fifteen-day filing deadline from paragraph 13.1 to a grievance filed by an

¹² Along with the definition of "policies and procedures" from *State v. Blick* it presented to the ALC in its supplemental brief, SCDC also provided a table reflecting the definitions of the terms "policies" and "procedures" sampled from other jurisdictions. (R. pp. 5129 – 30).

¹³ See also R. p. 5117.

¹⁴ See notes 5 and 11 above.

inmate in which the inmate alleged that SCDC had deprived him of his property (i.e. an “Inmate property complaint” under paragraph 7.4).

SCDC respectfully submits that the manner by which this Court applied the definition of “policies and procedures” from *State v. Blick* in its opinion in *Patterson*, albeit unpublished, supports the assertion made by its counsel during oral argument that the prison industries pay claims articulated by the Inmates in their grievances, in which they asserted that SCDC deprived them of their property (i.e. their wages), do not constitute “policies/procedures” grievances. *See Toth, supra.*

2. **The Prison Industries Service Work Projects Enhance “Internal Order and Discipline” and Assist SCDC Officials “to Maintain Institutional Security,” but they are not “Necessary to Preserve Internal Order and Discipline, and to Maintain Institutional Security in the Prison.”**

The wages paid by SCDC to inmates who participate in the prison industries projects it operates are not “necessary to preserve internal order and discipline, and to maintain institutional security in the prison,” the final component of the definition of “policies and procedures” from *State v. Blick*. Moreover, the projects themselves, while they undoubtedly enhance “internal order and discipline” and assist SCDC officials “to maintain institutional security” in the prisons at which the projects are operated, are not “necessary to preserve internal order and discipline, and to maintain institutional security in the prison.”

The first sentence of § 24-3-430(A), first enacted in 1995, provides that SCDC’s Director “**may establish** a program involving the use of inmate labor by a nonprofit organization or in private industry for the manufacturing and processing of goods, wares, or merchandise or the provision of services or another business or commercial enterprise considered by the director to enhance the general welfare of South Carolina.” [emphasis supplied].

Effective for the fiscal year beginning July 1, 2001, our General Assembly enacted the first of a series of yearly budget provisos which specifically addressed prison industries service work projects, the type of project in which the Inmates participated at Lieber. As this Court recognized, 2016 WL 516641 at *2, the first sentence of the first of these yearly provisos provided that SCDC's Director "**may enter** into contracts with private sector entities that would allow for inmate labor to be provided for prison industry service work." H. 3687, Appropriation Bill 2001–2002, Part IB § 37.31 (Act No. 66, 2001 S.C. Acts 738). [emphasis supplied].

Effective August 1, 2007, our General Assembly enacted S.C. Code Ann. § 24-1-295, which codified the language of the provisos. 2016 WL 516641 at *2. Just like all of the provisos enacted in and after 2001 and just like § 24-3-430(A), the first sentence of § 24-1-295 provides that SCDC's Director "**may enter** into contracts with private sector entities that allow inmate labor to be provided for prison industry service work and export work that involves exportation of products." [emphasis supplied].

SCDC is under no mandate by which it must operate prison industries service work projects or, for that matter, the types of prison industries projects which fall under the provisions of § 24-3-430.¹⁵ If SCDC halted operations of its service work projects or otherwise discontinued engaging in such projects, SCDC would still have to promulgate and follow "policies/procedures" which would be "necessary to preserve internal order and discipline, and to maintain institutional security in the prison" as contemplated under *State v. Blick*. Again, the wages paid by SCDC to inmates who participate in the prison industries projects it operates, like the projects themselves, are not "necessary to preserve internal order and discipline, and to maintain institutional security in the prison," the final component of the definition of "policies and procedures" from *State v. Blick*.

¹⁵ See note 6 above.

Consequentially, by rejecting the Inmates' arguments that the prison industries pay claims articulated in their grievances constituted challenges to SCDC "policies/procedures, to the extent that the Inmates ever indicated that their claims constituted challenges to SCDC "policies/procedures" under paragraphs 7.1 and 13.9, SCDC did not act in an arbitrary and capricious fashion as determined by the Court. 2016 WL 516641 at *5. SCDC respectfully urges this Court to rehear and reconsider its opinion, and, in doing so, this Court should, under *Kiawah Dev. Partners, II*, defer to SCDC's interpretation of the definition of "policies/procedures."

IV. CONCLUSION

As stated at the outset of its instant petition, SCDC respectfully submits that by its opinion, the Court has swept away any limitations period applicable to the pay claims articulated by the Inmates in their grievances. The ALC, however, recognized the significance and efficacy a limitations period upon the Inmates' claims (R. pp. 159 – 160):

Moreover, the [Inmates'] broad interpretation of the term "policies/procedures" does not comport with public policy. [SCDC] has a legitimate interest in investigating grievances while they are still new, and thus public policy calls for the application of some limitations period to the [Inmates'] prevailing wage claims. See Johnson v. Johnson, 385 F.3d 503, 519 (5th Cir. 2004) (noting that the prison system has a legitimate interest in investigating complaints while they are still fresh); see also Woodford v. Ngo, 548 U.S. 81, 95 (2006) ("When a grievance is filed shortly after the event giving rise to the grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved.").

...
The importance of filing deadlines is underscored by the facts of this case. The record demonstrates that [SCDC] did begin receiving Step 1s from the [Inmates] regarding their prevailing wage claims until September 22, 2004. The record also reflects that a significant number of the [Inmates] began participating in the prison industries project at Lieber in 1999. Thus, approximately five years passed between when these [Inmates] began participating in the project when they filed their [grievances] challenging their pay. Clearly, the passage of five years could significantly affect [SCDC's] ability to defend the [Inmates'] claims. [footnote omitted].

In *Stokes-Craven Holding Corp. v. Robinson*, -- S.E.2d --, 2015 WL 5247124 at *4 (Opinion No. 27572) (S.C. Sept. 9 2015), our Supreme Court, relying upon an opinion issued by this Court, articulated the following principles concerning statutes of limitations:

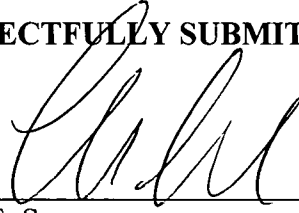
“Statutes of limitations are not simply technicalities.” [*Kelly v. Logan, Jolley & Smith, L.L.P.*, 682 S.E.2d 1, 4 (S.C. Ct. App. 2009)]. “On the contrary, they have long been respected as fundamental to a well-ordered judicial system.” *Id.* “Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs.” *Id.* “One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights.” *Id.* (citations omitted). “Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.” *Id.* “Statutes of limitations are, indeed, fundamental to our judicial system.” *Id.* (citation omitted).

As illustrated above, our Supreme Court, in *Okeru*, has already implicitly affirmed SCDC’s application of a limitations period, i.e. the fifteen-day filing deadline from paragraph 13.1,¹⁶ to a grievance in which the inmate claimed that SCDC deprived him of his property by failing to pay him the lawful hourly wage for his prison industries labor.

For these broader considerations as well as the foregoing analysis of the points overlooked and/or misapprehended by the Court, SCDC respectfully urges the Court to rehear and, obviously, reconsider its February 10, 2016 opinion in this matter.

¹⁶ See note 7 above.

RESPECTFULLY SUBMITTED,



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Counsel for Respondent

Columbia, South Carolina
February 25, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Francis Ackerman, #266928, Malik Aljalil, #219551,
Linso Allen, #269378, Michael Benninger, #264212,
Frederic Brown, #289602, Timothy Brown, #238461,
Terrell Buchanon, #277262, Christopher Buch, #200690,
Rudy Cassady, #238732, Sheldon Clark, #264772,
Zawaski Cobb, #187136, Kamathene Cooper, #145333,
Gladstone Cummings, #267450, Patrick Curtis, #175139,
Quintin Daniels, #196284, Curtis Davis, #238776,
Heyward Dempsey, #134171, Phillip Denney, #240678,
Paul Durham, #219573, Jerome Durham, #270393, Keith
Eigner, #299153, Bernard Felder, #122099, Jermaine
Garriett, #191274, Fred Gatewood, #289775, Dennis
Goff, #177506, Gregory Grant, #109656, Nelson
Hampton, #286427, James Hartman, #219770, Gary
Hayes, #263985, Michael Hood, #279987, Nikia Law,
#260855, Stephen Lease, #137016, Harry Leonard,
#249996, Herbert McFadden, #184297, Michael
McFarland, #266870, Earl Mack, #216237, John Moultri,
#276527, Matin Muntaqim, #266870, Tony Pitts,
#280597, Germaine Pringle, #250390, Gene Richardson,
#93614, Dennis Richey, #233472, Ignacio Rivera,
#300424, Vondell Sanders, #241308, James Sattler,
#235043, Joseph Schmitz, #173987, Arthur Scott,
#251957, Jerome Scott, #153381, Roosevelt Scott,
#275631, Archie Simmons, #161419, Robert Smith,
#199324, James Williams, #282929, Gary Bryant,
#258972, Harlon Edger, #261866, Johnny Holden,
#245199, Don Hughes, #256862, Michael Key, #266890,
Archie Lee, #226354, Isaac Richardson, #232574,
Larkland Richards, #281768, John Wojcik, #219463,
James Bogan, #288111, Larry Burke, #281911, Jammie
Gaymon, #208922, David Harrell, #260004, Jeff Stinson,
#260047, Ricky Libby, #274681, Alain Lareua, #128014,
Quentin Baker, #297868, Frank Corley, #292975, James
Jackson, #267718, Quintin Linen, #238553, Thomas
Miles, #246763, Chauncy Orr, #177069, Isaiah Scott,
#228008, Eric Youmous, #281091, Derek Carter,

#275938, Willie Hare, #256641, Ernest Miller, #235474,
Robert Norris, #266101, Ronald Simmons, #267937,
Samuel Simmons, #302393, William Thomas, #272501,
Anthony Murphy, #295893, Anthony Murray, #237867,
Johnny Hayes, #267910, Roy Morris, #288777, Daniel
Dewey, #276678, Nehemiah Greene, #243339, Leroy
Choice, #113990, James McFadden, #235419, Francis
Prioleau, #268813, Darrell Rochester, #146731, Wilbur
Jordan, #292264, Alvin Stewart, #278595, Kevin Poston,
#266083, Kevin Smith, #272440, Donald Robinson,
#277520, Douglas Bude, #263537, Willie Elder,
#246208, Rogelio Zavala, #245106, Dennis Knight,
#286981, Jacob Beach, #301270, Francis Ackerman,
#266928, Darrin Miller, #259593, Edward Bryant,
#255998, Sherman Austin, #20028, Michael Baylor,
#265682, Taurus Bowman, #252745, Kenneth Carter,
#243538, Calvin Drummond, #236322, David Feggins,
#287157, Terry Ferguson, #299080, Willie House,
#257820, Peter Jenkins, #257321, Percy Martin,
#270035, James Murray, #165487, Stephone Simmons,
#300422, Larry McClam, #282972, Tyrone Aiken,
#244428, Tyrone Aiken, #248367, Frank Anderson,
#282800, Ronald Brewer, #285756, Keith Brown,
#295762, Pete Bryant, #242370, Michael Busques,
#191961, Richard Butler, #162467, Gary Davis,
#106144, Anthony English, #238474, Kerlan Etheredge,
#236635, James Evans, #267837, Jose Flores, #240563,
Robert Garrett, #291096, Reginald Geddis, #183851,
Richard Graham, #228235, Gary Grooms, #283860,
Wayne Harlan, #245705, Johnny Hayes, #267910,
Steven Hickenbottom, #196263, Alfred Joyner, #260442,
Donald Lyles, #296135, Henry Baker, #263398, Thomas
Carter, #249362, Thomas Butler, #257552, Bobby
Williams, #261486, Ray Wells, #173651, Rodney
Pressley, #177947, Keith Kelly, #257556, Maxie
Gamble, #254413, James Enriquez, #215539, Perry
Deveaux, #109601, James Wells, #180458, Cedric
Martino, #291396, Donald McAteer, #292961, Robert
Wydman, #260331, Anthony Wright, #214007, Derrick

Williams, #272958, Kenneth White, #228409, James Trumper, #247429, Jeffrey Spears, #281697, Timothy Smith, #296539, Davis Sims, #278067, Virgil Simpson, #281888, Edward Simpson, #220017, Kenneth Simmons, #278911, George Shine, #292391, Ralph Sellers, #164295, Laron Richardson, #258786, Frank Patterson, #283098, Tony McNeil, #235864, Larry McClam, #282972, Lavanza Mack, #189340, Raymond Livingston, #277133, Nicholas Lambrose, #215080, Joseph Kelsey, #217218, Keith Eugene, no number, Chuck Jackson, #266425, James Foye, #211523, Timothy Inman, #151123, Marvin Gilbert, #273934, Demetrius Wheeling, #264976, Leon Wilson, #155867, Jeffrey Tevis, #216442, Darryel Beasley, #222388, Curtis Thompson, #266448, Baron Cobbs, #280479, James Tino, #145030, Harold Roberson, #117001, Ray Gadsen, #187527, Tony Witt, #242918, Jonathan Singleton, #287670, Joe Pannell, #89592, Charles Graham, #294453, Lazarus Brannon, #227847, Darrell Williams, #219730, Wilbert Mills, #244004, Howard Grant, #255473, Timothy Wilson, #261971, Rodney Elliott, #251337, Henry Rivers, #219118, Appellants,

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2012-210588

PROOF OF SERVICE

I certify that I have served the Respondent's **Petition for Rehearing** on the above-named Appellants by mailing a copy of it to their counsel, first class postage pre-paid, at the following address:

Douglas H. Westbrook, Esquire
Attorney at Law
23 Broad Street
Charleston, South Carolina 29401

February 25, 2016


LAKE E. SUMMERS

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