

JUN 21 2018

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

MALONE, THOMPSON  
SUMMERS & OTT, LLC

Elliott Hatton, #158373, )  
)  
Appellant, )  
)  
vs. )  
)  
South Carolina Department of Corrections, )  
)  
Respondent )  
\_\_\_\_\_ )

Docket No. 16-ALJ-04-0296-AP  
Grievance No.: ECI 1215-07

FINAL ORDER

RECEIVED

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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 Elliott Hatton (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 federally certified projects assembling electronic components and wire harnesses (altogether for approximately three (3) years and two (2) months) at Evans Correctional Institution (Projects). The Projects 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 the Projects, including 320 "training hours," when he was paid less than the prevailing wage for such work.<sup>2</sup> He also demanded access to wages

<sup>1</sup> These projects were not service projects exempted from the prevailing wage requirement by annual budget provisos and finally by S.C. Code Ann. § 24-1-295 (effective August 1, 2007). Also, S.C. Code Ann. § 24-3-40 was not substantially different when Appellant provided the labor involved in this case, and S.C. Code Ann. § 24-3-430 was the same.

<sup>2</sup> In its brief, Respondent also 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 training other than Appellant's claim that, based on *Torrence*, a sum was improperly deducted from his gross wages.

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SC ADMIN. LAW COURT

held in escrow by SCDC. The grievance was denied on June 1, 2012, served June 21, 2012. Appellant filed a Step 2 Grievance on June 22, 2012, renewing the same claims. 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 on Appeal. Appellant filed his initial brief on July 15, 2016. On July 28, 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 August 11, 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 a second Motion for Extension of the Deadline to File Its Brief. On August 15, 2017, Respondent filed its brief.

As appendices to its brief, Respondent presented itemized tables from portions of three contracts between SCDC and private contractors. In these contracts the parties agree "to follow the requirements" of the United States Department of Justice and federal statutes. These sections purport to define "Inmate Pay" as follows:

[For the Agreement first executed July 31, 1995, assembling electronic components ("1995 contract").]

Inmate Pay: Contractor and SCDC agree to a "minimum inmate wage" determined as follows:

Prevailing Wage Rate (See Appendix D [Not included])	\$ 4.25
+	
Prorata Social Security Withholding Payment	.32
+	
Prorata Workers' Compensation Premium	.15
+	
SCDC Surplus Fund Amount	1.32
<hr/>	
MINIMUM INMATE WAGE	\$ 6.04

At no time during this agreement will inmates be paid less than the prevailing "minimum wage" as set forth in Appendix D once they complete training.

[For the Agreement first executed November 28, 2000, assembling wire harnesses ("2000 contract").]

Hourly Rate: Contractor and SCDC agree to an hourly rate determined as follows:

	<b><u>FOR INMATE WORKER</u></b>
Prevailing Wage Rate (See Appendix D [Not included])	\$ 5.25
+	
Prorata Social Security Withholding Payment	.40
+	
Prorata Workers' Compensation Premium	.20
+	
<u>SCDC Surplus Fund Amount</u>	<u>1.32</u>
Hourly Rate charged to Contract	\$ 7.17

At no time during this agreement will inmates be paid less than the prevailing wage as set forth in Appendix D.

[For the Agreement first executed March 3, 2001, assembling wire harnesses ("2001 contract").]

Hourly Rate: Contractor and SCDC agree to an hourly rate determined as follows:

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Prevailing Wage Rate (See Appendix D [Not included])	\$ 5.25
+	
Prorata Social Security Withholding Payment	.40
+	
Prorata Workers' Compensation Premium	.20
+	
<u>SCDC Surplus Fund Amount</u>	<u>1.32</u>
Hourly Rate charged to Contract	\$ 7.17

At no time during this agreement will inmates be paid less than the prevailing wage as set forth in Appendix D.<sup>3</sup>

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<sup>3</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.

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.

### ISSUES ON APPEAL

- I. Whether Appellant was entitled to the prevailing hourly wage rate for his labor during the Project.
- II. Whether Social Security withholding payments, SCDC Surplus Fund Amount, 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

### **I. Whether Appellant was entitled to the prevailing hourly wage rate for his labor during the Project.**

In his Step 1 Grievance, Appellant states that he is grieving “all wages owed ... under S.C. Code Ann. 24-3-40(A) ... [in the amount of] of \$1.92 for every hour [he] worked ... along with the training wages that [he] worked, 320 hours for less than the prevailing wages, under Statute 24-3-430(D).” He asserts that these claims are supported by *Torrence v. S.C. Dep't of Corr.*, 373 S.C. 586, 646 S.E.2d 866 (2007).<sup>4</sup> Appellant also asks for immediate access to wages held in escrow. In his Step 2 Grievance, Appellant asserts that he is appealing the issues raised in his Step 1 Grievance. His appeal alleges SCDC “withheld illegally” wages earned by [him]” and restates that he is grieving “all wages owed to [him] by SCDC under case [of] ... *Torrence v. SCDC*.” Appellant also argues in his initial brief that “SCDC paid less than the prevailing wage during the training period.” In his briefs, Appellant claims that SCDC did not pay him the prevailing wage in accordance with S.C. Code § 24-3-430(D) and that he is entitled to back wages in the amount of the difference between the wages he received and the prevailing wage in effect at the time, ~~including the \$1.92 per hour in deductions for every hour that he worked on the Projects.~~<sup>5</sup> In support of his argument he quotes, without citation, from *Wicker*, 360 S.C. at 425, 602 S.E.2d at 58: “there is simply nothing in the statutory scheme authorizing the DOC to pay [an inmate] a training wage less than the prevailing wage.” In the supplemental brief, Appellant reasserts that the prevailing wage requirement of Section 24-3-430(D) applies to all his work for the Projects, and that his grievance was timely under the doctrine of equitable tolling.

Respondent contends that Appellant has not raised the prevailing wage issue and has not preserved

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<sup>4</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>5</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 improper deduction was removed from his gross wages.

his claim for immediate access to wages held in an interest-bearing escrow account established by S.C. Code Ann. § 24-3-40(A)(5) and governed by § 24-3-40(B)(2). Respondent further argues Appellant failed to assert the doctrine of equitable tolling prior to his supplemental brief. Therefore, Respondent argues that Appellant's claims are time-barred.<sup>6</sup>

#### Issue Preservation

At the outset, the Court must address Respondent's contentions that Appellant failed to preserve certain arguments for review on appeal. 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).

In this case, Respondent asserts that Appellant "failed to raise a claim for 'prevailing wage' under § 24-3-430(D) in his Step 1, Step 2, or Notice of Appeal and he failed to assert the doctrine of equitable tolling in his Step 2 or Notice of Appeal" and therefore did not preserve these claims for appeal. Respondent also argues that these claims, as well as Appellant's claim for prevailing wages for his training period (training wages), are time-barred for an untimely filing of his Step 1

<sup>6</sup> Respondent concedes in its brief, however, that if the Court does not accept its argument regarding the timeliness issue, the Court should remand the calculation for back pay for the first 320 hours he worked, as the "training wages" he received during this time "did not conform to § 24-3-430(D) or, for that matter, § 24-3-410(B)(7)."

Grievance. I disagree.

First, Appellant cites specifically to Section 24-3-430(D) in his Step 1 Grievance (and all of his issues are incorporated by reference in his Step 2 Grievance) and his initial brief. Appellant also consistently argues that he was being paid a lower wage rate than he should have been paid while he worked for a private sector business at the prison. Appellant used the phrase "prevailing wages" and even cites to *Torrence* as his authority for this issue. *Torrence* dealt with prevailing wages and S.C. Code Ann. §§ 24-3-40, -430(D). Similarly, Appellant refers to "training wages" in his Step 1 Grievance and asserts in his Step 1 Grievance that he was underpaid for "every hour" that he worked for the private sector company while at the prison, including the 320 hours of his training, and that he is owed \$1.92 (which should be \$1.79 under the 1995 contract and \$1.92 under the 2000 and 2001 contracts) "for every hour" he worked. He also cites *Wicker, supra*. In his Step 2 Grievance, Appellant claims he is appealing all the issues in the Step 1 Grievance. His appeal alleges SCDC "withheld illegally" wages earned by [him]" and restates that he is grieving "all wages owed to [him] by SCDC under case [of] ... *Torrence v. SCDC*." Appellant also argues in his initial brief that "SCDC paid less than the prevailing wage during the training period." In the supplemental brief, Appellant reasserts that the prevailing wage requirement of § 24-3-430(D) applies to all his work during the Projects. Appellant thus consistently requests reimbursement for the difference in what was paid and the prevailing wage rate for **all** wages earned, which encompasses "training wages" where the contract applied the wage rate applied to training.<sup>7</sup>

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Therefore, the Court finds the prevailing wage argument, which includes the training wages argument, to be preserved for review on appeal.

As to the equitable tolling/timeliness arguments, Respondent did not deny either the Step 1 Grievance or the Step 2 Grievance on the ground that either was time-barred.<sup>8</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

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<sup>7</sup> The South Carolina Supreme Court in *Wicker* held that "there is simply nothing in the statutory scheme authorizing [SCDC] to pay [an inmate] a training wage less than the prevailing wage." 360 S.C. at 425, 602 S.E.2d at 58. Accordingly, this Court finds that Appellant was entitled to the prevailing wage rate for his training wages, if the wage rate in the contract applied to training, too.

<sup>8</sup> Significantly, Respondent took nearly four (4) years to issue a decision on Appellant's timely-filed Step 2 Grievance.

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.<sup>9</sup> Therefore, the Court finds that claims in Appellant’s Step 1 and Step 2 Grievances are not time-barred.<sup>10</sup>

### Prevailing Wage Rate

Having addressed unpreserved, waived, and inapplicable issues, the Court now turns to one of the preserved issues on appeal: whether Appellant was entitled to the prevailing hourly wage rate for his labor during the Project.

Appellant argues that he should be reimbursed for the difference in what he was paid and the prevailing wage rate for **all** wages earned, including the “training wages” he received for the first 320 hours worked. Respondent argues that the prevailing wage rate issue was not preserved for review, but the Court has already addressed that argument, and found that it was.

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.

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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

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<sup>9</sup> Appellant made an additional argument concerning immediate access to wages escrowed pursuant to § 24-3-40(A)(5) and “returned” pursuant to § 24-3-40(B)(2), but it was only raised in his Step 1 Grievance and reiterated generally in his Step 2 Grievance but was not argued in his brief. Because this issue was not preserved on appeal, the Court will not consider this argument. *See Wright, supra*.

<sup>10</sup> Respondent acknowledges in its brief that if the Court does not accept its argument regarding the timeliness issue, the Court should remand the calculation for back pay for the first 320 hours he worked, as the “training wages” he received during this time “did not conform to § 24-3-430(D) or, for that matter, § 24-3-410(B)(7).”

receiving unemployment compensation while incarcerated.

The Department of Justice issued a final Prison Industry Enhancement Certification Program Guideline in which it reiterates the statutory requirement that “inmate workers must receive wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work is to be performed.” 64 Fed. Reg. 17009 (April 7, 1999) (Guideline). After voicing its concern to protect “the private sector labor force and business from unfair competition that could otherwise stem from the flow of low-cost, prisoner-made goods into the marketplace, it states that “participants must, therefore, implement the prevailing wage requirements under like conditions experienced by private sector competition.” *Id.* In determining the appropriate inmate wage, no “other cost variables [may] be taken into consideration [including any] ... unique expenses incurred as a result of undertaking production within the prison environment.” *Id.* at 17010. This prevailing wage, as it is referred to here, must be verified by the appropriate state agency which determines wage rates using a “non-inmate wage scale which will not result in the displacement of non-inmate workers performing similar work in the relevant locality.” *Id.* The “prevailing wage cannot be set below the Federal minimum wage”; however, [p]ayment of the Federal minimum wage ... does not automatically achieve compliance with the prevailing wage requirement unless the prevailing wage for the comparable private sector industries is, in fact, the Federal minimum wage.” *Id.* The Guideline also requires the payment of overtime because that requirement would be imposed on private sector competition.

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South Carolina enacted statutes to comply with federal law. For example, S.C. Code Ann. § 24-3-315 echoes the federal conditions:

*The director must determine prior to using inmate labor in a prison industry project that it will not displace employed workers, that the locality does not have a surplus of available labor for the skills, crafts, or trades that would utilize inmate labor, and that the rates of pay and other conditions of employment are not less than those paid and provided for work of similar nature in the locality in which the work is performed (emphasis added).*

Likewise, S.C. Code Ann. § 24-3-430 (D) provides that “[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector.” These state and federal requirements embrace both training and post-training wages.

In this case, remand is necessary for evidence to be entered by SCDC showing the gross wages paid to Appellant during his participation in the projects and what the prevailing wages were in

the area at the time of the project, as well as the calculation of any back wages to which Appellant is entitled for his labor, including his "training wages" for the first 320 hours he worked where the contract applied the wage rate to training.

**II. Whether Social Security withholding payments, SCDC Surplus Fund Amount, 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).**

Appellant contends that for every hour he worked his gross pay was reduced by an improper redirection of part of his pay to SCDC. Respondent argues that the items charged to the private company in addition to Appellant's gross hourly wages was 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 federal rules require that inmates be paid a wage that cannot be set below the Federal minimum wage, and that the Federal minimum wage does not automatically achieve compliance with the prevailing wage requirement. Inmates must be paid wages not less than the Federal minimum and not less than wages paid for work of a similar nature in the locality in which the work was performed. See Guideline at 17010.

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:

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\*

\*

(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).

(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).

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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 a "SCDC Surplus Fund Amount." Appellant contends that all these items are part of his hourly gross wage and should be part of the back pay owed. The Supreme Court referred to this sum 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 Section 24-3-140 (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 subsection (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.

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 \$1.79 under the 1995 contract and \$1.92 under the 2000 and 2001 contracts 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>11</sup> Thus, a remand is necessary for evidence to be entered by SCDC showing the proper deductions required by § 24-3-40(A).

### Conclusion

SCDC's failures to demonstrate that it paid Appellant the prevailing wage rate and to include the

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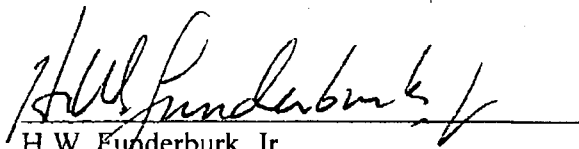
<sup>11</sup> In addition to addressing the issues raised by Appellant, Respondent contends that SCDC is required by law to make the prison system self-sustaining. *See* S.C. Code Ann. § 24-3-20. Specifically, Respondent cites S.C. Code Ann. §24-3-190, which provides among other things that "amounts 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 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 could have been increased to rent at market value.

Social Security withholding, Workers' Compensation premium, and SCDC Surplus Fund Amount in the gross wages prior to making deductions thereto were errors of law. Accordingly, the parts of Respondent's decision dealing with the prevailing wage rate and gross wages are **REVERSED** and **REMANDED**. Respondent must demonstrate that Appellant was paid prevailing wage rate for the type of labor he provided at the time and in the area that he provided it, pursuant to Section 24-3-430(D). SCDC must also 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). If the contractual wage rate was also used to pay the inmate while training for the work, then this amount must also be included in the recalculation.

**ORDER**

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

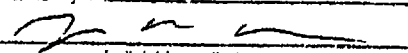
**AND IT IS SO ORDERED.**

  
H.W. Funderburk, Jr.  
Administrative Law Judge

June 20, 2018  
Columbia, South Carolina

**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

**FILED**

JUN 20 2018

SC ADMIN. LAW COURT