

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

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

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Appellate Case No. 2016-000285

JAN 05 2017

Trial Court Case No. 12ALJ0400143AP

SC Court of Appeals

Thomas J. Torrence, #094651 Respondent,

v.

South Carolina Department of Corrections Appellant.

RESPONDENT'S FINAL BRIEF

Thomas J. Torrence
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RESPONDENT, *Pro se*

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STATEMENT OF ISSUES ON APPEAL

The Appellant, the South Carolina Department of Corrections [“SCDC” or “Department”], appeals the January 30, 2014 and January 20, 2016 Orders issued by the South Carolina Administrative Law Court [“ALC”]¹ in the instant matter. By these orders, pursuant to S.C. Code §1-23-380, the ALC reversed several final decisions made by SCDC concerning prison industries wage claims articulated in an administrative grievance filed by the Respondent, Thomas J. Torrence [“Torrence”], under SCDC’s Inmate Grievance Policy System, designated as General Administration Policy Number GA-01.12 [“GA-01.12”].

- I. Did the ALC’s January 30, 2014 order properly find that Torrence timely filed his grievance?
- II. Did the ALC’s January 30, 2014 order properly find that equitable tolling applied to Torrence’s grievance?
- III. Did the ALC’s January 20, 2016 order properly define and calculate the “prevailing wage²” that SCDC should have paid Torrence for his prison industries labor?
- IV. Did the ALC’s January 20, 2016 order properly rule that Torrence must be allowed to designate persons or entities to receive an immediate distribution of funds held in escrow for his benefit pursuant to S.C. Code §24-3-40(A)(5)?
- V. The Appellate Court may affirm the January 30, 2014 and January 20, 2016 Orders of the ALC on any ground it finds in the record.

¹ The Honorable Deborah Brooks Durden, Administrative Law Judge.

² S.C. Code §24-3-315, without using the specific nomenclature “prevailing wage,” states in part “... and that the rates of pay and other conditions of employment are not less than those paid and provided for work of a similar nature in the locality in which the work is performed.” That statute was later supported by §24-3-430(D), “No inmate participating in the program may earn less than the prevailing wage for work of a similar nature in the private sector.” Both South Carolina statutes contemplate 18 USC §1761(c)(2) and 64 FR 17010 as defining the substance of the phrase and process for obtaining the “prevailing wage.” The ALC in *Wicker v. S.C. Dep’t of Corr.*, 2001 WL 1005574 was not asked to calculate the prevailing wage, but was asked by Wicker for the wage rate paid following the “training wage” period (\$5.25 per hour), which was the focus of Wicker’s grievance. This Court of Appeals remanded *S.C. Dep’t of Corr. v. Cartrette*, 694 S.E.2d 18 (S.C. Ct. App. 2010) back to the ALC with seven (7) questions to determine the prevailing wage. Torrence asked the ALC here to formulate a calculation for the sake of brevity and judicial economy where the record is replete with the information to perform such a task, and which was the nexus of the grievance.

STATEMENT OF THE CASE

I. TORRENCE'S PRE-GRIEVANCE LITIGATION

Torrence voluntarily participated in a federally certified prison industries project at Evans Correctional Institution from June 1997 to November 2004, (R p.393). The private sector industry sponsor was ESCOD Industries or Insilco Global Technologies.

The South Carolina Legislature amended S.C. Code §§24-3-40 and 24-3-430 by 1999 Act No. 68, §2. In 1999, Torrence and other prisoners complained to SCDC Division of Industries personnel, with no results. In 2000, Torrence and Inmate William Ray Ward petitioned the Department under the South Carolina Administrative Procedures Act ("APA") to change the wage payment practice. That petition went unanswered.³ At that time, the SCDC Grievance Policy (GA. 01.12, Paragraph 10.2) did not have a remedy for monetary claims other than the value for the loss/damage of personal property.

Upon receiving no answer to the APA petition, in 2000, Mr. Ward filed the wage policy claims in the United States District Court for South Carolina naming the SCDC Director, Prison Industries and Financial Accounting Personnel.⁴ Mr. Ward filed for a voluntary dismissal in order to file the claims in state court.

Torrence and Inmate Henry Hubbard filed a civil action in the Richland County Court of Common Pleas.⁵ Torrence and Ward obtained counsel, who amended the declaratory judgment action, adding additional plaintiff class representatives in May 2002.⁶

³ March 26, 2015 APPELLANT'S ORIGINAL BRIEF, p. 6. (Neither party made that petition part of the Record before the ALC, but it is not contested.); See Torrence's Affidavit in support of Step 2, Item No. 3, R. pp. 143 - 144.

⁴ Case/Docket Number unavailable

⁵ *Thomas Torrence and Henry Hubbard Jr. v. South Carolina Department of Corrections and the South Carolina Budget and Control Board*, C/A 2001- CP- 40-3409 [Original complaint].

⁶ *Thomas J. Torrence and William Ray Ward on behalf of themselves and all others similarly situated; Kimberly Dubose on behalf of herself and others similarly situated; and Susan Smith, on behalf of herself and all others*

On July 25, 2002, SCDC, by and through counsel in the instant appeal, filed a Motion to Dismiss the Second Amended Complaint for failure to state a claim. The Honorable J. Ernest Kinard, Jr. conducted a hearing on October 14, 2002. In a four (4)-page written Order dated November 25, 2002, Judge Kinard denied SCDC's Motion to Dismiss. That order was *after* the time of the Circuit Court and ALC orders in *Wicker* but *preceding* the Supreme Court's 2004 decision, in *Wicker*.

On February 14, 2005, in light of the companion *Adkins*⁷ and *Wicker*⁸ decisions, SCDC renewed its Motion to Dismiss in *Torrence, et al.* The Honorable D. Garrison Hill conducted a hearing on March 8, 2005 and in a May 24, 2005 Order, granted SCDC's Motion to Dismiss based upon:

“[A]ny access to such wages to which Plaintiff Torrence may be entitled must be addressed under *Wicker*, by Plaintiff Torrence filing a Grievance, *if he so elects*, to protest SCDC's alleged failure to provide him access he seeks in accordance with his interpretation of §24-3-40. SCDC would adjudicate any such grievance from Plaintiff Torrence in accordance with its applicable inmate grievance procedures, and, if SCDC denies the relief sought in such a grievance, Plaintiff Torrence may appeal any such denial to the Administrative Law Court.”⁹

Torrence, through counsel, appealed Judge Hill's Order and denial of Motion for Reconsideration to the Court of Appeals. Our Supreme Court took jurisdiction of the case, and *affirmed* the Circuit Court in *Torrence, et al. v. S.C. Dep't of Corr.*, 640 S.E.2d 866 (S.C. 2007).

similarly situated, Plaintiffs, vs. South Carolina Department of Corrections and the State of South Carolina, Defendants [Second Amended Complaint].

⁷ *Adkins, et al. v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (2004)

⁸ *Wicker v. S.C. Dep't of Corr.*, 602 S.E.2d 56 (2004)

⁹ May 24, 2005 Order of Judge Hill, pg. 22. (Emphasis added); May 24, 2005 Order, p. 17, (Regarding Torrence's Long Term Savings Account claim under §24-3-40(A)(5) and (B)(2)); and May 24, 2005 Order, p. 18 (in regards to overtime pay and other benefits.)

Torrence diligently pursued his legal rights in regards to SCDC's private sector prison industries wage practice and procedures.

II. TORRENCE'S AGENCY GRIEVANCE

Torrence's agency grievance was predicated upon the claims sought in *Torrence* and at all times challenged the policy, practice or procedures in which SCDC paid, withheld, disbursed, or granted access to prisoner wages earned in the federally certified private sector prison industries program operated in contravention of Federal¹⁰ and South Carolina Law.¹¹ Since program inception, *no written SCDC policy or procedure* existed to authorize or support SCDC in regards to the private sector prison industries' wage practice and procedure for participating prisoners. See September 12, 2002 deposition of Tony Ray Ellis (former SCDC Prison Industries Director), "...[b]ut I can tell you how we practice it and what we're doing," (R. p.568); "we administratively allow it," (R. p.569); "that is an administrative decision made by the agency," (R. p.574) and:

- Q: Do you have any documents out there to tell why you started this *procedure* of putting the wages down and adding to it the Social Security withholding and the workmen's compensation premium and then the Surplus Fund? Is there anywhere I can find out why this came about and how you decided to do that?
- A: We sat down with staff at the inception of the program when we first started with our accounting staff and our legal staff and *we came up and derived this*.
- Q: Is there some kind of document that sets forth how that was arrived and under what authority you did it and so forth?
- A: *We set it as an administrative exercise* with these three entities: the legal staff, the accounting staff, and me.

¹⁰ 18 USC §1761(c) and 64 FR 17000 et seq.

¹¹ S.C. Code §24-3-315 (1987 Act No. 177 §2) (enacted for specific purpose of certifying assurance of authority by state legislation to comply with federal guidelines. A certified copy was attached to SCDC's application to the Department of Justice ("DOJ") Bureau of Justice Assistance ("BJA")). Later 1995 legislation enacted S.C. Code §24-3-430 (1995 Act No. 7, Part II, §43.)

Q: And there's no writing about it, ya'll just decided to do it and you did it.

A: *We decided to do it that way*, that's correct.

Q: And I *can't find any writings about it* or anything that you know of?

A: *Not that I'm aware of.*

R. p.579 (Emphasis Torrence's).

A. TORRENCE'S STEP I

Torrence filed a Step I grievance form and addendum with SCDC at Broad River and Evans Correctional Institutions on May 21, 2007, within fifteen (15) days of notice of the Supreme Court's May 7, 2007 decision in *Torrence* (R. pp. 500 -504).

SCDC failed to timely process Torrence's instant grievance [ECI-980-10]. Torrence made two (2) attempts via correspondence [April 21, 2010 and June 24, 2011] to have SCDC process his Step I Grievance.

SCDC Grievance Branch Chief Mary Coleman responded that attorney Lake Summers was reviewing the grievance and would respond after the review. Previous correspondence from SCDC Grievance Administrators intimated that "no response to ECI-980-10 will be forthcoming until a disposition by the Appellate Court in a lawsuit to which this Petitioner is not a party." SCDC clearly stated "we cannot serve you with a response."¹²

On October 5, 2011, Torrence filed a Petition for Writ of Mandamus in the Supreme Court of South Carolina "to compel SCDC to perform the ministerial duty of filing, docketing and resolving Petitioner's agency grievance."¹³ On October 17, 2011, the Honorable Clerk of the Supreme Court notified SCDC of the Petition and instructed SCDC to

¹² Torrence's PETITION FOR WRIT OF MANDAMUS, AMENDED REPLY TO RESPONDENT'S RETURN, November 10, 2011, pg. 1 (R. p. 50)

¹³ Torrence's PETITION FOR WRIT OF MANDAMUS, October 5, 2011, p.1 (R. p. 0003)

enter and serve a response by October 27, 2011. SCDC, by and through instant counsel, entered a RETURN TO PETITION FOR WRIT OF MANDAMUS in which counsel submitted it would "... process and adjudicate the Petitioner's agency grievance..."¹⁴

Torrence's Step 1 articulated no "claim" as to being recognized as an employee of any entity, as SCDC asserted in its Initial Brief, p. 2 n. 3. Torrence's May 26, 2015 Original Brief, p. 3 n. 7, wrestled with the appropriate "description" of his labor in light of being a taxpayer and SCDC's own *AGREEMENT* with the private sector sponsor (Escod / Insilico Technologies) utilizing such language as "ARTICLE 3. Conditions Related to Employment of Inmates" (R. p.674) (Original emphasis); "the Contractor shall employ a minimum of 60 inmates full time" (R. p.674), (Emphasis added); "the Contractor shall then select those inmate workers that they wish to hire," (R. p.674) (Emphasis added); and "the inmates employed in the project," (R. p. 676), (Emphasis added).

Torrence's Step 1 and Addendum thereto (R. pp. 121 - 124) clearly indicates, absent any specific nomenclature, that SCDC's procedures and practices in the prevailing wage rates and distribution of those wages earned by prisoners in the private sector program, and the practice of denying access to such wages escrowed for the benefit of the prisoner, are issues regarding policies and procedure

B. SCDC'S RESPONSE TO TORRENCE'S STEP I

SCDC entered a Step I Grievance Response dated December 1, 2011 (R. pp. 128 - 133), three and one-half (3½) years after the date Torrence filed the grievance. SCDC's

¹⁴ SCDC's RETURN TO PETITION FOR WRIT OF MANDAMUS, October 27, 2011, p. 10 (R. p.36)

response to Step 1 followed only after Torrence sought the Writ of Mandamus to order SCDC to adjudicate his grievance.¹⁵

SCDC's Step I Response pled the statute of limitations where Torrence filed his Step 1 "nearly 10 years after he began participating in the project, and nearly 2½ years after our Supreme Court issued *Adkins* and its companion case of *Wicker*," (R. p. 131); SCDC's Initial Brief, p. 4 (citations omitted).

SCDC's Step 1 Response conceded that Torrence's Step 1 complained of the *practice* of "pay remitted to you by the agency," (R. p.128); that "SCDC paid you [] a 'training wage,'" (R. p.128); and SCDC's response stated "SCDC ended its *policy of paying* a 'training wage,'" (R. p.129), (Emphasis added).

SCDC's Step 1 Response concluded that the provisions of §24-3-410(B)(7) and not §24-3-430(D) applied to the rate of pay SCDC was required to remit, Appellant's Initial Brief, p. 5. In *Torrence*, our Supreme Court found that §§24-3-40, 24-3-315, and 24-3-430 were the controlling statutes in *Torrence's* prevailing wage, wage disbursement, and long-term account claims.

SCDC's Step 1 Response also concluded that SCDC paid Torrence the proper rate of pay in the project, relying upon "the guidelines established by the federal government,"

¹⁵ SCDC, in footnotes 5 (p. 3) and 17 (p. 12) of his Initial Brief, focuses on the chronology of the ALC order regarding the decision in *Torrence*, the Supreme Court's decision on SCDC's petition for rehearing, and "representations purportedly made by SCDC to Torrence." The ALC merely misconstrued those facts in the following manner. 1) Torrence's Step 1 Form section as to how informal resolution was sought by Torrence (R. p.121). 2) Torrence's petition for writ of mandamus to order SCDC to respond to Step 1. 3) Torrence's April 21, 2010 correspondence to Inmate Grievance Administration that "SCDC [in response to the writ of mandamus] has informed the State Supreme Court that the agency would process the grievance," (R. pp. 125 - 126). And in a June 10, 2010 response to Torrence's May 21, 2007 SCDC Request to Staff Member (R. p. 10), Mary Coleman, the Inmate Grievance Branch Chief, informed Torrence that "upon review by outside counsel Lake Summers [SCDC's counsel in the instant appeal], you will receive a Warden's Step 1 response upon completion of attorney Summers' review." Additional correspondence from SCDC Grievance Administration informed Torrence that his grievance was being held in abeyance pending cases currently before South Carolina appellate courts. In either event, the chronology error complained of by SCDC in footnotes 5 and 17 would have no bearing on the filing deadline holding or any other factor relevant to the ALC's January 30, 2014 holding.

specifically referring to the BJA Guidelines published in the Federal Register, 64 FR 17000, SCDC's Initial Brief, p. 5. SCDC's footnote 8 incorrectly asserts the ALC's January 20, 2016 order "is at odds with the applicable federal guidelines," which Torrence will discuss below.

SCDC's Step 1 Response concluded that the agency's Grievance Policy concerning deadlines "continues to apply to nearly every aspect of inmate activity, and *no special exception applies to prison industries pay disputes*," (R. pp. 130-131) (Emphasis supplied).

SCDC's Step 1 Response concluded that it did not owe Torrence any additional wage amount for every labor hour, (R. p.132). SCDC's Initial Brief, p. 5, following its Step 1 Response (R. p.132), relied upon *Adkins* for the proposition inmates did not have a viable claim for back wages, despite the nexus of the Supreme Court's *Adkins* holding was that a tort claim was the incorrect method of pursuing the claim. SCDC's Step 1 Response also concluded that Torrence was not entitled to complete and immediate access to the portion of his wages escrowed pursuant to §24-3-40(A)(5), (R. p.133).

C. TORRENCE'S STEP 2

Torrence's December 5, 2011 Step 2 Appeal (R. pp. 134-144) and appendices in support (R. pp. 532-682) demonstrated SCDC's Step 1 Response contradicts statutory law (R. pp. 943-947). Torrence's Step 2 articulated the Supreme Court's decision in *Wicker* was an exception "in a very limited circumstance" to the Court's holding in *Al-Shabazz v. State*, 527 S.E.2d 742 (S.C. 2000), (R. p.137) [regarding the types of cases reviewable by the ALC]. Torrence's Step 2 also articulated that prior to the holding in *Wicker*, the agency grievance system could not award monetary damages¹⁶ and relied upon ALC precedent that

¹⁶ GA-01.12, Note to §10.5 (The Warden's decision to grant *restitutional monetary reimbursement* will not require additional approval to have state provided *like/issued items or deposits made* to the grievant's E. H.

claims for money damages fell under the Tort Claims Act, citing *Rosemond v. SCDC*, 00-ALJ-04-01026-AP and *Stearns Miller v. SCDC*, 00-ALJ-04-00021-AP, (R. p.137).

SCDC's Initial Brief, p. 7 n. 13 stated the ALC erred in embracing Torrence's argument in its January 30, 2014 order that SCDC "did not recognize a wage claim as grievable until the Supreme Court upheld" the ALC's decision in *Wicker* in August 2004. The record in *Wicker*, up to the Supreme Court's holding in *Wicker*, demonstrates SCDC's position was that the wage claim advanced was "non-grievable," *Wicker*, 2001 WL 1005574 *1.

Torrence's Step 2 included appendices A-L that demonstrated that SCDC's practice and procedure of wage payment, withholding and disbursement were the intentional policy of the agency, R. pp. 139 - 140. Torrence's Step 2 reiterated the challenges to the custom, practice, policy and procedure raised in the Step 1.

D. SCDC'S REPLY TO TORRENCE'S STEP 2

SCDC's Response to Step 2 (R. pp. 145-152) affirmed the denial of Torrence's Step 1 and denied his Step 2. SCDC's Response to Step 2 asserted an analysis of the circuit court in *Adkins*, applying §24-3-410(B)(7), an order that is of no precedential value where it proceeded to the Appellate Courts on other grounds. SCDC's Step 2 Response also concluded that Torrence "will not receive any personal benefit by immediately distributing such monies to persons or entities of your choice," (R. p.151).

III. TORRENCE'S NOTICE OF APPEAL TO THE ALC

Torrence timely appealed the February 9, 2012 denial of his Step 2 grievance by filing a Notice of Appeal, dated March 2, 2012 in the ALC, (R. p.56).

Cooper Account *so long as the amount of reimbursement is within the monetary limits of SCDC Policy/Procedure OP-22.03...*) (Emphasis added).

SCDC's Initial Brief, p.10, asserted that the Notice of Appeal did not "challenge [d] SCDC policies and/or procedures" nor did Torrence "claim or otherwise assert" "that he had requested a waiver or exception from the filing deadline."

Torrence's March 2, 2012 Notice of Appeal conformed to the criteria for the Notice of Appeal form to the ALC. First, the form published by the State requires "A **general**"¹⁷ statement of the grounds for appeal is (See S.C. Code Ann. §1-23-380(A)(6)):" (Original emphasis). The Form requires no specificity other than compliance with §1-23-380(A)(6). Second, the grounds for appeal may be amended, supplemented or modified in the statement of issues in the brief.

Torrence's Notice of Appeal to the ALC sufficed to challenge SCDC's policies and procedures of paying less than the statutory mandated prevailing wage, and SCDC's practice and procedure of escrowed wages under §24-3-40(A)(5) and (B)(2), all of which constitute "conditions" that affected Torrence.

IV. ALC ORDERS ON APPEAL

A. THE ALC'S JANUARY 30, 2014 ORDER

Torrence did not appeal any aspect of the ALC's January 30, 2014 order.

The ALC's January 30, 2014 order finding Torrence timely filed his grievance and that equitable tolling applied to the filing of Torrence's grievance was a result of SCDC's June 5, 2012 "MOTION BY THE DEPARTMENT TO ADDRESS ONLY ONE (1) ISSUE IN ITS BRIEF AND TO FILE ITS BRIEF NO LATER THAN JUNE 15, 2012"¹⁸ (R. pp. 76-81), and the ALC's subsequent June 7, 2012 Order granting the Motion, R. p. 82.

¹⁷ General: adjective. 4. a. Not limited in scope, area, or application... 5. Involving only the main features rather than precise details. Noun 3. A statement, *The American Heritage Dictionary* (Third Edition) p. 566

¹⁸ SCDC's June 5, 2012 Motion pled that "the issue of whether the [Appellant] timely filed his Step 1 grievance form with the Department was identical to the central issue associated with a consolidated

SCDC asserts in its Initial Brief, p. 11 n. 16, that the ALC's finding that *Adkins* and *Wicker* did not create new substantive rights or new grievance rights is inconsistent with its finding that "any attempt by [Torrence] to file a grievance prior to August 23, 2004 would have been futile" (R. p. 399). The ALC's finding concerning the futility of Torrence filing a grievance before the *Wicker* holding was not premised on whether *Adkins* and *Wicker* created new rights,¹⁹ but by the time of filing *Torrence* in circuit court, SCDC's position up to and including arguing *Wicker* before the circuit court, the ALC, and the Supreme Court, was that associated claims were "nongrievable,"²⁰ and that no remedy for monetary claims existed at the time Torrence pursued his claims in circuit court.

The ALC correctly held that the prison industries pay claims articulated by Torrence concerned "policies/procedures" as defined under paragraph 13.9 of GA-01.12, and therefore, the 15-day filing deadline from paragraph 13.1 of GA-01.12 did not apply to the filing of Torrence's Step 1 (R. p. 398), where the prevailing wage claims in *Wicker* were found to be based on the DOC's policies and procedures.

The ALC's mistake in the chronology of the denial of SCDC's petition for rehearing by the Supreme Court in *Torrence*, as set forth in footnote 15, above, had no bearing on the filing deadline. The ALC did not rely on an erroneous review of the record. SCDC notified

matter recently heard by this Court, *Ackerman*, #266928, et al., S.C. Dep't of Corr., Docket No. 07-ALJ-04-00444-AP, et, seq." (R. p.77) (Emphasis supplied)

¹⁹ The ALC correctly held that *Adkins* and *Wicker* did not create new substantive rights. The substantive right at issue in *Adkins* and *Wicker* - i.e., the right to the prevailing wage - was granted to inmates in 1995 pursuant to S.C. Code Ann. §24-3-430(D). *Adkins* and *Wicker* simply addressed the appropriate procedure for seeking redress for a denial of that existing right. (R. p. 397). The ALC also correctly analyzed that our Supreme Court in *Wicker*, recognizing the state created a statutory right to the payment of a prevailing wage, cannot thereafter deny that right without affording due process of law, *Wicker*, 602 S.E.2d at 57; and that prevailing wage claims were grievable and could be appealed to the ALC, *Id* at 57-58 (R. p. 396).

²⁰ The ALC also recognized that in the case before the ALC, and ultimately the Supreme Court, "the Department contended that prevailing wage claims were "nongrievable," see *Wicker v. S.C. Dept. of Corrections*, 00-ALJ-04-00781-AP, 2001 WL 1005574 (S.C. Admin. Law Ct. Aug 13, 2001), (R. p. 397). Our Supreme Court acknowledged SCDC's position was that prevailing wage claims were "non-grievable," *Wicker*, 602 S.E.2d at 56-57.

Torrence via correspondence that it would not process the Step 1 until a case in which Torrence was not a party was decided. This was not a consideration in the equitable tolling finding. The ALC's findings are supported by the record with the exception of the wrong date for an action-taking place **after** the filing of Step 1.

B. SCDC'S APPEAL OF THE JANUARY 30, 2014 ORDER

On March 2, 2014, SCDC filed a Notice of Appeal in this Court from the January 30, 2014 Order of the ALC. On March 10, 2014, Torrence filed a MOTION TO DISMISS THE INSTANT APPEAL. In SCDC'S RETURN TO THE RESPONDENT'S MOTION TO DISMISS THE INSTANT APPEAL, dated April 4, 2014 (R. pp. 427-440), SCDC presented a section titled **"THIS COURT IS CURRENTLY CONSIDERING ANOTHER APPEAL IN WHICH THE IDENTICAL OR NEARLY IDENTICAL ISSUES CONCERNING TIMELINESS ARE IN CONTROVERSY,"** (R. pp. 433-434). In that section, SCDC urged this Court to deny Torrence's motion to dismiss "in light of the reality that another decision issued by the ALC involving identical or nearly identical issues," citing *Ackerman's* ALC July 26, 2012 Order, are "currently under review by this Court," (R. p. 433), and note 11 citing Appellate Case Number 2012-210588 (*Ackerman*).

SCDC argued "the issues concerning timeliness considered by the ALC in its January 30, 2014 written order in the instant matter were identical or nearly identical to some of the issues concerning timeliness considered by the ALC in its July 26, 2012 written order in *Ackerman*," (R. p.433). SCDC went on to state in footnote 12 that the ruling(s) rendered by this Court in *Ackerman* will undoubtedly impact the rulings rendered by the ALC in the January 30, 2014 final decision in this matter.

This Court dismissed that appeal in an April 17, 2014 Order as the January 30, 2014 order was not a final decision. (R. pp. 441 - 442).

C. SCDC'S MOTION TO HOLD ALC ACTION IN ABEYANCE

On March 3, 2012, simultaneously with SCDC's Notice of Appeal discussed in § IV. B, above, SCDC filed THE DEPARTMENT'S MOTION TO HOLD IN ABEYANCE OR OTHERWISE STAY FURTHER PROCEEDINGS IN THE INSTANT MATTER (R. pp. 411-416) in the ALC. The foundation for SCDC's motion was entirely predicated upon ALC Chief Judge Anderson's July 26, 2012 decision in *Ackerman*, # 266928, *et al. v. S.C. Dept' of Corrections*, Docket No. 07-ALJ-04-00444-AP, et seq., which was then under review by this Court as Appellate Case No. 2012-210588.²¹ As it did before this Court, SCDC's motion before the ALC advanced the argument that "the issue of whether the Appellant timely filed his Step 1 administrative grievance is *identical* to the central issue associated in *Ackerman*," (R. p.414) (Emphasis supplied); and "any decision issued in the Court of Appeals in *Ackerman will undoubtedly directly impact the parties' further litigation of the instant matter.*" (R. p. 414). (Emphasis supplied).²² The DOC argued further that "any further proceedings undertaken by the parties in the instant matter would turn out to represent an exercise in futility." (R. p. 414).. The ALC denied SCDC's Motion on March 20, 2014.

D. THE ALC'S JANUARY 20, 2016 ORDER

The ALC's January 20, 2016 order correctly applied the applicable standard of review before the ALC for procedural due process when an inmate is deprived of an interest of liberty and property, citing *Al-Shabazz*; and in prevailing wage claims creating a property

²¹ Reversed by this Court, 782 S.E.2d 757 (S.C. Ct. App. Feb 10, 2016) (Petition for Rehearing denied)

²² A position that SCDC strenuously argues does not apply to Torrence now. See Appellant's Initial Brief, pp. 21 n. 26; pp. 26-27, and now attempts to distinguish Torrence from *Ackerman*.

interest, *Wicker*, 602 S.E.2d at 58, that may be reviewable by the ALC via the Department's internal grievance procedure, *Torrence*, 646 S.E.2d at 869-70 (R. p.1031). The ALC's ruling correctly relied upon S.C. Code Ann. §1-23-380 in regards to guidance for its review (R. pp. 1031 - 1032).

The ALC's ruling correctly discussed the applicable federal law, 18 USC §1761(c) and the guidelines in 64 FR 17000 et. seq. ("Guidelines") in regards to the "prevailing wage,"²³ as well as the method for obtaining that wage rate (R. p.1033, 1035 - 1039). The ALC also determined S.C. Code Ann. §24-3-315 was "enacted to comply with federal law" (R. p.1033), and cites the Department "must determine... that the rates of pay... are not less than those paid... for work of a similar nature in the locality in which the work is performed," §24-3-315 (2007) (R. p.1033). The order also finds applicable the "prevailing wage" statute in S.C. Code Ann. §24-3-430 (2007) (R. p.1033).

The ALC correctly discussed the distribution of inmate wages pursuant to S.C. Code Ann. §24-3-40, (R. pp. 1033 - 1034).

On the issue of training wages, the ALC found that our Supreme Court held "there is simply nothing in the statutory scheme authorizing the DOC to pay [Appellant] a training wage less than the prevailing wage," citing *Wicker*, 602 S.E.2d at 58. The Court held further that "it is beyond argument that SCDC must pay [Appellant] the difference between the 'training wages' and the prevailing wage. Furthermore, the statutory mandate of comparable pay and conditions means that inmates are entitled to time-and-a-half overtime pay in situations non-inmate workers would receive such overtime pay," citing *Cartrette*, 694 S.E.2d at 21 and *Guideline* at 17000-01, (R. p. 1034). Applying the correct standard of

²³ *Guideline* at 17010

review, the ALC found the Department's decision to pay Torrence less than the prevailing wage for regular and time-and-a-half for overtime hours during his initial 320 hours of labor is "erroneous as a matter of law." (R. pp. 1034).

On the issue of post-training wages, as stated in the above holding, the ALC also held, "there is no construction of the law under which the Department could pay [Appellant] less than the prevailing wage," (R. p.1034-1035).

The Court next made an appropriate analysis of the definition of the term "prevailing wage" holding that the Court in *Torrence* "has already stated that the program at issue in this case operated under Section 24-3-430," 646 S.E.2d at 867 (R. p. 1035). The Court applied the *Guideline* to its analysis of the prevailing wage (R. p.1036) and agrees that "verification of wage rates by the ESC is the method of determining the prevailing wage that the federal Guideline and state statutes contemplate," (R. p.1037). The Court did not agree that the \$5.25 regular hourly rate conforms to the ESC data in the record (R. p.1037).

The ALC next performed a logical calculation of the prevailing wage based on South Carolina Statutes §§24-3-315 and 24-3-430, (R. pp 1037-1039).

The Court recognized the *Guideline* at 17010 requires the prevailing wage must be obtained from the state agency that determines wage rates, (R. p.1038), and that the prevailing wage must be set "exclusively in relation to the amount of pay received by similarly situated non-inmate workers and no other cost variables may be taken into consideration, *Guideline* at 17009-10," (R. p.1038). The Court determined "locality" meant South Carolina, (R. p.1038), and "work of a similar nature" as contemplated by federal guidelines and state statutes is found by "referring to the appropriate Occupational Employment Statistics (OES) or OCC Code used by ESC/DEW," (R p.1038).

The ALC utilized documentation in the instant record regarding the wage rates for various years of Torrence's employment in the project, (R. pp. 1038-1039).

The Court held that "to pay [Appellant] less than the prevailing wage is an error of law," that "by failing to pay the correct wage, the Department subverts the purpose of the laws enacted by Congress and the General Assembly..." (R. p.1039).

The ALC properly ordered SCDC "**must pay [Appellant] the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999 and the mean average wage reflected that by that code or its counterpart for the years data is not contained in the record,**" (R. p.1039) (Original emphasis).

The ALC correctly analyzed SCDC's denial of Torrence's access to the escrowed portion of his wages under S.C. Code §24-3-40(B)(2) and applied South Carolina rules of statutory interpretation, (R. pp. 1039-1042). The Court analyzed the provisions escrowed "for the benefit of the inmate" under §24-3-40(A)(5) as they apply to an "inmate sentenced to life imprisonment" (R. pp. 1040-1041) under subsection (B)(2) and concluded "both subsections (B)(2) and (A)(5) requires reading subsection (B)(2) to allow a *prisoner serving a life sentence without opportunity for parole* the *option* of having the escrowed funds distributed to the persons or entities of his choice *during his lifetime,*" (R. p. 1041) (Emphasis added). The Court found the legislative history surrounding the enactment of the statute provides compelling reasons to reach that conclusion, (R. pp. 1041-1042).

STANDARD OF REVIEW

The ALC considered this matter pursuant to our Supreme Court's decisions in *Al-Shabazz*, R. p.395 (the January 30, 2014 Order); in addition to *Wicker* and *Torrence*, R. p.1031 (the January 20, 2016 Order); as well as S.C. Code Ann. §1-23-380(A)(6). Therefore, the sister statute to § 1-23-380, specifically §1-23-610(B), establishes the standard of review applicable to this Court's consideration of SCDC's appeal of the ALC's two (2) Orders.

Section 1-23-610(B) provides:

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

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

Under this standard of review this Court may reverse or modify the decision of the ALC only if SCDC is able to prove that [its] substantive rights were prejudiced because the decision was clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or characterized by an abuse of discretion, or affected by other error of law. See *S.C. Dep't of Corr. v. Mitchell*, 659 S.E.2d 233 (S.C. Ct. App. 2008) (applying §1-23-610 as the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency). Even if SCDC can demonstrate error,

an Appellant seeking reversal must show error and prejudice, *McKissick v. J. F. Cleckley & Co.*, 479 S.E.2d 67 (S.C. Ct. App. 1996)

SCDC bears the burden of proving convincingly that the ALC's decision to reverse SCDC's final decision is unsupported by substantial evidence. Substantial evidence is relevant evidence "when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the ALC arrived at in justifying its decision," *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 669 S.E.2d 899, 905 (S.C. Ct. App. 2008) *reversed on other grounds*, 702 S.E.2d 246 (S.C. 2010).

Additionally, SCDC has the burden of proving the ALC's decision is arbitrary or otherwise characterized by an abuse of discretion. A decision is arbitrary where no rational basis for the conclusion exists, or when it is based on one's will and not upon any course of reasoning and exercise of judgment; or if made at pleasure without adequate determining principles or is not governed by any fixed rules or standards, *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 564 S.E.2d 341 (S.C. Ct. App. 2002). An abuse of discretion occurs when the judge's ruling is based upon an error of law, such as the application of the wrong legal principle, or, when based upon factual conclusions, the ruling is without evidentiary support.

ARGUMENT

I. THE ALC'S JANUARY 30, 2014 ORDER PROPERLY HELD THAT TORRENCE TIMELY FILED HIS GRIEVANCE

A. TORRENCE'S GRIEVANCE DISTINGUISHED FROM *Okera*

The Supreme Court in *Torrence*, footnote 1, stated that “We note that the issue of class certification was not ruled upon by the trial court.”

SCDC urges this Court to consider a memorandum opinion in *Okera v. S.C. Dep't of Corr.*, 2012 WL 10907962 (2012-MO-042) (S.C. 2012) where the Court *affirmed* the ALC's ruling that Okera failed to comply with the relevant statute of limitations. In its June 29, 2009 Order in 08-ALJ-04-00887-AP the ALC affirmed SCDC's denial of Okera's grievance where the record shows “it appears [Okera] failed to file his Step one (1) grievance [until] six years after his last day of work in the prison industries.”

The instant case is clearly distinguished from *Okera*. First, Torrence filed the civil action *Torrence* in the Richland County Court of Common Pleas *while* he was still employed in prison industries and the grievance *within* 15 days of notice of the Supreme Court's decision in *Torrence*. Second, Torrence and SCDC are the same parties in both actions, thus, SCDC was on notice of Torrence's claims at the initiation and service of the Original and Second Amended Complaints. Third, Okera was not a named party in *Torrence*. Fourth, Okera filed his grievance two (2) years after being terminated from prison industries for disciplinary reasons.

SCDC would suggest (Initial Brief p. 17 and p. 23) that *Okera* would control Torrence here based upon employment in the identical project, at Evans. If that suggestion bore any logic, then it would encompass the decision in *Wicker*, who, also employed at that

project, was also terminated for disciplinary reasons and filed his grievance **more than 15 days after** termination.²⁴ SCDC's assertion has no merit on that rationale.

The SCDC determination that Okera did not file his grievance within 15 days, that decision being affirmed by the ALC, and subsequently our Supreme Court, is clearly distinguishable from the instant appeal.

B. TORRENCE'S STEP 1, STEP 2, NOTICE OF APPEAL TO THE ALC AND HIS ALC BRIEFS CHALLENGED SCDC'S POLICIES AND PROCEDURES IN PAYING LESS THAN THE PREVAILING WAGE.

At all times relevant to this appeal, from Step 1 and Addendum, Step 2, and Torrence's briefs in the ALC, Torrence's claims have challenged on the custom, practice, policy and procedure of SCDC's prison industries wage rate, training pay, wage disbursement, and escrowed wages. Although not invoking specific nomenclature,²⁵ it has been a matter of law where the ALC in *Wicker* determined prevailing wage claims were based on the DOC's policies and procedure, *Wicker*, 2001 WL 1005574 *1.

Even SCDC acknowledged the pay practices as policy in their Step 1 Response, "[y]ou challenged *the rate* at which *SCDC* both *paid you* for your prison industries labor *and applied* statutorily mandated deductions to your pay," R. p.131. (Emphasis added). SCDC further acknowledged these practices as "policy" in holding "SCDC ended *its policy* of paying inmates a training wage..." R. p.129 (Step 1 Response) (Emphasis added).

Torrence suggests that the appendices submitted in support of Step 2 detail the "administrative" policy of prison industries pay,²⁶ "how we '**practice**' it," (R. p. 568); "We

²⁴ *Wicker* did not file Grievance No. Ker-0353-00 until transferred to another institution after his termination.

²⁵ See, e.g., *Calhoun v. Calhoun*, 529 S.E.2d 14 (S.C. 2000). Petitioner did not limit the issue on appeal even though she failed to refer to the term ["transmutation"] in her statement of the issue on appeal where her argument on the issue contained discussion and citations to authority on "transmutation."

²⁶ Deposition of Tony Ellis, Division of Industries Director. (R. pp. 561 – 583)

administratively allow that,” (R. p.569); and “that is an **administrative** decision made by the agency,” (R. p.574). (Emphasis added)

Torrence suggests the established methods employed by SCDC concerning private sector prison industries payroll constitutes custom, practice, policy and procedure.

Custom is defined as “a practice that by its common adoption and long, unvarying habit has come to have the force of law.” *Black’s Law Dictionary*, Deluxe Eighth Edition (2004), p. 413; *Custom* is also defined as “frequent or common use or practice; a frequent repetition of the same act; usage; or habit,” *Webster’s New Universal Unabridged Dictionary*, Deluxe Second Edition (1985), p. 449.

Policy is defined as “a plan or course of action, as of a government, political party, or business, intended to influence and determine decisions, actions, and other matters.” *The American Heritage College Dictionary*, Third Edition, p. 1058.

Practice is defined as “a habitual or customary action or way of doing something,” *Id.* at 1073.

Procedure is defined as “the act, method, or manner of proceeding in some process or course of action,” *Id.* at 1434.

Torrence’s challenge to wage payment and distribution pursuant to §§24-3-430(D) and 24-3-40 is a specific challenge to the policies of the DOC where these statutes imbue SCDC with the fiduciary duty in the annual wage verification, payment of the prevailing wage, disbursement of wages and management of the long-term savings account.

Torrence’s March 26, 2015 Original Brief before the ALC challenges SCDC’s policies and procedures in several forms, to wit: a) “conditions of employment,” R. p.733; b)

conditions that “informed that he would be required to work a ‘Training Period’²⁷ of 320 hours prior to working for ‘minimum wage,’”²⁸ (R p.733-734); c) that Torrence and Ward “petitioned the DOC to change the *wage payment practice* then in effect,” (R. p. 735)²⁹ (Emphasis added); d) citing §24-3-315 for “*the rates of pay and other conditions of employment*,” R. p. 737 - 738) (Original emphasis); e) neither Federal or South Carolina statutory authority “contemplate or leave any inference of an ‘authority’ to pay a ‘training wage,’” (R p. 740); f) being “*informed of the conditions of his employment*,”³⁰ (R. p.740); (Original emphasis); g) “training hours or pay a substandard wage below *statutory guidelines*,” (R. p. 741) (Emphasis added); h) “conditions of employment” citing §24-3-315 (R. p.743); i) “conditions of employment” citing of §24-3-315, 18 USC §1761(C)(2) and 64 FR 17009-10, (R. p.744); j) “*shall pay the prisoner’s wages*,” (R. p. 745) (Original emphasis); k) “*admit acting without authority*,” (R. p. 746) (Original emphasis); l) “We have not been advised by SCDC as to specific legal or regulatory guidelines governing the wage and displacement information SCESC has provided,” (R. pp. 747 - 748);³¹ m) “but I can tell you *how we practice it* and what we we’re doing,” (R. p.750) (Emphasis added); n) “we *administratively* allow that,” (R. p. 750); o) “public policy,” (R. pp. 752, 761); that applicable Federal and South Carolina statutes “do not contemplate or create any inference of authority to misdirect a portion of or make deductions,” (R. p. 756) ; p) in SCDC’s statutory

²⁷ A practice that SCDC concedes is policy in their Step 1 Response, “SCDC ended *its policy* of paying inmates a ‘training wage,’” R. p. 129. (Emphasis added)

²⁸ Footnote 11 of Torrence’s Original Brief (R. p.734) demonstrated the SCDC’S “policies” of the Division of Human Resources in the Employment Tax Deductions forms Torrence was required to execute or was issued bi-weekly.

²⁹ See also Torrence’s December 5, 2011 Affidavit, Item No. 3, in support of Step 2 Appeal, R. pp. 522 - 523.

³⁰ In relation to the statutory requirement of §24-3-430(C).

³¹ October 30, 2003 Correspondence from Roosevelt T. Halley, Executive Director of SCESC to George L. Schroeder, Director of the Legislative Audit Council. Torrence’s March 26, 2015 ALC Original Brief demonstrating SCDC’s “Legal or regulatory guidelines” noncompliant with the SCESC/DEW wage verification.

interpretation, a court “generally gives deference to an administrative agency’s interpretation of an applicable statute or *its own regulations*,”³² R. p. 758.

Torrence’s August 27, 2015 REPLY BRIEF continued to present claims that were based on SCDC policy governing private sector prison industry wage practices and procedure, to wit: a) citing §24-3-315 for the “conditions of employment,” R. p. 1005 - 1006; b) arguing against the Circuit Court order in *Adkins* that the “training wage policy conformed to the Federal Register” and that the BJA advised SCDC [they] could “continue his training wage policy,” R. p.1008; c) “conditions of employment” in requiring SCDC to inform Torrence pursuant to §24-3-430(C) and 18 USC §1761(c)(4), R. pp. 1008 - 1009; and d) in relation to a fiduciary duty upon SCDC created by the relevant prison industries statutes, the “conditions” for work of a similar nature and the failure “to pay those rates or make deductions outside statutory guidelines,” R. pp. 1018 - 1019.

Torrence’s November 12, 2012 REPLY BRIEF IN SUPPORT OF A TIMELY FILED GRIEVANCE thoroughly supports Torrence’s claims being based upon the policy and procedure of wage practices and procedures, R. pp. 369 - 392.

Torrence submits that the ALC properly found [his] claims were based on “policy/procedures” and exempted by GA-01.12 ¶ 13.9. As such, SCDC’s assertion that Torrence did not claim an exemption for policy/procedures is wholly without merit based upon the foregoing showings. This premise is supported further where this Court in *Ackerman v. S.C. Dep’t of Corrections*, 782 S.E.2d 757 (S.C. Ct. App. 2016) held that inmate’s grievances to amount of pay received under prevailing wage statute and contract for work performed as part of prison industry program were grievances to South Carolina

³² Citing *Brown v. Bi-Lo, Inc.*, 581 S.E.2d 838 (S.C. 2003), Original Brief, p. 30, arguing SCDC’s interpretation and application of §24-3-40(A)(5) and (B)(2).

Department of Corrections' "policies/procedures" rather than to incidents and, thus, were excepted from grievance system policy's 15-day filing deadline for incident grievances.

Torrence submits that the record before the ALC (Grievance Steps 1 and 2, Notice of Appeal, and Torrence's Briefs) demonstrate substantial evidence that the issue of statute of limitations has been properly raised to the court, *see, e.g., Peterson v. Richland County*, 515 S.E.2d 553 (S.C. Ct. App. 1999). Even SCDC stated there were "exceptions to the deadline" in Step 1 Response (R. p.509); SCDC's Step 2 Response (R. pp. 526-527); in SCDC's July 9, 2012 Brief on timelines of the grievance (R. pp. 107 and 108); and SCDC's Initial Brief, pp. 19-24. However, SCDC has adamantly asserted since its Step 1 Response that "**no special exception applies to prison industries pay disputes**" (R. p.509 - 510), and their Step 2 Response, (R. p.____). Each of these assertions by SCDC clearly implicate and acknowledge the exception for policy/procedure to the filing deadline, and that SCDC did not recognize prison industries wage claims under those exceptions.

Torrence suggests that a party need not use the exact name of a legal doctrine in order to preserve it, but that it was clear that the argument has been presented on that ground, *see State v. Russell*, 546 S.E.2d 202 (S.C. Ct. App. 2001); and *In re: Robert D*; 530 S.E.2d 137 (S.C. Ct. App. 2000).

C. SCDC RAISED THE DEFENSE OF STATUTE OF LIMITATIONS

SCDC initially raised the defense of statute of limitations in its Step 1 Response, R. pp. 509-510, 512, and continued the assertion in its Step 2 Response, R. pp. 526-527, 531.

On June 5, 2012, following the filing of Torrence's Original Brief in the ALC, SCDC entered "MOTION BY THE DEPARTMENT TO ADDRESS ONLY ONE (1) ISSUE IN IT'S BRIEF AND TO FILE IT'S BRIEF NO LATER THAN JUNE 5, 2012," R. pp. 76 -81.

In SCDC's June 5, 2012 Motion to address only the issue of timeliness, SCDC "proposed" that if the ALC found Torrence did not file his grievance timely, that Torrence could appeal only that issue, R. pp. 78 - 79. SCDC further proposed that, "on the other hand," if the ALC found Torrence's grievance was timely filed, "then the Court could direct the Department to submit a supplemental brief on any remaining issues animated by [Torrence's] claims," R. p.79.

By written Order dated June 7, 2012, the ALC granted SCDC's proposed Motion, R. p. 82. On January 30, 2014, pursuant to SCDC's request, the ALC found that Torrence timely filed his grievance.

Essentially, SCDC raised the defense of statute of limitations at the agency level. At the ALC level, in lieu of the issues raised by the Notice of Appeal, SCDC sought consent to address only the issue of timeliness in a preliminary matter and proposed to proceed on the merits only if the Court ruled in Torrence's favor. SCDC *requested* this action regarding the statute of limitations defense and must now abide by its requested action.

Torrence asserts that there was no specificity to the statute of limitations defense. The defense of "timeliness" and "statute of limitations" was too general and did not require specific nomenclature in response.

SCDC raised the defense and requested an order from the ALC to determine timeliness as a preliminary matter. Ultimately, Judge Durden's January 30, 2014 Order was the Order SCDC requested/proposed. Ordinarily, where a judgment or order is entered by consent, it is binding and conclusive and cannot be attacked by the parties either by direct appeal or in a collateral proceeding, *Johnson v. Johnson*, 425 S.E.2d 46 (S.C. Ct. App. 1992). The right of appeal from such an order is regarded as waived, *Calcutt v. Calcutt*, 320 S.E.2d

55 (S.C. Ct. App. 1984). A party cannot appeal from an order or judgment that he has requested, *Parsons, v. Gibbes*, 37 S.E. 753 (S.C. 1901).

Torrence further suggests this Court may consider the statute of limitations exceptions “lumped together under one issue on appeal,” see *Swentor v. Swentor*, 520 S.E.2d 330 (S.C. Ct. App. 1999). Further, the issue, read in conjunction with the argument adequately raised the issue at each stage of this litigation, *Eubank v. Eubank*, 555 S.E.2d 413 (S.C. Ct. App. 2001).

SCDC requested an order regarding the timeliness or statute of limitations and may not now appeal that order.

D. SCDC’S POLICY GA-01.12 PARAGRAPH 13.9 AND SCDC FORM 10.5 ESTABLISH A WAIVER OF THE 15-DAY DEADLINE.

SCDC Policy GA-01.12, §13.1 generally requires Step 1 grievances be filed “within 15 days of the alleged incident.” However, Paragraph 13.9 provides that “exceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures.”

This Court of Appeals recently held that inmates’ grievances to amount of pay received under the prevailing wage statute and contract for work performed as part of prison industry program were grievances to SCDC “policies/procedures” rather than to incidents and, thus, were excepted from the grievances deadline, *Ackerman et al., v. S.C. Dep’t of Corr.*, 782 S.E.2d 757 (S.C. Ct. App. 2016).

The ALC similarly determined that Wicker’s wage dispute also fell under GA-01.12, §7, “Department policies/procedures, directives, or conditions which directly affect an inmate,” and Wicker was directly affected by DOC’s arrangement with private industry to pay less than the “prevailing wage for work of a similar nature in the private sector,” *Wicker*

v. S.C. Dep't of Corrections, 2001 WL 1005574 *1. Our Supreme Court affirmed the ALC's holding in *Wicker*, 602 S.E.2d 56.

Torrence submits that the ALC, this Court of Appeals, and our Supreme Court have all determined that prisoner's prevailing wage claims were grievances to SCDC's "policies / procedures." Such claims are entitled to an exemption pursuant to GA-01.12, ¶ 13.9.

South Carolina Department of Corrections Form 10-5 (SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, INMATE GRIEVANCE FORM, STEP 1), on the reverse side, contains the section "INSTRUCTIONS FOR COMPLETING STEP 1 GRIEVANCE FORM." Instruction Number 4 reads in full:

Submit the completed form to the Institutional Grievance Coordinator within fifteen (15) days of an alleged incident; **policy grievances at any time**. Do not write in the space provided for the Warden's response.

SCDC Form 10-5 (Emphasis supplied).

These instructions are clearly present on the Step 1 in the instant record, R. pp. 500 - 501, despite SCDC's continuous assertion in its Step 1 and 2 Responses and July 9, 2012 Brief against timeliness of Torrence's Step 1, that "no special exception applies to prison industries pay disputes."

SCDC has asserted that Torrence must request a waiver to GA-01.12, ¶ 13.1 under ¶ 13.9. However, the Step 1 Form and ¶ 13.9 provide an exception to the fifteen-day filing deadline for grievances concerning "policies/procedures," thus, an *express waiver* to the fifteen-day deadline.

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right," *Eason v. Eason*, 682 S.E.2d 804, 807 (S.C. 2009). It may be either express or implied, *Lyles v. BMI, Inc.*, 355 S.E.2d 282, 285 (S.C. Ct. App. 1987).

The ALC's July 26, 2012 order in *Francis Ackerman, # 266928, et al, v. S.C. Dep't of Corrections*, ALC Docket Nos. 07-ALJ-04-00444 et seq. *14-15 (R. pp. 213-214), considered the same issues of ¶ 13.9 of GA-01.12 and SCDC Form 10-5 (Step 1). Judge Anderson's July 26, 2012, Order found that the "policies/procedure" exception in ¶13.9 and the Step 1 Form were inapplicable as a waiver based solely upon "nothing in the Department's grievance policy or in the language of the pre-printed Step 1 Form suggested that prevailing wage claims constitute policies/procedures grievances under Paragraph 13.9," *Ackerman*, *15 (R. p. 214). This Court of Appeals has since reversed Judge Anderson's July 26, 2012 Order that prevailing wage claims did not constitute "policies/procedures," *Ackerman*, 782 S.E.2d 757.

Therefore, GA-01.12, ¶ 13.9 provided an exception to ¶ 13.1 for policies/procedures, encompassing wage claims; and SCDC Form 10-5 (Step 1) provided an *express waiver* of "policy grievances at any time."

E. TORRENCE'S GRIEVANCE CHALLENGING SCDC'S POLICY OF PAYING A TRAINING WAGE AND LESS THAN PREVAILING WAGE MANDATED BY STATUTE CONFORMED TO THE 15 – DAY FILING DEADLINE EXCEPTION.

Torrence's Step 1 Grievance challenged SCDC's policies and procedures regarding the training wage practice, the prevailing wage practice, and the escrowed account practice, R. pp. 121 - 123.

SCDC conceded in their Step 1 response that the "training wage" practice was a "policy," R. p.129.

Our Supreme Court held in *Wicker* that "there is simply nothing in the statutory scheme authorizing the DOC to pay Wicker a training wage less than the prevailing wage," 602 S.E.2d at 57.

The Court of Appeals considered the case of *South Carolina Department of Corrections v. Cartrette*, 694 S.E.2d 18 (S.C. Ct. App. 2010) in which Cartrette filed a grievance concerning “conditions of his participation in the Prison Industries Program” and complaining his “hourly wage was insufficient compared to the prevailing wage for similar work performed in the private sector,” 694 S.E.2d at 19.

South Carolina Code Ann. §24-3-430(C) states “an inmate may participate in the program established pursuant to this section only on a voluntary basis and only after he has been informed of the *condition of his employment*,” (Emphasis added). Section 24-3-315 states in part the DOC must determine “that the rates of pay and other conditions of employment are not less than those paid for work of a similar nature...,” *see Torrence*, 646 S.E.2d at 868.

Based upon this Court’s holding in *Ackerman*, Torrence’s grievance concerning SCDC’s training wage, prevailing wage and escrowed wage practices are based on “policies/procedures” and are exempt pursuant to GA-01.12, ¶ 13.9. This assertion is further supported by the “Instructions” language on Form 10-5 (Step 1) that “policy grievances [may be filed] at anytime,” R. p.122.

SCDC’s Initial Brief (p. 21 and n. 26) asserts Torrence “failed to preserve this issue for review.” In note 26, SCDC argued that it’s July 9, 2012 Brief, p.108 n. 28, referenced *Ackerman’s* ALC case, R. pp. 108 - 109, that the Ackerman prisoners made a variety of assertions regarding the policies and procedures exception of Paragraph 13.9. In note 17 of their July 9, 2012 Brief, (R. p.93), SCDC represented that “[N]early all if not all of the arguments articulated by the Appellant [Torrence] in his Step 2 and his initial brief to [this] Court are identical or nearly identical to arguments articulated by nearly 200 current and

former inmates in a consolidated matter very recently considered by Chief Judge Anderson,” “designated as *Ackerman*...”

SCDC, in their Initial Brief here, p. 21, n. 26, reiterated the *Ackerman* inmates “made a variety of such assertions,” (Paragraph 13.9).

SCDC now argues, that “the assertions and arguments offered by the inmates in *Ackerman* are clearly distinguishable from those made by Torrence,” Initial Brief, p. 21, n. 26. Torrence submits that in the July 12, 2012 Order in *Ackerman*, Judge Anderson held “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,” *Ackerman*, *11. (R. p. 210) (Emphasis added). Judge Anderson further held that “[T]herefore, no Appellant satisfied the procedural requirements set forth in Paragraph 13.9,” *Id.* Judge Anderson further found that “the vast majority of the Appellants first explicitly invoked such a ‘reasonable cause’ exception in their Notices of Appeal to this Court,” *Id.*

Unlike *Ackerman*, Torrence’s grievance addressed the “conditions” of employment and wage practices since his Step 1 and Addendum.

F. TORRENCE’S GRIEVANCE PRESENTED CLAIMS CONSTITUTING “CONDITIONS WHICH DIRECTLY AFFECT THE INMATE” BY PAYING LESS THAN THE PREVAILING WAGE MANDATED BY STATUTE.

Torrence submits that his wage disputes articulated since Step 1 fall under the issues considered grievable in GA-01.12, ¶ 7.1 “Department policies/procedures, directives, or *conditions which directly affect an inmate*,” (Emphasis added). This same rationale was applied by the ALC in *Wicker*, 2001 WL 1005574 *2, and supported by the Supreme Court affirming the result in *Wicker*, 602 S.E.2d 56.

Torrence suggests that the statutory language of §24-3-430(C) “*conditions* of employment” and §24-3-315 “the DOC must determine that the rates of pay and other *conditions* of employment...” (Emphasis added) support Torrence’s premise of equating to GA-01.12, ¶ 7.1, the language “conditions which directly affect an inmate” where Torrence has been at all times a participant in the program and has money escrowed affected by such “conditions.”

G. TORRENCE’S GRIEVANCE CONCERNS POLICIES/PROCEDURES UNDER PARAGRAPH 7.1 AND NOT A PROPERTY CLAIM UNDER PARAGRAPH 7.4.

Torrence submits that this Court’s February 10, 2016 opinion in *Ackerman* clearly sets forth that grievances to wage claims in prison industries concern “policies/procedures,” which is set forth in GA-01.12, ¶ 7.1 and excepted in ¶ 13.9.

SCDC argues in their Initial Brief, pp. 24-27 that Torrence has articulated a “property” claim that falls under ¶ 7.4 instead of ¶ 7.1 of GA-01.12. This argument is based on Torrence’s language in his Step 1 Addendum, “*created a property interest,*” Initial Brief, pp. 25-26, claims one, two, four and five, (SCDC’s Emphasis).

Our Supreme Court found that procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment’s protection of liberty and property, *Wicker*, 602 S.E.2d at 57, citing *Al-Shabazz v. State*, 527 S.E.2d 742, 750 (1999). The Court found that “the state’s statutory mandate that inmates be paid the prevailing wage creates such an interest,” *Wicker*, 602 S.E.2d at 57 - 58, citing *Piatt v. McDougall*, 773 F.2d 1032 (9th Cir. 1985).

Torrence suggests that based on the above precedent SCDC's argument that Torrence's claim is a "property" claim under Paragraph 7.4 of GA-01.12 instead of one based on "policies/procedures" under Paragraph 7.1 is without merit.

H. THE FILING OF *Torrence* IN CIRCUIT COURT WITHIN ANY APPLICABLE FILING DEADLINE PLACED SCDC ON NOTICE OF TORRENCE'S CLAIMS

Torrence suggests that the issues presented in his Step 1 Grievance and Addendum are identical to the claims presented in *Torrence*, 2001-CP-40-3409, filed three (3) years prior to *Wicker* and *during the time Torrence was participating* in the ESCOD/Insilco project at Evans. Torrence therefore suggests that SCDC was placed on notice of the claims here when served the Summons in *Torrence* and cannot now complain it was not aware of his claims three (3) years prior to leaving the Evans project.

II. THE ALC'S JANUARY 30, 2014 ORDER PROPERLY HELD THAT EQUITABLE TOLLING APPLIED TO TORRENCE'S GRIEVANCE.

The ALC's January 30, 2014 Order properly analyzed the facts of Torrence's case and correctly applied applicable law to determine Torrence was entitled to the doctrine of equitable tolling in filing his agency grievance.

A. THE ALC'S ANALYSIS OF THE FACTS AND LAW IN DETERMINING EQUITABLE TOLLING APPLIED TO TORRENCE'S GRIEVANCE.

The ALC stated Torrence's position, based upon SCDC's policy not recognizing prevailing wage grievances prior to *Wicker*, that Torrence had no judicially recognized constitutional right to file a grievance,³³ so Torrence "logically elected" to file a claim in Circuit Court, R. p.398.

³³ The two exceptions enumerated in *Al-Shabazz*, 527 S.E.2d at 750, were not *judicially recognized* to apply in a "very limited circumstance" as reviewable by the ALC until our Supreme Court's ruling in *Wicker*, 602 S.E.2d at 58, (Original emphasis).

The ALC set forth the language of GA-01.12, ¶ 13.1 requiring Step 1 grievances be filed “within 15 days of the alleged incident,” R. p.398, and further set forth the exceptions to that 15 day limit for grievances concerning policies/procedures, R. p. 398.

The ALC analyzed the concept of interpreting a regulation [policy] under *Murphy v. S.C. Dep’t. of Health and Envtl. Control*, 723 S.E.2d 191, 195 (S.C. 2012), R. pp. 398 - 399, and found that “[I]n the absence of an express time limit for grievance of a policy or procedure this Court must determine a reasonable time limitation that gives effect to the statutory or regulatory scheme,” citing *McCummings v. S.C. Dept. of Corrections*, 462 S.E.2d 271 (S.C. 1995).

The ALC found that prior to *Wicker*, the Department maintained that wage issues were not grievable under the internal grievance system and acknowledged such by SCDC’s ALC brief in *Wicker*. The ALC found that “[C]learly the Department did not recognize a wage claim as grievable until the Supreme Court upheld the ALC’s decision in August 2004. Thus, any attempt to file a grievance would have been futile,” R. p.399. The ALC’s factual analysis concluded that our Supreme Court in *Torrence* held “[c]learly [Torrence] can present this claim via the inmate grievance procedure,” 646 S.E.2d at 870.

The ALC applied *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 687 S.E.2d 29, 32 (S.C. 2009) in holding “[W]here 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,’” R. pp. 400 - 401. The ALC further held that equitable tolling applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control, citing *Hooper*, 687 S.E.2d at 32; and 54 C.J.S. *Limitations of Actions* §133 (2013), R. p.400.

The ALC also correctly found that “[u]nder the doctrine of equitable tolling when a party has more than one legal remedy available, the statute of limitations is tolled while the party pursues one of the possible remedies,” citing *Abbott v. State*, 979 P.2d 994, 998 (Alaska 1999) R. p.401.

Based upon that analysis, the ALC found that Torrence:

“[d]id not have more than one legal remedy available, but no statute, regulation or precedent established the proper procedure for bringing his claim. Because the Department refused to consider the issue under the grievance procedures, [Torrence] was effectively prevented from utilizing the procedure that the Supreme Court ultimately determined to be the appropriate method to raise prison industry pay claims. [Torrence’s] case, originally filed as a class action in the Court of Common Pleas, was pending before the courts on August 23, 2004 when the *Wicker* and *Adkins* decisions were issued. This case presents the type of extraordinary circumstances in which fairness demands that the doctrine of equitable tolling be applied. [Torrence’s] existing lawsuit, filed prior to the time the department recognized grievances regarding pay claims, equitably tolled the time for filing a grievance during the period that lawsuit was pending. [Torrence] filed his Step 1 grievance within days of receiving the Supreme Court’s final order and decision in that matter holding that he could present his claim via the inmate grievance procedure.

R p. 401.

Torrence submits that the ALC’s January 30, 2014 ruling that equitable tolling be applied where that decision was based on the reliable and substantial evidence of the whole record and where the substantial rights of Torrence were prejudiced by SCDC’s final agency decision.

B. MONEY DAMAGES WERE NOT AN AVAILABLE REMEDY UNDER GA-01.12 AT THE TIME TORRENCE FILED A CIVIL ACTION

SCDC Policy GA-01.12, note to ¶ 10.5, allowed money damages *only* for the *damage or loss of an inmate’s personal property*, and *then only within the limits* of SCDC Policy OP-22.03, setting amounts that would be compensated or replaced with like items.

Thus, at the time of Torrence filing *Torrence* in the Court of Common Pleas on August 18, 2001, SCDC's policy, practice and procedure provided monetary reimbursement specifically for personal property but not for wage type claims, therefore, Torrence "logically elected" to pursue the matter in circuit court.

In discussing the grievance policy, Judge Anderson noted the correlation between GA-01.12 and OP-22.03 insofar as money damages being grievable in his July 26, 2012 Order in *Ackerman*, *8, R. p.207.

The ALC properly found that despite the 2004 Supreme Court holding in *Wicker*, at the time Torrence filed his action in the Court of Common Pleas, SCDC Policy did not provide a remedy for the recovery of money beyond personal property. January 30, 2014 Order, pp. 7, 9 R. p. 399.

C. THE CIVIL ACTION *Torrence et al., v. South Carolina Department of Corrections*, C/A No. 01-CP-40-3409 EQUITABLY TOLLED TORRENCE FILING AN AGENCY GRIEVANCE.

As set forth above, the ALC's January 30, 2014 Order properly applied the doctrine of equitable tolling based upon the pendency of *Torrence* in the Circuit, and ultimately, our State Supreme Court, R. pp. 398 - 401.

Torrence, at all times since the filing of the APA Petition with SCDC, and in filing the Circuit Court action prior to the 2004 *Wicker* decision, exercised due diligence in preserving his legal rights given the extraordinary circumstances of SCDC's originally mute and then vacillating position on the prevailing wage issue. At no time was Torrence negligent or delinquent in pursuit of his legal rights. Equitable tolling has been allowed where the claimant has *actively pursued* his judicial remedies by filing a defective pleading *during* the statutory period. See *Irvin v. Dept. of Veteran Affairs*, 498 U.S. 89, 96 (1990). Torrence

neither neglected his rights or failed to exercise reasonable diligence in enforcing his rights and it is not the policy of the law to unjustly deprive an injured person of a remedy, see *Moriarity v. Garden Sanctuary Church of God*, 534 S.E.2d 672 (S.C. 2000).

D. THE NOVEMBER 25, 2002 AND MAY 24, 2005 CIRCUIT COURT ORDERS IN *Torrence*, C/A No. 01-CP-40-3409 DEMONSTRATES SCDC'S POSITION AND THE PROCEDURAL POSTURE OF THE CASE WAS CONTROLLED BY *Wicker* AND SUPPORTED EQUITABLE TOLLING.

SCDC has argued in their Step 1 Response, R. p.131 and Step 2 Response, R. p.148 and their July 9, 2012 Brief, R. p.87 concerning timeliness that Torrence filed his grievance “over 2 ½ years after the South Carolina Supreme Court issued its decision in *Adkins* and *Wicker*,” thus establishing a starting point for grievances for prevailing wage claims from the August 2004 *Wicker* decision.

In the 2001 *Wicker* decision before the ALC, the Department argued that Wicker's complaint was “non-grievable,” 2001 WL 1005574 *1. The ALC disagreed because Wicker's pay represented conditions which directly affect an inmate. SCDC continued it's position before the Supreme Court that the wage claim was not grievable, which the Supreme Court rejected and affirmed the ALC's decision, *Wicker*, 602 S.E.2d at 56 - 57.

The November 25, 2002 Order of the Honorable J. Ernest Kinard, Jr., in *Torrence*, C/A 01-CP-40-3409, denied SCDC's Motion and did not argue the “grievable” status or *Wicker*'s 2001 ALC decision.

In a May 24, 2005 Order,³⁴ the Honorable D. Garrison Hill dismissed Torrence's Second Amended Complaint citing “[I]n light of the *Adkins* and *Wicker* decisions, SCDC renewed its 12(b)(6) motion on February 14, 2005.” Judge Hill gave a summary of the opinions in *Adkins* and *Wicker* in granting SCDC's motion to dismiss. It is important to note

³⁴ 2001-CP-40-3409

that Judge Hill's Order consistently stated "Any [] to which Plaintiff Torrence may be entitled must be addressed under *Wicker*, by Plaintiff Torrence filing a grievance, if he so elects..." R. pp. 17 - 22. Judge Hill's 2005 Order instructed all parties that Torrence may file a grievance "if he so elects," was four years *after* the 2001 ALC order in *Wicker* and the year *after* our Supreme Court affirming that 2001 decision.

SCDC's continued position up to the Supreme Court in *Wicker* supports Torrence's contention that until the Court affirmed that prevailing wage claims were grievable and reviewable by the ALC in a "very limited circumstance," SCDC maintained that those claims were non-grievable.

SCDC's position regarding the grievable status of prevailing wage claims up until 2004 supports the doctrine of equitable tolling by the ALC in this matter.

E. TORRENCE'S FILING OF *Torrence* ESTOPPED SCDC FROM PLEADING THE STATUTE OF LIMITATIONS

SCDC was a party to *Torrence* and was properly served within the time limitations periods and may not now assert the defense of statute of limitations, especially in light of Judge Hill's May 24, 2005 Order that Torrence may file a grievance "if he so elects." Torrence's diligence affects his right to have SCDC estopped from pleading the statute of limitations. *Torrence*, commenced within any conceived agency, regulatory or statutory time proscribed thereby, arrested the running of limitations, *Henderson v. Griffin*, 5 Pet. 151, 30 U.S. S.C. 151 (1831) and equitable estoppel may nullify SCDC's statute of limitations defense, *see, e.g., Rink v. Richland Memorial Hospital*, 422 S.E.2d 747 (S.C. 1992).

The ALC's rationale is supported by the relevant, reliable facts and substantial evidence of the whole record where Torrence was required to maintain *Torrence* in order to preserve judicial review where SCDC's adamant position was the issue was non-grievable.

SCDC asserts the ALC issued its 2001 decision in *Wicker* three (3) days before counsel for *Torrence* filed the class action, SCDC's Initial Brief, p. 29. Torrence contends two points; 1) SCDC refers to counsel filing the Second Amended Complaint; Torrence and Henry Hubbard filed the Original Complaint *pro se*. 2) the *Wicker* decision in the ALC, 2001 WL 1005574, was not binding precedent. Further, not in 2001, nor today, where institutional law libraries have Westlaw Terminals, are ALC decisions available to prisoners.

SCDC asserted that its conduct in defending its legal position in no way, shape or form constitutes any action - active or passive - on its behalf which interfered with or otherwise hindered Torrence's ability to pursue his wage claims via a grievance under GA-01.12, Initial Brief, and p. 29.

Torrence submits that SCDC's conduct in continuously asserting that wage claims were "non-grievable" is the very animus that rendered the filing of a grievance futile when filing a civil action SCDC was required to respond to the complaint. SCDC's negligence in responding to Torrence's Step 1 three (3) years after filing, and only based on Torrence's Petition for a Writ of Mandamus, is reliable and substantial evidence supported by the record.

In *Pace v. DiGuglielmo*, 554 U.S. 408 (2005),³⁵ a case considering the statute of limitations under 28 USC §2244 in a federal habeas corpus petition, the Supreme Court observed that, *generally*, "a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way.

Torrence submits that it is without contention that he has been diligently pursuing his rights, regardless of the venue, since 2000, at all times which SCDC has been aware and a party. Second, Torrence submits that extraordinary circumstance existed to interfere with his

³⁵ Relied upon by SCDC in Initial Brief, p. 31.

prosecution via grievance where, as the record demonstrates, up to 2004, SCDC maintained the issue was non-grievable and agency policy provided no remedy for monetary damages not associated with personal property loss.

III. THE JANUARY 20, 2016 ORDER OF THE ALC PROPERLY DEFINED AND CALCULATED THE “PREVAILING WAGE”

The ALC January 20, 2016 Order properly defined the “prevailing wage,” R. pp. 1062 - 1064 and correctly calculated the “prevailing wage,” R. pp. 1064 - 1066, based upon the relevant and substantial evidence in the record as a whole that would allow reasonable minds to reach the same conclusion as the ALC.

A. THE ALC PROPERLY ANALYZED APPLICABLE STATE LAW, FEDERAL LAW, AND FEDERAL REGULATIONS

The record supports the substantial evidence that the ALC properly applied applicable state law, federal law, and federal regulations in finding and calculating the prevailing wage, R. pp. 1059 - 1066.

1. SECTION 24-3-315

The ALC correctly identified the S.C. statute that originally enables, directs and controls that inmate’s rates of pay and other conditions of employment are not less than those paid and provided “for work of a similar nature in the locality in which the work is performed,” R. pp. 1064 - 1065.³⁶

SCDC’s argument completely ignores the fact that §24-3-315 is directly predicated upon 18 USC §1761(c) in compliance. The South Carolina Legislature’s intent was to craft a state assurance and authorization to comply with federal law, to be attached to SCDC’s application to the DOJ’s BJA for PIECP certification, in order for SCDC to operate a private

³⁶ §24-3-315, 1987 Act No. 177 §2

sector prison industries program.³⁷ SCDC's only treatment of §24-3-315 was at Initial Brief, p. 35 & n. 35 that "Our legislature assimilated this language into our state's prison industries statutes....," and at p. 40 as an "applicable statute[s] enacted by our legislature." Regardless, §24-3-315 was the statute created to demonstrate South Carolina compliance with federal guidelines and remained the sole governing law of private sector prison industries operation from 1987 to 1995 when Act No. 7, Part II, §43 crafted §24-3-430.

SCDC also overlooks that the Court of Appeals in *Cartrette* found §24-3-315 "resolved" Cartrette's dispute regarding the same rates of pay and employment conditions as their non-inmate peers.³⁸

2. SECTION 24-3-430

The ALC correctly identified, analyzed, and applied §24-3-430 as a controlling statute where "no inmate participating in the program may earn less than the prevailing wage for work of a similar nature in the private sector,"³⁹ R. pp. 1060, 1062 - 1065.

3. SECTION 18 U.S.C. §1761

The ALC correctly analyzed and applied 18 USC §1761 as the governing federal law by which SCDC must operate their private sector prison industries program, R. pp. 1059 - 1064, specifically, that participating inmates "receive[] wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work [is] performed," 18 USC §1761(c)(2) (2012), R. p. 1060.

4. 64 FR 17000, et seq.

³⁷ See specifically 64 FR 17012, IV. A. 2. (Application content) (A) (Assurances of Authority).

³⁸ Our Supreme Court found in *Torrence* that, "The program is federally certified and operates under various state statutes". See, e.g., §§ 24-3-40, 24-3-315 & 24-3-430 (2007)

³⁹ 1995 Act No. 7, Part II, §43; 1998 Act No. 355, §1.

The ALC correctly analyzed and applied 64 FR 17000, et seq. as the BJA's final PIECP *Guideline* for programs such as the instant one before this Court, specifically, "that payment of the minimum wage⁴⁰ does not achieve compliance with the law unless the comparable private sector industry wage is indeed the federal minimum wage," R. p. 1063. citing 64 FR 17010.

SCDC correctly noted, Initial Brief, p. 35, that the "[p]revailing wage is a wage rate which is not less than that paid for work of a similar nature in the locality in which the work is to be performed," (SCDC's emphasis), citing 64 FR 17007, but correctly cited as 64 FR 17008.

5. Circuit Court Analysis in *Adkins*

SCDC argues that the ALC "did not include §24-3-410 in the above-quoted passages from its January 26, 2016 Order," "specifically §24-3-410(B)(7)" where SCDC referenced the circuit court decision in *Adkins* in its response to Torrence's Step 1 and Step 2 Reply, Initial Brief, pp. 36-40.

The record fully supports the ALC's rationale for its decision concerning the circuit court order in *Adkins*. The ALC considered §24-3-410(B)(7) (2007) and "comparable wages" under §24-3-410 and determined a Circuit Court order in another case is not binding and it "contradicts the statements of the higher courts in this state," R. p. 1062, where the Supreme Court in *Torrence* has already stated the program at issue operates under §24-3-430, R. p.1062.

SCDC argued, Initial Brief, pp. 38-40, that the Circuit Court in *Adkins* has precedential value where our Supreme Court, in affirming the circuit court, "approvingly noted the circuit

⁴⁰ The Federal Minimum Wage at all times relevant herein was \$ 5.15 per hour. SCDC paid Torrence \$ 5.25 per hour.

court's decision," citing *Adkins*, 602 S.E.2d at 55, n. 6. **However**, that footnote only states 18 USC §1761 does not give rise to a private cause of actions in inmates. The *Adkins* Court noted the Prevailing Wage Statute is §24-3-430(D), 602 S.E.2d at 54, and n. 3. The Court's analysis of §24-3-410 was predominantly to reiterate no private cause of action. The Court made no holding in the regards to affirming the context of the circuit court holding asserted by SCDC here.

B. THE ALC PROPERLY DEFINED AND CALCULATED THE "PREVAILING WAGE"

The ALC's January 20, 2016 Order properly defined and calculated the "prevailing wage," R. pp. 1062 - 1066.

1. The definition of the term "prevailing wage"

The ALC correctly defined the prevailing wage as "the PIECP wage amount be set *exclusively* in relation to the amount of pay received by similarly situated non-inmate workers," citing *Guideline* at 17009-10 (Court's emphasis).

Rebecca W. Eleazer of the ESC/DEW, during her August 10, 2004 deposition for *Torrence*,⁴¹ R. pp. 604 - 655, despite South Carolina having no legal definition of the term, made a specific correlation of the term, as the agency official in charge of such, that for "prevailing wage," she would provide "our *average* wage," R. pp. 616 - 627.

SCDC has "admitted" that §24-3-430(D) applies to the prison industry program and *Torrence*, R. pp. 657 - 658.

Torrence further submits that SCDC's own *Agreement* with the private sector specifically states:

⁴¹ All portions of the deposition and relevant exhibits pertaining to defining and calculating the "prevailing wage" are contained in the record. The Court or SCDC may have the entire contents of that deposition supplemented into the record.

“At no time during this agreement will inmates be paid less than the *prevailing wage* as set forth in Appendix D. The prevailing wage rate for inmate labor is to be *established annually by the S.C. Employment Security Commission*,” R. p.677 (Emphasis supplied).⁴²

2. The ALC Properly Applied ESC / DEW Methodology and the Operative Federal Regulation

The ALC’s January 20, 2016 Order properly applied the ESC/DEW methodology and the federal regulation to calculate the prevailing wage in the instant matter, R. pp. 1065 - 1066.

First, the ALC applied §24-3-315 and §24-3-430 in a statutory analysis, R. pp. 1064 - 1065. Next, the ALC, in noting the method of obtaining the prevailing wage from *Guideline* at 17010; applied the deposition of Rebecca Eleazer and documents associated in the record, R. pp. 1065 - 1066, to ascertain the prevailing, or mean/average wage for the OES or OCC Code for Electronic Assemblers for years between 1997 – 1999.

The ALC correctly held that there is “no evidence whatsoever in the record to support the Department’s argument that its wage payment was in conformity with ESC data.” That “to pay [Appellant] less than the prevailing wage is an error of law,” R. p. 1066. The ALC found that “the record simply does not support a finding that the mean average wage for an assembler is as low as the \$5.25 paid [Torrence],” R. p. 1065. The ALC also relied upon the record containing correspondence from Ted Gladden of the ESC that informed SCDC that the mean average wage in 1997 for electronic assemblers was \$8.82, and for the years 1998 - 1999, the wage of \$9.92.

⁴² SCDC continually asserts the ESC/DEW does not have a term “prevailing wage,” despite SCDC’s own use of the term in their *AGREEMENT*, or the “mean” / “average” wage language correlated between documents, R. pp. 640, 782 and agency correspondence, R. pp. 647 - 654, utilized by both SCDC and ESC/DEW in their PIECP wage verification communications and explained by Ms. Eleazer in her deposition. Torrence notes that SCDC failed to apply or comply with every wage verification from ESC/DEW.

SCDC suggests, as compliance with 18 USC § 1761(c)(2), §24-3-315, and §24-3-430(D), that Torrence was paid ten cents above the federal minimum wage, Brief, p. 41. This application contradicts the substantial evidence in the record does not contain the hourly wage ESCOD actually paid its employees for work similar to Torrence. Torrence suggests that neither party to this action has access to those records, but common sense dictates it was within the average/mean wage range.

SCDC suggests reliance upon the Circuit Court proceedings in *Adkins* as to a determination of the prevailing wage. Torrence suggests that *Adkins* was appealed, but the wage verification process in *Adkins* was not ruled upon by the Supreme Court in *Adkins*, 602 S.E.2d 51, and that the testimony and evidence *now in the record* is relevant to and specific to the case on appeal here.

C. THE ALC PROPERLY HELD THAT TORRENCE WAS ENTITLED TO THE PREVAILING WAGE.

1. The ALC properly held Torrence was entitled to the prevailing wage during the training period.

Following an analysis of the applicable statutory law, *Wicker* and *Cartrette*, the ALC properly reversed SCDC's decision to pay Torrence less than the prevailing wage for regular hours and time-and-a-half the prevailing wage for overtime hours as it was erroneous as a matter of law, R. pp. 1032 - 1034.

2. The ALC properly held Torrence was entitled to the prevailing wage for the post-training hours.

Based upon its analysis of the applicable statutory and case law in Section III. C. 1, above, in relation to each hour of labor after the training period, the ALC properly held "there is no construction of law under which the Department could pay [Appellant] less than the prevailing wage," R. pp. 1034 - 1035.

IV. THE ALC'S JANUARY 20, 2016 ORDER CORRECTLY HELD SCDC MUST ALLOW TORRENCE TO DESIGNATE PERSONS OR ENTITIES TO RECEIVE AN IMMEDIATE DISTRIBUTION OF HIS MONIES HELD IN ESCROW PURSUANT TO §24-3-40(A)(5) AND (B)(2).

A. THE ALC'S ANALYSIS AND HOLDINGS

The ALC correctly analyzed and conducted a statutory construction of §§ 24-3-40(A)(5) as to the wages escrowed for the benefit of the prisoner; and (B)(2) providing how those wages are returned to a prisoner serving a sentence of life without parole. R. pp. 1039-1042.

The ALC correctly analyzed 1999 Act No. 68, §2 and 1999 House Bills 3562 (R. pp. 936 – 942) and amended 3216, (R. pp. 933 – 935), that contained the language “included upon his death,” and compared it with 1999 Senate Bill 384, (R. pp. 909 – 932), which actually became Act No. 68, that changed the above language to “include in his estate or distributed to the persons or entities of his choice.” The ALC’s rationale led to the conclusion that if the legislature had intended for the escrowed money to be distributed only “upon death,” it would have enacted that proposed language rather than amending it, R. p.1042.

B. THE ALC CORRECTLY REVERSED SCDC'S DECISION

The ALC correctly held that, based on §24-3-40(A)(5), “ten percent must be held in an interest bearing escrow account **for the benefit of the prisoner**” R. p.1041. (Court’s emphasis). The ALC correctly rationalized SCDC’s interpretation that the funds may not be distributed during the inmate’s choosing or lifetime ignores the fact “the funds are to be for the benefit of the prisoners; not the benefit for prisoner’s heirs,” R. p. 1041.

As such, the ALC held that Torrence must be allowed the opportunity to designate persons or entities to receive an immediate distribution of funds held pursuant to §24-3-40(A)(5) R. p.1042.

V. THE APPELLATE COURT MAY AFFIRM THE JANUARY 30, 2014 AND JANUARY 20, 2016 ORDERS OF THE ALC ON ANY GROUND IT FINDS IN THE RECORD.

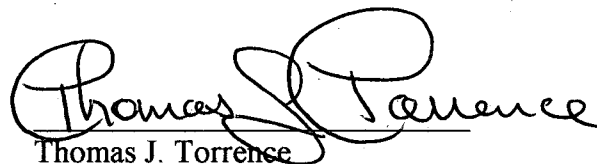
Torrence submits that pursuant to Rule 220(C), SCACR, this Honorable Court may affirm both orders on appeal based upon any ground it finds in the record.

CONCLUSION

Respondent respectfully prays this Honorable Court affirm the January 30, 2014 and January 20, 2016 Orders of the Administrative Law Court.

Respectfully submitted,

December 30, 2016

A handwritten signature in cursive script that reads "Thomas J. Torrence". The signature is written in black ink and is positioned above a horizontal line.

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

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2016-000285

Trial Court Case No. 12ALJ0400143AP

Thomas J. Torrence, #094651 Respondent,

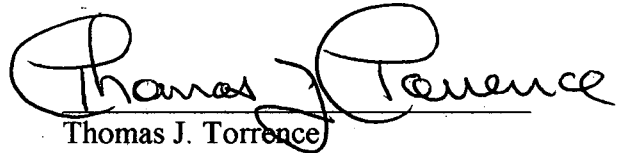
v.

South Carolina Department of Corrections Appellant.

CERTIFICATE OF *PRO SE* COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

December 30, 2016



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