

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

MAY 31 2016

Opinion No. 5379 (S.C. Ct. App. filed Feb. 10, 2016)  
App. Case No. 2016-000829

S.C. SUPREME COURT

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

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Rodney Elliott, #251337, Henry Rivers, #219118.....Respondents,

v.

South Carolina Department of Corrections, Petitioner.

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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Pursuant to SCACR 242(f), inmates respectfully submit their Response To Petition For A Writ Of Certiorari filed by the Department of Corrections (SCDC).

**SCDC'S QUESTIONS PRESENTED FOR REVIEW**

A. Does the Court of Appeals' decision, by which it reversed the Administrative Law Court's order upholding SCDC's conclusion that the Respondents' prison industries wage claims were time-barred, conflict with a prior, albeit unpublished decision by this Court?

B. Does the Court of Appeals' decision, in which it ruled that inmates' prison industries wage claims are exempt from any filing deadline whatsoever, present novel questions of law?

**INMATES' COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW**

If the Court grants SCDC's petition, inmates present the following question for review:

First Alternative: Did SCDC's fifteen-day filing deadline apply to inmates' grievances (App. p. 6110)?

Second Alternative: Did inmates' grievances concern policies/procedures under §13.9 of SCDC grievance policy because of their express language and substance, Adkins and Wicker, and notices of appeal, and was there a time limit to file under §13.9 (App. p. 5966)?

**COUNTER-STATEMENT OF THE CASE**

This case involves 197 inmate grievances for prevailing wages under S.C. Code §24-3-430(D). Respondents are inmates and former inmates who worked in the Lieber/Williams Technologies (WTI) work program at various times between 1998 and present. A 1998 contract between SCDC and WTI set inmates' pay rate at \$4 per hour and contained other work guidelines (App. p. 725).

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

On August 23, 2004, this 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), holding inmates could file a prevailing wage grievance and appeal to the Administrative Law Court (ALC).

Beginning on September 22, 2004, 200 inmates retained undersigned counsel to file grievance, and many filed step 1 grievances that day. All grievances were denied by SCDC. On November 3, 2004, the Circuit Court stayed the grievance process. Also in early November, inmates filed step 2 appeals.

On April 19, 2007, inmates filed 188 Amendments/Exhibits to their grievances pursuant to SCDC's in court agreement to accept them for filing and consider them on the merits (App. pp. 189, 247, 299).

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

From June 2007 to February 2008, counsel filed 116 appeals in the ALC.

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

On November 7, 2008 and April 10, 2009, counsel filed 81 automatic appeals in the ALC pursuant to §13.5 of grievance policy (App. p. 688). In an April 14, 2010 order, the ALC instructed the parties to brief this appeal in three levels. In its March 10, 2011 Level One order, the ALC ordered the parties to proceed to Level Two and brief the timeliness of each inmate's grievance filing under grievance policy (App. pp. 43-44). In its orders of March 2 and 16, 2012, the ALC held that all grievances but one were untimely as not being filed within 15 days of inmates' initial pay date. See App. pp. 94, 118.

On March 29, 2012, inmates filed Notice of Appeal in the Court of Appeals of the March 10, 2011, March 2, 2012 and March 16, 2012 orders (App. p. 5144). On April 27, 2012, inmates filed their initial brief in the Court of Appeals. That brief had references to the March 2 and 16, 2012 order and amended order. On May 17, 2012, the ALC requested leave from the Court of Appeals to file a Second Amended Order (App. p. 121). On June 15, 2012, inmates filed Notice of Appeal in the Court of Appeals of the March 10, 2011 order and Second Amended Order filed May 17, 2012 (App. p. 5148).

On July 23, 2012, the Court of Appeals remanded this appeal to the ALC to issue the Second Amended Order (App. p. 151). On July 26, 2012, the ALC issued and filed its Second Amended Order (App. p. 153). On August 22, 2012, inmates filed Notice of Appeal in the Court of Appeals of the March 10, 2011 order and July 26, 2012 Second Amended Order (App. p. 5159).

On August 27, 2014, inmates filed their final brief in the Court of Appeals (App. p. 5955). On November 6, 2014, SCDC filed its final brief (App. p. 6015).

On February 10, 2016, the Court of Appeals issued its decision reversing the ALC and holding that inmates' grievances did not concern an "incident",

but rather concerned SCDC "policies/procedures", which are exempt from the filing deadline under §13.9 (App. p. 6111). On February 25, 2016, SCDC petitioned for rehearing of the Court's February 10, 2016 decision (App. p. 6115). On March 24, 2016, the Court issued its decision denying the petition for rehearing (App. p. 6150).

## ARGUMENT

### I. Regarding SCDC's Questions Presented

#### A. The Court of Appeals' decision does not, under the rules, conflict with a prior decision of this Court.

Inmates contend SCDC's question A is not presentable because SCDC did not raise it in its Court of Appeals brief (App. pp. 6015-6074). Under SCACR 242(d)(2), only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for certiorari. Inmates further contend the question is not a substantive legal question presented under SCACR 242(d)(2), but rather one of the policy considerations governing review under SCACR 242(b). Thus, inmates contend SCDC has presented no proper question for review.

On the merits, memorandum opinions and unpublished orders are not precedent and should not be cited except in proceedings in which they are directly involved (SCACR 268(d)(2)). Here, the Okera decision cited by SCDC states at the top that it has no precedential value and should not be cited except as stated in SCACR 268(d)(2). Moreover, the opinion cite, "No. 2012-MO-042", appears to denote a memorandum opinion. Further, the notation at the bottom, "Not reported in S.E. 2d, 2012 WL 10907962" indicates it is an unpublished opinion. Finally, it does not appear Okera is involved in the instant appeal.

Moreover, inmates contend SCDC has discussed matters which are not in the record. SCDC's petition states Okera participated in an SCDC project; he filed a wage grievance; he and inmates here participated in different types of projects; and thus under §13.1 he and inmates here filed their wage grievances (SCDC petition, p. 9, n. 11). However, Okera does not mention this information, or what Okera was doing, or what he alleged in his grievance. This information is also not in the record here. Ordinarily, the appellate court will not consider any fact which does not appear in the record (Rule 210(h)).

SCDC contends that in Okera, this Court, under Toth v. Square D Co. 377 S.E. 2d 584, 586-587 (S.C., 1989), implicitly affirmed the 15 day deadline for a wage grievance which was in a posture similar to inmates' grievances. SCDC asks this Court to grant its petition to resolve the tension between Okera and the Court of Appeals decision here (SCDC petition, p. 10). Inmates contend we do not know what posture Okera was in, either from that opinion or the instant case record. Thus, there is no record evidence of tension.

In conclusion, inmates submit SCDC has not shown special and important reasons why its petition for question A should be granted, because SCDC did not raise this question in its Court of Appeals brief; it is not a substantive legal question; Okera has no precedential value and should not be cited; and there is no record evidence of tension between Okera and the Court of Appeals decision.

**B(1). The Court of Appeals decision does not, under the rules, present as a novel question of law that inmates alone determine if their grievances concern "policies/procedures".**

Inmates contend SCDC did not brief this question in the Court of Appeals or in its petition for rehearing (App. pp. 6053-6057, 6125-6147). Therefore,

it does not qualify for review under SCACR 242(d)(2).

On the merits, inmates contend SCDC incorrectly states the question. First, a grievance concerning policies/procedures should be readily recognized by SCDC (App. p. 6153). Second, inmates' grievances fall within SCDC's own definition of "policies/procedures"; the substance of grievances challenges the pay rate in the contract; and contract provisions cannot realistically be characterized as "incidents" (App. pp. 6113-6114). Third, the grievance form itself asks which, if any, SCDC policy is being grieved (App. p. 1296). Thus, inmates do not alone determine if grievances concern policies/procedures. Rather, SCDC makes the determination from the language and substance of the grievance.

SCDC contends grievance policy does not support the Court of Appeals' decision that the waiver requirement in §13.9 applies only to "incident" grievances (SCDC petition, pp. 13-14; App. pp. 6153-6154). Inmates contend the language and context of §13.9, and SCDC's step 1 instructions, support the Court's decision. Section 13.9 states (App. p. 689):

Exceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures. Exceptions **may** also be made for **incident** grievances by the Chief/designee Inmate Grievance Branch, provided that documented reasonable cause can be demonstrated as to why the original time frame was not met, e.g., inmate physically unable to initiate grievance due to hospitalization, court appearance, etc. The waiver must be requested by the grievant.

Thus, the first exception for policy/procedure grievances is mandatory, unqualified, and has no time limit. As an exception to §13.1, §13.9's first sentence is removed "absolutely" from §13.1's operation (73 Am Jur 2d (2001), Statutes, §212). In contrast, the second exception is permissive and concerns

"incident" grievances under §13.1. It also requires reasonable cause as to why the deadline was not met, such as hospitalization or court appearance. Obviously, this exception may be subject to the 15 day deadline if conditions are not met. Moreover, step 1 instructions direct inmates to (App. p. 1297):

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

Inmates contend that if waiver had to be requested from SCDC for §13.9 grievances concerning policies/procedures, it would be discretionary with SCDC. If discretionary, that would contradict (1) SCDC's mandatory exception in §13.9; (2) SCDC's step 1 instructions that policy grievances can be filed at any time; and (3) the context of §13.9, which clearly means for waiver to apply only to §13.9 incident grievances.

Finally, statutes and regulations must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of lawmakers (App. pp. 6153-6154). Inmates contend the Court of Appeals' decision concerning waiver is logical and comports with common sense. It is also practical, reasonable and fair, and consonant with the purpose, design and policy of SCDC grievance policy.

SCDC questions, what if an inmate asserts that his grievance concerns policies/procedures, but instead it obviously concerns an "incident" (SCDC petition, p. 14). First, SCDC's hypothetical does not present facts which are before the Court. As such, inmates contend the Court should not consider it (SCACR 210(h)). On the merits, it is reasonable to ask in response, why, if SCDC can determine an obvious "incident" grievance, it cannot also determine a grievance misrepresented as one concerning policies/procedures.

SCDC contends, under the Court of Appeals' March 24, 2016 order, if an inmate files a grievance claiming an officer entered his cell during inspection under a purported SCDC policy and took his typewriter, inmate would not have a 15 day deadline (SCDC petition p. 15). Again, SCDC's hypothetical does not present facts from the record and should not be considered (SCACR 210(h)). On the merits, inmates contend that SCDC could readily recognize and determine if the grievance's substance concerns policies/procedures or the taking of the typewriter.

SCDC contends the Court of Appeals' decisions give inmate the power to determine the type of grievance and when he may file, and this deprives SCDC of the opportunity to investigate the claim (SCDC petition, p. 15). As to the type of grievance, inmates note that SCDC itself directs inmates in the step 1 to "indicate which policy" if an SCDC policy is being grieved (App. p. 1296). That, plus the substance of the grievance as determined by SCDC, will determine the type of grievance (App. p. 6113). As to when inmate may file, §13.9 itself is an express, mandatory and automatic exception to the 15 day rule, and states no time limit in its place (App. p. 689). And, step 1 instructions state that policy grievances can be filed "at any time" (App. p. 1297).

As to the opportunity to investigate, this case concerns SCDC wage policy, which is ongoing and is contained in the 1998 contract and various memos (App. pp. 719-735). Moreover, the record contains thousands of pages of grievance documents, including SCDC's responses to step 1's and step 2's. These responses recount in detail the history of the proceedings and SCDC's multiple grounds for denying grievances (App. pp. 1298-1299, 1311-1317). In none of the decisions did SCDC complain of inability to investigate. To the contrary, SCDC states it

reviewed the step 2 appeal and all documents in support of the step 1. Also, pay records were reviewed by officials both at Lieber and Division Headquarters (App. p. 1311). Moreover, SCDC "...carefully considered the arguments you made in both your step 2 appeal and your step 1 grievance.." (App. p. 1311). Finally, SCDC notes it again reviewed the step 1 grievance and step 2 appeal in light of Adkins, Wicker, §13.1's deadline, and the exceptions in §13.9 (App. p. 1312). Inmates contend the Court of Appeals' decision did not affect SCDC's power to investigate.

SCDC contends the language in §13.9 supports a presumption that the 15 day deadline applies to all grievances (SCDC petition, pp. 15-16). However, SCDC's partial quote of §13.9 ("Exceptions to the (fifteen) day time limit requirement") omits the second half of the sentence ("will be made for grievances concerning policies/procedures"). Thus, SCDC's omission leaves out the parts most relevant to this appeal. In addition, SCDC's blanket presumption would violate the rule that, as an exception to §13.1, the first sentence in §13.9 is removed from §13.1's operation "absolutely" (73 Am Jur 2d (2001), Statutes, §212)./

SCDC questions how SCDC can determine if a grievance challenges policies/procedures, etc. if the inmate has no filing deadline (SCDC petition, p. 16). In response, inmates contend that, as this case demonstrates, when the grievance is filed does not affect SCDC's ability to determine its type, even though here SCDC made that determination incorrectly.

SCDC contends the waiver request in §13.9 exists to (1) compel inmate seeking an exception to advise SCDC of the type of grievance, and (2) compel inmate to seek an extension in timely fashion to enable SCDC to determine if the claim concerns policies/procedures and to promptly investigate (SCDC petition, p. 16).

First, an inmate does not seek an exception from §13.1 for §13.9 grievances concerning policies/procedures. That exception is unqualified, mandatory, and automatic (App. pp. 689, 6153). Also, step 1 instructions direct inmates to file "policy grievances at any time" (App. p. 1297). Thus, no waiver request is required.

Second, there is no grievance rule requiring inmates to advise SCDC of the type of grievance. The step 1 form directs inmates to "indicate which policy" if he is grieving an SCDC policy (App. p. 1296). Third, exceptions to the 15 day deadline may be made for "incident" grievances if reasonable cause is shown as to why the deadline was not met. The rule does not address timeliness, however, as it is phrased in the past tense, it implies that the request can be made after the deadline has expired.

In conclusion, inmates submit SCDC has not shown special and important reasons why its petition for question B(1) should be granted, because SCDC did not raise this question in its Court of Appeals brief or its petition for rehearing; SCDC incorrectly states the question in terms of inmates alone determining if their grievances concern policies/procedures; and, based on the language and context of §13.9, and SCDC step 1 instructions, the Court of Appeals was correct in deciding that the waiver requirement in §13.9 applies only to §13.9 "incident" grievances.

**B(2). The Court of Appeals' decision does not, under the rules, present as a novel question of law whether "inmate property complaints" under §7.4 covers only complaints about "chattels", or they also cover complaints about wages.**

Initially, inmates note SCDC did not raise this question in its Court of Appeals brief (App. pp. 6053-6057). Therefore, inmates contend it is not a

presentable question for review under SCACR 242(d)(2).

In addition, the Court of Appeals' decision did not discuss this issue (App. p. 6113). However, SCDC raised it in its petition for rehearing (App. pp. 6130-6133), and now again in its petition for certiorari. Inmates contend that the issue is not preserved for Supreme Court review because of the rule in Herron v. Century BMW 395 S.C. 461, 719 S.E. 2d 640, 644-645 (S.C., 2011). In Herron, this Court held, where federal preemption was not raised in the trial court or the Supreme Court, but was raised in the petition for rehearing in the Supreme Court and in the petition for certiorari to the United States Supreme Court, the issue was not preserved in the South Carolina proceedings.

On the merits, SCDC contends that under Wicker v. SCDC and Williams v. SCDC, inmates possessed a property right to wages; wages constituted their property; inmates' wage claims constituted "inmate property complaints" under §7.4; and inmates' grievances constituted "incident" grievances under §13.1 subject to the 15 day deadline (SCDC petition, p. 20). In Wicker v. SCDC 360 S.C. 421, 424-425, 602 S.E. 2d 56, 57-58 (S.C., 2004), the Court found:

..where..the state has created a statutory right to the payment of a prevailing wage, it cannot thereafter deny that right without affording due process of law.

..procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property. (citation)

We find the state's statutory mandate that inmates be paid the prevailing wage creates such an interest, which may not be denied without due process.

In Williams, et al. v. SCDC, et al. 372 S.C. 255, 641 S.E. 2d 885, 886, n. 1 (S.C., 2007), the Court noted:

In the companion case of (Wicker), we further held that inmates may not be deprived of this property interest without due process;

The Court of Appeals held that "property" in §7.4 contemplates "chattels" belonging to the grievant, rather than an intangible right to the payment of wages (App. p. 6154). "Property" is the unrestricted and exclusive right to a "thing" (Black's Law Dictionary, Fourth Edition, p. 1382). Inmates note that §10.1 of grievance policy allows restoration of "property" by substituting a state-like "item" (App. p. 686). "Chattel" means an article of personal property, or a "thing" personal and movable (Black's Law Dictionary, Fourth Edition, p. 299). Thus, legal definitions and grievance policy both compare "property" to "things" or "items".

Finally, when interpreting regulations, this Court looks to the plain and ordinary meaning of the words used without resort to subtle or forced construction to limit or expand the regulation (Murphy v. SCDHEC 396 S.C. 633, 723 S.E. 2d 191, 195 (S.C., 2012)). Inmates contend the Court of Appeals' decision that "inmate property complaints" in §7.4 means chattels is consistent with the plain and ordinary meaning of the words in keeping with the rule in Murphy.

SCDC contends the Court of Appeals made a baseless distinction between chattels and inmate wages as property (SCDC petition, pp. 20-21). "Wages" means compensation "paid" to a person for services (Black's Law Dictionary, Fourth Edition, p. 1750). Inmates note they have not been paid the wages they seek by their grievances. Indeed, by the current litigation SCDC continues to dispute inmates' entitlement to those wages. While inmates have an intangible right to payment of the wages, the money is not presently subject to inmates' control and disposition like a chattel in their cell would be. Inmates contend the Court of Appeals' distinction between chattels and wages as property was logical and correct.

SCDC contends that under §7.4 and grievance policy, there is no distinction between types of property, whether chattels or wages (SCDC petition, p. 21). Inmates respectfully refer the Court to the discussion above, page 12.

SCDC contends Adkins, Wicker, and Williams did not distinguish between "property right to wages" and property items inmates possess (SCDC petition, p. 21). In response, inmates note these cases did not concern or discuss property distinctions.

SCDC contends Adkins and Wicker held that inmates' "property rights" were subject to adjudication under grievance policy (SCDC petition, p. 21). Inmates contend that the holdings in these cases dispose of SCDC's argument:

In accordance with the companion case of (Wicker), we hold inmates may file an inmate grievance to protest DOC's failure to pay wages in accordance with the mandatory statutory provisions.

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

(Adkins, 360 S.C. 413, 419, 602 S.E. 2d 51, 55 (S.C., 2004); Wicker, 360 S.C. 421, 424-425, 602 S.E. 2d 56, 58 (S.C., 2004))

Thus, inmates contend Adkins and Wicker did not hold that "property rights" were grievable, but that SCDC's failure to pay wages in accord with the prevailing wage statutes was grievable.

SCDC contends the Court of Appeals' distinction between types of property may depart from Adkins, Wicker and Williams, or at least be a novel issue of law subject to Supreme Court review (SCDC petition, pp. 21-22). In addition to the holdings in Adkins and Wicker discussed above, Williams held inmates cannot sue WTI under the Payment of Wages Act because WTI is not the entity

responsible for paying their wages (Williams v. SCDC 372 S.C. 255, 260, 641 S.E. 2d 885, 888 (S.C., 2007)). Williams also did not address the distinctions between types of property.

SCDC reviews the ALC's June 24, 2012 order (presumably the July 26, 2012 Second Amended Order) and makes various contentions it made to the Court of Appeals (SCDC petition, pp. 22-24). However, the first two pages have nothing to do with SCDC's petition for certiorari. For this reason, inmates contend these pages should be disregarded.

On the merits, SCDC repeats arguments that the ALC adopted SCDC's definition of policies/procedures; SCDC's definition avoided the public policy concerns of inmates' definition; inmates' definition is overly broad; and a five year delay in filing grievances "could" affect SCDC's ability to defend (SCDC petition, pp. 22-24). Inmates contended that "policies/procedures" under §13.9 means SCDC wage policy (App. p. 5979). SCDC's definition is quoted in SCDC's brief and inmates' reply brief (App. pp. 6054, 6089). For brevity, inmates cite their briefs addressing inmates' definition and issues SCDC raises (App. pp. 5977-5979, 5984, 6089-6090). Concerning the five year delay, SCDC has never claimed or proven actual prejudice. On the contrary, the record shows SCDC has carefully and thoroughly documented its investigation and decisions for these claims. See discussion above, pages 8-9.

SCDC contends the Court of Appeals' decision "sweeps away" any limitation applicable to wage claims (SCDC petition, p. 24). Inmates respectfully refer the Court to the discussion above at pages 6-7, 9.

SCDC contends the Court of Appeals' decision gives no consideration to the "challenges" it confronts in defending inmate claims (SCDC petition, p. 24).

As evidence, SCDC cites inmates' ALC motion to supplement record disputing key data in SCDC's "Exhibit F" (SCDC petition, p. 24, n. 19; App. pp. 389-670). However, in its response to inmates' motion to supplement record, SCDC contends Exhibit F is the most accurate and reliable data regarding inmates' work participation (App. p. 4527). In sum, SCDC claimed no challenges or problems in defending the accuracy and completeness of its records.

SCDC contends the Court of Appeals' decision gives a "green light" to inmates to argue that the §13.9 exception trumps the 15 day deadline for all claims (SCDC petition, p. 24). However, as the Court of Appeals indicated, the substance of grievances will determine whether they concern policies/procedures (App. pp. 6113, 6154). Moreover, a policy/procedure grievance should be readily recognized by SCDC (App. p. 6153). If, after review, it is in substance an "incident" grievance, SCDC can treat it accordingly.

In conclusion, inmates submit SCDC has not shown special and important reasons why its petition for question B(2) should be granted, because SCDC did not raise this question in its Court of Appeals brief, but first did so in its petition for rehearing; and the Court of Appeals correctly decided that "property" under §7.4 means chattels, and the subject of inmates' grievances falls under Department policies/procedures, directives or conditions that directly affect an inmate, rather than "inmate property complaints".

## II. Regarding Inmates' Counter-Statement of the Question Presented

**First Alternative:** SCDC's fifteen day filing deadline did not apply to inmates' grievances.

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

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

The term "policies/procedures" appears in several provisions of SCDC's grievance policy, most notably §§7.1 and 13.9 (App. pp. 685, 689). However, the term is not defined in that policy (App. p. 691). "Policy" is defined elsewhere as "the general principles by which a government is guided in its management of public affairs" (Black's Law Dictionary, 5th ed., 104). The term "procedure" is defined as "the act or method of proceeding in an action" (Webster's New World Dictionary, 1989 ed., 341). SCDC defines "policies" and "procedures" as the approved guidelines for handling the agency's day-to-day operations as well as statements expressing the basic expectations of conduct for agency staff and inmates (App. p. 160).

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

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

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

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

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

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

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

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

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

Inmates point to several reasons why their grievances concerned policies/procedures. First, inmates note the express language of their grievances concerns policies/procedures. At least 92 step 1's state (e.g., App. p. 1388):

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

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

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

Second, the grievances concern policies/procedures in substance. SCDC wage policy is found in the 1998 contract with WTI (App. p. 720) and in various memos. These documents are attached as Exhibits B-E to Darrell Williams' grievance; incorporated by reference in the step 1's and Amendments quoted above; and Exhibit C, the 1998 contract, is attached in part to the Amendments (App. pp. 719-735; e.g., pp. 1300, 1302, 1388). The contract has two unlawful provisions, the \$4/hour wage and a provision to pay "PI overhead" (App. p. 725). The \$.35/hour base rate (App. p. 719), plus unauthorized (§24-3-40) overhead deductions, reduced inmates' pay to under \$1/hour. This wage policy violated §24-3-430(D) from 1998 to 2001, and the \$4/hour negotiated wage from 2001 to present. Inmates' grievances seek to set aside this illegal policy and enforce the public policy in §24-3-430(D) and Adkins/Wicker. Thus, these grievances "concern" and are based on policy entirely.

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

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

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

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

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

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

Inmates contend the March 10, 2011 order was correct in using the term DOC "policies" rather than "conditions". This view appears to be in line with the

Supreme Court's statement in Adkins 602 S.E. 2d at 53, n. 1, where, after describing inmates' training wage, the Court stated, "(T)he **policy** of paying a training wage ended July 1, 1999". Adkins held inmates could grieve their illegal wages (602 S.E. 2d at 55), which had been paid five years before.

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

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

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

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

the pay rate condition in that policy, the grievances are probably "concerning policies/procedures" under §§7.1, 13.9 of grievance policy.

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

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

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

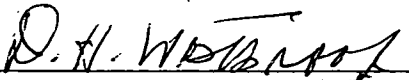
SCDC states special and important reasons exist to grant the petition because the Court of Appeals' decision "guts the filing deadline" in grievance policy (SCDC petition, p. 1). Inmates respectfully disagree. The Court did not apply the deadline in §13.1 because inmates' grievances are not "incident" grievances under §13.1 (App. pp. 6111, 6114). Instead, the grievances in substance challenge the contract pay rate, which logically falls under §13.9's "policies/procedures" exception to §13.1. Moreover, the wage contract is enduring and has the same effect on numerous inmates (App. pp. 6113-6114, 6154). In addition, §13.9 states a mandatory, automatic exception to §13.1 for

grievances concerning policies/procedures (App. pp. 6111, 6153). Finally, SCDC's step 1 instructions tell inmates that policy grievances can be filed "at any time" (App. p. 1297). Thus, the Court of Appeals' decision did not gut §13.1. That provision was simply not applicable to inmates' grievances.

#### CONCLUSION

In conclusion, inmates respectfully request that SCDC's Petition For A Writ Of Certiorari be denied and the Court of Appeals' decision be affirmed.

Respectfully submitted,

  
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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

Opinion No. 5379 (S.C. Ct. App. filed Feb. 10, 2016)  
App. Case No. 2016-000829

Dock. Nos. 07-ALJ-04-00444-AP, 07-ALJ-04-00445-AP, 07-ALJ-04-00446-AP,  
07-ALJ-04-00447-AP, 07-ALJ-04-00448-AP, 07-ALJ-04-00449-AP,  
07-ALJ-04-00500-AP, 07-ALJ-04-00501-AP, 07-ALJ-04-00502-AP,  
07-ALJ-04-00503-AP, 07-ALJ-04-00504-AP, 07-ALJ-04-00505-AP,  
07-ALJ-04-00506-AP, 07-ALJ-04-00507-AP, 07-ALJ-04-00508-AP,  
07-ALJ-04-00509-AP, 07-ALJ-04-00510-AP, 07-ALJ-04-00511-AP,  
07-ALJ-04-00512-AP, 07-ALJ-04-00513-AP, 07-ALJ-04-00514-AP,  
07-ALJ-04-00515-AP, 07-ALJ-04-00516-AP, 07-ALJ-04-00517-AP,  
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Francis Ackerman, #266928, Malik Aljalil, #219551, Linso Allen, #269378,  
Michael Benninger, #264212, Fredrick Brown, #289602, Timothy Brown, #238461,  
Terrell Buchanon, #277262, Christopher Bush, #300690, Rudy Cassady, #238732,  
Sheldon Clark, #264772, Zawaski Cobb, #187136, Kamathene Cooper, #145333,  
Gladstone Cummings, #267450, Patrick Curtis, #175139, Quintin Daniels, #196284,  
Curtis Davis, #238776, Heyward Dempsey, #134171, Phillip Denney, #240678,  
Paul Durham, #219573, Jerome Durham, #270393, Keith Eigner, #299153,  
Bernard Felder, #122099, Jermaine Garriett, #191274, Fred Gatewood, #289775,  
Dennis Goff, #177506, Gregory Grant, #109656, Nelson Hampton, #286427,  
James Hartman, #219770, Gary Hayes, #263985, Michael Hood, #279897,  
Nikia Law, #260855, Stephen Lease, #137016, Harry Leonard, #249996,  
Herbert McFadden, #184297, Michael McFarland, #266870, Earl Mack, #216237,  
John Moultrie, #276527, Matin Muntaqim, #142282, Tony Pitts, #280579,  
Germaine Pringle, #250390, Gene Richardson, #93614, Dennis Richey, #233472,

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

Ignacio Rivera, #300424, Vondell Sanders, #241308, James Sattler, #235043,  
Joseph Schmitz, #173987, Arthur Scott, #251957, Jerome Scott, #153381,  
Roosevelt Scott, #275631, Archie Simmons, #161419, Robert Smith, #199324,  
James Williams, #282929, Gary Bryant, #258972, Harlon Edger, #261866,  
Johnny Holden, #245199, Don Hughes, #256862, Michael Key, #266890,  
Archie Lee, #226354, Isaac Richardson, #232574, Larkland Richards, #281768,  
John Wojcik, #219463, James Bogan, #288111, Larry Burke, #281911,  
Jammie Gaymon, #208922, David Harrell, #260004, Jeff Stinson, #260047,  
Ricky Libby, #274681, Alain Lareau, #128014, Quentin Baker, #297868,  
Frank Corley, #292975, James Jackson, #267718, Quintin Linen, #238553,  
Thomas Miles, #246763, Chauncy Orr, #177069, Isaiah Scott, #228008,  
Eric Youmous, #281091, Derek Carter, #275938, Willie Hare, #256641,  
Ernest Miller, #235474, Robert Norris, #266101, Ronald Simmons, #267937,  
Samuel Simmons, #302393, William Thomas, #272501, Anthony Murphy, #295893,  
Anthony Murray, #237867, Johnny Hayes, #267910, Roy Morris, #288777,  
Daniel Dewey, #276678, Nehemiah Greene, #243339, Leroy Choice, #113990,  
James McFadden, #235419, Francis Prioleau, #268813, Darrell Rochester, #146731,  
Wilbur Jordan, #272264, Alvin Stewart, #278595, Kevin Poston, #266083,  
Kevin Smith, #272440, Donald Robinson, #277520, Douglas Bude, #263537,  
Willie Elder, #246208, Rogelio Zavala, #245106, Dennis Knight, #286981,  
Jacob Beach, #301270, Francis Ackerman, #266928, Darrin Miller, #259593,  
Edward Bryant, #255998, Sherman Austin, #300028, Michael Baylor, #265682,  
Taurus Bowman, #252745, Kenneth Carter, #243538, Calvin Drummond, #236322,  
David Feggins, #287157, Terry Ferguson, #299080, Willie House, #257820,  
Peter Jenkins, #257321, Percy Martin, #270035, James Murray, #165487,  
Stephone Simmons, #300422, Larry McClam, #282972, Tyrone Aiken, #244428,  
Tyrone Aiken, #248367, Frank Anderson, #282800, Ronald Brewer, #285756,  
Keith Brown, #295762, Pete Bryant, #242370, Michael Busques, #191961,  
Richard Butler, #162467, Gary Davis, #106144, Anthony English, #238474,  
Kerlan Etheredge, #236635, James Evans, #267837, Jose Flores, #240563,  
Robert Garrett, #291096, Reginald Geddis, #183851, Richard Graham, #228235,  
Gary Grooms, #283860, Wayne Harlen, #245705, Johnny Hayes, #267910,  
Steven Hickenbottom, #196263, Alfred Joyner, #260442, Donald Lyles, #296135,  
Henry Baker, #263398, Thomas Carter, #249362, Thomas Butler, #257552,  
Bobby Williams, #261486, Ray Wells, #173651, Rodney Pressley, #177947,  
Keith Kelly, #257556, Maxie Gamble, #254413, James Enriquez, #215539,  
Perry Deveaux, #109601, James Wells, #180458, Cedric Martino, #291396,  
Donald McAteer, #292961, Robert Wydman, #260331, Anthony Wright, #214007,  
Derrick Williams, #272958, Kenneth White, #228409, James Trumper, #247429,  
Jeffrey Spears, #281697, Timothy Smith, #296539, David Sims, #278067,  
Virgil Simpson, #281888, Edward Simpson, #220017, Kenneth Simmons, #278911,  
George Shine, #292391, Ralph Sellers, #164295, Laron Richardson, #258786,  
Frank Patterson, #283098, Tony McNeil, #235846, Larry McClam, #282972,  
Lavanza Mack, #189340, Raymond Livingston, #277133, Nicholas Lambrose, #215080,

Joseph Kelsey, #217218, Keith Eugene, no number, Chuck Jackson, #266425, James Foye, #211523, Timothy Inman, #151123, Marvin Gilbert, #273934, Demetrius Wheeling, #264976, Leon Wilson, #155867, Jeffrey Tevis, #216442, Darryel Beasley, #222388, Curtis Thompson, #266448, Baron Cobbs, #280479, James Tino, #145030, Harold Roberson, #117001, Ray Gadsden, #187527, Tony Witt, #242918, Jonathan Singleton, #287670, Joe Pannell, #89592, Charles Graham, #294453, Lazarus Brannon, #227847, Darrell Williams, #219730, Wilbert Mills, #244004, Howard Grant, #255473, Timothy Wilson, #261971, Rodney Elliott, #251337, Henry Rivers, #219118.....Respondents,

v.

South Carolina Department of Corrections, Petitioner.

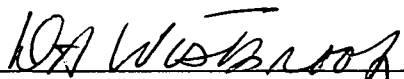
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PROOF OF SERVICE

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I certify that I have served respondents' Response To Petition For A Writ Of Certiorari on the S.C. Department of Corrections by depositing a copy of it in the U.S. Mail, postage prepaid, on May 27, 2016, addressed to its attorney of record, Lake Summers, Esquire, Malone, Thompson, Summers & Ott, LLC, 339 Heyward St., Suite 200, Columbia, SC 29201.

May 27, 2016.

  
Douglas H. Westbrook, #6039  
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Charleston, SC 29401  
(843) 853-9600  
Attorney For Respondents