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 BRIEF

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STATEMENT OF ISSUES ON APPEAL

The Appellant, the South Carolina Department of Corrections ["SCDC"], appeals several rulings from the January 30, 2014 and January 2, 2016 orders issued by the South Carolina Administrative Law Court ["ALC"] in the instant matter. By these orders, the ALC reversed several final decisions made by SCDC concerning prison industries wage claims articulated in an administrative grievance filed by the Respondent, Thomas Torrence, under SCDC's Inmate Grievance Policy System, designated as Policy Number GA-01.12 ["GA-01.12"].

Accordingly, SCDC respectfully presents the following issues on appeal:

I. Did the ALC err in its January 30, 2014 order by ruling 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?

III. Did the ALC err in its January 20, 2016 order by calculating the "prevailing wage[1]" 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)?

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[1] S.C. Code Ann. § 24-3-430(D) provides in its entirety that "[n]o inmate participating in the [prison industries] program may earn less than the **prevailing wage** for work of similar nature in the private sector." [emphasis supplied]. Neither § 24-3-430(D) nor any other section of § 24-3-430 quantifies the "prevailing wage." For that matter, no other prison industries statute enacted by our legislature quantifies the "prevailing wage." Likewise, no applicable federal statute or regulation quantifies the term. In *Wicker v. S.C. Dep't of Corr.*, 2001 WL 1005574, *2, n. 3 (S.C.A.L.J.D. Aug. 13, 2001), the ALC observed that "[t]he 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." In *Wicker*, the ALC considered prison industries pay claims presented by an inmate who participated in the same federally certified prison industries project as Torrence. Based upon its observation of the federal minimum wage, the ALC in *Wicker*, 2001 WL 1005574, *2, held that the "prevailing wage for work of a similar nature in the private sector is $5.25 per hour." While it affirmed the ALC by its decision in *Wicker*, 602 S.E.2d 56 (S.C. 2004), our Supreme Court did not consider the ALC's holding regarding the "prevailing wage." Until the ALC's January 20, 2016 order in Torrence's case, no other court in our state had calculated the "prevailing wage" due any inmate who participated in federally certified prison industries projects operated by SCDC, like the project in which Torrence participated. *See* notes 2, 8, 20, and 38 below.

STATEMENT OF THE CASE

I. TORRENCE'S GRIEVANCE

A. TORRENCE'S STEP 1

From 1997 to 2004, Torrence voluntarily participated in a federally certified prison industries project operated by SCDC at Evans Correctional Institution ["Evans"] in which ESCOD, Inc. and, later, INSILCO, Inc. participated as the private industry sponsors.

Torrence filed a Step 1 grievance form with SCDC dated May 21, 2007 (R. pp. 121 – 27), in which he asserted the following (R. p. 121):

> I was employed by [ESCOD], in the SCDC Private Sector Industries Program at [Evans] from June 1997 thru November, 2004.[2] During the course of my employment,[3] I learned that SCDC was withholding certain wages and monies from me in contravention of state law, **to which I have a property interest**. The S.C. Supreme Court recently ruled in [*Torrence, et al., v. S.C. Dep't of Corr.*, 640 S.E.2d 866 (S.C. 2007)] (filed May 7, 2007) (received by [me] on May 21, 2007), that I must file a Grievance under [GA-01.12].[4] [emphasis supplied].

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[2] SCDC operates three (3) types of projects within its prison industries program: "traditional" projects (*see* S.C. Code Ann. §§ 24-3-320 and 330), "service work" projects (*see* §§ 24-1-290 and 295; *see also* § 24-3-310(3)), and projects certified by the federal government under its "Prison Industries Enhancement Certification Program" ["PIECP"]. SCDC must operate its PIECP projects, such as the project at Evans, in conformity with federal law (*see* 18 USC § 1761, the Ashurst-Sumners Act), federal regulations (*see* 64 FR 17000, *et seq.*), and state law (*see* §§ 24-3-40 and 24-3-310, *et seq.*).

[3] Torrence's claims that he "employed" by or otherwise worked for ESCOD or that he was "employed" by or otherwise worked for SCDC are negated by our Supreme Court's decision in *Williams, et al., v. S.C. Dep't of Corr. et al.*, 641 S.E.2d 885, 887 – 88 (S.C. 2007). Torrence's claim is also negated by federal precedent. *See Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) ("People are not imprisoned for the purpose of enabling them to earn a living. … **But prisoners are not employees.**"). [emphasis supplied]. Torrence's claims are also negated by *S.C. Dep't of Corr. v. Cartrette*, 694 S.E.2d 18, 23 (S.C. Ct. App. 2010), in which this Court relied upon § 24-3-40(A) and *Williams*, 641 S.E.2d at 887, when it ruled that an inmate was not a private industry sponsor's employee. As an aside, the dissent in *Cartrette* quoted the above-provided passage from *Bennett*. 694 S.E.2d at 24. Notwithstanding *Williams*, *Bennett*, and *Cartrette*, the ALC declined to reject Torrence's repeated assertions that he was an "employee" or was otherwise "employed" by the private industry sponsor, SCDC, or the State in footnote 3 of its January 20, 2016 order. (R. p. 1035). Moreover, in ruling in the same order that SCDC should have paid Torrence "the mean average South Carolina wage of an electronic assembler," the ALC explicitly stated that SCDC should have done so for the years Torrence "**worked as a harness assembler for ESCOD.**" [emphasis supplied]. (R. p. 1039). *See* note 21 below.

[4] In an affidavit he submitted with this Step 2 form, Torrence attested that he, with the assistance of counsel, filed the civil class action, which our Supreme Court eventually considered in *Torrence* in 2001 in the "Richland County Court of Common Pleas." Torrence provided the civil action number associated with the litigation in his affidavit: 2001-CP-40-3409. After the circuit court dismissed his civil class action, Torrence and his fellow plaintiffs, with

Torrence articulated eight (8) claims by which he asserted SCDC had unconstitutionally deprived him of his property (i.e. his wages) in an "Addendum" attached to his Step 1 form. (R. p. 123).

Torrence then requested the following action: "Payment of wages, withholdings and interests as set forth in subsections 1 thru 8 of the Addendum attached hereto." (R. p. 121).

Torrence specified how and when he attempted to informally resolve the claim(s) he articulated within his Step 1: "This matter was pending before S.C. courts from 2001 until the recent May 7, 2007 decision. SCDC intends to petition the state supreme court for a rehearing on this matter within 30 days.[5]" (R. p. 121).

Significantly, Torrence did not claim or otherwise assert anywhere in his Step 1 form, his "Addendum," or their allied documents that his prison industries wage claims challenged SCDC policies and/or procedures, nor did he request a waiver or exception anywhere in his Step 1 or its allied documents from the filing deadline established by paragraph 13.9 in GA-01.12.

B. SCDC'S RESPONSE TO TORRENCE'S STEP 1

By written response dated December 1, 2011 (R. pp. 122 and 128 – 33), SCDC, by and through the appropriate official, denied the claim(s) articulated by Torrence in his Step 1 by concluding that Torrence did not timely file his Step 1.

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the continued assistance of counsel, appealed to our Court of Appeals, and, as he accurately stated, our Supreme Court accepted the case on direct review. (R. pp. 143 – 44). As an important aside, no part of *Torrence* stated that Torrence or any of his fellow inmate plaintiffs "must file" an administrative grievance under GA-01.12. Instead, our Supreme Court only acknowledged that under *Wicker*, Torrence "can present [his wage claims] via [GA-01.12]. *Torrence*, 646 S.E.2d at 870.

[5] As discussed in note 17 below, SCDC respectfully asserts that the ALC misapprehended the chronology associated with our Supreme Court's decision in *Torrence*, when Torrence filed his Step 1, representations purportedly made by SCDC to Torrence concerning its petition for rehearing in *Torrence*, and when our Supreme Court ruled on SCDC's petition for rehearing in *Torrence*.

SCDC first determined that Torrence did not file his Step 1 within the applicable filing deadline established by various editions GA-012. SCDC stated that Torrence's prison industries pay records reflected the following (R. p. 129):

> These records confirm that you voluntarily participated in the prison industries project operated by SCDC at Evans in which ESCOD participated as the private industry sponsor before SCDC ended its policy of paying inmates a "training wage" for their initial 320 hours of labor. SCDC ended its policy of paying a "training wage" on July 1, 1999.[6] These pay records reflect that SCDC began paying you on or about August 15, 1997 at the rate of at least $5.25 per hour for the labor you voluntarily provided in the project at Evans, and they reflect that SCDC remitted its final payment to you on or about November 16, 2004.

SCDC found that Torrence filed his Step 1 nearly 10 years after he began participating in the project, approximately 2½ years after he finished participating in the project, and nearly 2½ years after our Supreme Court issued *Adkins v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (S.C. 2004) and its companion case, *Wicker v. S.C. Dep't of Corr.*, 602 S.E.2d 56 (S.C. 2004). SCDC then decided that since Torrence did not file his Step 1 within either seven (7) or 15 days of the incident upon which he grounded his wage claims (i.e. the date upon which SCDC both first began paying him for his prison industries labor), Torrence failed to timely file his Step 1. (R. pp. 130 – 31).

SCDC also denied the merits of Torrence's wages claims, and, in doing so, it anchored its conclusion on the fact that the project in which Torrence participated was certified by the federal government and upon the examination of such federally certified projects undertaken by the circuit court in *Adkins* (R. p. 132):

> Additionally, I deny your claim that you are entitled to any relief under § 24-3-430(D), the so-called "prevailing wage" provision. Specifically, as the prison industries project in which you participated at Evans was a

[6] *See Adkins v. S.C. Dep't of Corr.*, 602 S.E.2d 51, 53, n. 1 (S.C. 2004). SCDC paid Torrence a "training wage" of $0.25 per hour for the first 160 hours of his labor, and $0.75 for the second 160 hours of his labor. SCDC thereafter paid Torrence $5.25 per hour for regular hours and $7.86 per hour for overtime hours. (R. pp. 1030 – 31).

> project for which SCDC received certification under the federal government's Prison Industries Enhancement Certification Program ["PIECP"],[7] I conclude 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 to you under [§] 24-3-40(A) for the labor you voluntarily provided to this project. In making this conclusion, **I rely upon the decision issued by the circuit court in [*Adkins*], which concluded that inmates who participated in an identically certified SCDC prison industries project did not possess a viable claim for back wages or higher wages under the provisions of § 24-3-430(D).**
>
> Even if you have a viable claim for relief under § 24-3-430(D), I conclude that SCDC paid you the proper rate of pay for the labor you voluntarily provided to the federal certified project industries project at Evans. **In making this conclusion, I rely upon the guidelines established by the federal government, specifically the United States Department of Justice's Bureau of Justice Administration [known as "BJA"]. BJA published the guidelines application to the PIECP in the Federal Register, specifically 64 FR 17000. Within these guidelines, BJA declared that the rate at which inmates are paid for the labor they voluntarily provide to PIECP projects, like the project in which you participated at [Evans], cannot be set below the federal minimum wage.**[8] With the exception of the period of time SCDC paid you "training wages," SCDC paid you at least the federal minimum wage for the labor you voluntarily provided to the prison industries project it operates at Evans. Again, I find that you did not timely file your grievance in which you demanded back pay allegedly owed to you by SCDC including any back pay associated with the period of time SCDC paid you a "training wage." [emphasis supplied].

SCDC also concluded that SCDC did not owe Torrence $1.92, $2.79, or any other amount for every labor hour Torrence provided to the federally certified project it operated at Evans. (R. p. 132).

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[7] *See* note 2 above.

[8] As discussed further below, SCDC respectfully asserts that the ruling from the ALC's January 20, 2016 order that 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" is at odds with the applicable federal guidelines published by BJA and applicable precedent from federal courts. (R. pp. 1034 – 39). SCDC also respectfully asserts that the ALC's ruling represents a novel issue for review by our state's appellate courts. *See* note 1 above and notes 20 and 38 below.

In so concluding, SCDC again relied upon the circuit court's decision in *Adkins*, as well as the provisions of § 24-3-400.[9] (R. p. 133).

Finally, SCDC concluded that contrary to Torrence's claim, Torrence was not entitled, under § 24-3-40(B)(2), to complete and immediate access to the portion of his wages SCDC had deducted and held in an interest bearing escrow account for his benefit in conformity with § 24-3-40(A)(5). (R. p. 133).

Torrence received the denial of his Step 1 on December 1, 2011, and the denial advised him that he could appeal the official's decision within five (5) days of receipt. (R. p. 122).

C. TORRENCE'S STEP 2

By his Step 2 dated December 5, 2011 (R. pp. 134 – 44 and 153 – 62), Torrence appealed SCDC's initial denial of the wage claims he articulated in his Step 1. In an affidavit he submitted with his Step 2 (R. p. 143), Torrence confirmed that he participated in the prison industries project operated by SCDC at Evans "from June 1997 through November 2004," and he also acknowledged that he filed the original complaint which eventually resulted in the decision by our Supreme Court in *Torrence* in 2007.

In his Step 2, Torrence argued that he timely filed his Step 1 (R. pp. 137 – 38):

> The Warden asserts that [I am] barred by the statute of limitations established in [GA-01.12] by not filing [my] grievance within seven or fifteen days – either the date upon which SCDC both first began paying [me] and applying statutorily mandated deductions. The Warden further asserted the Step 1 grievance was filed 10 years after participation began and 2 ½ years following the [*Wicker*] decision; that [GA-01.12] does not provide any exception to prison industries disputes; and that [I] exceeded a reasonable time with filing the Step 1 Grievance [reference omitted].
>
> **[I contend that] the Warden's assertions are moot where the pendency [of *Torrence*], filed four (4) years before the decision in [*Wicker*], tolls the filing of [my grievance].**

[9] As discussed in note 44 below, the ALC affirmed SCDC's decision on this issue.

> [I submit that my] counsel notified [me] of the Court's decision in Torrence in correspondence dated May 17, 2007 and received May 21, 2007, App. I.[10] In that correspondence counsel advised [me that] "we are preparing the papers for the grievance process and will circulate for your review once the Supreme Court Order has become final." Id. **Counsel recognized and informed [me] of the tolling. [I] filed [my] Step 1 immediately, App. H.**[11]
>
> In correspondence dated August 27, 2007 counsel advised "proceeding through the grievance process to address your claims and ultimately the [ALC] appeal process is the legal requirement," [App. J].[12] [*Torrence*] was still pending, [SCDC's] petition for rehearing was subsequently denied.
>
> [SCDC] filed a Motion to Dismiss [*Torrence*] (2001-CP-40-3409) from Circuit Court, however, that court found the Complaint properly stated a declaratory judgment action which involved novel issues and initially denied that motion in November 2002. [SCDC] renewed that motion, successfully, only after the decision in [*Wicker*] that the procedure to utilize is the grievance system. [emphasis supplied].

Torrence articulated the following relevant assertion in his Step 2 (R. p. 138):

> [I object to the] Warden's mischaracterization of a "pre-existing right" to file grievances, [reference omitted]. The Court in [*Torrence*] was clear in stating that the procedure to follow was an agency grievance, as established in, **and unavailable prior to [*Wicker*]**. [emphasis supplied].[13]

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[10] "Appendix I" to Torrence's Step 2 appears in the record. (R. pp. 155 – 57).

[11] "Appendix H" to Torrence's Step 2 also appears in the record. (R. pp. 153 – 54). In the affidavit he submitted with his Step 2, Torrence accurately observed that our Supreme Court released its opinion in *Torrence* on May 7, 2007. (R. p. 143). *See* note 4 above. Torrence stated in this affidavit that he received notice of the *Torrence* decision via correspondence from his counsel dated May 17, 2007, and he stated that the received the correspondence on May 21, 2007. (R. p. 143). Torrence included the May 17, 2007 letter from counsel as "Appendix I" in support of his Step 2. Torrence argued in his affidavit that he filed his Step 1 "on May 21, 2007, within seven (7) days of receipt of his right to file a grievance in this matter." (R. p. 143). *See* note 5 above and note 17 below.

[12] Torrence mistakenly referenced "Appendix I" regarding the August 27, 2007 correspondence from his counsel. Instead, Torrence included the August 27, 2007 correspondence from his counsel as "Appendix J" in support of his Step 2. "Appendix J" appears in the abbreviated Record on Appeal. (R. pp. 158 – 59).

[13] The ALC erroneously embraced Torrence's argument in its January 30, 2014 order when it concluded that SCDC "did not recognize a wage claim as grievable until the Supreme Court upheld" the ALC's decision in *Wicker* in August 2004, and, therefore, any attempt by Torrence "to file a grievance prior to August 2004 would have been futile." (R. p. 399). *Adkins* and *Wicker* were issued August 23, 2004. *See* note 16 below.

Torrence disputed the rationale by which SCDC denied the merits of his wage claims (R. pp. 139 – 40).

Torrence likewise disputed the rationale by which SCDC denied his claim for immediate access, under § 24-3-40(B)(2), to his wages escrowed by operation of § 24-3-40(A)(5) (R. pp. 140 – 41), and, in doing so, he asserted that SCDC's interpretation of § 24-3-40(B)(2) was unconstitutional. (R. p. 140).

Torrence again did not claim or otherwise assert anywhere in his Step 2 form or its allied documents that his prison industries wage claims challenged SCDC policies and/or procedures, nor did he request a waiver or exception anywhere in his Step 2 or its allied documents from the filing deadline established in GA-01.12 by invoking paragraph 13.9.

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

By its final decision dated February 9, 2012 (R. pp. 134 and 145 – 52), SCDC affirmed its denial of Torrence's Step 1 and likewise denied his Step 2.

In denying his Step 2, SCDC rejected the arguments offered by Torrence concerning whether he timely filed his Step 1 and concluded as follows (R. pp. 148 – 49):

> I fully concur with the warden's determination that the grievance filing deadline established in every edition of the relevant policy applied and continues to apply to nearly every aspect of inmate activity, and no special exception exists when it comes to [prison industries] pay disputes. Consequently, the deadline applied to your Step 1. Moreover, as the warden accurately chronicled in his response [to Torrence's Step 1], you filed your Step 1 nearly 10 years after you began participating in the [prison industries] project at Evans and approximately 2½ years after you concluded your participation in this project. For that matter, you filed your Step 1 over 2½ years after the decisions in *Adkins* and *Wicker* had been issued.
>
> You also filed your Step 1 approximately 6 years after you, as you claimed in your affidavit, that you "discovered" that SCDC was "collecting $7.17 per hour for [your] labor" and almost 8 years after you, as you claimed in

> your affidavit, discovered a "discrepancy" in your pay.[14] I fully concur with the warden's determination that you clearly exceeded any reasonable time frame associated with filing a grievance under [GA-01.12].
>
> I also fully concur with the warden's determination that the fact that you first sought relief by participating in a class action lawsuit filed in circuit court instead of filing a Step 1 by which you challenged the rate at which SCDC both paid you for your [prison industries] labor and applied statutorily mandated deductions to your pay does not change the filing deadline(s) from [GA.01.12]. **You served as the lead plaintiff in *Torrence*, and your attorneys filed their amended declaratory judgment complaint on your behalf on November 5, 2001. Obviously, you knew before your attorneys filed the complaint that you wanted to challenge the rate at which SCDC had been paying you for your [labor].**
>
> Moreover, the filing of your class action lawsuit in circuit court did not toll the deadline(s) by which you were required to file your Step 1. The appendices you submitted in support of your Step 2 simply do not support your assertion that your participation in the class action lawsuit tolled the deadline by which you were required to file your Step 1. Moreover, these same appendices simply do not establish that date upon which your right to file a grievance in this matter accrued. **The appendices you relied upon to support your assertion include correspondence that you received from your own counsel in *Torrence*, and this correspondence has absolutely no bearing on the filing deadline associated with your Step 1**. [emphasis supplied].

In denying his Step 2, SCDC also rejected the arguments offered by Torrence concerning the merits of his wage claims, and it affirmed the analysis of Torrence's wage claims provided in its response to his Step 1, in which it relied upon the analysis provided by the circuit court in *Adkins*, the provisions of § 24-3-410(B)(7), the applicable guidelines published by BJA in the Federal Register concerning PIECP projects, such as the project at Evans in which Torrence

[14] In the affidavit he submitted in support of his Step 2 (R. pp. 143 – 44), Torrence attested that he "had no knowledge of [any] discrepancy in pay until the July 1, 1999 change in law, at which time [he] began diligent research," and he attested that he "**discovered in 2000** that [SCDC] was collecting $7.17 per hour for [his] labor and during 'training hours.'" [emphasis supplied]. Torrence never asserted and the record does not reflect that SCDC prevented or otherwise hindered him from discovering his wage claims in any way. Furthermore, the ALC denied Torrence's appeal concerning the rate at which SCDC invoiced ESCOD for inmate labor, and Torrence did not appeal the ALC's ruling on this or any other point to this Court. *See* note 44 below.

participated, and the provisions of 18 U.S.C. § 1761, known as the Ashurst-Sumners Act. (R. pp. 150 – 51).

In denying his Step 2, SCDC likewise rejected the arguments offered by Torrence concerning his demand for immediate access, under § 24-3-40(B)(2), to his wages escrowed by operation of § 24-3-40(A)(5), and it affirmed the analysis of Torrence's demand it provided in response to his Step 1 (R. pp. 151 – 52).

Torrence received the denial of his Step 2 on February 15, 2012. (R. p. 134).

II. TORRENCE'S NOTICE OF APPEAL TO THE ALC

Torrence then timely appealed SCDC's denial of his grievance by filing a Notice of Appeal dated March 2, 2012 with the ALC. (R. p. 56).

Torrence addressed the timeliness issue by his sixth ground for appeal: "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 that his prison industries wage claims challenged SCDC policies and/or procedures, nor did he claim or otherwise assert in his Notice of Appeal that he had requested a waiver or exception from the filing deadline established in paragraph 13.9 of GA-01.12.

By his first and second grounds for appeal, Torrence also challenged SCDC's determination that it had paid him wages which conformed to the provisions of the applicable state law, federal law, and federal regulations.

Finally, by his fourth ground for appeal, Torrence challenged SCDC's conclusion that he is not, under § 24-3-40(B)(2), entitled to immediate access to the monies withheld from his gross wages and escrowed by operation of § 24-3-40(A)(5).

III. PROCEEDINGS BEFORE THE ALC AND ITS TWO (2) ORDERS

A. THE ALC'S JANUARY 30, 2014 ORDER

In footnote 2 of its January 30, 2014 order (R. p. 394), the ALC acknowledged that Torrence "raised multiple issues related to the payment of wages," but, by an order it issued June 7, 2012 (R. p. 82), the ALC determined that the only issue it would initially address consisted of "the timeliness of [Torrence's] Step 1 grievance." The parties then filed briefs and supplemental materials addressing the timeliness of Torrence's Step 1.[15] (R. pp. 83 – 194 and 197 – 392).

The ALC considered only these issues in its January 30, 2014 order: (1) whether our Supreme Court's decisions in *Adkins* and *Wicker* created new substantive or grievance rights; (2) whether Torrence timely filed his Step 1; and (3) whether the time to file Torrence's grievance was equitably tolled when he filed a class action in circuit court. (R. pp. 394 – 95).

The ALC ruled that *Adkins* and *Wicker* did not create new substantive rights or new grievance rights.[16] (R. pp. 396 – 97). The ALC next ruled 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. pp. 398 – 99). Finally, the ALC ruled that since Torrence filed his Step 1 "within days" of him receiving our Supreme Court's opinion in *Torrence* (i.e. the

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[15] By its June 7, 2012 order, the ALC, in the interests of judicial economy, agreed to consider the threshold issue of whether Torrence "timely filed his Step 1 within the 15-day filing deadline established by the applicable paragraphs of [GA-01.12]" before it considered the merits of Torrence's wage claims and his demand for immediate access to the monies withheld from his gross wages and escrowed by operation of § 24-3-40(A)(5). Paragraph 13.1 of GA-01.12 established the 15-day filing deadline referenced by the ALC in its June 7, 2012 order, and exceptions to the deadline appear in paragraph 13.9.

[16] SCDC does not appeal the ALC's ruling on this issue. Likewise, Torrence did not appeal the ALC's ruling on this issue or, for that matter, any ruling from its January 30, 2014 and January 20, 2016 orders. However, SCDC respectfully asserts that the ALC's ruling 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). *See* note 13 above. Succinctly stated, inmates, like Torrence, possessed the right to file prison industries wage grievances before our Supreme Court issued *Adkins* and *Wicker* on August 23, 2004.

class action filed by Torrence in circuit court),[17] the doctrine of equitable tolling applied. (R. pp. 400 – 01).

B. PROCEEDINGS BETWEEN THE ALC'S TWO (2) ORDERS

As it concluded that Torrence timely filed his Step 1, the ALC directed the parties on the final page of its January 30, 2014 order to next litigate outstanding motions concerning the record and then to subsequently file their briefs addressing the merits of Torrence's wage claims, as well as his demand for immediate access to his wages escrowed by operation of § 24-3-40(A)(5). (R. p. 402).

Recognizing the impact of the rulings from the ALC's January 30, 2014 order not only on the litigation of Torrence's appeal but potentially in all inmate grievances under GA-01.12, SCDC appealed the ALC's January 30, 2014 to this Court. However, this Court dismissed SCDC's appeal by an order filed April 17, 2014. (R. p. 441).

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[17] In its January 30, 2014 order (R. p. 394), the ALC provided the following chronology of the filing of Torrence's Step 1 as it related to our Supreme Court's decision in *Torrence*:

> In [*Torrence*], the South Carolina Supreme Court held that the plaintiffs did not hold a private right of action against [SCDC]. However, the court held that all members of the class action could file an internal grievance with [SCDC] to seek any monies owed. Upon the issuance of the Supreme Court decision, [Torrence] filed a Step 1 grievance with [SCDC] on May 21, 2007. [SCDC] notified [Torrence] that his Step 1 grievance would not be answered until the Supreme Court decided on [SCDC's] petition for rehearing. In December 2011, the petition for rehearing was denied by the court.

SCDC respectfully asserts that the record contradicts the above-quoted chronology provided by the ALC. As reflected by the decision itself, our Supreme Court denied SCDC's petition for rehearing in *Torrence* on July 29, 2007 and not in December 2011. Moreover, nothing in the record supports the ALC's finding that SCDC notified Torrence that it would not respond to his Step 1 until our Supreme Court ruled on SCDC's petition for rehearing. Instead, Torrence himself mentioned SCDC's petition for rehearing in the relevant passage from his Step 1. (R. p. 121). Thus, to the extent that it relied upon its own erroneous review of the record in ruling that Torrence timely filed his Step 1 and that the doctrine of equitable tolling applied to Torrence's Step 1 (R. pp. 398 – 401), the ALC's rulings are not only unsupported by the record, they are contradicted by the record. *See also* note 5 above.

The parties accordingly filed briefs and supplemental materials with the ALC in which they addressed the remaining issues associated with Torrence's appeal of SCDC's final decision by which SCDC denied the wage claims from his Step 1. (R. pp. 403 – 26 and 443 – 1028).

C. THE ALC'S JANUARY 20, 2016 ORDER

In the final order it issued on January 20, 2016, the ALC identified five (5) issues associated with Torrence's appeal, and the first three (3) issues it identified concerned his wage claims and his demand for immediate access to his escrowed wages (R. p. 1031):[18] (1) whether SCDC improperly failed to pay Torrence the "prevailing wage" during training; (2) whether SCDC improperly failed to pay Torrence the "prevailing wage" after training; and (3) whether SCDC improperly denied Torrence immediate access to his escrowed wages.

The ALC ruled that SCDC should have paid Torrence the "prevailing wage required by law" for the labor he voluntarily performed during the initial training period, and the ALC concluded that 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 during the first 320 hours of his labor is erroneous as a matter of law.[19]" (R. p. 1034).

The ALC next considered whether SCDC paid Torrence the "prevailing wage required by law" for the labor he voluntarily performed after he concluded the initial training period. In analyzing the term "prevailing wage," the ALC concluded as follows (R. pp. 1036 – 37):

> Finally, [SCDC] argues that the $5.25 regular hourly rate conformed to the wage data collected and published by the [South Carolina Employment Security Commission] for the type of work in question. While the Court

[18] Neither party appealed the ALC's rulings on the final two (2) issues from its January 20, 2016 order.

[19] SCDC challenges the ALC's ruling that it owes Torrence monies attributable to the first 320 hours of his labor on two (2) grounds. First, SCDC argues that Torrence did not timely file his Step 1 and, consequentially, any claims associated with the first 320 hours of his labor are time-barred. If such claims are not time barred, SCDC respectfully asserts that the ALC erred by calculating the purportedly applicable "prevailing wage" in contravention of the applicable federal regulations and that the "prevailing wage" figure(s) yielded by the ALC's calculations are themselves erroneous.

> agrees verification 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 Court does not agree that the $5.25 regular hourly rate conforms to the ESC data in the record.**
>
> [Torrence] has asked this Court to determine the prevailing wage based on the record in this case. **In so doing, the Court reaches an issue not yet addressed by South Carolina courts.**[20] While it has been decided that [SCDC] may not pay less than the prevailing wage during training, no inmate has successfully raised the issue of how the prevailing wage is calculated. [emphasis supplied].

In contravention of the very federal regulation it referenced in the above-quoted passage, the ALC itself calculated the applicable "prevailing wage" (R. pp. 1037 – 39), and it ultimately ruled as follows (R. p. 1039):

> [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.*[21] [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.** [italicized emphasis supplied by SCDC; bold emphasis supplied by the ALC].

The ALC then declared that paying Torrence less than the "prevailing wage," as the ALC quantified the term in its analysis, constituted an error of law by SCDC. (R. p. 1039).

Finally, the ALC agreed with Torrence that SCDC unlawfully denied him and continues to deny him immediate access to his escrowed wages. (R. p. 1039 – 42). The ALC ruled Torrence "must be allowed to designate persons or entities to receive an immediate distribution of funds held in escrow pursuant to [§ 24-3-40(A)(5)].[22]" (R. p. 1042).

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[20] *See* notes 1 and 8 above.

[21] Again, under *Williams*, *Bennett*, and *Cartrette*, Torrence never "worked … for ESCOD." *See* note 3 above.

[22] In the associated footnote, the ALC ruled as follows: "[Torrence] also argues that SCDC's application of [§ 24-3-40(B)(2)] operates as a bill of attainder, an *ex post facto* law, and violates his constitutional right to equal protection. **None of these issues were raised in the grievance before [SCDC], and therefore they may not be taken up by**

STANDARD OF REVIEW

ALC Rule of Procedure 65 states that "[j]udicial review of any decision of the [ALC] in a matter heard on appeal from final decisions pursuant to [*Al-Shabazz v. State*, 527 S.E.2d 742 (S.C. 2000)] shall be as provided in [§ 1-23-610]." *See also S.C. Dep't of Corr. v. Mitchell*, 659 S.E.2d 233, 234 (S.C. Ct. App. 2008) ("Section 1-23-610 ... sets forth 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.").

The ALC considered this matter Court pursuant to our Supreme Court's decisions in *Al-Shabazz*, as well as *Adkins* and *Wicker*. Thus, the provisions of § 1-23-610, specifically § 1-23-610(B), establish the standard of review applicable to this Court's consideration of SCDC'S appeal of the ALC's orders. In its entirety, § 1-23-610(B) reads as follows:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the 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 finding, 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.

Pursuant to § 1-23-610(B), this Court "may reverse or modify the [ALC's] decision only if [SCDC proves its] substantive rights [have] been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or

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this Court. *See* [*Home Med. Syss., Inc. v. S.C. Dept. of Rev.*, 677 S.E.2d 582, 586 (S.C. 2009)]." [emphasis supplied]. (R. p. 1042).

otherwise characterized by an abuse of discretion, or affected by other error of law." *Mitchell,* 659 S.E.2d at 236 (reversing the ALC's order because the "order [was] devoid of any finding of evidence adduced by [the Appellant] warranting the ALC's reversal of [SCDC].").

Moreover, SCDC must "distinctly and specifically direct the court's attention to the errors or abuses allegedly committed by the [ALC]. [SCDC] must include all that is necessary to enable [this Court] to decide whether the [ALC] made an erroneous or unsubstantiated ruling. A mere expression of dissatisfaction with the ruling is not sufficient." *Al-Shabazz*, 527 S.E.2d at 755 [citations omitted].

SCDC bears the burden of proving convincingly that the ALC's decision to reverse SCDC's final decision is unsupported by substantial evidence. *Mitchell*, 659 S.E.2d at 235. 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).

SCDC also has the burden of proving the ALC's decision is arbitrary and otherwise characterized by an abuse of discretion. *Mitchell*, 659 S.E.2d at 234. A decision is arbitrary if 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. A decision may also be arbitrary if it is made at pleasure without adequate determining principles or is governed by no fixed rules or standards. *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 564 S.E.2d 341, 345 (S.C. Ct. App. 2002). An "abuse of discretion occurs when the judge's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the judge is vested with discretion, but the

ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case." *Ex parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464, 467 (S.C. 2006).

ARGUMENT

I. THE ALC ERRED IN ITS JANUARY 30, 2014 ORDER BY RULING THAT TORRENCE TIMELY FILED HIS GRIEVANCE

A. OUR SUPREME COURT'S DECISION IN *Okera*

Before addressing the substance of ALC's erroneous ruling on this issue, SCDC respectfully urges this Court to consider a compelling memorandum opinion issued by our Supreme Court in *Okera v. S.C. Dep't of Corr.*, -- S.E.2d --, 2012 WL 10907962 (No. 2012-MO-042) (S.C. 2012).

Okera and Torrence participated in the identical project operated by SCDC at Evans.[23] Okera and Torrence were both members of the same class of prisoners in *Torrence*, and, therefore, they both were subject to the chronology of the litigation of *Torrence* as described by Torrence in his Step 1 and Step 2.

Like Torrence, Okera also filed a grievance with SCDC in which he claimed that SCDC did not pay him correct wages for his prison industries labor that conformed to the applicable state law, federal law, and federal regulations. As it did to Torrence's grievance, SCDC applied the 15-day filing deadline to Okera's grievance, and it denied Okera's grievance.

[23] As explained above in notes 1 and 2, the project operated by SCDC at Evans, in which both Torrence and Okera participated, was certified BJA under its PIECP. *See Torrence*, 646 S.E.2d at 867.

Okera appealed to the ALC, and the ALC affirmed SCDC's decision. Okera then appealed to our Court of Appeals, but our Supreme Court accepted his appeal on direct review.[24] In its per curiam opinion, our Supreme Court affirmed the ALC's ruling as follows:

> This is a direct appeal from an order of the [ALC] dismissing the appeal from [SCDC's] denial of [Okera's] inmate grievance based on **his failure to comply with the relevant statute of limitations set forth in [GA-01.12]. We affirm pursuant** to Rule 220(b)(1), SCACR, and the following authorities: **[*Al-Shabazz*] (approving [SCDC's] internal procedures for discipline and grievances, which specify a fifteen-day time limit for filing for grievances**). [emphasis supplied].

The following passage from our Supreme Court's decision in *Toth v. Square D Co.*, 377 S.E.2d 584, 586 – 87 (S.C. 1989), supports SCDC's analysis and argument on this point:

> Finally, we point out that this Court has already given retroactive effect to the [*Small v. Springs Industries, Inc.*, 357 S.E.2d 452 (S.C. 1987)] decision through our holding in *Francisco v. Black River Electric Cooperative,* Mem. Op. 87-MO-325 (S.C. filed July 27, 1987). ... **Although we recognize that *Francisco* is a memorandum opinion without precedential value (footnote omitted), it nonetheless indicates that we have already implicitly allowed retroactive application of *Small.*** By our holding today, we explicitly hold that *Small* is to be retroactively applied to causes of action arising prior to the date it was filed. [emphasis supplied].

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[24] On the first page of its June 29, 2009 order, designated as ALC Docket No. 08-ALJ-04-00887-AP, the ALC ruled against Okera and affirmed SCDC's denial of his grievance as follows:

> This matter was remanded to [SCDC] on July 17, 2008 to determine if [Okera] filed his grievance in the instant matter **while he was employed under the prison industries program or within fifteen days of the time he completed, terminated, or cease employment under the prison industries program**. The Record on Appeal was supplemented on December 29, 2008. In the record, **it appears [Okera] failed to file his step one grievance [until] six years after his last day of work in the prison industries. Therefore, [Okera's] Appeal was untimely.**
>
> Based on the Record on Appeal, **this appeal must be dismissed because [Okera] failed to file his grievance in the instant matter while he was employed under the prison industries program, or within fifteen days of the time he completed, terminated, or ceased employment under the prison industries program**. [emphasis supplied].

Therefore, by its memorandum opinion in *Okera*, our Supreme Court, under *Toth*, has implicitly affirmed the application of the 15-day filing deadline to a grievance in a posture identical to that of Torrence's grievance, and SCDC respectfully urges this Court to do the same.

B. TORRENCE DID NOT RAISE PARAGRAPH 13.9'S EXCEPTION TO THE 15-DAY FILING DEADLINE IN HIS STEP 1, HIS STEP 2, HIS NOTICE OF APPEAL, OR HIS BRIEFS TO THE ALC

The ALC observed in its January 30, 2014 order that SCDC had decided that Torrence's Step 1 was untimely, because he did not file it within 15 days of the date upon which SCDC began paying Torrence for his labor. (R. p. 398). The ALC then summarized Torrence's position as follows (R. p. 398):

> [Torrence] points out that prior to [*Wicker*] decision no such grievance was recognized by [SCDC], so any attempt to file an internal grievance would have been futile.[25] [Torrence] also argues that, at that time, he had no judicially recognized constitutional right to file a grievance, so he "logically elected" to file a claim in Circuit Court. [Torrence] states that he timely filed his grievance with [SCDC] within 15 days after the Supreme Court issued a final ruling which stated: "[c]learly, [Torrence] can present this claim via the inmate grievance procedure." [*Torrence*, 646 S.E.2d at 870].

The ALC's next discussed paragraphs 13.1 and 13.9 of GA-01.12 and, critically, it observed as follows (R. p. 398):

> Paragraph 13.1 of GA-01.12 generally requires that Step 1 grievances be filed "within 15 days of the alleged incident." ... However, Paragraph 13.9 of GA-01.12 provides that "[e]xceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures." ... In the present case, [Torrence] **contends that his grievance concerns "policies/procedures" and, therefore the 15 day time limit requirement does not apply to the filing of his grievance. I agree.** [emphasis supplied].

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

[25] *See* notes 13 and 16 above and note 28 below.

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.

Paragraph 13.9, in its entirety, reads as follows:

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

The "15 day time limit requirement" referenced in paragraph 13.9 comes from paragraph 13.1, which, in pertinent part, provides as follows:

> *Inmates must make an effort to informally resolve a grievance by either submitting a Request to Staff Member Form or by discussing their complaint with the appropriate supervisor/staff. However, in certain cases,* informal resolution may not be appropriate or possible (e.g., when the matter concerns staff not working at the institution, or when the matter involves allegations of criminal activity). *An informal resolution is not necessary when appealing a disciplinary conviction or a custody reduction.* If informal resolution is not possible, **the grievant will complete Form 10-5, Step 1, ... and will submit the Form ... within 15 days of the alleged incident.** *An inmate will submit a grievance within the time frames established in the policy.* [italicized emphasis from GA-01.12; bold emphasis supplied by SCDC].

In his brief to the ALC dated May 23, 2012, Torrence exclusively invoked equitable tolling as the basis upon which he asserted that he timely filed his Step 1. (R. pp. 68 – 69). Torrence did not raise paragraph 13.9's exception or even discuss the notion that his wage claims challenged SCDC "policies" or "procedures" in his May 23, 2012 brief. Likewise, in his reply brief dated November 12, 2012, Torrence once again failed to raise paragraph 13.9's exception to the filing deadline or even discuss the notion that his wage claims challenged SCDC "policies" or "procedures." (R. pp. 369 – 92).

Instead, Torrence rebutted the arguments raised by SCDC in its July 9, 2012 brief,[26] and he again invoked equitable tolling, along with equitable estoppel, as the basis upon which he asserted that he timely filed his Step 1. (R. pp. 385 – 91).

Consequentially, Torrence failed to preserve this issue for review, and the ALC erred by taking up the issue in its January 30, 2014 order under the standard it subsequently articulated in its January 20, 2016 order. *See Home Med. Syss., Inc. v. S.C. Dept. of Rev.*, 677 S.E.2d 582, 586 (S.C. 2009).[27] *See also Wilder Corp. v. Wilke,* 497 S.E.2d 731, 733 (S.C. 1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). *See also Critcher v. Rhodes*, -- S.E.2d --, 2015 WL 4757067, *1 (S.C. Ct. App. Aug. 12, 2015) (applying axiom from *Wilder Corp.* to equitable tolling claim).

C. TORRENCE DID NOT REQUEST AN EXCEPTION TO THE FILING DEADLINE AS REQUIRED BY PARAGRAPH 13.9

After erroneously stating that Torrence contended his wage claims concerned "policies/procedures," and, therefore, the 15-day filing deadline did not apply to his Step 1 and then agreeing with the contention never uttered by Torrence, the ALC observed that GA-01.12 "failed to define either 'incident' or 'policies/procedures.'" (R. p. 398).

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[26] In footnote 28 of its July 9, 2012 brief, SCDC noted that Torrence did not seek the exception to the filing deadline available under GA-01.12. (R. pp. 108 – 09). In its July 9, 2012 brief, SCDC referenced the ALC's decision in *Ackerman, et al., v. S.C. Dep't of Corr.*, ALC Docket Nos. 07-ALJ-04-00444-AP, *et seq.* In the aforementioned footnote, SCDC observed that the inmates in *Ackerman* made a variety of assertions concerning the exception available under GA-01.12 for grievances concerning SCDC "policies/procedures," and SCDC observed that the ALC rejected them when it affirmed SCDC's denial of their grievances based upon their failure to comply with the 15-day filing deadline. Obviously, this Court reversed the ALC's decision in *Ackerman* by its February 10, 2016 decision. 782 S.E.2d 757 (S.C. Ct. App. 2016). By its order dated March 24, 2016, this Court denied SCDC's petition for rehearing in *Ackerman.* However, SCDC filed a petition for writ of certiorari with our Supreme Court on May 2, 2016 by which it seeks review of this Court's decision in *Ackerman* by our Supreme Court. SCDC's petition for rehearing in *Ackerman* remains pending as of the date of SCDC's instant brief. Notwithstanding *Ackerman's* current procedural posture, the assertions and arguments offered by the inmates in *Ackerman* are clearly distinguishable from those made by Torrence, because, unlike Torrence, the inmates in *Ackerman* actually raised the "policies/procedures" exception to the 15-day filing deadline from paragraph 13.9 of GA-01.12.

[27] *See* note 22 above.

After considering dictionary definitions of these terms, the ALC reasoned as follows (R. pp. 398 – 99):

> Based on the "plain and ordinary meaning" of both of these words, it is clear that an incident would be a one-time, specific event, and a policy would be continuous course of action. In the present case, it was not a one-time event, in which [Torrence] was not paid a prevailing wage. [SCDC] continuously failed to pay [Torrence] a prevailing wage. Therefore, the grievance involved is related to a policy or procedure.

Despite having seemingly negated any filing deadline applicable to Torrence's Step 1 by applying paragraph 13.9, the ALC nevertheless stated "it must determine a reasonable time limitation that gives effect to the statutory or regulatory scheme" in the absence of an "express time limit" for "policies/procedures" grievances under GA-01.12. (R. p. 399). The ALC then recognized the following (R. p. 399):

> The fact that other grievances must be filed within 15 days indicates a policy requiring the utmost promptness in raising a grievance. In the case of a challenge to the agency's policies and practices, such as the one raised here, it seems reasonable to require the grievance be raised within 15 days of the time some action has been taken under the policy relevant to the grievance.

After examining both the position taken by SCDC concerning prison industries wage grievances in the litigation of *Wicker* before the ALC in 2001 and the provisions of paragraph 7 of GA-01.12, the ALC concluded as follows (R. p. 399):

> Clearly, [SCDC] did not recognize a wage claim as grievable until the Supreme Court upheld the ALC's decision [in *Wicker*] in August 2004. Thus, any attempt by [Torrence] to file a grievance prior to August 22, 2004 would have been futile. By that time, [Torrence's] lawsuit initiated as a class action in Circuit Court was pending before the courts, representing ongoing litigation between these same parties over the same issue. [Torrence] filed his grievance within fifteen days of the date the Supreme Court issued its decision in his case stating, "[c]learly, [Torrence] can present this claim via the inmate grievance procedure." [*Torrence*, 646 S.E.2d at 870].

With all due deference to the ALC, its conclusion that it would have been futile for Torrence to file his grievance before August 22, 2004 constitutes plain error. In making this conclusion, the ALC clearly embraced and adopted Torrence's argument on this point.[28]

However, the ALC ignored the reality that by *reversing* SCDC's denial of the inmate's prison industries wage grievance in *Wicker*, the ALC actually held, by its August 13, 2001 decision, that inmates, like Torrence, could file grievances under GA-01.12 in which they presented such claims. Moreover, as our Supreme Court clarified in its August 23, 2004 decision in *Wicker*, 602 S.E.2d at 56, the inmate who filed the grievance participated in the same project at Evans as Torrence. Thus, Torrence could have and should have followed the ALC's 2001 decision in *Wicker* and filed his Step 1 sometime between 2001 and when he actually filed his Step 1 in May 2007.

By its January 30, 2014 order, the ALC seemingly concluded that the ALC's August 13, 2001 decision in *Wicker* did not constitute binding precedent until affirmed by our Supreme Court on August 23, 2004 and that Torrence was somehow excused from filing his grievance until our Supreme Court issued *Torrence* in 2007.

Nothing, however, prevented Torrence from filing his Step 1 at any time before May 2007, and, rather than discouraging him from filing his Step 1 before 2007, the ALC's August, 13, 2001 decision in *Wicker* encouraged him to do so, or at least it should have. If the ALC's decision in Wicker didn't encourage him sufficiently, certainly the Supreme Court's decision in *Wicker* should have provided Torrence ample motivation to file his Step 1 sooner rather than later. Had he filed his Step 1 after the August 13, 2001 decision in *Wicker* and had SCDC denied his Step 1, it's entirely possible that the ALC, as it did in *Wicker*, would have reversed SCDC's

[28] *See* notes 13, 16, and 25 above.

denial of his Step 1. Even if the ALC affirmed SCDC's denial of his Step 1, Torrence could have appealed the ALC's decision to this Court.

Torrence would still have confronted the 15-day filing deadline from paragraph 13.1 of GA-01.12 had he filed his Step 1 sometime after the ALC's August 13, 2001 decision in *Wicker*, or even after our Supreme Court's August 23, 2004 decision affirming the ALC's decision in *Wicker*, but before May 2007 when he actually filed his Step 1.[29] Torrence could have attempted to overcome the filing deadline by invoking any part of paragraph 13.9, and, as required by paragraph 13.9's final sentence, requesting a waiver from the filing deadline.

Obviously, however, Torrence failed to file his Step 1 until May 2007. Moreover, when he actually did file his Step 1 and Step 2, Torrence failed to request a waiver of the 15-day filing deadline as required by paragraph 13.9's final sentence. Likewise, Torrence failed to claim in either his Step 1 or Step 2 that his wage claims concerned SCDC "policies/procedures," and, for that matter, he did not even utter the term "policies/procedures" in either filing.

Accordingly, the ALC erred in its January 30, 2014 order by granting the "policies/procedures" exception from paragraph 13.9 to Torrence's Step 1 when he failed to raise a request such relief in his Step 1 or Step 2. *See Home Med. Syss., Inc. v. S.C. Dept. of Rev.*, 677 S.E.2d 582, 586 (S.C. 2009).

D. TORRENCE'S GRIEVANCE WAS SUBJECT TO THE 15-DAY FILING DEADLINE, AS HE PRESENTED CLAIMS CONSTITUTING "INMATE PROPERTY COMPLAINTS" UNDER PARAGRAPH 7.4

In his Step 1 dated May 21, 2007, Torrence broke down his prison industries wage claim into eight (8) subsections, and he articulated the following specific claims in the first, second, fourth, and fifth subsections of the "Addendum" to his Step 1 (R. p. 123):

[29] As discussed below, the ALC applied the doctrine of equitable tolling to fill this gap.

> Sections 24-3-40, 24-3-315, and 24-3-430(D) **created a property interest** in the prevailing wage ($7.17) [I] earned during "regular" hours performed for the period by SCDC as Training Hours and [I am] entitled to said monies.
>
> Sections 24-3-40, 24-3-315, and 24-3-430(D) **created a property interest** in the prevailing wage ($10.75) [I] earned during "overtime" hours performed for the period described by SCDC as Training Hours, in [the first subsection], above, and [I am] entitled to said monies.
>
> ...
>
> Sections 24-3-40, 24-3-315, and 24-3-430(D) **created a property interest** in the $1.92 difference between the prevailing wage ($7.17) paid by the private sector employer [ESCOD] for [my] "regular" hour labor and the wage ($5.25) paid [me] by SCDC during the course of [my] private sector employment [August 1997 thru November 2004], including any change in the rate during [my] participation and [I am] entitled to said monies.
>
> Sections 24-3-40, 24-3-315, and 24-3-430(D) **created a property interest** in the $2.79 difference between the prevailing wage ($10.75) paid by the private sector employer [ESCOD] for [my] "overtime" hour labor and the wage ($7.86) paid [me] by SCDC during the course of [my] private sector employment [August 1997 thru November 2004], including any change in the rate during [my] participation and [I am] entitled to said monies. [emphasis supplied].

In the seventh subsection of his "Addendum," Torrence articulated the following claim (R. p. 123):

> Section 24-3-40, 24-3-315, 24-3-430(D), 24-3-430(A)(5) and 24-3-430(B)(2) **created a property interest** in escrowed wages wherein [I am] entitled to complete and immediate access to the amount of [my] escrowed wages [$5,368.00 as of November, 2004] to distribute them to persons or entities of his choice at the time said wages were escrowed for [my] benefit, but [I am] denied [my] personal benefit because of serving a life sentence. [emphasis supplied].

In the final order it issued January 20, 2016, the ALC, in articulating the applicable standard of review, observed as follows (R. p. 1031):

> The Court's jurisdiction to hear this matter is derived from the South Carolina Supreme Court decisions in [*Al-Shabazz*]. The [*Al-Shabazz*] decision explained 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 58] (citation omitted). **The statutory mandate that inmates be paid**

> **the prevailing wage creates a property interest** that may not be denied without due process of law. [*Id.*] (citation omitted). Thus, **when [SCDC] denies an inmate**, dependent, victim, or other interested party **property to which he or she is entitled by law**, the matter is reviewable by the ALC via [GA-01.12]. [*See Torrence*, 646 S.E.2d at 869 – 70]. [emphasis supplied].

Therefore, based not just upon above-quoted passages from the "Addendum" to his May 27, 2007 Step 1, but also the above-quoted passage from the ALC's January 20, 2016 order, Torrence's claims clearly constituted complaints by him that SCDC unconstitutionally deprived him of his property by purportedly failing to pay him an hourly wage for his prison industries labor that conformed to the applicable state laws and, for that matter, the applicable federal laws, and federal regulations. As such, Torrence's claims fell under paragraph 7.4 of GA-01.12 rather than paragraph 7.1.

Paragraph 7 is entitled "GRIEVABLE ISSUES," and paragraph 7.1 provides that "[SCDC] policies/procedures, directives or conditions which directly affect an inmate" constitute issues which "will be considered grievable." The term "policies/procedures" appears in the first sentence of paragraph 13.9, the paragraph which provides, upon an inmate's request, an exception to the 15-day filing deadline. Paragraph 7 enumerates six (6) other grievable issues. *See* Paragraphs 7.2 – 7.7.

Of profound impact to the ALC's January 30, 2014 ruling, "Inmate property complaints" are explicitly grievable under paragraph 7.4 of GA-01.12.

In its recent decision in *Ackerman, et al., v. S.C. Dep't of Corr.*, 782 S.E.2d 757, 761 (S.C. Ct. App. 2016), this Court held as follows: "It logically follows that the remaining items in

paragraph 7, i.e., 7.2 through 7.7, **were meant to serve as "incidents"** for purposes of paragraphs 13.1 and 13.9.[30]" [emphasis supplied].

As he explicitly alleged in his Step 1 and as the ALC explicitly recognized in its January 20, 2016 order, Torrence's prison industries wages unquestionably constituted his property. *See Wicker*, 602 S.E.2d at 57 – 58 ("We find that where, as here, the state has created a statutory right to the payment of a prevailing wage, it cannot thereafter deny that right without affording due process of law ... The *Al-Shabazz* Court explained that procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of ... property. [527 S.E.2d at 750].") and *Williams*, 641 S.E.2d at 886, n. 1 ("In the companion case of [*Wicker*], we further held that inmates may not be deprived of this property interest without due process; accordingly, inmates were directed to file grievances if they wished to protest [SCDC's] failure to pay a prevailing wage.").

Therefore, the wage claims he articulated in his Step 1 unquestionably constituted "Inmate property complaints" as explicitly contemplated by paragraph 7.4. Consequentially, Torrence's grievance constituted an "incident" grievance, and the ALC erred in its January 30, 2014 order by not ruling that the 15-day filing deadline from paragraph 13.1 barred his claims.

II. THE ALC ERRED IN ITS JANUARY 30, 2014 ORDER BY RULING THAT EQUITABLE TOLLING APPLIED TO TORRENCE'S GRIEVANCE

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

[30] In its petition for rehearing in *Ackerman*, SCDC argued that the inmates' claims were subject to the 15-day filing deadline as "incidents" under paragraphs 7.4 and 13.1. In its March 24, 2016 order denying SCDC's petition for rehearing, this Court provided further clarification of the above-quoted passage from its decision and paragraph 7.4. SCDC raised this specific point in the petition for writ of certiorari it filed with the Supreme Court on May 2, 2016. *See* note 26 above.

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 1 under the doctrine of equitable tolling, and he identified equitable tolling as an issue for review in his Notice of Appeal to the ALC.

A. THE ALC'S INTERPRETATION OF EQUITABLE TOLLING

In its January 30, 2014 order, the ALC framed the equitable tolling issue as follows (R. p. 400):

> [Torrence] maintains that by filing his class action lawsuit in the Court of Common Pleas, he effectively tolled the filing requirement of his internal grievance. [Torrence] argues that a defective action, filed within the statute of limitations, maintained in a court of competent jurisdiction tolled the time to file an agency grievance. [SCDC] maintains that [Torrence] did not toll the time to file a grievance by filing a claim in the Court of Common Pleas.

The ALC embraced Torrence's invocation of the doctrine, and it did so by relying upon *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 687 S.E.2d 29, 32 – 33 (S.C. 2009). (R. pp. 400 – 01). According to the ALC's interpretation of *Hooper*, equitable tolling typically "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)). The ALC also relied upon a precedent far outside our state, *Abbott v. State*, 979 P.2d 994, 998 (Alaska 1999), or the following proposition: "Under 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."

The ALC ruled as follows (R. p. 401):

> **In this case, [Torrence] did not have more than one legal remedy available, but** no statute, regulation, or **precedent established the proper procedure for bringing his claim.** ... [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 [SCDC] 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 [*Torrence*] holding that he could present his claim via the inmate grievance procedure. [emphasis supplied].

B. FACTS UNDERMINE THE ALC'S LOGIC AND REASONING

The above-quoted rationale by which the ALC applied equitable tolling to Torrence's Step 1 is undermined by the relevant and operative facts.

The ALC's conclusion that no "precedent established the proper procedure for bringing his claim" is decisively undermined by the reality that our Supreme Court issued *Wicker*, as well as *Adkins*, on August 23, 2004. Significantly, the ALC issued its decision in *Wicker* on August 13, 2001, three (3) days *before* counsel for Torrence and his fellow plaintiffs filed the class action which our Supreme Court eventually considered in *Torrence*.[31]

The notion that SCDC didn't recognize "grievances regarding pay claims" is likewise decisively undermined by the reality that it accepted, processed, and adjudicated the prison wage grievance filed by the inmate in *Wicker*. While it denied the inmate's wage claim, SCDC nonetheless defended the inmate's appeal to the ALC, and, once the ALC reversed its denial by the decision it issued on August 13, 2001, SCDC appealed the ALC's decision to this Court. Once our Supreme Court accepted *Wicker* on direct review, SCDC prosecuted its appeal of the ALC's decision in that forum.

SCDC's 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

[31] As observed above, the civil action number for *Torrence* was 2001-CP-40-3409. The circuit court history for *Torrence* is available on-line via the Richland County Public Index. According to the Public Index, Torrence's counsel filed the class action on August 16, 2001, and the circuit court dismissed the class action on May 31, 2005. *See* http://www5.rcgov.us/SCJDWEB/PublicIndex/PISearch.aspx.

ability to discover his wage claims or to pursue his wage claims via an administrative grievance under GA-01.12.

C. THE STANDARDS ASSOCIATED WITH EQUITABLE TOLLING AS FASHIONED BY COURTS IN OUR STATE

SCDC respectfully contends that the ALC misapprehended the doctrine of equitable tolling, particularly the contours of the doctrine developed by this Court, our Supreme Court, federal courts in our state, and the United States Supreme Court.

This Court has recently declined to apply the doctrine of equitable tolling from *Hooper* in several of its unpublished opinions. *See Teal v. Hickman-Tedder*, -- S.E.2d --, 2015 WL 9393946, *1 (S.C. Ct. App. Dec. 23, 2015) ("... we conclude equitable tolling would not be proper in this case: *See* [*Hooper*, 687 S.E.2d at 32] ("Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it."); [*Id.*, 687 S.E.2d at 33] ("Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use."); [*Id.*] ("The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong *at the hands of the other.*" [emphasis by this Court].

See also Campbell v. Guignard, -- S.E.2d --, 2015 WL 3819059, *1 (S.C. Ct. App. June 17, 2015) (quoting *Hooper*, 687 S.E.2d at 33); and *Griffis v. Cherry Hill Estates, LLC*, -- S.E.2d --, 2015 WL 1517412, *3 (S.C. Ct. App. Apr. 1, 2015) (quoting *Hooper*, 687 S.E.2d at 33).

Likewise, our federal courts have declined to apply the doctrine as established in *Hooper*. For example, in *Holmes v. Marion School Dist. One*, 2011 WL 4591647, *1 (D.S.C. Sept. 30, 2011), the federal court offered the following applicable analysis:

> Additionally, the Court has carefully considered the plaintiffs' argument that the doctrine of equitable tolling applies to this case and their citation to [*Hooper*] in support. However, the Court finds that **equitable tolling does not apply here and that *Hooper* is inapposite to the facts here because *Hooper* involved the question of whether equitable tolling should apply in limited circumstances such as when a defendant fails to properly list its registered agent for service with the South Carolina Secretary of State, as required by state law**. [*Hooper*, 687 S.E.2d at 32 – 34]. The South Carolina Supreme Court noted equitable tolling "**should be used sparingly**." *Id.* at 33. [emphasis supplied].

The federal court in *Wellin v. Wellin*, 2014 WL 234216, *4, (D.S.C. Jan. 22, 2014), offered a more robust analysis when it considered both *Hooper* and this Court's decision in *Magnolia North Property Owners' Ass'n, Inc., v. Heritage Communities, Inc.*, 725 S.E.2d 112 (S.C. Ct. App. 2012):

> **In South Carolina, equitable tolling "is a doctrine that should be used sparingly and only when the interests of justice compel its use."** [*Hooper*, 687 S.E.2d at 33]. **It is generally applied only where the defendant's actions hinder the plaintiff's discovery of or ability to pursue the claim.** [*Hooper*, 687 S.E.2d at 33 – 34]; *see also* [*Magnolia North*] (tolling the statute of limitations for a homeowners association to file claims against the developer for the time that the developer controlled the homeowners association). "Equitable tolling does not [, however,] require a showing that the defendant has made a misrepresentation to the plaintiff." [*Magnolia North*, 725 S.E.2d at 125].[32] [emphasis supplied].

In *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005), the United States Supreme Court relied on *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990), when it observed that, generally, "a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has

[32] Our Supreme Court granted certiorari in *Magnolia North* on June 26, 2014, but it subsequently dismissed the writ as improvidently granted. 777 S.E.2d 831, 832 (S.C. 2015).

been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. See, *e.g.,* [*Irwin*, 498 U.S. 89 at 96]."

D. THE ALC ERRED BY APPLYING EQUITABLE TOLLING

The ALC erred by applying equitable tolling in order to rescue Torrence's Step 1 from the 15-day deadline, as, contrary to any allegation by Torrence or any finding by the ALC, SCDC literally did nothing whatsoever to hinder Torrence's discovery of his wage claims or his ability to pursue his claims.

As explained above in Sections I(C) and II(B) of SCDC's argument, Torrence confronted numerous instances in which he received notice that he should file a grievance under GA-01.12 in order to prosecute or at least preserve his wage claims.

If he couldn't discern from these milestones that he urgently needed to file a Step 1 by which to pursue his wage claims, the circuit court's dismissal of *Torrence* on May 31, 2005 surely alerted Torrence of the need to do so.[33] Any action by Torrence's counsel which discouraged or otherwise restrained him from filing his Step 1 is simply not attributable to SCDC, particularly within the context of an equitable tolling analysis.

In *Pace v. DiGuglielmo*, 544 U.S. at 418, the United States Supreme Court observed that "[u]nder long-established principles, petitioner's lack of diligence precludes equity's operation. See [*Irwin*, 498 U.S. at 96]; *McQuiddy v. Ware*, 20 Wall. 14, 19, 22 L.Ed. 311 (1874) ('Equity always refuses to interfere where there has been gross laches in the prosecution of rights')."

Nothing, and certainly no action of any kind by SCDC, prevented or hindered Torrence from filing his Step 1 before May 21, 2007. As observed in *Pace*, a decision very close in kinship to *Hooper*, the ALC erred by allowing equity interfere with Torrence's dilatory prosecution of his wage claims via an administrative grievance under GA-01.12.

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[33] *See* note 31 above.

III. THE ALC ERRED IN ITS JANUARY 20, 2016 ORDER BY CALCULATING THE "PREVAILING WAGE"

A. THE ALC MISAPPREHENED THE APPLICABLE STATE LAW, FEDERAL LAW, AND FEDERAL REGULATIONS

As illustrated above, SCDC discussed and relied upon the circuit court's order in *Adkins* in the response it provided to Torrence's Step 1 and the reply it provided to his Step 2. Obviously, our Supreme Court in *Adkins* considered not only the record generated during the trial conducted by the circuit court, but the circuit court's order.

1. Section 24-3-430

The circuit court in *Adkins*, like the ALC, found that the project operated by SCDC in which the inmates participated "is and has been since its inception certified by" BJA pursuant to its PIECP, and it also found that "[t]he PIECP is codified at 18 U.S.C. Section 1761(c)." (R. p. 865).

Echoing the Ashurst-Sumners Act (18 U.S.C. § 1761), § 24-3-430(A) allows SCDC to "establish a program involving the use of inmate labor ... in private industry for **the manufacturing and processing of goods, wares, or merchandise** ... or another business or commercial enterprise considered by the director to enhance the general welfare of South Carolina." [emphasis supplied].

Section 24-3-430(G) specifically references federally certified projects administered by BJA by declaring that "[n]o inmate who participates in **a project designated by the Director of [BJA]** pursuant to Public Law 90-351 is eligible for unemployment compensation upon termination from the program." [emphasis supplied].

Our legislature assimilated the key provisions of Ashurst-Sumners, specifically 18 U.S.C.A. § 1761(c)(2) and (c)(4), by enacting the following subsections to § 24-3-430:

(C) 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 conditions of his employment.

(D) No inmate participating in the program **may earn less than the prevailing wage for work of similar nature in the private sector**.

(E) Inmate participation in the program may not result in the displacement of **employed workers** in the State of South Carolina and may not impair existing contracts for services. [emphasis supplied].

2. The Ashurst-Sumners Act, 18 U.S.C. § 1761

The first component of Ashurst-Sumners, 18 U.S.C.A. § 1761(a), criminalized the transportation in interstate commerce of "any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners," and our legislature assimilated this standard in § 24-3-410(A). Another component of Ashurst-Sumners, 18 U.S.C. § 1761(c), provided an exception to the criminal penalties established by subsection (a) for such items that are "manufactured, produced, or mined by convicts or prisoners" who:

(1) are participating in--one of not more than 50 non-Federal prison work pilot projects designated by the Director of the **[BJA]**;

(2) have, in connection with such work, received wages **at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed**, except that such wages may be subject to deductions which shall not, in the aggregate, exceed 80 per centum of gross wages, and shall be limited as follows:

(A) **taxes** (Federal, State, local);

(B) **reasonable charges for room and board**, as determined by regulations issued by the chief State correctional officer, in the case of a State prisoner;

(C) **allocations for support of family pursuant to State statute**, court order, or agreement by the offender;

(D) contributions to any fund established by law to **compensate the victims of crime** of not more than 20 per centum but not less than 5 per centum of gross wages.[34] [emphasis supplied].

However, §1761(c)(2) does not include, define, or quantify the term "prevailing wage."

3. 64 FR 17000, *et seq.*

The BJA, as recognized by 18 U.S.C. § 1761(c)(1) and as acknowledged by both the circuit court in *Adkins* and the ALC, is the arm of the federal government which coordinates with state correctional authorities, such as SCDC, to establish, certify, and monitor PIECP projects, such as the project in which Torrence participated at Evans. BJA acts, under the authority of Ashurst-Sumners, through federal regulation, specifically 64 FR 17000.

BJA, 64 FR 17007, articulated the following definitions applicable to the PIECP projects it certifies and monitors:

> Minimum wage refers to the Federal minimum wage which is the lowest possible wage that can be paid to private sector employees under the Fair Labor Standards Act, 29 U.S.C. 206. ... **The requisite payment of at least a minimum wage, by a [project], is in no way intended by BJA to imply that PIECP inmate workers are employees for purposes of the PIECP statute or any other Federal law**. [emphasis supplied].

BJA, 64 FR 17007, articulated the following additional applicable definitions:

> ***Prevailing 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**, 18 U.S.C. 1761(c)(2).[35] [emphasis supplied].

BJA, 64 FR 170009 – 10, also specifically addressed wages for inmates who participate in PIECP projects in the following manner:

> PIECP inmate workers must 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 to be performed. This requirement benefits society by allowing for the

[34] The legislature assimilated the provisions of 18 U.S.C. § 1761(c)(2)(A) – (D) when it amended S.C. Code § 24-3-40 in 1999. *See* § 24-3-40(A).

[35] Our legislature assimilated this language into our state's prison industries statutes by enacting § 24-3-315.

development of prison industries while protecting the private sector labor force and business from unfair competition that could otherwise stem from the flow of low-cost, prisoner-made goods into the marketplace. PIECP participants must, therefore, implement the prevailing wage requirements under like conditions experienced by private sector competition. Toward this end, the following requirements are applicable:

...

(B) **Prevailing wage verification must be obtained by the appropriate state agency which determines wage rates (usually the Department of Economic Security).**

...

(G) The PIECP prevailing wage [cannot] be set below the Federal minimum wage, as defined in the [FLSA]. **Payment of the Federal minimum wage, however, does not automatically achieve compliance with the prevailing wage requirement *unless* the prevailing wage for the comparable private sector industries is, in fact, the Federal minimum wage.**

(H) Overtime, at one and a half times the rate **of regular or prevailing wage**, must be paid for prisoner hours worked in excess of 40 hours per week. See 29 U.S.C. 207(a) (a payment standard imposed on private sector competition). [emphasis supplied].

4. The ALC Ignored the Circuit Court's Analysis in *Adkins*

In its January 20, 2016 order, the ALC first accounted for the Ashurst-Sumners Act (R. p. 1033):

> The federal statute requires that inmates in BJA-administered programs "[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 U.S.C. § 1761(c)(2)]. From these wages, deductions of up to 80% may be made for taxes, room and board, family support, and victim compensation. [*Id.*]

The ALC next accounted for BJA's controlling regulations (R. p. 1033):

> **The PIECP Guideline refers to this rate of pay as the "prevailing wage" and states that the prevailing wage *must be obtained from the state agency that determines wage rates*.** [64 FR 17010]. The Guideline states that this agency is usually the "Department of Economic Security." **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). [emphasis supplied].

The ALC continued as follows (R. p. 1033):

> 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. [64 FR 17009-10]. Additionally, the Guideline states that the prevailing wage cannot be less than the federal minimum wage, but that payment of the minimum wage does not achieve compliance with the law unless the comparable private sector industry wage is indeed the federal minimum wage. [64 FR 17010].

The ALC next examined §§ 24-3-315 and 24-3-430(D) (R. p. 1033). The ALC, however, did not include § 24-3-410 in the above-quoted passages from its January 20, 2016 order. The circuit court in *Adkins* relied upon § 24-3-410, specifically § 24-3-410(B)(7), and SCDC referenced the circuit court's decisions in Adkins in its response to Torrence's Step 1 and its reply to his Step 2.

The ALC purposefully and, SCDC respectfully asserts, detrimentally ignored the circuit court's order in *Adkins*, 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-Sumners 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(B)(7)], and not [§ 24-3-430(D)], 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 [§] 24-3-430. [*See Torrence*, 646 S.E.2d at 867]. [emphasis supplied].

The "Circuit Court order" referenced by the ALC in the above-quoted paragraph from its January 20, 2016 order is the order filed October 30, 2002 by the circuit court in *Adkins*.[36] (R. pp. 860 – 91). The ALC cited no authorities to support its assessment that "statements of the higher courts" in our state have contradicted of the circuit court's rulings in *Adkins* concerning §§ 24-3-410(B)(7) and 24-3-430. If not contrary to the ALC's assessment than at least in contrast to it, our Supreme Court, in affirming in result the circuit court's rulings in *Adkins*, approvingly noted the circuit court's decision. 602 S.E.2d at 55, n. 6.

Furthermore, the ALC's assertion that our Supreme Court in *Torrence* stated that the project in which Torrence participated "operated under [§ 24-3-430]" is misleading. Unlike the circuit court in *Adkins*, the circuit court in *Torrence* never conducted a trial. The circuit court in *Torrence*, unlike the circuit court in *Adkins*, never considered the breadth of our state's prison industries statutes, including § 24-3-410, nor did it consider these statutes in depth. Instead, the circuit court in *Torrence*, after the Supreme Court affirmed in result the circuit court's in *Adkins* and affirmed the ALC in *Wicker*, granted SCDC's motion for summary judgment on May 31, 2005.[37] The circuit court in *Torrence*, unlike the circuit court in *Adkins*, never considered exhibits or heard live sworn testimony from inmates, SCDC officials, and ESC officials.

Thus, the ALC declined to avail itself of the benefit of the circuit court's work in *Adkins*, and it intentionally ignored § 24-3-410. The legislature enacted both §§ 24-3-410 and 24-3-430, and no subsequent enactment by the legislature or precedent issue by our appellate courts diminishes the reality that § 24-3-410 and 24-3-430 apply with equal force to SCDC's federally certified prison industries projects.

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[36] The civil action number for *Adkins* was 2000-CP-40-4761, and, just like *Torrence*, the litigation history of *Adkins* in circuit court is available on-line via the Richland County Public Index. *See* note 31 above.

[37] *See* note 31 above.

5. The Circuit Court in *Adkins* Considered Both §§ 24-3-410(B)(7) and 24-3-430(D)

The circuit court in *Adkins* rejected the inmates' contention that § 24-3-430(D) even applied to their demand for the "prevailing wage." It ruled that the provisions of § 24-3-410 and, specifically, § 24-3-410(B)(7) governed the inmates hourly wage "in the federally certified PIECP project operated by [SCDC], in conjunction with Standard Plywoods, at Tyger River."

As it recognized, § 24-3-410(B)(7) must be read in conjunction with the rest of § 24-3-410, and, specifically, § 24-3-410(A) (R. pp. 879 – 80):

> (A) It is unlawful to sell or offer for sale on the open market of this State articles or projects manufactured or produced wholly or in part by inmates in this or another state.
>
> (B) The provisions of this section do not apply to:
>
> (7) products sold intrastate or interstate produced by inmates of [SCDC] employed in a *federally certified private sector/prison industries program* if the inmate workers participate voluntarily, receive comparable wages, and the work does not displace employed workers. … The Department of Labor shall develop guidelines to determine if the work displaces employed workers. [italicized and underlined emphasis supplied by the circuit court].

The circuit court in *Adkins* concluded that § 24-3-410(B)(7) "precisely addresses activity in the [SCDC] project in which the [inmates] participate, which is a 'federal certified private sector/prison industries program.'" It then ruled that the inmates' "demand for the 'prevailing wage' is unsupported by the precisely applicable statutory authority," as § 24-3-410(B)(7) only provides that they "should receive comparable wages and not the 'prevailing wage' for their [prison industries] labor."

Finally, it ruled that the permanent hourly wage that SCDC paid the inmates after the inmates 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 [§ 24-3-430(D)] under the guidelines published by the [ESC]." [emphasis supplied]. (R. pp. 880 – 81).

Thus, following the template provided by the circuit court in *Adkins*, SCDC, by paying Torrence a regular hourly rate of $5.25 (ten cents *above* the federal minimum wage applicable during the entirety of his participation) and an overtime hourly rate of $7.86 once he completed the first 320 hours of his labor, satisfied the requirements imposed by state law, federal law, and federal regulations. While it understands that the circuit court's order in *Adkins* does not represent binding precedent, SCDC urged the ALC, and it respectfully urges this Court, to consider the circuit court's analysis and holdings in *Adkins*.

The reality is that no court in our state, including the circuit court in *Torrence*, has undertaken a comprehensive and comparative analysis of the various terms concerning prison industries wages in the federally certified projects operated by SCDC under the applicable statutes enacted by our legislature, which in include §§ 24-3-315, 24-3-430, and, the ALC's position notwithstanding, 24-3-410 in the same manner as the circuit court in *Adkins*. Of more precise significance to SCDC's instant argument, the circuit court in *Adkins*, as illustrated below, had the immeasurable benefit of presiding over testimony elicited from the actual ESC representative whom the ALC identified in its January 20, 2016 order.

B. THE ALC'S ERRONEOUS DECISION TO CALCULATE THE "PREVAILING WAGE" AND ITS FLAWED CALCULATION OF THE "PREVAILING WAGE"

1. Conclusions upon which the ALC Erroneously Decided to Calculate the "Prevailing Wage"

The ALC, intent on depriving itself of the benefit of the circuit court's rulings in *Adkins*, began deviating from the methodology actually used by the ESC when it collected and analyzed wage data as follows (R. p. 1036):

> Third, [SCDC] argues that so long as the wage paid exceeds the federal minimum wage it is a lawful wage. SCDC argues that nothing in the statutes establishes a specific rate as the prevailing wage with respect to the wages an inmate must be paid. The final agency decision states: "BJA declared that the rate at which inmates are paid for the labor they voluntarily provide to PIECP projects ... cannot be set below the federal minimum wage. Except for the period of time it paid you a 'training wage,' SCDC paid you at least the federal minimum wage for your labor." However, [SCDC] neglected to note in this statement that the Guideline's language in question also provides: "Payment of the Federal minimum wage, however, does not automatically achieve compliance with the prevailing wage requirement unless the prevailing wage for the comparable private sector industries is, in fact, the Federal minimum wage." [64 FR 170010].

The ALC continued as follows (R. p. 1036):

> The federal minimum wage is the *lowest possible* acceptable wage to pay inmates, because it is legally impossible for the prevailing wage to be any lower. The minimum wage would only satisfy the prevailing wage standard in all instances if all non-inmate workers were paid only the minimum wage. However, workers in this state earn different rates of pay according to their skillset and the type job in which they work. The Guideline cited by [SCDC] also states that the federal law "requires that the PIECP wage amount be set *exclusively* in relation to the amount of pay received by similarly situated non-inmate workers." [64 FR 17009-10] (emphasis added). [SCDC] cites no evidence that the minimum wage was the prevailing wage for workers in jobs similar to the one performed by [Torrence]. The law clearly states that "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." [§ 24-3-430(D)].

The ALC, however, overlooked several important realities. First, SCDC paid Torrence an hourly wage of $5.25, ten cents above the federal minimum wage, as a base wage for the entirety of his labor after he completed his first 320 hours in the project, and SCDC calculated the overtime wage it paid Torrence upon the base wage. Second, 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. Finally, as discussed below, the ESC does not even use the term "prevailing wage" in its activities.

The ALC concluded as follows (R. pp. 1036 – 37):

> Finally, [SCDC] argues that the $5.25 regular hourly rate conformed to the wage data collected and published by the ESC for the type of work in question. **While the Court 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 Court does not agree that the $5.25 regular hourly rate conforms to the ESC data in the record.** [emphasis supplied].

2. The ALC Erroneously Deviated from Both ESC Methodology and the Operative Federal Regulation

Having erroneously concluded that the $5.25 hourly regular rate did not constitute a lawful wage, the ALC next observed as follows (R. p. 1037):

> [Torrence] has asked this Court to determine the prevailing wage based on the record in this case. **In so doing, the Court reaches an issue not yet addressed by South Carolina courts**. While it has been decided that [SCDC] may not pay less than the prevailing wage during training, **no inmate has successfully raised the issue of how the prevailing wage is calculated.** [emphasis supplied].

By stating that the calculation of the "prevailing wage" had not yet been addressed by courts in our state, the ALC overlooked the 2001 decision in *Wicker*, in which the ALC determined that the "prevailing wage" for the very project in which Torrence participated was $5.25 per hour.[38] 2001 WL 1005574, *2. Likewise, the ALC purposefully ignored the analysis, conclusions, and rulings fashioned by the circuit court in *Adkins* after it conducted a two (2) day bench trial on August 8 and 9, 2002 during which it heard testimony from 10 inmates, two (2) employees of the private industry sponsor, two (2) official from SCDC, and Ms. Rebecca Eleazer, a key representative from the ESC. (R. pp. 861 and 864).

Again, the circuit court in *Torrence* never considered exhibits or heard testimony from inmates, SCDC officials, and ESC officials. For that matter, the ALC, in considering Torrence's appeal of SCDC's final decision, did not conduct a contested hearing at which the parties

[38] *See* notes 1, 8, and 20 above.

submitted evidence and presented witness testimony. *See* ALC Rules of Procedure 25 and 29. Instead, the ALC sat in its appellate capacity as it considered Torrence's appeal of SCDC's final decision. *See* ALC Rules of Procedure 51, *et seq.* SCDC, in considering Torrence's Step 1 and Step 2, also did not conduct a contested hearing, because GA-01.12 authorizes no such hearing.

Nevertheless, the ALC began calculating the "prevailing wage" (R. p. 1037):

> In its argument that $5.25 constitutes a permissible wage, [SCDC] seems to misapprehend the policy of the laws governing this private-sector program. [SCDC] argues in its brief that "[Torrence's] claim that the hourly rate of pay for his prison industries labor should have been identical to the hourly rate at which ESCOD paid its true employees is wholly without merit." While, it is true that the law does not require "identical" rates of pay to those paid by the same employer for similar work, there are strong policy reasons why inmates working in the private sector must be paid the prevailing wage of that sector.

Again, no evidence exists in the record which reflects the hourly wage ESCOD *actually paid* its employees who performed job tasks identical or similar to those performed by Torrence. The 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. Instead, the ALC continued apace (R. p. 1037):

> Inmates must be paid the prevailing wage so that inmate labor does not create a cheaper alternative to non-inmate labor. *See* [*Cartrette*, 694 S.E.2d at 22] (Failure to pay inmates overtime "would create an impermissible and unfair advantage for inmate labor over private labor.");[39] [*Adkins*, 602 S.E.2d at 55] ("Given that the overall purpose of the prevailing wage statute is to prevent unfair competition, and to aid society and the public in general, we cannot conclude that the statutes in question were enacted for the special benefit of Inmates.").[40]

[39] *See* SCDC's discussion of *Cartrette* in notes 3 and 21 above.

[40] Again, our Supreme Court, in affirming in result the circuit court's rulings in *Adkins*, approvingly noted the circuit court's decision. 602 S.E.2d at 55, n. 6.

The ALC then circled back language from §§ 24-3-315 and 24-3-430(D), but again it ignored § 24-3-410. (R. pp. 1037 – 38). The ALC next offered the following authorities as standards for its "prevailing wage" calculations (R. p. 1038):

> The Merriam-Webster Dictionary defines "prevail" as "to be frequent: predominate." Merriam-Webster, www.merriam-webster.com/prevail (Dec. 14, 2015). Predominate is defined as "to hold advantage in numbers or quantity." Id. at www.merriam-webster.com/predominate. **The affidavit in the record of Rebecca Eleazer of the ESC supports the conclusion that the "average" wage in South Carolina for a given occupational category would be the ordinary interpretation of the statutory phrase prevailing wage. The Court therefore concludes that the "prevailing wage" equals the mean average wage for an occupation.** [emphasis supplied].

In yet another example of the ALC's unfortunate misapprehension of the record,[41] no affidavit from Ms. Eleazer appears in the record. Instead, Torrence included only selected excerpts from the deposition testimony provided August 10, 2004 by Ms. Eleazer during the litigation of *Torrence* in circuit court as an appendix to the Step 2 he filed with SCDC, and these excerpts appear in the record considered by the ALC.[42] (R. pp. 533 and 604 – 39).

More importantly, the ALC overlooked the substance of Ms. Eleazer's deposition testimony when she affirmed that the ESC, the agency by whom she was employed and the agency exclusively tasked by BJA to verify the "prevailing wage," does "not have a wage classification called prevailing wage." (R. p. 617). *See* 64 FR 170009 – 10(B).

The ALC also overlooked the reality that Ms. Eleazer's deposition testimony in *Torrence* is totally consistent with the testimony she provided before the circuit court in *Adkins* during the two-day trial it conducted in August 2002 (R. pp. 887 – 88):

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[41] *See* notes 5 and 17 above.

[42] Unsurprisingly, the excepts of Ms. Eleazer's deposition testimony submitted by Torrence with his Step 2 and upon which the ALC apparently relied reflect only responses Ms. Eleazer provided to questions posed by Torrence's counsel, and these excerpts reflect objections to such questions by SCDC's counsel.

> The evidence introduced by the parties at trial showed that [the ESC], the state agency responsible for collecting and publishing wage data for non-institutional businesses throughout South Carolina, reviewed and approved the permanent $5.15 per hour wage SCDC pays the Plaintiffs for their [prison industries] labor.
>
> On July 27, 2000, Director [Tony Ellis] wrote Mr. Ted Gladden, ESC's Assistant Director for Labor Market Information, and asked him to review the hourly wage rate for the [project] in which the Plaintiffs participate. Director Ellis clearly stated that SCDC pays the Plaintiffs $5.15 per hour. On August 4, 2000, Mr. Gladden responded to Director Ellis' inquiry by providing Director Ellis with a range of wages articulated as follows: "Low" = $6.05, "Mean" = $7.48, and "High" = $8.29.
>
> Ms. Rebecca Eleazer resolved any confusion surrounding the meaning of Mr. Gladden's August 4, 2000 response. The Plaintiffs called Ms. Eleazer, an ESC representative, during *their* case-in-chief, because she actually prepared Mr. Gladden's response. Ms. Eleazer clarified and explained Mr. Gladden's response.
>
> ...
>
> **Critically, however, the "floor" for the wage range described by Ms. Eleazer is the federal minimum wage of $5.15 per hour, the rate alleged by the Plaintiffs in their first cause of action to be below the "prevailing wage" for work of a similar nature.**
>
> ...
>
> According to Ms. Eleazer, no business surveyed by her agency reported an hourly wage below the federal minimum wage of $5.15 per hour. **Therefore, the $5.15 hourly wage SCDC pays the Plaintiffs for their [prison industries] labor at Tyger River falls within ESC's wage range as recited by Mr. Gladden is his August 4, 2000 letter to Director Ellis.** [emphasis supplied].

Critically, the circuit court in *Adkins* noted that "Ms. Eleazer emphasized her agency **does not recognize or even use the term 'prevailing wage'** in compiling or publishing its wage data." (R. pp. 886 – 88).

3. The ALC's Flawed Calculation of the "Prevailing Wage"

The ALC nonetheless continued its efforts to calculate the "prevailing wage," a term not recognized or even used by the ESC, as follows (R. pp. 1038 – 39):

> The PIECP Guideline requires that the prevailing wage must be obtained from the state agency that determines wage rates. [64 FR 17010]. In

> South Carolina, this agency would have been the [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. [64 FR 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]. The record simply does not support a finding that the mean average wage for an assembler is as low as the $5.25 [SCDC] paid [Torrence]. For example, in 1999, Ted Gladden of the [ESC] 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 [the ESC], the evidence in the record is insufficient to calculate the wage for all of the relevant years. [43]

The ALC then held that no evidence existed "in the record to support [SCDC's] argument that [the hourly wages it paid Torrence conformed] with ESC data" and that to pay Torrence "less than the prevailing wage is an error of law.[44]" (R. p. 1039).

The ALC then, in contravention of the regulation published by BJA which explicitly states that "prevailing wage verification must be obtained by the appropriate state agency which

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[43] The circuit court in *Adkins*, as reflected by the above-quoted passage from its order, accounted for correspondence provided by Mr. Gladden concerning the federally certified project it reviewed.

[44] In the associated footnote, the ALC provided the following critical ruling (R. p. 1039):

> The Court acknowledges the footnote statement of the South Carolina Supreme Court, that "if appellants prove true their allegation that [SCDC] removes any of the money remitted by the private industry sponsor and then disburses the percentages listed in section 24-3-40 based on the lower rate, [SCDC] would be in violation of the plain language of the statute." [*Torrence*, 646 S.E.2d at 870 n. 4] (citing § 24-3-40(A)) (emphasis in original)). Upon review, this Court concludes that [§] 24-3-40 does not bar [SCDC] from invoicing ESCOD for services provided in addition to inmate labor, such as the use of workspace. Here, [SCDC] did not remove any of the money intended to constitute wages prior to disbursing the percentages. Only money intended for other purposes was separated from the wages.

For the sake of clarity, SCDC does not appeal this ruling by the ALC, and Torrence did not appeal this or any other ruling by the ALC in either its January 30, 2014 order or its January 20, 2016 order.

determines wage rates" (i.e. 64 FR 17009 – 10(B)), erroneously quantified the "prevailing wage" SCDC should have paid Torrence for his labor (R. p. 1039):

> [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 [DEW]. **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.** [bold emphasis supplied by the ALC].

In light of the foregoing analysis of the ALC's January 20, 2016 order, SCDC respectfully argues that the ALC clearly erred not just by its decision to calculate the "prevailing wage" SCDC should have paid Torrence for his prison industries labor but in the methodology it used to calculate the purportedly applicable "prevailing wage" SCDC should have paid Torrence. Accordingly, this Court should reverse the ALC's rulings on these issues.

IV. THE ALC ERRED IN ITS JANUARY 2016 ORDER BY RULING THAT 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)

A. THE ALC'S ANALYSIS AND HOLDINGS

The ALC framed the issue as follows (R. pp. 1039 – 40):

> The parties contest the meaning of [§] 24-3-40(B)(2). … The parties disagree on when [Torrence's] escrowed wages may be distributed to persons or entities of the inmate's choosing-i.e. whether they may be distributed only after the inmate's death. **While there is nothing in the statute explicitly stating that the distribution of the funds to persons or entities chosen by the inmate can occur only after the inmate's death, [SCDC's] interpretation of an ambiguous statute that it administers is entitled to deference unless there is a compelling reason to differ.** … Therefore, the Court turns to the rules of statutory construction to determine the intent of the legislature. [emphasis supplied and citation omitted].

The ALC examined precedent concerning statutory construction and continued as follows: (R. p. 1041):

> On the one hand, the meaning urged by [Torrence] ignores the language of [§ 24-3-40(B)(2)]. ... This subsection specifically provides for the distribution of the escrowed wages of a prisoner serving a life sentence, and immediate personal access to the funds is not an allowed option. On the other hand, SCDC's interpretation ignores the language of [§ 24-3-40(A)(5)]. ... [SCDC's] interpretation that the escrowed funds may not be distributed to a person or entity of the inmate's choosing during the inmate's lifetime ignores the fact that the funds are to be for the benefit of the prisoner, not the benefit of the prisoner's heirs. **Therefore, the Court concludes that a construction of the statute that gives full effect to both [§ 24-3-40(B)(2)] and [§ 24-3-40(A)(5)] requires reading [§ 24-3-40(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.** [emphasis supplied].

The ALC then held that Torrence "must be allowed the opportunity to designate persons or entities to receive an immediate distribution of funds held in escrow pursuant to [§] 24-3-40(A)(5)." [footnote omitted]. (R. p. 1042).

B. THE ALC ERRED WHEN IT REVERSED SCDC'S DECISION

With all due deference to the ALC and with SCDC's apologies for the invocation of the following phrase, SCDC respectfully asserts that the ruling fashioned by the ALC "splits the baby" by providing at least part of the relief demanded by Torrence but just not all of the relief he demanded.

As recognized by the ALC, § 24-3-40(B)(2) reads, in its entirety, as follows: "A prisoner **serving life in prison *or* sentenced to death** shall be given the option of having his escrowed wages included in his estate or distributed to the persons or entities of his choice" [emphasis supplied]. No need existed for the ALC to harmonize §§ 24-3-40(A)(5) and (B)(2) by resorting to the rules of statutory construction, because a plain reading of § 24-3-40(B)(2), within the context of both §§ 24-3-40(B)(1) and (B)(3), makes it clear that Torrence, as an inmate serving a

life sentence in SCDC's custody, may only distribute the monies held in escrow for his benefit by operation of § 24-3-40(A)(5) upon his natural death.

The ALC overlooked §§ 24-3-40(B)(1) and (B)(3) in its analysis. Moreover, by concluding that a plain reading of § 24-3-40(B)(2) does not conform to § 24-3-40(A)(5)'s intent that the monies withheld from his wages are for Torrence's benefit, the ALC overlooked the reality that Torrence will indeed benefit by having monies available for distribution to family members or even charitable causes upon his natural death.

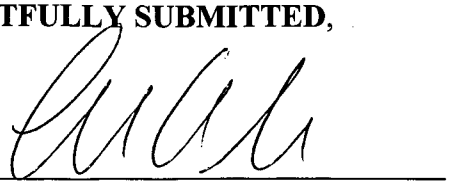
Therefore, SCDC respectfully asserts that the ALC committed plain error by reversing SCDC's denial of Torrence's demand for immediate access to his monies held in escrow by operation of § 24-3-40(A)(5).

CONCLUSION

In the four (4) rulings in its January 30, 2014 and January 20, 2016 orders subject to the instant appeal, SCDC respectfully argues the ALC made findings that were clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, employed reasoning detrimentally affected by errors of law, and rendered arbitrary and capricious conclusions.

Accordingly, SCDC respectfully urges this Court, under the provisions of §§ 1-23-610(B)(d), (e), and (f), to reverse each of the ALC's four (4) rulings.

RESPECTFULLY SUBMITTED,

BY: 

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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 Brief complies with Rule 211(b), SCACR.

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