

JUN 21 2018

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

MALONE, THOMPSON  
SUMMERS & OTT, LLC

James Nathaniel Allen, #171214, )  
)  
Appellant, )  
)  
vs. )  
)  
South Carolina Department of Corrections, )  
)  
Respondent )  
\_\_\_\_\_ )

Docket No. 16-ALJ-04-0297-AP  
Grievance No.: PCI 1001-07

FINAL ORDER

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SC Court of Appeals

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to the Notice of Appeal filed by James Nathaniel Allen (Appellant), an inmate in the custody of the South Carolina Department of Corrections (SCDC or Respondent). Appellant challenges the hourly rate billed by SCDC for labor that Appellant performed.

FACTS/PROCEDURAL BACKGROUND

Appellant participated in a federally certified project manufacturing automobile consoles at Perry Correctional Institution (Project). The Project complied with federal guidelines and operated under state statutes codified at S.C. Code Ann. § 24-3-310 et seq. (1989, as amended). S.C. Code Ann. §§ 24-3-40 and 24-3-430 are directly at issue in this case.<sup>1</sup>

Appellant filed a Step 1 Grievance on June 21, 2007, claiming that he was owed back wages of \$1.92 for each hour worked during his participation in a Prison Industries Project. He also demanded immediate access to wages held in escrow by SCDC. The grievance was denied on July 25, 2007. Appellant filed a Step 2 Grievance on August 2, 2007, renewing his claim for \$1.92 per hour in back wages. SCDC denied the Step 2 Grievance on March 28, 2016. Appellant filed his appeal to the ALC on April 8, 2016, in which he demanded the same rate of back pay for all wages illegally withheld or removed from his gross pay. On June 28, 2016, Respondent filed the Record

<sup>1</sup> Contrary to one ground asserted by SCDC in its denial of Appellant's Step 2 Grievance, this Project was not a service project exempted from the prevailing wage requirement by annual budget provisos and finally by S.C. Code Ann. § 24-1-295 (effective August 1, 2007) because it involved original equipment manufacturing.

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on Appeal. Appellant filed his initial brief on July 6, 2016. On July 25, 2016, Respondent filed a Motion to Hold in Abeyance because two issues controlling in the instant case were also at issue in two cases pending on petitions for writs of certiorari to the South Carolina Court of Appeals: *Gatewood v. S.C. Dep't of Corr.*, 416 S.C. 304, 785 S.E. 2d 60 (2016), *cert. denied* (May 30, 2017) 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). This Court issued an Order of Abeyance on July 27, 2016. After the Supreme Court issued its orders denying certiorari in *Gatewood* and *Ackerman*, this Court issued an Order Lifting Abeyance on June 15, 2017, allowing the parties to file supplemental briefs. On June 27, 2017, Appellant filed a supplemental brief. On July 24, 2017, Respondent filed a Motion for Extension of Deadline to File Its Brief, which the Court granted. On August 8, 2017, Respondent filed its brief.

As an appendix to its brief, Respondent presented an itemized table included in a portion of a contract executed June 25, 2001 between SCDC and a private contractor. In the agreement, the referenced subsection defines "Inmate Pay" as follows:

Inmate Pay: Contractor and SCDC agree to an "hourly rate" determined as follows:

Prevailing Wage Rate (See Appendix C [Not included])	\$ 6.00
+	
Prorata Social Security Withholding Payment	.46
+	
Prorata Workers' Compensation Premium	.23
+	
<u>SCDC/Prison Industries Administrative Cost</u>	<u>1.32</u>
 HOURLY RATE CHARGED TO CONTRACTOR	 \$ 8.01

At no time during this agreement will inmates be paid less than the prevailing wage as set forth in Appendix C.<sup>2</sup>

The agreements were to be annually adjusted to conform to any changes in the "prevailing wage" as determined by the South Carolina Employment Security Commission.

<sup>2</sup> This information was not included in the Record on Appeal, nor was it provided to Appellant prior to service of the Respondent's brief. Furthermore, Appendix C referenced in the pay schedule (which presumably provides a basis for the prevailing wage) was neither included in the Record on Appeal nor in Respondent's brief.

## ISSUES ON APPEAL

Whether Social Security withholding payments, SCDC/Prison Industries Administrative Costs, and Workers' Compensation premiums, collectively, were required to be included in Appellant's gross wages for purposes of the calculations mandated in S.C. Code Ann. § 24-3-40(A).

## STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decisions of the South Carolina Supreme Court in *Adkins v. S.C. Dep't of Corr.*, 360 S.C. 413, 602 S.E.2d 51 (2004) and *Wicker v. S.C. Dep't of Corr.*, 360 S.C. 421, 602 S.E.2d 56 (2004), wherein the Court held that an inmate's claim that he was paid less than the prevailing wage for work performed in the Prison Industries program, in violation of a statute mandating payment of the prevailing wage, implicated a state-created property interest and was therefore reviewable by the ALC. Furthermore, when reviewing the Department's decisions in inmate grievance matters, the Court sits in an appellate capacity. *Al-Shabazz v. State*, 338 S.C. 354, 377, 527 S.E.2d 742, 754 (2000); *see also* S.C. Code Ann. § 1-23-600(E) (Supp. 2017) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). Section 1-23-380(5) states:

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

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

S.C. Code Ann. § 1-23-380(5) (Supp. 2017). *See also* *Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 337 S.C. 133, 137, 522 S.E.2d 605, 607 (Ct. App. 1999); *S.C. Dep't of Labor, Licensing and Regulation v. Girgis*, 332 S.C. 162, 166, 503 S.E.2d 490, 492 (Ct. App. 1998).

## DISCUSSION

Whether Social Security withholding payments, SCDC/Prison Industries Administrative Costs, and Workers' Compensation premiums, collectively, were required to be included in Appellant's gross wages for purposes of the calculation mandated in S.C. Code Ann. § 24-3-40(A).

In his Step 1 grievance, Appellant states that SCDC is in violation of Section 24-3-40(A) by disbursing the required deductions from a sum less than his gross wages. He contends that he is owed back pay for that reduction in the amount of \$1.92 “for every hour [he] worked in [a] private sector company [at the prison].” Appellant also asserts in his Step 1 Grievance that he is entitled to immediate access to wages held in escrow as provided in §§ 24-3-40(A)(5) and 24-3-40(B)(2). He also argues that his claims are supported by *Torrence v. S.C. Dep’t of Corr.*, 373 S.C. 586, 646 S.E.2d 866 (2007).<sup>3</sup> In his Step 2 Grievance, Appellant reiterates his claim that SCDC has paid him based on a lower rate (which he states is \$1.92 per hour) than what the private sector business paid to SCDC. In his briefs, Appellant claims he was not credited for the full amount of his “gross wages” because of this deduction that he believed was \$1.92 an hour.<sup>4</sup> Appellant claims certain items were either deducted from or not included in his gross pay. Appellant also argues that he is entitled to back pay for “training wages” he received while training with the private company that contracted with the prison. In his supplemental brief, Appellant also asserts that his grievances were timely under the doctrine of equitable tolling.

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Respondent contends that Appellant has not raised the prevailing wage issue and has not preserved his claim for immediate access to his escrowed wages. Respondent argues that Appellant appealed only his backpay claim for “\$1.92 for every hour he participated in the federally certified” project at Perry. Respondent also contends that Appellant’s argument only raised for the first time in his appellate brief the argument that he was also entitled to back pay for any “training wages” he might have been paid for the first 320 hours worked. Respondent further argues Appellant failed to assert the doctrine of equitable tolling in his Step 1 and Step 2 Grievance, his Notice of Appeal, and in

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<sup>3</sup> Appellant cites the case name for *Torrence*, as well as the correct opinion number (26328) and filing date, to support his position that Respondent had violated S.C. Code Ann. §§ 24-3-40 and 24-3-430(D). The Court will therefore consider this authority as support for Appellant’s appeal.

<sup>4</sup> In its brief, Respondent refers to training wages for the first 320 hours of Appellant’s labor, but there is nothing in the record to establish what rate of pay was paid for the training period other than Appellant’s claim that, based on *Torrence*, an amount was improperly deducted from his gross wages.

his initial brief. Therefore, Respondent argues that Appellant's claim is time-barred.

### Issue Preservation

At the outset, the Court must address Respondent's arguments that Appellant failed to preserve arguments not raised in Appellant's Step 1 and Step 2 Grievances. Appellant is required to exhaust his administrative remedies before appealing to this Court, unless an exception exists to excuse the failure to do so. *See Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994) ("The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule."); *Brown v. James*, 389 S.C. 41, 48, 697 S.E.2d 604, 608 (Ct. App. 2010) ("The doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act."). The administrative remedies provided for inmates pursuant to the Department's Inmate Grievance Policy are Step 1 and Step 2 grievances. *See also Al-Shabazz*, 338 S.C. at 376, 527 S.E.2d at 754 (2000) (citing *Kiawah Resort Assocs. v. S.C. Tax Comm'n*, 318 S.C. 502, 505, 458 S.E.2d 542, 544 (1995) ("[I]ssues or arguments that were not raised to or ruled on by [an administrative agency] ordinarily are not preserved for review.")). Further, issues raised but not argued in Appellant's briefs have also been waived and are not properly before the ALC. *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court") (citations omitted).

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In this case, Respondent asserts that Appellant "failed to raise claims for 'prevailing wage' under § 24-3-430(D) and for back pay associated with the 'training wages' SCDC paid him for the first 320 hours of his labor in his Step 1, Step 2, or Notice of Appeal," and that the prevailing wage claim cannot now be raised for the first time on appeal. I agree. Appellant did not reference "prevailing wage" or cite to Section 24-3-430(D) in his Step 1 and Step 2 Grievances and Notice of Appeal. Also, Appellant's argument in his Step 1 and Step 2 Grievances only reference his argument that \$1.92 was deducted from his gross wages, contrary to the provisions of Section 24-3-40, and that he should have been paid that amount "for every single hour [he] worked in the program." It was not until his initial brief that Appellant raised for the first time the prevailing wage issue under 24-3-430(D), which he listed as a separately enumerated issue from the \$1.92-deduction/gross wage issue. Similarly, Appellant never referred to or even suggested "training

wages” in his Step 1 and Step 2 Grievances and Notice of Appeal, Therefore, the Court finds the prevailing wage argument, which includes the training wages argument, is not preserved for review on appeal.<sup>5</sup>

Respondent also contends that Appellant failed to assert the doctrine of equitable tolling in his Step 1 grievance, his Step 2 grievance, his appeal, and in his initial brief. Therefore, Respondent argues, Appellant’s claim is time-barred. I disagree.

First, Respondent did not deny either the Step 1 Grievance or the Step 2 Grievance on the ground that either was time-barred.<sup>6</sup> Moreover, in *Torrence*, the Supreme Court directed SCDC to provide “due process via the internal grievance system.” *Torrence*, 373 S.C. 586 at 595, 646 S.E.2d 866 at 870. To limit that remedy to the grievance system’s 15-day filing deadline at this stage would make the Court’s 2007 order a nullity. Subsequently, in *Ackerman, supra*, the Court of Appeals held that the characterization of a wage grievance as an incident subject to the 15-day filing deadline “was arbitrary and capricious,” and that the wage challenges “logically [fall] within [challenges to] policies and procedures as contemplated in [the inmate grievance system].” *Id.* at 421, 782 S.E.2d at 761. This decision has the effect of identifying a wage complaint as not subject to a “time bar” for missing the 15-day deadline. Therefore, the Court will not dismiss any preserved arguments from Appellant’s Step 1 and Step 2 Grievances based on either of them being time-barred by the grievance system’s 15-day deadline.

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However, Respondent argues that one of Appellant’s arguments from his Step 1 Grievance, specifically his claim for immediate access to his escrowed wages pursuant to Section 24-3-40(A)(5), (B)(2), is not preserved. I agree. Appellant only raised this argument in his Step 1 Grievance but did not raise it in his Step 2 Grievance or in his brief. Because this issue was not preserved on appeal, the Court will not consider this argument. *See Wright, supra*.

### Gross Wages

Having addressed unpreserved, waived, and inapplicable issues, the Court now turns to the sole

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<sup>5</sup> Although Appellant’s training wage argument is not preserved with respect to the prevailing wage rate, Appellant did preserve his argument that he should have been paid \$1.92 in deductions as part of his gross wages for every hour he worked in the program, which includes the 320 hours Appellant worked during the training period. Therefore, Appellant’s gross wages includes the hours he worked during the training period to the extent the training period is covered by the contract.

<sup>6</sup> Interestingly, Respondent took nearly nine (9) years to issue a decision on Appellant’s timely-filed Step 2 Grievance.

preserved issue on appeal: whether Social Security withholding payments, SCDC/Prison Industries Administrative Costs, and Workers' Compensation premiums, collectively, were required to be included in Appellant's gross wages for purposes of the calculation mandated in S.C. Code Ann. § 24-3-40(A).

In his Step 1 and Step 2 Grievances, Appellant claims he was paid at a lower rate for "every single hour" and that he is owed \$1.92 "for every single hour." In his initial and supplemental briefs, Appellant reasserts that he is owed back wages for his work in the project and that a sum (which, under the contract, should be \$2.01) was improperly deducted from his wages "for the entirety of his work with the project."

Respondent argues that the items charged to the private company in addition to Appellant's gross hourly wages were lawful and that charging those items in addition to inmates' gross wages was necessary to defray the expenses associated with the operation of its prison industries program.

The Prison Industries Program is authorized and operated pursuant to federal and state laws. Federal law, 18 U.S.C. § 1761(a) (2011), limits the transportation in interstate commerce of goods, wares, or merchandise manufactured or produced wholly or in part by convicts or prisoners. Exceptions are established in 18 U.S.C. 1761(c) for projects designated by the Director of the Bureau of Justice Assistance. Those exceptions require "wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed" but allow deductions not to exceed eighty percent (80%) of the gross wages, to include federal and state taxes, reasonable charges for room and board, family support (according to court order or state statute), and contributions to a fund for victim compensation. Further, the federal law allows inmates to have benefits such as Workers' Compensation but specifically disqualifies them from receiving unemployment compensation while incarcerated.

S.C. Code Ann. § 24-3-40(A) provides for specific deductions from the gross wages of an inmate authorized to work in a community or in a prison industry program. These deductions are as follows:

The Director of the Department of Corrections, or the local detention or correctional facility manager, if applicable, shall deduct the following amounts from the gross wages of the prisoner:

(1) If restitution to a particular victim or victims has been ordered by the court, then twenty percent must be used to fulfill the restitution obligation. If a restitution

payment schedule has been ordered by the court pursuant to Section 17-25-322, the twenty percent must be applied to the scheduled payments. If restitution to a particular victim or victims has been ordered but a payment schedule has not been specified by the court, the director shall impose a payment schedule of equal monthly payments and use twenty percent to meet the payment schedule so imposed.

(2) If restitution to a particular victim or victims has not been ordered by the court, or if court-ordered restitution to a particular victim or victims has been satisfied then:

\* \* \*

(b) if the prisoner is employed in a prison industry program, ten percent must be directed to the Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation, Victim Compensation Fund for use in training, program development, victim compensation, and general administrative support pursuant to Section 16-3-1410 and ten percent must be retained by the department to support services provided by the department to victims of the incarcerated population.

(3) Thirty-five percent must be used to pay the prisoner's child support obligations pursuant to law, court order, or agreement of the prisoner. These child support monies must be disbursed to the guardian of the child or children or to appropriate clerks of court, in the case of court ordered child support, for application toward payment of child support obligations, whichever is appropriate. If there are no child support obligations, then twenty-five percent must be used by the Department of Corrections to defray the cost of the prisoner's room and board. Furthermore, if there are no child support obligations, then ten percent must be made available to the inmate during his incarceration for the purchase of incidentals pursuant to subsection (4). This is in addition to the ten percent used for the same purpose in subsection (4).

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~~(4) Ten percent must be available to the inmate during his incarceration for the purchase of incidentals. Any monies made available to the inmate for the purchase of incidentals also may be distributed to the person or persons of the inmate's choice.~~

(5) Ten percent must be held in an interest bearing [sic] escrow account for the benefit of the prisoner.

(6) The remaining balance must be used to pay federal and state taxes required by law. Any monies not used to satisfy federal and state taxes must be made available to the inmate for the purchase of incidentals pursuant to subsection (4).

The agreement between SCDC and the private sector entity (Contractor) establishes an hourly rate that includes a wage, Social Security withholding, a Workers' Compensation premium, and "SCDC/Prison Industries Administrative Cost." Appellant contends that all these items are part of his hourly gross wage and should constitute the back pay owed. The Supreme Court referred to the sum of these items as a diversion from the hourly rate paid for inmate labor and stated:

[I]f [appellants Torrence and Ward] prove true their allegation that [SCDC]

removes any of the money remitted by the private industry sponsor and then disburses the percentages listed in section 24-3-40 based on the lower rate, [SCDC] would be in violation of the plain language of the statute which directs it to disburse the money based on the gross wages. See § 24-3-40(A).

*Torrence*, 373 S.C. at 594 n.4, 646 S.E.2d at 870 n.4.

Based on the analysis in *Torrence* and the contract excerpts quoted above, these items comprise the inmate's gross hourly wages, which must be determined on remand and be recalculated and disbursed accordingly. The Court further notes that under Item (A)(3) thirty-five percent (35%) of the gross hourly wage would go to Appellant's child support obligation. If there is no child support obligation, ten percent (10%) would be added to Appellant's "incidentals" account as provided in Item (A)(4). Once in that account, the funds could be "distributed to the person or persons of the inmate's choice." The remaining twenty-five percent (25%) would go to SCDC to defray the cost of the inmate's room and board.

The items set out in the contract as the hourly rate charged to the private sector business for the inmate labor furnished by SCDC are "the gross wages of the prisoner," as the South Carolina Supreme Court indicated in *Torrence*. These gross wages must be disbursed as provided in § 24-3-40(A). Not to do so is an error of law, a "violation of the plain language of the statute which directs [SCDC] to disburse the money based on the gross wages." See *Torrence*, 373 S.C. at 594 n.4, 646 S.E.2d at 870 n.4.

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An Administrative Law Judge may reverse or modify an agency's decision if that decision is not supported by substantial evidence on the whole record or is affected by an error of law. In this case, much of the evidence relied on by Respondent (for example, the contract and proof of the actual wages paid during Appellant's work for the project, as well as how much was deducted from Appellant's wages) was not in the record. Also, Respondent takes the position that the additional itemized expenses totaling \$2.01 were not "lawfully" part of Appellant's gross wages, a position that is contrary to our Supreme Court's note in *Torrence* and is thus an error of law.<sup>7</sup>

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<sup>7</sup> In addition to addressing the issues raised by Appellant, Respondent contends that SCDC is required by law to make the prison system self-sustaining. See S.C. Code Ann. § 24-3-20. Specifically, Respondent cites S.C. Code Ann. § 24-3-190, which provides among other things that "amounts received or to be received from the hire of convicts or from any other source during the current fiscal year [must be] appropriated for the support of the penitentiary." (Respondent also cites S.C. Code Ann. § 24-3-400, but this section deals with proceeds from the sale of articles and products manufactured or produced by convict labor, not payments for the labor itself.). Respondent concludes that recalculating the wage structure as argued by Appellant would create a deficiency in the prison industries program. This argument is outside of the scope of this appeal. The Court notes, however, that if creating a program that would

**Conclusion**

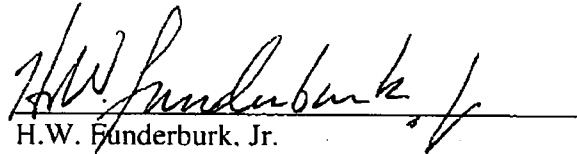
SCDC's failure to include the Social Security withholding, Workers' Compensation premium, and SCDC/Prison Industries Administrative Cost in the gross wages prior to making deductions thereto was an error of law. Accordingly, the parts of Respondent's decision dealing with gross wages are **REVERSED** and **REMANDED**. Respondent must classify the entire contract amount as the hourly gross wages and calculate deductions and distributions from Appellant's pay as set forth in Section 24-3-40(A).

**ORDER**

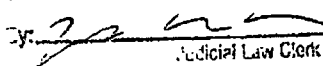
**IT IS THEREFORE ORDERED** that those parts of SCDC's decision dealing with Appellant's prison industry gross wages, including for Appellant's training period to the extent this period is covered by the contract, and their disposition are **REVERSED AND REMANDED** for proceedings consistent with this Order.

**AND IT IS SO ORDERED.**

June 20, 2018  
Columbia, South Carolina

  
H.W. Funderburk, Jr.  
Administrative Law Judge

**CERTIFICATE OF SERVICE**  
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 20<sup>th</sup> day of June 2018  
By:   
Judicial Law Clerk

make prisons self-sustaining, while not favoring prison industries over non-inmate labor furnished by law-abiding citizens, were the goal, then the token \$1.00 a month for occupancy of public property for private use would have been increased to rent at market value.

**FILED**

JUN 20 2018

SC ADMIN. LAW COURT