

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Court of Appeals Opinion No. 5379
Supreme Court Case Tracking No. 2016-000829

Francis Ackerman, #266928, Malik Aljalil, #219551,
Linso Allen, #269378, Michael Benninger, #264212,
Frederic Brown, #289602, Timothy Brown, #238461,
Terrell Buchanan, #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
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#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,
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#245199, Don Hughes, #256862, Michael Key, #266890,
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#260047, Ricky Libby, #274681, Alain Lareua, #128014,
Quentin Baker, #297868, Frank Corley, #292975, James

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v.

South Carolina Department of Corrections, Petitioner.

**PETITION FOR WRIT OF CERTIORARI
BY THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS**

**APPENDIX
VOLUME 14 OF 14**

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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

Docket Nos. 07-ALJ-04-00444-AP, 07-ALJ-04-00445-AP, 07-ALJ-04-00446-AP,
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*Docket No. 07-ALJ-04-00826-AP is probably assigned to an unrelated case. See June 8, 2012 letter to the ALC with copy to the Court of Appeals. The number remains in this caption because it appears in the ALC Second Amended Order caption, line 6, and has not yet been deleted by the Court of Appeals.

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

Appellate Case No. 2012-210588

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the Adkins and Wicker decisions create new grievance and appeal remedies for inmates' pre-existing right to prevailing wages?
2. Did inmates' grievances concern policies/procedures under §13.9 of SCDC Grievance Policy because of their express language and substance, Adkins and Wicker, and notices of appeal, and was there a time limit to file under §13.9?
3. Was there reasonable cause under §13.9 not to file within the original time frame because inmates had no wage grievance and appeal rights before Adkins and Wicker, and even if inmates had such rights, were they effectively barred from exercising those rights, and was there a time limit to file under §13.9 after Adkins and Wicker?
4. Did SCDC's application of §13.1 violate due process because it cut off inmates' claims before they accrued and denied inmates a meaningful opportunity to file grievances and obtain judicial review before the bar took effect?
5. Did SCDC waive §13.1 because §13.9 and step 1 instructions were inconsistent with an intention to rely on §13.1, SCDC did not raise §13.1 until step 2 appeals, and SCDC considered these grievances on the merits before invoking §13.1?
6. Was SCDC estopped from raising §13.1 by equitable estoppel?
7. Did inmates comply with §13.1 because it was tolled by their class action and they filed grievances no later than 15 days after the class action remittitur filing date or within 45 days of notice posting under the 2005 order?
8. Did §13.1 require filing within 15 days after inmates' initial pay date, and if not, did they comply with §13.1 by filing during a term of employment or for the

previous 15 days work?

9. If §13.1 required filing within 15 days after initial pay date, did inmates comply with §13.1 because it was tolled while inmates were barred, or effectively barred, from grieving and appealing prevailing wage claims before Adkins/Wicker, and after those decisions recognized such rights, inmates filed grievances within 15 days after the Adkins/Wicker remittitur filing date?

STATEMENT OF THE CASE

This case involves 197 inmate grievances for prevailing wages under S. C. Code §24-3-430(D). Appellants are inmates and former inmates who worked in the Lieber/Williams Technologies (WTI) work program at various times between 1998 and present.*

Section 24-3-430 (D) required the Department of Corrections (SCDC) to pay inmates at least “the prevailing wage for work of similar nature in the private sector”. As of July 2001, Statutes at Large, No. 66, §37.31 amended §24-3-430 (D) to allow SCDC to pay inmates a “negotiated wage”.

On January 29, 2002, inmate Darrell Williams filed a civil action for back wages earned in the program (R. p. 212). On July 1, 2002 and February 12, 2003, amended class action complaints were filed (R. pp. 220, 230).

On August 23, 2004, decisions were issued in Adkins, et al. v. SCDC 360 S.C. 413, 602 S.E. 2d 56 (S.C., 2004) and Wicker v. SCDC 360 S.C. 421, 602 S.E. 2d 51 (S.C., 2004), holding inmates could file a prevailing wage grievance and appeal to the Administrative Law Court (ALC). On September 9, 2004, the Court’s remittiturs were

*Work and grievance file dates are in inmates’ Appendix 1 and SCDC’s spreadsheet in the record (R. pp. 252, 4602).

filed in Circuit Court (R. pp. 190, 199).

Beginning on September 22, 2004, 200 inmates retained undersigned counsel to file grievance, and many filed step 1 grievances that day. An April 2005 Circuit Court order found, "(O)n September 22, 2004, plaintiffs' counsel submitted nearly 200 grievances to SCDC's Inmate Grievance Coordinator at Lieber Correctional Institution" (R. pp. 19-20). Certificates of Service document 94 filings on September 22, and 84 (plus 7 repeat filers) on September 30 (R. pp. 1238-1241, 4632). An additional 3 filed on September 22 and 23, and 17 at other times. Two (McNeill, Perez) apparently did not file grievances.

All grievances were denied by SCDC. On November 3, 2004, the Circuit Court stayed the grievance process. Also in early November, inmates filed step 2 appeals.

The 2005 order dismissed the class action and decertified the class (R. p. 19). In May 2005, inmates appealed the order and SCDC invoked the automatic stay in SCACR 225 (R. pp. 293, 5139, 5141). In February 2007, the Supreme Court affirmed the dismissal and the Court's remittitur was filed March 22, 2007 (R. p. 205).

On April 19, 2007, inmates filed 188 Amendments/Exhibits to their grievances pursuant to SCDC's in court agreement to accept them for filing and consider them on the merits (R. pp. 189, 247, 299). A few inmates filed Amendments on their own as evidenced by certificates proposed for record inclusion (R. pp. 1246, 1274, 1291-1293, 4487-4495).

On or about May 21, 2007, the stay was lifted and the grievance process then resumed (e.g., R. p. 1311)**. SCDC then issued final decisions to many step 2 appeals. Again, all grievances were denied. SCDC invoked the 15 day rule for “incident” grievances in §13.1 of Grievance Policy GA-01.12 (R. p. 687), contending inmates filed more than 15 days after initial employment and Adkins/Wicker (e.g., R. pp. 1311-1317).

The 2005 Circuit Court order directed SCDC to post notice that inmates who had not filed grievances had until 45 days after notice posting to do so (R. pp. 23, 24). This notice was posted from October 20 to December 6, 2008 (R. p. 301).

From June 2007 to February 2008, counsel filed 116 appeals in the ALC. On November 7, 2008 and April 10, 2009, counsel filed 81 automatic appeals in the ALC pursuant to §13.5 of grievance policy (R. p. 688).

In an April 14, 2010 order, the ALC instructed the parties to brief this appeal in three levels. Level one consisted of two issues, whether Adkins and Wicker created a new remedy and/or substantive right, and whether those decisions apply prospectively or retrospectively. After the parties briefed these issues, the ALC in a March 10, 2011 order held that Adkins and Wicker did not create new substantive rights, new grievance remedies, or new appeal remedies. And further, these decisions apply retrospectively. The ALC also ordered the parties to proceed to Level two and brief the timeliness of each inmate’s grievance filing under Grievance Policy GA-01.12 (R. pp. 43-44).

** In this brief, individual inmate grievance documents are cited as typical of most or all such documents in the manner indicated.

Following receipt of the parties' briefs, the ALC in its orders of March 2 and 16, 2012 held that all grievances but one were untimely as not being filed within 15 days of inmates' initial pay date. The ALC held that inmate Fred Gatewood had timely filed his grievance, and ordered the parties to brief his grievance on the merits (R. pp. 94, 118).

The amount involved on appeal has not been determined. The amount of back wages owed per inmate varies depending on how long they worked and other factors. At the appropriate time, inmates may request appointment of a special master to make this determination.

On March 29, 2012, inmates filed their Notice of Appeal in the Court of Appeals, and at the same time served the notice on the ALC and counsel for SCDC (R. p. 5144).

On April 27, 2012, inmates filed their Initial Brief and Designation of Matter with the Court of Appeals. That brief contained references to the March 2 and 16, 2012 Order and Amended Order of the ALC.

On May 17, 2012, the ALC requested leave from the Court of Appeals to file a Second Amended Order. This request and copies of the proposed order were served on the parties' counsel, and the order was filed dated May 17, 2012 in the ALC (R. p. 121).

On May 23, 2012, inmates filed their Motion to Suspend Briefing Schedule and for Permission to File a Revised Initial Brief should the Court of Appeals grant the

ALC's request to file its Second Amended Order (R. p. 5132).

On June 15, 2012, inmates filed a Notice of Appeal in the Court of Appeals covering the ALC's Second Amended Order filed on May 17, 2012. This Notice of Appeal was filed in the event that the Court of Appeals granted the ALC leave to file that order (R. p. 5148).

On July 23, 2012, the Court of Appeals remanded this appeal to the ALC for the purpose of issuing the Second Amended Order (R. p. 151).

On July 26, 2012, the ALC issued and filed its Second Amended Order (R. p. 153).

On August 22, 2012, inmates filed a Notice of Appeal in the Court of Appeals of the ALC's Second Amended Order (R. p. 5159).

On January 11, 2013, the Court of Appeals issued an order granting inmates' May 23, 2012 motion and directed them to serve and file their amended initial brief and designation of matter within thirty days (R. p. 181).*

ARGUMENT

1. The Adkins and Wicker decisions created new grievance and appeal remedies for inmates' pre-existing right to prevailing wages.

The standard of review is as follows. Review must be confined to the record.

The appellate court may not substitute its judgment for that of the ALC as to weight of

*April 27, 2012/January 11, 2013 matters provide a history of the proceedings as it relates to referencing the ALC's July 26, 2012 Second Amended Order. Pursuant to the January 11 Court of Appeals order, the within brief substitutes references to the ALC's Second Amended Order for references to the ALC's March 2012 orders in inmates' April 27, 2012 Initial Brief. The within brief also reflects pagination and grammatical changes, and some changed or deleted text, necessitated by referencing the Second Amended Order.

the evidence on questions of fact. The appellate court may reverse or modify the decision if the substantive rights of the appellants have been prejudiced because the ALC's finding, conclusion, or decision is (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion (S.C. Code §1-23-610 (B)).

In its March 10, 2011 order, the ALC held that, prior to Adkins/Wicker, inmates "could have submitted" a prevailing wage grievance because SCDC grievance policy included, as grievable issues, SCDC policies/procedures, directives, or conditions which directly affected inmates. And, inmates were directly affected by "SCDC policies" that caused inmates to be paid less than prevailing wages. (R. pp. 40-41). The ALC also held that Wicker did not create new appeal remedies, but merely re-affirmed Al Shabazz v. State 338 S.C. 354, 527 S.E. 2d 742 (S.C., 2000), which held due process applied to protection of 14th Amendment liberty and property interests (R. p. 42).

Inmates contend the conclusion that inmates "could have submitted" a wage grievance disregards due process requirements, is clearly erroneous in view of the substantial evidence of record, and is arbitrary and an abuse of discretion. And further, the conclusion that Wicker did not create new appeal remedies is affected by error of law.

Before Adkins/Wicker, SCDC contended in court that wage grievances were not grievable under its grievance policy (Bennie Wicker, #122304 v. SCDC Dock No. 00-ALJ-04-00781-AP, Aug. 13, 2001, Op.1). The ALC conceded this point (R. p. 40).

Thus, while inmates "could have submitted" such a grievance, SCDC would have summarily dismissed it as non-grievable (e.g., R. p. 4115) (grievance dismissed for "want of jurisdiction"). In other words, SCDC's grievance remedy did not exist for these claims.

Due process requires an opportunity granted at a meaningful time and in a **meaningful manner** for an appropriate hearing (Logan v. Zimmerman Brush Co. 102 S.Ct. 1148, 1159 (1982). Inmates contend that summary dismissal of grievances for non-grievability would not provide a meaningful and appropriate hearing under due process.

Furthermore, inmates contend the ALC did not have jurisdiction to review these cases before Adkins/Wicker (Wicker v. SCDC 360 S.C. 421, 424, n.1, 425, 602 S.E. 2d 56,58, n. 1) ("expanding the jurisdiction" of the ALC to cover prevailing wage grievance appeals); James E. McNeil, #147700 v. SCDC Dock. No. 00-ALJ-04-00336-AP, Sept. 5, 2001, en banc opinion, 4-5) (limiting ALC appeal jurisdiction to sentence/credits/custody matters and "liberty" interests).

McNeil involved an inmate ALC appeal for SCDC administering chemical munition spray to McNeil and placing him in a restraint chair for unruly conduct. In an en banc opinion denying jurisdiction to hear the appeal, the ALC held:

The Administrative Law Judge Division's appellate jurisdiction in inmate appeals is limited to either:

1. Cases in which an inmate contends that prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; or
2. Cases in which the Department has taken an inmate's created liberty interest as punishment in a major disciplinary hearing.

On October 23, 2001, the ALC cited McNeil in dismissing an inmate's wage appeal for lack of subject matter jurisdiction (Willie Ingram, # 83404 v. SCDC Dock.

No. 01-ALJ-04-00190-AP, 1-2). Thus, while Ingram had "appealed" his wage dispute, the Court held it had no jurisdiction "to decide this matter".

Dismissal in Ingram was apparently required by ALC Rule 70F. This rule states that issues addressed in an en banc decision, such as McNeil, are "binding" upon individual administrative law judges in subsequent cases unless a majority of judges determines otherwise. Rule 70F was effective on May 1, 2001, before McNeil was decided. After the McNeil en banc opinion was issued, the ALC dismissed McNeil's appeal stating the en banc opinion was "binding", citing Rule 70F (James E. McNeil, #147700 v. SCDC Dock. No. 00-ALJ-04-00336-AP, October 1, 2001 Order of Dismissal). Inmates contend that McNeil and Rule 70F prevented wage appeals from receiving a hearing and decision on the merits before Adkins/Wicker.

Significantly, in Wicker itself SCDC argued, citing McNeil, that the ALC lacked subject matter jurisdiction to review Wicker's wage appeal (Wicker v. SCDC 360 S.C. 421, 424, 602 S.E. 2nd 56, 57). In sum, before Adkins/Wicker inmates had no meaningful right to grieve wage disputes and could not enforce their right to prevailing wages in court.

Inmates contend the Adkins and Wicker decisions corrected this situation by creating new grievance and appeal remedies to vindicate inmates' right to prevailing wages under §24-3-430 (D). In Adkins, the Court considered the issue of whether §24-3-430 (D) created a private right of action in inmates. The Court held at 360 S.C. 413, 419, 602 S.E. 51, 55:

However, notwithstanding our holding that inmates have no private civil cause of action, they are **not without a remedy**. In accordance with the companion case of Wicker v. South Carolina Dept. of Corrections 360 S.C. 421, 602 S.E. 2nd 56, 2004 WL 1877947 (2004), we hold inmates **may file an inmate grievance** to protest DOC's failure to pay wages in accordance with the mandatory statutory provisions.

In Wicker, the issue was whether the Circuit Court erred in holding Wicker was entitled to a \$5.25 per hour training wage pursuant to his prevailing wage grievance. The Court held that although Wicker had no claim for civil damages, he properly filed a grievance with SCDC (360 S.C. 421, 424, 602 S.E. 2nd 56, 57). The second part of the Court's holding is stated at 360 S.C. 421, 424-425, 602 S.E. 56, 58, note 1:

..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. 338 S.C. at 369, 527 S.E. 2d at 750.

We find that 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. McDougall, supra. Accordingly, in this very limited circumstance,¹ we hold the DOC's failure to pay in accordance with the statutes is reviewable by the ALJ.

¹ We note that our holding today is extremely limited and is not to be viewed as **expanding the jurisdiction of the ALJD** in any other circumstance.

Inmates respectfully submit the only logical interpretation of the Court's "holding today" is the Court was "expanding", or enlarging the ALC's jurisdiction to include matters, i.e., prevailing wage grievance appeals, not within the ALC's jurisdiction before that holding.

Inmates further contend that the remedies created in Adkins and Wicker were intended to vindicate their existing right to prevailing wages under §24-3-430 (D). This

statute states that "(N)o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector". It was held to be "mandatory" in Adkins (360 S.C. 413, 419, 602 S.E. 2nd 51, 55). In Wicker, the Court found that in §24-3-430 (D), the state "has created a statutory right to the payment of a prevailing wage" (360 S.C. 421, 424, 602 S.E. 2nd 56, 57).

The statutory right to prevailing wages is the right violated by SCDC's underpayment of wages. Together with Adkins and Wicker, it is also the legal basis for inmates' grievances (e.g., R. pp. 1296, 1388). Finally, it was the reason for the Court's decisions, as evidenced by the holding in Adkins that inmates could file a grievance to protest SCDC's failure to pay wages "in accordance with the mandatory statutory provisions" (360 S.C. 413, 419, 602 S.E. 2nd 51, 55). In sum, inmates' rights and SCDC's liability are based on §24-3-430 (D) which pre-existed Adkins and Wicker by nine (9) years.

Inmates submit that Adkins and Wicker created new grievance and appeal remedies to enforce inmates' pre-existing right to prevailing wages under §24-3-430 (D).

2. **Inmates' grievances concern policies/procedures under §13.9 of SCDC Grievance Policy because of their express language and substance, Adkins/Wicker, and notices of appeal, and there was no time limit to file under §13.9.**

The ALC held that inmates' grievances do not concern policies/procedures under §13.9, but are "incident" grievances subject to the 15 day filing limitation of §13.1 (R. p. 162). Inmates contend the ALC's conclusion is affected by error of law in its interpretation of these provisions and is clearly erroneous in view of the substantial evidence on the whole record.

Inmates' primary contention is these were not "incident" grievances under §13.1, but grievances "concerning policies/procedures" under §13.9 with no time limit to file. Section 13.9 states, "(E)xceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures" (R. p. 689).

The term "policies/procedures" appears in several provisions of SCDC's grievance policy, most notably §§7.1 and 13.9 (R. pp. 685, 689). However, the term is not defined in that policy (R. p. 691). "Policy" is defined elsewhere as "the general principles by which a government is guided in its management of public affairs" (Black's Law Dictionary, 5th ed., 104). The term "procedure" is defined as "the act or method of proceeding in an action" (Webster's New World Dictionary, 1989 ed., 341). SCDC defines "policies" and "procedures" as the 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 (R. p. 160).

Several conclusions can be drawn from these definitions. First, SCDC is an agency of "government". Second, SCDC operates the work program in question under S.C. Code §24-3-310 (R. p. 720) as one of its "public affairs" and "day-to-day operations". And third, SCDC operates the program pursuant to certain "principles", "methods", and "guidelines", primarily those in its 1998 contract with Williams Technologies, Inc. (WTI).

Among other things, this contract sets forth the \$4/hour pay rate for inmate workers (R. p. 725); the invoicing and payment procedure between SCDC and WTI (R. p. 724); WTI's agreement to pay SCDC \$4 per hour per inmate and SCDC's agreement to pay inmates and PI overhead (R. p. 725). The contract also sets these guidelines for

inmates: status as SCDC "employees" (R. p. 727); job duties (R. p. 723); and grounds for dismissal (Id.). As for SCDC, it selects inmates to work (R. p. 724); manages and supervises inmates (Id.); pays for inmate health and safety (R. p. 725); agrees not to discriminate against inmates (R. p. 728); and SCDC's Director and General Counsel signed the contract (R. p. 731).

Inmates contend that this contract, along with other memos in the record (R. pp. 719-735), form the basis of SCDC wage policy which caused them to be paid less than prevailing wages. The contract also contains, as summarized above, general principles, guidelines and methods for handling SCDC's day-to-day operations, as well as expectations of conduct, for the work program.

Section 7 of grievance policy describes the kinds of issues which are grievable. Among these are "policies/procedures" which directly affect an inmate (§7.1) (R. p. 685). Section 13.9 states, "(E)xceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures" (R. p. 689). Thus, §§7.1 and 13.9 both use the term, "policies/procedures" to describe a kind of grievable issue or grievance. No other type of grievance in §7 contains the term "policies/procedures". Therefore, any §13.9 grievance "concerning policies/procedures" must also be a §7.1 "Department policies/procedures" grievable issue. Obviously, that issue is the only grievable issue within §7 it could possibly be.

From the above, it seems apparent that "policies/procedures" in §13.9 carries the same meaning as "policies/procedures" in §7.1. If so, any interpretation of the term in one should be authoritative for the other (Spartanburg County v. Arthur 180 S.C. 81, 85, 185 S.E. 2nd 486, 488) (S.C., 1936) (To aid in the construction of the language of a

statute, the Court should look to the construction placed upon similar language in other statutes dealing with the same or a cognate subject matter); Busby v. State Farm Mut. Auto Ins. Co. 280 S.C. 330, 312 S.E. 2nd 716 (S.C. App., 1984) (The same word is presumptively intended to have the same meaning throughout a statute).

The meaning of "policies/procedures" in §13.9 has apparently not been directly addressed. However, "policies/procedures" in §7.1 has been discussed in at least two ALC rulings: Bennie Wicker, #122304 v. SCDC Dock. No. 00-ALJ-04-00781-AP, August 13, 2001, Op. 2; and the ALC's March 10, 2011 order (R. pp. 40-41). These rulings held that "DOC's arrangement with private industry to pay inmates" (Wicker), and "DOC policies that cause them to be paid less than that required by law" (March 10, 2011 order) directly affected inmates under §7.1. If SCDC had an "arrangement" to pay inmates, or "policies" causing them to be paid, it seems reasonable to infer that such arrangement or policies were SCDC's wage policy. This conclusion is supported by language from Adkins, et al. v. SCDC 602 S.E. 2nd 51, 53, n. 1, where, after describing inmates' training wage, the Supreme Court stated: "The policy of paying a training wage ended July 1, 1999".

If SCDC's wage policy is the kind of grievable issue presented in §7.1 by a prevailing wage grievance, the same grievance should also concern wage policy, and thus "policies/procedures", under §13.9. If so, it seems to follow that "policies/procedures" within §7.1, and by extension in §13.9, means SCDC wage policy. Thus, inmates contend that the term "policies/procedures" in §13.9 means SCDC wage policy, without excluding other possible meanings depending on the policy involved.

Inmates point to several reasons why their grievances concerned

policies/procedures. First, inmates note the express language of their grievances concerns policies/procedures. At least 92 step 1's state the following (e.g., R. p. 1388):

STATE GRIEVANCE (including documentation, and date of incident; if SCDC policy, indicate which policy.

..From 1999 to July 2001, WTI/Lieber were required by S.C. Code 24-3-430 to pay IE's the "prevailing wage" .. Since July 2001, WTI/Lieber were required to pay IE's the negotiated wage of \$4.00 per hour (Statutes at Large, No. 66, §37.31., Exh. B, C). In fact, WTI/Lieber's policy was to pay IE's, in most cases, under \$1.00 per hour.

Moreover, all 188 Amendments to grievances have similar language (e.g., R. p. 1300):

..From 1999 to July 2001, §24-3-430 required WTI/Lieber to pay Grievant the prevailing wage..Since July 2001, WTI/Lieber were required to pay Grievant the negotiated wage of \$4.00/hour (Stat. At Large, No. 66, §37.31; Exh. B, C). In fact, SCDC policy was to pay a maximum of about \$1/hour, and usually less.

Second, the grievances concern policies/procedures in substance. SCDC wage policy is found in the 1998 contract with WTI (R. p. 720) and in various memos. These documents are attached as Exhibits B-E to Darrell Williams' grievance; incorporated by reference in the step 1's and Amendments quoted above; and Exhibit C, the 1998 contract, is attached in part to the Amendments (R. pp. 719-735; e.g., 1300, 1388). The contract has two unlawful provisions, the \$4/hour wage and a provision to pay "PI overhead" (R. p. 725). The \$.35/hour base rate (R. p. 719), plus unauthorized (§24-3-40) overhead deductions, reduced inmates' pay to under \$1/hour. This wage policy violated §24-3-430 (D) from 1998 to 2001, and the \$4/hour negotiated wage from 2001 to present. Inmates' grievances seek to set aside this illegal policy and enforce the public policy in §24-3-430 (D) and Adkins/Wicker. Thus, these grievances "concern" and are based on policy entirely.

Third, Adkins/Wicker support inmates' position. In Bennie Wicker, #122304 v. SCDC Dock. No. 00-ALJ-04-00781-AP, Aug. 13, 2001, SCDC argued that Wicker's grievance was not grievable. The ALC disagreed, stating at page 2 of its opinion:

Moreover, Wicker's wage dispute falls under the listed issues considered "grievable" under DOC policy at GA-01.12 (OP), Specific Procedures, paragraph 7: the first issue listed is Department policies/procedures, directives, or conditions which directly affect an inmate. Wicker is directly affected by DOC's arrangement with private industry to pay inmates less than the "prevailing wage"..

In its March 10, 2011 order, the ALC reached the same conclusion, stating at page 6 of its opinion (R. p. 40):

Paragraph 7 of DOC Policy Number GA-01.12, which has existed in some form since May 1, 1996, sets forth the issues that are considered grievable by DOC. Among other grievable issues, it includes the following: "Department policies/procedures, directives, or conditions which directly affect an inmate". DOC Policy Number GA-01.12, ¶7.1 (emphasis in original) Unquestionably, inmates are "directly affected" by DOC policies that cause them to be paid less than that required by law. Thus, this provision, which is very broad in scope, encompasses prevailing wage claims.

In its July 26, 2012 Second Amended Order, the ALC explained its use of the term "policies" in the March 10, 2011 order (R. pp. 161-162):

Although the Court employed the term "policies" in discussing the appellants' claims, its use of that term was made in the context of determining whether the appellants' claims were grievable under Paragraph 7.1 of GA-01.12. The Court was simply describing the appellants' claims; it was not ruling on whether the Department did in fact have policies to underpay inmates. Moreover, in utilizing the term "policies", the Court was referring to its broad meaning as "course(s) of action", not to the meaning ascribed to the term in Paragraph 13.9. The sentence highlighted above was meant to convey the Court's conclusion that the Department's alleged action in the case (i.e., deciding to pay the appellants less than the prevailing wage) would have, if true, created a "condition" that "directly affected" the appellants.

Inmates respectfully make the following observations concerning the ALC's explanation. Section 7.1 of grievance policy contains three categories of grievable issues: Department policies/procedures, directives, or conditions which directly affect an inmate (R. p. 685). Because the ALC stated in its March 10, 2011 order that "DOC policies" directly affected inmates, the ALC necessarily **excluded** "directives, or conditions".

Moreover, the ALC candidly explains in the July 26 Second Amended Order that it used the term "policies" in context of determining if inmates' claims were grievable under §7.1. The March 10, 2011 order did not say that "directives" or "conditions" directly affected inmates, but "DOC policies" did, and "unquestionably" so. Inmates submit the only logical conclusion is the ALC determined, in the March 10, 2011 order, that prevailing wage grievances were a §7.1 "Department policies and procedures" type grievable issue. And, because §13.9 is the only grievance provision pertaining to grievances concerning policies/procedures, it seems to follow that a §7.1 "Department policies/procedures" grievable issue would necessarily concern policies/procedures under §13.9.

Finally, if the March 10, 2011 order was "meant to convey" the conclusion that underpayment of wages would create a "condition" that directly affected inmates, that is not what the ALC said. The ALC said that "unquestionably" inmates were directly affected by "DOC policies" that cause them to be paid less than prevailing wages.

Inmates contend that the March 10, 2011 order was correct in using the term DOC "policies" rather than "conditions". This view appears to be in line with Adkins 602 S.E. 2d at 53, n. 1, where, after describing inmates' training wage, the Court stated, "(T)he

policy of paying a training wage ended July 1, 1999.” Adkins held that inmates could grieve their illegal wages (602 S.E. 2d at 55).

However, inmates also contend that this Court need not decide which ALC order is correct. The issue is not whether these are “policy” or “condition” grievances, but whether the grievances are “concerning policies/procedures” under §13.9. Grievances need not be, but only “concern” policies/procedures (R. p. 689).

Inmates’ pay rate is set at \$4 per hour in the 1998 contract (R. p. 725). If a pay rate “condition” caused the illegal wages, that “condition” is still a fundamental provision of the contract. The contract, in turn, is the basis for SCDC wage policy for this work program.

Because inmates have protested the pay rate in their grievances (e.g., R. pp. 1296, 1388), a successful challenge to that pay rate would effect a change in the contract rate and thus in wage policy itself. Indeed, a successful challenge could cause a termination of the contract altogether (R. pp. 728-729). For these reasons, inmates contend that, whether a pay rate “policy” or “condition” caused illegal wages, their grievances are probably “concerning policies/procedures” under §13.9.

Inmates contend that several conclusions can be made from Adkins/Wicker: First, SCDC wage policy, or the pay rate condition in that policy, is the cause of illegal wages. Second, inmates may file a grievance to protest these wages. Third, such a grievance falls under §7.1 of SCDC grievance policy. And finally, if grievances protest illegal wages, which are caused by SCDC wage “policy” or the pay rate condition in that policy, the grievances are probably “concerning policies/procedures” under §§7.1, 13.9 of grievance policy.

Fourth, the notices of appeal expressly challenge wage policy by "contesting SCDC policy/procedure of paying below prevailing/negotiated wages" (e.g., R. p. 1318).

In conclusion, there should be no time limit to file. First, §13.9 has no limit. It excepts policy/procedure grievances from the 15 day rule, and provides no time limit in its place. As an exception to §13.1, §13.9 is removed "absolutely" from §13.1's operation (73 Am. Jur. 2nd (2001), Statutes, §212). Also, §13.9 is plain and unambiguous, and the courts should not change its terms (Wiggins v. Edwards 442 S.E. 2nd 169, 171 (S.C., 1994). Finally, SCDC's own application of §13.9 supports inmates' position. In its step 1 instructions (e.g., R. p. 1297), SCDC directs inmates to :

Submit the completed form to the Institutional Grievance Coordinator within fifteen (15) days of an alleged incident; **policy grievances at any time.**

The ALC states that some inmates filed years after they started work (R. pp. 159-160). Again, Adkins/Wicker are helpful. In Wicker, the courts upheld Wicker's grievance filed on April 19, 2000, over six months after his work (February 18 to October 8, 1999) had ended (Bennie Wicker, #122304 v. SCDC Dock. No. 00-ALJ 04-00781-AP, Aug. 13, 2001, Op. p. 4; Wicker's ALC Brief, filed Nov. 22, 2000, p. 1). In addition, the Adkins Court approved grievances to protest an SCDC wage "policy" of 1999, over five years in the past (602 S.E. 2nd at 53, note 1; 55). Although the timeliness issue was not presented in Adkins/Wicker, these rulings are entirely consistent with the view that grievances concerning policies/procedures have no time limit to file.

The ALC believed §13.1 to be a "statute of creation" (R. pp. 157-158). A statute

of creation creates a **new liability**, and affixes the time within which an action may be commenced (Knight Pub. Co. v U.S.C. 367 S.E. 2d 20, 22 (S.C. 2007); 54 C.J.S. (2010), Limitations, §5).

Inmates contend §13.1 is not a statute of creation. First, §13.1 is not a statute at all, but an SCDC grievance regulation fixing a filing time limit for “incident” grievances (R. p. 687). Second, §13.1 creates no new liability. As the ALC correctly noted in its March 10, 2011 order, inmates’ substantive right to prevailing wages was created in the 1995 statute, §24-3-430 (R. p. 39).

Finally, the ALC held the “alleged incident” in this case was SCDC’s **decision** to pay inmates less than prevailing wages as required by §24-3-430 (D) (R. p. 177). Inmates contend that “decision” was made in its 1998 contract with WTI establishing the pay rate at \$4 per hour (R. p. 725). This wage rate provision is a fundamental guideline by which SCDC manages the work program and thus an essential component of SCDC wage policy. If the “alleged incident” was this decision, or contract provision, which is SCDC policy, it seems to follow that inmates’ grievances protesting the wage rate are “concerning policies/procedures” under §13.9.

Inmates submit that their grievances were “concerning policies/procedures” under §13.9, and there was no time limit to file. This rule applies to all inmate grievances. Inmates contend they had to file only once to cover all work in the past, present and future. This is because grievances concerning policies/procedures can be filed at any time. Also, inmates are prohibited from filing repeated grievances on the same matter or for an issue previously addressed (R. pp. 685, 691). For inmates still working, the back pay period should include the time this case is on appeal until the Court’s order is fully

complied with by SCDC (45 C Am. Jur. 2nd (2002), Job Discrim., §§2596-2597).

3. **There was reasonable cause under §13.9 not to file within the original time frame because inmates had no wage grievance and appeal rights before Adkins/Wicker, and even if inmates had such rights, they were effectively barred from exercising those rights, and there was no time limit to file under §13.9 after Adkins/Wicker.**

The ALC held that this issue was not presented to SCDC for consideration, and thus not preserved for judicial review (R. p. 163). On the merits, the ALC held inmates could have filed grievances and appealed to the ALC, and were not effectively barred from pursuing grievances before Adkins/Wicker (R. p. 164). Inmates contend that these holdings are affected by error of law, and are clearly erroneous in view of the substantial evidence on the whole record.

If the Court believes these were "incident" grievances, inmates contend there was reasonable cause under §13.9 not to file until Adkins/Wicker were decided, and also the 15 day rule in §13.1 did not apply. Section 13.9 (R. p. 689) provides:

Exceptions may also be made for incident grievances..provided that documented reasonable cause can be demonstrated as to why the original time frame was not met..The waiver must be requested by the grievant.

Inmates' first position is they had no wage grievance and appeal rights before Adkins/Wicker. See issue 1, pp. 7-10.

Assuming inmates had grievance and appeal rights before Adkins/Wicker, they contend that SCDC's practice of denying grievability, as in Wicker, and McNeil's limitation of ALC jurisdiction to cases other than prevailing wage disputes, effectively barred them from exercising those rights before Adkins/Wicker. (Yoder v. Nu-Enamel

Corp. 145 F 2nd 420, 427 (CA 8, 1944) (limitations period could not run against a right while court decisions prevented enforcement of right); 51 Am. Jur. 2nd (2000), Limit., §§170, 210 (courts recognize limitations exception for inability to sue or exercise one's remedy).

In Al-Shabazz v. State 527 S.E. 2nd 742, 750 (S.C., 2000), the Court stated that due process "consists of notice, a hearing, and judicial review". For special appeals, the rules require compiling a record, briefing, and a "decision" rendered by the ALC (ALC Rules 58, 60-61, 65). Furthermore, a merits decision seems to be required by statute (S.C. Code §§1-23-600 (E), 1-23-380 (5)). Inmates refer the Court to issue 1, pp. 8-9, discussing the effect of McNeil and ALC Rule 70 F on ALC jurisdiction in prevailing wage appeals before Adkins/Wicker.

In sum, even if grievance and appeal rights pre-dated Adkins/Wicker, inmates contend they could not exercise those rights in any meaningful way or enforce wage claims in court to successful conclusion. For that reason, their claims should be held unaccrued and any limitations period tolled before that time (Bergstrom v. Palmetto Health Alliance 596 S.E. 2nd 42, 46 (S.C., 2004) (cause of action accrues when plaintiff has legal right to sue on it); Wooten v. Standard Life 122 S.E. 2nd 637, 640 (S.C., 1961) (cause of action accrues so as to start limitations period as soon as right to sue arises); King v. James 694 S.E. 2nd 35, 40 (S.C. App., 2010) (In analyzing a limitations defense, the fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it); 51 Am. Jur. 2nd (2011), Limitations, §127 (accrual occurs when claimant first may maintain an action to successful conclusion and is remediable in court).

Inmates contend that their inability to enforce any rights they had or grieve and appeal to successful conclusion before Adkins/Wicker should be considered reasonable cause for delayed filing under §13.9 of SCDC grievance policy.

The ALC held this issue was not preserved for review because inmates failed to raise it with SCDC (R. p. 163). Section 13.9 gives as examples of reasonable cause, hospitalization and court appearances (R. p. 689). Normally, these events will be appropriate for documented excuses and requests for waiver.

Here, inmates contend that their grievances contain adequate notification of reasonable cause. Inmate drafted grievances allege, "(L)awsuit was filed, ordered to file grievance by court Wicker v. SCDC, Adkins v. SCDC" (e.g., R. p. 1296). Grievances drafted by counsel allege Darrell Williams' 2001 grievance and its dismissal for want of jurisdiction; Williams' 2002 filing of a lawsuit for wages; and reference the Adkins and Wicker decisions' holding that §24-3-430 was mandatory and inmates could file grievances for their wages (e.g., R. p. 1388).

From the above, it seems apparent that the reason for filing in September 2004, and not earlier, was Adkins/Wicker's grant of grievance and appeal rights for these cases. Moreover, in contrast to the examples of reasonable cause in §13.9, the reasons here were SCDC's treating grievances as non-grievable and the ALC's lacking merits jurisdiction to review. Inmates contend that these circumstances were not caused by inmates, do not call for waiver request, and none should be required.

The ALC refers to the 2001 ALC decision in Bennie Wicker, #122304 v. SCDC Dock. No. 00-ALJ 04-00781-AP, August 13, 2001, holding these grievances to be grievable (R. p. 164). Inmates contend that the September 5, 2001 McNeil en banc

opinion effectively overruled the Wicker ALC opinion until ALC jurisdiction was expanded to cover these cases in Wicker. Thus, until Wicker these grievances were unenforceable in court and of no practical effect.

In its July 26, 2012 Second Amended Order, the ALC cited Sullivan v. SCDC 355 S.C. 437, 586 S.E. 2d 124 (S.C., 2003) in support of its ruling (R. p. 164). In Sullivan, the inmate sought admission to a sex offender treatment program. After receiving no response, inmate filed a grievance, which SCDC denied, and inmate appealed to the ALC. The ALC found no jurisdiction to decide the matter, citing McNeil.

The Supreme Court held that SCDC's denial of enrollment in the program did not implicate a liberty interest and therefore the ALC had no jurisdiction to review (586 S.E. 2d at 128). In footnote 5, page 128, the Court stated:

The en banc decision of the ALJD in McNeil formed the basis for the ALJD's and the Circuit Court's dismissal of Sullivan's claim. For this reason, and because we know McNeil has been relied upon by the ALJ in other cases to deny jurisdiction, the ALJD and the Circuit Court are instructed to look to this opinion, not McNeil, for guidance in future cases. Although much of McNeil's analysis is accurate, we believe Wolff requires minimal due process when for state created liberty interests, which are not necessarily limited to sentence credit issues and major disciplinary decisions. We recognize that a condition of confinement could implicate a state created liberty interest under Wolff. However, we adhere to Sandin's pronouncement that "these interests will generally be limited to freedom from restraint which ..imposes atypical or significant hardship on the inmate in relation to the ordinary incidents of prison life Sandin at 484, 115 S. Ct. at 2300, 132 L. Ed. at 430.

From the above, it seems clear that courts were directed to look to Sullivan instead of McNeil because a condition of confinement could implicate a liberty interest

other than the two bases for jurisdiction specified in McNeil. However, the fact that Sullivan recognized the possibility of other liberty interests being implicated did not change the then existing absence of ALC jurisdiction over inmates' property interests implicated by prevailing wage claims. Sullivan said nothing about these claims or any kind of property interests. These interests were only recognized, and ALC jurisdiction expanded, in Wicker a year later.

In conclusion, there should also be no time limit to file after Adkins/Wicker. Again, §13.9 has no time limit. As with policy grievances, the reasonable cause provision in §13.9 is an exception to §13.1 and thus "absolutely" removed from §13.1's operation (73 Am. Jur. 2nd (2001), Statutes, §212). Section 13.9 is also plain and unambiguous, and the courts should not change its terms (Wiggins v. Edwards 442 S.E. 2d 169, 171 (S.C., 1994)). In addition, a time limit is contrary to SCDC's own application of §13.9, at least for policy grievances. Finally, as a limitations period §13.1 should be strictly limited in application to its express terms (S.C. Juris., vol. 26, Limit., §9). Reasonable cause is not a term in §13.1, so the 15 day rule should be limited to incident grievances without reasonable cause.

Inmates submit that their grievances were timely as there was reasonable cause under §13.9 and no time limit to file. This rule applies to all inmates' grievances. Inmates contend they had to file only once to cover all work in the past, present and future, as non-accrual of their claim excused pre-Adkins/Wicker compliance with §13.1 and there was no time limit to file after. Also, repeated grievances are prohibited, and back pay periods extend to the date of SCDC's compliance, for the reasons stated in issue 2, last paragraph.

4. SCDC's application of §13.1 violated due process because it cut off inmates' claims before they accrued and denied inmates a meaningful opportunity to file grievances and obtain judicial review before the bar took effect.

The ALC held that SCDC did not violate due process (R. p. 166). Inmates contend that this holding was affected by error of law and was clearly erroneous in view of the substantial evidence on the whole record.

If the Court believes these were "incident" grievances and §13.1 applied, inmates contend it violated due process. Due process requires that a limitations period afford a party reasonable time to file suit considering the situation at hand. A limitation is not reasonable which does not afford full opportunity to sue before the bar takes effect (Hite v. West Columbia 66 S.E. 2nd 427, 429 (S.C., 1951); S.C. Juris., vol. 26, Limitations, §7; 51 Am. Jur. 2nd (2000), Limitations, §40). Due process requires an opportunity granted at a meaningful time and in a meaningful manner for an appropriate hearing (Logan v. Zimmerman Brush Co. 102 S. Ct. 1148, 1159 (1982).

Inmates contend their claims did not accrue until Adkins/Wicker and could not have been enforced or filed successfully at an earlier time. See issue 3. However, SCDC applied §13.1 to pre-Adkins/Wicker claims. These applications denied inmates a meaningful opportunity to file and obtain judicial review before the bar took effect. It cannot be said that reasonable and meaningful opportunity to file and appeal is granted where claims, such as these, are cut off before they ever accrue.

The ALC held that its March 10, 2011 order has disposed of inmates' contention by finding inmates did have grievance and appeal rights prior to Adkins/Wicker (R. p. 165). Inmates refer the Court to their discussion in issue 1, pp. 7-10.

The ALC also noted that Al Shabazz v. State 338 S.C. at 374-375, 527 S.E. 2d at 753, held that SCDC disciplinary and grievance procedures comply with minimal due process "in such proceedings" (R. p. 165). The proceedings in Al Shabazz were disciplinary proceedings which inmates could appeal by initiating a grievance (527 S.E. 2d at 752). The Supreme Court was making an observation about SCDC grievance procedures in general. It was not addressing the due process issue presented in this case.

Inmates submit that application of §13.1 denied them due process. This rule applies to all inmates who worked on or before September 9, 2004, the Adkins/Wicker remittitur date (R. pp. 190, 199). Inmates contend they had to file only once to cover all work in the past, present and future. This is because application of §13.1 to pre-Adkins/Wicker work violated due process and was thus ineffective. Also, repeated grievances are prohibited, and back pay periods extend to date of SCDC's compliance, for the reasons stated in issue 2, last paragraph.

5. **SCDC waived §13.1 because §13.9 and step 1 instructions were inconsistent with an intention to rely on §13.1, SCDC did not raise §13.1 until step 2 appeals, and SCDC considered these grievances on the merits before invoking §13.1.**

The ALC held SCDC did not waive §13.1 (R. pp. 167, 169-170). Inmates contend the court's ruling was affected by error of law, was clearly erroneous in view of the substantial evidence on the whole record, and was arbitrary and characterized by abuse of discretion.

If the Court believes these were "incident" grievances and §13.1 applied, inmates

contend SCDC waived the right to raise it. In Anonymous Taxpayer v. Dept. of Revenue 377 S.C. 425, 661 S.E. 2nd 73, 80 (S.C., 2008), the Supreme Court stated how a party can waive the statute of limitations:

A party can waive a statute of limitations defense, but the waiver must be shown by words or conduct, including an express agreement, failure to claim the defense, or any action or inaction inconsistent with an intention to use the statute of limitations defense.

First, inmates contend that §13.9 and step 1 instructions were words and actions which were inconsistent with an intent to raise §13.1. At least 92 step 1's filed in September 2004, plus all 188 amendments to grievances, expressly protested SCDC "policy" of paying below prevailing wages (e.g., R. pp. 1300, 1388). In addition, all inmates' grievances "concern" policy in substance, as discussed in issue 2.

When these grievances were filed, §13.9 provided that "(E)xceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures" (R. p. 689). And, §13.9 provided no alternative time limit for such grievances. Moreover, SCDC step 1 instructions directed inmates to file "policy grievances at any time" (e.g., R. p. 1297). As of 2004, this step 1 form had been in use and was last revised in November 1997 (R. p. 1343). Thus, the form was in effect the entire time the work program existed until grievances were filed.

The ALC states that nothing in SCDC's grievance policy or the step 1 instructions suggested that prevailing wage claims "constituted" policies/procedures grievances under §13.9 (R. p. 167). However, the issue is whether §13.9 and step 1 instructions were inconsistent with an intent to raise §13.1 for grievances which were in form and

substance “concerning policies/procedures”.

Inmates contend §13.9 and the step 1 instructions were words, conduct and actions which were inconsistent with an intent to raise §13.1 for grievances such as these and waiver should apply.

Second, for some 153 inmates SCDC failed to plead §13.1 in step 1 responses, and did so only on appeal in step 2 decisions (e.g., R. pp. 1298, 1311). A statute of limitations must be pleaded as an affirmative defense or it is waived (Glen v. School District 366 S.E. 2d 47, 49 (S.C. App. 1988)). Generally, the statute cannot be raised for the first time on appeal (Verizon Maryland, Inc. v. Global Naps, Inc. 377 F 3rd 355, 369 (CA 4, 2004)).

Here, SCDC’s step 1, 2, and responses all refer to step 2 as an “appeal” (e.g., R. pp. 1297, 1299, 1309, 1311). Moreover, step 2 instructions prohibited inmates from raising new issues on appeal (e.g., R. p. 1310), as SCDC did by invoking §13.1. Inmates contend the same rule should apply to both parties. Otherwise, SCDC gets to raise new issues without giving inmates a chance to respond.

The ALC held that waiver did not apply because step 1 responses which failed to raise §13.1 were not final decisions, citing Friends of Potter Marsh v. Peters 371 F. Supp. 2d 1115 (D. Alaska, 2005) (R. pp. 167-168). That case is distinguishable in that the Secretary apparently took affirmative action at the first level by waiving a statutory requirement that projects not be located on local roads. Here, SCDC did nothing concerning §13.1 in the 153 step 1 responses in question, but invoked §13.1 only on appeal in step 2.

The ALC states inmates' reliance on Ross v. County of Bernalillo 365 F 3d 1181, 1186 (CA 10, 2004) is misplaced because Ross stated that nothing in the record suggested the prison treated Ross' complaint as untimely (R. p. 169). However, inmates cited Ross, not on this issue, but on the third basis of SCDC merits consideration of grievances. See below, page 30. Also, the 153 step 1's at issue did not raise §13.1 or timeliness, and like Ross, did not suggest that timeliness was a problem.

Inmates contend that SCDC failed to plead §13.1 in the 153 step 1 responses, and should be held to have waived it on appeal (Glen; Verizon Maryland, Inc.).

Third, SCDC considered grievances on the merits before invoking §13.1. If a prison accepts and considers on the merits a late filing, it is considered timely (Ross v. County of Bernalillo 365 F 3d 1181, 1186 (CA 10, 2004). Initially, the 153 step 1 responses which failed to plead §13.1 were merits decisions because they disputed inmates' claims for "employee" status, class grievance recognition, prevailing wage rates, overtime pay, interest, costs and attorney fees (e.g., R. pp. 1298-1299). Thus, having accepted and considered on the merits these step 1's, SCDC should be held to have waived §13.1 even if they were filed late (Ross).

In addition, SCDC considered inmates' Amendments/Exhibits to grievances on the merits before invoking §13.1. The Amendments allege each inmate's work hours, but otherwise paraphrase much of the language in the 92 step 1's filed in September 2004 which protested SCDC "policy" (e.g., R. pp. 1300, 1388).

At an April 19, 2007 Circuit Court hearing on inmate's motion to allow filing of Amendments, SCDC agreed to file all Amendment/Exhibits and consider them on the

merits (R. p. 247). This became an order of the Circuit Court (R. p. 189). The in court agreement is summarized in the following colloquy between Judge Williams and counsel at pages 20, 22 of the April 19, 2007 transcript:

The Court: He's telling me now that he will physically accept whatever it is that you want to submit, and he's telling me now that they will consider whatever you submit **on the merits** but they will not go back and change any deadlines. And I don't —

The Court: Will you accept service of filings on behalf of Department of Corrections?

Mr. Summers: Yes, sir, I will.

After the hearing, undersigned counsel tendered to SCDC's counsel the original Amendments with Exhibits for Lieber inmate-clients, and copies of Amendments without Exhibits for non-Lieber inmate-clients. On April 25, 2007, undersigned mailed to SCDC's counsel the Exhibits for non-Lieber inmate clients to pair up with Amendment copies hand-delivered on April 19. The Amendments/Exhibits tendered to SCDC April 19 and 25 pertained to 188 inmates now on appeal. Confirming letters were sent on April 25, 2007 to SCDC's counsel, and on June 4, 2007 to counsel with a copy to Judge Williams (R. pp. 295, 299). Inmates request that the Amendments and Exhibits be deemed filed on April 19, 2007 and considered on the merits by SCDC pursuant to the Circuit Court order of April 20, 2007.

Finally, there are some 32 step 1 responses, and 136 step 2 final decisions, which raised §13.1 and considered the merits by disputing the same claims discussed on page 30 above (32 step 1's: e.g., R. pp. 1805-1809; 136 step 2's: e.g., R. pp. 1358-1364). Some 30 step 2 final decisions do not expressly dispute claims, but they "completely adopt and endorse" step 1 responses which do (e.g., R. pp. 1444-1448 & 1457).

In analogous circumstances, cases apparently go both ways on the issue of whether a document that is rejected as both late and unmeritorious counts as properly filed (Pozo v. McCaughtry 286 F 3rd 1022, 1025 (CA 7, 2002)). Inmates urge the Court to conclude that it does count as properly filed because SCDC's merits consideration of their grievances should trump its simultaneous assertion of §13.1.

The ALC briefly discussed inmates' third basis for merits consideration waiver (R. p. 170), but did not address the two primary bases discussed at pp. 30-31 above.

Inmates contend that SCDC's merits consideration of their grievances in the above ways was inconsistent with an intent to rely on §13.1, and waiver should apply.

Inmates submit that SCDC waived §13.1 for all of the reasons stated herein. This rule should apply to all grievances because §13.9 and step 1 instructions were not consistent with an intent to rely on §13.1 for grievances such as these. Waiver should also apply to all step 1 responses where SCDC failed to plead §13.1. Finally, waiver should apply to all grievances considered on the merits by SCDC in the above ways.

Inmates contend that they had to file only once to cover all work in the past, present and future. This is because SCDC's waiver excuses compliance with §13.1 for pre-waiver work. For post-waiver work, repeated grievances are prohibited, and back pay periods extend to date of SCDC's compliance, for the reasons stated in issue 2, last paragraph.

6. **SCDC was estopped from raising §13.1 by equitable estoppel.**

The ALC held that SCDC was not equitably estopped from raising §13.1 (R. p. 172). Inmates contend this ruling was affected by error of law and was clearly erroneous in view of the substantial evidence on the whole record.

If the Court believes these were “incident” grievances and §13.1 applied, inmates contend SCDC was equitably estopped from raising it. In RWE Nukem Corp. v. ENSR Corp. 373 S.C. 190, 644 S.E. 2nd 730, 734 (S.C., 2007), the Supreme Court stated how a defendant can be estopped from raising the statute of limitations:

A defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant’s conduct (cite.).

Earlier, the Court in Kleckley v. Northwestern Nat. Cas. Co. 338 S.C. 131, 526 S.E. 2nd 218, 220 (S.C., 2000) described the conduct which can create an estoppel:

The defendant’s conduct may also involve inducing the plaintiff either to believe that an amicable adjustment of the claim will be made without suit or to **forbear exercising the right to sue.**

An intentional misrepresentation is not required. It is sufficient if claimant reasonably relied on defendant’s words or conduct in allowing the limitations period to expire (Hedgepath v. A.T.T. 348 S.C. 340, 559 S.E. 2nd 327, 338 (S.C. App., 2001)).

Here, inmates and counsel reasonably believed these were grievances “concerning policies/procedures” under §13.9 and/or step 1 instructions, and could be filed “at any time”. Inmate-drafted grievances allege that SCDC paid them only \$.35 per hour instead of prevailing wages under §24-3-430 (e.g., R. p. 1296). Counsel-drafted grievances expressly state §24-3-430’s requirement of prevailing wages, and “WTI/Lieber’s policy”

of paying usually under \$1 per hour (e.g., R. p. 1388). Thus, all grievances, including Amendments to grievances, invoke SCDC wage policy and the public policy in the statute as a basis for their claims (e.g., R. p. 1300). It follows that inmates and counsel reasonably believed these were grievances concerning policies/procedures.

As to such a grievance being exempt from deadlines, step 1 instructions allowing filing of "policy grievances at any time" do suggest that pay claims concerning policy would be exempt from the deadline (e.g., R. p. 1296).

In Dillon County School v. Lewis Metal Works, 332 S.E. 2nd 555, 561-562 (S.C. App., 1985), a school had sued to recover for the defective design and construction of a roof. Defendant raised the statute of limitations. School contended defendant's investigation of the roof, meetings, repair attempts and correspondence had lulled the school into a false sense of security and induced it to delay filing suit before the statute ran. The Court held a jury question existed as to whether defendant invited the very delay defendant now asserted as a defense.

In much the same way, inmates contend that §13.9 and/or step 1 instructions lulled them into a false sense of security that no limitations period applied to grievances such as these, and they could be filed "at any time".

The ALC relied on the test from Strickland v. Strickland 375 S.C. 76, 84, 650 S.E. 2d 465, 470 (2007) for the elements of equitable estoppel (R. p. 171). However, it appears the Supreme Court uses the test from RWE Nukern Corp. and Kleckley for estoppel to plead the statute of limitations.

The ALC states there is no evidence that SCDC induced inmates to believe their

grievances "constituted" policies/procedures grievances or that filing a grievance was unnecessary (R. p. 172). Inmates contend that because their grievances expressly and substantively "concerned" SCDC wage policy and the public policy in §24-3-430, a reasonable person reading §13.9 and step 1 instructions would conclude that these grievances concerned policies and procedures and could be filed at any time.

Inmates submit that SCDC should be estopped from raising §13.1 in these cases. This rule applies to all grievances. Inmates contend they had to file only once to cover all work in the past, present and future. This is because SCDC's estoppel excuses compliance with §13.1 for pre-filing work. Post-filing work should also be covered because repeated grievances are prohibited, and back pay periods extend to date of SCDC's compliance, for the reasons stated in issue 2, last paragraph.

7. **Inmates complied with §13.1 because it was tolled by their class action and they filed grievances no later than 15 days after the class action remittitur filing date or within 45 days of notice posting under the 2005 order.**

The ALC held inmates' class action did not toll the filing deadline in §13.1 (R. p. 176). Inmates contend that the Court's ruling is affected by error of law and is clearly erroneous in view of the substantial evidence on the whole record.

If the Court believes these were "incident" grievances and §13.1 applied, inmates contend it was tolled by their class action. In Crown, Cork & Seal Co. v. Parker 103 S. Ct. 2392, 2397-8 (1983), the Supreme Court held the filing of a class action tolls the statute of limitations as to all class members who timely file **individual actions** after class certification is denied. Since the plaintiff in that case did not receive a right to sue

letter until after the class action was filed, he had the full 90 days to sue after class certification was denied (affirming, Parker v. Crown, Cork & Seal Co. 677 F 2nd 391, 394 (CA 4, 1982). See, also Hunter v. American Gen. Life & Acc. Ins. Co. 384 F. Supp. 2nd 888 (D.S.C., 2005) (doctrine recognized).

Here, inmates' class action was filed on July 1, 2002, which itself was an amended complaint relating back to the original complaint of January 29, 2002 (R. pp. 212, 220). See SCRCF 15. Thus, under the above cases if §13.1 applied, it should be considered tolled on January 29, 2002.

In August 2004, Adkins/Wicker first recognized inmates' right to grieve and appeal wage disputes, thus removing the bar to exercise of any rights inmates had. In April 2005, the Circuit Court decertified the class and gave inmates who had not filed a grievance 45 days after notice posting to do so (R. pp. 19, 24). Inmates appealed this order, and SCDC invoked the automatic stay rule in SCACR 225 (R. pp. 293, 5139, 5141). This stayed all matters decided and relief ordered, including decertification and the right to file grievances, for the "duration of the appeal" (SCACR 225). In February 2007, the Supreme Court affirmed the order, and the remittitur was filed on March 22, 2007 (R. p. 205). From October 20 to December 6, 2008, SCDC posted the notice required by the order (R. p. 301).

Most grievances were filed in 2004 when the limitations period was tolled and before the class action order in 2005. A few were filed during the class action appeal and a few after. Inmates contend that since the bar to exercise of any rights they had was not removed until after the class action was filed, they had until 15 days after the remittitur filing date of March 22, 2007, or until April 6, 2007, to file grievances (Crown, Cork &

Seal Co. v. Parker). See issue 9. For inmates not filed by April 6, 2007, the Circuit Court's order gave them until 45 days after notice posting, or until December 4, 2008 to file.

The ALC held that Crown, Cork & Seal Co. is distinguishable because, unlike that case, inmates' class action did not fail because certification was denied, but because Adkins held that inmates had no private cause of action (R. pp. 175-176). Inmates contend the more important point is that both class actions resulted in decertification, and tolling should apply in both to promote the Rule 23 goal of economy of litigation (American Pipe & Construction Co. v. Utah 94 S. Ct. 756, 766 (1974)).

The ALC also stated that Crown, Cork & Seal Co. was based largely on FRCP 23 and there is no rule similar to FRCP 23 that allows inmates to file grievances as a class (R. p. 176). Inmates' class action was filed under SCRCF 23, a rule very similar to FRCP 23 (R. p. 238). Inmates contend that their grievances need not be "class" grievances to come within the Crown, Cork & Seal Co. tolling rule. While grievances are technically not "lawsuits" in the traditional sense, they are the sole remedy provided to inmates in Adkins/Wicker. The grievances should be considered "individual actions" under the Crown, Cork & Seal Co. tolling rule. Inmates contend the purposes of Rule 23 are equally served by suspending §13.1 during pendency of their class action and 15 days thereafter for grievances, or "individual actions", to be filed.

Finally, the ALC stated there is a significant number of inmates who began work long before 2002 when their class action was filed, and thus even if the class action suspended §13.1, these inmates' grievances were still untimely since they were required

to be filed within 15 days of beginning work (R. p. 176). Inmates respectfully disagree that grievances had to be filed as the ALC ruled. Even if the ALC was correct, there are some 80 inmates* who started work within 15 days of January 29, 2002 (or after), the effective date of their class action. These grievances would all be timely under this rule.

Inmates submit they timely filed under these rules since all step 1's were filed before December 4, 2008. For those who filed by April 6, 2007, work should be covered if performed within 15 days of filing date (not counting the period tolled from January 29, 2002 through March 22, 2007) and any term of employment existing during that period, or occurring thereafter, the latter since policy prohibits repeated grievances for the same matter (Calvin Byrd, #257319 v. SCDC Dock. No. 07-ALJ-04-00410-AP, Oct. 10, 2007, Op. 2; Griev. Pol., 4,10). For example, if an inmate filed on March 23, 2007, all work from January 15, 2002 to March 23, 2007, and any term of employment existing during that period, or occurring thereafter, should be covered.

For those who filed on or after April 7, 2007, work should be covered if performed within 15 days of filing date and any term of employment existing during that

*T. Aiken, 244428, F. Anderson, S. Austin, Q. Baker, Beach, Beasley, Benninger, Bogan, Brewer, F. Brown, K. Brown, E. Bryant, Buchanon, Burke, Bush, Busques, T. Carter, Cassady, Cobbs, Corley, Denney, P. Durham, Eigner, Elder, Feggins, Flores, Garrett, Garriett, Gatewood, Gilbert, C. Graham, G. Grant, Grooms, J. Hayes, Hood, Inman, Jordan, Knight, Libby, Linen, Lyles, L. Mack, Martino, McAteer, McClam, H. McFadden, J. McFadden, McFarland, Mills, Morris, A. Murphy, A. Murray, Patterson, Pitts, Poston, Pringle, Richards, Rivera, Rivers, Rochester, V. Sanders, Sattler, R. Scott, Shine, K. Simmons, Samuel Simmons, Stephon Simmons, V. Simpson, Sims, Singleton, T. Smith, Spears, Tevis, Thomas, Tino, Trumper, Wheeling, B. Williams, J. Williams, Youmous.

period or occurring thereafter. If the Court believes inmates were required to file within 15 days of their first pay date, the 80 inmates in the footnote on page 38 who started work within 15 days of January 29, 2002 or after should be considered to have timely filed under class action tolling. Finally, back pay periods extend to date of SCDC's compliance for the reasons stated in issue 2, last paragraph.

8. **Section 13.1 did not require filing within 15 days after inmates' initial pay date, and they complied with §13.1 by filing during a term of employment or for the previous 15 days work.**

The ALC held that inmates had to file grievances within 15 days after their initial pay date (R. pp. 177-179). Inmates contend the court's ruling was affected by error of law and was clearly erroneous in view of the substantial evidence on the whole record.

If this Court believes these were "incident" grievances and §13.1 applied, inmates contend they complied by filing during or within 15 days of a term of employment, or alternatively, by filing for the previous 15 days work. The ALC has previously stated in a prevailing wage grievance appeal (Calvin Byrd, #257319 v. SCDC Dock. No. 07-ALJ-04-00410-AP, Oct. 10, 2007, Op. 2) involving §13.1:

Applying this policy provision to the instant matter would lead to an absurd result for this tribunal to find that an inmate must file a separate grievance for each day of work performed or for each pay period. A more logical result would be to interpret the policy so as to find that an inmate has timely filed a prevailing wage grievance if he filed during the course or term of employment, regardless of when he initially began employment with the prison industries program.

Here, some inmates clearly worked one continuous term of employment, and the records so reflect (e.g., Ackerman, R. p. 252). But for many, it is hard to determine if

multiple terms were worked or when one term stops and the next begins. Often there is ambiguity or inconsistency on these issues. For example, some final decisions state "work assignments" in separate periods or with unexplained "interruptions" (e.g., K. Carter, R. p. 257). Obviously, any number of issues can cause a disruption of work, e.g., illness, without terminating employment.

In addition, Exhibit F records may have occasional gaps, or apparent time lapses, between certain pay periods. These gaps appear to indicate separate periods of work in some cases. Obviously, this would not be true if the gaps were caused by computer error or some other reason. A comparison of Exhibit F with other SCDC records illustrates the discrepancy between them. As shown on Appendix 1, many inmates have multiple work periods for Exhibit F, while other SCDC document sources show single or fewer work periods for the same work (e.g., Bogan, R. p. 254). Moreover, for many inmates Exhibit F last pay dates are also disputed by other SCDC records (e.g., Baylor, R. p. 253).

In sum, Appendix 1 shows some 24 instances where other SCDC records state fewer work periods than Exhibit F (e.g., Bogan, Burke, Choice, Linen, Pringle; R. pp. 254, 256, 258, 270, 275). There are also about 26 inmates whose other records state more recent "last pay dates" than Exhibit F (e.g., Benninger, Deveaux, A. Scott, R. Scott, Sellers; R. pp. 254, 260, 278).

For these reasons, inmates contend the record does not show multiple terms of work, or at best the evidence is ambiguous. "Ambiguity" is uncertainty of meaning (Black's Law Dictionary, 8th ed., p. 88). Ambiguity should be resolved against a discriminating employer, and when it is impossible to reconstruct a claimant's work, back pay equal to the maximum amount which could have been earned but for the employer's

discrimination is proper (45C Am. Jur. 2nd (2002), Job Discrim.; §2607).

On this record, inmates request the Court to construe alleged multiple work periods as one term of employment for filing timeliness purposes. So construed, an inmates' work should be considered continuous from his first work day to the last regardless of alleged gaps or work periods.

As reflected on Appendix 1, some 94 inmates filed step 1's **while working**.^{*} Of these 94, 89 filed on September 22 or 30, 2004 as documented in Certificates of Service (R. pp. 1238-1241, 4632). Inmates contend these 94 inmates should be entitled to back pay for the entire term of employment in which (or within 15 days of which) they filed (Calvin Byrd, #257319 v. SCDC).

The ALC held that the "incident" was not the inmate's term of employment, but SCD's decision to pay inmates less than the prevailing wage (R. p. 177). The Court stated inmates had to file grievances within 15 days of their initial pay date (R. pp. 177-179) citing Wallace v. Burbury 305 F. Supp. 2d 801, 806 ((N. D. Ohio, 2003). In Wallace, the "incident" was when the inmate learned the prison would not honor his request to observe Passover (R. p. 177).

^{*} Aljalil, Q. Baker, Beach, Beaseley, Bogan, F. Brown, K. Brown, T. Brown, E. Bryant, P. Bryant, Bude, Burke, Bush, Busques, T. Butler, D. Carter, Cassady, Choice, Cobbs, Cooper, Corley, Daniels, Denney, Dewey, P. Durham, Edger, Elder, Feggins, Flores, Gamble, Garrett, Garriett, Gatewood, Goff, C. Graham, H. Grant, Greene, Grooms, Harrell, Hartman, Hickenbottom, Holden, Hood, House, Inman, J. Jackson, Jordan, Kelly, Kelsey, Key, Law, Lease, Leonard, Linen, Livingston, Lyles, L. Mack, Martin, McAteer, H. McFadden, J. McFadden, McFarland, D. Miller, Moultrie, Murphy, A. Murray, Orr, Pitts, Poston, Pringle, Prioleau, G. Richardson, I. Richardson, Rivera, Robinson, Rochester, V. Sanders, R. Scott, Shine, K. Simmons, Samuel Simmons, Stephon Simmons, V. Simpson, Sims, T. Smith, Spears, Stewart, Stinson, Tevis, Thompson, Wheeling, B. Williams, J. Williams, L. Wilson. Selections are based on Appendix 1, column 9 dates. See Appendix 1, note 9, (R. p. 286).

.....

If this Court does not adopt the “term of employment” rule in Calvin Byrd, inmates contend the “incident” here was each paycheck wrongfully paid below prevailing wages. For limitations purposes, a suit for employment compensation due and periodically payable is a continuing claim involving multiple causes of action, each arising when the employer fails to make the payment due. A claim based on a single distinct event, with continued ill effects later on, is not a continuous claim (51 Am. Jur 2d (2011), Limitations, §145).

Inmates contend that Wallace involved a claim based on a single distinct event with continued ill effects, whereas inmates’ is a continuing claim involving multiple causes of action arising with each pay check. For example, the Supreme Court has held that an employer violates Title 7 and triggers a new EEOC charging period whenever the employer issues pay checks using a discriminatory pay structure. A new violation does not occur when an employer issues pay checks pursuant to a system that is facially nondiscriminatory or there is no evidence that the employer initially adopted its pay system with a purpose to discriminate or the employer later applied this system within the limitations period with discriminatory animus (Ledbetter v. Goodyear Tire & Rubber Co. 127 S. Ct. 2162, 2174 (2007) & Bazemore v. Friday 106 S. Ct. 3000 (1986).

After Ledbetter, Congress passed the Ledbetter Fair Pay Act, Pub. Law No. 111-2, 123 Stat. 5 (2009), stating the statute of limitations on a pay discrimination charge begins anew each time claimant receives pay that is reduced by a discriminatory pay decision or practice.

Here, §24-3-430 was enacted in 1995 (R. p. 39). Thus, SCDC would have known of this law in 1998 when it contracted with WTI to receive only \$4 per hour for inmate

labor. At the time, the federal minimum wage was \$5.15 per hour (29 U.S.C. §206). Inmates contend that a wage of \$4 per hour was facially illegal and agreed to with knowledge and intent to violate §24-3-430's requirement to pay "prevailing wages".

In Mahe v. Tietex Corp., 500 S.E. 2d 204, 210 (S.C. App., 1998), the Court held, where an employer wrongfully canceled an employee's bonus, the "wrong" was the employee's discovery of the initial cancellation, which had continuing effects on subsequent pay. The Court stated the discovery rule was sufficient to allow plaintiff the opportunity to discover and act upon the original breach without need for the "continuing wrong" doctrine.

Here, inmates contend there is a need for the continuing wrong rule because they could not have "acted" due to their grievances being treated as non-grievable by SCDC and non-appealable by the ALC. At a minimum, inmates contend they should receive back pay for the 15 days preceding their step 1 file date.

Finally, the ALC held that as long as an inmate timely files a grievance within 15 days of learning of SCDC's decision to pay him less than prevailing wages, he will not need to file additional grievances during the period of his employment affected by the decision (R. p. 178). Inmates note that there is no apparent connection between the legal basis for a timely filing and the necessity for additional filings thereafter. If correct, the ALC's ruling on this point seems to mean that, once a grievance is timely filed, for whatever reason, all subsequent work during the period of employment affected by the decision, is covered.

Inmates submit they did not have to file within 15 days of initial pay date, but only during or within 15 days of a term of employment. Alternatively, they contend they

timely filed for the previous 15 days' work. Inmates further contend that all work is covered from their first to last work day regardless of time gaps. Alternatively, all work should be covered for the term of employment during which or within 15 days of which they filed; or for the 15 days preceding the file date. Back pay periods extend to date of SCDC's compliance for the reasons stated in issue 2, last paragraph.

9. If §13.1 required filing within 15 days after initial pay date, inmates complied with §13.1 because it was tolled while inmates were barred, or effectively barred, from grieving and appealing prevailing wage claims before Adkins/Wicker, and after those decisions recognized such rights, inmates filed grievances within 15 days after the Adkins/Wicker remittitur filing date.

The ALC held that §13.1 was not equitably tolled (R. p. 174). Inmates contend that the Court's ruling was affected by error of law and was clearly erroneous in view of the substantial evidence on the whole record.

If the Court believes these were "incident" grievances and §13.1 required filing within 15 days after initial pay date, inmates contend that they complied with §13.1 because it was tolled while inmates were barred, or effectively barred, from grieving and appealing prevailing wage claims before Adkins/Wicker, and inmates filed grievances within 15 days after the Adkins/Wicker remittitur filing date.

The legal obstacles to exercising any grievance and appeal remedies inmates may have had (See issue 3) ended upon final disposition of Adkins/Wicker. Inmates contend that occurred when the remittitur in those cases was filed in Circuit Court on September 9, 2004 (R. pp. 190, 199). Until then, these cases were still "pending" on appeal (J. Toal, Appellate Practice of South Carolina, p. 294, citing Christy v. Christy 452 S.E. 2nd 1, 4 (S.C. App., 1994); McDowell v. DSS 386 S.E. 2nd 280, 281 (S.C. App., 1989) (issue of

timeliness of attorney fee petition within thirty days of case final disposition, held, final disposition occurred when remittitur was filed in Circuit Court, not on date of Court of Appeals' opinion); Brackenbrook v. County of Charleston 623 S.E. 2nd 91, 93 (S.C., 2005). SCDC acknowledged observing the remittitur rule in its final decisions (e.g., R. pp. 1311, 1315).

Inmates contend that all grievances filed within 15 days of the remittitur, or by September 24, 2004, were timely. At worst, under SCACR 221 the remittitur could not have been sent earlier than 15 days after the Adkins/Wicker opinion date (August 23, 2004), or September 7, 2004. Allowing a day for mailing and filing on September 8 would make all grievances filed within 15 days, or by September 23, 2004, timely.

In denying equitable tolling, the ALC cited 54 C.J.S., Limitations of Actions §133 (2011) for the rule that the statute of limitations generally will not be tolled when plaintiff has slept on his rights, but only when he has been prevented from asserting them (R. pp. 173). Here, inmates' effective class action file date was January 29, 2002, less than three years after most of the first workers started work (R. p. 212). Inmates contend this demonstrates they did not sleep on their rights.

Inmates contend also that they were prevented from asserting their rights by SCDC's treating prevailing wage grievances as non-grievable, and the ALC summarily dismissing wage appeals as outside its jurisdiction.

The ALC believed §13.1 is a "statute of creation" and not subject to being tolled (R. pp. 173-174). Inmates respectfully disagree, and refer to their discussion at pp. 19-20 above.

The ALC states McNeil was not binding precedent; inmates could have filed

grievances and appealed to the ALC and Court of Appeals, which had authority to reverse McNeil; pertinent portions of McNeil were superseded in Sullivan; and while McNeil "may have discouraged" inmates from filing grievances, it did not bar them from doing so (R. p. 174).

However, McNeil, as an en banc opinion, was binding on administrative law judges unless a majority determined otherwise (ALC Rule 70 F). Moreover, the Court in Sullivan recognized the ALC had relied on McNeil to deny jurisdiction in other cases (586 S.E. 2d 124, 128, n. 5). See, for example, Willie Ingram #83404 v. SCDC, discussed at pp. 8-9 herein.

While inmates could have filed a wage grievance, it would probably have been dismissed as non-grievable (R. p. 40), or for want of jurisdiction. For example, the step 1 grievance of Darrell Williams states his 2001 wage grievance had been "dismissed for want of jurisdiction" (R. p. 4115).

In addition, an appeal to the Court of Appeals would have probably resulted in dismissal. While Al Shabazz had stated that procedural due process was guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment (527 S.E. 2d at 750), inmates' right to prevailing wages under §24-3-430 was not held to be a property interest protected by the Fourteenth Amendment until Wicker in 2004 (602 S.E. 2d at 58).

As to McNeil being superseded by Sullivan, inmates agree that is true with respect to liberty interests, but not property interests implicated by inmates' right to prevailing wages under §24-3-430. See discussion pp. 24-25.

Inmates contend that McNeil not only discouraged but prevented ALC appellate

jurisdiction in prevailing wage cases. Sullivan did nothing to change that, and ALC jurisdiction continued to exclude these cases until it was expanded to cover them in Wicker.

The ALC notes that if equitable tolling is applied, SCDC would be forced to defend actions it took many years ago and evidence and witnesses may be lost (R. p. 174). However, the ALC record contains some 3911 pages of inmates' grievances and related documents, and SCDC has never claimed that loss of evidence would hamper its ability to defend, or it has been prejudiced in any way.

The ALC states the prevailing wage statute was enacted to prevent unfair competition and any unfair competition arising from SCDC's failure to pay prevailing wages will not be rectified now because the "damage has already been done", and harmed competitors will not receive any benefits from inmates' case (R. pp. 174-175). However, if SCDC is ordered to pay inmates lawful wages due, SCDC could seek contribution from WTI (now Caterpillar) under their mutual hold harmless provision in the 1998 contract for ". . .any liability or claim for damage . . . arising out of the performance of this Agreement" (R. p. 727). Such contribution would require WTI to pay its share of lawful wages it should have paid in the first place. In so doing, the unfair competition WTI enjoyed would be prevented and the prevailing wage statute's purpose fulfilled. The statute was enacted to prevent unfair competition, not pay those harmed by its violation.

In conclusion, inmates contend that if grievances had to be filed within 15 days of their pay date, they still timely filed for the reasons stated herein. These grievances should cover work performed within 15 days of the filing. They should also cover pre-

remitter work because §13.1 should not run against inmates' right to prevailing wages while legal obstacles barred the free exercise of any rights inmates had. See authorities discussed in issue 3. Post-filing work should also be covered since repeated grievances are prohibited, and back pay periods extend to the date of SCDC's compliance, for the reasons stated in issue 2, last paragraph.

CONCLUSION

In conclusion, inmates respectfully request this Court to reverse the ALC order, and hold as follows:

1. Adkins/Wicker created new grievance and appeal remedies to enforce inmates' right to prevailing wages.
2. All grievances concern policies/procedures under §13.9; there was no time limit to file; and all work before and after grievances is covered.
3. All inmates had reasonable cause under §13.9 for not filing within the original time frame; there was no time limit to file; and all work before and after grievances is covered.
4. SCDC's application of §13.1 violated due process for all inmates who worked on or before September 9, 2004; grievances were timely if filed by September 24, 2004; and all work before and after grievances is covered.
5. SCDC waived §13.1 as to all grievances because §13.9 and step 1 instructions were inconsistent with intent to rely on §13.1, as to the 153 step1 responses where SCDC failed to raise §13.1, and as to all grievances considered on the merits by SCDC; there was no time limit to file; and all work before and after grievances is covered.
6. SCDC was estopped from raising §13.1; there was no time limit to file; and all

work before and after grievances is covered.

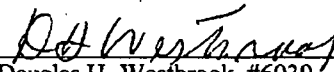
7. Section 13.1 was tolled by inmates' class action; grievances were timely if filed by April 6, 2007 or December 4, 2008; for filings by April 6 2007, all work from January 29, 2002 through March 22, 2007, and any term of employment existing during that period or occurring thereafter, is covered; for filings between April 7, 2007 and December 4, 2008, all work within 15 days of file date, and any term of employment existing during that period or occurring thereafter, is covered.

8. Section 13.1 did not require filing within 15 days of inmates' initial pay date; grievances were timely if filed during or within 15 days of a term of employment (alternatively, by filing for the previous 15 days work); and all work from inmates' first work day to the last is covered regardless of time gaps or work periods (alternative #1, all work for the term of employment during which, or within 15 days of which, inmates filed, is covered; alternative #2, work for the 15 days preceding file date is covered).

9. If §13.1 did require filing within 15 days of initial pay date, §13.1 was tolled until September 9, 2004; grievances filed by September 24, 2004 were timely; and all work before and after grievances is covered.

10. Finally, inmates request remand to the ALC for briefing on the merits as to all grievances.

Respectfully submitted.


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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,
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v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2012-210588

RESPONDENT SCDC'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

The Respondent, the South Carolina Department of Corrections ["SCDC"], accepts the "Statement of Issues on Appeal" identified by the Appellants in their brief.

STATEMENT OF THE CASE

This matter concerns 197 administrative grievances filed by the Appellants under the Inmate Grievance System Policy promulgated by SCDC. SCDC's Inmate Grievance System Policy is designated as Policy GA-01.12 (R. pp. 672 – 691).

The Appellants include current and former inmates who either currently participate or at one time participated in a prison industries service project operated by SCDC at Lieber Correctional Institution ["Lieber"] in which first Williams Technologies, Inc., participated and now Caterpillar, Inc., participates as the private industry sponsor.

In each of their grievances, the Appellants asserted that they were and are entitled to back pay and a higher hourly rate of pay for the labor they have provided or currently provide to the prison industries service project operated by SCDC at Lieber. Specifically, the Appellants asserted in their grievances that they were and are entitled to the so-called "prevailing wage," pursuant to S.C. Code Ann. § 24-3-430(D), for the labor they voluntarily provided to this service project. In its entirety, Section 24-3-430(D) provides as follows:

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

The Appellants asserted in their grievances that the proper hourly rate of pay for their labor ranged between \$8.40 and \$12.06 per hour. (R. p. 322).

However, the South Carolina General Assembly enacted a budget proviso, effective July 1, 2001, by which it permitted SCDC to pay inmates who participate in prison industries service projects, like the service project at Lieber, less than the "prevailing wage." In its entirety, the

proviso effective July 1, 2001, H.B. 3687, § 37.31, 2001 – 2002 Gen. Assem., Gen.

Appropriations (S.C. 2001), read as follows:

The Director of [SCDC] may enter into contracts with private sector entities that would allow for inmate labor to be provided for **prison industry service work**. The use of such inmate labor may not result in the displacement of employed workers within the local region in which work is being performed. **Service work is defined as any work such as repair, replacement of original manufactured items, packaging, sorting, labeling, or similar work that is not original equipment manufacturing.** The department may negotiate the wage to be paid for inmate labor provided under prison industry service work contracts, and **such wages may be less than the prevailing wage for work of a similar nature in the private sector.** [emphasis supplied].

The General Assembly enacted an identical or nearly identical proviso each year thereafter until it codified the proviso as S.C. Code Ann. § 24-1-295, effective August 1, 2007.

The Appellants acknowledged within their grievances that they are not now and have not been entitled to the so-called “prevailing wage” for their labor since the July 1, 2001 effective date of the above-quoted proviso. Instead, the Appellants asserted that SCDC owes them back pay and higher current pay attributable to a so-called “negotiated wage” of \$4.00 per hour. (R. p. 322):

Two (2) decisions issued by our Supreme Court on August 23, 2004 serve as the focal point of the Appellants’ arguments the instant matter: *Adkins v. S.C. Dep’t of Corr.*, 602 S.E.2d 51 (S.C. 2004) and *Wicker v. S.C. Dep’t of Corr.*, 602 S.E.2d 56 (S.C. 2004). In these two (2) cases, inmates, like the Appellants, who then participated or at one time participated in prison industries projects operated by SCDC at other correctional facilities alleged that they were also entitled to the so-called “prevailing wage” pursuant to § 24-3-430(D).¹

¹ The parties agree that the types of projects operated by SCDC in *Adkins* and *Wicker* differed from the type of project operated by the agency at Lieber, and, therefore, the budget proviso discussed above did not and does not apply to the hourly rates of pay associated with the projects at issue in those two (2) cases.

PROCEDURAL HISTORY

I. THE APPELLANTS' CLASS ACTION LAWSUIT STYLED AS *Williams*

At the time our Supreme Court issued *Adkins* and *Wicker*, the Appellants, through the efforts of their counsel, had pending in circuit court a class action lawsuit in which they sought back pay and higher current pay under the provisions of § 24-3-430(D). In their class action, styled as *Williams, et al., v. S.C. Dep't of Corr. and Williams Technologies, Inc.*, the Appellants also invoked the provisions of our state's Payment of Wages Act. Only after the release of *Adkins* and *Wicker* on August 23, 2004, did the Appellants' counsel, on September 22, 2004, file with SCDC officials at Lieber an initial set of grievances on behalf of some of the Appellants.²

The Appellants' counsel submitted this initial set of grievances as well as the remainder of the Appellants' grievances under the provisions of SCDC's Inmate Grievance System Policy. As stated at the outset of its instant brief, Policy GA-01.12, its preceding editions, and its successive editions constitute SCDC's Inmate Grievance System.³ In accordance with the applicable provisions of the policy, SCDC officials began processing and adjudicating the claims presented within the first sets of the Appellants' grievances.

However, on November 3, 2004, the circuit court judge presiding over the class action lawsuit styled as *Williams*, which was still active, granted a request from the Appellants' counsel

² As discussed further below in note 39, the Appellants' counsel has continuously represented the Appellants since approximately late 2002. As reflected by the Record, the Appellants and their counsel began filing the 197 grievances which comprise the instant matter on September 22, 2004, 30 days after our Supreme Court issued *Adkins* and *Wicker*. As also reflected by the Record, the Appellants' counsel filed approximately 90 inmate grievances on September 22, 2004, and he filed approximately 81 grievances on or about September 30, 2004. As further reflected by the Record, the Appellants' counsel filed the remaining grievances after September 30, 2004. (R. pp. 358 - 387 and 1295 - 4276).

³ SCDC first issued tandem written policies regarding its Inmate Grievance System on May 1, 1996, and the agency designated these tandem policies as Policy Number PS-10.01 and PS-10.01 (OP). On January 30, 1998, SCDC re-designated the policies regarding its Inmate Grievance System as Policy GA-01.12 and GA-01.12 (OP), and it published new editions of these tandem policies under this new designation. On April 1, 2000, SCDC consolidated its tandem policies into a single new edition of Policy GA-01.12, and, since April 1, 2000, the agency has continued to publish new editions of this policy under the same designation.

and stayed SCDC's efforts to process and adjudicate all administrative grievances which it had received from or on behalf of inmates who articulated pay claims attributed to their participation in the agency's service project at Lieber, including, obviously, the Appellants' grievances.

However, after it imposed this stay on November 3, 2004, the circuit court granted motions for dismissal filed by both SCDC and Williams Technologies, Inc., the private industry sponsor. By an order filed July 1, 2005, the circuit court dismissed the Appellants' class action lawsuit styled as *Williams*, and it decertified the class it had originally recognized. In its July 1, 2005 order, the circuit court also lifted the stay it had imposed on November 3, 2004. However, as the Appellants' counsel appealed the circuit court's order, the entirety of the circuit court's July 1, 2005 order came under review by this Court, and, the stay imposed by the circuit court on November 3, 2004, which halted SCDC's processing and adjudication of the Appellants' grievances, remained in place.⁴

Our Supreme Court later accepted direct review of the appeal filed by the Appellants, through their counsel, from the circuit court's decision, and, on February 26, 2007, it affirmed the circuit court's dismissal of the class action lawsuit by its opinion in *Williams, et al., v. S.C. Dep't of Corr. and Williams Tech., Inc.*, 641 S.E.2d 885 (S.C. 2007).

Consequently, the stay imposed by the circuit court on November 3, 2004 ceased being effective on or about May 22, 2007.⁵ Thereafter, SCDC resumed processing and adjudicating

⁴ On June 8, 2005, the Appellants' counsel petitioned this Court for an order lifting the stay imposed by operation of South Carolina Appellate Court Rule ["SCACR"] 225(a) upon the entirety of the order filed by the circuit court in *Williams* on July 1, 2005. By an order dated December 7, 2005, this Court denied the petition filed by the Appellants' counsel.

⁵ Our Supreme Court denied the Petition for Rehearing filed by the Appellants' counsel by an order issued March 21, 2007. On March 22, 2007, the Clerk of Court for Dorchester County, the county in which the Appellants' counsel filed the Appellants' class action, received notice of the Supreme Court's denial of the Petition for Rehearing. Thus, the section of the order issued by the circuit court on July 1, 2005, which lifted the stay on grievance processing first imposed on November 3, 2004, finally went into effect. Therefore, SCDC had 60 days

the Appellants' grievances pursuant to Policy GA.01.12. The Appellants then appealed SCDC's final decisions denying their respective grievances to the South Carolina Administrative Law Court ["ALC"].

II. PROCEEDINGS BEFORE THE ALC WHICH YIELED THE TWO (2) ORDERS SUBJECT TO THE INSTANT APPEAL

Pursuant to an order dated April 14, 2010 (R. pp. 27 – 28), the ALC, in the interest of judicial economy, consolidated the 197 appeals into a single matter, and it instructed the parties that it would consider the issues relevant to all of the appeals in a "three level approach."

Regarding "Level One," the ALC declared as follows (R. p. 27):

Level One shall consist of a review of the issues of whether or not [Wicker] and [Adkins] created a new remedy and/substantive right and whether the application of [Wicker] and [Adkins] applies prospectively or retrospectively. ... Upon resolution of the first level of review, the Court will instruct the parties on the appropriate manner in which to proceed with review of level's two and three, including further briefing and supplementation to the record. [emphasis supplied].

The ALC then ordered SCDC to prepare and "file an abbreviated Record on Appeal, sufficient to cover the issues in the Level One stage of the appeal." (R. p. 28).

After the ALC issued an order on November 23, 2010 which addressed the contents and other aspects of the abbreviated Record on Appeal it described in its April 14, 2010 order (R. pp. 30 – 33), SCDC's undersigned counsel, on December 2, 2010, filed and served the abbreviated Record on Appeal. (R. pp. 312 – 331).

By the order it issued March 10, 2011 (R. pp. 35 – 44), the ALC addressed the two (2) issues it had determined constituted the "Level One" stage of review in the instant matter: (1)

from the date the Dorchester County Clerk of Court received notice of the Supreme Court's denial of the Petition for Rehearing or May 22, 2007 to resume its processing of grievances.

whether *Adkins* and *Wicker* created new substantive rights and/or new remedies;⁶ and (2) whether *Adkins* and *Wicker* applied prospectively or retrospectively.⁷

At the outset of its March 10, 2011 order (R. pp. 36 and 43), the ALC determined (1) that *Adkins* and *Wicker* created neither new substantive rights nor new remedies and (2) that both decisions applied retrospectively.

With resolution of these two (2) issues, the ALC, at the conclusion of its March 10, 2011 order (R. p. 43), declared that “the second level of review must now commence.” Accordingly, the ALC identified the following single issue for its consideration at the “Level Two” stage (R. pp. 43 – 44):

The next issue to be addressed by this Court is the timeliness of each Appellant’s grievance under [Policy GA-01.12].

The ALC, after concluding that further briefing and supplementation of the record were necessary, ordered as follows (R. p. 44):

IT IS HEREBY ORDERED that, ... , [SCDC], with the assistance of Appellants as needed, shall supplement the Record on Appeal to include a spreadsheet showing the following information: (i) the date each Appellant filed his or her grievance with [SCDC] in the instant matter; and (ii) the date each Appellant receive his or her most recent paycheck, for work performed in the prison industries program relating to the instant matter, in which he or she is alleged to have received less than that required under South Carolina law.

IT IS FURTHERMORE ORDERED that the parties prepare brief on the issue of when the fifteen (15) day time period for filing a grievance under [Policy GA-01.12] began to run, taking into account the Court’s rulings in this Order. [emphasis supplied].

⁶ See the Appellants’ first issue on appeal (Appellants’ Brief, p. 1), and their first argument (*Id.*, pp. 6 – 11).

⁷ The Appellants conceded during the “Level One” stage that *Adkins* and *Wicker* applied retrospectively, and the ALC agreed with the Appellants on this point. Consequentially, they did not appeal the ALC’s ruling on this issue to this Court. However, as developed further below, the Appellants now effectively assert to this Court that *Adkins* and *Wicker* apply both retrospectively and prospectively. SCDC respectfully argues below that such an assertion is fatally defective, and accordingly, many of the Appellants’ arguments are fatally undermined by such an inherently contradictory assertion.

Per the ALC's March 10, 2011 order, SCDC, by and through its undersigned counsel, filed the "1st Supplemental Record on Appeal" on May 6, 2011. (R. pp. 354 – 4276). Along with the spreadsheet discussed by the ALC in its March 10, 2011 order, SCDC included additional relevant materials in the "1st Supplemental Record on Appeal."⁸

On May 23, 2011, the Appellants moved to supplement the "1st Supplemental Record on Appeal" with a variety of additional materials. However, by its August 5, 2011 order (R. pp. 46 – 67), the ALC decided against, with limited exceptions, including the materials identified by the Appellants in their May 23, 2011 motion in the "1st Supplemental Record on Appeal."⁹ By submissions to the ALC on August 29, 2011 (R. pp. 4576 – 4597) and September 6, 2011 (R. pp. 4598 – 4634), SCDC added the materials identified by the ALC in its August 5, 2011 order to the "1st Supplemental Record on Appeal," and, in doing so, SCDC satisfied the directives issued by the ALC in its August 5, 2011 order.

On July 26, 2012, the ALC issued the second amended version of its "Level Two" order in the instant consolidated matter. (R. pp. 152 – 180). As reflected at the outset of its order, the ALC considered the eight (8) arguments articulated by the Appellants regarding the timeliness of the filing of their grievances. (R. p. 153).

⁸ See the Table of Contents for the "1st Supplemental Record on Appeal." (R. p. 365). Pursuant to an order issued August 5, 2011 by the ALC, SCDC filed a new version of the spreadsheet on September 6, 2011 which supplanted the version of the spreadsheet which appeared at Tab A in Volume I of the "1st Supplemental Record on Appeal." (R. pp. 4602 – 4631).

⁹ The Appellants did not and, to date, have not appealed the order issued by the ALC on August 5, 2011 which denied their motion to supplement the "1st Supplemental Record on Appeal." However, the Appellants still designated for inclusion in the record on appeal before this Court most if not all of the materials that the ALC rejected for inclusion in the record compiled for the instant matter. Accordingly, SCDC concurrently files a motion to strike these items from the Appellants' designation for matter.

The ALC rejected each of the eight (8) arguments advanced by the Appellants at the “Level Two” phase of its review of the instant matter, and, in doing so, it affirmed SCDC’s denial of all but one (1) of the 197 administrative grievances filed by the Appellants.¹⁰

Thereafter, on August 22, 2013, the Appellants timely filed their amended Notice of Appeal to this Court, and, by their amended notice, they indicated that they were appealing both the ALC’s “Level One” order and its “Level Two” order.

STANDARD OF REVIEW

ALC Rule of Procedure 65 states that “[j]udicial review of any decision of the [ALC] in a matter heard on appeal from final decisions pursuant to *Al-Shabazz v. State*, 527 S.E.2d 742 (S.C. 2000)] shall be as provided in S.C. Code Ann. § 1-23-610 (2005) (as amended).” *See also S.C. Dep’t of Corr. v. Mitchell*, 659 S.E.2d 233, 234 (S.C. Ct. App. 2008) (“Section 1-23-610 ... sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency.”).

Thus, the provisions of § 1-23-610, specifically § 1-23-610(B), establish the standard of review applicable to this Court’s consideration of the Appellants’ challenge of the ALC’s orders. In its entirety, § 1-23-610(B) reads as follows:

The review of the administrative law judge’s order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact.¹¹ The court of appeals may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if substantial rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

¹⁰ By an order dated filed July 5, 2013, this Court advised the parties that the ALC had jurisdiction to proceed on the merits of the matter styled as *Fred Gatewood v. S.C. Dep’t of Corr.*, ALC Docket No. 07-ALJ-04-00517-AP. As of the date of SCDC’s initial brief, Inmate Gatewood’s appeal of SCDC’s denial of his prison industries pay grievance remained pending before the ALC.

¹¹ *See generally, Mitchell*, 659 S.E.2d at 235 (The ALC must apply the standard articulated in § 1-23-380(5) when reviewing, on appeal, an administrative agency’s decision.). SCDC also respectfully submits that the standards of review set forth in §§ 1-23-380(5) and 1-23-610(B) are identical if not nearly identical.

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Pursuant to § 1-23-610(B), this Court “may reverse or modify the [ALC’s] decision **only** if [the Appellants prove their] substantive rights [have] been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law.” *Mitchell*, 659 S.E.2d at 234 [emphasis supplied] (reversing the ALC’s order because the “order [was] devoid of any finding of evidence adduced by [the Appellant] warranting the ALC’s reversal of the Department.”). Moreover, the Appellants must “distinctly and specifically direct the court’s attention to the errors or abuses allegedly committed by the [ALC]. [The Appellants] must include all that is necessary to enable [this Court] to decide whether the [ALC] made an erroneous or unsubstantiated ruling. A mere expression of dissatisfaction with the ruling is not sufficient.”¹² *Al-Shabazz*, 527 S.E.2d at 755 (citations omitted).

Critically, the Appellants have the burden of proving convincingly that the ALC’s decision to uphold SCDC’s decision is unsupported by substantial evidence. *Mitchell*, 659 S.E.2d at 235. Substantial evidence is relevant evidence “when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the ALC arrived at in justifying its decision.” *S.C. Coastal Conservation League v. S.C. Dep’t of Health & Envtl. Control*, 669 S.E.2d 899, 905 (S.C. Ct. App. 2008).

¹² In 2006, the General Assembly amended the Administrative Procedures Act so that a party must appeal a decision of the ALC, in which the ALC considered an appeal of an administrative agency’s decision, to this Court rather than the circuit court.

The Appellants also have the burden of proving the ALC's decision is arbitrary and otherwise characterized by an abuse of discretion. *Mitchell*, 659 S.E.2d at 234. A decision is arbitrary if no rational basis for the conclusion exists, or when it is based on one's will and not upon any course of reasoning and exercise of judgment. A decision may also be arbitrary if it is made at pleasure without adequate determining principles or is governed by no fixed rules or standards. *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 564 S.E.2d 341, 345 (S.C. Ct. App. 2002). An "abuse of discretion occurs when the judge's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the judge is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case." *Ex parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464, 467 (S.C. 2006).

ARGUMENT

I. OVERVIEW OF ALC'S OPERATIVE RULINGS AND THE APPELLANTS' OVERARCHING THEORIES ON APPEAL

In its "Level One" and "Level Two" orders, the ALC made the following 10 rulings:

- (1) *Adkins* and *Wicker* created neither new substantive rights nor new remedies (R. pp. 38 – 43);¹³
- (2) Both *Adkins* and *Wicker* apply retrospectively (R. p. 43);¹⁴

¹³ Importantly, the ALC observed that both SCDC and the Appellants agreed that *Adkins* and *Wicker* did not create new substantive rights, and, after conducting a review of both cases, the ALC agreed with the parties. (R. p. 38). However, the ALC acknowledged that, while they conceded *Adkins* and *Wicker* did not create new substantive rights, the Appellants claimed that the two (2) cases created new grievance remedies. Specifically, the ALC recognized that the Appellants argued that, before *Adkins* and *Wicker*, inmates did not have the right to grieve so-called "prevailing wage" disputes. (R. p. 40). The ALC also recognized that the Appellants claimed that *Wicker* created new appeal remedies to vindicate inmates' right to so-called "prevailing wages" under the provisions of § 24-3-430(D). (R. p. 41). The ALC rejected both of these arguments.

¹⁴ See note 7 above. (R. p. 43).

- (3) The Appellants' Step 1 grievances did not concern "policies/procedures" as that term is used in ¶13.9 of Policy GA-01.12, and thus the fifteen day filing deadline from ¶13.1 applied to their grievances (R. pp. 157 – 162);
- (4) The Appellants did not have reasonable cause under ¶13.9 by which they did not have to file their grievances within the fifteen day time limit established by ¶13.1, or, alternatively stated, the Appellants were not "effectively barred" from filing their Step 1 grievances before our Supreme Court issued *Adkins* and *Wicker* (R. pp. 162 – 164);
- (5) SCDC did not violate the Appellants' due process rights by applying the fifteen day filing deadline from ¶13.1 to their claims (R. pp. 165 – 166);
- (6) SCDC did not waive its right to apply the fifteen day filing deadline from ¶13.1 (R. pp. 166 – 170);
- (7) SCDC was not equitably estopped from applying the fifteen day filing deadline from ¶13.1 (R. pp. 171 – 172);
- (8) The fifteen day filing deadline from ¶13.1 was not tolled until after our Supreme Court issued *Adkins* and *Wicker* (R. pp. 172 – 175);¹⁵
- (9) The fifteen day filing deadline from ¶13.1 was not tolled when, on January 29, 2002, the Appellants filed their class action suit (i.e. *Williams*) in circuit court (R. pp. 175 – 176); and
- (10) The Appellants' did not comply with the fifteen day filing deadline from ¶13.1 if they filed their grievances within fifteen days of a term of "employment" (R. pp. 176 – 178).

Obviously, the Appellants challenge, explicitly or otherwise, each of these rulings.

SCDC, by and through its undersigned counsel, respectfully submits that the nine (9) arguments from the Appellants' brief are frequently overlapping and, at times, repetitive.

SCDC, therefore, respectfully submits that the arguments the Appellants articulated in their brief to this Court are best considered when they are reduced to the following three (3) overarching theories:

¹⁵ The Appellants argued to the ALC that the filing deadline from ¶13.1 was tolled until after the issuance of *Adkins* and *Wicker*, because, prior to the issuance of these two (2) opinions, they were "effectively barred" from exercising any grievance and appeal rights. Thus, this particular argument by the Appellants to the ALC constituted an amalgam of the issues determined by the ALC in rulings #1, #2, and #4 above. See also notes 22 and 23 below.

1. *Adkins* and *Wicker* created, contrary to the ALC's ruling(s), new grievance and appeal remedies, which apply to the Appellants' pre-existing pay claims, and any applicable limitations period on the Appellants' pre-existing pay claims began to run only after our Supreme Court issued the remittiturs for *Adkins* and *Wicker*.¹⁶

2. Contrary to the ALC's rulings regarding the applicability of the fifteen day filing deadline from ¶13.1, the Appellants should not be subjected to any filing deadlines or limitations period whatsoever by which they must file grievances challenging the rates at which SCDC paid them for the labor they provided to the prison industries project service at Lieber;¹⁷

3. Even if the ALC correctly determined both that the Appellants possessed grievance and appeal remedies before our Supreme Court issued *Adkins* and *Wicker* and that the fifteen day filing deadline from ¶13.1 applied to their grievances, the Appellants possess numerous and legitimate excuses as to why they failed to comply with the deadline.¹⁸

The Appellants' theories and the arguments from their brief in support of these theories are fatally defective and unpersuasive, and, accordingly, SCDC respectfully urges this Court to affirm each of the rulings issued by the ALC in its "Level One" and "Level Two" orders.

¹⁶ The Appellants articulated these theories in their first, third, fourth and ninth arguments.

¹⁷ The Appellants articulated these theories in their second and eighth arguments.

¹⁸ The Appellants articulated these theories in their third, fourth, fifth, sixth, seventh, and ninth arguments.

II. THE APPELLANTS' THREE (3) THEORIES ARE FATALY DEFECTIVE

A. *Adkins* AND *Wicker* DID NOT CREATE NEW GRIEVANCE OR APPEAL REMEDIES IN FAVOR OF THE APPELLANTS OR OTHER INMATES

In their first argument,¹⁹ the Appellants assert that the ALC erred when it concluded that *Adkins* and *Wicker* did not create new grievance and appeal remedies by which inmates could prosecute their "pre-existing right" to the so-called "prevailing wage."

In their third, fourth, and ninth arguments, the Appellants assert that even if the ALC correctly ruled that *Adkins* and *Wicker* did not create new grievance and appeal remedies in their favor, the ALC still erred when it concluded (1) that they did not have reasonable cause not to file their grievances within the time frame from ¶13.1 of Policy GA-01-12 (R. p. 687);²⁰ (2) that the application of the time frame from ¶13.1 to their grievances did not violate their due process rights;²¹ (3) that the time frame from ¶13.1 was not tolled before our Supreme Court issued *Adkins* and *Wicker*;²² and (4) that they were not "effectively barred" from filing the grievances in which they articulated their prison industries pay claims before the issuance of *Adkins* and *Wicker*.²³

SCDC respectfully asserts that all of these assertions constitute nothing more than hollow excuses by the Appellants for their failure to file the grievances in which they articulated their

¹⁹ See Appellants' Brief, pp. 6 – 11.

²⁰ *Id.*, pp. 21 – 25 (the Appellants' third argument).

²¹ *Id.*, pp. 26 – 27 (the Appellants' fourth argument).

²² *Id.*, pp. 44 – 47 (the Appellants' ninth argument).

²³ *Id.*, pp. 21 – 25 and 44 – 47 (the Appellants' fourth and ninth arguments).

pay claims before September 22, 2004,²⁴ the date upon which they contend *Adkins* and *Wicker* became "final."²⁵

The Appellants' excuses are best considered in two (2) two categories: (1) the positions articulated by SCDC before the ALC in *Wicker v. S.C. Dep't of Corr.*, 2001 WL 1005574 (S.C.A.L.J.D. August 13, 2001), prevented or excused them from filing grievances prior to September 22, 2004, and (2) the decision issued by the ALC in *McNeil v. S.C. Dep't of Corr.*, 00-ALJ-04-00336-AP (S.C.A.L.J.D. Sept. 5, 2001), and enforced in 2001 WL 1262667 (S.C.A.L.J.D. Oct. 1, 2001) also prevented or excused them from filing grievances prior to September 22, 2004.

The ALC, after reviewing the decisions it rendered in *Wicker* and *McNeil*, as well as our Supreme Court's decision in *Sullivan v. S.C. Dep't of Corr.*, 586 S.E.2d 124 (S.C. 2003), did not err when it denied the arguments offered by the Appellants concerning the first, third, fourth and ninth arguments from their brief to this Court. Likewise, an analysis of the ALC's decisions in *Wicker* and *McNeil*, our Supreme Court's decisions in *Sullivan* and *Al-Shabazz*, as well as, obviously, *Adkins* and *Wicker*, confirms that the ALC correctly ruled on these issues.

1. The ALC's Decision in *Wicker*.

The Appellants assert that the position articulated by SCDC before the ALC when the ALC considered the appeal of Inmate Bennie Wicker somehow demonstrates that the decisions

²⁴ The Record, specifically the spreadsheet labeled "9-6-11" (R. pp. 4602 – 4631), clearly establishes that none of the Appellants filed a Step 1 grievance until September 22, 2004.

²⁵ According to the Appellants, *Adkins* and *Wicker* did not become final until fifteen days had expired after the remittiturs associated with these decisions had been issued. See Appellants' Brief, pp. 44 – 45. However, the Appellants' contention conflicts with *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213, 216 (S.C. Nov. 18, 1985) ("[T]he termination at will doctrine, ... applies only to this case and to those causes of action arising after the filing of this opinion, November 18, 1985."); and *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 508 S.E.2d 565, 576 (S.C. 1998) ("We therefore apply our present ruling to the instant case and to all causes of action that arise or accrue after the date of this opinion. Thus, except for this case, if a cause of action arose or accrued prior to our decision today, it will be governed by the common law form of assumption of risk...").

issued by our Supreme Court in *Adkins* and *Wicker* created new grievance and appeal remedies, because, according to the Appellants, SCDC had, prior to the issuance of *Adkins* and *Wicker*, prevented inmates from prosecuting prison industries pay claims under Policy GA-01.12.²⁶

The ALC's August 13, 2001 decision in *Wicker*, 2001 WL 1005574, *1, however, explained SCDC's position as follows:

[SCDC] raises two positions. First, [SCDC] argues that Wicker's complaint is non-grievable. Second, if grievable, [SCDC] disagrees with Wicker's position on the merits. [SCDC] argues that Wicker voluntarily accepted the "training pay" of \$.25 for the first 160 hours and \$.75 for the next 160 hours. According to [SCDC], Wicker was entitled to \$5.25 per hour only after the first 320 hours.²⁷

Thus, SCDC, in its presentation to the ALC, offered both procedural and substantive arguments in opposition to the issues raised by Inmate Wicker in his appeal of SCDC's decision to deny the grievance in which he articulated a prison industries pay claim.²⁸

SCDC argued to the ALC that Inmate Wicker's pay dispute constituted "a 'non-grievable' challenge to an institutional job assignment," but the ALC disagreed, and it concluded that Inmate Wicker challenged his wages, not his job assignment. 2001 WL 1005574, *1. Moreover, the ALC, 2001 WL 1005574, *1, concluded as follows:

Wicker's wage dispute falls under the listed issues considered 'grievable' under [SCDC] policy at GA-01.12(OP), Specific Procedures, paragraph 7;

²⁶ See Appellants' Brief, pp. 7 - 8.

²⁷ No part of Inmate Wicker's administrative grievance (i.e. his Step 1, his Step 2, or SCDC's responses to his Step 1 and Step 2) appears in the Record for the instant matter.

²⁸ As reflected by the Record, the decisions by which SCDC denied the Appellants' grievances reflect both procedural and substantive grounds, just as SCDC raised both procedural and substantive grounds in opposition to the issues identified by Inmate Wicker in the appeal he filed with the ALC. Likewise, Policy GA-01.12 and its preceding editions served as the foundational document for SCDC's arguments in opposition to Inmate Wicker's appeal to the ALC as well as its consideration of the Appellants' grievances. In both *Wicker* and the instant matter, the ALC invoked the same provision of Policy GA-01.12 to conclude that inmates' prison industries pay disputes are grievable. In their fifth argument, the Appellants contend that because SCDC denied their grievances on procedural and substantive grounds, SCDC waived the fifteen day filing deadline. See Appellants' Brief, pp. 27 - 32. SCDC respectfully submits that, in light of the ALC's decision in *Wicker* which our Supreme Court later affirmed, the Appellants' contention is without merit.

the first issue listed is "Department policies/procedures, directives, or conditions which directly affect an inmate.

The ALC found that "Wicker is directly affected by [SCDC's] arrangement with private industry to pay inmates" a specific wage, and, consequentially, it ruled that Inmate Wicker's "wage dispute [was] grievable under [SCDC's] grievance system." 2001 WL 1005574, *1.

Thus, contrary to SCDC's position, the ALC, in its August 13, 2001 decision in *Wicker*, expressly held that prison industries pay claims are "grievable" under Policy GA-01.12. Thus, as of its August 13, 2011 decision in *Wicker*, the ALC recognized that inmates could, under the provisions of Policy GA-01.12, file grievances in which they articulated prison industries pay claims and that SCDC's denial of any such claims were subject to judicial review by the ALC.

The Record demonstrates that numerous Appellants began participating in the prison industries project before the ALC's August 13, 2001 decision in *Wicker*.²⁹ However, despite the ALC's August 13, 2001 decision in *Wicker*, no evidence exists in the Record that any of the 197 Appellants filed a Step 1 grievance with SCDC in which a prison industries pay claim appear prior to September 22, 2004. The Appellants argued that "[w]hile inmates could have filed a wage grievance, it would *probably* have been dismissed as non-grievable, or for want of jurisdiction."³⁰ [italicized emphasis supplied]. While the Appellants also assert that SCDC "summarily dismissed" prison industries pay grievances as "non-grievable," no evidence in the Record supports their assertion.³¹

²⁹ See the spreadsheet labeled "9-6-11." (R. pp. 4602 – 4631). The ALC also recognized this fact. (R. p. 176).

³⁰ See Appellants' Brief, p. 46.

³¹ *Id.*, p. 8. The Appellants conveniently neglect to assert that any of them appealed such a decision by SCDC to the ALC, and nothing in the Record evidences that any of the Appellants undertook such an appeal. Inmate Wicker, on the other hand, appealed the decision he received from SCDC regarding the grievance in which he articulated his prison industries pay claim to the ALC, and, on August 13, 2001, the ALC issued a decision in his favor. SCDC appealed the ALC's August 13, 2001 decision to the circuit court, and the circuit court affirmed the ALC's decision.

Even if one of the Appellants had filed such a grievance, no evidence exists that, upon a denial of the grievance by SCDC, a concerned Appellant appealed SCDC's denial to the ALC. As no Appellant filed a grievance in which he challenged the rate at which he was paid for his prison industries labor or otherwise appealed to the ALC an adverse decision from SCDC regarding such a grievance, SCDC never had the opportunity to consider and respond to such a challenge prior to our Supreme Court's issuance of its decision in *Wicker*.

Thus, no evidence exists in the Record which demonstrates how SCDC would have treated any prison industries pay grievance submitted by any of the Appellants. This Court must confine its review to the evidence in the Record, not hypothetical results conjured up by the Appellants. See § 1-23-610(B) ("The review of the [ALC Order] must be confined to the record."). See also *Mitchell*, 659 S.E.2d at 258 (same).

Succinctly stated, none of the Appellants, who possessed the benefit of competent counsel, did what Inmate Wicker managed to do *pro se*.

2. The ALC's decision in *McNeil*.

The Appellants also argue in their brief that, regardless of its August 13, 2001 decision in *Wicker*, the ALC did not have jurisdiction to review inmate wage grievances because of the *en banc* decision issued by the ALC on September 5, 2011 in *McNeil*. The Appellants also argue that, before our Supreme Court affirmed the ALC's original decision in *Wicker*, they did not have the ability to appeal any prison industries pay grievances they may have filed to the ALC.

SCDC appealed the circuit court's decision, and our Supreme Court accepted SCDC's appeal on direct review. Thus, our Supreme Court's decision in *Wicker* ultimately affirmed the ALC's August 13, 2001 decision.

Accordingly, the Appellants argue in their brief (1) that *Adkins* and *Wicker* created new grievance and appeal remedies;³² (2) that they had reasonable cause under ¶13.9 (R. p. 689) not to file their grievances within the time frame established by ¶13.1;³³ (3) that the application of fifteen-day filing deadline from ¶13.1 to their grievances violated their due process rights;³⁴ (4) that fifteen-day filing deadline from ¶13.1 was tolled before our Supreme Court issued *Adkins* and *Wicker*;³⁵ and (5) they were barred or “effectively barred” from challenging the rate at which SCDC paid them for their prison industries labor until the publication of *Adkins* and *Wicker*.³⁶

SCDC again respectfully submits that this Court should affirm the ALC’s rulings on these points, and specifically that it should affirm the ALC’s ruling that *Wicker* did not create new appeal rights in favor of inmates concerning their prison industries pay claims. SCDC also respectfully submits that this Court should deem as invalid all of the reasons offered by the Appellants to excuse their failure to file a single grievance in which one of them protested the rate at which SCDC paid them for their prison industries labor prior to September 22, 2004.

In its “Level One” order (R. pp. 42 – 43), the ALC concluded that our Supreme Court’s decision in *Wicker* did not create new appeal remedies and that its *en banc* order in *McNeil* did not preclude the Appellants from seeking appellate review of any denial by SCDC of their prison industries pay claims prior to our Supreme Court issuing *Wicker*. Regarding its order in *McNeil*, the ALC explained as follows (R. pp. 42 – 43):

³² See Appellants’ Brief, pp. 6 – 11. (The Appellants’ first argument).

³³ *Id.*, pp. 21 – 25. (The Appellants’ third argument).

³⁴ *Id.*, pp. 26 – 27. (The Appellants’ fourth argument).

³⁵ *Id.*, pp. 44 – 48. (The Appellants’ ninth argument).

³⁶ *Id.*, pp. 21 – 25 and 44 – 48. (The Appellants’ fourth and ninth arguments).

According to Appellants, the ALC's *en banc* decision [in *McNeil*] answered the appealability question "with finality" until *Wicker* was decided. I find this argument to be without merit. Because the ALC is a lower court, its decisions do not constitute binding precedent. See 21 C.J.S. Courts § 212 (updated Dec. 2010) ("Trial and other inferior courts' decisions are not precedent, either with regard to appellate courts or other trial judges. ..."). Given that the ALC cannot create judicial precedent, it certainly cannot answer legal questions with "finality."

In its "Level Two" order (R. pp. 162 – 164 and 174), the ALC concluded that its *en banc* order in *McNeil* did not provide inmates with reasonable cause not to file their Step 1 grievances before September 22, 2004 and that its *en banc* order in *McNeil* did not toll any provision of Policy GA-01.12 until our Supreme Court issued its decision in *Wicker*. The ALC assessed the invocation of *McNeil* by the Appellants to justify their failure to file any of their grievances prior to September 22, 2004 as follows (R. p. 164):

Indeed, as [SCDC] correctly notes, the *McNeil* decision was not the final word on the appealability of inmate grievances. In [*Sullivan*], a decision issued a year prior to *Adkins* and *Wicker*, our Supreme Court specifically instructed the ALC to refrain from relying upon *McNeil* when determining its jurisdiction to hear inmate appeals. See *id.* at 445 n. 5, 586 S.E.2d at 128 n. 5 ("[B]ecause we know *McNeil* has been relied upon by the ALJ in other cases to deny jurisdiction, the ALJD and the circuit court are instructed to look to this opinion, not *McNeil*, for guidance in future cases."). ... Notwithstanding the issuance of *Sullivan* in August 2003, the earliest any of the Appellants filed a grievance regarding their prevailing wage claims was September 22, 2004. Thus, in light of *Sullivan*, it seems disingenuous for the Appellants to suggest that they would have filed their grievances earlier had it not been for *McNeil*. [emphasis supplied].

The ALC explained later in its "Level Two" order as follows (R. p. 174):

However, as noted above, *McNeil* was an ALC decision and did not constitute binding precedent. See 21 C.J.S. Courts § 212 (updated Dec. 2011). Had the Appellants timely filed grievances and had the ALC denied their grievances based upon *McNeil*, the Appellants could have appealed to the Court of Appeals, which possessed the authority to reverse *McNeil*. In fact, as discussed above, the pertinent portions of *McNeil* were unmistakably superseded by the *Sullivan* decision in August 2003 – a full year before any of the Appellants filed a grievance. See *Sullivan*,

355 S.C. at 445 n. 5, 586 S.E.2d at 128 n. 5. Thus, while McNeil may have discouraged the Appellants from filing their prevailing wage grievances, it did not bar them from doing so. [emphasis supplied].

The Appellants nonetheless argue that ALC erroneously interpreted both *McNeil* and *Sullivan*. The Appellants interpret our Supreme Court's decision in *Sullivan* as instructing the ALC to look to the decision in *Sullivan*, rather than *McNeil*, in disputes implicating only liberty interests. The Appellants contend *Sullivan* was silent on cases implicating only property interests, and, therefore, *Sullivan* did not have any impact on appealability of inmates wage claims.³⁷ The Appellants even contend that, if they had appealed to the ALC, received an adverse decision from the ALC, and then appealed such an adverse decision to this Court, their appeal to this Court "would have *probably* resulted in dismissal."³⁸

Succinctly stated, the Appellants' untested and erroneous belief in the futility purportedly associated with prosecuting their prison industries pay claims through SCDC via Policy GA-01.12, to the ALC, to the circuit court, and then to this Court simply does not constitute a valid excuse by which they could sleep on their known rights.³⁹

Again, the Appellants offer no evidence that any of them filed a wage related grievance that SCDC dismissed or returned as "non-grievable." Furthermore, the Appellants offer no evidence that any of them prosecuted an appeal of such a grievance to the ALC after having received such an adverse decision from SCDC. No evidence exists that the ALC ever dismissed such the appeal of such a grievance filed by any of the Appellants for lack of jurisdiction. The

³⁷ See Appellants' Brief, p. 25.

³⁸ *Id.*, p. 46.

³⁹ The Appellants originally filed their class action styled as *Williams* in January 2002. Beginning in approximately late 2002, the Appellants' counsel has represented the Appellants, and he has continuously represented them since. Thus, the Appellants cannot now claim that any of them were unaware of their purported right to the so-called "prevailing wage" prior to the issuance of *Sullivan* in 2003. Moreover, as clearly reflected by the Record and as recognized by the ALC in its "Level Two" order, none of the Appellants filed a grievance until September 22, 2004.

Appellants have not and cannot reference a single ALC decision issued after *Sullivan* in which the ALC relied on its *en banc* decision in *McNeil* and denied the appealability of prison industries pay claims or other inmate property claims.

SCDC respectfully submits, as correctly determined by the ALC, that any claim by the Appellants that *McNeil*, in light of the *Sullivan* decision, prevented them from filing a wage related grievance or appeal to the ALC is disingenuous. Thus, SCDC respectfully submits that the Appellants offer no legitimate excuse for their failure to file a single grievance after *Sullivan* and prior to September 22, 2004.

Assuming that the *en banc* decision in *McNeil*, even for a short period of time, precluded the ALC from reviewing decisions issued by SCDC which denied prison industries pay grievances filed by the Appellants or other inmates, the decision in *McNeil* relates solely to the ALC's jurisdiction and has absolutely no impact on Policy GA-01.12 or what may constitute "grievable" issues under Policy GA-01.12. Any impediment concerning the appealability of decisions issued by SCDC which denied such prison industries pay claims simply did not prevent or preclude the Appellants or other inmates from timely filing grievances with SCDC.

3. The Appellants mistakenly rely on the ALC's decision in *Ingram*.

Contrary to the argument offered by the Appellants in their brief, this reality is reflected in the ALC's decision in *Willie Ingram, #83404, v. S.C. Dep't of Corr.*, ALJ Docket No. 01-ALJ-04-00190-AP, 2001 WL 1397430 (S.C.A.L.J.D October 23, 2001). In *Ingram*, the ALC observed that the inmate protested various aspects of his prison industries pay. Although the ALC does not discuss the adjudication of his administrative grievance by SCDC, Inmate Ingram must have filed an administrative grievance in which he articulated some kind of prison industries pay claim and SCDC must have denied Inmate Ingram's claim(s) in order for Inmate

Ingram to have appealed SCDC's denial of his claims to the ALC. *See also Gary Slezak, # 109201 v. S.C. Dep't of Corr.,* ALC Docket No. 01-ALJ-04-00169-AP, 2001 WL 1870457 (S.C.A.L.J.D. Dec. 7, 2001) (dismissing Inmate Slezak's grievance appeal in which he protested various aspects of his prison pay).

Even though the ALC apparently dismissed Inmate Ingram's appeal in light of *McNeil*, the decision in *Ingram* reflects the reality that inmates, such as Inmate Ingram and Inmate Wicker, could still file grievances under Policy GA-01.12 by which they could challenge the rate at which SCDC paid them for their prison industries labor. Additionally, no evidence exists that Inmate Ingram appealed the ALC's decision to the circuit court or to an appellate court. Regardless of *McNeil's* impact on ALC jurisdiction, *McNeil* did not impact an inmate's ability to file a grievance with SCDC to challenge his inmate wages.

Thus, as demonstrated above, the ALC correctly concluded the following: (1) that neither *Adkins* nor *Wicker* created new grievance or appeal remedies (R. p. 43); (2) that the Appellants did not have reasonable cause under ¶13.9 to not file their grievances within the time frame established by ¶13.1 (R. p. 162); (3) that the Appellants were not "effectively barred" from filing Step 1 grievances before the issuances of *Adkins* and *Wicker* (R. pp. 164 and 172); (4) that SCDC did not violate the Appellants' due process rights (R. p. 166); and (5) that the ALC's *en banc* decision in *McNeil* did not bar inmates, including the Appellants, from filing grievances in which they articulated prison industries pay claims, and therefore, the fifteen day filing deadline from ¶13.1 was not equitably tolled until our Supreme Court issued its decisions in *Adkins* and *Wicker* (R. p. 174). For the foregoing reasons, this Court should affirm the ALC's decision on these points.

B. OUR SUPREME COURT'S DECISIONS IN *Adkins* AND *Wicker* APPLY RETROSPECTIVELY, AND THEY CANNOT APPLY BOTH RETROSPECTIVELY AND PROSPECTIVELY

The Appellants argue that *Adkins* and *Wicker* created new grievance and appeal remedies and that such remedies apply to their "pre-existing" wage claims that arose before our Supreme Court issued its decisions in the two (2) cases. Their argument, however, actually supports the ALC's determination that *Adkins* and *Wicker* apply retrospectively.

Such an argument by the Appellants is unsurprising since they conceded during the "Level One" phase that *Adkins* and *Wicker* apply retrospectively.⁴⁰ As the Appellants have not appealed this critical point, the ALC's ruling constitutes the law of the case. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 489 S.E.2d 470, 472 (S.C. 1997) ("This unappealed ruling is the law of the case ... and should not [be] reconsidered by the Court of Appeals."); *First Union National Bank of S.C. v. Pierce*, 511 S.E.2d 372, 378 (S.C. Ct. App. 1998) ("The unchallenged ruling, right or wrong, is the law of the case and requires affirmance.").

The Appellants then argue that they could prosecute their prison industries pay claims only after *Adkins* and *Wicker* purportedly created these new grievance and appeal remedies. Thus, according to their argument, no limitations period of any kind applied to any of the Appellants' prison industries pay claims which accrued before the issuance of *Adkins* and *Wicker*. However, by asserting that the fifteen day time from ¶13.1 only began to run after our Supreme Court issued the remittiturs in *Adkins* and *Wicker*,⁴¹ the Appellants effectively assert that the applicable limitations period applies *prospectively* to their claims.

As stated above, the Appellants assert, in their first, third, and ninth arguments, that they were barred or effectively barred from exercising their pre-existing rights to enforce their prison

⁴⁰ See note 7 above.

⁴¹ See note 25 above.

industries pay claims before our Supreme Court issued *Adkins* and *Wicker*.⁴² The Appellants further assert, in their fourth argument, that their rights to due process would be violated if this Court affirms the ALC's decision which upheld SCDC's application of the fifteen day filing deadline from ¶13.1 during the period of time before our Supreme Court issued *Adkins* and *Wicker*.⁴³ The Appellants also contend, in their ninth argument that any limitations period applicable to their prison industries pay claims began running only after our Supreme Court issued the remittiturs associated with *Adkins* and *Wicker*.⁴⁴

However, the Appellants' arguments on these points are irreconcilable with the reality that they conceded during the "Level One" phase of the ALC's review that *Adkins* and *Wicker* apply retrospectively and that the ALC endorsed and agreed with their concession.⁴⁵

1. The Appellants misunderstand or simply ignore the definitions of retrospective and prospective.

Furthermore, the Appellants misunderstand or simply ignore the definitions "retrospective" and "prospective," and they further misunderstand or ignore concepts of retrospective and prospective applications of judicial decisions.

Retrospective, or retroactive, is defined as "extending in scope or effect to matters that have occurred in the past." Black's Law Dictionary (9th ed. 2009). Conversely, prospective is defined as "[e]ffective or operative in the future." *Id.* The practical effect of applying *Adkins* and *Wicker* retroactively to the Appellants' pre-existing wage prison industries pay claims may be best explained by a review of the following precedent.

⁴² See Appellants' Brief, pp. 7 – 11, 21 – 25, and 44 – 48.

⁴³ *Id.*, pp. 26 – 27.

⁴⁴ *Id.*, pp. 44 – 48.

⁴⁵ See note 7 above.

As explained by the ALC (R. p. 43), in "South Carolina, the general rule regarding retroactive application of judicial decisions is that 'decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights applied retrospectively.'" *Toth v. Square D Co.*, 377 S.E.2d 584, 587 (S.C. 1989) (holding that the breach of contract action based on an employee handbook that the court announced in *Small v. Springs Industries, Inc.*, 357 S.E.2d 452 (S.C. 1987) applied retroactively "to causes of action arising prior to the date it was filed."). See also *Simmons v. S.C. Farm Bureau Mutual Ins. Co.*, 391 S.E.2d 560 (S.C. 1990) (holding that because "actions to reform insurance policies have long been available to insureds [and the *State Farm Mutual Auto Ins. v. Wannamaker*, 354 S.E.2d 555 (S.C. 1987) decision] merely provide[d] a method for determining whether a policy should be reformed," the *Wannamaker* decision did not create any new substantive rights, and, therefore, it applied retroactively).

Conversely, our state's appellate courts reserve prospective application of prior judicial rulings to decisions which create new causes of action or abolish a previously available immunity doctrine. For instance, appellate courts in our state have determined that the following decisions created new causes of actions, and, therefore, applied only to the facts then before the court and prospectively to future cases: *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 508 S.E.2d 565 (S.C. 1998) (abolishing the assumption of the risk doctrine as a complete defense to a plaintiff's negligence action); *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213 (S.C. 1985) (creating public policy exception to the at-will employment doctrine); *McCormick v. England, M.D.*, 494 S.E.2d 431 (S.C. Ct. App. 1997) (creating the common law tort of breach of a physician's duty of confidentiality); *McCaskey v. Shaw*, 368 S.E.2d 672 (S.C. Ct. App. 1988) (holding that Supreme Court's decision in *Kinard v. Augusta*

Sash & Door Co., 336 S.E.2d 465, 467 (S.C. 1985) created a new substantive right for negligent infliction of emotional distress).

At best, the Appellants' arguments that they were barred or effectively barred from exercising their grievance and appeal rights before the issuance of *Adkins* and *Wicker* or that their due process rights would be violated by applying any limitations period to their pre-existing prison industries pay claims are more akin to prospectively applied decisions than to decisions which fall under *Toth* or *Simmons*.

Unlike prospectively applied decisions, however, the decision by the *Wicker* Court, which affirmed the ALC's decision that SCDC owed Inmate Wicker back pay attributable to a higher hourly rate for the labor performed by Inmate Wicker during the first 320 hours he participated in a prison industries project operated by SCDC, does not suggest in any way, shape or form that SCDC was immune from prison industries pay claims prior to the issuance of the decisions in *Adkins* and *Wicker* by our Supreme Court or that *Adkins* and *Wicker* created a new substantive right. Rather, the Appellants argued to the ALC that neither *Adkins* nor *Wicker* created new substantive rights, and the ALC agreed. (R. pp. 38 – 39).

As in *Toth*, *Small*, *Simmons*, and *Wannamaker*, our Supreme Court in *Adkins* and *Wicker* recognized that Policy GA-01.12 was not some kind of novel mechanism by which inmates, such as the Appellants, could challenge "conditions which directly affect" them, such as the rate at which SCDC paid them for their prison industries labor. In its analysis of the Appellants' argument on this point in the "Level One" phase of its review, the ALC correctly observed that Policy GA-01.12 has existed in some form since May 1, 1996. (R. p. 40). The ALC further observed that its 2001 decision in *Wicker*, which our Supreme Court affirmed in 2004, concluded that inmate wage disputes fall under this policy. (R. p. 41).

Thus, the ALC's application of our Supreme Court's decision in *Wicker* to the Appellants' pre-existing prison industries pay claims is no different than the manner in which our Supreme Court applied prior judicial decisions to the operative facts in *Toth*, *Small*, *Simmons*, and *Wannamaker*. Thus, the ALC correctly determined in its "Level One" order that "prior to the Supreme Court's decisions in *Adkins* and *Wicker*, inmates could have submitted a grievance relating to their prevailing wage claims." (R. p. 41).

2. *Adkins* and *Wicker* cannot and do not apply both retrospectively and prospectively.

Contrary to the analysis they provided, the Appellants cannot support, either legally or logically, their argument that *Adkins* and *Wicker* retrospectively created grievance remedies by which they could seek vindication of past wrongs purportedly committed by SCDC regarding their prison industries pay but any limitations period associated with such grievance remedies, namely the fifteen day filing deadline from ¶13.1 of Policy GA-01.12 (R. p. 687), applies only prospectively. Stated another way, *Adkins* and *Wicker* cannot apply both retrospectively and prospectively to the Appellants' prison industries pay claims.

In addition, as the ALC's ruling that *Adkins* and *Wicker* apply retrospectively, which the Appellants do not appeal, is the law of the case, SCDC respectfully submits that this Court may dispense with the Appellants' first, third, fourth, and ninth arguments, because the Appellants, in each of these arguments, asserted that retrospective application of the fifteen day filing deadline from ¶13.1 of Policy GA-01.12 would be unfair.

C. THE ALC CORRECTLY RULED ON EACH OF THE NINE (9) ISSUES IDENTIFIED BY THE APPELLANTS

1. The ALC correctly ruled that *Adkins* and *Wicker* did not create new grievance and appeal remedies in the Appellants' favor.

As demonstrated above,⁴⁶ the ALC correctly ruled that the decisions issued by our Supreme Court on August 22, 2004 in *Adkins* and *Wicker* created no new grievance and appeal remedies in the Appellants' favor. Accordingly, under the applicable legal standard articulated above,⁴⁷ this Court should affirm the ALC's ruling on this issue.

2. The ALC correctly ruled that the Appellants' grievances did not concern "policies/procedures" under ¶13.9 from Policy GA-01.12.

In the second and eighth issues from their brief,⁴⁸ the Appellants assert that the ALC erred when it concluded the following: (1) their wage claims did not concern "policies/procedures" as defined and used in ¶13.9 (R. pp. 157 – 162); (2) their wage claims constituted "incident" grievances that must be filed within fifteen day time frame set forth in ¶13.1 (R. pp. 157 – 162); and (3) their wage claims were not timely filed if they were filed within fifteen days of the completion of a term of employment (R. pp. 176 – 177).

The ALC, after recognizing the long-standing legitimacy of Policy GA-01.12, determined that the fifteen day filing deadline from ¶ 13.1 is a statute of creation. (R. pp. 157 – 158). The ALC found that the Appellants' interpretation of the term "policies/procedures" as used in ¶13.9 was overly broad, because under their construction, ¶13.9's exception for "policies/procedures" would swallow the fifteen day deadline from ¶13.1. (R. pp. 158 – 159). The ALC also rejected

⁴⁶ See pp. 13 – 22 above.

⁴⁷ See pp. 8 – 10 above.

⁴⁸ See Appellants' Brief, pp. 11 – 20 and 39 – 44.

the Appellants' interpretation of "policies/procedures," because such an interpretation violates public policy.⁴⁹ (R. p. 159).

The ALC then adopted SCDC's interpretation of the term "policies/procedures," as the ALC determined that SCDC's interpretation is reasonable, consistent with SCDC's use of the term throughout Policy GA-01.12, and avoids the public policy problems inherent in the Appellants' construction of the term (R. p. 160):

[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."

In their arguments to this Court,⁵⁰ the Appellants merely repeat their broad interpretation of the terms "policies" and "procedures" without addressing the ALC's rejection of their definitions. Instead, the Appellants attempt to parse the ALC's words from its "Level One" order and discredit the ALC's interpretation of its "Level One" order that it provided in its "Level Two" order.⁵¹ (R. p. 40; R. p. 161).

For this reason alone, this Court should affirm the ALC's holding that the Appellants' wage claim grievances did not constitute "policy/procedure" grievances, and, as such, their grievances were subject to the fifteen day filing deadline from ¶13.1 (R. p. 687). *Al-Shabazz*, 527

⁴⁹ The Appellants reference dictionary definitions of the terms "policy" and "procedure." Specifically, the Appellants define "policy" as "the general principles by which a government is guided in its management of public affairs." They also define "procedure" as "the act or method of proceeding in action." See Appellants' Brief, p. 12. In essence, the Appellants contend that SCDC's contracts with private industry sponsors constitute SCDC policy. (R. pp. 720 – 731). Moreover, the Appellants contend that because they included the term "policy" within their grievances, the grievances in which they articulated prison industries pay claims constituted "policy/procedure" grievances.

⁵⁰ See Appellants' Brief, pp. 11 – 20.

⁵¹ *Id.*, p. 17.

S.E.2d at 755 (observing that under the APA, inmates must direct the court's attention to errors or abuses allegedly committed by the ALC. A mere expression of dissatisfaction with the ALC's ruling is not sufficient.).

The Appellants also fail to address the ALC's ruling that public policy calls for the application of some limitations period to the Appellants' wage claims, because SCDC has a legitimate interest in investigating grievances while they are still new. (R. p. 159). The fifteen day filing limit is the only limitation found within Policy GA-01.12, and, accordingly, it must be the time period applicable to the Appellants' wage claims. (R. p. 159). As the ALC explained, "[t]he importance of a filing deadline is underscored by the facts of this case." (R. p. 159).

The Record reveals that SCDC began paying some of the Appellants for their participation in the prison industries service project at Lieber in 1999, and it further reveals that no Appellant filed a wage related grievance prior to September 22, 2004, approximately five (5) years *after* SCDC first paid them.⁵² (R. pp. 4602 – 4631). Furthermore, a fifteen day filing period is consistent with other filing periods in this state.⁵³ Thus, the ALC correctly ruled that applying the fifteen day filing deadline from ¶13.1 to the Appellants' wage claims avoids the public policy problems of requiring SCDC to defend stale claims.

⁵² The Appellants suggest that SCDC is not harmed by their nearly five (5) year filing delay, because the Record consists of 3911 pages of inmate grievances. *See* Appellants' Brief, p. 47. Contrary to this assertion, the Appellants continue to criticize the accuracy and completeness of SCDC's records, and they argue that all ambiguities should be resolved in their favor. *See* Appellants' Brief, pp 39 – 40 ("[I]nmates contend the record does not show multiple terms of work, or at best the evidence is ambiguous.").

⁵³ *See e.g.* § 40-11-100 ("An entity or individual assessed administrative penalties may appeal those penalties to the board within fifteen days of receipt of the citation."); § 11-35-3220(3) ("The date for submission of information from interested persons or firms in response to an invitation must not be less than fifteen days after publication of the invitation."); § 59-25-470 ("Within fifteen days after receipt of notice of suspension or dismissal, a teacher may serve upon the chairman of the board or the superintendent a written request for a hearing before the board.").

The ALC also correctly determined that pursuant to ¶13.1, the Appellants must submit their grievance within fifteen days of the alleged "incident," and the fifteen day time frame from ¶13.1 began to run when SCDC informed the Appellants of their wage. (R. pp. 162 – 177). The ALC's determination is consistent with public policy as well as the decision in *Wallace v. Burbury*, 305 F. Supp. 2d 801 (N.D. Ohio 2003).

In *Wallace*, 305 F. Supp. 2d at 806, the federal court considered the timeliness of an inmate's grievance that the inmate filed more than fourteen days after the inmate learned of the prison's decision to deny his religious accommodation. Specifically, the inmate argued that even though he learned the prison denied his religious accommodation request a week before the week-long Passover holiday, his grievance, which he filed eleven days after the last day of Passover, was timely because his rights were continuously violated each day of the Passover event. The *Wallace* Court rejected the inmate's argument because "[t]o allow a filing deadline to toll with a continuous violation ... would undermine the very purpose of the deadline, which is to limit the time to file a claim." *Id.* The *Wallace* Court also determined that the event giving rise to the grievance arose on the date the inmate learned that prison would not honor his request for a religious accommodation.

Like the inmate in *Wallace*, the Appellants should have, under ¶13.1, filed their wage grievances within fifteen days after SCDC informed each of them of its decision to pay them a specific wage, i.e., when SCDC first paid the Appellants. Similar to the operative deadline in *Wallace*, the purpose of ¶13.1's fifteen day deadline is to limit the time to file a claim. (R. p. 178).

The Appellants attempt to distinguish *Wallace* by relying on principles from employment and wage law, including *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007),

superseded by statute, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. Critically, however, the Appellants failed to raise these arguments before the ALC. *Herron v. Century BMW*, 719 S.E.2d 640, 642 (S.C. 2011), *cert. denied*, 132 S. Ct. 2436 (2012) “(It is axiomatic that an issue cannot be raised for the first time on appeal.”) (internal citations omitted); *State v. Dunbar*, 587 S.E.2d 691, 694 (S.C. 2003) (“A party may not argue one ground at trial and an alternate ground on appeal.”).

In addition, unlike traditional employment and wage laws, *Adkins*, 602 S.E.2d at 54, held that § 24-3-430 was not enacted for the special benefit of inmates, like the Appellants. As the ALC recognized, Policy GA-01.12 has been approved by our Supreme Court in *Al-Shabazz*. 527 S.E.2d at 752 (“We hold that [SCDC’s] disciplinary and grievance procedures are consistent with the standards delineated by the Supreme Court in [*Wolff v. McDonnell*, 418 U.S. 539 (1974)]. We note that [SCDC] also prepared its grievance procedures in compliance with the Civil Rights of Institutionalized Persons Act.”). (R. p. 157).

Thus, for the reasons articulated above, the ALC correctly concluded the following: (1) the Appellants’ wage claims do not constitute grievances concerning “policies/procedures” under ¶13.9 (R. p. 162); (2) their wage claims constitute “incident” grievances, and, as such, they must have been filed within the fifteen day timeframe set forth in ¶13.1 (R. p. 162); and (3) their wage claims were not timely filed if they were filed within fifteen days of the completion of a term of employment. (R. p. 176).

3. **The ALC correctly ruled that the Appellants did not have reasonable cause under ¶13.9 by which they did not have to comply with the fifteen day filing deadline from ¶13.1.**

As demonstrated above,⁵⁴ the ALC correctly ruled that the Appellants did not have reasonable cause, as contemplated under ¶13.9 of Policy GA-01.12 (R. p. 689), by which they did not have to comply with ¶13.1's fifteen day filing deadline (R. p. 687). Accordingly, under the applicable legal standard articulated above,⁵⁵ this Court should affirm the ALC's ruling on this issue.

4. **The ALC correctly ruled that SCDC did not violate the Appellants' right to due process by applying the fifteen day filing deadline from ¶13.1 to their grievances.**

As demonstrated above,⁵⁶ the ALC correctly ruled that SCDC did not violate the Appellants' due process rights when it applied the fifteen day filing deadline from ¶13.1 of Policy GA-01-12 to the Appellants' grievances (R. p. 687). Accordingly, under the applicable legal standard articulated above,⁵⁷ this Court should affirm the ALC's ruling on this issue.

5. **The ALC correctly ruled that SCDC did not waive ¶13.1.**

In the fifth issue from their brief,⁵⁸ the Appellants assert that the ALC erred when it rejected the all three (3) of their arguments which supporting their assertion that that SCDC waived the fifteen day deadline: (1) the language from ¶ 13.1, from ¶13.9 and from the Step 1 instructions is inconsistent with SCDC's assertion of the fifteen day filing deadline; (2) for 153 of the Appellants, SCDC did not raise the fifteen day deadline in the response it provided to their

⁵⁴ See pp. 13 – 22 above.

⁵⁵ See pp. 8 – 10 above.

⁵⁶ See pp. 13 – 26 above.

⁵⁷ See pp. 8 – 10 above.

⁵⁸ See Appellants' Brief, pp. 28 – 29.

Step 1 grievance; and (3) SCDC considered the merits of their grievances before it invoked the fifteen day deadline.⁵⁹ (R. pp. 166 – 170).

As the ALC explained, “[w]aiver is a voluntary and intentional abandonment or relinquishment of a known right.” *Eason v. Eason*, 682 S.E.2d 804, 807 (S.C. 2009) (quoting *Parker v. Parker*, 443 S.E.2d 388, 391 (S.C. 1994)). (R. p. 166). Waiver may be either express or implied. *Lvles v. BMI, Inc.*, 355 S.E.2d 282, 285 (S.C. Ct. App. 1987). Acts that are inconsistent with the continued assertion of a right may give rise to a waiver. *Provident Life and Ace. Ins. Co. v. Driver*, 451 S.E.2d 924, 928 (S.C. Ct. App. 1994). Waiver is an affirmative defense, and the party asserting it has the burden of proof. *Id.* at 929. (R. pp. 166 – 167).

- a) The ALC correctly ruled that the language from ¶13.1, from ¶13.9, and from the Step 1 grievance form is not inconsistent with SCDC’s intent to apply the fifteen day filing deadline.⁶⁰

As explained above, ¶13.1 requires inmates to file grievances within fifteen days of an alleged “incident,” but ¶13.9 provides exceptions to the fifteen day deadline from ¶13.1 (R. p. 689):

Exceptions to the 15 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].

⁵⁹ *Id.*, pp. 27 – 32.

⁶⁰ SCDC respectfully asserts that the Appellants’ argument on this point only makes sense if their wage claims constituted “policy/procedure” grievances and then SCDC improperly applied the fifteen day filing deadline to their grievances. Should this Court affirm the ALC’s decision on this point and determines that the Appellants’ grievances did not concern “policies/procedures,” SCDC respectfully submits that it should dismiss the Appellants’ instant issue on appeal.

As determined by the ALC, the above provisions of the operative policy and the Step 1 form are clear and unambiguous. See e.g. *Ward v. West Oil Co., Inc.*, 692 S.E.2d 516, 519 (S.C. 2010). (R. p. 167). Per the pre-printed form and ¶13.1,⁶¹ inmates must file their Step 1 grievances within fifteen days of any alleged "incident." The only exceptions to this deadline arise under "policy" grievances per the Step 1 form and ¶13.9 or when an inmate requests, and receives, a "reasonable cause" exception per ¶13.9.⁶²

Nothing about the interplay between the form's instructions, ¶ 13.1, and ¶ 13.9 was or is confusing, misleading, or contradictory as suggested by the Appellants. SCDC exercised no control or influence over the Appellants' understanding of these provisions. Absolutely nothing in the operative policy or in the language from the pre-printed Step 1 form suggested that an inmate's prison industries pay claims constitute "policy" issues and that a Step 1 grievance presenting such "policy" issues would be exempt from any filing deadline. The Appellants cannot now blame their defective interpretation of these provisions of Policy GA-01.12 on anyone other than themselves.

Thus, the ALC correctly determined that by including the fifteen day filing deadline for incident grievances within the operative policy and Step 1 grievance form,⁶³ and by "providing

⁶¹ The instructions on the preprinted Step 1 form provided as follows: "State Grievance (include documentation, and date of incident; if SCDC Policy, indicate which policy)." (R. p. 314). Further instructions on the form provided as follows: "Submit the completed form to the Institutional Grievance Coordinator within fifteen (15) days of an alleged incident; policy grievances at any time." (R. p. 315).

⁶² As explained above, the ALC correctly determined that the Appellants' grievances did not constitute "policy/procedure" grievances, and they did not request, or receive, an exception to the fifteen day filing deadline for this or any other reason.

⁶³ Policy GA-01.12 and the Step 1 grievance form existed before many of the Appellants began participating in the prison industry project at Lieber. By their argument, SCDC waived its right to assert the fifteen day deadline *before* the Appellants' purported right to the so-called "prevailing wage" accrued. If such an assertion is correct, then, essentially, SCDC could never invoke the fifteen day filing deadline.

an exception to the fifteen-day filing deadline, [SCDC] did not waive its right to invoke the fifteen-day deadline for cases falling outside that exception.” (R. p. 167).

- b) **The ALC correctly ruled that SCDC did not waive the fifteen day deadline by not raising timeliness in some of its responses to the Appellants’ Step 1 grievances.**

In the fifth issue from their brief,⁶⁴ the Appellants also assert that the ALC erred when it concluded that SCDC did not waive the fifteen day deadline by not raising timeliness in its responses to some of to the Appellants’ Step 1 grievances.

The ALC, after reviewing the operative provisions from Policy GA-01.12 (R. pp. 682 – 691), examining *Friends of Potter Marsh v. Peters*, 371 F.Supp. 2d 1115 (D. Alaska 2005) and then distinguishing *Ross v. County of Bernalillo*, 365 F.3d 1181 (10th Cir. 2004),⁶⁵ *abrogated in part by Jones v. Bock*, 549 U.S. 1999 (2007), correctly determined that SCDC is an administrative agency, and, as such, it possesses the inherent authority by which to reconsider a prior decision which is not final. 2 Am. Jur., 2d Administrative Law § 468 (updated Nov. 2011). (R. pp. 167 – 168).

Step 1 grievances “provide[d] a vehicle for internal solutions at the level having most direct contact with the inmate,⁶⁶” and they were reviewed at the institutional level. Per ¶ 13.1 (R. p. 687), an inmate completed a Step 1 grievance form in which he articulated the basis of his complaint, and he then had to submit that form to the employee designated by the Warden within

⁶⁴ See Appellants’ Brief, pp. 29 – 30.

⁶⁵ The Appellants contend that the ALC misunderstood their reliance on *Ross*. Specifically, they contend that they relied on *Ross* in support of their third, and not their second, waiver argument. See Appellants’ Brief p. 30. Consequently, the Appellants do not to challenge the ALC’s interpretation of *Ross* on their second waiver argument.

⁶⁶ The first page of Policy GA-01.12 provided a “Policy Statement” which read as follows (R. p. 682): “At a minimum, the grievance system will be designed to provide inmates with a mechanism by which they may seek formal review of their complaints; provide a vehicle for internal solutions at the level having most direct contact with the inmate [Step 1 level]; and provide a means for management review of staff decisions and policies/procedures that may be the source of a complaint [Step 2 level].”

fifteen days of the alleged "incident." Per ¶¶5 and 13.2 (R. pp 684 and 687), the responsible agency official, upon receipt of the Step 1, conducted a complete investigation and made recommendations to the Warden. Per ¶ 13.3 (R. p. 687), the Warden responded "in writing ... indicating in detail the rationale for the decision rendered and any recommended remedies." [emphasis supplied]. Per ¶ 10 (R. p. 686), the Warden did not have the authority to resolve the claims articulated within the Step 1; instead, the Warden could only made recommendations regarding the remedies sought by the inmate.⁶⁷ (R. pp. 167 – 168).

If the inmate was unsatisfied with the response he received at the institutional level, he could have appealed, under ¶ 13.4 and ¶ 13.5, by filing a "Step 2" appeal form and sought a final agency decision (R. p. 688):

13.4 Appeals to the Responsible Official: If the grievant is not satisfied with the decision of the Warden, the grievant may next appeal to the *Division Director of Operations* for final resolution of the grievance. Matters under the administrative jurisdiction of the Department Director and which do not come within the scope of authority/responsibility of [a] *Division Director of Operations* may be appealed to the appropriate Officer Director or Division Director for final review of the grievance. ...

13.5 Appeal Process: The grievant may appeal by completing the SCDC Form 10-5a, Step 2, and submitting this form,⁶⁸ as well as the completed copies of Step 1, to the Institutional Inmate Grievance Coordinator within five (5) *calendar* days of the receipt of the response by the grievant. ... The Inmate Grievance Branch will confirm receipt of the appeal, conduct any further investigation necessary, prepare a report, and present all available information to the responsible official. The responsible official will render the final decision on the grievance within 60 days from the date that the Institutional Inmate Grievance Coordinator received the appeal of the Warden's decision. ... The

⁶⁷ Per ¶9 (R. p. 686), the Warden did not have the authority to determine whether a questionable issue is grievable or not. Furthermore, the Warden did not possess the authority to award the relief demanded by the Appellants, namely back pay, interest, costs and attorney's fees.

⁶⁸ The Step 2 appeal form stated as follows (R. p. 318): "The decision rendered by the responsible official exhausts the appeal process of the Inmate Grievance Procedure. I hereby acknowledge receipt of the official's response and understand this is the Agency's final response to this matter." [emphasis supplied]. Similar language also appeared on the instructions for completing the Step 2 appeal form: "The decision rendered by the responsible official exhausts the appeal process of the SCDC Inmate Grievance Procedure."

response of the responsible official will be the Department's final response in the matter. Any action required to implement the Department's final response will require no additional signatures/approval. The Department's final response implies the Department Director's approval. [emphasis supplied].

The ALC, after reviewing ¶¶13.4 and 13.5, concluded that the final decisions concerning the issues associated with the Appellants' grievances were rendered by the responsible official at the agency level, not the Warden. (R. p. 168). The Warden's responses to the Appellants' Step 1 grievances constituted merely a recommendation regarding the disposition of the prison industries pay claims raised therein, and it did not constitute SCDC's final decision. As the Warden's response to the Appellants' Step 1s constituted only a recommendation, the Warden could not and did not "waive" any potential defense, procedural or substantive, held by SCDC. The official's response to the Step 2 appeal constituted the final agency decision. As the appropriate agency official asserted the fifteen day filing deadline in SCDC's final decisions, the Appellants' contention is without merit. (R. p. 168).

In *Peters*, environmental groups challenged the Federal Highway Administration's ["FHWA"] assessment of environmental impacts on recreational trails. Amongst the plaintiffs' challenges was the Secretary of Transportation's waiver of a statutory provision. The government moved to dismiss the complaint, because the FHWA had not issued a final agency action and only final agency actions are subject to review under the federal Administrative Procedures Act. Ultimately, the *Peters* Court agreed and dismissed the action finding that the plaintiffs' action was premature and the court lacked jurisdiction to consider the matter. In reaching its decision, the *Peters* Court observed that prior to the issuance of the agency's final decision, the agency may change or modify its decision. *Peters*, 371 F.Supp. 2d at 1120.

The ALC reasoned that in *Ross*, the Tenth Circuit Court of Appeals concluded that because the prison accepted the inmate's complaint and provided the inmate a requested remedy, the inmate exhausted his administrative remedies. (R. p. 169). The *Ross* court relied on the fact that nothing in the record suggests that the prison treated the inmate's complaint as untimely and the inmate received a favorable response to his complaint. The ALC distinguished *Ross*, because unlike in the present case, SCDC did, in fact, raise timeliness as an issue before the Appellants appealed the denial of their grievances to the ALC.⁶⁹

The Appellants attempt to distinguish *Peters*,⁷⁰ however, they do not distinguish or call into question the ALC's reliance on *Peters* for the proposition that an administrative agency may amend or modify its decisions before they are final.

As the ALC correctly pointed out, the legislative guidance at issue in *Peters*, like SCDC's responses to the Appellants' the Step 1 grievances, were not final agency decisions. (R. p. 169). As in *Peters*, the ALC lacked jurisdiction over attempts by inmates to appeal SCDC's denial of their Step 1 grievances to the ALC. Thus, similar to the court's observation in *Peters*, SCDC retained the right to change or modify the Step 1 responses before it issued its final agency decision in the form of a Step 2 response.

⁶⁹ See note 60 above.

⁷⁰ See Appellants' Brief, pp. 30 – 32.

- c) The ALC correctly ruled that SCDC did not waive the fifteen day deadline by denying some of the Appellants' grievances for timeliness reasons as well as the grievances' merits.

Within the fifth issue from their brief,⁷¹ the Appellants further assert that the ALC erred when it concluded that SCDC did not waive the fifteen day filing deadline in the 32 Step 1 responses and 136 Step 2 final agency decisions at issue; by both having raised the fifteen day filing deadline and rejecting the merits of the Appellants prevailing wage claims. (R. p. 170). Specifically, the Appellants contend that *Ross and Pozo v. McCaughtry*, 286 F.3d 1022 (7th Cir. 2002) support their assertions and that the ALC overlooked their arguments related to the issues they raised to the circuit court in *Williams*.

The ALC explained that in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), the U.S. Supreme Court considered whether a state post-conviction petition that the state court had rejected as untimely could nonetheless be considered properly filed for the purposes of the tolling provision of 28 U.S.C. § 2244(d)(2). (R. p. 170, n. 10). Ultimately, the *Pace* Court held:

[T]ime limits, no matter their form, are "filing" conditions. Because the state court rejected petitioner's PCRA petition as untimely, it was not 'properly filed' ..." *Id.*, at 417; see also *Carey v. Saffold*, 536 U.S. 214, 226 (2002) (holding that if a state court clearly ruled that a prisoner's application for collateral review was untimely, then "that would be the end of the matter" for federal purposes, "regardless of whether [the state court] also addressed the merits of the claim, or whether its timeliness ruling was 'entangled' with the merits.>").

The ALC rejected the Appellants' invocation of *Pozo* by stating that in light of *Pace*, "it is unwilling to rely upon any federal circuit court decision holding that a document dismissed as both untimely and unmeritorious is properly filed." (R. p. 170, n. 10). The Appellants fail to address the ALC's examination and reliance on *Pace* or its impact on *Pozo* within their brief to this Court.

⁷¹ *Id.*, pp. 29 – 30.

As to the Appellants' argument that the ALC overlooked the arguments they raised to the circuit court in *Williams*, SCDC respectfully submits that the materials the Appellants cite in support their arguments do not appear in the Record, and, accordingly, both these materials and the argument articulated by the Appellants therefrom are not properly before this Court.⁷² SCACR 210(h) ("the appellate court will not consider any fact which does not appear in the Record on Appeal."). SCDC further submits that because the ALC did not rule on or consider the Appellants' argument, this issue is not properly preserved for this Court's review. *Dunbar*, 587 S.E.2d at 693-94 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

For all the reasons articulated above, this Court should affirm the ALC's ruling that SCDC did not waive the fifteen day filing deadline.

6. The ALC correctly ruled that SCDC was not equitably estopped from applying the fifteen day filing deadline from ¶13.1.

In the sixth issue from their brief,⁷³ the Appellants assert that the ALC erred by ruling that SCDC was not equitably estopped from raising the fifteen day filing deadline from ¶13.1 (R. p. 687).

As the ALC explained, the elements of equitable estoppel are divided between the estopped party and the party claiming estoppel. (R. pp. 171 – 172). Specifically, the elements related to the party being estopped are: "(1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that

⁷² See note 9 above.

⁷³ See Appellants' Brief, pp. 33 – 35.

such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts.” *Strickland v. Strickland*, 650 S.E.2d 465, 470 (S.C. 2007). “The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped.” *Id.*

The ALC, relying on *Kleckly v. Nw. Nat. Cas. Co.*, 526 S.E.2d 218, 220 (S.C. 2000),⁷⁴ further explained that “a party may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute was induced by the party’s conduct.” (R. pp. 171 – 172). Inducement “may consist of an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary.” *Id.* A defendant’s conduct may induce “the plaintiff either to believe that an amicable adjustment of the claim will be made without suit or to forbear exercising the right to sue.” *Id.*

As observed by the ALC, the Appellants’ equitable estoppel argument is based solely on the language in ¶13.9 of Policy GA-01.12 and the instructions printed on the Step 1 grievance form. Specifically, the Appellants contend they and their counsel “believed” that their prevailing wage grievances concerned SCDC’s “policies/procedures” and could be filed at any time.⁷⁵

⁷⁴ The Appellants contend that the ALC erred by relying on the elements set forth in *Strickland*. Instead, they assert that *RWE Nukem Corp. v. ENSR Corp.*, 644 S.E.2d 730 (S.C. 2007), and *Kleckly* announce the proper test for considering equitable estoppel in a statute of limitations case. See Appellants’ Brief, p. 34. The Appellants apparently missed the ALC’s explanation of *Kleckly* and the ALC’s application of *Kleckly* to their case. (R. pp. 171 – 172). Also, the Appellants merely point to the following observation in *RWE Nukem*, 644 S.E.2d at 734, as the purported equitable estoppel test: “A defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant’s conduct.” Moreover, the Appellants fail to identify any aspect of *Strickland* that is inconsistent with *RWE Nukem* or that is otherwise misapplied to their case.

⁷⁵ See Appellants’ Brief, p. 33.

As the ALC correctly explained, the language in ¶13.1 (R. p. 687) and the Step 1 instructions (R. pp. 314 – 315) informed all inmates, including the Appellants, of the different time periods for filing different types of grievances. (R. p. 172). Both ¶13.1 and the Step 1 instructions clearly notified the Appellants that “incident” grievances had to be filed within fifteen days.

No evidence in the Record remotely suggests that SCDC, through its words or actions, influenced in any way the manner in which the Appellants interpreted ¶13.1 or the Step 1 form, induced the Appellants into believing their prevailing wage grievances concerned SCDC policies/procedures and could be filed at any time, or induced the Appellants into believing that filing a grievance was unnecessary. (R. p. 172).

The Appellants alone misinterpreted the filing deadline, and they cannot now blame their defective interpretation of the operative materials on anyone other than themselves.⁷⁶ Consequentially, their argument fails, and SCDC respectfully submits that the ALC correctly determined that SCDC is not equitably estopped from applying the fifteen day deadline in ¶13.1.

7. The ALC correctly ruled that the fifteen day filing deadline from ¶13.1 was not tolled when the Appellants filed their class action lawsuit styled as *Williams*.

In the seventh issue from their brief,⁷⁷ the Appellants assert that the ALC erred when it concluded that the fifteen day filing deadline from ¶13.1 was not tolled when the Appellants filed their class action lawsuit, styled as *Williams*, on January 29, 2002. (R. p. 175).

The ALC reached this conclusion by the following analysis: (1) *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the case relied upon by the Appellants, was distinguishable from

⁷⁶ No evidence exists that any of the Appellants, or their counsel, ever asked SCDC whether a prevailing wage claim constituted an “incident” grievance or a policy grievance. (R. p. 172, n. 11).

⁷⁷ See Appellants’ Brief, pp. 35 – 39.

the facts of this case; (2) South Carolina Rule of Civil Procedure ["SCRCP"] 23 was not applicable to SCDC's inmate grievance system established under Policy GA-01.12; and (3) the fifteen day filing deadline had already passed for a significant number of the Appellants by they filed *Williams*.

In *Crown*, the U.S. Supreme Court held that the running of the ninety-day statutory period within which the plaintiff was required to commence an employment discrimination lawsuit was tolled during the time the class action was pending in which he was a putative class member. The *Crown* Court further held that because the plaintiff did not receive his right to sue notice until after the class action was filed, the plaintiff had the full ninety days to file his lawsuit after the class certification was denied. (R. pp. 175 – 176). The tolling principle announced in *Crown*, 462 U.S. at 352 – 53, was based upon Federal Rule of Civil Procedure ["FRCP"] 23, which is entitled "Class Actions."⁷⁸

⁷⁸ *Crown* dealt with the prerequisites to filing a Title VII race discrimination lawsuit. Under the Title VII scheme, a complainant must exhaust his administrative remedies before filing a Title VII discrimination lawsuit. Specifically, a complainant must file an administrative charge of discrimination with the EEOC within 180 days of the purported unlawful employment action, or within 300 days in a deferral state. The charge of discrimination determines the scope of any subsequent lawsuit. The complainant cannot file a lawsuit until he receives a right to sue notice from the EEOC, or the state deferral agency. A complainant then has ninety days from his receipt of the right to sue notice to file a lawsuit.

Thus, in *Crown*, the plaintiff had already met the first administrative hurdle of timely filing his administrative charge of discrimination. While waiting for his right to sue notice, which would start the ninety day period to file his lawsuit, the plaintiff joined a class action lawsuit. The *Crown* Court held that because the class action was filed before the right to sue notice was issued (before his right to sue accrued), the ninety day period to file the lawsuit had not begun to run. Thus, the plaintiff in *Crown*, had the full ninety days following the dismissal of the class action lawsuit to file a discrimination lawsuit based on Title VII. The issue in *Crown* was not whether the federal court was the proper forum to consider the plaintiff's claims, but whether, based on the chronology and FRCP 23, the plaintiff's lawsuit was time barred.

Unlike in *Crown*, the Appellants had not begun the process by which they administratively challenged their wages or otherwise preserve their claims. The Record reveals that the first filing of any type by the Appellants by which they challenged their wages was their class action lawsuit styled as *Williams*. The Appellants had not filed a grievance with SCDC, as would typically be required under the Prison Litigation Reform Act, to exhaust their administrative remedies. The plaintiff in *Crown* had a right to file an individual lawsuit in federal court to assert employment discrimination claims once he received his right to sue notice. The Appellants, as recognized in *Adkins*, *Wicker* and *Williams*, never had a right to file a lawsuit in circuit court by which they could challenge their wages. Rather, under *Wicker*, the proper forum for them to challenge their wage claims is through Policy GA-01.12. The issue in *Adkins* and *Williams* was not whether the circuit court could consider the inmates' claims if they were

The ALC distinguished *Crown* from *Williams*, because the Appellants' class action lawsuit in *Williams* did not fail by a decision from the circuit court which refused to certify the Appellants and other inmates as a class. Instead, the circuit court dismissed the Appellants' class action in *Williams* only after our Supreme Court, in *Adkins*, declared that inmates did not, under § 24-3-430(D), possess a private cause of action by which to assert a prevailing wage claim. (R. p. 175). Our Supreme Court, in *Williams*, affirmed the circuit court's dismissal of the entirety of the Appellants' class action. The ALC further concluded that tolling the Appellants' claims "would require the [ALC] to conclude that the Appellants were justified in relying upon the 2002 class action to protect their rights." (R. p. 176).

The Appellants apparently do not dispute the ALC's finding that *Crown* is distinguishable from the present case.⁷⁹ Instead, they meekly state, without explanation, that tolling principle announced in *Crown* should apply to the grievances they filed with SCDC "to promote the Rule 23 goal of economy of litigation."⁸⁰ SCDC respectfully submits that applying the fifteen day deadline from the date of the incident is consistent with the overall objective of its inmate grievance system. See e.g. *Jones*, 549 U.S. at 219.

timely, but whether the circuit court could consider the inmates claims at all. Clearly, the facts and legal issues in *Crown* are distinguishable from the present case.

Applying the tolling provisions in *Crown* to the Appellants' case would be analogous to the court in *Crown* holding that the initial time period, whether 180 or 300 days, for the plaintiff to file his initial charge of discrimination, was tolled because he joined a class action lawsuit *after* the deadline to file his charge had past. If *Crown* were to apply to the inmates in *Williams*, it would conceivably allow individual inmates to file individual lawsuits in the circuit court. However, in *Adkins* and later in *Williams*, our Supreme Court ruled that inmates had no private right of action in circuit court, and, therefore, the appropriate forum for the Appellants and other inmates was and remains Policy GA-01.12.

⁷⁹ See Appellants Brief, p. 37.

⁸⁰ *Id.*

The ALC also correctly determined that FRCP 23 does not apply to Policy GA-01.12 and that no similar rule allows inmates to file class grievances with SCDC. (R. p. 176). This reality is reflected within the federal and state rules of civil procedure.

Specifically, SCRCP 1 is entitled "Scope of Rules,"⁸¹ and it states as follows:

These rules govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81.⁸² They shall be construed to secure the just, speedy, and inexpensive determination of every action.

SCDC's inmate grievance system, comprised by Policy GA-01.2, is not a South Carolina court. *See also Jones*, 549 U.S. at 219. Therefore, the rules of procedure do not apply. Similarly, critical provisions of the ALC Rules of Procedure and the Administrative Procedures Act do not apply to SCDC's inmate grievance system. *Al-Shabazz*, 527 S.E.2d at 753, 757 (declining to apply certain APA provisions and ALC contested case rules to administrative matters decided by SCDC and observing that "Courts traditionally have adopted a 'hands off' doctrine regarding judicial involvement in prison disciplinary procedures and other internal prison matters.").

Therefore, as the rule announced in *Crown* is derived from the federal rules, and the federal rules,⁸³ like critical provisions of our state rules, are inapplicable to SCDC's inmate

⁸¹ *Crown* was litigated in federal court, and, thus, the Federal Rules of Civil Procedure applied. The Appellants assert that their class action styled as *Williams* is based upon SCRCP 23, "a rule very similar to FRCP 23." *See Appellants' Brief*, p. 37.

⁸² SCRCP 81 is entitled "applicability," and it states as follows:

These rules, or any of them, shall apply to every trial court of civil jurisdiction within this state, within the limits of the jurisdiction and powers of the court provided by law, and the procedure therein shall conform to these rules insofar as practicable. They shall apply insofar as practicable in magistrate's courts, probate courts, and family courts to the extent they are not inconsistent with the statutes and rules governing those courts. In any case where no provision is made by statute or these Rules, the procedure shall be according to the practice as it has heretofore existed in the courts of this State.

⁸³ FRCP 1 is entitled "scope and purpose" and, like SCRCP 1, it provides as follows:

grievance system, *Crown* does not impact the applicable time frame by which the Appellants were required to file their grievances.

Furthermore, the ALC accurately recognized that a significant number of the Appellants were paid for their participation in prison industries project long before, in some cases years before, they filed their class action styled as *Williams*.⁸⁴ (R. p. 176). Thus, the fifteen day filing deadline had already passed by the time the Appellants filed their class action in 2002. SCDC respectfully submits that no component of the decision in *Crown* held or otherwise concluded that the tolling provision from FRCP 23 would revive stale claims. Moreover, applying the tolling provisions discussed in *Crown* to the Appellants' instant grievances would be analogous to the *Crown* Court holding that the initial time period, whether 180 or 300 days, for the plaintiff to file his initial charge of discrimination, was tolled, because he joined a class action lawsuit *after* the deadline to file his charge had passed.

Consequently, this Court should affirm the ALC's conclusions that *Crown* is distinguishable from the present case, that the rules of civil procedure do not apply to SCDC's internal grievance system comprised by Policy GA-01.12, and that the Appellants did not toll the fifteen day filing deadline from ¶13.1 when they filed their class action styled as *Williams* on January 29, 2002.

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

⁸⁴ The Appellants conceded the ALC's conclusion by stating "there are some 80 inmates who started work within fifteen days of January 29, 2002 (or after), the effective date of their class action." See Appellants' Brief, p. 38.

8. **The ALC correctly ruled that the Appellants were required, under ¶13.1, to file their prison industries pay grievances within fifteen days of their initial pay date.**

As demonstrated above,⁸⁵ the ALC correctly ruled that the Appellants were required, under ¶13.1 of Policy GA-01.12 (R. p. 687), to file their prison industries pay grievance within fifteen days of their initial pay date. Accordingly, under the applicable legal standard articulated above,⁸⁶ this Court should affirm the ALC's ruling on this issue.

9. **The ALC correctly ruled that the Appellants did not comply with the fifteen day filing deadline established by ¶13.1.**

As demonstrated above,⁸⁷ the ALC correctly ruled that the Appellants failed to comply with the fifteen day filing deadline established by ¶13.1 of Policy GA-01.12 (R. p. 687). Accordingly, under the applicable legal standard articulated above,⁸⁸ this Court should affirm the ALC's ruling on this issue.

D. SCACR 208(b)(2) AND 220(c)

As provided by SCACR 208(b)(2) and 220(c), SCDC also, for the foregoing reasons, respectfully reminds this Court that it may affirm the entirety of the two (2) orders issued by the ALC in the instant consolidated matter "upon any ground(s) appearing in the Record on Appeal."

CONCLUSION

Therefore, for the foregoing reasons, SCDC respectfully urges this Court to affirm each of the ten rulings issued by the ALC in its "Level One" and "Level Two" orders.

⁸⁵ See pp. 30 – 32 above.

⁸⁶ See pp. 8 – 10 above.

⁸⁷ See pp. 28 – 32 above.

⁸⁸ See pp. 8 – 10 above.

RESPECTFULLY SUBMITTED,

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Columbia, South Carolina
November 6, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Dock. Nos. 07-ALJ-04-00444-AP, 07-ALJ-04-00445-AP, 07-ALJ-04-00446-AP,
07-ALJ-04-00447-AP, 07-ALJ-04-00448-AP, 07-ALJ-04-00449-AP,
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 Michael Benninger, #264212, Fredrick Brown, #289602, Timothy Brown, #238461,
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 Dennis Goff, #177506, Gregory Grant, #109656, Nelson Hampton, #286427,
 James Hartman, #219770, Gary Hayes, #263985, Michael Hood, #279897,
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 Herbert McFadden, #184297, Michael McFarland, #266870, Earl Mack, #216237,
 John Moultrie, #276527, Martin Muntaqim, #142282, Tony Pitts, #280579,
 Germaine Pringle, #250390, Gene Richardson, #93614, Dennis Richey, #233472,

* Docket No. 07-ALJ-04-00826-AP is probably assigned to an unrelated case. See June 8, 2012 letter to the ALC with copy to the Court of Appeals. The number remains in this caption because it appears in the ALC Second Amended Order caption, line 6, and has not yet been deleted by the Court of Appeals.

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,
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 Edward Bryant, #255998, Sherman Austin, #300028, Michael Baylor, #265682,
 Taurus Bowman, #252745, Kenneth Carter, #243538, Calvin Drummond, #236322,
 David Peggins, #287157, Terry Ferguson, #299080, Willie House, #257820,
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 Gary Grooms, #283860, Wayne Harlen, #245705, Johnny Hayes, #267910,
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 Bobby Williams, #261486, Ray Wells, #173651, Rodney Pressley, #177947,
 Keith Kelly, #257556, Maxie Gamble, #254413, James Enriquez, #215539,
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 Derrick Williams, #272958, Kenneth White, #228409, James Trumper, #247429,
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 Virgil Simpson, #281888, Edward Simpson, #220017, Kenneth Simmons, #278911,
 George Shine, #292391, Ralph Sellers, #164295, Laron Richardson, #258786,
 Frank Patterson, #283098, Tony McNeil, #235846, Larry McClam, #282972,
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Darryel Beasley, #222388, Curtis Thompson, #266448, Baron Cobbs, #280479,
James Tino, #145030, Harold Roberson, #117001, Ray Gadsden, #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

REPLY BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

The Department of Corrections (SCDC) accepts the Statement of Issues made by Appellants (inmates) in their Amended Initial Brief (Inmates' Brief, 1-2; SCDC Brief, 1). Therefore, inmates contend SCDC is bound by those issues (Lanford v. West Oakwood Cemetery Addition 75 S.E. 2d 865, 867 (S.C., 1953); S.C. Juris. (1992), App. & Error, §93). This reply brief will address SCDC's points under the issue number and in the order presented in inmates' brief.

STATEMENT OF THE CASE

SCDC notes inmates did not appeal the ALC August 5, 2011 order denying their May 23, 2011 motion to supplement the ALC record with documents they have designated for this Court's record, and SCDC has filed a motion to strike (SCDC Brief, 7, n. 9). Inmates contend the ALC order was not appealable, and they presented these documents to the ALC in their motion and in their September 13, 2011 ALC Level Two brief, as to be described in their response to the motion to strike (Inmates' 5-23-11 ALC motion to supplement with Exhibits 1 and 2 (with proposed documents); 9-13-11 ALC brief with Appendices 1 and 2 (with proposed documents); R. pp. 4278-4498, 4636-5062).

ARGUMENT

1. The Adkins and Wicker decisions created new grievance and appeal remedies for inmates' pre-existing right to prevailing wages.

SCDC analogizes its denial of inmates' grievances to its denial in Bennie Wicker, #122304 v. SCDC Dock. No. 00-ALJ-04-00781-AP, Aug. 13, 2001 (SCDC Brief, 15, n. 28). In Wicker, SCDC contended Wicker's grievance was not even grievable (Inmates' Brief, 7). Here, SCDC takes the opposite position (SCDC Brief, 16).

SCDC contends there is no evidence of an appellant filing a step 1 grievance before September 22, 2004 or of such grievance being summarily dismissed by SCDC or appealed to the ALC (SCDC Brief, 16, n. 31). Inmates respectfully disagree, and refer to the 2004 step 1 of appellant Darrell Williams which discusses his 2001 step 1 dismissed by the ALC for "want of jurisdiction" (Inmates' Brief, 8; Darrell Williams' 9-22-04 step 1; Williams' 1-11-01 step 1 and SCDC response; Williams' 6-26-01 step 2 and SCDC final decision; and 12-5-01 ALC dismissal; R. pp. 10, 305, 308, 4115).

SCDC makes various contentions about McNeil and Sullivan (SCDC Brief, 17-21). These matters are addressed in inmates' brief, pp. 8-9, 22, 24-25, 45-47.

SCDC contends that although the ALC apparently dismissed Willie Ingram's appeal in light of McNeil, Ingram demonstrates inmates could still file grievances for wages (Willie Ingram, #83404 v. SCDC Dock. No. 01-ALJ-04-00190-AP, Op. 1-2, Oct. 23, 2001; SCDC Brief, 22). Inmates contend the relevant issue is whether SCDC treated such grievances as grievable. See inmates' brief, 7-8.

SCDC contends the ALC March 10, 2011 order, p. 9, correctly concluded that neither Adkins nor Wicker created new grievance or appeal remedies (SCDC Brief, 22). However, the ALC order, p. 8, did not even mention the most important language in Wicker, 602 S.E. 2d at 58, n. 1, concerning new appeal remedies: "We note that our holding today is extremely limited and is not to be viewed as expanding the jurisdiction of the ALJD in any other circumstance".

SCDC contends Wicker did not suggest SCDC was immune from prison industries pay claims prior to Adkins/Wicker (SCDC Brief, 26). Inmates first contend SCDC's own final grievance decisions indicate to the contrary (e.g., Ackerman

step 2 final decision, p. 1; R. p. 1311):*

The South Carolina Supreme Court, in two opinions it issued on August 23, 2004, first determined that you could file a grievance by which to protest any provision of the "prevailing wage" statutes that applied to the prison industries project in which you participated. These opinions are Adkins, et al. v. SCDC and Wicker v. SCDC.

Second, inmates contend the ALC and Supreme Court have also indicated Adkins and Wicker created new grievance rights for these claims. In Darrell Williams, #219730 v. SCDC Dock. No. 04-ALJ-04-00613-AP, Aug. 10, 2005, Order of Remand, the ALC stated:

The holding in Wicker granting inmates the right to file a grievance for back wages is founded upon the premise that the right to prevailing wages under S.C. Code App. §24-3-430 (Supp. 2003) is a protected property interest for which an inmate in (sic) entitled to due process.

And, in Torrence v. SCDC 646 S.E. 2d 866, 869 (S.C., 2007), the Court stated that Adkins held that while inmates had no private right of action, they were:

not without a remedy because Wicker allowed them an avenue of relief through the inmate grievance system..The clear rule emerging from the Adkins and Wicker cases is this.. the DOC's internal grievance procedure, with recourse to the Administrative Law Court, is the appropriate way to have a prisoner's wage claim adjudicated.

SCDC contends Adkins and Wicker recognized that SCDC grievance policy was not a "novel mechanism" for inmates to contest "conditions" which affect them (SCDC Brief, 26). Inmates contend that, while the grievance policy was not new, allowing wage claims to be grieved under that policy was new. It was new because inmates' statutory right to prevailing wages was not recognized as a "property" interest protected by due process until Wicker (602

* Inmate's grievance document is typical of others in the manner indicated.

S.E. 2d at 58). Inmates contend this new due process protection was the basis for the Adkins holding providing a grievance remedy for prevailing wage claimants (Adkins, 360 S.C. 413, 419, 602 S.E. 2d 51, 55).

Finally, inmates note an appellee's failure to respond to an argument can amount to a conclusion that the lower court ruled incorrectly (First Union Nat. Bank v. FCVS Comm. 469 S.E. 2d 613, 617 (S.C. App., 1996). For issue 1, inmates contend SCDC failed to respond to these arguments:

(1) SCDC's summary dismissal of prevailing wage claims before Adkins/Wicker violated the due process requirement for a "meaningful" hearing (Logan v. Zimmerman Brush Co. 102 S. Ct. 1148, 1159 (1982) (Inmates' Brief, 8).

(2) The logical interpretation of Wicker, 602 S.E. 2d at 58, n. 1 ("...our holding...is not to be viewed as expanding the jurisdiction of the ALJD in any other circumstance") is that it expanded ALC jurisdiction to cover prevailing wage claims (Inmates' Brief, 10).

Respondent SCDC's New Issue 1. Our Supreme Court's decisions in Adkins and Wicker apply retrospectively, and they cannot apply both retrospectively and prospectively (SCDC Brief, 23).

SCDC presents the issue of prospective vs. retrospective application of Adkins/Wicker (SCDC Brief, 23-27). However, this issue is not listed in inmates' Statement of Issues on Appeal, which SCDC accepts (Inmates' Brief, 1-2; SCDC Brief, 1). Therefore, inmates contend SCDC is bound by those issues, and the Court should not consider this new issue (Lanford v. West Oakwood Cemetery Addition 75 S.E. 2d 865, 867 (S.C., 1953); S.C. Juris. (1992), App. & Error, §93).

SCDC contends Adkins and Wicker cannot apply both retrospectively and

prospectively (SCDC Brief, 23). This argument was not ruled upon by the ALC, and inmates contend it is not preserved for review (ALC 3-10-11 order, 9; R. p. 43 ; J. Toal, Appellate Practice in South Carolina, Second Edition, p. 58; Wilder Corp. v. Wilke 330 S.C. 71, 497 S.E. 2d 731, 733 (S.C., 1998).

On the merits, inmates contend Adkins and Wicker apply retrospectively to all past, present and future cases. As a rule, court decisions are applied retroactively to all civil matters that have not reached final judgment (20 Am Jur 2d (2005), Courts, §152). Decisions are said to be presumptively retrospective (Id., §150). Decisions applied prospectively govern operative facts occurring after the decision, while retrospective decisions apply to all past, present and future cases (Id., §§150-151).

In South Carolina, decisions creating new substantive rights have only prospective effect. Decisions creating new remedies to vindicate existing rights are applied retrospectively. And, prospective application is required when liability is created where none formerly existed (J. Toal, Appellate Practice in South Carolina, Second Edition, p. 291, citing, Davenport v. Cotton Hope Plantation 333 S.C. 71, 87, 508 S.E. 2d 565, 574 (S.C., 1998).

As to SCDC's contention that Adkins and Wicker cannot apply both retrospectively and prospectively (SCDC Brief, 27), inmates respectfully disagree. Inmates contend retrospective decisions like Adkins and Wicker normally apply to all past, present and future cases (20 Am Jur 2d (2005), Courts, §150). Inmates further contend if SCDC did not agree that Adkins/Wicker applied to past and future claims, it would probably still be arguing that inmates' claims are not grievable since they were filed after Adkins/Wicker were decided.

2. Inmates' grievances concern policies/procedures under §13.9 of SCDC Grievance Policy because of their express language and substance, Adkins/Wicker, and notices of appeal, and there was no time limit to file under §13.9.

SCDC cites the ALC opinion that inmates' interpretation of "policies/procedures" is overly broad (SCDC Brief, 28). Inmates contend the ALC used the wrong definition, and hence the ALC's conclusion is wrong. The ALC noted inmates appear to argue that "policies/procedures" means any act or method of proceeding in an action (ALC 7-26-12 Sec. Amend. Order, 6-7; R. pp. 158-159). In fact, that definition was for the term "procedure" as defined in the dictionary (Inmates' Brief, 12). Inmates contended "policies/procedures" in §13.9 means "SCDC wage policy" (Inmates' Brief, 14). Inmates contend this definition is sufficiently narrow to avoid public policy concerns.

SCDC notes the ALC adopted SCDC's interpretation of "policies/procedures", as follows (SCDC Brief, 29):

The 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."

Inmates note this definition is not the agency's definition, but one obtained, apparently by SCDC's counsel, from departments of corrections in other states (SCDC ALC Supp. Level Two Brief, p. 2, n. 5; R. p. 5117). Even so, inmates contend SCDC's definition is not inconsistent with the 1998 SCDC/WII contract, discussed at pp. 12-13 of inmates' brief (1998 contract; R.p. 720).

SCDC contends inmates failed to address the ALC's ruling that (1) public policy calls for application of some limitations period to these claims, and (2) because the 15 day filing limitation in §13.1 of grievance policy is the only limitations period in that policy, it must be the period applicable (SCDC Brief, 30). Inmates contend the first point is partially addressed in inmates' brief, p. 19. In addition, inmates note the courts should not impose a limitations period where, if the 15 day rule would otherwise apply, it was tolled or some other legal principle prevented its application.

The second SCDC point is inconsistent with SCDC's position that inmates could have filed a pre-Adkins/Wicker grievance since it was a §7.1 grievable issue involving "Department policies/procedures, directives or conditions which directly affect an inmate" (SCDC Brief, 15-16; Griev. Pol. §7.1; R. p. 685). However, a §13.1 grievance, which concerns "incidents", is most probably a §7.2 or 7.3 grievable issue involving "actions" between inmates or staff and inmates (Griev. Pol. §§7, 13.1; R. pp. 685, 687).

SCDC contends the ALC correctly ruled that, under §13.1, inmates must file grievances within 15 days of when SCDC informed them of their wage, and this ruling is consistent with public policy and Wallace v. Burbury 305 F. Supp. 2d 801 (N.D. Ohio, 2003) (SCDC Brief, 31). This point is partially addressed in inmates' brief, pp. 20, 41-42.

In addition, inmates note that "public policy" properly cognizable by the courts is that derivable by clear implication from constitutions, statutes and judicial decisions (Black's Law Dictionary, Revised Fourth Edition,

p. 1318; Brown v. American Ry. Express Co. 128 S.C. 428, 123 S.E. 97-98). Inmates contend the ALC's ruling that inmates had to file within 15 days of when SCDC informed them of their wage, is not consistent with public policy as contained in the ALC's prior decisions (James Wright, #200123 v. SCDC Dock. No. 06-ALJ-04-00114-AP, Op. 3, Apr. 28, 2006 ("Therefore, appellant was required to file a grievance within 15 days of the Department's failure to pay him the wages owed"); Angelo McKelvie, #105696 v. SCDC Dock. No. 06-ALJ-04-00116-AP, Op. 3, Apr. 28, 2006 (same ruling as Wright); and Delane Terrell, #234582 v. SCDC Dock. No. 06-ALJ-04-00120-AP, Op. 3, Apr. 28, 2006 (same ruling as Wright).

SCDC contends inmates' attempt to distinguish Wallace v. Burbury by relying on principles from Ledbetter v. Goodyear Tire & Rubber Co. 127 S. Ct. 2162, 2174 (2007) were not raised in the ALC and inmates are barred from raising them now (SCDC Brief, 31-32). Inmates contend they did substantially raise this matter in the ALC. A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear the argument has been presented on that ground (J. Toal, Appellate Practice in South Carolina, Second Edition, pp. 57-59, citing State v. Russell 345 S.C. 128, 546 S.E. 2d 202, 205 (S.C. App., 2001).

In the ALC, inmates contended they complied with §13.1 by filing within 15 days of a term of employment and should be paid for that term, or at a minimum for the 15 days preceding the step 1 file date (Inmates' ALC Level Two Brief, 23, 26 and reply brief, 11-12; R. pp. 4658, 4661, 5107-5108). The ALC ruled against inmates in its order (ALC Sec. Amend. Order 7-26-12, 27; R. p. 179).

In this Court, inmates' eighth argument stated: Section 13.1 did not require filing within 15 days after inmates' initial pay date, and they complied with §13.1 by filing during a term of employment or for the previous 15 days work. (Inmates' Brief, 39). Inmates distinguished Wallace on the basis that inmates' is a continuous claim involving multiple causes of action arising with each pay check, drawing on similar principles discussed in Ledbetter (Inmates' Brief, 42).

Inmates contend that arguing in the ALC and this Court for a minimum back pay for 15 days is substantially the same as arguing in this Court that inmates' claim is a continuing claim involving multiple violations each time an illegal pay check is issued, which in inmates' case was every two weeks (Exh. D to Darrell Williams' Sept. 22, 2004 step 1; e.g., Exh. F for P. Ackerman; R. pp. 732, 1304).

If this Court believes the issue was not preserved, inmates incorporate by reference in this reply brief their initial brief argument, pp. 41-43, as a proper attempt to distinguish Wallace as discussed in SCDC's brief, pp. 31-32 (J. Toal, Appellate Practice in South Carolina, Second Edition, 215).

For issue 2, inmates contend SCDC failed to respond to these arguments:

(1) "Policies/procedures" in §13.9 means SCDC wage policy (Inmates' Brief, 14).

(2) These were not "incident" grievances under §13.1, but grievances "concerning policies/procedures" under §13.9 for the reasons stated in inmates' brief (Inmates' Brief, 12, 15-19).

Respondent SCDC's New Issue 2. Although not stated as a separate issue, SCDC contends the ALC correctly ruled that applying the §13.1 filing deadline avoids the public policy problems of requiring SCDC to defend stale claims (SCDC Brief, 30).

Stale claims is not listed in inmates' Statement of Issues on Appeal, which SCDC accepts (SCDC Brief, 1). Again, inmates contend SCDC is bound by inmates' Statement of Issues and this Court should not consider this issue (Lanford v. West Oakwood Cemetery Addition 75 S.E. 2d 865, 867 (S.C., 1953); S.C. Juris. (1992), App. & Error, §93).

On the merits, the ALC in its order mentioned the five year period between some inmates' starting work and filing grievances, and stated that, "(C)learly, the passage of five years could significantly affect the Department's ability to defend the Appellants' claims" (ALC 7-26-12 Sec. Amend. Order, 7-8; R. pp. 159-160). Inmates contend the ALC's opinion is affected by error of law and is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record (S.C. Code §1-23-610(B)).

In the ALC, SCDC raised laches and contended that many inmates filed grievances over six years after starting work, and this delay "..was unreasonable and obviously prejudices its interests" (SCDC ALC Level Two Brief, 14; R. p. 5079). In their ALC reply brief, inmates cited Historic Charleston Holdings, LLC v. Mallon 673 S.E. 2d 448, 456 (S.C., 2009), for the elements a party must show to prove laches: unreasonable delay by the complaining party resulting in prejudice to the party asserting laches. Inmates contended SCDC never raised laches at the agency level, and had not shown why the delay was unreasonable or how SCDC was prejudiced (Inmates'

ALC Level Two Reply Brief, 2-3; R. pp. 5098, 5099).

In King v. James 694 S.E. 2d 35, 41-42 (S.C. App., 2010), this Court stated a stale demand is one that has remained unasserted for a long time, one that is first asserted after an unexplained delay of such great length as to render it difficult for the court to ascertain the truth and do justice, or as to create a presumption against the validity of the claim or presumption that the claim has been abandoned or satisfied.

A laches defense must be pleaded in the trial court or it is waived (Wright v. Craft 372 S.C. 1, 20-21, 640 S.E. 2d 486, 497 (S.C. App., 2006). A delay may be reasonable if the party does not raise a claim due to unfavorable law but brings suit after the law changes (27 Am Jur 2d (1996), Equity, §170). Laches connotes negligence and opportunity to have acted sooner (Chambers of S.C., Inc. v. County Council for Lee County 434 S.E. 2d 279, 281 (S.C., 1993). Laches usually requires proof of actual prejudice, which must be particularized and not conclusory (27 Am Jur 2d (1996), Equity, §§181, 185).

Inmates' class action (2002) was filed less than three years after most inmates started work (1-29-02 Sum/Complt.; SCDC 9-6-11 spreadsheet; R. pp. 212, 4602). Most grievances were filed in September 2004 within five weeks of the Adkins/Wicker decisions (SCDC 9-6-11 spreadsheet; R. p. 4602). Thus, inmates contend these claims were not unasserted (King v. James).

As to the delay being unexplained, SCDC obviously knew of inmates' class action it was defending. SCDC also knew it considered wage claims non-grievable prior to Adkins/Wicker, and the ALC excluded those claims from its appeal jurisdiction. Inmates contend the delay was not unexplained (Id.).

Finally, SCDC has made no showing the delay rendered it difficult for the courts to do justice for lack of evidence or witnesses, or to create any of the presumptions discussed in King v. James.

Regarding laches, as to waiver, SCDC did not mention the delay in most step 1 responses (e.g., Ackerman step 1 response; R. p. 1298). In step 2 final decisions, SCDC stated the time period from starting work to filing grievances with no mention of prejudice (e.g., Ackerman final dec.; R. p. 1312). SCDC did not allege laches or stale claims until the ALC proceedings (SCDC ALC Level Two Brief, 14; R. p. 5079). Thus, inmates contend SCDC waived laches and stale claims as a defense (Wright v. Craft).

Concerning unreasonableness of delay, in the ALC SCDC made the conclusory allegation that a "...six (6) year delay was unreasonable" (SCDC ALC Level Two Brief, 14; R. p. 5079). In this Court, SCDC did not mention unreasonableness of delay (SCDC Brief, 30, n. 52). Moreover, inmates have discussed in their briefs the pre and post-Adkins/Wicker law regarding grievability and appealability of these claims, and grievance filings within weeks of those decisions. Inmates contend SCDC has not shown the delay was unreasonable.

Regarding prejudice, in the ALC SCDC again made the conclusory allegation that the delay "...obviously prejudices its interests" (SCDC ALC Level Two Brief, 14; R.p. 5079). In this Court, SCDC states what inmates say about prejudice, but fails to state how SCDC believes it was prejudiced (SCDC Brief, 30, n. 52). Inmates contend SCDC has failed to show that it was prejudiced.

3. There was reasonable cause under §13.9 not to file within the original time frame because inmates had no wage grievance and appeal rights before Adkins/Wicker, and even if inmates had such rights, they were effectively barred from exercising those rights, and there was no time limit to file under §13.9 after Adkins/Wicker.

For issue 3, inmates contend SCDC failed to respond to these arguments:

- (1) Inmates' claims were unaccrued before Adkins/Wicker (Inmates' Brief, 22).
- (2) Inmates' grievances contain adequate notification of reasonable cause, and a request for waiver was not necessary in these circumstances (Inmates' Brief, 23).

4. SCDC's application of §13.1 violated due process because it cut off inmates' claims before they accrued and denied inmates a meaningful opportunity to file grievances and obtain judicial review before the bar took effect.

For issue 4, inmates contend SCDC failed to respond to these arguments:

- (1) Inmates' claims did not accrue until Adkins/Wicker (Inmates' Brief, 26).
- (2) Application of §13.1 to pre-Adkins/Wicker claims denied inmates of a meaningful opportunity to file and appeal under Logan v. Zimmerman Brush Co. 102 S. Ct. 1148, 1159 (1982) (Inmates' Brief, 26).

5. SCDC waived §13.1 because §13.9 and step 1 instructions were inconsistent with an intention to rely on §13.1, SCDC did not raise §13.1 until step 2 appeals, and SCDC considered these grievances on the merits before invoking §13.1.

SCDC contends §13.9 and step 1 instructions are not inconsistent with SCDC's intent to apply §13.1's deadline, as inmates' argument only makes sense if their wage claims constituted policies/procedures grievances and then SCDC improperly applied the 15 day deadline (SCDC Brief, 34, n. 60). Inmates respectfully disagree, and contend their argument only makes sense if the Court believes these were "incident" grievances and §13.1 applied (Inmates' Brief, 27-28). Waiver is not a possibility for a §13.9 grievance "concerning policies/procedures" since that provision has no time limit.

SCDC contends nothing in grievance policy or step 1 instructions suggested inmates' claims constitute "policy" issues and a grievance presenting such issues is exempt from filing deadlines (SCDC Brief, 35). This point is partially addressed in inmates' brief, pp. 28-29. In addition, inmates note that §13.9 and step 1 instructions, with their language "concerning policies/procedures" and "policy grievances at any time", respectively, do suggest these claims constitute "policy" issues and are exempt from filing deadlines.

SCDC contends, by inmates' argument, SCDC waived the right to assert the 15 day deadline before inmates' right to prevailing wages accrued (SCDC Brief, 35, n. 63). Inmates' respectfully disagree, as they contend SCDC's waiver arose when inmates filed grievances in September 2004 since it is the wording and substance of those grievances which triggered the inconsistency between §13.9 and step 1 instructions, and SCDC's intent to raise §13.1 "for grievances such as these" (Inmates' Brief, 29).

SCDC contends the ALC correctly determined that SCDC's step 1 responses are not final decisions and the Warden could only make recommendations, but not award back pay, interest, costs and attorney fees (SCDC Brief, 36-37, n. 67). This point is partially addressed in inmates' brief, p. 29. In addition, inmates contend the Warden's step 1 decision was final if not appealed, as inmates must check a blank on the step 1 indicating they accept the Warden's "decision" and consider the matter "closed", or they wish to appeal (e.g., Ackerman step 1; R. p. 1297).

Moreover, the Warden's step 1 response states that, "...I again deny your grievance.." (e.g., Ackerman step 1 response; R. p. 1299). Finally, grievance policy §13.3 states the Warden issues a "decision" to the step 1 (Griev. Pol., §13.3; R. p. 687).

As to the Warden's right to award back pay, Grievance Policy allows the Warden to grant restitution/monetary reimbursement without additional approval up to the monetary limits of SCDC policy/procedure OP-22.03 (Griev. Pol., §10 Note, R. p. 686). And obviously, the Warden could deny back pay, etc., which he did for all inmates (e.g., Ackerman step 1 resp.; R. p. 1299).

SCDC cited the ALC opinion that the Warden could not waive defenses (SCDC Brief, 38). Inmates first contend the Warden's waiver authority is irrelevant since waiver is asserted herein by operation of law (Inmates' Brief, 28-32). Further, the matter of SCDC raising defenses is partially addressed in inmates' brief, p. 31.

In addition, the Warden raised these defenses in step 1 responses:

Inmates' hourly rate is incorrect; Adkins/Wicker did not order inmates to file grievances, or require payment of overtime or wages at the rates stated in Darrell Williams' grievance; inmates were not WII's employees; denial of class grievance recognition; and denial of interest, costs and attorney fees (e.g., Ackerman step 1 response; R. p. 1298). Inmates contend if the Warden could raise defenses, he should be deemed capable of waiving them by operation of law.

SCDC contends Friends of Potter Marsh v. Peters 371 F. Supp. 2d 1115 (D. Alaska, 2005) supports the ALC's ruling (SCDC Brief, 38). This point is partially addressed in inmates' brief, p. 29. In addition, Friends of Potter Marsh noted the agency's draft assessment of environmental impact had no legal effect (371 F. Supp. 2d at 1119). Here, inmates contend the Warden's step 1 decision did have legal effect and the matter was "closed" if inmate failed to appeal (e.g., Ackerman step 1; R. p. 1297).

SCDC contends inmates do not question the ALC's reliance on Friends of Potter Marsh's rule that an agency can modify its decisions (SCDC Brief, 39). Inmates contend the Federal Highway Administration's process in that case has little bearing on the workings of SCDC's inmate grievance policy where, as noted, the Warden's step 1 response is final and legally effective if not appealed.

SCDC cites the ALC's reliance on Pace v. DiGuglielmo 544 U.S. 408 (2005) in support of its position that SCDC did not waive the filing deadline in the 32 step 1 responses and 136 step 2 final decisions which raised the deadline and considered the merits (SCDC Brief, 40). Inmates contend that,

because Pace concerned a post conviction petition in state court, it is distinguishable and the Ross v. County of Bernalillo 365 F 3d 1181, 1186 (CA 10, 2004) decision, which involved a prison acceptance and consideration on the merits of an inmate grievance, is more analogous to our case.

SCDC contends inmates' argument that SCDC waived §13.1 because it denied their grievances on procedural and substantive grounds, is without merit due to the ALC's 2001 decision in Wicker (SCDC Brief, 15, n. 28). Inmates respectfully disagree, as waiver was not an issue in Wicker.

SCDC contends the argument that the ALC overlooked inmates' two primary grounds for merits consideration waiver is based on materials not in the record, the ALC did not rule on or consider these arguments, and the issue is not preserved for review (Inmates' Brief, 30-32; SCDC Brief, 41). Inmates contend, with respect to the first ground overlooked, the 153 step 1 responses which failed to plead §13.1 and were also merits decisions, these 153 step 1 responses are in the ALC record, and the record designated for this Court (e.g., Ackerman step 1 response; R. p. 1298; ALC Rec., 936).

As to the second ground, SCDC's merits consideration of inmates' Amendment/Exhibits to grievances before invoking §13.1, some 150 Amendments are also in the ALC record, and record designated for this Court (e.g., Ackerman Amendment; R. p. 1300; ALC Rec., 938). Further, SCDC's spreadsheet in the ALC record, also designated for this Court's record, contains some 180 Amendments noted as having been filed (SCDC 9-6-11 spreadsheet; R. p. 4602; ALC Rec., 1). Finally, inmates' Statement of the Case summarizes Amendment filings in April 2007, while SCDC's Statement is silent on the matter (In-

mates' Brief, 3; SCDC Brief, 1-5). Compare, SCACR 208(b)(2)(If a respondent does not include his own statement of the case, he shall be bound by the matters stated or alleged in appellant's statement of the case).

As to the ALC not considering or ruling on these matters, ordinarily where a party raises an issue but it is never ruled upon by the trial court, and the party fails to file a motion to alter or amend the judgment, the issue is not preserved for review (J. Toal, Appellate Practice in South Carolina, Second Edition, pp. 58-59, citing, S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters 347 S.C. 333, 554 S.E. 2d 870, 875 (S.C. App., 2001).

Here, the ALC proceedings were governed by ALC Rules 63 and 65, which state the ALC's decision is final and motions for reconsideration will not be considered. There is no provision in the ALC Special Appeals rules for filing a motion to alter or amend judgment. Inmates contend they did all they could to preserve this issue by arguing the two overlooked grounds for merits consideration waiver in their ALC Level Two Brief, pp. 13-16 (Inmates' ALC Level Two Brief, pp. 13-16; R. pp. 4648-4651).

For issue 5, inmates contend SCDC failed to respond to the above discussed overlooked grounds for merits consideration waiver except to present their preservation argument.

6. SCDC was estopped from raising §13.1 by equitable estoppel.

SCDC contends inmates do not identify any aspect of Strickland v. Strickland 375 S.C. 76, 650 S.E. 2d 465 (S.C., 2007) that is inconsistent with RWE Nukem Corp. v. ENSR Corp. 373 S.C. 190, 644 S.E. 2d 730 (S.C., 2007) or misapplied to their case (SCDC Brief, 42, n. 74). Inmates contend this point is partially addressed in inmates' brief, p. 34. In addition, inmates note Strickland did not involve estoppel to plead the statute of limitations, but a claim for past due alimony barred by equitable estoppel (Strickland, 650 S.E. 2d at 471-472).

SCDC contends inmates misinterpreted the filing deadline, and no evidence exists that inmates or counsel ever asked SCDC whether a prevailing wage claim constituted an "incident" or policy grievance (SCDC Brief, 43, n. 76). Inmates contend they did not misinterpret §§13.1 and 13.9, but SCDC incorrectly applied §13.1 to their claims. Counsel cannot speak for inmates, but does not recall asking SCDC the above stated question.

7. Inmates complied with §13.1 because it was tolled by their class action and they filed grievances no later than 15 days after the class action remittitur filing date or within 45 days of notice posting under the 2005 order.

SCDC cites the ALC opinion that tolling inmates' claims would require the ALC to conclude inmates were justified in relying on their class action to protect their rights (SCDC Brief, 45). Inmates point to the class action opinion in Darrell Williams, et al. v. SCDC, et al. 641 S.E. 2d 885, 888 (S.C., 2007), where a dissenting justice would have held defendants subject to inmates' suit claims under the Payment of Wages Act, §41-10-10 et seq.

Inmates contend this demonstrates they were justified in relying on the class action to protect their rights.

For issue 7, inmates contend SCDC failed to respond to their argument that, for inmates who had not filed grievances by April 6, 2007, they had until December 4, 2008 to file pursuant to the 2005 Circuit Court order (Inmates' Brief, 37).

8. Section 13.1 did not require filing within 15 days after inmates' initial pay date, and they complied with §13.1 by filing during a term of employment or for the previous 15 days work.

SCDC contends the ALC's ruling that inmates had to file within 15 days of the alleged "incident", meaning the date when SCDC informed them of their wage rate, was consistent with public policy and Wallace v. Burbury 305 F. Supp. 2d 801, 806 (N.D. Ohio, 2003) (SCDC Brief, 31, 48, n. 85). This point is addressed in inmates' brief, pp. 41-42, and herein at pp. 7-8.

SCDC contends inmates' attempt to distinguish Wallace by relying on principles from Ledbetter v. Goodyear Tire & Rubber Co. 550 U.S. 618, 637 (2007) was not raised in the ALC and cannot be argued in this Court (SCDC Brief, 31-32, 48, n. 85). This point is addressed herein at pp. 8-9.

9. If §13.1 required filing within 15 days after initial pay date, inmates complied with §13.1 because it was tolled while inmates were barred, or effectively barred, from grieving and appealing prevailing wage claims before Adkins/Wicker, and after those decisions recognized such rights, inmates filed grievances within 15 days after the Adkins/Wicker remittitur file date.

SCDC contends inmates' position that Adkins and Wicker did not become final until 15 days after filing of the remittitur, conflicts with Ludwick

v. This Minute of Carolina, Inc. 337 S.E. 2d 213, 216 (S.C., 1985) and Davenport v. Cotton Hope Plantation 508 S.E. 2d 565, 574 (S.C., 1998) (SCDC Brief, 14, n. 25). First, inmates contend Adkins/Wicker were final on the date the remittitur was filed in Circuit Court, not 15 days thereafter (Inmates' Brief, 44).

Second, inmates contend Ludwick and Davenport are not analogous to our case, since they concerned applying appellate court decisions retrospectively or prospectively, not the issue of when final disposition of appellate decisions occurs.

For issue 9, inmates contend SCDC failed to respond to these arguments:

(1) That SCDC, in its final decisions, acknowledged observing the remittitur rule in this case (Inmates' Brief, 45).

(2) That §13.1 is not a "statute of creation" under Knight Pub. Co. v. U.S.C. 367 S.E. 2d 20, 22 (S.C., 2007) (Inmates' Brief, 19-20, 45).

(3) That ALC prevailing wage appeals were barred prior to Adkins/Wicker because, in addition to McNeil, only in Wicker was inmates' right to prevailing wages held to be a property interest protected by the due process clause (Inmates' Brief, 46).

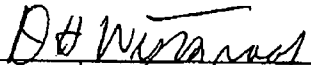
(4) That SCDC, if ordered to pay back wages, could seek contribution from WTI for inmates' claims (Inmates' Brief, 47).

CONCLUSION

Inmates respectfully request reversal of the ALC order; rulings on each issue as summarized in inmates' Amended Initial Brief, pp. 48-49, based on

the applicable standard of review stated in that brief at pp. 7, 11, 21, 26-27, 33, 35, 39, and 44, and in this reply brief at p. 10; and remand to the ALC for briefing on the merits as to all grievances.

Respectfully submitted,


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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

LAW OFFICES

FEB 11 2016

**MALONE, THOMPSON
SUMMERS & OTT, LLC**

Francis Ackerman, et al., Appellants,

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2012-210588

Appeal From The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 5379
Heard October 20, 2015 – Filed February 10, 2016

REVERSED AND REMANDED

Douglas H. Westbrook, of Charleston, for Appellants.

Lake Eric Summers, of Malone Thompson Summers &
Ott, LLC, of Columbia, for Respondent.

GEATHERS, J.: Appellants (Inmates), 196 current or former inmates participating in a Prison Industries service project operated by Respondent South Carolina Department of Corrections (SCDC), challenge an order of the South Carolina Administrative Law Court (ALC) upholding SCDC's denial of Inmates' grievances. Inmates argue their grievances invoking the Prevailing Wage Statute¹ were not subject to SCDC's fifteen-day filing deadline because these grievances

¹ S.C. Code Ann. § 24-3-430(D) (2007). Section 24-3-430(D) provides, "No inmate participating in the [Prison Industries] program may earn less than the prevailing wage for work of [a] similar nature in the private sector."

concerned SCDC policy rather than an "incident." We reverse and remand for consideration of Inmates' grievances on the merits.

FACTS/PROCEDURAL HISTORY

In 1995, our legislature enacted section 24-3-430 of the South Carolina Code (2007) to authorize the expansion of the Prison Industries program into the private sector. This expansion allowed qualified private entities to use inmate labor but required the wages for participating inmates to be no less than "the prevailing wage for work of [a] similar nature in the private sector." Act No. 7, 1995 S.C. Acts 78. Section 24-3-430 became effective on July 1, 1995. *Id.* at 102. Subsequently, on September 30, 1998, SCDC entered into a contract with Williams Technologies, Inc. (WTI) for the employment of SCDC inmates on the premises of Lieber Correctional Institution (Lieber) in WTI's business of "disassembly and/or remanufacturing of its product lines at [Lieber]." The cover page for the contract document is entitled "Williams Technology Transmissions Service Contract."

The contract's "Scope of Work" provision states, in pertinent part, "Prison Industry inmates under the general oversight of SCDC will disassemble and/or remanufacture [WTI's] product lines according to engineering design and manufacturing specifications developed and provided by [WTI]" The contract also provides, "For all purposes, inmates shall be considered to be employees of SCDC."

With regard to payment for services, the contract requires WTI to pay SCDC "\$4.00 per hour per inmate for work performed[,] including training hours and hours in excess of the inmate's normal shift." The contract's cover page highlights the contract's "Requirements/Specifications," which include "Wage Rate: \$4.00 per hour/per inmate; \$.35/[hour] base for inmates."

On January 11, 2001, Inmate Darrell Williams filed a "Step 1" Inmate Grievance Form requesting SCDC to pay him the prevailing wage for his labor. SCDC's Inmate Grievance System Policy, designated as Policy GA-01.12, provides for formal review of inmate complaints in two steps. A Step 1 grievance is evaluated by the prison's Warden, and any appeal from the Warden's decision to the "responsible official," is designated as "Step 2." The responsible official must render a decision on the appeal within sixty days, and this decision constitutes SCDC's final response in the matter.

Lieber's Warden denied Williams' Step 1 grievance without addressing the Prevailing Wage Statute, stating, in pertinent part: "Prison Industries does not fall under the minimum wage federal guidelines. Your inmate wages are determined by the Division of Budget & Finance[.] Therefore[,] your requested action cannot be honored at this time." Williams then filed a Step 2 Grievance Form on June 26, 2001, complaining about unsafe working conditions and seeking the prevailing wage for his labor as well as a correction of SCDC's deductions from his wages.

While Williams' Step 2 grievance was pending, the legislature enacted the first of a series of yearly budget provisos, effective for the fiscal year beginning July 1, 2001, permitting SCDC to pay participating inmates less than the prevailing wage for "service work":²

The Director of [SCDC] may enter into contracts with private sector entities that would allow for inmate labor to be provided for prison industry service work. The use of such inmate labor may not result in the displacement of employed workers within the local region in which work is being performed. Service work is defined as any work such as repair, replacement of original manufactured items, packaging, sorting, labeling, or similar work that is not original equipment manufacturing. *The department may negotiate the wage to be paid for inmate labor provided under prison industry service work contracts, and such wages may be less than the prevailing wage for work of a similar nature in the private sector.*

H. 3687, Appropriation Bill 2001-2002, Part IB § 37.31 (Act No. 66, 2001 S.C. Acts 738) (emphasis added). The legislature enacted identical, or nearly identical, provisos for each following fiscal year until the 2007-2008 fiscal year. On August 1, 2007, section 24-1-295 of the South Carolina Code, which codified the language in the provisos, became effective.³

² The 2001-2002 budget was enacted on July 20, 2001, for the fiscal year beginning July 1, 2001.

³ H. 4878, Appropriation Bill 2002-2003, Part IB § 37.25 (Act No. 289, 2002 S.C. Acts 3145); H. 3749, Appropriation Bill 2003-2004, Part IB § 37.23 (Act No. 91, 2003 S.C. Acts 1437); H. 4925, Appropriation Bill 2004-2005, Part IB § 37.23

On August 3, 2001, SCDC denied Williams' Step 2 grievance. Williams' appeal to the ALC was dismissed for lack of subject matter jurisdiction. Williams later filed a Summons and Complaint against SCDC and WTI in circuit court, seeking the prevailing wage and other related relief and complaining about unsafe working conditions. On July 1, 2002, Williams filed an amended Summons and Complaint adding numerous plaintiffs and defendants and invoking the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 to -220 (2005 and Supp. 2015). On February 12, 2003, Williams filed a second amended complaint in the form of a class action pursuant to Rule 23, SCRPC.

While Williams' class action was pending in circuit court, Inmates filed their respective Step 1 Inmate Grievance Forms with SCDC on various dates in late September 2004, requesting the prevailing wage for their labor from 1999 through June 30, 2001, and the negotiated wage of \$4.00 per hour beginning on July 1, 2001, the effective date of the first budget proviso permitting SCDC to pay participating inmates less than the prevailing wage. On October 28, 2004, Lieber's Warden denied several of these Step 1 grievances on the merits. On November 3, 2004, several Inmates filed their Step 2 Inmate Grievance Forms, challenging SCDC's denial of the requested relief. According to the parties, on this same date, the circuit court judge presiding over Williams' class action stayed SCDC's processing of Inmates' grievances.

On July 1, 2005, the circuit court filed an order dismissing Williams' class action and lifting the stay it had imposed on SCDC's processing of Inmates' grievances. However, Williams appealed the circuit court's order, and SCDC invoked the automatic stay set forth in Rule 225(a), SCACR to withhold further processing of Inmates' grievances. On February 25, 2007, our supreme court affirmed the circuit court's order, and the remittitur was filed with the Dorchester

(Act No. 248, 2004 S.C. Acts 2574); H. 3716, Appropriation Bill 2005-2006, Part IB § 37.22 (Act No. 115, 2005 S.C. Acts 1324); H. 4810, Appropriation Bill 2006-2007, Part IB § 37.22 (2006 Act No. 397); Act No. 68, 2007 S.C. Acts 288. The legislature sustained the Governor's veto of H. 3620, Appropriation Bill 2007-2008, Part IB § 37.21, the stated reason for the veto being, "the language is no longer necessary after I signed S. 182, the Prison Industries legislation. This proviso conflicts with the statutory changes and is unneeded." Therefore, from July 1, 2007 to August 1, 2007, there existed no authorization for SCDC to pay participating inmates below the prevailing wage.

County Clerk of Court on March 22, 2007. *Williams v. S.C. Dep't of Corr.*, 372 S.C. 255, 257, 641 S.E.2d 885, 886 (2007).

On May 14, 2007, SCDC issued final decisions on Inmates' Step 2 Forms, basing its denial of relief on both the merits and the fifteen-day filing deadline set forth in paragraph 13.1 of Policy GA-01.12. 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.*"⁴ On appeal, the ALC upheld SCDC's denial of Inmates' grievances on the ground that Inmates did not timely file their Step 1 grievances. This appeal followed.

ISSUE ON APPEAL

Did SCDC's fifteen-day filing deadline apply to Inmates' grievances?⁵

STANDARD OF REVIEW

Section 1-23-610(B) of the South Carolina Code (Supp. 2015) sets forth the standard of review when this court is sitting in review of a decision by the ALC on an appeal from an administrative agency. Here, there are no factual disputes. Rather, the issue on review involves a question of law. Therefore, our review of the ALC's decision is governed by item (d) of section 1-23-610(B), which allows this court to reverse the ALC's decision if it is affected by an error of law.

⁴ SCDC applied the November 1, 2004 version of Policy GA-01.12 to Inmates' grievances, although presumably the August 1, 2002 version was in effect when Inmates filed their Step 1 grievances in September 2004 and when Lieber's Warden denied these Step 1 grievances on October 28, 2004. Nonetheless, the provisions concerning the filing deadline for Step 1 grievances are substantially the same in both versions. Therefore, to avoid confusion, we will reference the 2004 version of Policy GA-01.12 throughout this opinion.

⁵ Because we reverse the ALC's order on this ground alone, we need not reach the merits of Inmates' remaining issues. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address the remaining issues on appeal when resolution of a prior issue is dispositive).

LAW/ANALYSIS

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.

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.

(emphases added). In the present case, SCDC has indicated that the terms "policy" and "procedure" are not defined in any of its policies or relevant publications. However, a review of paragraph 7, entitled "**GRIEVABLE ISSUES**," is instructive:

The following issues will be considered **grievable**:

- 7.1 Department policies/procedures, directives, or conditions [that] directly affect an inmate;
- 7.2 Actions of a staff member toward an inmate;
- 7.3 Actions of an inmate against another inmate;
- 7.4 Inmate property complaints;

7.5 Disciplinary Hearing actions to appeal a conviction following an innocent plea, or to appeal any guilty verdict due to alleged technicalities or misinterpretation of evidence, or to appeal a sentence when the sanction imposed was allegedly not proportionate to the rules violation; . . .

7.6 Any classification decision that directly affects an inmate's custody level; and . . .

7.7 Calculation of sentence-related credits.

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 & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012) (holding regulations are interpreted using the rules of statutory construction)).⁶

⁶ Although SCDC's statements concerning the inmate grievance system are within a document entitled "SCDC Policy/Procedure," they are "binding norms" and, thus, more like rules or regulations that may be interpreted using statutory construction rules than they are true policy statements. See *Home Health Serv., Inc. v. S.C. Tax Comm'n*, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994) ("Whether a particular agency proceeding announces a rule or a general policy statement depends upon whether the agency action establishes a binding norm.").

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. 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."

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.

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.⁷ 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

⁷ Approximately ninety-two of Inmates' grievances involve periods of work beginning prior to July 1, 2001, the effective date of the first budget proviso permitting SCDC to pay participating inmates less than the prevailing wage for "service work."

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.

Moreover, the provisions of these contracts are enduring and have the same effect on numerous inmates. Therefore, they cannot realistically be characterized as "incidents," which are temporally limited and rarely affect more than a few inmates. *Cf. Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 383, 537 S.E.2d 543, 548 (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." (emphasis added)).

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*, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (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))).

CONCLUSION

Accordingly, we reverse the ALC's decision and remand for the ALC's consideration of Inmates' grievances on the merits.

REVERSED AND REMANDED.

SHORT and MCDONALD, JJ., concur.

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,
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#245199, Don Hughes, #256862, Michael Key, #266890,
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SC Court of Appeals

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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. [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.

Consequently, 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 *Klawah 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 *Oker*, 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 *Oker 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 *Oker*, 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 Oker participated in prison industries project operated by SCDC.⁶ Like the Inmates in the case at bar, Inmate Oker 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 Oker's grievance, and it denied Inmate Oker's grievance. Inmate Oker appealed SCDC's denial of his grievance to the ALC, and the ALC

⁶ Inmate Oker 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*, *Oker*, 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 & Envtl. 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.

Consequently, 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:

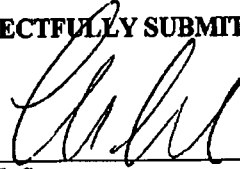
“Statutes of limitations are not simply technicalities.” [*Kelly v. Logan, Jolley & Smith, L.L.P.*, 682 S.E.2d 1, 4 (S.C. Ct. App. 2009)]. “On the contrary, they have long been respected as fundamental to a well-ordered judicial system.” *Id.* “Statutes of limitations embody important public policy concerns 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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**Columbia, South Carolina
February 25, 2016**

The South Carolina Court of Appeals

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v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2012-210588

ORDER

Respondent South Carolina Department of Corrections (SCDC) has filed a petition for rehearing in this appeal. After careful consideration of the petition, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing.

Accordingly, the petition for rehearing is denied. However, we take this opportunity to address SCDC's misapprehension of our February 10, 2016 opinion.

As stated in our opinion, the exception for "policies/procedures" in section 13.9 of SCDC Policy GA-01.12 serves as shorthand for the language in section 7.1, which lists one of the issues considered by SCDC to be grievable as "Department policies/procedures, directives, or conditions [that] directly affect an inmate." Therefore, even if SCDC's implementation, or lack thereof, of the legislature's policies on inmate wages *also* constitutes a condition of imprisonment, such a condition is encompassed by the policies/procedures exception in section 13.9.

Further, the plain language of section 13.9 states in mandatory terms, "Exceptions to the [fifteen] day time limit requirement *will* be made for grievances concerning policies/procedures." (emphasis added). The remainder of the section is permissive:

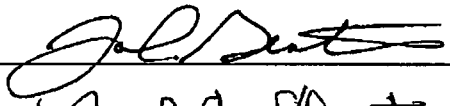
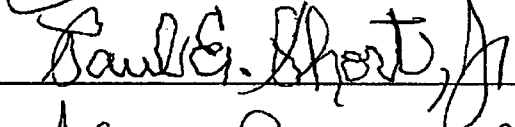
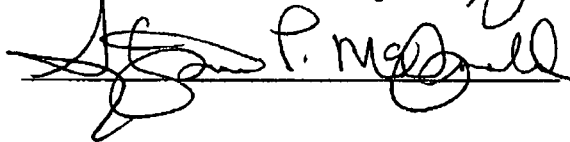
Exceptions *may* also be made for incident grievances by the Chief/designee, Inmate Grievance Branch, provided that documented reasonable cause can be demonstrated as to why the original time frame was not met, e.g., inmate physically unable to initiate grievance due to hospitalization, court appearance,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

(emphasis added). The final statement requiring the grievant to request a waiver pertains only to the exceptions permitted for incident grievances. Without such a request, SCDC would not be aware of a particular grievant's reason for seeking a time extension.

In contrast, the mandatory exception for policies/procedures is automatic for every grievance complaining of an SCDC policy, procedure, directive, or condition that directly affects the grievant. Such a complaint within the grievance form should be readily recognized by SCDC as a policy, procedure, directive, or condition that directly affects the grievant. Upon such recognition, SCDC is required by section 13.9 to accept the grievance as timely. It makes no sense to require the grievant to submit a request for an exception to the fifteen-day deadline when SCDC is already required to accept the grievance as timely. Therefore, in the present case, Inmates were not required to submit a request for a waiver from the fifteen-day deadline. See *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) ("A statute as a whole must receive a practical, *reasonable*, and fair

interpretation consonant with the purpose, design, and policy of the lawmakers." (emphasis added) (quoting *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992)); see also *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012) (holding regulations are interpreted using the rules of statutory construction); *Home Health Serv., Inc. v. S.C. Tax Comm'n*, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994) ("Whether a particular agency proceeding announces a rule or a general policy statement depends upon whether the agency action establishes a binding norm.").

Finally, the word "property" in section 7.4, which lists one of the issues considered by SCDC to be grievable as "Inmate property complaints," contemplates any chattels belonging to the grievant, rather than an intangible *right* to the payment of wages for work in the Prison Industries program. SCDC's actions concerning the amount of wages it pays to inmates are directly controlled by its policies and the legislature's policies concerning the amount inmates should be paid. Therefore, the subject of Inmates' grievances in the present case clearly falls under "Department policies/procedures, directives, or conditions [that] directly affect an inmate" rather than "Inmate property complaints."

 J.
 J.
 J.

Columbia, South Carolina

cc:
Douglas H. Westbrook, Esquire
Lake Eric Summers, Esquire

FILED

March 24, 2016

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from The Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Court of Appeals Opinion No. 5379
Supreme Court Case Tracking No. 2016-000829

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Garriett, #191274, Fred Gatewood, #289775, Dennis
Goff, #177506, Gregory Grant, #109656, Nelson
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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, Respondents,

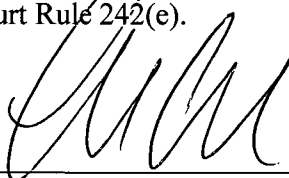
v.

South Carolina Department of Corrections, Petitioner.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appendix contains material in conformity with the provisions of South Carolina Appellate Court Rule 242(e).

May 2, 2016



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