

RECEIVED

DEC 08 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court
APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Administrative Law Judge
Dock. No. 07-ALJ-04-00517-AP

S.C. SUPREME COURT

Order (S.C. Ct. App. filed Oct. 17, 2017)

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

v.

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

Court of Appeals Appellate Case No. 2017-002087

PETITION FOR A WRIT OF CERTIORARI
APPENDIX

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

INDEX

page

Supreme Court order denying petitions for certiorari in Fred Gatewood v. SCDC Appellate Case No. 2016-001221, dated May 30, 2017..... 2

Court of Appeals order dismissing Gatewood's appeal of ALC rulings at status conference in Fred Gatewood v. SCDC Appellate Case No. 2017-002087, dated October 17, 2017..... 3

Court of Appeals order denying Gatewood's petition for rehearing in Fred Gatewood v. SCDC Appellate Case No. 2017-002087, dated November 8, 2017..... 4

Court of Appeals remittitur to ALC in Fred Gatewood v. SCDC Appellate Case No. 2014-001199, dated June 2, 2017..... 5

ALC order of remand to SCDC in Fred Gatewood v. SCDC Dock. No. 07-ALJ-04-0517-AP, dated June 13, 2017..... 6

Gatewood's notice of appeal to Court of Appeals in Fred Gatewood v. SCDC Dock. No. 07-ALJ-04-00517-AP, dated Oct. 5, 2017. 8

Gatewood's petition for rehearing to Court of Appeals in Fred Gatewood v. SCDC Appellate Case No. 2017-002087, dated Oct. 27, 2017..... 40

Fee contract, dated September 14, 2004..... 78

The Supreme Court of South Carolina

Fred Gatewood, Respondent/Petitioner,

v.

South Carolina Department of Corrections,
Petitioner/Respondent.

Appellate Case No. 2016-001221
Lower Court Case No. 2007-ALJ-04-0517-AP

ORDER

Based on the vote of the Court, the petitions for a writ of certiorari to the court of appeals is denied.

FOR THE COURT

BY



CLERK

Columbia, South Carolina
May 30, 2007

cc:
Douglas H. Westbrook, Esquire
Lake Eric Summers, Esquire
The Honorable Jenny Abbott Kitchings
The Honorable Jana E. Shealy

The South Carolina Court of Appeals

Fred Gatewood #289775, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2017-002087

ORDER

The notice of appeal filed in this case indicates the appeal is taken from statements made by the Administrative Law Judge during a status conference on this case. Because the decision of the Administrative Law Judge is not a final decision, this appeal is dismissed as interlocutory. *See* S.C. Code Ann. § 14-3-330 (2016) (setting forth the categories of judgments from which an appeal may be taken); S.C. Code Ann. § 14-8-200(a) (2016) (defining the appellate jurisdiction of the Court of Appeals to include final decisions of an administrative law judge with the same scope of review as the Supreme Court would apply in a similar case). The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

 J.
FOR THE COURT

Columbia, South Carolina

FILED

October 17, 2017

cc:

Douglas H. Westbrook, Esquire
Lake Eric Summers, Esquire

The South Carolina Court of Appeals

Fred Gatewood #289775, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2017-002087

ORDER

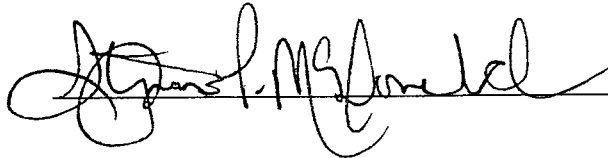
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing.¹ Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Douglas H. Westbrook, Esquire

Lake Eric Summers, Esquire

FILED

November 8, 2017

¹ Pursuant to section 1-23-610(A)(1) of the South Carolina Code (Supp. 2017), appeals are limited to final decisions of an administrative law judge.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734-1890
FAX (803) 734-1839
www.sccourts.org

June 02, 2017

The Honorable Jana E. Shealy
Edgar A. Brown Building
1205 Pendleton Street
Suite 224
Columbia SC 29201

REMITTITUR

Re: Fred Gatewood v. SCDC (2)
Lower Court Case No. 2007ALJ040517AP
Appellate Case No. 2014-001199

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Douglas H. Westbrook, Esquire
Lake Eric Summers, Esquire

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Fred Gatewood, #289775,
Appellant,
vs.
South Carolina Department of Corrections,
Respondent.

) Docket No. 07-ALJ-04-0517-A-AP
)
)
)
)
)
)
)
)
)
)

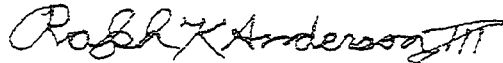
ORDER OF REMAND

This matter is before the South Carolina Administrative Law Court (Court or ALC) on remand from the South Carolina Court of Appeals (Court of Appeals). Fred Gatewood (Appellant) participated in prison industries, and his case was one of 197 consolidated cases regarding wages. The Court of Appeals reversed the ALC's conclusion that S.C. Code § 24-1-295 (2007) applied retroactively to inmate gross wages earned prior to August 1, 2007. In addition, the Court of Appeals remanded the issue of Appellant's entitlement to costs, attorney's fees, prejudgment interest, and post-judgement interest.

Because the determination of attorney's fees encompasses several factors, including the beneficial results obtained,¹ this matter shall be held in abeyance pending the outcome of the grievance hearings on the wage cases arising from both this case and *Ackerman, et al. v S.C. Dep't of Corr.*, 415 S.C. 412, 782 S.E.2d 757 (Ct. App. 2016), *cert. denied* (May 30 2017). Accordingly,

IT IS THEREFORE ORDERED that the grievance is remanded to the South Carolina Department of Corrections for processing as set forth in *Gatewood v. S.C. Dep't of Corr.*, 416 S.C. 304, 785 S.E. 2d 60 (2016), *cert. denied* (May 30, 2017).

AND IT IS SO ORDERED.



Ralph King Anderson, III
Chief Administrative Law Judge

June 13, 2017
Columbia, South Carolina

¹ See S.C. Code Ann. § 15-77-300 (B) (2016)

FILED

June 13, 2017

SC ADMIN. LAW COURT

3
7 6

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
E. Harvin Belser Fair
Judicial Law Clerk

June 13, 2017
Columbia, South Carolina

2 4

8

7

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Administrative Law Judge
Dock. No. 07-ALJ-04-00517-AP

Fred Gatewood..... Appellant,

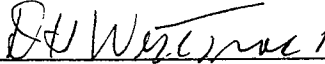
v.

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

NOTICE OF APPEAL

Fred Gatewood appeals the rulings of The Honorable Ralph K. Anderson, III at a hearing on September 7, 2017. Gatewood received a copy of the transcript of the hearing on or about September 27, 2017.

October 5, 2017.



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

Other Counsel of Record:

Lake E. Summers, Esquire
Malone, Thompson, Summers & Ott, LLC
339 Heyward St.
Suite 200
Columbia, SC 29201
(803) 254-3300
Attorney for Respondent
S.C. Department of Corrections

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 07-ALJ-04-0517-A-AP

Fredrick Gatewood,)
)
 Appellant,)
)
 v.)
)
 South Carolina Department of)
 Corrections,)
)
 Respondent.)
-----)

COPY

STATUS CONFERENCE

Thursday, September 7, 2017
10:03 a.m. - 10:34 a.m.

The Status Conference before the Honorable Ralph King Anderson, III was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 7th day of September, 2017 before Carla S. Dominick, Court Reporter and Notary Public in and for the State of South Carolina.



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

9 2

APPEARANCES

Douglas H. Westbrook, Esquire
ATTORNEY AT LAW
23 Broad Street
Charleston, South Carolina 29401
Attorney for the Appellant

Lake E. Summers, Esquire
MALONE THOMPSON SUMMERS AND OTT, LLC
339 Heyward Street, Suite 200
Columbia, South Carolina 29201
Attorney for the Respondent

Stephen H. Lunsford, Esquire
South Carolina Department of Corrections
Deputy General Counsel
4444 Broad River Road
Post Office Box 21787
Columbia, South Carolina 29221-1787
Attorney for the Respondent

INDEX

	<u>PAGE:</u>
Certificate	30

EXHIBITS

(There were no exhibits marked during this Status Conference.)

STIPULATIONS

It is stipulated and agreed that this Status Conference is being taken pursuant to the rules of the Administrative Law Court and the South Carolina Rules of Civil Procedure.



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

10.3

1 **THE COURT:** This is a Status Conference in the
2 matter of Fred Gatewood, Appellant versus South
3 Carolina Department of Corrections, Respondent.
4 The Docket Number is 07-ALJ-04-0517-A-AP and I
5 tell you what, I'll ask real quickly before I
6 go into anything else, what is the status of
7 this case right now?

8 **MR. SUMMERS:** Doug, if you want to go first, I'll go
9 after you, sir.

10 **MR. WESTBROOK:** Well, Your Honor, if it please the
11 Court, Doug Westbrook for inmates.

12 **THE COURT:** Go ahead.

13 **MR. WESTBROOK:** We -- we have presently before the
14 Court three motions. This isn't Gatewood.

15 **THE COURT:** Well, I know about those.

16 **MR. WESTBROOK:** And -- and ---

17 **THE COURT:** I'm talking about -- go ahead. At the --
18 - I was asking more about on the department
19 level.

20 **MR. WESTBROOK:** Oh, I'm sorry. I'm sorry.

21 **MR. SUMMERS:** And I didn't want to cut Mr. Westbrook
22 off. For the record, Your Honor, this is Lake
23 Summers on behalf of the Department of
24 Corrections. Mr. Westbrook, as he mentioned to
25 the Court a moment ago, had the three motions



1 that are pending with the Court. The Court
2 obviously issued its remand order, if my memory
3 serves accurately, June the 13th of this year.
4 Subsequent to the remand order, Mr. Westbrook
5 on June the 30th filed and served the three
6 motions he just mentioned. There are also, I
7 think, Mr. Westbrook still has a petition for
8 a hearing pending with the Court of Appeals.
9 Mr. Westbrook filed a petition for writ.

10 **THE COURT:** Well, if that's true, then I wouldn't be
11 hearing those motions anyway.

12 **MR. SUMMERS:** Yes, sir. I just wanted, for the sake
13 of the record, to -- maybe Mr. Westbrook has
14 more information than me, but I believe that
15 there might still be a petition for a rehearing
16 pending with the Court of Appeals. It may be
17 in Ackerman, not in Gatewood because obviously
18 ---

19 **THE COURT:** Okay.

20 **MR. SUMMERS:** --- you mentioned this morning,
21 Gatewood, as the Court recalls, Mr. Gatewood
22 ...

23 **THE COURT:** Yeah, we're here on Gatewood today.

24 **MR. SUMMERS:** Yes, sir. Yes, sir. No, Mr. Gatewood
25 is a participant in the Ackerman litigation.



1 He is, however, distinguished because Your
2 Honor found that he had -- when the parameters
3 were what they were, had timely filed his step
4 one grievance. Consequentially, as the Court
5 recalls and Mr. Westbrook recalls, the Court
6 made findings and recommendations and issued an
7 order on the merits of Mr. Gatewood's case.
8 That is why we are split, if you will, between
9 the Gatewood ---

10 **THE COURT:** Yeah, I had all that.

11 **MR. SUMMERS:** Yes, sir. So as far as activity
12 before on remand, we have been working on our
13 side towards looking at how the Court of
14 Appeals decision in Gatewood influences the --
15 or directs the calculation of back pay for Mr.
16 Gatewood. We have had some communication with
17 Mr. Westbrook in the form of correspondence,
18 but the potential of submitting Mr. Gatewood's
19 claims to mediation. I can certainly defer to
20 Mr. Westbrook and his perspective on that. The
21 Department feels it's right for mediation. Mr.
22 Westbrook, I believe, without speaking for him,
23 has a different perspective on it. We're
24 prepared to undertake activities on remand up
25 to and including issuing a new final decision,



1 but again, to the best of my recollection, I
2 think there may be and I just want to clarify
3 for the record, a petition for rehearing based
4 upon the Court of Appeals denial of Mr.
5 Westbrook's petition for writ of mandamus.
6 Again, that may be in Ackerman, not in
7 Gatewood, so ---

8 **THE COURT:** Okay.

9 **MR. SUMMERS:** Yes, sir. I apologize for digressing
10 a bit.

11 **THE COURT:** All right. Mr. Westbrook?

12 **MR. WESTBROOK:** Your Honor, the two remands have
13 been appealed to the Court of Appeals and both
14 of these are now pending on petition for
15 rehearing.

16 **THE COURT:** Okay.

17 **MR. WESTBROOK:** The mandamus petitions the -- as
18 you, I'm sure know, the Court of Appeals sent
19 back stating they no longer had jurisdiction of
20 the cases. So -- and that's both -- and -- and
21 I'm speaking of both Ackerman and Gatewood.
22 That is, I think, the present status of -- of
23 the matters.

24 **THE COURT:** And if you do a motion for rehearing on
25 both of those?



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

147

1 **MR. WESTBROOK:** Yes, sir, it's pending.

2 **THE COURT:** Then, I -- I don't have any jurisdiction
3 to issue any of the -- any orders in this case
4 right now anyway. I don't think. I mean,
5 you've made a -- you've take the position it's
6 a contested case. You wish to have a special
7 referee. I don't think I would even determine
8 that at this point. Do you have a position on
9 any of that? Is there anything that is left to
10 determine at this point in time?

11 **MR. WESTBROOK:** Judge, our -- our position in -- in
12 very to be -- to concisely state our position
13 is that each Court of Appeals remand order
14 should be and I implore this Court to carry out
15 those remands.

16 **THE COURT:** I -- I -- just -- I'm going to have to
17 humbly disagree with you. I don't even think
18 this -- the Court of Appeals can, even if it
19 was before this Court to do -- hear it as a
20 contested case, can do that because the
21 jurisdiction -- the only Court that can grant
22 -- create jurisdiction like that would be the
23 Supreme Court. Our Court has been granted only
24 appellate jurisdiction by the Supreme Court and
25 that jurisdiction has been affirmed through



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

158

1 legislation by the -- the -- by the General
2 Assembly. All right. So I cannot do what I do
3 not have the authority to do unless the Supreme
4 Court orders me to do it, but I say that. I
5 don't know if the Court of Appeals can do that
6 or not, but I'm not challenging them in any
7 way. It's just at this point in time, I'm
8 saying that -- that I would not do that because
9 I just think that would be an improper exercise
10 of my authority and I don't wish to head down
11 that path.

12 **MR. WESTBROOK:** Uh-huh. May I respond to that?

13 **THE COURT:** Yes, sir.

14 **MR. WESTBROOK:** I do think that we do have these
15 petitions for rehearing that are pending, but
16 our position as I have stated, Your Honor, is
17 that the remand orders of this Court to the
18 Department of Corrections are void because they
19 were outside this Court's jurisdiction to carry
20 out the Court of Appeals remand to this Court.

21 **THE COURT:** I'm just curious, was it ---

22 **MR. WESTBROOK:** And I -- and I ---

23 **THE COURT:** --- was it at all an argument before the
24 Court of Appeals as to what this Court's
25 jurisdiction is? I mean, did anybody ever take



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

16 9

1 the position that this Court has contested case
2 jurisdiction? Was that -- in other words, how
3 can -- how can anything that the Court of
4 Appeals have done in its -- in its remand order
5 be nothing but dictum as far as -- as any
6 pronouncement of what the Court's jurisdiction
7 is.

8 **MR. WESTBROOK:** No, Your Honor, to -- to -- to
9 answer your question very shortly, no,
10 jurisdiction not addressed, but in the remand,
11 the Court of Appeals gave this Court
12 jurisdiction to do -- in each case to
13 reconsider the grievances in the Ackerman case
14 and in the Gatewood case -- I'm sorry, to
15 consider the grievances in Ackerman and in
16 Gatewood to reconsider the attorney fees.

17 **THE COURT:** Well, what I'm asking ---

18 **MR. WESTBROOK:** That's where this Court's
19 jurisdiction comes from right now.

20 **THE COURT:** How can the Court in a remand order
21 where the jurisdiction of the Court has never
22 been addressed, create jurisdiction out of
23 whole cloth that never existed before and that
24 both the General Assembly and the Supreme Court
25 have stated otherwise?



1 **MR. WESTBROOK:** Muller v. Myrtle Beach, the Supreme
2 -- the Circuit Court, on remand, acquires
3 jurisdiction to enforce the judgment of the
4 Appellate Court and take any action consistent
5 ---

6 **THE COURT:** Yeah, I read ...

7 **MR. WESTBROOK:** --- with the Supreme Court.

8 **THE COURT:** I read that, but that was a Circuit
9 Court case. That was a case in which the
10 Circuit Court had jurisdiction.

11 **MR. WESTBROOK:** Well, Your Honor, ---

12 **THE COURT:** I mean, it had the subject matter
13 jurisdiction. When I keep saying jurisdiction,
14 I'm talking about subject matter. We don't
15 have contested case subject matter. We only
16 have Appellate case subject matter.

17 **MR. WESTBROOK:** Well, first of all, in -- in -- in
18 Justice Toal's 2016 edition of -- of the
19 Appellate Practice in South Carolina, they
20 mention in there, and I don't have the page
21 number from memory, but there are times when
22 this Court can have concurrent appellate and
23 contested case jurisdiction.

24 **THE COURT:** She -- she's very smart, Justice Toal,
25 and she is very correct on that and -- and as



1 a matter of fact, we can have both appellate
2 and contested jurisdiction with the same agency
3 and she is -- but if you go and read where she
4 got that from, she got that from the statutes.
5 For instance, the Department of Insurance, we
6 have both appellate and contested case
7 jurisdiction with that agency because
8 statutorily, there are instances in which we
9 hear some of an appellate and some of it
10 contested and so that's where she's making that
11 statement.

12 **MR. WESTBROOK:** Well, let's -- let's -- let's talk,
13 if I might, Ackerman and Gatewood, because
14 they're two different, procedurally,
15 situations. Ackerman, the Court has remanded
16 to this Court to consider grievances on the
17 merits, which is exactly what you have already
18 done in Gatewood.

19 **THE COURT:** I haven't considered -- I treated both
20 Gatewood and Ackerman as appellate cases.

21 **MR. WESTBROOK:** No, no, no, the -- it's been
22 remanded to this Court in Ackerman to consider
23 grievances on the merits and that's what our
24 position is that this Court should carry out.

25 **THE COURT:** Okay.



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

19 *te*

1 **MR. WESTBROOK:** Because the Court of Appeals has
2 ordered this Court to do that.

3 **THE COURT:** Now, if they ...

4 **MR. WESTBROOK:** In Gatewood, Your Honor, they have
5 ordered this Court in the remand order to
6 reconsider the question of attorney fees, which
7 is statutorily supposed to be handled ---

8 **THE COURT:** I ---

9 **MR. WESTBROOK:** --- in the lower Court.

10 **THE COURT:** --- well, I do intend to hear the
11 attorney's fees, but I -- I don't think I can
12 hear the attorney's fees until -- until there
13 is a determination made as to what -- what
14 actually the official results obtained and I
15 also -- I will tell you looking at this case
16 down the road because we're not going to get
17 anywhere on this today because the Appellate
18 Court's got jurisdiction to hear this now and
19 once you took the -- you took that action, I --
20 I'm removed from it anyway.

21 **MR. WESTBROOK:** Uh-huh.

22 **THE COURT:** So I would really just now discussing
23 this with you because I really want to
24 understand your position.

25 **MR. WESTBROOK:** Uh-huh.



1 **THE COURT:** But I think one of the major
2 considerations we're going to have down the
3 road in this case is the current 15-77-300 sets
4 forth that -- that in no instance shall the
5 Court grant attorney's fees greater than the
6 contingency fee arrangement and -- and honestly,
7 I think, I don't know what your position is,
8 Mr. Summers, but I think that I've researched
9 the case law and I -- I can give y'all a fair
10 amount of cases if you want down the road, but
11 -- in Kansas, North Carolina, Washington, New
12 York, they've all held that attorney's --
13 attorney fees is a remedial -- remedial action
14 by the -- by the General Assembly and obviously
15 if it's a remedial action by the General
16 Assembly, then -- then, actions taken regarding
17 those fees are retroactive, so that would make
18 15-77-300 retroactive and then I -- when I look
19 at 15-77-300, and I'm just talking. I haven't
20 heard your briefing on this and I'm going to
21 ask y'all both to brief it if you don't sell
22 it, but when I look at 15-77-300, even if I was
23 not to consider that provision about
24 contingency's fees, it would take me right back
25 to Layman as a good example of the six criteria



1 that I consider in determining attorney's fees,
2 one of which takes you right back to
3 contingency fee arrangements, which is number
4 six. So either way, I'm going to be
5 considering that provision and -- and I think
6 that would probably -- could solve everything
7 is I award you the contingency fees that you're
8 getting, the 40 percent on all these cases and
9 -- and hopefully that would be -- you'd be well
10 compensated, but I -- I mean, I don't know
11 because I don't know what the ultimate decision
12 of the amounts are going to be. But I just
13 think that's a -

14 **MR. WESTBROOK:** Well ...

15 **THE COURT:** --- looking at the statute that 15-77-
16 300 is a good way to resolve that issue down
17 the road.

18 **MR. WESTBROOK:** Your Honor, respectfully, if you
19 look at my brief ---

20 **THE COURT:** I've read it twice.

21 **MR. WESTBROOK:** --- on Gatewood, it -- it's a
22 lengthy one.

23 **THE COURT:** Yes, sir.

24 **MR. WESTBROOK:** And I apologize for that, but it's -

25 --



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

22 15

1 THE COURT: No, no, no.

2 MR. WESTBROOK: --- it's a lot of ground to cover.

3 THE COURT: I know.

4 MR. WESTBROOK: But, Your Honor, I am -- I -- I -- I
5 -- I -- I -- I don't say never. I've learned
6 because I've been wrong too many times, but I
7 feel very comfortable -- I've got about three
8 or four bases to say those amendments don't
9 apply in this case, but perhaps the most ---

10 THE COURT: What amendments?

11 MR. WESTBROOK: The -- the amendments to 15-77-300
12 in 2010.

13 THE COURT: Well, some of them I -- I ---

14 MR. WESTBROOK: And -- and ---

15 THE COURT: --- I was just talking about -- only
16 about the provision dealing with contingency
17 fee because the law is interesting on that is
18 if it -- if even if it's involving attorney's
19 fees, if it changes the subject matter aspect
20 of it, in other words, the right -- the right
21 to -- to attorney's fees and you -- I think you
22 pointed out that I can -- it is considered
23 remedial if it doesn't effect and one of the
24 things is vested contract and so we can't
25 effect your vested contract concerning



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

23 #6

1 contingency fee.

2 **MR. WESTBROOK:** Precise -- precisely.

3 **THE COURT:** Well, I'm agreeing with all of that.
4 What I'm saying is that you had a vested
5 contract regarding contingency fee. I would
6 not step on that in any way, but the
7 compilation of those fees is a remedial aspect
8 that I can take into account.

9 **MR. WESTBROOK:** Your Honor -- Your Honor, my
10 contract expressly -- it doesn't have to
11 expressly mention it, but it expressly mentions
12 15-77-300. The contract is dated September 14,
13 2004. The law is very clear in the Wilkinson
14 Case in the Court of Appeals and -- and -- and
15 -- and -- and the Catawba Indian's Case in the
16 Supreme Court that the law in effect at the
17 time of a contract ---

18 **THE COURT:** Well, I ---

19 **MR. WESTBROOK:** --- governs that contract. That ---

20 **THE COURT:** Well, I think contingency ---

21 **MR. WESTBROOK:** --- means the 1985 version is what
22 is applicable here.

23 **THE COURT:** Even if I consider that version, I would
24 go back and consider the six criteria under
25 Layman that -- that the Court set forth that I



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

24 17

1 consider and which includes ---

2 **MR. WESTBROOK:** The Court ---

3 **THE COURT:** --- contingency here.

4 **MR. WESTBROOK:** --- but the Court, Your Honor, only
5 considers the -- the -- the -- those factors in
6 -- in -- in -- in -- in enhancing the fee, not
7 on the lodestar. The only -- Judge -- Judge,
8 please.

9 **THE COURT:** Well, I'm very familiar with this
10 hearing.

11 **MR. WESTBROOK:** I -- I -- I -- I know you are, but -
12 - but Judge, unfortunately, I'm more familiar
13 than I ever wanted to be. The only -- the
14 criteria, the only things for the lodestar are
15 the -- the -- the -- the -- the -- the hours
16 times the -- the fee, per hourly fee. The
17 factors are considered to enhance the lodestar
18 if you find a lodestar ---

19 **THE COURT:** Yeah ...

20 **MR. WESTBROOK:** --- but not to figure the lodestar
21 itself.

22 **THE COURT:** Well, you're talking -- there -- you
23 first consider the attorney's fees, then
24 afterward you consider the lodestar.

25 **MR. WESTBROOK:** You're -- whether under the -- the



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

25 19

1 three factors ---

2 **THE COURT:** What I'm saying is to get to the
3 attorney's fees, you consider the six factors,
4 which includes the contingency of compensation
5 and then you would make a determination where
6 you believe that there is a necessity to
7 consider a lodestar based on evaluation of the
8 case.

9 **MR. WESTBROOK:** Your Honor, respectfully, the
10 lodestar is -- is calculated first.

11 **THE COURT:** Well, I'll go back ---

12 **MR. WESTBROOK:** --- and then ---

13 **THE COURT:** --- and look at that.

14 **MR. WESTBROOK:** --- and then ...

15 **THE COURT:** I didn't read that.

16 **MR. WESTBROOK:** Yes, sir. The lodestar is
17 calculated first, then the -- the Court
18 considers whether to enhance the lodestar. You
19 can't enhance something that doesn't exist yet.

20 **THE COURT:** Right. Well, can I stop you. Mr.
21 Summers, it was my understanding that the
22 lodestar is the enhancement.

23 **MR. WESTBROOK:** No.

24 **MR. SUMMERS:** With respect to Mr. Westbrook, I -- I
25 -- that would be my and the Department's



1 assessment as well.

2 **THE COURT:** Okay.

3 **MR. SUMMERS:** But this is not an area ---

4 **THE COURT:** I just wanted to ---

5 **MR. SUMMERS:** --- that we've briefed extensively in
6 this matter.

7 **THE COURT:** Okay. Well, even ---

8 **MR. SUMMERS:** But my -- my general understanding if
9 -- and I'll call it general, is what the Court
10 has been articulating to Mr. Westbrook.

11 **THE COURT:** And you know I'm just tell -- I want to
12 be right on this.

13 **MR. SUMMERS:** Yes, sir.

14 **THE COURT:** You're not just telling me that because
15 that's your position.

16 **MR. SUMMERS:** Oh, no.

17 **THE COURT:** I want ---

18 **MR. SUMMERS:** That is what my initial assessment
19 was. Ultimately, Mr. Westbrook obviously is
20 articulating his position.

21 **THE COURT:** Yeah.

22 **MR. SUMMERS:** And he briefed it, I think,
23 extensively in the materials.

24 **THE COURT:** Okay. Well, I'll address it down the
25 road, but what I was trying to explain to all



1 of y'all is I'm going to give, I think, the
2 contingency compensation is going to be a
3 consideration. We'll find out if you have a
4 different position on that. I thought maybe I
5 had a good compromise for y'all, but apparently
6 I don't. So that's what I ---

7 **MR. WESTBROOK:** Judge, I mean, it's all in my memo.

8 **THE COURT:** Yeah.

9 **MR. WESTBROOK:** It's all in the memo.

10 **THE COURT:** Okay.

11 **MR. WESTBROOK:** And if you read Layman it -- it --
12 it's Layman ...

13 **THE COURT:** I think you may also want to consider
14 it's Duvall. I don't have the cite right off,
15 but even if I go back and consider -- if we
16 take the position that -- that I don't find
17 that it's retro -- retroactive and I consider
18 the -- the statute in 2009 and later but I
19 think in 2010 is when it changed, I still would
20 have to make a determination of the meaning of
21 that statute and I think it's called Duvall.
22 That is a case in which in interpreting a
23 statute, the -- it's Duvall v. South Carolina
24 Budget Control Board. Basically, it says that
25 a change to the statute may be considered a



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

28 21

1 change to existing law and you consider the
2 existing law and the subsequent change to make
3 that determination or it could be clarifying
4 original legislative intent. In other words,
5 in interpreting the 2010 version of the
6 statute, I could -- reading that -- that most
7 current version, I could read that version as
8 clarifying what 15 -- 15-77-300 originally
9 intended, so I'm just letting you know that,
10 that's a way of interpreting ---

11 **MR. WESTBROOK:** Your Honor, you have constitutional
12 -- that's a due process clear violation to --
13 to -- to apply a statute to divest vested
14 rights.

15 **THE COURT:** Well, I agree with you on that.

16 **MR. WESTBROOK:** I've briefed -- what you -- you
17 can't apply the new statute because -- because
18 the contract is made per the old statute and if
19 you use the new statute to uproot the old, it's
20 a violation of due process. That's very clear.

21 **THE COURT:** So you're saying that you can draft a
22 contract to -- to give you vested rights into
23 what statute or the -- or the interpretation of
24 a statute. Is that what you're saying?

25 **MR. WESTBROOK:** I'm saying that a contract -- if a



1 statute applies to a contract and not even have
2 to be written in the contract, which is what
3 this is, it's written in it.

4 **THE COURT:** Yeah.

5 **MR. WESTBROOK:** But even if it's applicable, our
6 cases say that -- that you can't come along
7 later and amend that statute. That's an
8 impairment of contract and it also divests
9 those vested interests that the -- the signees
10 of that contract have to enforce that contract
11 and -- and you can't -- you can't do that and
12 so you've got impairment of contract.

13 **THE COURT:** Well, how in the -- how would -- if the
14 -- if we did a shifting because maybe you're
15 missing the point. I -- I think you really
16 are.

17 **MR. WESTBROOK:** It's possible, Judge.

18 **THE COURT:** Yeah, is what 15-77-300 deals with is it
19 takes us and Layman interpreted it, it takes
20 us from the American Rules and shifts the
21 requirement to pay the attorney's fees, so the
22 individuals -- the inmates would not be harmed
23 in any way by the shift because they would get
24 all of the -- they would get all the
25 compensation that they were due under -- and we



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

30 23

1 -- we even have to go -- let me go down that
2 and then I'll tell you, but so the only issue
3 is it shifts to the Department to pay the --
4 pay the appropriate attorney's fees. Now under
5 the current version of 15-77-300, that shift
6 when it occurs limits the -- the agency from
7 having to pay it -- attorney's fees in any
8 amount greater than the original contingency of
9 compensation or what was appropriate
10 contingency compensation. But so I'm not
11 talking about eliminating the -- the inmates
12 from receiving compensation. We're just
13 dealing with the calculation thereof, but I --
14 what I wanted to tell you was, even before I
15 get there, we've got to determine, number one,
16 whether -- because there -- there's been
17 divergency in this view in this area and -- and
18 what I'm about to discuss in this Court as to
19 whether any action in the Administrative Law
20 Court is a civil action, so because 15-77-300
21 only applies to civil actions. None of y'all
22 have briefed that issue, but clearly under, I
23 think it's McDowell. I'd have to go back and
24 look at that. Anything that happens at the
25 agency level is not considered a civil action.



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

31 74

1 The only Court that has ever interpreted
2 anything regarding the APA action to be a civil
3 action involved litigation in the Court of --
4 in the Circuit Court and -- and I won't get
5 into what this time about all that, but I've
6 got to make a determination of whether it's a
7 civil action. I've got to look at the
8 substantial -- whether it was a substantial
9 justification. I will tell you from -- from
10 Ackerman standpoint that's going to make your
11 -- your sledding pretty difficult because
12 Ackerman said it was all arbitrarily increased.
13 Now that holding wasn't in this case.

14 **MR. SUMMERS:** Correct, sir. But we're aware of the
15 language that the Court just referenced.

16 **THE COURT:** Okay. But then -- then I've got to go
17 through the time sheets and make determinations
18 in -- at least in this case of the application
19 of those time sheets to this case. I've got to
20 make a contingency fee because consideration
21 about the implications of that, then after all
22 of that I've got to make a calculation of which
23 one of the -- one of the considerations is, you
24 know, the beneficial results obtained and --
25 and I've got to make that analysis. So I'm



1 just telling you that those are all analyses
2 I've got to make once I get jurisdiction of
3 this case down the road. So that's one of the
4 things I just wanted to explain to y'all.

5 **MR. WESTBROOK:** May I speak to one of those points
6 you made?

7 **THE COURT:** Yes, well, I -- I don't want to address
8 them quite yet. You can if you want, but I'm
9 just -- I was just telling y'all both some
10 considerations -- this is a status conference
11 ---

12 **MR. WESTBROOK:** Yes, sir.

13 **THE COURT:** --- and I'm trying to let you know ---

14 **MR. WESTBROOK:** Yes, sir.

15 **THE COURT:** --- the status of the case.

16 **MR. WESTBROOK:** You mentioned -- I believe you
17 mentioned, correct me if I'm wrong, that we
18 didn't address the civil action issue. In the
19 Ackerman -- Gatewood, you see, is not -- it's
20 not addressed in that because the -- the
21 petition for attorney fees in Gatewood, which
22 we now have presently, only goes back through
23 -- it doesn't go back to the Department because
24 Gatewood here ---

25 **THE COURT:** But ...



1 MR. WESTBROOK: --- only starts in 2012 after the
2 Department ---

3 THE COURT: I -- I recognize that but ...

4 MR. WESTBROOK: It will be addressed in the Ackerman
5 brief when I file that.

6 THE COURT: But even the litigation that occurred
7 here, there is a question of law as to whether
8 or not the litigation that occurs at the
9 Administrative Law Court is a civil action.

10 MR. WESTBROOK: No, Judge, McDowell they said the
11 Circuit Court, Judicial Review Court, in that
12 case the Circuit Court, it was a Circuit Court,
13 it was a civil action.

14 THE COURT: I'll just tell you that, that's an issue
15 that's got to be addressed.

16 MR. WESTBROOK: Well, sure, anything can be an
17 issue, but it's clear that -- that ---

18 THE COURT: We've got ---

19 MR. WESTBROOK: --- this is ...

20 THE COURT: --- we've got Judges of our Court who
21 have held that actions in our Court are not a
22 civil action, so you may ---

23 MR. WESTBROOK: It's -

24 THE COURT: --- disagree with them, but ---

25 MR. WESTBROOK: This is judicial review and that's



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

34 27

1 what the Court in McDowell said enabled Mrs.
2 McDowell to take the case up because it was a
3 judicial review ---

4 **THE COURT:** I -- I understand.

5 **MR. WESTBROOK:** --- matter.

6 **THE COURT:** I read that case. So, but I'm just
7 saying I've got to make that determination.

8 **MR. WESTBROOK:** I know. But, to me the ...

9 **THE COURT:** There -- there's a dispute in my Court
10 about that.

11 **MR. WESTBROOK:** Well, you had -- do -- does the
12 Court have any cases ---

13 **THE COURT:** Well, we have this ---

14 **MR. WESTBROOK:** --- that have been litigated in the
15 Appellate Courts on that?

16 **THE COURT:** No, that's what I'm saying, there --
17 that I've got at least one Judge who is now a
18 Federal Judge, who took the position that it's
19 not a civil action in this case, but ---

20 **MR. WESTBROOK:** Was it on judicial review from an
21 agency?

22 **THE COURT:** Well, it's either a contested case or
23 appellate case. I think it was contested case.

24 **MR. WESTBROOK:** See, that was not judicial review
25 then.



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

35 28

1 **THE COURT:** I recognize and you can make that
2 argument, I'm just telling you that's something
3 I have to consider, Mr. Westbrook.

4 **MR. WESTBROOK:** Well, it's not just an argument,
5 it's what McDowell said enabled her to have
6 review -- because it was the Judicial Review
7 Court that enabled her to do it.

8 **THE COURT:** I'll consider -- I'm just telling -- all
9 I'm telling you it's an issue that I have to
10 decide in the case.

11 **MR. WESTBROOK:** Yes, sir.

12 **THE COURT:** I was trying to let y'all know the
13 status is these are the issues that I have to
14 decide. I wasn't trying to create an argument
15 or -- or raise anybody's blood pressure. So --
16 but -- it's something that I need to address
17 because that -- 15-77-300 brings it up. All
18 right. So with that, I now know the status of
19 the case. Is there anything else we need to
20 consider because I won't address this or do
21 anything today, anyway?

22 **MR. SUMMERS:** I believe that is accurate, Your
23 Honor, based upon the current status of the
24 petitions for a hearing from the orders issued
25 by the Court of Appeals in both Ackerman and



1 Gatewood, which dismissed Mr. Westbrook's
2 appeals. Those are still pending, those
3 petitions for rehearing are still pending ---

4 **THE COURT:** So ...

5 **MR. SUMMERS:** --- and therefore, the Court's
6 assessment is accurate.

7 **THE COURT:** All right. Thank y'all for your time.

8 **MR. WESTBROOK:** Thank you, Your Honor.

9 **MR. SUMMERS:** Thank you, Judge. Good to see you,
10 sir.

11 **THE COURT:** All right.

12 **(There being nothing further, the Status Conference**
13 **concluded at 10:34 a.m.)**

14

15

16

17

18

19

20

21

22

23

24

25



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

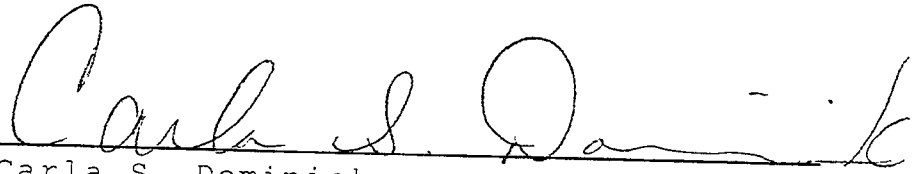
37 30

CERTIFICATE

This is to certify that the within Status Conference consisting of twenty nine (29) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said Status Conference was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on September 25, 2017.



Carla S. Dominick
Court Reporter

Notary Public for South Carolina
My Commission Expires: 3/13/2022



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

38 3T

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Fred Gatewood..... Appellant,

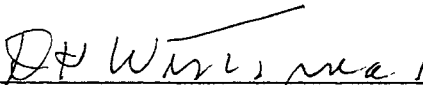
v.

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

PROOF OF SERVICE

I certify that I have served Appellant's Notice of Appeal and the Administrative Law Court's hearing transcript of September 7, 2017 on The Honorable Ralph K. Anderson, III and the S.C. Department of Corrections, by depositing copies of these documents in the U.S. Mail, postage prepaid, on October 5, 2017, addressed to: The Honorable Ralph K. Anderson, III, Chief Judge, S.C. Administrative Law Court, Edgar A. Brown Building, Suite 224, 1205 Pendleton St., Columbia, SC 29201; and Lake Summers, Esquire, Malone, Thompson, Summers & Ott, LLC, 339 Heyward St., Suite 200, Columbia, SC 29201, attorney of record for Respondent S.C. Department of Corrections.

October 5, 2017.


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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Fred Gatewood, #289775..... Appellant,

v.

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

Appellate Case No. 2017-002087

PETITION FOR REHEARING

Fred Gatewood submits his Petition for Rehearing in this case, contending the Court of Appeals overlooked or misapprehended the following points in its October 17, 2017 dismissal of the appeal.

1. S.C. Code §1-23-610(A)(1) applies where a party seeks review of an ALC final decision.

2. Charlotte-Mecklenburg Hosp. v. DHEC relied on Mid-State Distributors, Inc. v. Century Importers, Inc. and Good v. Hartford Accident & Indem. Co. to explain the meaning of "finality", which should be applied to the ALC rulings.

3. The ALC ruling that it did not have to carry out the Court of Appeals' remand may cause inmate(s) to lose the right to have the ALC consider the issue specified in the remand, which is a distinct branch of the case, and thus the ALC ruling is "final" for purposes of appealability.

4. The ALC ruling that it did not have contested case jurisdiction may cause inmate(s) to lose the right to have the ALC consider the issue specified in the remand from the Court of Appeals, which is a distinct branch of the case, and thus the ALC ruling is "final" for purposes of appealability.

5. The ALC ruling that it did not have jurisdiction because of the pending appeal to the Court of Appeals of the ALC June 13, 2017 remand to SCDC may cause inmate(s) to lose the right to have the ALC consider the issue specified in the Court of Appeals' remand, which is a distinct branch of the case, and thus the ALC ruling is "final" for purposes of appealability.

6. The ALC ruling that it could not hear attorney's fees until there is a determination (by SCDC) as to the "official results obtained", would cause a loss of the due process right to have an impartial adjudicator calculate back wages, could effectively dispose of the back wage calculations phase of the case, and eliminate or prejudice the claim for back wages, and thus the ALC ruling is "final" for purposes of appealability.

7. The ALC ruling that it would not at this point determine the motion for

appointment of a Special Referee may cause a loss of the right to have the ALC consider the issue specified in the Court of Appeals' remand, which is a distinct branch of the case, and thus the ALC ruling is "final" for purposes of appealability.

8. The ALC ruling that counsel had a "vested contract" to a contingent fee did not state that inmate(s) also acquired vested rights, or that those rights included the §15-77-300 fee, which may effectively dispose of the attorney fee branch of the case and/or prejudice the right to pursue the attorney fee claim under §15-77-300, and thus the ALC ruling is "final" for purposes of appealability.

9. The ALC ruling that attorney fee petitions are remedial and the current version of §15-77-300 can be applied retroactively would operate to nullify or substantially prejudice the vested fee contract rights to have the original 1985 version of §15-77-300 apply, and thus the ALC ruling is "final" for purposes of appealability.

10. The ALC ruling that, even if §15-77-300, 2010 version, is not retroactive, the ALC can still use it to "clarify" what §15-77-300 originally intended would cause the vested fee contract rights to have the 1985 version of §15-77-300 apply to be lost, and thus the ALC ruling is "final" for purposes of appealability.

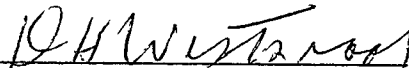
11. The ALC ruling that under the current version of §15-77-300 the Court cannot grant attorney fees greater than the contingent fee would cause the vested fee contract rights to have the original version of §15-77-300 apply, to be lost, and thus the ALC ruling is "final" for purposes of appealability.

12. The ALC ruling that you determine attorney fees by considering the 6

(common law) factors, and then if necessary, consider the lodestar; and the ruling that the lodestar is the enhancement; would result in miscalculation of attorney fees and divest the right under Layman to claim attorney fees as therein determined, and thus the ALC ruling is "final" for purposes of appealability.

13. The ALC ruling that there is a question of law as to whether or not litigation in the ALC is a "civil action" under §15-77-300 would prevent an attorney fee claim for the ALC litigation, and thus the ALC ruling is "final" for purposes of appealability assuming the ALC decides it is not a civil action.

Respectfully submitted,



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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Fred Gatewood, #289775..... Appellant,

v.

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

Appellate Case No. 2017-002087

MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING

This appeal was filed on October 5, 2017. The parties did not brief the appeal before the Court of Appeals issued its order dismissing the appeal on October 17, 2017. The Court dismissed the appeal as interlocutory, citing S.C. Code Ann. §14-3-330 (2016) (Setting forth the categories of judgments from which an appeal may be taken); and S.C. Code Ann. §14-8-200(a) (2016) (Defining the appellate jurisdiction of the Court of Appeals to include **final** decisions of an administrative law judge with the same scope of review as the Supreme Court would apply in a similar case).

Pursuant to SCACR 221(a), Gatewood* contends the Court of Appeals' order overlooked or misapprehended the following points.

1. S.C. Code §1-23-610(A)(1) applies in cases where a party seeks to obtain review of an ALC final decision (Charlotte-Mecklenburg Hosp. v. DHEC 387 S.C. 265, 266, 692 S.E. 2d 894 (S.C., 2010)).

2. In Charlotte-Mecklenburg Hosp., 387 S.C. at 267, the Court relied on two cases, among others, to explain the meaning of "finality": Mid-State Distributors, Inc. v. Century Importers, Inc. 310 S.C. 330, 426 S.E. 2d 777, 780-781 (S.C., 1993) (Regarding issue of appealability of denial of motion to dismiss for lack of personal jurisdiction, held, there is no finality in the denial, and defendant can still show lack of personal jurisdiction at trial); and Good v. Hartford Accident & Indem. Co. 201 S.C. 32, 21 S.E. 2d 209, 212 (S.C., 1942) (Regarding issue of appealability of trial court's rulings, the Court approved principles that a final order or decree must dispose of the cause, or a distinct branch thereof, or operate to divest some right in such a manner as

* "Gatewood" refers to Fred Gatewood in this Appellate Case No. 2017-002087.

to put it out of court).

3. The ALC believed it did not have to carry out the Court of Appeals' remand* because the ALC only has appellate jurisdiction and the Court of Appeals' remand is dictum (Sept. 7, 2017 transcript with notice of appeal, pp. 7-9).

Gatewood contends the ALC has jurisdiction and is duty bound to carry out the Court of Appeals' remand order (Muller v. Myrtle Beach Golf & Yacht Club 313 S.C. 412, 414-415, 438 S.E. 2d 248 (S.C., 1993) (Once remittitur is sent down from Supreme Court, Circuit Court "acquires jurisdiction" to enforce the judgment, and is "vested with jurisdiction" to determine attorney fees); Prince v. Beaufort Mem. Hosp. 392 S.C. 599, 709 S.E. 2d 122, 125 (S.C. App., 2011) (Appellate court's mandate is "jurisdictional", and trial court has duty to follow appellate court's directions); SCDSS v. Basnight 346 S.C. 241, 250-251, 551 S.E. 2d 274, 279 (S.C. App., 2001); and Ackerman v. McMillan 324 S.C. 440, 443, 477 S.E. 2d 267, 268 (S.C. App., 1996)).

On June 13, 2017, the ALC remanded this case back to SCDC (remand attached). Now, the ALC believes it does not have jurisdiction to carry out the Court of Appeals' remand.

Gatewood submits the Court of Appeals overlooked the point that the ALC ruling may cause Gatewood to lose the right to have the ALC consider the issue specified in the Court of Appeals' remand, which is a distinct branch of this case (Mid-State Distributors, Inc. v. Century Importers, Inc.; Good v. Hartford

* The remand in Gatewood required the ALC to reconsider Gatewood's "...entitlement to costs, attorney's fees, pre-judgment interest, and post-judgment interest..in light of this opinion" (Gatewood v. SCDC 416 S.C. 304, 785 S.E. 2d 600, 613 (S.C. App., 2016)).

Accident & Indem. Co.). Thus, Gatewood submits the ALC ruling is "final" for purposes of appealability.

4. The ALC stated it did not have contested case, but only appellate jurisdiction (Sept. 7, 2017 transcript, p. 10).

Gatewood contends the ALC has appellate and contested case jurisdiction (ALC Rule 2(E) ("Contested case" means a hearing required by due process); ALC Rule 51 (Jurisdiction for Special Appeals is based on Al-Shabazz v. State 338 S.C. 354, 527 S.E. 2d 742, 750 (S.C., 2000) (Due process requirements apply to interests within the Fourteenth Amendment's protection of liberty and property); Wicker v. SCDC 360 S.C. 421, 602 S.E. 2d 56, 58 (S.C., 2004) (Prevailing wage statute creates interest protected by Fourteenth Amendment which cannot be denied without due process, and these cases are reviewable by the ALC); J. Toal, Appellate Practice in South Carolina, 3d Ed., 2016, p. 74) (ALC can have both contested case and appellate jurisdiction).

Gatewood submits the Court of Appeals overlooked the point that the ALC ruling may cause Gatewood to lose the right to have the ALC consider the issue specified in the Court of Appeals' remand, which is a distinct branch of this case (Mid-State Distributors, Inc. v. Century Importers, Inc.; Good v. Hartford Accident & Indem. Co.). Thus, Gatewood submits the ALC ruling is "final" for purposes of appealability.

5. The ALC stated it did not have jurisdiction because of the pending appeal to the Court of Appeals of the ALC's June 13, 2017 remand to SCDC (Sept. 7, 2017 transcript, pp. 4, 7, 12, 24-25).

Gatewood contends the ALC retains jurisdiction notwithstanding the appeal of the ALC remand (Jackson v. Speed 326 S.C. 289, 486 S.E. 2d 750, 761 (S.C.,

1997) (Notice of appeal divests lower court of jurisdiction only of the order being appealed); SCACR 205 (After notice of appeal, lower court retains jurisdiction over matters not affected by the appeal); Jackson v. Speed, 486 S.E. 2d at 761 (Jurisdiction retained for attorney fees); Wayne Smith Const. Co., Inc. v. Wolman, Duberstein & Thompson 294 S.C. 140, 149, 363 S.E. 2d 115, 120 (S.C. App., 1987) (Jurisdiction retained for attorney fees); Parker v. Shecut 340 S.C. 460, 492-493, 531 S.E. 2d 546 (S.C. App., 2000) (Jurisdiction retained for contract damages); Grosshuesch v. Cramer 377 S.C. 12, 659 S.E. 2d 112, 122 n. 7 (S.C., 2008) (Different subject matters in lower court and on appeal).

Gatewood submits the Court of Appeals overlooked the point that the ALC ruling may cause Gatewood to lose the right to have the ALC consider the issue specified in the Court of Appeals' remand, which is a distinct branch of this case (Mid-State Distributors, Inc. v. Century Importers, Inc.; Good v. Hartford Accident & Indem. Co.). Thus, Gatewood submits the ALC ruling is "final" for purposes of appealability.

6. The ALC stated he did not think he could hear attorney's fees until there is a determination as to the "official results obtained" (Sept. 7, 2017 transcript, p. 12). The ALC's June 13, 2017 Gatewood remand, attached, was for SCDC to determine the "beneficial results obtained", presumably meaning back wage calculations.

Gatewood contends due process requires that an impartial adjudicator determine the "beneficial results obtained" (Due process clause of the South Carolina and United States Constitutions; Art. I, Section 22 of the South Carolina Constitution; Ross v. MUSC 492 S.C. 62, 72 (S.C., 1997) (Due process in administrative matters requires impartial adjudicator); Al Shabazz v. State, 527 S.E.

2d at 750, 753; J. Toal, Appellate Practice in South Carolina, 3d Ed., 2016, pp. 66-67).

Further, due process would exclude SCDC as a back wage adjudicator, since it would be a conflict of interest for SCDC to determine its own damages, and SCDC has developed a "will to win" over the course of 13 years contesting liability in these cases (Ross v. MUSC 492 S.C. at 72) ("Will to win" demonstrates partiality by an administrative adjudicator).

Gatewood submits that the Court of Appeals overlooked the point that the due process right to have an impartial adjudicator calculate back wages would be lost if SCDC performed that task (Good v. Hartford Accident & Indem. Co.). Moreover, given SCDC's "will to win" and partiality, the ALC's ruling and remand to SCDC may effectively dispose of the back wage calculations phase of the case, and eliminate or prejudice the claim for back wages (Mid-State Distributors, Inc. v. Century Importers, Inc.; Good v. Hartford Accident & Indem. Co.). Thus, Gatewood submits the ALC ruling was "final" for purposes of appealability.

7. The ALC stated it would not at this point determine the motion for appointment of a Special Referee (Sept. 7, 2017 transcript, p. 7).

Gatewood contends the ALC, or a Special Referee, should calculate back wages, interest, attorney fees, and other matters (Layman, et al. v. State of South Carolina, et al. 376 S.C. 434, 658 S.E. 2d 320, 324, 333-335 (S.C., 2008) (Supreme Court remanded attorney fees request to the Circuit Court to determine entitlement to attorney fees under §15-77-300, with the amount of such fees to be based in part on "the benefit obtained" and other factors to enhance the lodestar with a multiplier). See also, S.C. Code §14-11-60, SCRPC 53(b), and

ALC Rule 68, which Gatewood contends allow for appointment of a Special Referee in this case. See motion, attached hereto.

Gatewood submits the Court of Appeals overlooked the point that Gatewood may lose the right to have the ALC consider the issue specified in the Court of Appeals' remand, which is a distinct branch of this case (Mid-State Distributors, Inc. v. Century Importers, Inc.; Good v. Hartford Accident & Indem. Co.). Thus, Gatewood submits the ALC ruling is "final" for purposes of appealability.

8. The ALC stated that counsel had a "vested contract" to a contingent fee (Sept. 7, 2017 transcript, pp. 15-16).

Gatewood contends that counsel and all inmates who signed the 2004 fee contract (attached) acquired vested contract rights, entitling them to the \$15-77-300 (original 1985 version) fee, or the 40% contingent fee, whichever is greater (Sept. 14, 2004 fee contract, containing two methods of fee calculation, \$15-77-300 and contingent fee; Vested contract rights: 16B Am Jur 2d (2009), Const. Law, §747; 16A C.J.S. (2015), Const. Law, §472; Black's Law Dict., Rev. Fourth Ed., p. 1735; United States Trust Co. of New York v. New Jersey 431 U.S. 1, 97 S. Ct. 1505, 1515 note 14; 1516 note 17; Catawba Indian Tribe of South Carolina v. South Carolina 372 S.C. 519, 642 S.E. 2d 751, 756 (S.C., 2007); Wilkinson ex rel Wilkinson v. Palmetto State Transp, Co. 638 S.E. 2d 109, 116 (S.C. App., 2006); First of America Bank v. Netsch 651 N.E. 2d 1105, 1113 (Ill., 1995); Entitlement to greater of \$15-77-300 fee or contingent fee: Albunio, et al. v. City of New York, et al. 11 N.E. 3d 1104, 1108-1110 (Ct. of App. N.Y., 2014)).

Gatewood submits the Court of Appeals overlooked the points that the ALC ruling did not state that Gatewood also acquired vested rights, or that those

rights included the §15-77-300 fee as well. This may effectively dispose of the attorney fee branch of the case, and/or prejudice the right to pursue the attorney fee claim under §15-77-300 (Mid-State Distributors, Inc. v. Century Importers, Inc.; Good v. Hartford Accident & Indem. Co.). Thus, Gatewood submits the ALC ruling is "final" for purposes of appealability.

9. The ALC stated attorney fee petitions are remedial, and §15-77-300, current version, can be applied retroactively (Sept. 7, 2017 transcript, pp. 13, 15-16).

Gatewood contends the original 1985 version of §15-77-300 applies, per the 2004 fee contract, and the current version does not apply and is not remedial. First, the current version would violate the presumption against retroactive application of statutes (Kirven v. Central States Health & Life 409 S.C. 30, 760 S.E. 2d 794, 799 (S.C., 2014)). It would also materially limit the vested contract rights under the 2004 fee contract (Edwards v. SLED 395 S.C. 571, 720 S.E. 2d 462, 466-467 (S.C., 2011); Fernandez-Vargas v. Gonzales 548 U.S. 30, 126 S. Ct. 2422, 2428 (2006); and First of America Bank v. Netsch, 651 N.E. 2d at 1113).

Moreover, the 2010 amendments to §15-77-300 are not remedial because they create no new remedy (Edwards v. SLED, 720 S.E. 2d at 466); and they create a different fee liability for the agency than under original §15-77-300 (Carolina Chemicals, Inc. v. SCDHEC 351 S.E. 2d 575, 578-579 (S.C. App., 1986)).

The current version of §15-77-300 would also materially alter and divest vested fee contract rights, which are "property" under the Constitution, and thus violate due process (United States Trust Co. of New York v. New Jersey, 97 S. Ct. at 1516 note 16; Coombes v. Getz 285 U.S. 434, 52 S. Ct. 435, 438

(1932); and Jefferson Disposal Co. v. Jefferson Parrish 603 F. Supp. 1125, 1136 (ED La., 1985)).

The current version of §15-77-300 would also substantially impair the fee contract by altering the reasonable expectations of the contract parties (Kirven, 760 S.E. 2d at 800), since the parties are presumed to have adopted the fee contract terms in reliance on the original version of §15-77-300 to govern a later fee petition (United States Trust Co. of New York v. New Jersey, 97 S. Ct. at 1515 note 14, 1516 note 17).

In addition, the current version of §15-77-300 would also materially alter the fee contract terms (Harleysville Mut. Inc. Co. v. South Carolina 401 S.C. 15, 736 S.E. 2d 651, 658 (S.C., 2012); and the rights and obligations of the contract parties, and legal effect of the contract (Superior Motors, Inc. v. Winnebago Ind., Inc. 359 F. Supp. 773, 777 (D.S.C., 1973)).

Finally, application of the 2010 amendments to §15-77-300 would breach a legislatively-created contract in original §15-77-300 (United States Trust Co. of New York v. New Jersey, 97 S. Ct. at 1515 note 14; Layman, et al. v. State of South Carolina, et al. 368 S.C. 631, 630 S.E. 2d 265, 268 (S.C., 2006)).

Gatewood submits the Court of Appeals overlooked the point that the ALC ruling would operate to nullify or substantially prejudice the vested fee contract rights to have the 1985 version of §15-77-300 apply (Mid-State Distributors, Inc. v. Century Importers, Inc.; Good v. Hartford Accident & Indem. Co.). Thus, Gatewood submits the ALC ruling is "final" for purposes of appealability.

10. The ALC stated, even if §15-77-300, 2010 version, is not retroactive, the ALC can still use it to "clarify" what §15-77-300 "originally intended", based on Duvall v. State Budget & Control Board 377 S.C. 36, 659 S.E. 2d 125,

130 (S.C., 2008) (Sept. 7, 2017 transcript, pp. 20-21).

Gatewood contends that §15-77-300, 1985 original version applies, and the 2010 amendments to §15-77-300 do not apply. See authorities, paragraph 9. Also, in Duvall, the amendment itself stated it was a clarification of, rather than a change to, existing law.

Gatewood submits the Court of Appeals overlooked the point that here, there are vested fee contract rights that original §15-77-300 would apply, which rights would be lost if the 2010 amendments "clarified" what §15-77-300 originally intended (Mid-State Distributors, Inc. v. Century Importers, Inc.; Good v. Hartford Accident & Indem. Co.). Thus, Gatewood submits the ALC ruling is "final" for purposes of appealability.

11. The ALC stated, under the current version of §15-77-300, the ALC cannot grant attorney fees greater than the contingent fee (Sept. 7, 2017 transcript, p. 13).

Gatewood contends §15-77-300, 1985 version, applies, and the 2010 amendments do not apply. See authorities, paragraph 9.

Gatewood submits the Court of Appeals overlooked the point that here, there are vested fee contract rights that original §15-77-300 will apply, which rights would be lost if the current version of §15-77-300 were applied (Mid-State Distributors, Inc. v. Century Importers, Inc.; Good v. Hartford Accident & Indem. Co.). Thus, Gatewood submits the ALC ruling is "final" for purposes of appealability.

12. The ALC stated you determine the attorney fee by considering the six (common law) factors, and then if necessary, consider a lodestar. The ALC also stated the lodestar is the enhancement (Sept. 7, 2017 transcript, p. 18).

Gatewood contends that under Layman, 658 S.E. 2d at 332-335, the ALC was incorrect. The lodestar is calculated first, and then the Court may enhance the lodestar with a multiplier based on one or more of the common law factors (Id.).

Gatewood submits that the Court of Appeals overlooked the point that the ALC ruling would result in miscalculation of attorney fees, and divest the right under Layman to claim attorney fees as calculated therein (Mid-State Distributors, Inc. v. Century Importers, Inc.; Good v. Hartford Accident & Indem. Co.). Thus, Gatewood submits the ALC ruling is "final" for purposes of appealability.

13. The ALC stated there is a question of law as to whether or not litigation in the ALC is a "civil action" under §15-77-300 (Sept. 7, 2017 transcript, p. 26).

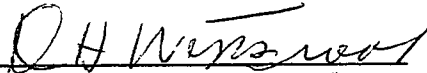
Gatewood contends that litigation in the ALC for judicial review of SCDC wage denial is a "civil action" under §15-77-300 (McDowell v. SCDC 304 S.C. 537, 543, 405 S.E. 2d 830, 833 (S.C., 1991) (Agency typically "presses its claim" in judicial review actions); Al-Shabazz v. State, 527 S.E. 2d at 750, 754 (Inmates may seek judicial review in ALC of SCDC final decisions); Wicker v. SCDC, 602 S.E. 2d at 58 (Due process requires judicial review in ALC of SCDC wage denial claims); and Ross v. MUSC 435 S.E. 2d 877, 878 note 2 (Proceeding under APA is civil action for purposes of attorney fee recovery).

Gatewood submits that the Court of Appeals overlooked the point that the ALC ruling would prevent the claim for attorney fees for the ALC litigation on judicial review of SCDC wage denials (Mid-State Distributors, Inc. v. Century Importers, Inc.; Good v. Hartford Accident & Indem. Co.). Thus, Gatewood

submits the ALC ruling is "final" for purposes of appealability.*

For the reasons stated herein, Gatewood requests that the petition for re-hearing be granted.

Respectfully submitted,



Douglas H. Westbrook, #6039

23 Broad St.

Charleston, SC 29401

(843) 853-9600

Attorney for Fred Gatewood

* Assuming the ALC decides it is not a civil action.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Francis Ackerman, #266928, Malik)
Aljalil, #219551, Linso Allen, #269378,)
Michael Benninger, #264212, Fredrick)
Brown, #289602, Timothy Brown,)
#238461, Terrell Buchanon, #277262,)
Christopher Buch, #200690, Rudy)
Cassady, #238732, Sheldon Clark,)
#264772, Zawaski Cobb, #187136,)
Kamathene Cooper, #145333,)
Gladstone Cummings, #267450, Patrick)
Curtis, #175139, Quintin Daniels,)
#196284, Curtis Davis, #238776,)
Heyward Dempsey, #134171, Phillip)
Denney, #240678, Paul Durham,)
#219573, Jerome Durham, #270393,)
Keith Eigner, #299153, Bernard Felder,)
#122099, Jermaine Carriett, #191274,)
Dennis Goff, #177506, Gregory Grant,)
#109656, Nelson Hampton, #286427,)
James Hartmant, #219770, Gary Hayes,)
#263985, Michael Hood, #279897,)
Nikia Law, #260855, Stephen Lease,)
#137016, Harry Leonard, #249996,)
Herbert McFadden, #184297, Michael)
McFarland, #266870, Earl Mack,)
#216237, John Moultri, #276527, Matin)
Muntaqim, #266870, Tony Pitts,)
#280597, Germaine Pringle, #250390,)
Gene Richardson, #93614, Dennis)
Richey, #233472, Ignacio Rivera,)
#300424, Vondell Sanders, #241308,)
James Sattler, #235043, Joseph)
Schmitz, #173987, Arthur Scott,)
#251957, Jerome Scott, #153381,)
Roosevelt Scott, #275631, Archie)
Simmons, #161419, Robert Smith,)
#199324, James Williams, #282929,)
Gary Bryant, #258972, Harlon Edger,)
#261866, Johnny Holden, #245199,)
Don Hughes, #256862, Michael Key,)
#266890, Archie Lee, #226354, Isaac)
Richardson, #232574, Larkland)
Richards, #281768, John Wojcik,)

Docket No. 07-ALJ-04-0444-A-AP

ORDER OF REMAND

FILED

June 13, 2017

SC ADMIN. LAW COURT

56 14 18 17

#219463, James Bogan, #288111, Larry)
 Burke, #281911, Jammie Gaymon,)
 #208922, David Harrell, #260004, Jeff)
 Stinson, #260047, Ricky Libby,)
 #274681, Alain Lareua, #128014,)
 Quentin Baker, #297868, Frank Corley,)
 #292975, James Jackson, #267718,)
 Quintin Linen, #238553, Thomas Miles,)
 #246763, Chauncy Orr, #177069,)
 Isaiah Scott, #228008, Eric Youmous,)
 #281091, Derek Carter, #275938,)
 Willie Hare, #256641, Ernest Miller,)
 #235474, Robert Norris, #266101,)
 Ronald Simmons, #267937, Samuel)
 Simmons, #302393, William Thomas,)
 #272501, Anthony Murphy, #295893,)
 Anthony Murray, #237867, Johnny)
 Hayes, #267910, Roy Morris, #288777,)
 Daniel Dewey, #276678, Nehemiah)
 Greene, #243339, Leroy Choice,)
 #113990, James McFadden, #235419,)
 Francis Prioleau, #268813, Darrell)
 Rochester, #146731, Wilbur Jordan)
 #292264, Alvin Stewart, #278595,)
 Kevin Poston, #266083, Kevin Smith,)
 #272440, Donald Robinson, #277520,)
 Douglas Bude, #263537, Willie Elder,)
 #246208, Rogelio Zavala, #245106,)
 Dennis Knight, #286981, Jacob Beach,)
 #301270, Francis Ackerman, #266928,)
 Darrin Miller, #259593, Edward Bryant,)
 #255998, Sherman Austin, #20028,)
 Michael Baylor, #265682, Taurus)
 Bowman, #252745, Kenneth Carter,)
 #243538, Calvin Drummond, #236322,)
 David Feggins, #287157, Terry)
 Ferguson, #299080, Willie House,)
 #257820, Peter Jenkins, #257321, Percy)
 Martin, #270035, James Murray,)
 #165487, Stephone Simmons, #300422,)
 Larry McClam, #282972, Tyrone Aiken,)
 #244428, Tyrone Aiken, #248367,)
 Frank Anderson, #282800, Ronald)
 Brewer, #285756, Keith Brown,)
 #295762, Pete Bryant, #242370,)
 Michael Busques, #191961, Richard)

26

57 15 18
19

Butler, #162467, Gary Davis, #106144,)
 Anthony English, #238474, Kerlan)
 Etheredge, #236635, James Evans,)
 #267837, Jose Flores, #240563, Robert)
 Garrett, #291096, Reginald Geddis,)
 #183851, Richard Graham, #228235,)
 Gary Grooms, #283860, Wayne Harlan,)
 #245705, Johnny Hayes, #267910,)
 Steven Hickenbottom, #196263,)
 Alfred Joyner, #260442, Donald Lyles,)
 #296135, Henry Baker, #263398,)
 Thomas Carter, #249362, Thomas)
 Butler, #257552, Bobby Williams,)
 #261486, Ray Wells, #173651, Rodney)
 Pressley, #177947, Keith Kelly,)
 #257556, Maxie Gamble, #254413,)
 James Enriquez, #215539, Perry)
 Deveaux, #109601, James Wells,)
 #180458, Cedric Martino, #291396,)
 Donald McAteer, #292961, Robert)
 Wydman, #260331, Anthony Wright,)
 #214007, Derrick Williams, #272958,)
 Kenneth White, #228409, James)
 Trumper, #247429, Jeffrey Spears,)
 #281697, Timothy Smith, #296539,)
 Davis Sims, #278067, Virgil Simpson,)
 #281888, Edward Simpson, #220017,)
 Kenneth Simmons, #278911, George)
 Shine, #292391, Ralph Sellers, #164295,)
 Laron Richardson, #258786, Frank)
 Patterson, #283098, Tony McNeil,)
 #235846, Larry McClam, #282972,)
 Lavanza Mack, #189340, Raymond)
 Livingston, #277133, Nicholas)
 Lambrose, #215080, Joseph Kelsey,)
 #217218, Keith Eugene, no number,)
 Chuck Jackson, #266425, James Foye,)
 #211523, Timothy Inman, #151123,)
 Marvin Gilbert, #273934, Demetrius)
 Wheeling, #264976, Leon Wilson,)
 #155867, Jeffrey Tevis, #216442,)
 Darryel Beasley, #222388, Curtis)
 Thompson, #266448, Baron Cobbs,)
 #280479, James Tino, #145030, Harold)
 Roberson, #117001, Ray Gadsen,)
 #187527, Tony Witt, #242918,)

37

26

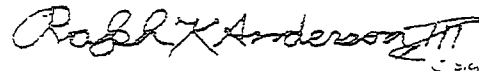
58 28 19

Jonathan Singleton, #287670, Joe)
Pannell, #89592, Charles Graham,)
#294453, Lazarus Brannon, #227847,)
Darrell Williams, #219730, Wilbert)
Mills, #244004, Howard Grant,)
#255473, Timothy Wilson, #261971,)
Rodney Elliott, #251337, Henry)
Rivers, #219118,)
Appellants,)
vs.)
South Carolina Department of Corrections.)
Respondent.)

This matter is before the South Carolina Administrative Law Court (Court or ALC) on remand from the South Carolina Court of Appeals (Court of Appeals). The case originally came before the ALC on an appeal filed by multiple inmates (Appellants) concerning the Prevailing Wage Statute. The Court denied the appeal, stating that Appellants failed to timely file their grievances. The Court of Appeals subsequently reversed and remanded the cases for processing of the grievances. *See Ackerman, et al. v. S.C. Dep't of Corr.*, 415 S.C. 412, 782 S.E.2d 757 (Ct. App. 2016), *cert. denied* (May 30 2017). Accordingly,

IT IS THEREFORE ORDERED that these cases are remanded to the South Carolina Department of Corrections for consideration of Appellants' grievances on the merits in keeping with the Court of Appeals decisions in *Ackerman* and *Gatewood v. S.C. Dep't of Corr.*, 416 S.C. 304, 785 S.E. 2d 60 (2016).

AND IT IS SO ORDERED.



Ralph King Anderson, III
Chief Administrative Law Judge

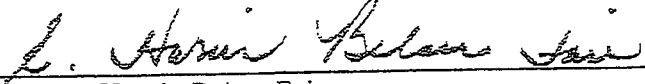
June 13, 2017
Columbia, South Carolina

48

17
59 21 20

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

June 13, 2017
Columbia, South Carolina

59

60 ¹⁸ 22 21

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Fred Gatewood, #289775,)
)
 Appellant,)
)
 vs.)
)
 South Carolina Department of Corrections,)
)
 Respondent.)
 _____)

Docket No. 07-ALJ-04-0517-A-AP

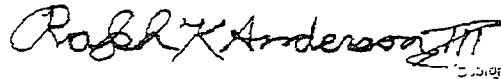
ORDER OF REMAND

This matter is before the South Carolina Administrative Law Court (Court or ALC) on remand from the South Carolina Court of Appeals (Court of Appeals). Fred Gatewood (Appellant) participated in prison industries, and his case was one of 197 consolidated cases regarding wages. The Court of Appeals reversed the ALC's conclusion that S.C. Code § 24-1-295 (2007) applied retroactively to inmate gross wages earned prior to August 1, 2007. In addition, the Court of Appeals remanded the issue of Appellant's entitlement to costs, attorney's fees, prejudgment interest, and post-judgment interest.

Because the determination of attorney's fees encompasses several factors, including the beneficial results obtained,¹ this matter shall be held in abeyance pending the outcome of the grievance hearings on the wage cases arising from both this case and *Ackerman, et al. v. S.C. Dep't of Corr.*, 415 S.C. 412, 782 S.E.2d 757 (Ct. App. 2016), *cert. denied* (May 30 2017). Accordingly,

IT IS THEREFORE ORDERED that the grievance is remanded to the South Carolina Department of Corrections for processing as set forth in *Gatewood v. S.C. Dep't of Corr.* 416 S.C. 304, 785 S.E. 2d 60 (2016), *cert. denied* (May 30, 2017).

AND IT IS SO ORDERED.



Ralph King Anderson, III
Chief Administrative Law Judge

June 13, 2017
Columbia, South Carolina

¹ See S.C. Code Ann. § 15-77-300 (B) (2016).

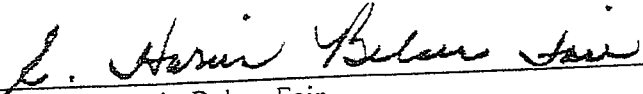
FILED

June 13, 2017
SC ADMIN. LAW COURT

3
23 22
61

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

June 13, 2017
Columbia, South Carolina

24
24 23
62

that the prevailing wage statute, §24-3-430(D), creates an interest encompassed by the Fourteenth Amendment's protection of liberty and property which cannot be denied without due process.

The South Carolina Constitution, Article I, Section 22, states as follows:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication.

In Ross v. MUSC 492 S.E. 2d 62, 72 (S.C., 1997), the Supreme Court stated that the purpose of S.C. Constitution, Article I, Section 22, is to:

ensure adjudications are conducted by **impartial** administrative bodies. See Babcock v. Office of Audits, *supra* note 7 (due process requires impartial decisionmaker). Partiality exists where, among others, an adjudicator either has ex parte information as a result of prior investigation or has developed, by prior involvement with the case, a "will to win".

(B) S.C. Code §14-11-60 and SCRCP 53(b)

S.C. Code §14-11-60 and SCRCP 53(b) allow a Circuit Court judge to appoint a Special Referee to decide a matter upon agreement of the parties, and in default and foreclosure cases. The Circuit Court may also direct a reference "in all other actions" as to some or all causes of action. Moreover, ALC Rule 68 allows the Administrative Law Court to apply the South Carolina Rules of Civil Procedure to resolve questions not raised by the ALC rules. There is no known ALC rule addressing appointment of Special Referees.

III. DISCUSSION

(A) Reasons to Appoint Special Referee

The initial reason to appoint a Special Referee is to comply with due process in the calculation of Gatewood's back wages. On June 13, 2017, the ALC

issued an order of remand to SCDC for "processing" to determine the "beneficial results obtained", apparently meaning Gatewood's back wages due. However, if SCDC calculates back wages, deductions and the like, in effect SCDC will be determining its own damages. In such circumstances, SCDC would not be an impartial adjudicator as required by due process. Moreover, Gatewood submits that SCDC's litigation of this matter since 2004 demonstrates its "will to win" to avoid paying statutory wages, and thus, its partiality (Ross v. MUSC).

Second, these calculations will require back wage, deductions, interest and tax computations for Gatewood from 2004 to 2009. Gatewood submits that the computations will require the skills and objectivity of a Special Referee, preferably a Certified Public Accountant or tax attorney.

(B) SCDC Responsibilities

Gatewood requests the Court to issue an order requiring SCDC to perform the following responsibilities:

1. Within 30 days after appointment of the Special Referee, submit to the Special Referee and counsel for the parties all documents relevant to Gatewood's wage calculations, including but not limited to Gatewood's "Exhibit F" documents (containing Gatewood's pay dates, pay rates, hours worked and pay amounts);* pay stubs and time cards; dates and hours worked, pay dates, pay rates, and pay amounts; and deductions, including but not limited to, child

* SCDC has indicated Exhibit F may have incorrect information after a certain date. Gatewood contends Exhibit F, as an SCDC document, is prima facie evidence of the information stated therein.

support, victim assistance, court orders for same, and deductions for security and prison industry overhead, including health, safety and welfare of Gatewood.

2. Within the 35-60 day period following file date of the Special Referee's calculations and payment order, if the order has not been appealed by a party:

(a) SCDC shall make payment in the amounts owed under the order as follows: (1) to Gatewood's prison account if he has one, and if not, a prison account should be opened in his name and payment made, and obtain a written receipt signed by Gatewood acknowledging receipt of said funds into his prison account. If Gatewood cannot have a prison account, or otherwise accept funds, SCDC shall notify the Special Referee and both counsel of that fact and cooperate with Gatewood and counsel to have the funds sent to a person or persons of Gatewood's choice; (2) to Gatewood's counsel for any attorney fees and costs owed by SCDC to counsel; and (3) to the Special Referee for SCDC's portion, and Gatewood's portion, of the Special Referee fee owed;

(b) When the payments in (a) are made to Gatewood, SCDC shall submit a written accounting to Gatewood for all payments SCDC makes per the Special Referee's order; and submit the written accounting, and a copy of Gatewood's signed receipt of funds into his prison account, to the Special Referee and to both parties' counsel;

(c) SCDC shall also provide Gatewood's current prison location and address to the Special Referee and both parties' counsel.

(C) Special Referee Responsibilities

Gatewood requests the Court to issue an order requiring the Special Referee to perform the following responsibilities:

1. Gross Wages. Calculate Gatewood's gross wages from 2004 to 2009 at \$4 per hour based on the budget provisos for that period, and §24-1-295. The prevailing wage should apply for July 2007, and should be at least \$12.06 per hour based on the 2004 estimates of economist Joe Benich in the record (Gatewood v. SCDC App. Case No. 2014-001199 (Op. No. 5389, 3-9-16, p. 10; SR p. 865; SC App, p. 1225).*

2. Statutory Deductions. For 2004 to June 30, 2007, calculate deductions per the budget provisos from gross wages as follows:

(a) 20% for court-ordered restitution, or 10% for Victim Compensation Fund if no court-ordered restitution or court-ordered restitution has been satisfied;

(b) 10% for room and board. See Gatewood v. SCDC Op. p. 10.

For July 1, 2007 to July 31, 2007, calculate deductions per §24-3-40(A) from gross wages as follows:

(a) 20% for court-ordered restitution, or 10% to State Office of Victim Assistance and 10% retained by SCDC for services to crime victims if restitution has not been court-ordered or if court-ordered restitution has been satisfied;

* "SR" denotes the ALC 1st Supplemental Record on Appeal in Ackerman, et al. v. SCDC Dock. No. 07-ALJ-04-00444, etc., dated May 6, 2011. "SC App." denotes the Appendix in Ackerman, et al. v. SCDC Sup. Ct. App. Case No. 2016-000829.

(b) 35% for court-ordered or agreed upon child support obligation, or 25% for room and board if no child support obligation;

(c) 10% set aside for Gatewood, plus another 10% if no child support, plus another 10% in interest bearing account for Gatewood (not deductions);

(d) balance to pay Gatewood's federal and state taxes;

(e) any balance to Gatewood (not a deduction). Gatewood, p. 10.

For August 1, 2007 to 2009, pursuant to the March 9, 2016 Court of Appeals' decision, calculate deductions per §24-1-295 from gross wages as follows:

(a) any required deductions for security and prison industries overhead;

(b) 20% for court-ordered restitution, or 20% to S.C. Victims Compensation Fund if restitution has not been court-ordered or if court-ordered restitution has been satisfied;

(c) 35% for court-ordered or agreed upon child support obligation, or 25% for room and board if no child support obligation;

(d) 10% to Gatewood if no child support; another 10% to Gatewood; and another 10% held in interest bearing account for Gatewood (not deductions);

(e) balance to pay Gatewood's federal and state taxes;

(f) any balance to Gatewood (not a deduction). Gatewood, p. 10.

The Court of Appeals stated in its March 9, 2016 decision, page 16, note 14, it was "likely" that SCDC was already taking deductions for security and overhead from Gatewood's gross wages. If that proves true, Gatewood requests that he be credited for these improper deductions against any applicable

security/overhead deductions taken after August 1, 2007.

Gatewood contends SCDC incurred no expense for security/overhead. In its Court of Appeals brief, SCDC stated at page 25 that it was reimbursed by WTI for security and overhead and all expenses. Also, the 2004 deduction records Gatewood proposes for the record show only victim compensation and room and board deductions for inmates, but no deductions for security or prison industries overhead. If SCDC had no expense for these items, they should not be deductible from Gatewood's wages.

3. SCDC Payments Made. For Gatewood, deduct the wage amount SCDC previously paid, to arrive at the net back wage amount due.

4. Pre-Judgment Interest. For Gatewood, calculate and add to the net back wage due, pre-judgment interest at 8 3/4% from each pay date, based on the amount underpaid, that is, the amount that should have been paid (gross wages less statutory deductions), less the amount actually paid. Pre-judgment interest accrues per annum (S.C. Code §34-31-20(A)).

5. Post-Judgment Interest. For Gatewood, calculate and add post-judgment interest at 7.5%, compounded annually, from March 9, 2016, the Court of Appeals' opinion date. See, S.C. Code §34-31-20(B).

6. Attorney Fee. The attorney fee is either the \$15-77-300 fee or the 40% contingent fee, whichever is greater. The \$15-77-300 fee is determined by the Court. The Special Referee shall first calculate the "full 40% contingent fee amount" for Gatewood. Calculate Gatewood's total gross wages (para. 1) for all pay periods worked, before costs, and if approved by the Court, any statutory deductions are made (2004 Fee Contract). Then, subtract SCDC's total wage payments to Gatewood for all pay periods worked (para. 3). The result

is the "gross amount recovered" under the fee contract, before costs and statutory deductions, for Gatewood. Next, multiply the "gross amount recovered" by 40% to arrive at the "full 40% contingent fee amount" for Gatewood. The final step is to calculate the difference between the "full 40% contingent fee amount", and the \$15-77-300 fee amount, to arrive at the "portion of the full contingent fee amount" which Gatewood shall pay counsel from his recovery.

If the \$15-77-300 fee does not apply, the Special Referee shall calculate the "full 40% contingent fee amount" as stated above, however, the provision requiring Gatewood to pay counsel the difference between the "full 40% contingent fee amount" and the \$15-77-300 fee would not apply, and Gatewood would pay counsel the "full 40% contingent fee amount".

7. Attorney Costs. Section 15-77-300 costs will be determined by the Court. It is expected that costs will be the same whether assessed under \$15-77-300 or the contingent fee contract. If assessed under \$15-77-300, SCDC will pay costs. If assessed under the contingent fee contract, Gatewood will pay costs to counsel from Gatewood's recovery.

8. Special Referee Fee. The Special Referee shall also calculate Gatewood's share of the Special Referee's fee. This probably works out to 50% of the Special Referee's fee to do Gatewood's calculations alone, since S.C. Code §14-11-60 requires the Special Referee to be compensated "by the parties", presumably leaving 50% of the total Gatewood fee to be paid by SCDC, and 50% to be paid by Gatewood from his recovery.

9. Net Inmate Payment. The result should be the total back wages and interest net recovery for Gatewood.

10. Attorney Fee Interest. For Gatewood, calculate interest on any attorney fee award at 7.75%, compounded annually, from the date of such award.

11. No statutory deduction should be taken without verifiable written documentation in the record to support it.

12. In a Title VII action, the precise amount of back wages need not be determined (Hance v. Norfolk South. Ry. Co. 571 F 3d 511 (6 Cir., 2009); 45C Am Jur 2d (2012), Job Discrim., §2555). The back pay calculations may be based on a just and reasonable inference of the imprecise figure (Akouri v. State of Florida Dept. of Trans. 408 F 3d 1338 (11 Cir., 2005); 45C Am Jur 2d (2012), Job Discrim., §2555). Any ambiguity should be resolved against a discriminating employer (Hance v. Norfolk South. Ry. Co.), and when it is impossible to reconstruct the employment of each claimant, back pay equal to the maximum amount which could have been earned but for the discrimination is appropriate (U.S. v. City of Warren, Mich. 138 F 3d 1083 (6 Cir., 1998); 45C Am Jur 2d (2012), Job Discrim., §2555). One whose wrongful conduct has rendered difficult the ascertainment of precise damages cannot complain of the impreciseness. Thus, doubt regarding the certainty of damages is resolved against the wrongdoer (22 Am Jur 2d (2013), Damages, §343). Gatewood contends these rules should apply here.

13. Gatewood is currently in a county prison facility and apparently has no prison account. He requests instructions as to how he is to receive any back wage recovery. He apparently has a "county" account.

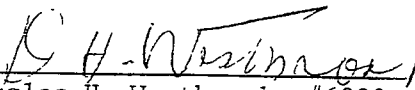
14. Gatewood's counsel requests permission to petition the Court for further instructions if the need arises.

15. Finally, the Special Referee should prepare and file a calculations and payment order incorporating the within suggestions and any others that the Court deems appropriate.

IV. CONCLUSION

For the above reasons, Gatewood respectfully requests appointment of a Special Referee in this matter, preferably a Certified Public Accountant or tax attorney. Gatewood also requests orders to SCDC and the Special Referee to perform the responsibilities discussed herein, and any others the Court may deem appropriate.

Respectfully submitted,


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

STATE OF SOUTH CAROLINA
IN THE ADMINISTRATIVE LAW COURT

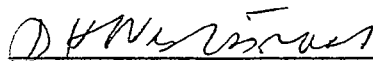
Fred Gatewood, #289775,)
))
 Appellant,))
))
vs.))
))
South Carolina Department)
of Corrections,))
))
 Respondent.))
_____))

Dock. No. 07-ALJ-04-00517-AP

CERTIFICATE OF SERVICE

I certify that on the 30 day of June , 2017, I mailed a copy of Fred Gatewood's Motion and Memorandum for Appointment of Special Referee to counsel of record for the S.C. Department of Corrections, as follows:

Lake E. Summers, Esquire
Malone, Thompson, Summers & Ott, LLC
339 Heyward St.
Suite 200
Columbia, SC 29201



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

DOUGLAS H. WESTBROOK
ATTORNEY AT LAW
23 BROAD STREET
CHARLESTON, SOUTH CAROLINA 29401
TELEPHONE: (843) 853-9600
FAX: (843) 577-2241

September 14, 2004

Mr. Darrell Williams
#219730
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472

Re: Collection of Wages Against SCDC and Williams
Technologies, Inc.; Supplement to August 27,
2002 Fee Agreement; Authorization to File a
Grievance and Proceed Through ALJ and Court
Channels

Dear Mr. Williams:

This will confirm our previous conversations concerning
the above captioned matter.

This letter will supplement our August 27, 2002 Fee Agree-
ment, and authorize me as class counsel in Williams, et al. v.
SCDC, et al., Case No. 02-CP-18-134, and Darrell Williams as
class representative, to file a grievance against SCDC for
collection of wages, and pursue that grievance on behalf of
the class through the Administrative Law Judge Division and
Courts, if necessary.

My attorney fee will be one third of any amount recovered
by the inmates by way of settlement, judgment, or otherwise,
whether before or after suit is filed. I may ask the Court,
in appropriate circumstances, to require the State to pay the
attorney fees in this case pursuant to S.C. Code 15-77-300.

The attorney fee does not include any costs which may be
incurred, which are the inmates' responsibility to pay, and
must be paid in advance at my election.

The above described 33 1/3 % contingent fee is based on
the gross amount recovered, before costs, and if approved by
the Court, any statutory deductions are made.

Mr. Darrell Williams
September 14, 2004
Page Two

This supplemental fee agreement covers handling the case at the grievance level only, plus appeal to the ALJ Division and Circuit Court. I retain the right to include any appeal beyond the Circuit Court in this contingent fee agreement, and if that occurs, the attorney fee will increase to 40% of any amount recovered, and the inmates will bear the cost of any appeal costs.

I also retain the right to withdraw from representing you and the inmates if, after further investigation and research, I determine there is questionable liability and/or damages, or there is no likely source of funds from which an award or attorney fee could be paid. In addition, if you discharge me as your lawyer, I will be entitled to compensation for my services up to the time of discharge.

If the above is agreeable, please sign (and have the below named other inmates sign) and date the blanks by your name(s), and return all sheets to me.


Sincerely,



Douglas H. Westbrook

DHW/

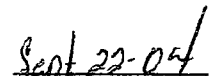
I have read the attached supplemental fee agreement dated September 14, 2004, and understand and agree that it, along with the August 27, 2002 fee agreement, constitutes the fee agreement for this case. I further agree to make prompt payment of any expenses required. I also understand that the outcome of any litigation is uncertain, and that no promises of success in the case have been made to me.

✓ 

Darrell Williams
Class Representative



Darrell Williams
Signature



Date

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Fred Gatewood, #289775..... Appellant,

v.

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

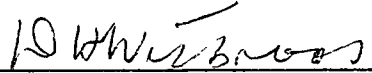
Appellate Case No. 2017-002087

PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing, Memorandum, and attachments on the S.C. Department of Corrections by depositing a copy of these documents in the U.S. Mail, postage prepaid, on October 27, 2017, addressed to Lake Summers, Esquire, Malone, Thompson, Summers & Ott, LLC, 339

Heyward St., Suite 200, Columbia, SC 29201, attorney of record for Respondent
S.C. Department of Corrections.

October 27, 2017.



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

DOUGLAS H. WESTBROOK
ATTORNEY AT LAW
23 BROAD STREET
CHARLESTON, SOUTH CAROLINA 29401
TELEPHONE: (843) 853-9600
FAX: (843) 577-2241

September 14, 2004

Mr. Darrell Williams
#219730
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472

Re: Collection of Wages Against SCDC and Williams Technologies, Inc.; Supplement to August 27, 2002 Fee Agreement; Authorization to File a Grievance and Proceed Through ALJ and Court Channels

Dear Mr. Williams:

This will confirm our previous conversations concerning the above captioned matter.

This letter will supplement our August 27, 2002 Fee Agreement, and authorize me as class counsel in Williams, et al. v. SCDC, et al., Case No. 02-CP-18-134, and Darrell Williams as class representative, to file a grievance against SCDC for collection of wages, and pursue that grievance on behalf of the class through the Administrative Law Judge Division and Courts, if necessary.

My attorney fee will be one third of any amount recovered by the inmates by way of settlement, judgment, or otherwise, whether before or after suit is filed. I may ask the Court, in appropriate circumstances, to require the State to pay the attorney fees in this case pursuant to S.C. Code 15-77-300.

The attorney fee does not include any costs which may be incurred, which are the inmates' responsibility to pay, and must be paid in advance at my election.

The above described 33 1/3 % contingent fee is based on the gross amount recovered, before costs, and if approved by the Court, any statutory deductions are made.

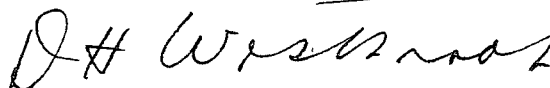
Mr. Darrell Williams
September 14, 2004
Page Two

This supplemental fee agreement covers handling the case at the grievance level only, plus appeal to the ALJ Division and Circuit Court. I retain the right to include any appeal beyond the Circuit Court in this contingent fee agreement, and if that occurs, the attorney fee will increase to 40% of any amount recovered, and the inmates will bear the cost of any appeal costs.

I also retain the right to withdraw from representing you and the inmates if, after further investigation and research, I determine there is questionable liability and/or damages, or there is no likely source of funds from which an award or attorney fee could be paid. In addition, if you discharge me as your lawyer, I will be entitled to compensation for my services up to the time of discharge.

If the above is agreeable, please sign (and have the below named other inmates sign) and date the blanks by your name(s), and return all sheets to me.


Sincerely,



Douglas H. Westbrook

DHW/

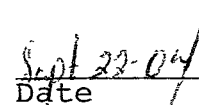
I have read the attached supplemental fee agreement dated September 14, 2004, and understand and agree that it, along with the August 27, 2002 fee agreement, constitutes the fee agreement for this case. I further agree to make prompt payment of any expenses required. I also understand that the outcome of any litigation is uncertain, and that no promises of success in the case have been made to me.



Darrell Williams
Class Representative



Darrell Williams
Signature



Date

NAME

SIGNATURE

DATE

Keith Vincent Brown

Keith Vincent Brown

9-25-04

Jeff Scott Stinson

Jeff L. Stinson Lieber

9-25-04

Donald Robinson

Donald Robinson

9-25-04

Jermaine Garnett

Jermaine Garnett

9-25-04

Thomas Carter

Thomas Carter

9-25-04

Don Hughes

Don Hughes Lieber

9-27-04

Rodney Pressley

Rodney Pressley

9-27-04

Fred Gatewood

Fred Gatewood

9-27-04

James Enriquez

James Enriquez

9-27-04

Henry Rivers

Henry Rivers

9-27-04