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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

RECEIVED

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

MAR 21 2016

Fred Gatewood.....

Appellant,
SC Court of Appeals

v.

South Carolina Department of Corrections.....

Respondent.

Appellate Case No. 2014-001199

PETITION FOR REHEARING OF APPELLANT

COMES NOW, Appellant Fred Gatewood by counsel, who respectfully submits his Petition for Rehearing of the Court's opinion filed March 9, 2016 (SCACR 221(a)). Gatewood contends the Court overlooked certain points in Section I of its opinion (Gatewood issue 1, Motion to Supplement); Section II (Gatewood issues 2 and 6, deductions and "other required deductions"); Section III (Gatewood issue 6, security and overhead as "other required deductions"); Section V (Gatewood issue 7, overtime); Section VII (Gatewood issue 9, processing grievance for all inmate-workers); and Section VIII (Gatewood issue 10, injunctive relief); as more particularly described in the attached Memorandum.

Respectfully submitted,

DH Westbrook

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

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

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MEMORANDUM IN SUPPORT OF
APPELLANT'S PETITION FOR REHEARING

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SC Court of Appeals

COMES NOW, Appellant Fred Gatewood by counsel, who submits his Memorandum in support of the Petition for Rehearing pursuant to SCACR 221(a) and 240(c).

1. Regarding Section I of the Court's opinion (Gatewood issue 1, Motion to Supplement), the Court held any error in denying the motion was harmless. Gatewood contends the Court overlooked the points that he has appealed from ALC Level 3 merits briefing; Level 3 is the only opportunity to add Gatewood's pay stubs and time cards to the record before wage calculations; these records are needed to make accurate calculations; and this causes prejudice to Gatewood if the records are not added to the record (Gatewood brief, 8; reply brief, 2-3).

1a. Regarding Section II (Gatewood issues 2 and 6, deductions and "other required deductions" under §24-1-295), the Court stated §24-1-295 governed Gatewood's deductions from August 1, 2007 to April 13, 2009. Gatewood contends the Court overlooked those points summarized in paragraph 2 on pages 3-4 of this Memorandum (Gatewood brief, 21-24, 27-28; reply brief, 6, 11-14).

2. Regarding Section III (Gatewood issue 6, security and overhead as "other required deductions" under §24-1-295), the Court agreed with the ALC that security and prison industries overhead were "other required deductions" under §24-1-295 because they were built into the \$4 per hour rate WTI paid for inmate labor. In support, the Court cited §3.3.1 of the contract ("It is the intent of the parties that such increase shall only reflect SCDC's increased costs of prison overhead"); and two provisions in §24-1-295, and the legislative intent statement in §24-3-310. The Court stated these provisions necessarily imply that SCDC has flexibility to determine the amount it will charge the industry sponsor for inmate labor and any other costs SCDC must incur for the program. Gatewood contends the Court overlooked the following points:

(a) The express terms of the 1998 contract state that SCDC invoices WTI for "inmate labor"; SCDC is responsible for security "at its expense"; and SCDC "..shall be responsible to..cover security costs and P.I. overhead, including any costs for health, safety and welfare of the inmates.." Thus, under the contract terms deductions for security and P.I. overhead are not required, or allowed, to be taken out of the \$4 per hour gross wage. Moreover, the express terms do not state that security and P.I. overhead are built into the \$4 wage rate. (Gatewood brief, 21-24, 27-28).

(b) A meaning cannot be read into a contract which imparts an intent wholly unexpressed therein (Gatewood brief, 27).

(c) Section 3.3.1 of the contract (allowing the parties to negotiate an increase in the hourly pay rate) is to reflect "SCDC's increased costs of

prison overhead", not "prison industries overhead" (Gatewood reply brief, 11-12).

(d) Section 3.3.1 was drafted with §24-3-40 in mind to reimburse the State for inmate's room and board (Gatewood reply brief, 12).

(e) The main issue in §24-1-295's "other required deductions" clause is whether security and prison industries overhead are required deductions from the \$4 wage pursuant to the 1998 contract (Gatewood brief, 21, 23-24, 27-28; reply brief, 14).

(f) Section 24-3-310(2) speaks of reimbursing the State for inmates' "crimes and imprisonment", which more closely describes the deduction for room and board allowed under §24-3-40 (Gatewood reply brief, 11-12).

(g) Under §24-1-295, SCDC may negotiate the wage for inmate labor, not SCDC's deductions from that wage. See Court's opinion, Section III.

(h) Since SCDC is a drafter of the contract, any ambiguity must be construed against it (Gatewood reply brief, 13).

3. Regarding Section V (Gatewood issue 7, overtime), the Court held Gatewood did not raise overtime with SCDC at the agency level, and the ALC properly ruled overtime was not preserved for review. Gatewood contends the Court overlooked the following points:

(a) In the ALC, Gatewood briefed overtime on the merits; SCDC admitted inmates could perform overtime labor; SCDC waived issue preservation by failing to argue it in its brief; and the ALC erred in raising issue preservation on its own (Gatewood brief, 30).

(b) Under SCDC v. Cartrette 694 S.E. 2d 18, 21-23 (S.C. App., 2010),

Gatewood's right to overtime is ensured under §24-3-430. And, his step 1 and Amendment allegations of entitlement to prevailing wages under §24-3-430, and to the \$4 rate after July 2001, were sufficient for issue preservation purposes (Gatewood reply brief, 14-15).

(c) In Gatewood's reply to SCDC's argument that there was no extent to which SCDC could consider overtime (SCDC brief, 26), Gatewood noted that his step 1 requested back wages, as determined by Exhibits A-H, which were incorporated by reference from Darrell Williams' grievance, and Exhibits C-E allowed overtime at time and a half pay to be worked, and these exhibits adequately raised overtime (Gatewood reply brief, 15).

(d) SCDC admitted in this Court that inmates could perform overtime labor (SCDC brief, 27), which admission should resolve the issue preservation issue (Gatewood brief, 30; reply brief, 16).

4. Regarding Section VII (Gatewood issue 9, processing grievance for all inmate-workers), the Court agreed with the ALC that this issue was manifestly without merit, and this conclusion did not have to be stated in the ALC order. Gatewood contends the Court overlooked the following points:

(a) Gatewood's step 1 was filed individually and on behalf of all inmate-workers.

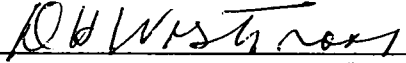
(b) Gatewood's grievance requested that it be a grievance for all workers in the program.

(c) SCDC's grievance decision denied "class" grievance status to the grievance.

(d) Gatewood named this issue in his ALC Statement of Issues and argued it (Gatewood brief, 34; reply brief, 16-17).

5. Regarding Section VIII (Gatewood issue 10, injunctive relief), the Court affirmed the ALC decision declining to entertain Gatewood's request for an injunction. Gatewood contends the Court overlooked the point that §1-13-90, by analogy, supports enjoining SCDC from further unlawful practices (Gatewood brief, 34).

Respectfully submitted,


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PROOF OF SERVICE

SC Court of Appeals

I certify that I have served the Appellant's Petition for Rehearing and Memorandum in Support on the S.C. Department of Corrections by depositing a copy of these documents in the U.S. Mail, postage prepaid, on March 19, 2016, addressed to its attorney of record, Lake Summers, Esquire, of Malone, Thompson, Summers & Ott, LLC, 339 Heyward St., Ste. 200, Columbia, SC 29201.



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March ¹⁹~~18~~, 2016

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MAR 21 2016
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Fred Gatewood, #289775 v. SCDC
Appellate Case No. 2014-001199

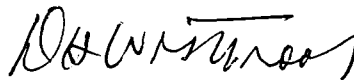
Dear Ms. Kitchings:

Please find enclosed for filing with the Court the original and six copies of Appellant's Petition for Rehearing, Memorandum, and Proof of Service, for the above captioned appeal. I also enclose a check for the \$25 filing fee.

By copy of this letter, I have served a copy of these documents on counsel for the Respondent Department of Corrections.

Thank you for your assistance in this matter.

Sincerely,



Douglas H. Westbrook

DHW/
Encl.
cc: Lake Summers, Esquire