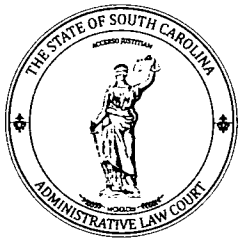
STATE OF SOUTH CAROLINA

Administrative Law Court

Ralph K. Anderson, III
Chief Judge

Jana E. Cox Shealy
Clerk



PHONE: (803) 734-0550
FAX: (803) 734-6400
WEB: WWW.SCALC.NET

May 17, 2012

Hand-Delivered

Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Dear Ms. Kitchings:

I issued an Amended Order in Francis Ackerman, #266928, et al. v. South Carolina Department of Revenue Corrections, on March 16, 2012. This case has been appealed to South Carolina Court of Appeals and is docketed as 2012210588. The Amended Order was intended to be the exact same decision as the previous decision with simply the addition of four (4) inmates in the caption that had been inadvertently omitted. In fact, a footnote in the amended decision stated that; "This Order is amended to correct the caption to include the docket numbers of four (4) inmates inadvertently omitted." However, it thereafter came to my attention that due to a clerical error, a draft decision was utilized as my Amended Decision rather than the Order I had previously issued.

Administrative Law Court Rule 60 (a) provides that:

> Clerical mistakes in orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the administrative law judge at any time of his own initiative or on the motion of any party and after such notice, if any, as the administrative law judge orders. During the pendency of an appeal from the decision of an administrative law judge, leave to correct the mistake must be obtained from the appellate court.

I hereby request leave of the court to issue a Second Amended Order to correct the above oversight. For the sake of efficiency, I have attached a copy of the proposed Second Amended Order should leave be granted.

Thank you for your attention to this matter.

Yours very truly,

Ralph King Anderson, III

cc: Lake E. Summers, Esq.
Katherine A. Phillips, Esq.
Doug Westbrook, Esq.

enclosure

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Francis Ackerman, #266928, et al.,	) Docket Nos. 07-ALJ-04-00444 through 00449-AP) Docket Nos. 07-ALJ-04-00500 through 00548-AP) 0549-IJ, 0550 through 07-00559-AP) Docket Nos. 07-ALJ-04-00623 through 00632-AP
Appellants,	) Docket Nos. 07-ALJ-04-00671 through 00677-AP) Docket Nos. 07-ALJ-04-00691, 0752, 0798, 0826,) 0856 through 0868-AP) Docket Nos. 07-ALJ-04-00869 through 00872-AP
vs.	) Docket Nos. 07-ALJ-04-00444, 0876, 0885) Docket Nos. 08-ALJ-04-00141 through 00149-AP) Docket Nos. 08-ALJ-04-00169 through 0171-AP) Docket No. 08-ALJ-04-00192-AP)Docket Nos. 08-ALJ-04-00966 through 01022-IJ
South Carolina Department of Corrections,	) Docket Nos. 08-ALJ-04-01023 through 01045-IJ) Docket No. 09-ALJ-04-00304-IJ
Respondent.	) **SECOND AMENDED ORDER**[1]

STATEMENT OF THE CASE

In this consolidated action before the Administrative Law Court (ALC), the Appellants appeal the denial by the South Carolina Department of Corrections (Department or DOC) of 197 administrative grievances filed by them under DOC Policy Number GA-01.12 (GA-01.12). The Appellants include current and former inmates of the Department who either currently participate or at one time participated in the prison industries project operated by the Department at Lieber Correctional Institution (Lieber) in which Williams Technologies, Inc. (WTI), and now Caterpillar, Inc., act as the private industry sponsors. The Appellants argue that they 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 project operated at Lieber. Specifically, the Appellants contend that they are entitled to the "prevailing wage" under S.C. Code Ann. § 24-3-430(D) (2007).

Pursuant to an April 14, 2010 order, this court, in the interest of judicial economy, instructed the parties that it would consider the issues relevant to the Appellants' appeals in three

[1] This Order is amended to correct the caption to include the docket numbers of four (4) inmates inadvertently omitted.

levels. In the first level of review, which was set forth in an order dated March 10, 2011, the court addressed the following two issues: (1) did Adkins v. S.C. Department of Corrections, 360 S.C. 413, 602 S.E.2d 51 (2004) and Wicker v. S.C. Department of Corrections, 360 S.C. 421, 602 S.E.2d 56 (2004) create new substantive rights and/or new remedies? and (2) do Adkins and Wicker apply prospective or retrospectively? As discussed in the March 10, 2011 order, the court found that Adkins and Wicker created neither new substantive rights nor new remedies and that both decisions applied retrospectively.

The court now turns to the second level of review, which involves the timeliness of the filing of the Appellants' grievances under GA-01.12. The Appellants make the following arguments: (1) the Appellants' grievances are not time-barred under the fifteen-day time limit for filing grievances set forth in Paragraph 13.1 of GA-01.12 because they concern policies/procedures and thus fall under Paragraph 13.9; (2) the Appellants had reasonable cause under Paragraph 13.9 of GA-01.12 not to file within Paragraph 13.1's fifteen-day time limit; (3) the Department's application of Paragraph 13.1 violated the Appellants' due process rights because it cut off the Appellants' claims before they accrued; (4) the Department waived Paragraph 13.1 because it did not raise Paragraph 13.1 until the Step 2 appeal and it considered the Appellants' grievances on the merits before invoking Paragraph 13.1; (5) the Department was equitably estopped from raising Paragraph 13.1; (6) the Appellants were "effectively barred" from exercising their grievance and appeal rights before Adkins and Wicker and therefore Paragraph 13.1's fifteen-day filing deadline was tolled prior to the issuance of those decisions; (7) Paragraph 13.1's fifteen-day filing deadline was tolled by the filing of the Appellants' class action suit in circuit court; and (8) the Appellants complied with Paragraph 13.1 by filing their grievances within fifteen days of a term of employment.

BACKGROUND

In 2002, the Appellants filed a class action lawsuit in circuit court against the Department and WTI in which they sought back pay and higher current pay under the provisions of Section 24-3-430(D). In that lawsuit, which was captioned Williams v. S.C. Department of Corrections, the Appellants alleged a cause of action under South Carolina's Payment of Wages Act, claiming they were due lost wages because they were not paid the "prevailing wage" as specified in Section 24-3-430(D).

On August 23, 2004, while the Appellants' class action lawsuit was pending, the Supreme Court issued its decisions in Wicker and Adkins. In those two cases, inmates who then participated or at one time participated in a prison industries projects operated by the Department alleged that they were entitled to the "prevailing wage" pursuant to Section 24-3-430(D). As discussed in this court's March 10, 2011 order, the Supreme Court held that Section 24-3-430(D) did not give rise to a private cause of action,[2] but that inmates could pursue their claims under the Department's grievance policies and, if necessary, appeal the Department's decision to the ALC.[3]

After Adkins and Wicker were issued on August 23, 2004, the Appellants' counsel filed grievances with Department officials at Lieber on behalf of the Appellants. Although Department officials had begun processing those grievances, on November 3, 2004, the circuit court judge presiding over the class action lawsuit, which was still active, stayed the Department's efforts to process and adjudicate all administrative grievances—including the Appellants'—which it had received from or on behalf of inmates who articulated pay claims attributed to their participation in the Department's project at Lieber. After it imposed this stay on November 3, 2004, however, the circuit court granted motions for dismissal filed by both the Department and WTI, and, by an order filed on July 1, 2005, the circuit court dismissed the Appellants' class action lawsuit and 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, because the Appellants subsequently appealed the circuit court's order, the stay imposed by the circuit court on November 3, 2004 was reimposed.

On February 26, 2007, the South Carolina Supreme Court affirmed the circuit court's dismissal of the class action lawsuit in its opinion, Williams v. S.C. Department of Corrections, 372 S.C. 255, 641 S.E.2d 885 (2007), and, as a result, the stay imposed by the circuit court on November 3, 2004 ceased being effective on or about May 22, 2007. Thereafter, the Department resumed processing and adjudicating the Appellants' grievances. Ultimately, the Department issued final decisions denying each Appellant's respective grievance, largely finding that the grievances were not filed within the fifteen-day time period required under Paragraph 13.1 of

---

2 Adkins, 360 S.C. at 416-419, 602 S.E.2d at 53-55.

3 Wicker, 360 S.C. at 423-25, 602 S.E.2d at 57-58.

GA-01.12. The Appellants timely appealed those decisions to this court. Subsequently, during a conference call held on February 25, 2010, the parties agreed to consolidate the appeals for the purposes of briefing and filing the record.

ISSUES ON APPEAL

1. Are the Appellants' grievances not time-barred under the fifteen-day time limit for filing grievances set forth in Paragraph 13.1 of GA-01.12 because they concern "policies/procedures" and thus fall under Paragraph 13.9 of GA-01.12?

2. Did the Appellants have reasonable cause not to file within Paragraph 13.1's fifteen-day time limit?

3. Did the Department's application of Paragraph 13.1 violate the Appellants' due process rights because it cut off the Appellants' claims before they accrued?

4. Did the Department waive its right to raise Paragraph 13.1's fifteen-day time limit?

5. Was the Department equitably estopped from raising Paragraph 13.1?

6. Was the fifteen-day time limit set forth in Paragraph 13.1 tolled until after the issuance of Adkins and Wicker because, prior to that time, the Appellants were "effectively barred" from exercising their grievance and appeal rights?

7. Was the fifteen-day time limit set forth in Paragraph 13.1 tolled by the filing of the Appellants' class action suit in circuit court?

8. Did the Appellants comply with Paragraph 13.1 by filing their grievances within fifteen days of a term of employment?

STANDARD OF REVIEW

As set forth above, this case is before the ALC on appeal from consolidated final decisions of the Department pursuant to S.C. Code Ann. § 1-23-600(D) (Supp. 2010) of the Administrative Procedures Act (APA). As such, the Administrative Law Judge (ALJ) sits in an appellate capacity under the APA rather than as an independent finder of fact. In South Carolina, the provisions of the APA—specifically Section 1-23-380(A)(5)—govern the circumstances in which an appellate body may reverse or modify an agency decision. That section states:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(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 Ann. § 1-23-380(5) (Supp. 2010).

DISCUSSION

I. Did the Appellants' claims involve a DOC "policy/procedure" such that there was no time limit to file under Paragraph 13.9 of GA-01.12?

Paragraph 13.1 of GA-01.12 generally requires that Step 1 grievances be filed "within 15 days of the alleged incident." DOC Policy Number GA-01.12, ¶ 13.1. However, Paragraph 13.9 of GA-01.12 provides that "[e]xceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures." DOC Policy Number GA-01.12, ¶ 13.9. In the present case, the Appellants contend that their grievances concerned DOC "policies/procedures" and that no time limit therefore applied to the filing of their grievances. I disagree.

Before delving into the specifics of the Appellants' argument, it is necessary to briefly discuss the nature of, and the purpose behind, Paragraph 13.1's fifteen-day filing deadline. By issuing GA-01.12, the Department has unquestionably established a prescribed procedure for handling inmate grievance matters that has been approved by the South Carolina Supreme Court. See Al-Shabazz v. State, 338 S.C. 354, 373, 527 S.E.2d 742, 752 (2000) ("We hold that Department's disciplinary and grievance procedures are consistent with the standards delineated by the Supreme Court in Wolff v. McDonnell, supra. We note that Department also prepared its grievance procedures in compliance with the Civil Rights of Institutionalized Persons Act."). The Department's prescribed procedure further sets forth a specific time frame to exercise the rights created under those provisions. Therefore, as discussed below, it appears that the Department's regulations are a "statute of creation."

Under South Carolina law, a statute that creates a new liability and affixes the time within which an action may be commenced is a "statute of creation," and commencement within the time affixed is an indispensable condition of the action. Knight Publ'g Co. v. Univ. of S.C., 295 S.C. 31, 33, 367 S.E.2d 20, 22 (1988), overruled on other grounds by McLendon v. S.C. Dep't of Highways and Public Transp., 313 S.C. 525, 443 S.E.2d 539 (1994). Although the failure to timely commence an action pursuant to a statute of creation is not a subject matter jurisdiction defect, such an action "cannot be maintained unless brought within the time allowed by that statute." Simpson v. Sanders, 314 S.C. 413, 415 n.1, 445 S.E.2d 93, 94 n.1 (1994). When a statute both creates a cause of action and includes a time limit for its commencement, compliance with the time limit is a condition precedent to the maintenance of the action. 54 C.J.S. Limitations of Actions § 31 (updated Dec. 2011). "Such a statutory time limit conditions the existence of the right of action, thereby creating a substantive, rather than procedural, limitation on the right. Bringing suit within the prescribed time is a condition of liability itself, not of the remedy alone." Id.

The rationale behind a statute of creation is similar to that of a statute of limitations. Significantly, South Carolina courts have held that "[s]tatutes of limitations are not simply technicalities," but rather are "fundamental to a well-ordered judicial system." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). "The purpose of statutes of limitation is to ensure litigation is 'brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation.'" Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 428, 699 S.E.2d 687, 690 (2010) (quoting Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 377 S.C. 217, 227, 659 S.E.2d 213, 218 (Ct. App. 2008)). "Statutes of limitation embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." Transp. Ins. Co., 389 S.C. at 428, 699 S.E.2d at 690 (quoting Moates, 322 S.C. at 176, 470 S.E.2d at 404). Moreover, statutes of limitations relieve courts of the burden of trying stale claims of those who have "slept on their rights." Transp. Ins. Co., 389 S.C. at 428, 699 S.E.2d at 690.

In the present case, the court finds that the Appellants' interpretation of the term "policies/procedures" in Paragraph 13.9 is overly expansive. The Appellants appear to argue that the term, which is not defined in GA-01.12, refers to any "act or method of proceeding in an

action." However, if the term were construed that broadly, Paragraph 13.9's exception would effectively swallow Paragraph 13.1's general rule. Because such a construction would fail to give proper effect to Paragraph 13.1's fifteen-day filing deadline, it must be rejected. Cf. State ex rel. McLeod v. Nessler, 273 S.C. 371, 373, 256 S.E.2d 419, 420 (1979) ("In determining the meaning of a statute, it is the duty of this Court to give force and effect to all parts of the statute, if possible."); Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs., 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct. App. 2004) ("Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together **and each given effect** . . . .") (emphasis added).

Moreover, the Appellants' broad interpretation of the term "policies/procedures" does not comport with public policy. The Department 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 Appellants' 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."). Here, the fifteen-day filing deadline from Paragraph 13.1 is the only limitations period applicable to these claims.[4] Therefore, ruling in favor of the Appellants would mean that inmates would not be required to file prevailing wage grievances within any set time period. Due in part to public policy concerns over such a result, this court has consistently held that prevailing wage claims do not involve the Department's "policies or procedures." See, e.g., Lawson v. S.C. Dep't of Corr., 06-ALJ-04-00823-AP (S.C. Admin. Law Ct. Feb. 12, 2007); Wright v. S.C. Dep't of Corr., 06-ALJ-04-00114-AP, 2006 WL 1430140 (S.C. Admin. Law Ct. Apr. 28, 2006).

The importance of filing deadlines is underscored by the facts of this case. The record demonstrates the Department did not begin receiving Step 1s from the Appellants regarding their prevailing wage claims until September 22, 2004. The record also reflects that a significant

---

[4] The statutory provisions upon which Appellants base their pay claims do not create a private right of action. See Adkins, 360 S.C. at 416-419, 602 S.E.2d at 53-55. Therefore, statutes of limitations derived from state law do not apply to Appellants' claims. See Talford v. S.C. Dep't of Corr., 06-ALJ-04-00823-AP (S.C. Admin. Law Ct. Feb. 14, 2007).

number of the Appellants began participating in the prison industries project at Lieber in 1999. Thus, approximately five years passed between when these Appellants began participating in the project and when they filed their Step 1s challenging their pay. Clearly, the passage of five years could significantly affect the Department's ability to defend the Appellants' claims.[5]

In contrast to the Appellants, the Department—the agency that drafted Paragraph 13.9—presents a very persuasive construction of the term "policies/procedures." In its brief, the Department argues:

> [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."

(footnote and citations omitted). This interpretation is consistent with the way in which "policies/procedures" is used throughout GA-01.12. See Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 24, 579 S.E.2d 334, 337 (Ct. App. 2003) (holding that undefined terms "must be construed in context"). Significantly, nearly all of the references to "policy/procedure" in GA-01.12 are to the official policies and procedures set forth within that document or another similar operating document issued by the Department. See, e.g., DOC Policy Number GA-01.12, ¶ 1.3 ("Every inmate assigned to a South Carolina Department of Corrections (SCDC) institution is eligible to utilize the grievance system as set forth in **this policy/procedure**.") (emphasis added); DOC Policy Number GA-01.12, Note to ¶ 10.5 ("The Warden's decision to grant restitution/monetary reimbursement will not require additional approval to have state provided like/issued items issued or deposits made to the grievant's E.H. Cooper Account so long as the amount of reimbursement is within the monetary limits of **SCDC Policy/Procedure OP-22.03** . . . .") (emphasis added); DOC Policy Number GA-01.12, ¶ 13.1 ("No inmate (except the grievant, if s/he requests it) and no employee (other than those specified in **this policy/procedure**) will be given a copy of a grievance.") (emphasis added); DOC Policy

---

[5] The court notes in this regard that the statutory deadline for filing wage recovery claims under South Carolina's Payment of Wages Act is three years. See S.C. Code Ann. § 41-10-80(C) (Supp. 2010) ("Any civil action for the recovery of wages must be commenced within three years after the wages become due.").

Number GA-01.12, ¶ 17 ("The Inmate Grievance Branch will serve as monitor to ensure compliance with **this policy/procedure**.") (emphasis added).

In addition to being supported by the text of GA-01.12, the Department's interpretation of the term "policies/procedures" in Paragraph 13.9 avoids the public policy problems inherent in the Appellants' construction. Under the Department's interpretation, the filing of a "policies/procedures" grievance under Paragraph 13.9 would not force the Department to defend actions it took many years ago. Rather, the Department would merely be required to determine whether the "policies/procedures" it currently has in effect should be changed.

I find that the Department's interpretation of "policies/procedures" is reasonable and should be accepted by this court. In that light, it is clear that the Appellants' prevailing wage claims do not concern "policies/procedures" as that term is used in Paragraph 13.9.

The Appellants' attempt to argue otherwise by pointing to this court's use of the term "policies" in its March 10, 2011 order is unpersuasive. Specifically, Appellants refer to the following portion of the court's order:

> 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 added). **Unquestionably, inmates are "directly affect[ed]" 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.

(emphasis added).

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,"[6] 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

---

[6] See Dictionary.com, http://dictionary.reference.com (last visited Jan. 23, 2012) (defining "policy").

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.[7]

While the Appellants contend that the term "policies" should be given the same meaning in Paragraph 7.1 as it is in Paragraph 13.9, Paragraph 7.1 makes grievable not only "policies/procedures" that directly affect inmates, but also "directives" and "conditions." See DOC Policy Number GA-01.12, ¶ 7.1 ("The following issues will be considered grievable: Department policies/procedures, **directives, or conditions** which directly affect an inmate.") (emphasis added). Thus, ruling that the Appellants' grievances do not concern "policies/procedures" under Paragraph 13.9 is not inconsistent with ruling that the Appellants' claims were grievable under Paragraph 7.1.

For the foregoing reasons, I conclude that prevailing wage claims do not constitute grievances concerning "policies/procedures" under Paragraph 13.9 of GA-01.12. Rather, I find that prevailing wage claims are "incident" grievances and thus must be filed within the fifteen-day timeframe set forth in Paragraph 13.1.

II. Did the Appellants have reasonable cause under Paragraph 13.9 not to file within Paragraph 13.1's fifteen-day time frame?

The Appellants next argue that, if this court determines that their Step 1 grievances constituted "incident" grievances and, therefore, were subject to Paragraph 13.1's fifteen-day filing deadline, they had "reasonable cause" under Paragraph 13.9 not to file their Step 1s before the South Carolina Supreme Court issued its opinions in Adkins and Wicker. Specifically, the Appellants contend that the Department's "practice of denying grievability" for prevailing wage claims, as well as the ALC's en banc order in McNeil v. South Carolina Department of Corrections, 00-ALJ-04-00336-AP (S.C. Admin. Law Ct. Sept. 5, 2001), "effectively barred"

---

[7] In this court's view, the Appellants' 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 S.C. Code Ann. § 24-3-315 (2007) (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 added).

them from exercising their grievance and appeal rights prior to the issuance of Adkins and Wicker.[8] I disagree.

Paragraph 13.9 of GA-01.12 provides in pertinent part:

> Exceptions [to the 15 day time limit requirement] may . . . 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.**

DOC Policy Number GA-01.12, ¶ 13.9 (emphasis added).

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 Appellant 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 Appellant provided "documented reasonable cause" in the manner required by Paragraph 13.9. Therefore, no Appellant satisfied the procedural requirements set forth in Paragraph 13.9.

Instead, the vast majority of the Appellants first explicitly invoked such a "reasonable cause" exception in their Notices of Appeal to this court. By only invoking this exception within their Notices of Appeal, the Appellants failed to afford the Department an opportunity to consider their request. Accordingly, this issue has not been properly preserved by the Appellants. See Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (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, 318 S.C. 502, 505, 458 S.E.2d 542, 544 (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).

---

[8] In McNeil, the ALC held that its appellate jurisdiction in inmate appeals was limited to either: (1) cases in which an inmate contended that prison officials had erroneously calculated his sentence, sentence related credits, or custody status; or (2) cases in which the Department had taken an inmate's created liberty interest as punishment in a major disciplinary hearing.

Furthermore, even if this issue were preserved, I find that it lacks merit. In its March 10, 2011 order, this court expressly held that "Adkins and Wicker did not create new substantive rights, new grievance remedies, or new appeal remedies." In doing so, the court explained that under the broad provision of Paragraph 7.1 of GA-01.12, the Appellants' prevailing wage claims were grievable and had, in fact, been held to be so by an Administrative Law Judge in 2001.

This court also specifically rejected the Appellants' argument that the ALC's decision in McNeil made prevailing wage claims unappealable prior to the issuance of Wicker. The court explained: "Because the ALC is a lower court, its decisions do not constitute binding precedent. Given that the ALC cannot create judicial precedent, it certainly cannot answer legal questions with "finality." (citations omitted).

Indeed, as the Department correctly notes, the McNeil decision was not the final word on the appealability of inmate grievances. In Sullivan v. S.C. Dep't of Corr., 355 S.C. 437, 586 S.E.2d 124 (2003), 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."). Moreover, in that case, the Supreme Court reiterated its holding in Al-Shabazz that procedural due process was guaranteed whenever an inmate was deprived of an interest encompassed by "the Fourteenth Amendment's protection of liberty **and property**."[9] Id. at 441-42, 586 S.E.2d at 126 (emphasis added). 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.

For these reasons, I find that the Appellants' contention that they were "effectively barred" from filing their Step 1s before the issuance of Adkins and Wicker is without merit.

---

[9] In Al-Shabazz, our Supreme Court, quoting U.S. Supreme Court precedent from 1972, held that "[t]he requirements of procedural due process apply . . . to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Al-Shabazz, 338 S.C. at 369, 527 S.E.2d at 750 (quoting Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972)).

III. Did the Department violate the Appellants' due process rights by applying the fifteen-day filing deadline in Paragraph 13.1 to their claims?

Next, the Appellants argue that their right to file Step 1 grievances regarding their prevailing wage claims did not accrue until the issuance of Adkins and Wicker and that they could not enforce such rights until the issuance of those two decisions. Therefore, they argue that the Department denied them due process by applying Paragraph 13.1's fifteen-day filing deadline to those grievances involving prevailing wage claims that arose prior to the issuance of Adkins and Wicker. I disagree.

As discussed above, this court's March 10, 2011 order previously determined that "Adkins and Wicker did not create new substantive rights, new grievance remedies, or new appeal remedies." Thus, the court has already determined that the Appellants possessed grievance rights and appellate remedies concerning their prevailing wage claims prior to the Supreme Court's issuance of Adkins and Wicker.

Furthermore, it should be noted that, in Al-Shabazz, 338 S.C. 354, 374-75, 527 S.E.2d 742, 753 (2000), our Supreme Court held that "[DOC]'s disciplinary and grievance procedures **comply with the minimal due process required in such proceedings.**" Al-Shabazz, 338 S.C. at 374-75, 527 S.E.2d at 753 (emphasis added). The Court also determined that "an inmate may seek review of [DOC's] final decision in an administrative matter under the APA," and that "[p]lacing review of these cases within the ambit of the APA **will ensure that inmate receives due process.**" Id. at 369, 527 S.E.2d at 750 (emphasis added). Thus, the Court recognized that inmates received due process by filing a grievance with the Department and then appealing the Department's final decision regarding the grievance to the ALC.

The Court also recognized as much in Wicker when it rejected the notion that the ALC lacked jurisdiction to review the Department's denial of an inmate's prevailing wage grievance. See Wicker, 360 S.C. at 424-25, 602 S.E.2d at 57-58. The Court concluded that because the inmate was entitled to due process with regard to his prevailing wage claim under Al-Shabazz, the Department's denial of his grievance was reviewable by the ALC. Id. Thus, the Court implicitly acknowledged that inmates receive due process by processing their prevailing wage claims through the Department's grievance system and the review procedures of the APA.

In conclusion, this court's March 10, 2011 order and the relevant precedent from our Supreme Court clearly contradict the Appellants' claim that the Department denied them due

process by invoking the fifteen-day filing deadline set forth in Paragraph 13.1. The Appellants' failure to timely avail themselves to the process available to them is exclusively attributable to their own failure to act in conformity with the provisions of this paragraph. Consequently, the Department's application of the fifteen-day filing deadline to the Appellants' prevailing wage claims that arose before the issuance of Adkins and Wicker did not violate their due process rights.

IV. Did the Department waive its right to raise Paragraph 13.1's fifteen-day time limit?

Next, the Appellants argue that the Department waived its right to apply the fifteen-day filing deadline to their Step 1 grievances for the following reasons: (1) the language in Paragraph 13.9 and the instructions on the Department's pre-printed Step 1 grievance form, which both state that policy grievances may be filed at any time, are inconsistent with an intent to raise the fifteen-day filing deadline; (2) for 153 inmates, the Department did not raise timeliness as an issue in its responses to the Appellants' Step 1 grievances; and (3) for 32 Step 1 responses, and 136 Step 2 final decisions, the Department raised the fifteen-day filing deadline **and** considered the merits of the Appellants' prevailing wage claims. As discussed below, I find the Appellants' arguments unpersuasive.

A

As stated above, the Appellants contend that the language in Paragraph 13.9 and the instructions appearing on the preprinted Step 1 grievance form are inconsistent with the Department's intent to assert the fifteen-day filing deadline as a basis by which to deny the prevailing wage claims articulated by the Appellants within their Step 1s. I disagree.

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right." Eason v. Eason, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) (quoting Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)). It may be either express or implied. Lyles v. BMI, Inc., 292 S.C. 153, 158, 355 S.E.2d 282, 285 (Ct. App. 1987). Acts that are inconsistent with the continued assertion of a right may give rise to a waiver. Provident Life and Acc. Ins. Co. v. Driver, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994). Waiver is an affirmative defense, and the burden of proof is upon the party who asserts it. Id. at 478, 451 S.E.2d at 929.

Here, the Department applied the fifteen-day filing deadline set forth in Paragraph 13.1 to the Appellants' prevailing wage claims because those claims represented "incidents" by which the Appellants challenged the conditions of their participation in the prison industries project at Lieber. Importantly, the pre-printed form and Paragraph 13.1 expressly stated that inmates were required to file their Step 1s within 15 days of any alleged "incident." Thus, the Department's application of the fifteen-day filing deadline in Paragraph 13.1 was entirely consistent with the Department's grievance policy and the pre-printed Step 1 forms.

Although the Step 1 form and Paragraph 13.9 provided an exception to the fifteen-day filing deadline for grievances concerning "policies/procedures," nothing in the Department's grievance policy or in the language of the pre-printed Step 1 form suggested that prevailing wage claims constituted policies/procedures grievances under Paragraph 13.9. By merely providing an exception to the fifteen-day filing deadline, the Department did not waive its right to invoke the fifteen-day deadline for cases falling outside that exception. Accordingly, I find that the Department did not waive the fifteen-day deadline in Paragraph 13.1 for filing incident grievances by issuing the language in Paragraph 13.9 or the instructions on the pre-printed Step 1 grievance form.

B

The Appellants also argue that the Department waived the fifteen-day filing deadline in Paragraph 13.1 because it did not raise timeliness as an issue in 153 of its responses to the Appellants' Step 1 grievances. I disagree.

"Administrative agencies have an inherent authority to reconsider a prior determination which is not final . . . ." 2 Am. Jur. 2d Administrative Law § 468 (updated Nov. 2011). As discussed below, the responses provided to the Appellants' Step 1s did not constitute final decisions of the Department. Accordingly, during the Step 2 review process, the Department was authorized to reverse the Step 1 decision or, alternatively, to uphold the Step 1 decision on different grounds.

Paragraph 13 of the Department's grievance policy sets forth the steps in the grievance process. Per Paragraph 13.1, an inmate must complete a Step 1 grievance form in which he must articulate the basis of his complaint. The inmate must then submit that form to an employee designated by the Warden within fifteen days of the alleged "incident." DOC Policy Number

GA-01.12, ¶ 13.1. Paragraph 13.2 further articulates that the Step 1 must be forwarded to the Institutional Inmate Grievance Coordinator, who, if unable to resolve the matter informally, must conduct a complete investigation and make recommendations to the Warden. DOC Policy Number GA-01.12, ¶ 13.2. The Warden must respond to the inmate "in writing . . . indicating in detail the rationale for the decision rendered and any recommended remedies." DOC Policy Number GA-01.12, ¶ 13.3.

If the inmate is unsatisfied with the response at the institutional level, he may appeal under Paragraphs 13.4 and 13.5 by filing a "Step 2" appeal and thereby seek a final agency decision. Paragraph 13.4 provides that "[i]f 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.**" DOC Policy Number GA-01.12, ¶ 13.4 (emphasis added). Furthermore, Paragraph 13.5 states: "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 response of the responsible official will be the Department's final response in the matter.** DOC Policy Number GA-01.12, ¶ 13.5 (emphases added).

Thus, under Paragraphs 13.4 and 13.5, the final decisions concerning the issues raised in the Appellants' grievances were rendered by the responsible official at the agency level, and this official's response to the Step 2 appeals constituted the final agency decisions. Therefore, because the Department raised the issue of the fifteen-day filing deadline in its Step 2 decisions, the failure by the Warden to raise the issue in some of his Step 1 decisions did not constitute waiver of the issue. Rather, as noted above, the Department possessed the authority to modify the Warden's Step 1 decisions because they were not final.

For instance, in Friends of Potter Marsh v. Peters, 371 F. Supp. 2d 1115 (D. Alaska 2005), the plaintiffs objected to the Secretary of Transportation's waiver, in a federal transportation legislation guidance, of a statutory requirement that Surface Transportation Program projects not be located on local roads or rural minor collectors. The defendants moved to dismiss the matter, contending that there had been no final agency action. The court granted the defendant's motion to dismiss, explaining:

> Even if Plaintiffs are correct that the waiver is invalid, an erroneous legal interpretation at one stage in the process is not a final agency action. **There is**

> **still time for the Secretary to change or modify the waiver, issue an individualized waiver, or the agency may not need to rely on the waiver.**

Id. at 1122 (emphasis added).

Like the legislation guidance at issue in Peters, the Step 1s in this case were not final agency decisions. In its Step 2 responses, the Department retained the right to come to a different conclusion than that reached in the Step 1 responses. Just as the Department could have reversed the Step 1 decisions, it also had the authority to affirm the Step 1 decisions on other grounds. Thus, because the Step 1 responses were not final agency decisions, the mere fact that the Department failed to invoke the fifteen-day filing deadline when it issued some of the Step 1 responses did not preclude it from raising the issue in its Step 2 responses.

The Appellants' reliance on Ross v. County of Bernalillo, 365 F.3d 1181 (10th Cir. 2004), abrogated in part by Jones v. Bock, 549 U.S. 199 (2007), is misplaced. In that case, the Tenth Circuit addressed whether an inmate had exhausted his administrative remedies regarding his claim that the prison shower was unreasonably dangerous where the inmate failed to file a complaint within the three-day timeframe set forth in the prison's procedures. The Tenth Circuit concluded that because prison officials had accepted his complaint and found in his favor, the inmate had exhausted his administrative remedies. Specifically, the court held:

> We need not address in the abstract whether Ross' complaint was timely because in this case the prison did actually consider it. Nothing in the record suggests that MCDC treated Ross' complaint as untimely; indeed, Ross received a favorable response and a mat was placed in the shower as he requested. If a prison accepts a belated filing, and considers it on the merits, that step makes the filing proper for purposes of state law and avoids exhaustion, default, and timeliness hurdles in federal court.

Id. at 1186.

The present case is distinguishable from Ross. In Ross, the court based its decision on the fact that "[n]othing in the record suggests that MCDC treated Ross' complaint as untimely" and that "Ross received a favorable response" to his complaint. Id. Here, in contrast, the Department found against the Appellants in its responses to both the Appellants' Step 1s and Step 2s. Moreover, in its responses to the Appellants' Step 2s, the Department made it clear that it considered the Appellants' grievances to be untimely.

Accordingly, because the Department raised the issue of the fifteen-day filing deadline in its Step 2 decisions, it did not waive its right to do so in the present appeal.

C

Finally, the Appellants note that there are 32 Step 1 responses and 136 Step 2 final decisions in which the Department both raised the fifteen-day filing deadline in Paragraph 13.1 and considered the merits of the Appellants' prevailing wage claims. The Appellants contend that with respect to those responses, waiver should apply because the Department's consideration of the merits was inconsistent with an intent to rely on Paragraph 13.1. I disagree.

In the responses at issue, the Department plainly stated that the Appellants' prevailing wage claims were time-barred under Paragraph 13.1. While the Department also addressed the merits of the Appellants' claims within those responses, that mere fact did not preclude the Department from applying the fifteen-day filing deadline from Paragraph 13.1. The Department's decisions must be read in their entirety. When done so, it is plain that there is no basis for concluding that the Department waived, either expressly or impliedly, its right to invoke the fifteen-day filing deadline. Cf. Brooks v. Walls, 279 F.3d 518, 523 (7th Cir. 2002) (holding that when a state court rules against a party on both procedural and substantive grounds, the court "has not abandoned the procedural ground but has instead added a substantive failing to the procedural one.").[10]

V. Was the Department equitably estopped from raising Paragraph 13.1?

Next, the Appellants contend that the Department is equitably estopped from raising the fifteen-day filing deadline in Paragraph 13.1. Specifically, the Appellants argue that Paragraph

---

[10] Appellants cite Pozo v. McCaughtry, 286 F.3d 1022 (7th Cir. 2002) for the proposition that courts are divided on the issue of whether a filing that is dismissed as both untimely and unmeritorious is properly filed. In that case, the Seventh Circuit considered whether a prisoner's failure to take a timely administrative appeal within the state system meant that he failed to exhaust state remedies for purposes of 42 U.S.C. § 1997e(a). Although the court answered the question in the affirmative, in dicta it stated that "[c]ases look both ways on the question whether a document that is rejected as *both* late and unmeritorious counts as properly filed." Id. at 1025.

Appellants now attempt to rely on that statement, but they neglect to discuss the U.S. Supreme Court's subsequent decision in Pace v. DiGuglielmo, 544 U.S. 408 (2005). In that case, the Court addressed 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). After noting the division among the circuit courts on the issue, the 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."). In light of the U.S. Supreme Court's holding in Pace, this court is unwilling to rely upon any federal circuit court decision holding that a document dismissed as both untimely and unmeritorious is properly filed.

13.9 and the pre-printed Step 1 form "lulled" them into believing that their prevailing wage claims were policy grievances and thus could be filed "at any time." I disagree.

"The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel." Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The elements of equitable estoppel as 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 such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. Id. 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. at 84-85, 650 S.E.2d at 470. The party asserting equitable estoppel bears the burden of establishing all of the elements. Kelly v. Logan, Jolley, & Smith, L.L.P., 383 S.C. 626, 682 S.E.2d 1, 7 (Ct. App. 2009).

Under South Carolina law, 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. Kleckley v. Nw. Nat. Cas. Co., 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000). The South Carolina Supreme Court has described the necessary "inducement" as follows:

> Such inducement may consist of an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary. 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.

Id. at 136-37, 526 S.E.2d at 220 (citations omitted).

Here, the only conduct of the Department that the Appellants point to in making their estoppel argument is the Department's issuance of Paragraph 13.9 and the Step 1 instructions. However, Paragraph 13.9 and the Step 1 instructions did not state that *all* grievances could be filed outside of Section 13.1's fifteen-day deadline. Rather, they merely stated that grievances concerning "policies/procedures" could be filed outside of that deadline. Additionally, both Paragraph 13.1 and the Step 1 instructions clearly notified the Appellants that "incident"

grievances had to be filed within fifteen days. Although the Appellants claim they thought that Paragraph 13.9 applied to their prevailing wage claims, there is **no** evidence that the Department, through its words or actions, induced the Appellants into believing that their grievances constituted "policies/procedures" grievances. Therefore, the Appellants have failed to show that the Department engaged in conduct which "amount[ed] to a false representation," or conduct which was "calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert." See Strickland, 375 S.C. at 84, 650 S.E.2d at 470.

The Appellants have also failed to establish that the Department engaged in the type of "inducement" described in Kleckley. See Kleckley, 338 S.C. at 136-37, 526 S.E.2d at 220. There is **no** evidence the Department did anything that would have induced the Appellants into believing that filing a grievance was unnecessary. Rather, the record merely shows that the Department issued a grievance policy that set forth, in a straightforward fashion, different time periods for filing different types of grievances. In the court's view, such evidence, on its own, is insufficient to establish an estoppel claim. A party should not be able to avoid the consequences of a filing deadline simply by claiming that it misinterpreted the deadline.[11] For these reasons, I find that the Department is not equitably estopped from raising the fifteen-day filing deadline in Paragraph 13.1.

VI. Was the fifteen-day time limit set forth in Paragraph 13.1 tolled until after the issuance of Adkins and Wicker?

Next, the Appellants argue that the fifteen-day filing deadline in Paragraph 13.1 was tolled until after the issuance of Adkins and Wicker because, prior to that time, Appellants were "effectively barred" from exercising any grievance and appeal rights. I disagree.

Where a statute sets forth a limitation period for commencement of an action, courts have invoked the doctrine of equitable tolling to suspend the statutory period "to ensure fundamental practicality and fairness." Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (quoting Rodriguez v. Superior Court, 98 Cal. Rptr. 3d 728, 736 (Cal. Ct. App. 2009)). Equitable tolling is a judicially created doctrine, and it stems from the judiciary's

[11] Significantly, there is no evidence that any of the Appellants ever asked the Department whether a prevailing wage claim constituted an "incident" grievance or a grievance concerning "policies/procedures."

inherent power to formulate rules of procedure "where justice demands it." Hooper, 386 S.C. at 115, 687 S.E.2d at 32. The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. Id.

Equitable tolling is reserved for extraordinary circumstances, and it is rarely applied in South Carolina. American Legion Post 15 v. Horry County, 381 S.C. 576, 582, 674 S.E.2d 181, 184 (Ct. App. 2009). The threshold necessary to trigger equitable tolling is very high, lest the exception swallow the rule. Ex parte Ward, 46 So. 3d 888, 897 (Ala. 2007). Our Court of Appeals has explained:

> [A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation.

Pelzer v. State, 378 S.C. 516, 522, 662 S.E.2d 618, 621 (Ct. App. 2008) (quoting Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000)).

Typically, equitable tolling applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control. Hooper, 386 S.C. at 116, 687 S.E.2d at 32; see also 54 C.J.S. Limitations of Actions § 133 (updated Dec. 2011) ("The statute of limitations generally will not be tolled when the plaintiff has slept on his or her rights, but only when he or she has been prevented from asserting them."). However, as the South Carolina Supreme Court has noted, court have flexibility in applying equitable remedies such as tolling:

> "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.

Hooper, 386 S.C. at 116-17, 687 S.E.2d at 33 (citations omitted).

Turning to the present case, the court notes at the onset it is questionable whether Paragraph 13.1's fifteen-day filing deadline is subject to tolling. As noted above, it appears that the deadline is a statute of creation. Unlike statutes of limitations, statutes of creation cannot be tolled. See 54 C.J.S. Limitations of Actions § 5 (updated Dec. 2011) ("Statutes of limitations are subject to tolling, whereas statutes of creation are not.").

Even if the deadline can be tolled, the circumstances do not warrant the application of equitable tolling here. The Appellants contend that tolling should be applied because the McNeil decision prevented them from filing their grievances. 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.

Furthermore, the "interests of justice" do not call for the application of equitable tolling in this case. There is no evidence that the Department prevented the Appellants from timely filing their grievances. Moreover, if equitable tolling were applied here, the Department would be forced to defend actions it took many years ago. As our Court of Appeals has noted, the passage of time can greatly hinder a party's ability to defend against a claim:

> [W]ith the passage of time, evidence becomes more difficult to obtain and is less reliable. Physical evidence is lost or destroyed, witnesses become impossible to locate, and memories fade. With passing time, a defendant faces an increasingly difficult task in formulating and mounting an effective defense.

Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 163, 511 S.E.2d 699, 706 (Ct. App. 1999), aff'd, 341 S.C. 320, 534 S.E.2d 672 (2000).

While not tolling Paragraph 13.1 will mean the dismissal of nearly all of the Appellants' prevailing wage claims, in Adkins, our Supreme Court held that the prevailing wage statute was not enacted for the special benefit of inmates, but rather was passed to "prevent unfair competition." Adkins, 360 S.C. at 418, 602 S.E.2d at 54. In the present case, any unfair competition that arose as a result of the Department's alleged failure to pay the prevailing wage years ago will not be rectified by allowing the inmates to bring a prevailing wage claim now. Competitors who may have been previously harmed by the Department's asserted failure to pay the prevailing wage likely will not receive any type of benefit as a result of the inmates bringing such a case. The damage has already been done. Rather, the main party that stands to benefit

from prevailing wage claims involving conduct that occurred long ago is the inmates—a group which our Supreme Court expressly stated was not the intended beneficiary of the prevailing wage statute.

VII. Did inmates comply with Paragraph 13.1's filing deadline because it was tolled by their class action?

Next, the Appellants argue that the fifteen-day filing deadline in Paragraph 13.1 was tolled when they filed their class action in Williams on January 29, 2002. I disagree.

In making this argument, Appellants rely upon the U.S. Supreme Court's decision in Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983). In that case, the Court held that the running of the ninety-day statutory period within which the plaintiff was required to commence his employment discrimination suit was tolled during the period there was pending a class action in which he was a putative class member. Id. at 353-54. The Court further held that because the plaintiff did not receive his notice of right to sue until after the class action was filed, he retained a full ninety days to bring suit after the class certification was denied. Id. at 354. In reaching these conclusions, the Court reasoned that "unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights." Id. at 350. The Court further reasoned:

> A putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23[12] and the tolling rule of American Pipe were designed to avoid.

Id. at 350-51.

The facts of the present case are notably different from those of Crown. Unlike the class action in Crown, the Appellants' class action did not fail because their certification was denied. Rather, it failed because the South Carolina Supreme Court concluded in Adkins that the inmates did not have a private cause of action with regard to their prevailing wage claims. See Adkins, 360 S.C. at 416-419, 602 S.E.2d at 53-55. Thus, applying tolling to the present matter would constitute a significant extension of Crown. Such an extension would also require this court to

---

[12] Federal Rule of Civil Procedure 23 sets forth the requirements regarding the filing of class actions. See Fed. R. Civ. P. 23.

conclude that the Appellants were justified in relying upon the 2002 class action to protect their rights, despite the fact that the South Carolina Supreme Court ultimately determined that no private right of action existed.

The Appellants' reliance on Crown is also mistaken because the Crown decision was based in large part upon Federal Rule of Civil Procedure 23—a rule which does not apply to the Department's internal grievance system. Moreover, the Court is unaware of any applicable rule similar to Rule 23 that allows inmates to file grievances as a class. Therefore, the Crown Court's reasoning regarding Rule 23 and its purpose are simply inapplicable to the present case.

Finally, the court notes that, unlike in Crown, for a significant number of Appellants, their right to file a grievance regarding their prevailing wage claims arose long before the filing of the class action in 2002. The record shows that numerous Appellants began participating in the prison industries project at Lieber several months, and in some cases *years*, before the class action was filed. As discussed in more detail below, under Paragraph 13.1, these Appellants were required to file a grievance within fifteen days after being informed of the Department's decision to pay them less than the prevailing wage. Thus, by the time the 2002 class action was filed, Paragraph 13.1's fifteen-day filing deadline had already passed with regard to their prevailing wage claims. Accordingly, even if the running of the fifteen-day filing deadline were suspended by the filing of the class action, these Appellants still failed to timely file their grievances.

For these reasons, I conclude that Crown is distinguishable from the present case and that Paragraph 13.1's fifteen-day filing deadline was therefore not tolled by the filing of Appellants' class action in Williams.

VIII. Are inmates' grievances timely filed because they filed within fifteen days of a term of employment?

Finally, the Appellants argue that all Step 1s filed during or within fifteen days of completion of a term of employment should be considered timely regardless of when the Appellants began their employment. I disagree.

As noted above, Paragraph 13.1 of GA-01.12 states that inmates must submit their grievances "within 15 days of the alleged incident." The "alleged incident" in this case was not the Appellants' "completion of a term of employment," but rather the Department's decision to

pay the Appellants less than the prevailing wage as required under Section 24-3-430(D). Accordingly, the fifteen-day time frame in Paragraph 13.1 began to run when the Appellants were informed of the Department's decision to pay them less than that mandated by Paragraph 24-3-430(D).

A similar conclusions was reached in Wallace v. Burbury, 305 F. Supp. 2d 801, 806 (N.D. Ohio 2003). In that case, an inmate brought an action in federal court alleging that prison officials violated his constitutional rights by denying his religious accommodation request for Passover. The prison officials argued that the inmate failed to exhaust his administrative remedies because he did not timely file a complaint under Ohio's inmate grievance procedure. The procedure required that "[w]ithin fourteen calendar days of the date of the event giving rise to the complaint, the inmate shall file an informal complaint to the direct supervisor of the staff member, or department most directly responsible for the particular subject matter of the complaint." Id. at 806. The inmate, despite learning of the denial of his religious accommodation request a week before Passover began, did not file a complaint until eleven days after the week-long holiday ended. Nevertheless, the inmate contended that his complaint was timely filed, arguing that "because his requests for religious accommodation were denied through the week of Passover," the "event giving rise to the complaint" occurred daily through the last day of the holiday. Id. The court rejected the inmate's argument, explaining:

> **To 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.** The event giving rise to the complaint was the date in March, 2002, when plaintiff first learned that NCCI would not honor his request to observe Passover. All subsequent grievances stem from that initial event. The filing of plaintiff's informal grievance was therefore untimely, and failure to file a timely grievance does not constitute an exhaustion of available administrative remedies.

Id. (emphasis added); see also Johnson v. Johnson, 385 F.3d 503, 519 (5th Cir. 2004) ("While it is true that the conditions that Johnson suffered both before and after the grievance were of the same general character, to permit the March 2001 grievance to reach back to events that transpired up to six months earlier would effectively negate the state's fifteen-day rule and frustrate the prison system's legitimate interest in investigating complaints while they are still fresh. **That a condition continues does not excuse the failure to file a grievance earlier.**") (emphasis added).

Similar to the court in Wallace, this court concludes that the Appellants should have filed a grievance within fifteen days after being informed of the Department's decision to pay them less than the prevailing wage. Like the deadline at issue in that case, the purpose of the fifteen-day deadline in Paragraph 13.1 is to limit the time to file a claim. If this court were to hold that inmates may timely file grievances within fifteen days of any term of employment, the Department could be forced to defend wage decisions it made a long time ago.

The Appellants contend that ruling against them on this issue would be "absurd" because it would require an inmate asserting a prevailing wage claim to file a grievance every time he received a paycheck. However, the court's decision here does not mandate such a result. Rather, a timely filed grievance will cover all damages recoverable by an inmate as a result of the Department's decision to pay him less than the prevailing wage. Thus, as long as an inmate timely files a grievance within fifteen days of learning of the Department's decision to pay him less than that required under Section 24-3-430(D), he will not need to file any additional grievances during the period of his employment affected by that decision.

CONCLUSION AND ORDER

Based on the foregoing, I conclude the following:

1. The Appellants' grievances did not concern "policies/procedures" as that term is used in Paragraph 13.9 of GA-01.12 and thus the fifteen-day filing deadline in Paragraph 13.1 applied to their grievances.
2. The Appellants did not have reasonable cause for not filing their grievances within Paragraph 13.1's fifteen-day time limit.
3. The Department's application of Paragraph 13.1 did not violate the Appellants' due process rights.
4. The Department did not waive its right to raise Paragraph 13.1's fifteen-day filing deadline.
5. The Department was not equitably estopped from raising Paragraph 13.1.
6. The Appellants were not "effectively barred" from exercising their grievance and appeal rights before Adkins and Wicker and therefore the fifteen-day filing deadline set forth in Paragraph 13.1 was not tolled prior to the issuance of those decisions.
7. Paragraph 13.1's fifteen-day filing deadline was not tolled by the filing of the Appellants' class action suit in circuit court.
8. The Appellants did not comply with Paragraph 13.1 by filing their grievances within fifteen days of a term of employment.

Applying these conclusions to this case, a review of the record reveals that, with the lone exception of Fred Gatewood, #289775, none of the Appellants timely filed their Step 1 grievances. Other than Gatewood, each Appellant filed his Step 1 grievance more than fifteen days after his initial pay date. Certainly, by his initial pay date, each Appellant should have known of the Department's decision to pay him less than the prevailing wage. Accordingly,

IT IS HEREBY ORDERED that, for every Appellant other than Gatewood, the Department's final decisions in this matter are **AFFIRMED**.

IT IS FURTHER ORDERED that, as to Gatewood's appeal, within twenty (20) days from the date of this Order, the Department shall supplement, to the extent necessary, the Record on Appeal to include all content required under ALC Rule 36(B).

IT IS FURTHER ORDERED that the parties prepare briefs on the merits of Gatewood's appeal, taking into account the court's rulings in this Order.

IT IS FURTHER ORDERED that the Appellants' Brief shall be filed thirty (30) days from the date of receipt of the supplemented Record on Appeal and shall be limited to no more than thirty (30) pages. The Respondent's Brief shall be filed thirty (30) days from the date of receipt of the Appellants' Brief and shall be limited to no more than thirty (30) pages. If the Appellants wish to file a Reply to Respondent's Brief, that Reply shall be due fifteen (15) days from the date of receipt of the Respondent's Brief and shall be limited to no more than fifteen (15) pages.

AND IT IS SO ORDERED.

Ralph K. Anderson, III
Chief Administrative Law Judge

May 17, 2012
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

May 17, 2012
Columbia, South Carolina