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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Judge

Appellate Case No. 2018-001324

Reyes Cabrera Pena, #265665 Respondent,

v.

South Carolina Department of Corrections Appellant.

PROOF OF SERVICE

I certify that I served the **Notice of Appeal** in the above-referenced matter upon the Clerk of the South Carolina Administrative Law Court ["ALC"] via hand delivery on July 18, 2018. A copy of the same bearing an ALC file-stamp accompanies the instant proof of service. I also certify that I have served the above-described items on the *pro se* Respondent by mailing copies to him, first class postage pre-paid, at the following address:

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430 Oaklawn Road
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July 27, 2018



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Judge

Administrative Law Court Docket No. 16-ALJ-04-0397-AP

Reyes Cabrera Pena, #265665 Respondent,

v.

South Carolina Department of Corrections Appellant.

NOTICE OF APPEAL

In accordance with South Carolina Appellate Court Rule 203 and the provisions of S.C. Code Ann. § 1-23-610(A)(1), the South Carolina Department of Corrections [“the Department”] appeals the June 20, 2018 Final Order issued by the Honorable H.W. Funderburk, Jr., Administrative Law Judge.

The Department’s undersigned counsel received written notice of the entry of Judge Funderburk’s June 20, 2018 Final Order on June 21, 2018.

By his June 20, 2018 Final Order, Judge Funderburk affirmed in part and reversed in part the final decision issued by the Department in an administrative grievance filed by the Respondent.

For clarity’s sake, the Department does not appeal the rulings by which Judge Funderburk affirmed its final decision regarding the Respondent’s administrative grievance.

FILED

JUL 18 2018

Instead, the Department appeals the following ruling(s) from Judge Funderburk's June

20, 2018 order:

The agreement between [the Department] and the Contractor (the private sector entity) establishes an hourly rate that includes a wage, Social Security withholding, a Workers' Compensation premium, and a "SCDC Surplus Fund Amount." [Pena] contends that all of these items are part of his hourly gross wage should be part of 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 [Torrence and Ward] prove true their allegation that [the Department] removes any of the money remitted by the private industry sponsor and then disburses the percentages listed in [S.C. Code Ann. § 24-3-40] based on the lower rate, [the Department] would be in violation of the plain language of the statute which directs it to disburse the money based on the gross wages. *See* [S.C. Code Ann. § 24-3-40(A)].

[*Torrence v. S.C. Dep't of Corr.*, 646 S.E.2d 866, 870, n. 4 (S.C. 2007)].

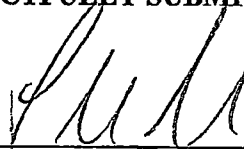
Thus, all the items in this subsection of the contract are included in an inmate's gross wages. What must be proved is whether the statutory deductions were calculated after the removal of any of these items. From the record provided, this Court can only direct [the Department] to calculate the statutory deductions from the gross hourly sum of \$8.01, if it cannot show that it has already done so.

...
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 [the Department's] decision dealing with gross wages are **REVERSED and REMANDED**. [The Department] must classify the entire contract amount as the hourly gross wages and calculate deductions and distributions from [Pena's] pay as set forth in [§ 24-3-40(A)].

...
IT IS THEREFORE ORDERED that those parts of [the Department's] decision dealing with [Pena's] prison industry gross wages, including for [Pena'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."

See Order, pp. 8 – 9. [emphasis supplied by ALJ].

RESPECTFULLY SUBMITTED:



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July 18, 2018

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also demanded access to wages held in escrow by SCDC. The grievance was denied on July 25, 2007. Appellant renewed these claims in his Step 2 Grievance filed on August 3, 2007. SCDC denied the Step 2 Grievance on March 28, 2016, received by Appellant on April 21, 2016. Appellant filed his appeal to the ALC on May 5, 2016, claiming he was owed back pay for "every hour" worked and claiming he should have immediate access to wages held in escrow. On July 5, 2016, Appellant filed his initial brief. On July 7, 2016, Respondent filed the Record on Appeal. On August 29, 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 30, 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 a supplemental briefs. On June 26, 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 15, 2017, Respondent filed an Amended Record on Appeal and its brief.

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

| | |
|----------------------------------------------------------------------|----------------|
| 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.⁴

⁴ This information was neither included in the Record on Appeal nor provided to Appellant prior to service of the

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 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*

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.

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 he is grieving "wages withheld from [him] in violation of [S.C. Code Ann. § 24-3-40(A)]" in the amount of "\$1.92 for every single hour [he] worked" for the private sector company while at the prison. 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).⁵ Appellant also asks for immediate access to wages held in escrow pursuant to S.C. Code Ann. § 24-3-40(B)(2). In his Step 2 Grievance and appeal, Appellant reasserts the issues raised in his Step 1 Grievance. In his initial brief, Appellant argues that SCDC failed to pay him the prevailing wage in accordance with Section 24-3-430(D) while he worked on the Project, and that he is entitled to recover \$1.92 in hourly deductions for every hour he worked on the Project. He reasserts these arguments in his supplemental brief, but also adds that his grievance was timely under the doctrine of equitable tolling.

Respondent argues that Appellant abandoned certain claims. First, it contends that Appellant failed to raise claims in his grievances (Step 1 or Step 2) or in his appeal for the "prevailing wage" under § 24-3-430(D) and for back pay for "training wages" for the first 320 hours of his labor. Respondent also contends that Appellant failed to assert the doctrine of equitable tolling in his Step 2 Grievance and in his appeal and that he did not raise or preserve an argument that his claim for back wages was a challenge to SCDC policies or procedures. Therefore, Respondent argues, 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

⁵ 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.

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 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 be raised on appeal. I agree. Appellant failed to 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 being deducted from his gross wages that should not have been pursuant to 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.⁶

⁶ Although Appellant’s training wage argument is not preserved with respect to the prevailing wage rate, Appellant

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.⁷ 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.

In addition, 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 and Step 2 Grievances and Notice of Appeal but did not argue it 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 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

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.

⁷ Interestingly, Respondent took nearly nine (9) years to issue a decision on Appellant's timely-filed Step 2 Grievance.

S.C. Code Ann. § 24-3-40(A).

In his Step 1 and Step 2 Grievances, Appellant claims that Respondent wrongfully withheld wages from him in violation of Section 24-3-40(A), and that he is owed \$1.92 "for every single hour [he] worked" for the private company during the Project. In his initial and supplemental briefs, Appellant reasserts that he is owed back wages for a sum (which, under the contract, should be \$2.01) that was improperly deducted from his wages during his work in the Project.

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 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).

(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 Contractor (the private sector entity) 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 of these items are part of his hourly gross wage should be part of 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 [Torrence and Ward] prove true their allegation that the DOC 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, the DOC 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.

Thus, all the items in this subsection of the contract are included in an inmate's gross wages. What must be proved is whether the statutory deductions were calculated after the removal of any of these items. From the record provided, this Court can only direct Respondent to calculate the statutory deductions from the gross hourly sum of \$8.01, if it cannot show that it has already done so.

As directed by these provisions, the gross wages as determined on remand and accounting for the three items (as noted by the Supreme Court) would be subject to recalculation of these deductions and disbursed accordingly. The Court further notes that under Section 24-3-40(A)(3) thirty-five percent (35%) of the gross hourly wage (in Appellant's case, \$8.01) would go to Appellant's child support obligation. If there is no child support obligation, ten percent (10%) is to be added to Appellant's "incidentals" account as provided in subsection (A)(4). Once in that account, the funds may be "distributed to the person or persons of the inmate's choice. The remaining twenty-five percent (25%) goes to SCDC to defray the cost of the inmate's room and board.

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 and their disposition are **REVERSED AND REMANDED** for proceedings consistent with this Order.

AND IT IS SO ORDERED.

June 20, 2018
Columbia, SC

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 9 Mail Service addressed to the party(ies) or their attorney(s).

Filed 20 day of June 2018

By: [Signature]

[Signature]
H.W. Funderburk, Jr.
Administrative Law Judge

FILED

JUN 20 2018

SC ADMIN. LAW COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Judge

Administrative Law Court Docket No. 16-ALJ-04-0397-AP

Reyes Cabrera Pena, #265665 Respondent,

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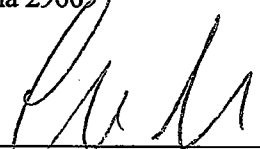
South Carolina Department of Corrections Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's **Notice of Appeal** on the above-named *pro se* Respondent by depositing a copy of it in the United States Mail, First Class Postage Pre-Paid, to the Respondent addressed as follows:

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