

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Administrative Law Judge
Dock. No. 07-ALJ-04-00517-AP

Opinion No. 5389 (S.C. Ct. App. filed March 9, 2016)
App. Case No. 2016-001221

Fred Gatewood, #289775..... Petitioner,

v.

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

PETITION FOR A WRIT OF CERTIORARI

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Pursuant to SCACR 242(a), Fred Gatewood respectfully petitions the Court for a writ of certiorari to review parts of the final decision of the Court of Appeals in this case.

CERTIFICATION OF COUNSEL

Pursuant to SCACR 242(d)(1), Gatewood's undersigned counsel certifies that a petition for rehearing was made on March 19, 2016, and finally ruled on and denied by the Court of Appeals on June 2, 2016 (App. pp. 312, 319).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that any error by the ALC in denying Gatewood's motion to supplement record was harmless, and should the Court have remanded to the ALC to add Gatewood's pay stubs and time cards, and Appendix 1, page 12, to the record?
2. Did the Court of Appeals err in holding that §24-1-295 governed Gatewood's deductions from gross wages from August 1, 2007 through April 13, 2009?
3. Did the Court of Appeals err in holding that security costs and prison industries overhead constituted "other required deductions" under §24-1-295?
4. Did the Court of Appeals err in holding that overtime was not preserved for ALC review, and in not finding Gatewood was entitled to overtime?
5. Did the Court of Appeals err in affirming the ALC decision declining to address the issue of whether SCDC had to process grievance for all inmate workers whether or not they personally filed, and in not remanding to the ALC to consider the issue?
6. Did the Court of Appeals err in affirming the ALC decision declining to entertain Gatewood's request for an injunction against SCDC's future wage

violations, and in not remanding to the ALC to issue the injunction?*

STATEMENT OF THE CASE

This appeal involves inmate Fred Gatewood's grievance for past due wages under South Carolina law. Gatewood worked in the Lieber/Williams Technologies (WTI) work program between 2004 and at least 2009. When Gatewood worked, S.C. Code §24-3-430(D), the "prevailing wage" statute, had been replaced by a budget proviso which allowed the Department of Corrections (SCDC) to pay inmates a negotiated wage which could be less than the prevailing wage (Statutes at Large, No. 66, §37.31, effective July 2001). Similar budget provisos were passed until 2007. In 2007, §24-1-295 was enacted and contained language that was very similar to the previous provisos, plus other provisions.

In 1998, SCDC and WTI entered into a contract to set up this work program (App. p. 73). The contract set inmates' pay rate at \$4 per hour and contained other work guidelines (App. p. 78).

On August 23, 2004, the Supreme Court issued decisions in Adkins, et al. v. SCDC 360 S.C. 413, 602 S.E. 2d 51 (S.C., 2004) and Wicker v. SCDC 360 S.C. 421, 602 S.E. 2d 56 (S.C., 2004). These decisions held inmates could file prevailing wage grievances and appeal to the Administrative Law Court (ALC).

On September 27, 2004, Gatewood retained undersigned counsel to file grievance. On or about October 18, 2004, Gatewood filed his step 1 grievance with

* This petition does not seek review of the following parts of the Court of Appeals' opinion: Section II Deductions (those parts stating §24-3-40 governs deductions from the prevailing wage for July 2007) (App. pp. 298, 300-301); and appropriations bills govern deductions for 2004-05, 2005-06, and 2006-07 until July 2007) (App. p. 301); Section IV Retroactive application (App. pp. 303-308); and Section VI Interest, costs and attorney fees (App. p. 309).

SCDC (App. p. 46). On October 28, 2004, SCDC issued its step 1 response, which was received by Gatewood on November 2, 2004 (App. p. 40). On February 3, 2006 and/or April 19, 2007, Gatewood filed his Amendment/Exhibits to grievance with SCDC (App. p. 50). On May 14, 2007, SCDC issued its step 2 final decision, which was received by Gatewood on May 22, 2007 (App. p. 42). Both SCDC decisions denied the grievance as untimely and also on the merits.

On June 5, 2007, counsel filed Gatewood's appeal in the ALC (App. p. 56). Some 196 other inmates followed this same process. These appeals were consolidated in the ALC under the caption, Francis Ackerman, #266928, et al. v. SCDC Dock. No. 07-ALJ-04-00444, etc.)

The ALC ordered the consolidated appeal to be briefed in three levels. After briefing and receiving the ALC's decision for Level One, counsel briefed the Level Two issue of timeliness of Gatewood's and others' grievances. On March 2 and 16, 2012, the ALC issued its decision that Gatewood's grievance was timely filed and should be briefed on the merits. All others were held untimely filed.

On March 29, 2012, all inmates filed Notice of Appeal in the Court of Appeals of the ALC's March 2 and 16 orders, and a previous order. This appeal was captioned, Francis Ackerman, #266928, et al. v. SCDC Appellate Case No. 2012-210588.

On April 16, 2012, Gatewood filed his merits brief in the ALC as ordered. On June 19, 2012, the ALC issued its order that it had no jurisdiction to continue with Gatewood's merits briefing. On July 18, 2012, Gatewood filed Notice of Appeal in the Court of Appeals of the ALC's June 19 order.

On July 23, 2012, the Court of Appeals remanded the appeal in Francis Ackerman, #266928, et al. v. SCDC to the ALC to issue its Second Amended Order. On July 26, 2012, the ALC issued and filed its Second Amended Order. This order also directed the parties to merits brief Gatewood's grievance.

On August 22, 2012, inmates filed Notice of Appeal in the Court of Appeals in Francis Ackerman, #266928, et al. v. SCDC of the ALC's July 26 Second Amended Order, and a previous order. Gatewood did not appeal the portion of the Second Amended Order that he timely filed his grievance and the parties were to brief his grievance on the merits.

On August 24, 2012, Gatewood re-filed his merits brief with the ALC. On September 5, 2012, the ALC returned the brief unfiled because the matter had been appealed to the Court of Appeals and was no longer pending in the ALC.

On March 26, 2013, the Court of Appeals dismissed Gatewood's appeal in Appellate Case No. 2012-212574 which had been filed on July 18, 2012. On August 26, 2013, the Court of Appeals remitted that appeal to the ALC.

On September 17, 2013, Gatewood filed his Motion to Supplement the Record in the ALC (App. p. 93). On October 21, 2013, SCDC filed its response to Gatewood's Motion to Supplement (App. p. 105).

On October 29, 2013, in a teleconference with counsel, the ALC ruled it could proceed with merits briefing (Level Three) on the issue of Gatewood's entitlement to a \$4.00 per hour wage. However, the ALC stated it could not consider back wage calculations for Gatewood, and indicated such calculations would probably have to be made by SCDC on remand.

On November 12, 2013, the ALC issued an order denying Gatewood's September

17, 2013 Motion to Supplement the Record (App. p. 25).

On February 19, 2014, Gatewood filed his Level Three brief in the ALC (App. p. 113). On April 7, 2014, SCDC filed its responsive brief (App. p. 127). On April 17, 2014, Gatewood filed his reply brief (App. p. 154).

On April 29, 2014, the ALC issued its order affirming SCDC's denial of Gatewood's grievance (App. p. 29).

On June 2, 2014, Gatewood filed Notice of Appeal in the Court of Appeals of the ALC's November 12, 2013 and April 29, 2014 orders (App. p. 185).

On December 11, 2014, Gatewood filed his final brief in the Court of Appeals (App. p. 189). Gatewood briefed the following issues: issue 1 (Motion to Supplement the Record in ALC); issue 2 (statutory basis for deductions from inmate wages); issue 3 (retroactive application of §24-1-295); issue 4 (due process); issue 5 (impairment of contracts); issue 6 ("other required deductions" under §24-1-295); issue 7 (overtime); issue 8 (attorney fees, pre and post-judgment interest, and costs); issue 9 (processing grievance for all inmate workers); and issue 10 (injunctive relief).

On December 22, 2014, SCDC filed its final brief (App. p. 232). On March 9, 2016, the Court of Appeals issued its decision affirming in part, reversing in part, and remanding the case to the ALC (App. p. 292). On March 19, 2016, Gatewood filed his Petition for Rehearing with the Court of Appeals (App. p. 312). On March 31, 2016, SCDC filed its Petition for Rehearing. On June 2, 2016, the Court of Appeals issued its order denying both petitions (App. p. 319).

ARGUMENT

1. The Court of Appeals should have held that the ALC's denial of Gatewood's Motion to Supplement Record was prejudicial error, and remanded to the ALC to have Gatewood's pay stubs and time cards, and Appendix 1, page 12, added to the record.

The Court of Appeals held that any error in denying Gatewood's motion to supplement (App. pp. 93-97) was harmless since the sole issue in the ALC was entitlement to the \$4 wage, which was a legal issue not requiring review of pay records (App. p. 297). Gatewood contends the ALC denial of his motion was prejudicial error, and the Court of Appeals should have so held and remanded to the ALC to have the proposed documents added to the record (App. pp. 201, 231; 276-277; 312-313). Gatewood further contends that, while his pay records were not needed before, they will be needed now since the courts have upheld his entitlement to the \$4 wage (App. pp. 36-37, 301, n. 8).

Gatewood's proposed documents were his pay stubs and time cards, and Appendix 1, page 12 (App. pp. 104, 201). Gatewood contends these documents were "considered" by SCDC under ALC Rule 58B, or proffered but excluded under ALC Rule 58D. Rule 58 states, in pertinent part:

Where applicable, the record of the **contested case** shall consist of:

- ..
- B. All evidence received or considered;
- ..
- D. All proffers of proof of excluded evidence;

The ALC denied Gatewood's motion because the documents were not received or considered by SCDC (App. p. 26). Regarding Gatewood's pay stubs and time cards, SCDC made a prior admission that, after July 2000, such documents have to be consulted for pay rate and hours information (App. p. 182). Moreover,

Gatewood's SCDC administrative hearing lasted from 2004 to 2007. Gatewood contends SCDC must have consulted his pay stubs and time cards to pay him during that time since these were apparently the only accurate records available (App. pp. 182, 203). This conclusion is supported by SCDC's step 2 final decision statement that Gatewood's "participation and pay records were reviewed" by SCDC officials before making its decision (App. p. 42).

Concerning Gatewood's other proposed document, Appendix 1, page 12, the ALC held Rule 58(D) allows inclusion of proffers excluded "in the contested case heard below" (App. p. 26). Gatewood contends the rule also covers proffers made to the ALC. ALC Rule 2E defines "contested case" as "..hearings required by due process.." (App. p. 202). Moreover, in Wicker v. SCDC 360 S.C. 421, 424-425, 602 S.E. 2d 56, 58, n. 1, the Court found that the prevailing wage statute created an interest which may not be denied without due process, and ALC appeal jurisdiction was expanded to cover these claims (App. pp. 202-203). Thus, Gatewood contends his ALC appeal was required by due process, and therefore was a "contested case" under Rule 2E and Rule 58D. It follows that Rule 58D should cover proffers made to the ALC. Finally, inmates proffered Exhibit 1 and Appendix 1 for the ALC record, and at least regarding Exhibit 1, the proffer was denied (App. pp. 8, 90, 92).

As to prejudice from denial of Gatewood's motion to supplement, the ALC during a teleconference stated Gatewood's back pay calculations would probably have to be made by SCDC on remand (App. p. 200). These calculations will require knowledge of Gatewood's work dates, hours and wages paid, and pay stubs and time cards must be consulted for that information (App. pp. 182, 276).

Moreover, Gatewood contends ALC Level Three briefing is the only opportunity for the ALC to order wage calculations on remand, and he will be prejudiced if these documents are not produced (App. p. 277). Finally, Gatewood's Court of Appeals brief requested remand to the ALC to add these documents to the record (App. p. 231).

For the above reasons, Gatewood contends the Court of Appeals should have found the ALC denial of Gatewood's motion to be prejudicial error, and remanded to the ALC to include his pay stubs and time cards, and Appendix 1, page 12, in the record.

Gatewood submits there are special and important reasons to grant the petition (SCACR 242(b)). First, question 1 presents two subsidiary novel questions of law under SCACR 242(b)(1). One involves the appellate court's role in an issue of law appeal to safeguard an appellant's due process appeal rights by remanding to the lower court for inclusion of relevant evidence in the record. The other is the question of whether a due process appeal under Wicker and Rule 2E is a "contested case" under Rule 58D, and therefore covers proffers made to the ALC (App. p. 204). Second, these novel questions obviously involve the constitutional issue of due process under SCACR 242(b)(4).

2. The Court of Appeals should have held that §24-1-295 did not govern Gatewood's deductions from gross wages from August 1, 2007 through April 13, 2009.

The Court of Appeals held that appropriations bills for fiscal years 2004-05, 2005-06, and 2006-07 governed deductions from Gatewood's gross wages until July 2007. During July 2007, §24-3-40 governed deductions (from the prevailing wage) because the governor's veto of the 2007-08 proviso left a void in deduc-

tions for that month. Finally, §24-1-295 governed deductions from August 1, 2007 through April 13, 2009 (App. p. 301). Gatewood contends the Court of Appeals should have held that §24-1-295 did not govern deductions for August 1, 2007 through April 13, 2009 (App. pp. 204, 216; 277, 284; 313-315).

In his Court of Appeals brief, Gatewood contended that §24-3-40 governed deductions, primarily because of clear language to that effect in Williams, et al. v. SCDC, et al. 641 S.E. 2d 885, 887 (S.C., 2007) and Torrence, et al. v. SCDC, et al. 646 S.E. 2d 866, 867 (S.C., 2007). An additional reason was the August 1, 2007 effective date for §24-1-295 (App. pp. 205-208). However, as the Court of Appeals held, from 2004 to 2007 appropriations bills contained provisions which governed deductions for that period (App. p. 301). Therefore, Gatewood does not contest the application of those provisions to his work.

Gatewood does contest the application of §24-1-295 to his work from August 1, 2007 through April 13, 2009. The Court of Appeals held that security costs and prison industries overhead constituted "other required deductions" under §24-1-295. Therefore, the Court held §24-1-295 governed deductions from August 1, 2007, the effective date of §24-1-295, through April 13, 2009. Gatewood contends this was error because the 1998 SCDC/WTI contract terms show that security and prison industries overhead were not required deductions, as more particularly described under Question 3 below.

Gatewood submits there are special and important reasons to grant the petition (SCACR 242(b)). First, the matter of deductions under §24-1-295's "other required deductions" clause (Question 3 below) may present a novel question of law (SCACR 242(b)(1)). Second, deductions from prison wages involve a state agency's finances and potentially large numbers of inmate payees.

Third, a review of the case would enable this Court to clarify the issue of deductions not only for Gatewood, but also for the companion case of Ackerman, et al. v. SCDC Appellate Case No. 2016-000829, now pending on SCDC's Petition for Certiorari.

3. The Court of Appeals should have held that security costs and prison industries overhead did not constitute "other required deductions" under §24-1-295.

The Court of Appeals held SCDC's security costs and prison industries overhead constituted "other required deductions" under §24-1-295, and were thus deductible from Gatewood's \$4 gross wage (App. p. 302). However, the Court also held that §24-1-295 cannot apply retroactively since it was not remedial or procedural, and would violate due process (App. p. 307). And, §24-1-295 applies prospectively to Gatewood's work from August 1, 2007 through April 13, 2009 (App. pp. 301-307). Gatewood contends the clear and unambiguous terms of the 1998 contract show that security costs and prison industries overhead were paid by SCDC at its own expense, and were thus not required deductions from the \$4 wage (App. pp. 216; 284; 312-315).

The cardinal rule of contract interpretation is to ascertain and give effect to the parties' intentions as determined by the contract language (Alexander's Land Co., LLC v. M & M & K Corp. 390 S.C. 582, 703 S.E. 2d 207, 215 (S.C., 2010)). If contract language is clear and unambiguous, the language alone determines the contract's force and effect (Schulmeyer v. State Farm 353 S.C. 491, 579 S.E. 2d 132, 134 (S.C., 2003)). Generally, if the terms of the contract are clear and unambiguous, a court must enforce it according to its terms regardless of its wisdom or folly (Southern Atlantic Financial Serv.,

Inc. v. Middleton 356 S.C. 444, 590 S.E. 2d 27, 29 (2003)). A meaning cannot be given to a contract other than that expressed, hence, words cannot be read into a contract which impart an intent wholly unexpressed when the contract was executed (Park Regency, LLC v. R & D Development of the Carolinas, LLC 402 S.C. 401, 741 S.E. 2d 528, 534 (S.C. App., 2012)). When a party does not argue that contract terms are ambiguous, there is no need for the court to look beyond the four corners of the contract to discern the parties' intentions (Sherlock Holmes Pub., Inc. v. City of Columbia 389 S.C. 77, 697 S.E. 2d 619, 622 (S.C. App., 2010)).

In 1998, SCDC contracted with WTI to set up this work program (App. p. 73).

The contract states, in pertinent part (App. pp. 77-78, 82):

6. Payment for Inmate Services: SCDC will invoice Williams on a bimonthly basis for **inmate labor**.. (§3.1.6)

..

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

..

1. Payment for Services: Williams agrees 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. **SCDC shall be responsible to pay inmate workers, cover security costs and P.I. overhead**, including any costs for health, safety and welfare of the inmates, taxes or other payroll deduction.. (§3.3.1)

..

i. Failure of Williams to pay promptly to SCDC any **inmate wages** due or **supervision pass through costs** hereunder for a period of fifteen (15) days after written notice from SCDC to Williams of such default; (§4.7(i))

Thus, under the contract SCDC invoices WTI for "inmate labor". WTI, in turn, pays SCDC \$4.00 per hour per inmate "for work performed". And, the contract is terminated if WTI fails to pay SCDC promptly for "inmate wages"

or "supervision pass through costs". The contract does not say that WTI is invoiced for, or that it pays SCDC, for labor and security/overhead.

Concerning security, the contract says SCDC is responsible for security "(A)t its expense". As for security and prison industries overhead, "SCDC shall be responsible to..cover security costs and P.I. overhead".

From the above, Gatewood contends the contract is clear that SCDC pays for security and prison industries overhead at its own expense and not out of the \$4 per hour WTI pays for wages. The contract is also clear that the \$4 payment is for "labor", "work", or "wages", and no other expense. It follows that the \$4 payment does not encompass security and prison industries overhead. Finally, the contract is clear in what it does not say, that security and prison industries overhead are encompassed within the \$4 payment, or that these costs are deductible from that payment.

The bullet sheet preceding the contract, and the contract itself, have additional provisions indicating that security and prison industries overhead were not deductible from the \$4 wage. The bullet sheet states as "Requirements/ Specifications" for the contract (App. p. 72): "Utilities: Williams pays utilities - own meter"; "Supervisory cost: Williams will provide one civilian staff and we charge them back"; "Security cost: SCDC responsible 3.2.4".

The contract has provisions requiring WTI to pay, or allowing SCDC to "pass through" costs to WTI, program expenses for: insurance (App. pp. 74-75); phone installation and maintenance (App. p. 74); tools, equipment and supplies (App. p. 74); utilities (water, electricity, gas and trash removal) (App. p. 75); supervisory staff (App. p. 76); training inmates (App. p. 76); and raw materials and component parts (App. p. 76).

In addition, SCDC made the following statement in its Court of Appeals brief following its argument that the contract required SCDC to deduct security and prison industries overhead from the \$4 wage (App. p. 262):

Alternatively, SCDC respectfully submits for argument purposes only and in order to preserve its position regarding this issue, that it paid security, overhead, and other related costs "at its expense" after those expenses were **reimbursed by WTI** pursuant to the 1998 contract.

Thus, pursuant to the above statement, SCDC was reimbursed by WTI for all program expenses. This may explain why the contract says SCDC is responsible to "pay" inmates, but to "cover" security costs and prison industries overhead (App. p. 78). In any event, if SCDC is allowed to deduct security and prison industries overhead from the \$4 wage, it shifts the burden to the inmate when the **contract** clearly places that burden on SCDC and/or WTI. It also allows SCDC to deduct for costs it did not incur since they were reimbursed by WTI.

The Court of Appeals agreed with the ALC's conclusion that "SCDC's security costs and prison industries overhead" constituted "other required deductions" under §24-1-295 because they were "**built into**" the \$4 wage rate. The Court cited §3.3.1 of the contract, which states in part, "(I)t is the intent of the parties that such increase shall only reflect SCDC's increased costs of **prison** overhead" (App. pp. 78, 302).

Again, it appears SCDC had no program costs, or if it did, they were payable by SCDC or passed through to WTI. Moreover, contract terms state the \$4 wage payment is for "work", "labor", or "wages", not wages plus security

costs and prison industries overhead. A meaning cannot be read into a contract which imparts an intent wholly unexpressed therein (Park Regency, LLC v. R & D Development of the Carolinas, LLC). Gatewood contends the Court of Appeals' ruling that security and prison industries overhead are "built into" the \$4 wage reads a meaning into the contract which imparts an intent not expressed.

In addition, the term "P.I. overhead" in the first paragraph of §3.3.1 clearly means prison industries overhead. However, "prison overhead" in the second paragraph, relied on by the Court of Appeals, logically refers to costs to operate the "prison", such as room and board. Gatewood contends, if the drafters had meant "prison industries overhead" in the second paragraph, they would have said so as they did in the first. And further, to ascribe a meaning of "prison industries overhead" to the term "prison overhead" in the second paragraph, reads into the contract a meaning and intent that was not expressed (Park Regency, LLC v. R & D Development of the Carolinas, LLC).

Finally, when the contract was signed in 1998, the only prison wage deduction statute was §24-3-40. That statute had no deduction for security or prison industries overhead. However, it did have a deduction for prison room and board if there was no child support obligation (§24-3-40(A)(3)). For these reasons, Gatewood contends "prison overhead" in §3.3.1, second paragraph, means prison room and board, not prison industries overhead. As a result, that paragraph does not support the Court of Appeals' ruling.

The Court of Appeals cited three provisions in §§24-1-295 and 24-3-310* which "necessarily imply" that SCDC has flexibility to determine what it will charge for inmate labor and "any other costs SCDC must incur" to make this

* Gatewood contends there was no need to look beyond the contract to discern the parties' intent (Sherlock Holmes Pub., Inc. v. City of Columbia).

work available (App. pp. 302-303). As mentioned, SCDC states it was reimbursed for all costs. The first provision from §24-1-295 allows SCDC to "enter into contracts" to provide inmate labor. However, Gatewood contends the issue is whether, under the "other required deductions" clause, the contract required security and prison industries overhead to be deducted from the \$4 wage. The contract required SCDC to cover, not deduct, these costs (App. p. 78).

The second provision in §24-1-295 allows SCDC to "negotiate the wage to be paid for inmate labor" provided under the contract. Gatewood notes it is the "wage" that SCDC negotiates, not deductions from that wage. And, the negotiated wage is paid for "labor", not labor plus security and prison industries overhead.

Gatewood contends the third provision cited by the Court of Appeals, in §24-3-310(2)(4), actually supports his position. Section 24-3-310(2)(4) states the article's intent is to utilize inmate labor for self-maintenance; to reimburse the State for "expenses" incurred by reason of their crimes and imprisonment; and to support themselves and their families. However, inmates cannot maintain themselves, much less their families, if all their earnings are used to pay SCDC for security costs and prison industries overhead. This case illustrates the point. The ALC found Gatewood was entitled to the \$4 gross wage, but not entitled to back wages because of SCDC deductions for security and prison industries overhead (App. pp. 36-38).

Moreover, Gatewood contends that reimbursing the State for "expenses incurred by reason of their crimes and imprisonment" most likely refers to prison room and board allowed as a deduction under §24-3-40(A)(3).

Finally, if the Court finds any ambiguity in the contract, Gatewood contends the Court should construe it against SCDC as a drafter of the contract (Mathis v. Brown & Brown of South Carolina, Inc. 698 S.E. 2d 773, 778 (S.C., 2010)).

Gatewood submits there are special and important reasons to grant the petition (SCACR 242(b)). First, the matter of deductions under §24-1-295's "other required deductions" clause may present a novel question of law (SCACR 242(b)(1)). Second, deductions from prison wages involve a State agency's finances and potentially large numbers of inmate payees. Third, a review of the case would enable this Court to clarify the issue of deductions not only for Gatewood, but also for the companion case of Ackerman, et al. v. SCDC Appellate Case No. 2016-000829, now pending on SCDC's Petition for Certiorari.

4. The Court of Appeals should have held that overtime was preserved for ALC review and that Gatewood was entitled to overtime.

The Court of Appeals held that Gatewood did not raise overtime with SCDC and the ALC properly declined to consider it (App. pp. 308-309). Gatewood contends overtime was preserved for review; SCDC waived the issue preservation argument; the ALC improperly raised issue preservation sua sponte; and Gatewood was entitled to overtime for hours worked in excess of his normal shift (App. pp. 223; 288; 312, 315-316).

Although Gatewood did not demand overtime in his grievances, SCDC raised and denied overtime in its responses "to the extent" Gatewood had demanded it (App. pp. 40, 44, 46, 48, 50). Gatewood contends this was sufficient to preserve overtime for review (J. Toal, Appellate Practice in South Carolina,

Second Edition, p. 59 (issues not raised to or ruled upon by administrative agency will not be addressed on appeal); 73A C.J.S. (2004), Pub. Adm. Law & Procedure, §471). The Appellate Practice in South Carolina discussion cited relied on Kiawah Resort Ass'n v. S.C. Tax Comm'n 318 S.C. 502, 458 S.E. 2d 542, 544 (S.C., 1995) (Opinion states "raised to and ruled upon").

Moreover, Gatewood demanded overtime in his ALC notice of appeal and the parties briefed the issue (App. p. 56, 119, 146). Gatewood's brief raised overtime in his statement of issues, discussed SCDC's denial of overtime and Gatewood's entitlement to it on the merits (App. pp. 113, 119). In support, Gatewood cited the 1998 contract, wage memos, and the decisions in SCDC v. Cartrette 694 S.E. 2d 18, 20-22 (S.C. App., 2010) and SCDC v. Tomlin 694 S.E. 2d 25, 27-29 (S.C. App., 2010). See App. p. 119. In its brief, SCDC conceded inmates could perform overtime, but argued the issue was not ripe for review until the ALC ruled on the first issue of entitlement to the \$4 wage (App. pp. 131, 146). The ALC did rule, and held Gatewood was entitled to the \$4 wage (App. pp. 36-37). Gatewood contends overtime was preserved for ALC review under the rule in Herron v. Century BMW 395 S.C. 461, 719 S.E. 2d 640, 642 (S.C., 2011) (When an issue is not specifically set out in the statement of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from an appellant's arguments).

In addition, Gatewood contends that, in the ALC, SCDC waived issue preservation by failing to argue it in its brief (vol. 5, Am Jur 2d (2007), App. Review, §5) (App. pp. 146-147).

Further, Gatewood contends the ALC erred in raising issue preservation

on its own (J. Toal, Appellate Practice in South Carolina, Second Edition, p. 55; State v. Austin 306 S.C. 9, 19, 409 S.E. 2d 811, 819 (S.C. App., 1991) (Appellate courts in this State, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked).

Gatewood also contends that under Cartrette, he did not have to expressly demand overtime in his grievances. In Cartrette, 694 S.E. 2d at 21-23, the Court of Appeals held §§24-3-315 and 430(D) "compel the Department to ensure" inmate workers receive the same pay rates as non-inmates. Gatewood's step 1 and Amendment to grievance alleged entitlement to the prevailing wage under §24-3-430 and the \$4.00 wage under the budget proviso after July 2001 (App. pp. 46, 50). Gatewood contends his allegations of entitlement under the statute were sufficient for issue preservation purposes.

Even if Gatewood had to expressly demand overtime, he contends his allegations were sufficient. Gatewood's step 1 requested back wages "...as determined from Exhibits A-H". These exhibits were incorporated by reference from Darrell Williams' grievance (App. pp. 46, 50). Exhibit C is the 1998 contract which authorizes overtime to be worked at the standard rate (App. pp. 52, 76, 78). Exhibits D-E are memos allowing overtime to be worked at time and a half the base wage rate (App. pp. 85, 88). Gatewood contends these incorporated exhibits adequately preserved overtime for review.

On the merits, Gatewood contends he was entitled to overtime pay for hours worked in excess of his normal shift. First, the exhibits incorporated by reference in his grievance support entitlement to overtime. Second, Cartrette authorizes overtime. The Court in Cartrette concluded at 694 S.E. 2d 23:

We find sections 24-3-315 and 24-3-430(D) entitle inmate workers in a PIP to pay and working conditions comparable to those enjoyed by workers in private industry, including time-and-a-half pay for overtime hours worked.

Third, SCDC did not argue that Gatewood was not entitled to overtime, and in fact conceded that inmates could perform overtime labor (App. p. 264). Gatewood contends SCDC's concession disposes of this issue on the merits.

Gatewood submits there are special and important reasons to grant the petition (SCACR 242(b)). First, entitlement to prison work overtime presents a novel question of law not previously considered by this Court (SCACR 242(b) (1)). Second, overtime pay involves a State agency's finances and potentially large numbers of inmate payees.

5. **The Court of Appeals should have reversed the ALC decision declining to address the issue of whether SCDC had to process grievance for all inmate workers whether or not they personally filed, and remanded to the ALC to consider the issue.**

The Court of Appeals agreed with the ALC that this contention was manifestly without merit and need not be addressed (App. pp. 309-310). Gatewood contends the Court of Appeals should have reversed the ALC and remanded for the ALC to consider the issue (App. pp. 228, 231; 290; 312, 316).

ALC Rule 65 states the ALC "...may affirm any ruling, order or judgment upon any ground(s) appearing in the Record and need not address a point which is manifestly without merit". In its order, the ALC held that, because the case does not involve "...the grievances of other workers in the program or persons in the program who never filed grievances", it would not consider this issue (App. p. 30, n. 1). However, the ALC did not state the issue was

manifestly without merit. Gatewood contends a court speaks only through its orders, and the ALC did not make this finding. Further, Gatewood raised this issue in his ALC Statement of Issues on Appeal and argued it in his brief (App. pp. 113, 123). Therefore, Gatewood contends the ALC should have considered it on the merits.

Moreover, Gatewood's step 1 grievance was filed "individually, and on behalf of all inmate employees (IE's) listed on attached Exh A" (App. p. 46). Also, SCDC grievance decisions denied "class" grievance status to the grievance (App. pp. 41, 44). Thus, Gatewood's grievance requested that it be a grievance for all workers in the program and SCDC denied it on the merits.

Gatewood submits there are special and important reasons to grant the petition (SCACR 242(b)). First, the issue may present a novel question of law (SCACR 242(b)(1)). Second, processing grievance for all workers would involve a State agency's finances and large numbers of inmate payees.

- 6. The Court of Appeals should have reversed the ALC decision declining to entertain Gatewood's request for an injunction against SCDC's future wage violations, and remanded to the ALC to issue the injunction.**

The Court of Appeals agreed with the ALC decision declining to entertain Gatewood's request for an injunction against SCDC's future wage violations (App. p. 310). Gatewood contends the Court of Appeals should have reversed the ALC and remanded for the ALC to issue the injunction (App. pp. 229, 231; 291; 312, 317).

S.C. Code §1-13-90(d)(9) states that in complaints asserting violations of §1-13-80, unlawful employment practices, the court may enjoin the employer

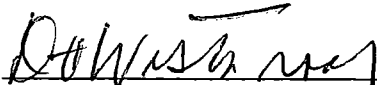
from engaging in such practices. By analogy to §1-13-90, Gatewood contends the Court of Appeals should have reversed the ALC and remanded for the ALC to issue the injunction against future violations.

Gatewood submits there are special and important reasons to grant the petition (SCACR 242(b)). First, the issue may present a novel question of law (SCACR 242(b)(1)). Second, an injunction against SCDC would involve a State agency's finances and large numbers of inmate payees.

CONCLUSION

For the reasons stated, petitioner requests the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,



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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JUL 05 2016

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph k. Anderson, III, Administrative Law Judge
Dock. No. 07-ALJ-04-00517-AP

SC Court of Appeals

Opinion No. 5389 (S.C. Ct. App. filed March 9, 2016)
App. Case No. 2016-001221

Fred Gatewood, #289775..... Petitioner,

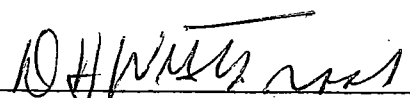
v.

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

PROOF OF SERVICE

I certify that I have served petitioner's Petition for a Writ of Certiorari and Appendix on the S.C. Department of Corrections by depositing copies of them in the U.S. Mail, postage prepaid, on June 30, 2016, addressed to its attorney of record, Lake Summers, Esquire, of Malone, Thompson, Summers & Ott, LLC, 339 Heyward St., Suite 200, Columbia, SC 29201.

June 30, 2016



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CHARLESTON, SOUTH CAROLINA 29401
TELEPHONE: (843) 853-9600
FAX: (843) 577-2241

June 30, 2016

RECEIVED
JUL 05 2016
SC Court of Appeals

The Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Fred Gatewood v. SCDC
Appellate Case No. 2016-001221

Dear Mr. Shearouse:

Pursuant to SCACR 242(a), please find enclosed for filing with the Court the original and six (6) copies of Petitioner Fred Gatewood's Petition for a Writ of Certiorari and Proof of Service. I also enclose two (2) copies of the Appendix, one (1) copy unbound, pursuant to SCACR 242(e). Finally, I enclose a check for the \$100 filing fee.

I have this date filed by mail a copy of the Petition and Proof of Service with the Clerk of the Court of Appeals. By copy of this letter, I also served by mail a copy of the Petition, Appendix, and Proof of Service on counsel for the Department of Corrections.

Thank you for your assistance in this matter.

Sincerely,



Douglas H. Westbrook

DHW/
Encl.

cc: The Honorable Jenny Abbott Kitchings
Lake E. Summers, Esquire

DOUGLAS H. WESTBROOK
ATTORNEY AT LAW
23 BROAD STREET
CHARLESTON, SOUTH CAROLINA 29401
TELEPHONE: (843) 853-9600
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June 30, 2016

RECEIVED
JUL 05 2016
SC Court of Appeals

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

Re: Fred Gatewood v. SCDC
Court of Appeals Appellate Case No. 2014-001199
Supreme Court Appellate Case No. 2016-001221

Dear Ms. Kitchings:

Pursuant to SCACR 242(c), please find enclosed for filing with the Court a copy of Petitioner Fred Gatewood's Petition for a Writ of Certiorari and Proof of Service, which have been filed by mail this date in the Supreme Court.

Thank you for your assistance in this matter.

Sincerely,



Douglas H. Westbrook

DHW/
Encl.

cc: The Honorable Daniel E. Shearouse
Lake E. Summers, Esquire



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