

THE 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. 2012ALJ040143AP

Thomas J. Torrence, #094651, Respondent,

v.

South Carolina Department of Corrections, Appellant.

APPELLANT'S REPLY BRIEF

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In accordance with South Carolina Appellant Court Rules [“SCACR”] 208(a)(3), 208(b)(3), and 208(b)(5), the Appellant in the instant matter, the South Carolina Department of Corrections [“SCDC”], respectfully submits its instant reply brief to the brief filed by the Respondent, Thomas J. Torrence [“Torrence”].

SCDC’s instant reply brief accompanies the brief it filed with this Court in support of its appeal of two (2) orders issued by the Administrative Law Court [“ALC”] in this instant matter. The ALC issued its first order on January 30, 2014, and it issued its second order on January 20, 2016. (R. pp. 393 – 402 and 1029 – 43).

I. TORRENCE’S STATEMENT OF ISSUES ON APPEAL

A comparison of the first four (4) issues on appeal identified by Torrence in his brief to the four (4) issues on appeal identified by SCDC in its brief reveal that they are nearly identical:¹

Issue	SCDC	Torrence
I.	Did the ALC err in its January 30, 2014 order by ruling that Torrence timely filed his grievance?	Did the ALC’s January 30, 2014 order properly find that Torrence timely filed his grievance?
II.	Did the ALC err in its January 30, 2014 order by ruling that equitable tolling applied to Torrence’s grievance?	Did the ALC’s January 30, 2014 order properly find that equitable tolling applied to Torrence’s grievance?
III.	Did the ALC err in its January 20, 2016 order by calculating the “prevailing wage” that SCDC should have paid Torrence for his prison industries labor?	Did the ALC’s January 20, 2016 order properly define and calculate the “prevailing wage” that SCDC should have paid Torrence for his prison industries labor?
IV.	Did the ALC err in its January 20, 2016 order by ruling 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 Ann. § 24-3-40(A)(5)?	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)?

¹ See Torrence’s Brief, p. 1, and SCDC’s Brief, p. 1.

However, Torrence identified five (5) issues on appeal in his brief, and he identified his fifth issue as follows:² “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.”

SCDC respectfully asserts that the fifth issue on appeal identified by Torrence in his brief actually constitutes one of Torrence’s arguments, and the argument which comprises Torrence’s fifth issue is simply his restatement of the final sentence from SCACR 208(b)(2).

SCACR 208(b)(2) is entitled “Brief of Respondent,” and its final sentence provides that the “Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by [SCACR] 220(c).”

In Section V of his brief,³ Torrence seemingly confirms SCDC’s assertion by arguing that “pursuant to [SCACR 220(c)], this Honorable Court may affirm both orders on appeal based upon [any] ground it finds in the record.”

Nevertheless, SCDC respectfully urges the Court to, for clarity’s sake, strike Torrence’s fifth issue on appeal, and, accordingly, SCDC respectfully urges the Court to accept the four (4) issues on appeal it identified in its brief.

II. THE ALC ABUSED ITS DISCRETION BY CALCULATING THE “PREVAILING WAGE” IN ITS JANUARY 20, 2016 ORDER

As reflected by the above-provided table, the parties, in the third issue on appeal they presented in their respective briefs to this Court, addressed the reality that the ALC calculated the “prevailing wage” at which SCDC should have paid Torrence for his prison industries labor.

In doing so, the ALC ruled as follows (R. p. 1039):

² See Torrence’s Brief, p. 1.

³ *Id.*, p. 46.

[Torrence] must be paid the mean average South Carolina wage of an electronic assembler, including overtime, for the years he worked as a harness assembler for ESCOD. [SCDC] must obtain the data to determine this wage from the Department of Employment and Workforce. **Specifically, [SCDC] must pay [Torrence] the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999 and the mean average wage reflected by that code or its counterpart for the years data is not contained in the record.** [emphasis supplied by the ALC].

Before articulating the above-quoted ruling, the ALC offered the following analysis (R. p. 1038):

The PIECP Guideline requires that the prevailing wage must be obtained from the state agency that determines wage rates. Guideline at 17010. In South Carolina, this agency would have been the Employment Security Commission (ESC) at the times relevant to this case, but would now be the Department of Employment and Workforce (DEW). Further, the Guideline states that the prevailing wage must be set exclusively in relation to the amount of pay received by similarly situated non-inmate workers and that no other cost variables may be taken into consideration. *Id.* at 17009-10. In referring to the ESC data in the record, the Court concludes that “locality” means the state of South Carolina. Further, the Court concludes that the data necessary to determine the mean average wage for “work of a similar nature” as contemplated by the state statutes and federal guidelines may be found by referring to the appropriate Occupational Employment Statistics (OES) or OCC code used by ESC/DEW.

The ALC then concluded as follows (R. pp. 1038 – 39):

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]. For example, in 1999, Ted Gladden of the Employment Security Commission informed [SCDC] by letter **that the mean average wage in 1997 for electronic assemblers was \$8.82.** In 2000, Gladden informed [SCDC] **that the mean average wage in 1998-1999 for electronic assemblers was \$9.92.** While this evidence demonstrates that the data necessary to calculate the mean average wage is available from DEW, the evidence in the record is insufficient to calculate the wage for all of the relevant years. [emphasis supplied].

Thus, as reflected by above-quoted passages from its January 20, 2016 order, the ALC made three (3) factual determinations regarding the “prevailing wage” SCDC should have paid

Torrence for his prison industries labor, namely that SCDC should have paid Torrence \$8.82 per hour in 1997, \$9.92 per hour in 1998, and \$9.92 per hour in 1999.

In his efforts to support the ALC's factual determination(s) of the applicable "prevailing wage," Torrence offered the following assertions in his brief to this Court:

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," **as well as the method for obtaining that wage rate.** The ALC also determined S.C. Code Ann. § 24-3-315 was "enacted to comply with federal law" and cites [SCDC] "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). [The ALC's January 20, 2016 order] also finds applicable the "prevailing wage" statute in S.C. Code Ann. § 24-3-430 (2007).⁴ [footnote omitted, references to record omitted, and emphasis supplied].

...

The [ALC] next made an appropriate analysis of the definition of the term "prevailing wage" holding **that [our Supreme Court] in *Torrence* "has already stated that the program at issue in this case operated under Section 24-3-430,"**⁵ [646 S.E.2d 866, 867]. The [ALC] applied the *Guideline* to its analysis of the prevailing wage 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." The [ALC] did not agree that the \$5.25 regular hourly rate conforms to the ESC data in the record. [references to record omitted and emphasis supplied].

The ALC next performed a logical calculation of the prevailing wage based on South Carolina Statutes §§ 24-3-315 and 24-3-430.⁶ [references to record omitted and emphasis supplied].

...

The ALC utilized documentation in the instant record regarding the wage rates for various years of Torrence's employment in the project.⁷ [references to record omitted and emphasis supplied].

⁴ See Torrence's Brief, p. 14.

⁵ As discussed below, the ALC relied upon its own erroneous interpretation of our Supreme Court's decision in *Torrence* in an effort to avoid or, more accurately, ignore § 24-3-410 and, specifically, § 24-3-410(B)(7).

⁶ See Torrence's Brief, p. 15.

⁷ *Id.*, p. 16.

Later in his brief to this Court, Torrence further supported the methods by which the ALC determined the actual “prevailing wage” purportedly applicable to his prison industries labor as follows:

[The ALC’s] January 20, 2016 Order properly defined the “prevailing wage,” and correctly calculated the [“prevailing wage,”] 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.**⁸ [references to record omitted and emphasis supplied].

...
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.**⁹ [references to record omitted and emphasis supplied].

...
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.¹⁰ [references to record omitted and emphasis supplied].

At the outset of his brief to this Court,¹¹ Torrence asserted as follows:

The ALC in [*Wicker v. S.C. Dep’t of Corr.*, 2001 WL 1005574 (S.C.A.L.J.D. 2001)] 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.

In so asserting, Torrence simply ignored the reality that in its August 13, 2001 decision in *Wicker*, 2001 WL 1005574, *2, the ALC explicitly determined that the “prevailing wage” for the inmate’s labor equaled \$5.25 per hour. (“The record reflects that after the initial 320 hours of work, Wicker was paid at the rate of \$5.25 per hour. ([SCDC] Staff Memorandum dated May 4,

⁸ See Torrence’s Brief, p. 39.

⁹ *Id.*

¹⁰ *Id.*, p. 43.

¹¹ *Id.*, p. 1, n. 2.

2000). **Thus, the prevailing wage for work of a similar nature in the private sector is \$5.25 per hour.**” [emphasis supplied].¹²

Torrence then admitted at the outset of his brief to this Court that he asked the ALC “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.”¹³ [emphasis supplied].

The following two (2) passages from his brief to the ALC dated March 26, 2015 reflect instances in which Torrence asked the ALC to “formulate a calculation” of the “prevailing wage” SCDC should have paid him for his prison industries labor:

[Torrence] suggests this Court **make a determination independent** of [SCDC] of the prevailing wage for work of a similar nature during the “training period.” [emphasis supplied]. (R. p. 741).

... [Torrence] suggests this Court **determine what the prevailing wage**, pursuant to S.C. Code Ann. §§ 24-3-40; 24-3-315; 24-3-430(D) and 18 U.S.C. § 1761(c)(2) **for such labor actually was during that period.** See “Prevailing Wage Verification,” 64 FR 17010. [emphasis supplied]. (R. p. 746).

As reflected by the above-quoted passages from its January 20, 2016 order, the ALC did exactly what Torrence asked it to do in his March 26, 2015 brief, namely render independent determinations of fact by actually declaring the “prevailing wage” SCDC should have paid Torrence for the years 1997, 1998, and 1999.

¹² In the footnote associated with this passage from its August 13, 2001 decision, the ALC in *Wicker*, 2001 WL 1005574, *2, n. 3, also offered the following critical observation:

The federal minimum wage is currently \$5.15 per hour, see 29 U.S.C.A. § 206; thus, the prevailing wage in the private sector would have to be at least \$5.15 per hour. Additionally, no argument has been made and nothing is in the record before me to suggest that the “prevailing wage for work of similar nature in the private sector” should be the amount authorized under a special certificate of learners. See 29 C.F.R. § 520.408. [emphasis supplied].

¹³ See Torrence’s Brief, p. 1, n. 2.

However, in doing so, SCDC respectfully asserts that the ALC completely lost sight of the reality that it considered Torrence's appeal of SCDC's final decision exclusively in its appellate capacity, and, accordingly, the provisions of S.C. Code Ann. § 1-23-380(A)(5) dictated its standard of review:¹⁴

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

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

SCDC emphasized this reality in the brief it filed June 29, 2015 with the ALC (R. p. 802):

In South Carolina, the provisions of the APA, specifically § 1-23-380(A)(5), govern the circumstances in which an appellate body may reverse or modify an agency decision. **Under the APA, this Court sits in an appellate capacity rather than as an independent finder of fact.** See also [*Al-Shabazz v. State*, 527 S.E.2d 742, 754 (S.C. 2000)]. [emphasis supplied].

Moreover, SCDC respectfully asserts that the ALC completely lost sight of the reality that Torrence's appeal of SCDC's final decision fell under Section V of the ALC Rules of Procedure, which is entitled "Special Appeals." ALC Rule 51, which is the first rule in Section V, declares that the rules of Section V "shall apply "exclusively in matters heard on appeal from final decisions pursuant to [*Al-Shabazz*]."

¹⁴ Torrence quoted the entirety of § 1-23-380(5) in his brief to the ALC dated March 26, 2015. (R. p. 731).

Not only did it lose sight of the reality that Torrence's appeal fell under Section V of the ALC Rules of Procedure, the ALC further lost sight of the reality that the provisions of Policy GA-01.12, SCDC's Inmate Grievance System Policy, do not provide or contemplate that SCDC must conduct a contested hearing of prison industries pay claims, such as the claims Torrence asserted in his Step 1 grievance.

Accordingly, the following provisions of our Supreme Court's decision in *Al-Shabazz*, 572 S.E.2d at 754, precisely apply to the standard of review the ALC should have applied in its January 20, 2016 order but failed to do so:

We decline, as we did with certain [Administrative Procedures Act] provisions discussed above, to apply these contested case rules to non-collateral and administrative matters decided by [SCDC]. [SCDC's] procedures provide a sufficient method of resolving administrative matters pertaining to inmates without the need for a contested-case hearing before an [Administrative Law Judge].

An inmate may, however, seek review of [SCDC's] final decision by an ALJ in a non-collateral or administrative matter. *Cf. [Bennett v. S.C. Dep't of Corr., 408 S.E.2d 230 (S.C. 1991)]* (statutory requirements proffering administrative remedy and requiring exhaustion before seeking judicial review mean **administrative agency has exclusive right to decide issues before it, subject only to appeal for judicial review of its decision**). The [Administrative Law Judge] sits in an appellate capacity to review [SCDC's] decisions. *Cf. [Reliance Ins. Co. v. Smith, 489 S.E.2d 674, 677 (S.C. Ct. App.1997)]* (explaining that [the Administrative Law Judge] is not restricted to merely reviewing decision below when hearing a contested case, which is in the nature of a *de novo* hearing; **thus indicating the converse proposition that an [Administrative Law Judge] is restricted to reviewing the decision below when acting in an appellate capacity**). [emphasis supplied].

Our Supreme Court, when it affirmed the ALC's 2001 decision in *Wicker*, relied upon its earlier decision in *Al-Shabazz* when it ruled that inmates, such as Torrence, may litigate their prison industries pay claims through Policy GA-01.12. *See Wicker v. S.C. Dep't of Corr., 602 S.E.2d 56, 57 – 58 (S.C. 2004)*.

Thus, under both § 1-23-380(A)(5) and our Supreme Court's decision in *Al-Shabazz*, the ALC was not, and is not, authorized to act as an independent finder of fact, and, accordingly, the ALC, by Torrence's own characterization, clearly exceeded its authority by so acting. SCDC respectfully asserts that the ALC clearly erred by rendering a factual conclusion, namely its declaration of "prevailing wage" SCDC should have paid Torrence in 1997, 1998, and 1999.

Notwithstanding these realities, Torrence, in his brief to this Court, invoked this Court's decision in *Cartrette* to support the ALC's erroneous factual determination (i.e. calculations) of the "prevailing wage":¹⁵

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.

Torrence, however, overlooked the essential reality that in its decision in *Cartrette*, this Court, sitting in an appellate capacity just as the ALC did in the instant matter, did not calculate the "prevailing wage" attributable to the inmate's prison industries labor.

Instead, this Court in *Cartrette*, 694 S.E.2d at 22, acknowledged that "the question of the prevailing wage to which [the inmate] is entitled has been remanded to the ALC for further proceedings," and SCDC respectfully asserts that the ALC in *Cartrette*, once it finally begins proceedings in accordance with the Court of Appeals' decision,¹⁶ cannot sit as an independent

¹⁵ See Torrence's Brief, p. 40.

¹⁶ Cartrette challenged this Court's rulings by filing a petition for writ of certiorari with our Supreme Court, and our Supreme Court granted his petition. However, by the decision it issued February 12, 2012, our Supreme Court dismissed the writ of certiorari as having been improvidently granted. See *S.C. Dep't of Corr. v. Cartrette*, 772 S.E.2d 805 (S.C. 2012). Cartrette did not subsequently prosecute his claims before the ALC in the aftermath of our Supreme Court's dismissal of the writ of certiorari. Instead, Cartrette filed a declaratory judgment action in circuit court in which he attempted to litigate the prison industries pay claims which this Court explicitly remanded back to the ALC in its 2010 decision. In early 2015, the circuit court granted SCDC's motion to dismiss Cartrette's declaratory judgment action. Rather than prosecuting his claims before the ALC after the circuit court dismissed his declaratory judgment action, Cartrette appealed the circuit court's decision to this Court. See *Cartrette v. S.C. Dep't of Corr.*, Trial Court Case No. 2014-CP-23-5969, Appellate Case No. 2015-000759. As of the filing date of SCDC's instant reply brief, the parties have filed with this Court all materials associated with Cartrette's appeal of the circuit court's decision, and his appeal remains pending.

finder of fact regarding the question of whether SCDC paid the inmate the correct “prevailing wage” for his prison industries labor.

In further rationalizing the ALC’s erroneous factual determinations (i.e. calculations) of the “prevailing wage,” Torrence offered the following argument in his to this Court, which reflects the ultimate folly inherent with the ALC’s factual determination of the “prevailing wage” SCDC purportedly should have paid him:¹⁷

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, [SCDC’s 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.** [emphasis supplied].

Obviously, Torrence does not serve his own interests by acknowledging that in its January 20, 2016 order, the ALC order should have remanded the issue of whether SCDC paid him a lawful “prevailing wage” for his prison industries labor back to SCDC so that the parties could submit evidence into the record and argue the merits of their respective positions.

As SCDC accurately observed in the brief it filed with this Court, “no evidence exists in the record to confirm the hourly wage ESCOD *actually paid* its employees who performed job tasks identical or similar to those performed by Torrence.¹⁸” As SCDC also accurately observed in its brief, “[t]he ALC could have directed the parties to introduce such evidence into the record when it ultimately remanded the matter back to SCDC for further proceedings, but it elected not to do so.¹⁹”

¹⁷ See Torrence’s Brief, p. 44.

¹⁸ See SCDC’s Brief, p. 41.

¹⁹ *Id.*, p. 43.

Thus, the ALC's calculation of the "prevailing wage" SCDC should have paid Torrence during 1997, 1998, and 1999 raises the very real possibility that the ALC fashioned a "prevailing wage" for Torrence that exceeded the actual hourly wage ESCOD and INSILCO paid their non-inmate workers. No state statute, federal statute or federal regulation even contemplates such an absurd result.

Instead, Torrence effectively advocated that this Court should affirm the ALC's improper factual determinations even though the ALC lacked such critical evidence under some undefined notion of "common sense."

Ironically, Torrence unwittingly embraced the authority which succinctly states SCDC's ultimate argument in his brief to this Court:²⁰

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.** [emphasis supplied].

SCDC respectfully asserts that the ALC clearly abused its discretion by actually calculating the "prevailing wage" SCDC should have paid Torrence for his prison industries labor, and, therefore, SCDC respectfully urges this Court to, at the very least, reverse the ALC's rulings on this issue as contemplated by under § 1-23-610(B)(c), (d), (e), and (f).

²⁰ See Torrence's Brief, p. 18. SCDC respectfully submits that Torrence's above-quoted paragraph simply echoes the assessment of the applicable standard it articulated in its brief. See SCDC's Brief, p. 16.

III. EVEN IF IT DID NOT ABUSE ITS DISCRETION BY CALCULATING THE “PREVAILING WAGE” IN ITS JANUARY 20, 2016 ORDER, THE ALC ERRONEOUSLY IGNORED § 24-3-410(B)(7) IN ITS CALCULATIONS

Again, in the third issue on appeal they presented in their respective briefs to this Court, the parties addressed the reality that the ALC calculated the “prevailing wage” at which SCDC should have paid Torrence for his prison industries labor.

As SCDC argued in Section II immediately above, the ALC abused its discretion by calculating the actual “prevailing wage” SCDC should have paid Torrence for his prison industries labor in 1997, 1998, and 1999. However, even if the ALC did not abuse its discretion by doing so, SCDC respectfully asserts that the ALC erroneously ignored § 24-3-410 and, specifically, § 24-3-410(B)(7) in making its calculations.

The ALC referenced § 24-3-410(B)(7) only once in its January 20, 2016 order, and it did so as follows (R. p. 1035):

First, [SCDC] argues that “comparable wages” and “prevailing wage” are different concepts and that the requirement to pay a comparable wage does not require [SCDC] to pay the prevailing wage. The term “comparable wages” is used in [§ 24-3-410]. This section is similar to the Ashurst-Summers Act, in that it bans the sale of inmate-manufactured goods, with certain exceptions. The exception applicable to the PSPIP provides that the “inmate workers participate voluntarily, receive comparable wages, and the work does not displace employed workers.” [§ 24-3-410(B)(7)]. **[SCDC] cites a Circuit Court order in another case as support for the theory that [§ 24-3-410], and not [§ 24-3-430], governs the wage standard applicable in this case.** Not only is this Circuit Court order not binding, the argument for which it is cited contradicts the statements of the higher courts in this state. This Court declines to further address the argument that only [§ 24-3-410] applies, noting that the South Carolina Supreme Court has already stated that the program at issue in this case operated under Section 24-3-430. [*See Torrence, et al., v. S.C. Dep’t of Corr.*, 646 S.E.2d 866, 867 (S.C. 2007)]. [emphasis supplied].

Torrence offered the following assertions in his brief to this Court in his efforts to support the ALC’s stark unwillingness to consider the full spectrum of our state’s prison industries

statutes, a spectrum which obviously includes § 24-3-410(B)(7), as it embarked upon a course which ultimately resulted in the ALC rendering factual determinations as to the “prevailing wage” SCDC should have paid Torrence in 1997, 1998, and 1999:

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.²¹

...
The record fully supports the ALC’s rationale for its decision concerning the circuit court order in [*Adkins, et al. v. S.C. Dep’t of Corr.*] The ALC considered [§ 24-3-410(B)(7)] 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,” where the Supreme Court in *Torrence* has already stated the program at issue operates under § 24-3-430, *Id.*²² [References to record omitted].

Contrary to Torrence’s assertions, the ALC didn’t consider the provisions of § 24-3-410(B)(7). Instead, the ALC flatly ignored them, and, for that matter, it completely dodged whether the provisions of § 24-3-410(B)(7) even applied to the hourly rate at which SCDC paid Torrence for his prison industries labor, and, if it did, whether § 24-3-410(B)(7) may have applied in lieu of both §§ 24-3-315 and 24-3-430(D).

The ALC so ignored § 24-3-410(B)(7) and so dodged the issues animated by the very existence of the statute, because the ALC erroneously believed that our Supreme Court, by its 2007 decision in *Torrence*, ruled on the merits of Torrence’s prison industries wage claims.

As recognized by our Supreme Court in its decision in *Torrence*, 646 S.E.2d at 867, Torrence and his fellow plaintiffs filed class action declaratory judgment complaint by which they sought “certain declarations of rights under various statutes related to the Prison Industries Program. *See* [S.C. Code Ann. §§ 24-3-40 and 24-3-310 through 24-3-430].” As our Supreme Court recognized, *Id.*, Torrence and his fellow plaintiffs sought “a declaration from the circuit

²¹ *See* Torrence’s Brief, p. 7.

²² *Id.*, p. 41.

court that [SCDC] has violated South Carolina law,” and the only two (2) statutes referenced by our Supreme Court consisted of §§ 24-3-40 and 24-3-430.

Thus, contrary to both the arguments offered by Torrence and the analysis offered by the ALC in its January 20, 2016 order, Torrence and his fellow plaintiffs never sought any declaration of their rights under § 24-3-410, and a review of the entirety of the decision issued by our Supreme Court in *Torrence* reveals that it never once discussed or even cited § 24-3-410.

Our Supreme Court in *Torrence*, 646 S.E.2d at 868, observed as follows regarding the motions to dismiss SCDC filed before the circuit court:

[SCDC] filed a motion to dismiss the Second Amended Complaint pursuant to Rule 12(b)(6), SCRCP. Finding that the complaint properly stated a declaratory judgment action which involved novel issues, the trial court initially denied the motion in November 2002. However, after this Court issued its opinions in [*Adkins, et al., v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (S.C. 2004)], and [*Wicker*], [SCDC] renewed its motion to dismiss.

The trial court ruled that *Adkins* and *Wicker* barred the entire declaratory action and therefore granted the dismissal. The trial court found the circuit court was not the proper forum for members of the Prisoner Subclass to use for an adjudication of their rights. Instead, the trial court noted that, pursuant to *Wicker*, these members could pursue their claims via [Policy GA-01.12].

Our Supreme Court in *Torrence* affirmed the circuit court's decision to grant SCDC's motion for summary judgment by ruling as follows, 646 S.E.2d at 869:

Appellants claim that despite the holdings of *Adkins* and *Wicker*, the Prisoner Subclass should be able to proceed in circuit court in the posture of a declaratory judgment action. We disagree. The clear rule emerging from the *Adkins* and *Wicker* cases is this: inmates working in the Prison Industries Program have a cognizable, state-created interest in having [SCDC] pay them according to the statutory scheme governing the Program, but they do not have a private right of action; instead, [Policy GA-01.12], with recourse to the [ALC], is the appropriate way to have a prisoner's wage claim adjudicated. Therefore, the trial court correctly applied *Adkins* and *Wicker* to the Prisoner Subclass. To hold otherwise would contravene our precedent on these issues by allowing inmates

access to the circuit court merely by styling their cases as declaratory judgment actions.

Rather obviously, by granting SCDC's motion to dismiss in *Torrence*, the circuit court never considered the merits of Torrence's prison industries pay claims, including Torrence's claim that SCDC failed to pay him the lawful "prevailing wage" for his labor. Consequentially, our Supreme Court, in the decision by which it affirmed the circuit court in *Torrence*, never considered the merits of Torrence's prison industries pay claims, as it left the determination of the merits of Torrence's prison industries pay claims to the process which unfolded when Torrence finally, nearly three (3) years after our Supreme Court issued its decision in *Wicker* and *Adkins*, filed his Step 1 grievance under the provisions of Policy GA-01.12.

Torrence offered a more full-throated support of the ALC's decision to flatly ignore § 24-3-410(B)(7) in response to argument SCDC offered in its brief to this Court:²³

SCDC argued, [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 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. [emphasis supplied].

SCDC did not state in the brief it filed with this Court that the circuit court's decision in *Adkins* had precedential value. Instead, SCDC explicitly acknowledged in its brief that "the circuit court's order in *Adkins* does not represent binding precedent."²⁴

²³ See Torrence's Brief, pp. 41 – 42.

²⁴ See SCDC's Brief, p. 40.

Before affirming the circuit court’s decision to grant SCDC’s motion to dismiss, our Supreme Court in *Torrence*, 646 S.E.2d at 869, offered the following assessment of its earlier decision in *Adkins*:

In *Adkins*, the inmates filed tort claims in circuit court against [SCDC] alleging violations of the prevailing wage statutes. The Court affirmed the circuit court’s determination that these statutes provided no private right of action for inmates. Noting that “the overall purpose of the prevailing wage statute is to prevent unfair competition, and to aid society and the public in general,” we decided the statutes were not enacted for the special benefit of inmates. [*Adkins*, 602 S.E.2d at 54]. Nonetheless, the *Adkins* Court stated the inmates were not without a remedy because *Wicker* allowed them an avenue of relief through the inmate grievance system.²⁵

Like §§ 24-3-315 and 24-3-430(D), § 24-3-410(B)(7) does not provide inmates, like the inmates in *Adkins* or *Torrence*, a private right of action. Thus, our Supreme Court in *Torrence* did not determine how § 24-3-410(B)(7) or, for that matter, §§ 24-3-315 and 24-3-430(D) impacted the merits of the “prevailing wage” claims asserted by *Torrence* and his fellow inmates.

However, the circuit court in *Adkins* actually considered both §§ 24-3-430 and 24-3-410(B)(7) in the course of conducting a trial on the merits of the inmates’ prison industries pay claims, and it determined that § 24-3-410(B)(7) applied to their claims.

As SCDC asserted in its brief to this Court,²⁶ the circuit court in *Adkins* ruled that the permanent hourly wage that SCDC paid the inmates after they completed the first 320 hours of their labor; “i.e. the federal minimum wage of \$5.15 per hour, conforms to both the ‘comparable wage’ standard from [§ 24-3-410(B)(7)] and the ‘prevailing wage’ standard from [§ 24-3-

²⁵ In the footnote associated with this passage from its decision, the *Torrence* Court, 646 S.E.2d at 869, n. 3, observed as follows: “More recently, we held in [*Williams, et al., v. S.C. Dep’t of Corr., et al.*, 641 S.E.2d 885 (2007)], that a class of inmates could not maintain a prison industry program suit against the private industry sponsor who paid the prisoners’ wages to [SCDC].” Many of the current and former inmates in *Williams* are now litigants in *Ackerman v. S.C. Dep’t of Corr.*, 782 S.E.2d 757 (S.C. Ct. App. 2016). All materials associated with the petition for writ of certiorari filed by SCDC in *Ackerman* have now been filed with our Supreme Court and, as of the filing date of SCDC’s instant reply brief, SCDC’s petition for writ of certiorari remains pending.

²⁶ See SCDC’s Brief, pp. 39 – 40.

430(D)] under the guidelines published by the South Carolina Employment Security Commission.” (R. pp. 880 – 81).

Since the parties litigated § 24-3-410 before the circuit court in *Adkins*, our Supreme Court in *Adkins*, when considering the inmate plaintiffs’ appeal of the circuit court’s decision, at least addressed § 24-3-410. Despite SCDC raising § 24-3-410 and, specifically, § 24-3-410(B)(7) in its response to Torrence’s Step 1 (R. p. 132), its response to his Step 2 (R. pp. 149 – 50), and in its June 29, 2015 brief to the ALC (R. pp. 803, 823, and 827 – 28), the ALC knowingly and purposefully ignored it in its January 20, 2016 order.

Our Supreme Court in *Adkins*, 602 S.E.2d at 54 – 55, discussed the provisions of § 24-3-410 as follows:

Section 24-3-410 is entitled “Sale of prison-made products on open market generally prohibited; penalties.” Violation of the statute is a misdemeanor and, upon conviction, a person must be fined not less than two hundred nor more than five thousand dollars or imprisoned for not less than three months nor more than one year, or both. [§ 24-3-410(C)]. **Although [§ 24-3-430] does not specifically set forth criminal penalties, [§ 24-3-420] states that “Any person who willfully violates any of the provisions of this article other than § 24-3-410 shall be guilty of a misdemeanor and, upon conviction, shall be confined in jail not less than ten days nor more than one year, or fined not less than ten dollars nor more than five hundred dollars, or both, in the discretion of the court.”** Nothing in the statutes indicates a legislative intent to create civil liability for a violation of the statutes. Accordingly, they do not give rise to a private right of action. [footnotes and citations omitted; emphasis supplied].

It was in the footnote associated with the very last sentence of the above-quoted passage that the *Adkins* Court, 602 S.E.2d at 55, n. 6, added the following observation:

The [circuit court] relied upon federal cases interpreting the Ashurst-Sumners Act, 18 U.S.C. § 1761, to support its findings that the prevailing wage statute does not give rise to a private cause of action in inmates. In light of our holding, we need not address federal caselaw. However, we note the trial court’s ruling is supported by the caselaw. *See Harker v. State Use Industries*, 990 F.2d 131 (4th Cir.), *cert. denied* 510 U.S. 886,

114 S.Ct. 238, 126 L.Ed.2d 192 (1993); *McMaster v. Minnesota*, 819 F.Supp. 1429 (D.Minn. 1993).

Rather than conduct its own analysis of § 24-3-410(B)(7), the ALC, unlike both the circuit court and our Supreme Court in *Adkins*, simply ignored it and set it aside. In his brief to this Court, Torrence did the same, and, like the ALC, he never asserted any analysis or rationale by which § 24-3-410, and, specifically, § 24-3-410(B)(7) should not apply to his prison industries pay claims.

Since our legislature obviously enacted § 24-3-410 and, specifically, § 24-3-410(B)(7) for legitimate reasons, SCDC respectfully asserts that the ALC, even if it possessed the authority under § 1-23-380(A)(5) and *Al-Shabazz* to calculate the “prevailing wage” SCDC should have paid Torrence for 1997, 1998, and 1999, could not have legitimately calculated the “prevailing wage” SCDC should have paid Torrence at any point during the many years he voluntarily participated in the prison industries project operated by SCDC without substantively addressing, at least in some fashion, § 24-3-410 and, specifically, § 24-3-410(B)(7).

Therefore, SCDC respectfully submits that the ALC erred in its January 20, 2016 order by intentionally failing to substantively address § 24-3-410 and, specifically, § 24-3-410(B)(7) in the course of calculating the “prevailing wage” purportedly due Torrence. SCDC respectfully urges this Court to reverse the ALC on this issue under § 1-23-610(B)(d) and (f).

IV. TORRENCE’S MISTAKEN ASSERTIONS REGARDING HIS NOTICE OF APPEAL TO THE ALC

In its brief to this Court,²⁷ SCDC asserted as follows:

Torrence addressed the timeliness issue by his sixth ground for appeal [to the ALC]: “Time to file grievance equitably tolled by pendency of this action in [*Torrence*].” Yet again, however, Torrence did not claim or otherwise assert in **his Notice of Appeal [to the ALC]** that his prison industries wage claims challenged SCDC policies and/or procedures, nor

²⁷ See SCDC’s Brief, p. 10.

did he claim or otherwise assert in **his Notice of Appeal [to the ALC]** that he had requested a waiver or exception from the filing deadline established in paragraph 13.9 of GA-01.12. [emphasis supplied].

Later in its brief,²⁸ SCDC asserted as follows:

However, the record contradicts the ALC's observation that Torrence contended that his wage claims concerned SCDC "policies" and/or "procedures." Instead, as repeatedly noted above and as confirmed by the record, Torrence never raised the exception to the 15-day filing deadline from paragraph 13.1 of GA-01.12 available to him under paragraph 13.9 in his Step 1, Step 2, or **his Notice of Appeal to the ALC**. [emphasis supplied].

SCDC further asserted the following in its brief:²⁹

As illustrated in the previous argument, Torrence did not preserve the issue of whether the exception to the 15-day deadline for "policies/procedure" grievances from paragraph 13.9 applied to his Step 1, because he never raised the issue before SCDC in either his Step 1 or Step 2, nor did he identify the issue in his Notice of Appeal to the ALC. Instead, Torrence asserted exclusively in his grievance that he timely filed his Step I under the doctrine of equitable tolling, and **he identified equitable tolling as an issue for review in his Notice of Appeal to the ALC**. [emphasis supplied].

In response to SCDC's arguments regarding the Notice of Appeal he filed with the ALC,

Torrence asserted as follows in his brief to this Court:³⁰

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 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. [footnote omitted and emphasis supplied].

²⁸ See SCDC's Brief, pp. 19 – 20.

²⁹ *Id.*, p. 27.

³⁰ See Torrence's Brief, p. 10.

In offering his above-quoted assertions regarding his Notice of Appeal to the ALC, Torrence once again overlooked Section V of the ALC Rules of Procedure.

As explained above, Torrence's appeal to the ALC of SCDC's denial of his grievance was governed by Section V of the ALC Rules of Procedure, which is entitled "Special Appeals."

ALC Rule 59 falls under Section V, and the first paragraph of ALC Rule 59, which is entitled "Notice of Appeal," provides that the "notice of appeal from the final decision to be heard by the [ALC] shall be filed with the Court and a copy served on each party, including the agency, within thirty (30) days of receipt of the decision from which the appeal is taken." The next sentence of ALC Rule 59 provides as follows:

The notice shall be on the form prescribed by the Court pursuant to Rule 57 and shall contain the following information:

- A. the name, address, SCDC number, and telephone number of the party requesting the appeal, and the name, address, and telephone number of the attorney or other authorized representative, if any, representing that party;
- B. **a brief factual basis for each expressly and specifically asserted constitutional violation;**
- C. a copy of the final decision which is the subject of the appeal and the date received;
- D. proof of service of the notice of appeal on all parties.
[emphasis supplied].

Torrence did not, within his Notice of Appeal to the ALC (R. p. 56), assert as an issue on appeal that his prison industries wage claims challenged SCDC "policies" and/or "procedures" as required by the above-quoted provisions from ALC Rule 59(B).

Accordingly, SCDC respectfully asserts that Torrence failed to preserve this issue for consideration by the ALC, and, by extension, this Court. *See Goins v. S. C. Dep't of Corr.*, Opinion No. 2014-UP-390, 2014 WL 5840482, at *1 (S.C. Ct. App. Nov. 12, 2014) (citing *Risher v. S.C. Dep't of Health & Envtl. Control*, 712 S.E.2d 428, 433, n. 5 (S.C. 2011) ("[T]his Court has long enforced and relied upon issue preservation rules in administrative appeals.") and

Brown v. S.C. Dep't of Health & Env'tl. Control, 560 S.E.2d 410, 417 (S.C. 2002) (“[I]ssues not raised to and ruled on by the [ALC] are not preserved for appellate consideration.”)).

V. SCDC IS NOT PRECLUDED FROM APPEALING THE ALC’S JANUARY 30, 2014 ORDER

In his brief to this Court,³¹ Torrence offered the following argument:

SCDC raised the defense and requested an order from the ALC to determine timeliness as a preliminary matter. Ultimately, [the ALC’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. 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).

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

In its June 5, 2012 motion to the ALC (R. p. 76),³² SCDC stated as follows:

By an order issued May 8, 2012, this Court granted the motion filed by [SCDC] to file the Record on Appeal and its brief no later than Friday, June 8, 2012.

In light of developments in other similar cases, [SCDC] now hereby respectfully moves this Court for an Order by which it permits [SCDC] to address only (1) issue in the initial brief it will and must submit to this Court.

Later in its June 5, 2012 motion (R. p. 78), SCDC stated the following:

Thus, should this Court favorably consider this proposal, [SCDC] would file its brief focusing only on the timeliness issue. [Torrence], even though he has already filed his brief in this matter, would then have an opportunity to file a brief specifically rebutting [SCDC’s] argument that it

³¹ See Torrence’s Brief, pp. 25 – 26.

³² SCDC did not identify its June 5, 2012 motion to the ALC for inclusion into the record in its designation of matter. However, Torrence proposed SCDC’s June 5, 2012 motion as the second item for inclusion in his designation of matter. As reflected by its motion to strike items from Torrence’s designation of matter, which it filed separately, SCDC agreed to include its June 5, 2012 motion to the ALC into the record.

properly denied the prison industries pay claims he articulated in his administrative grievance because he did not timely file his Step 1.

SCDC did not, at any point in its June 5, 2012 motion (R. pp. 76 – 81), consent to accept whatever ruling the ALC issued as to whether Torrence timely filed his Step 1 grievance as the law of the case if the ALC granted its June 5, 2012. Likewise, SCDC did not, at any point in its June 5, 2012 motion, waive or forsake any right to appeal any order the ALC would issue regarding whether Torrence timely filed his Step 1 if the ALC granted its June 5, 2012 motion.

Finally, nowhere in the order issued June 7, 2012 by the ALC, by which it granted SCDC's June 5, 2012 motion, did the ALC state, hint, or otherwise infer that SCDC had consented to accept whatever ruling it would issue as to whether Torrence timely filed his Step 1. Instead, the relevant language of the ALC's June 7, 2012 order declared as follows (R. p. 82):

The issue [SCDC] seeks to address as a preliminary matter is whether [Torrence] timely filed his Step 1 within the 15-day filing deadline established by the applicable paragraphs of [Policy GA-01.12].

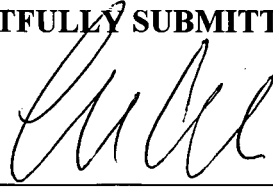
This Court agrees that the interests of judicial economy would be served by considering the timeliness of the filing as a preliminary matter and will grant [SCDC] additional time to prepare an abbreviated record dealing solely with that issue.

SCDC respectfully urges this Court to reject Torrence's argument on this point.

VI. CONCLUSION

For the foregoing reasons, as well as all of the reasons articulated in its brief, SCDC again respectfully urges this Court to reverse the decisions issued January 30, 2014 and January 20, 2016 by the ALC in the instant matter.

RESPECTFULLY SUBMITTED:



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January 3, 2017

THE 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. 2012ALJ040143AP

Thomas J. Torrence, #094651, Respondent,


v.

South Carolina Department of Corrections, Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Appellant's Final Reply Brief complies with Rule 211(b), SCACR.

January 3, 2017



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