

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

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

Appellate Case No. 2018-001325

William Ray Ward, #91566 Respondent,

v.

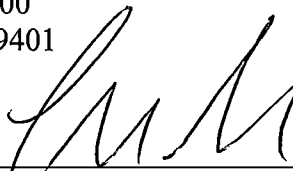
South Carolina Department of Corrections Appellant.

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 Respondent by mailing copies of them to his counsel of record, first class postage pre-paid, at the following address:

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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. 15-ALJ-04-0560-AP

William Ray Ward, #91566 Respondent,

v.

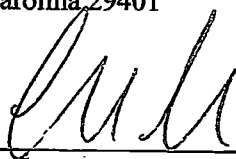
South Carolina Department of Corrections Appellant.

PROOF OF SERVICE

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

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FILED

JUL 18 2018

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. 15-ALJ-04-0560-AP

William Ray Ward, #91566 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.

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JUL 18 2018

SC ADMIN LAW COURT

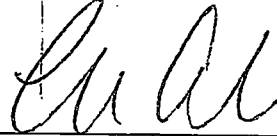
Instead, the Department appeals the following ruling(s) from Judge Funderburk's June 20, 2018 order:

The items set out in the contract as the hourly rate charged to the private sector business for the inmate labor furnished by [the Department] are 'the gross wages of the prisoner,' as indicated in [*Torrence v. S.C. Dep't of Corr.*, 646 S.E.2d 866, 870, n. 4 (S.C. 2007)]. These gross wages must be disbursed as provided in [S.C. Code Ann. § 24-3-40(A)]. Not to do so in an error of law, a "violation of the plain language of the statute which directs [the Department] to disburse the money based on the gross wages." [*Torrence*, 646 S.E.2d at 870, n. 4]. See Order, p. 12.

[The Department] takes the position that the additional itemized expenses totaling \$1.92 were not "lawfully" part of [Ward's] gross wages, a position that is contrary to [*Torrence*, 646 S.E.2d at 870, n. 4] and is thus an error of law. Thus, this portion of [the Department's] decision is **REVERSED** and **REMANDED**. [The Department] shall classify the entire contract amount as the hourly gross wage for the purpose of determining not only whether the wage meets the prevailing wage requirement but also for the purpose of calculating deductions and distribution of [Ward's] pay as set forth in § 24-3-40(A). See [*Torrence*, 646 S.E.2d at 870, n. 4]. [footnote omitted and emphasis supplied by ALJ]. See Order, p. 13.

[The Department's] failures to demonstrate that it paid [Ward] the prevailing wage rate and to include the 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 [the Department's] decision dealing with the prevailing wage rate and gross wages are **REVERSED** and **REMANDED**. [The Department] must demonstrate that [Ward] 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 [S.C. Code Ann. §§ 24-3-410(B)(7) and 24-3-430(D)]. [The Department] must also classify the entire contract amount as the hourly gross wages and calculate deductions and distributions from [Hatton's] pay as set forth in [§ 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. [emphasis supplied by ALJ]. See Order, p. 14.

RESPECTFULLY SUBMITTED:



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LAW OFFICES

JUN 21 2018

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MALONE, THOMPSON
SUMMERS & OTT, LLC

William Ray Ward, #91566,)
)
Appellant,)
)
vs.)
)
South Carolina Department of Corrections,)
)
Respondent)
_____)

Docket No. 15-ALJ-04 0560-AP
Grievance No.: ECI 1212-07

FINAL ORDER

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 William Ray Ward (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 assembling wire harnesses (Project) at Evans Correctional Institution for thirteen (13) years.¹ 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.²

Appellant completed 320 hours of training for which he was paid less than \$1.00 an hour. After completing training, beginning on June 30, 1995, Appellant was paid \$4.25 an hour. On November 1, 1996, his wages were increased to \$5.25 an hour. This rate of pay continued until Appellant's participation in the Project ended on November 14, 2003.

¹ The "record" in this appeal includes the Appellant's grievances and Respondent's rulings on these grievances. In addition, Respondent has submitted other documents as supplemental material in its original brief. These documents, including the agreement between SCDC and INSILCO executed on March 3, 2001, have not been properly included in the record to be reviewed by the Court. Likewise, wage surveys from the Bureau of Labor Statistics attached to Appellant's Supplemental Brief cannot be considered.

² This project was not a service project exempted from the prevailing wage requirement by annual budget provisions and finally by S.C. Code Ann. § 24-1-295 (effective August 1, 2007).

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SC ADMIN. LAW COURT

Appellant had previously sought relief through a class action suit against SCDC in circuit court. In *Torrence v. S.C. Dep't of Corr.*, 373 S.C. 586, 646 S.E.2d 866 (2007) (a case in which Appellant participated) the South Carolina Supreme Court held that inmates could not, through a declaratory judgment action, bring an action in circuit court against SCDC. See also *Adkins v. S.C. Dep't of Corr.*, 360 S.C. 413, 602 S.E.2d 51 (2004); *Wicker v. S.C. Dep't of Corr.*, 360 S.C. 421, 602 S.E.2d 56 (2004) (Inmates have no private right of action but can seek relief through the inmate grievance system.).

The *Torrence* decision was issued May 7, 2007. On June 25, 2007, while a petition for rehearing in *Torrence* was pending, Appellant filed a Step 1 Grievance, claiming that he was owed back wages of \$1.92 for each hour worked during his participation in the Project and for the amounts below the prevailing wage that he was paid for 320 "training hours."³ He also demanded immediate access to wages held in escrow by SCDC. The grievance was denied on May 25, 2012. Appellant filed a Step 2 Grievance on May 29, 2012, renewing the same claims. SCDC denied the Step 2 Grievance on October 14, 2015. Appellant filed his appeal to the ALC on October 16, 2015, in which he again renewed his claims. On January 4, 2016, Respondent filed the Record on Appeal. Appellant filed his initial brief on January 27, 2016, after filing on January 25, 2016, a Motion to Resolve Appeal Adversely to Respondent, or, in the Alternative, for a Briefing Schedule. On February 11, 2016, the Court issued an Order for Complete Record. On February 17, 2016, Respondent filed a Motion to Supplement Record, which the Court granted on February 26, 2016.

Appellant then filed an amended initial brief on March 8, 2016. On March 24, 2016, Respondent filed a Motion for Extension of Deadline to File Its Brief. On April 11, 2016, Respondent filed its initial brief. On April 21, 2016, Appellant filed a reply brief.

On July 13, 2016, the Court issued an Order of 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). After the Supreme Court issued its orders denying certiorari in *Gatewood* and *Ackerman*, this Court issued an Order Lifting Abeyance on

³ 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*, was improperly removed from his gross wages.

June 15, 2017, allowing the parties to file supplemental briefs. On July 5, 2017, Appellant filed his supplemental brief. On July 24, 2017, Respondent filed a Motion for Extension of Deadline to File Its Supplemental Brief, which the Court granted. On August 1, 2017, Respondent filed its supplemental brief. Finally, on August 10, 2017, Appellant filed his reply brief to Respondent's supplemental brief.

As an appendix to its brief, Respondent presented 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 D [Not included])	\$ 5.25
+	
Prorata Social Security Withholding Payment	.40
+	
Prorata Workers' Compensation Premium	.20
+	
<u>SCDC/Prison Industries Administrative Cost</u>	<u>1.32</u>
HOURLY RATE CHARGED TO CONTRACTOR	\$ 7.17

At no time during this agreement will inmates be paid less than the prevailing wage as set forth in Appendix D.⁴

~~The agreement was 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).
- III. Whether Appellant is entitled to immediate access to monies escrowed

⁴ 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 D 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. See also note 1 above.

pursuant to S.C. Code Ann. § 24-3-40(A)(5) and (B)(2).

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).

An Administrative Law Judge may not substitute his judgment for that of an agency "as to the weight of the evidence on questions of fact." *Id.* Furthermore, an Administrative Law Judge may not reverse or modify an agency's decision unless the Record reflects that substantial rights of the appellant have been prejudiced because the decision is clearly erroneous in view of the substantial evidence, arbitrary, capricious, or affected by an error of law or abuse of discretion. § 1-23-380(5); *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 alleges that he is owed back wages earned during his participation in the Project for all hours, including 320 "training hours," for which he was paid less than the prevailing wage for such work and for monies unlawfully withheld from or not included in his wages. He also demanded immediate access to wages held in escrow by SCDC. He asserts that these claims are supported by *Torrence, supra*.⁵ In his Step 2 Grievance, Appellant asserts that he is appealing the issues raised in his Step 1 Grievance. His appeal realleges the issues raised in his Step 1 and Step 2 Grievances. In his initial brief, Appellant argues that his grievance was timely filed under the doctrine of equitable tolling, that SCDC did not pay him the prevailing wage in accordance with S.C. Code § 24-3-430(D), and thus owes him back wages in the amount of the difference between the wages he received and the prevailing wage in effect at the time, and that SCDC was not entitled to deduct \$1.92 per hour from the wages he earned working on the Project.

In his supplemental brief, Appellant reasserts that the prevailing wage requirement of Section 24-3-430(D) applies to all his work under the Project, that he was owed back wages based on being paid below the prevailing wage rate, that his grievance was timely through the doctrine of equitable tolling, and that the deduction was improper. However, Appellant also adds that he was entitled to immediate access to the funds held in his escrow account and refers to an unpublished South Carolina Court of Appeals opinion, *Cramer v. S.C. Dep't of Corr.*, No. 2014-002172, 2016 WL 4125580, at *1 (S.C. Ct. App. Aug. 3, 2016), to support his position.

Respondent argues that equitable tolling does not apply in this case, and that Appellant otherwise failed to meet the 15-day deadline to file his Step 1 Grievance. Therefore, Respondent argues that Appellant's claims are time-barred. It also argues that S.C. Code Ann. § 24-3-410(B)(7) (2007)

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.

applies to the wages paid to Appellant after the training period.⁶ It further argues that the hourly rate paid to Appellant for the work performed in the Project operated at the prison conformed to the provisions of this section or of S.C. Code Ann. § 24-3-430(D). SCDC asserts that by paying Appellant "at or above the federal minimum wage" it paid Appellant an hourly rate that satisfied either statute.⁷ Finally, Respondent contends that based on a plain reading of Section 24-3-40(B)(1)-(3), an inmate like Appellant, who is serving a life sentence, cannot immediately withdraw funds held in escrow under Section 24-3-40(A)(5). Rather, under Section 24-3-40(A)(5), that money can only be withdrawn by his estate and distributed upon his natural death. It also points out that Appellant's reliance on *Cramer* is misguided because that case is not on remand before the ALC, and a petition for a writ of certiorari to the Court of Appeals is still pending in that case.⁸

Issue Preservation

At the outset, the Court must address Respondent's contention that Appellant failed to preserve his claims by failing to timely file his Step 1 Grievance. Respondent asserts that equitable tolling does not apply in this case, and that Appellants' claims are time-barred for untimely filing his Step 1 Grievance. I disagree.

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

⁶ Respondent concedes in its supplemental brief that the "training wages" Appellant received for the first 320 hours he worked "did not conform to § 24-3-410(B)(7) or § 24-3-430(D)."

⁷ This hourly rate, the "gross" pay, must include the SCDC "surplus fund" paid by the private sector entities to SCDC. *See Torrence*, 373 S.C. at 590, 646 S.E.2d at 867 and the discussion below.

⁸ The *Cramer* case to which Appellant cites in his briefs has no precedential value, as it is unpublished, and the court in that case never addressed the issue of whether an inmate has a state-created liberty or property interest in immediate access to funds held in his or her escrow account. Moreover, the petition for writ of certiorari in that case has since been denied by our Supreme Court. However, though the case is currently before the ALC on remand, ALC orders have no binding effect on other ALC orders. Nevertheless, Appellant does not argue this issue but instead, in his supplemental reply brief, states that he "reserves the right to file a subsequent grievance requesting access to any monies earned by him during his participation in the Project and held in escrow."

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 did not deny either the Step 1 Grievance or the Step 2 Grievance on the ground that either was time-barred.⁹ 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.” Therefore, the Court finds that claims in Appellant’s Step 1 and Step 2 Grievances are not time-barred.

Moreover, even if the 15-day deadline governed in this case, equitable tolling would apply. In *Hooper v. Ebenezer Sr. Servs. And Rehab. Ctr.*, our Supreme Court noted that “[e]quitable tolling is judicially created; it stems from the judiciary’s inherent power to formulate rules of procedure where justice demands it” (citation omitted). 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). The Court went on to provide a list of circumstances illustrating where equitable tolling has been applied, though it also pointed out that these circumstances “do not constitute an exclusive list of circumstances that justify the application of equitable tolling[,] since the doctrine is “flexible and adaptable to particular exigencies so that relief will be granted” to avoid a party’s “suffer[ing] a gross wrong.” *Id.* at 116-17, 687 S.E.2d at 33. One of these circumstances is where “a party has

⁹ Interestingly, Respondent took over three (3) years to issue a decision on Appellant’s timely-filed Step 2 Grievance.

more than one legal remedy available[.]” in which case the statute of limitations is tolled while the party pursues one of the possible remedies.” *Id.* at 116, 687 S.E.2d at 33 (citation omitted). The Court observed that “equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use. *Id.* at 116, 687 S.E.2d at 33. But it “serves to ameliorate the harsh results that sometimes flow from a strict, literalistic application of administrative time limits.” *Id.* At 116, 687 S.E.2d at 33. Additionally, our federal courts have noted that the “relevant conditions for equitable tolling [are] notice, lack of prejudice, and diligent and reasonable action[.]” See *Aikens v. Ingram*, 524 F. App’x 873, 884 (4th Cir. 2013).

In this case, Respondent argues that the Appellant should have filed his Step 1 Grievance after the issuance of *Adkins* and *Wicker* on August 23, 2004, or certainly after the dismissal of *Torrence* on May 31, 2005. However, Appellant was a plaintiff and later appellant in *Torrence*, which arose following *Adkins* and *Wicker*, and the case was appealed after its 2005 dismissal. *Torrence* was still on appeal and was not concluded in the S.C. Supreme Court until July 2007, after which Appellant diligently and reasonably filed his Step 1 Grievance within 15 days. Moreover, SCDC was aware of Appellant’s claims through *Torrence* and was not prejudiced by his filing his grievance in 2007. Therefore, the Court finds that even if the 15-day deadline applies in this case, equitable tolling would also apply, and thus Appellant’s claims would not be time-barred.

Prevailing Wage Rate

The Court now turns to the issue of 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 first argues that Appellant never asserted that he was challenging SCDC’s “policies/procedures,” so *Ackerman* does not apply. Alternatively, Respondent argues that *Ackerman* and *Gatewood*, and the prevailing wage statute – Section 24-3-430(D), do not apply because the prison industries project at issue was not a service project or service work project, but rather a federally certified PIECP project operated by the prison. Therefore, Respondent argues that Section 24-3-410(B)(7) applied and that “comparable wage” under that provision was satisfied because Appellant was paid at or above the federal minimum wage.

As an initial matter, Respondent concedes that the “training wages” paid to appellant for his first

320 hours of labor did not comply with the controlling statutes, S.C. Code Ann. §§ 24-3-410(B)(7) and 24-3-430(D) (Supp. 1995),¹⁰ but it denies that Appellant is owed any back pay for labor provided after the first 320 hours. This portion of Respondent's decision is REVERSED and REMANDED. Respondent shall calculate back pay owed for the training wages based on a wage rate that is not less than the Federal minimum wage and is not less than that paid for work of a similar nature in the locality in which the work was performed at the time during which it was performed.

The Court now turns to the wages paid to Appellant after the training period.

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.

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

¹⁰ These provisions remain the same in the current code.

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.

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.”¹¹ These state and federal requirements embrace both training and post-training wages. S.C. Code Ann. § 24-3-410(B)(7) (2007) also requires inmates to be paid “comparable wages.” SCDC asserts that by paying Appellant “at or above the federal minimum wage” it paid Appellant an hourly rate that satisfied the statute. The Court disagrees. The federal rules provide that the prevailing wage cannot be below the federal minimum wage, but that paying the federal minimum wage “does not automatically achieve compliance with the prevailing wage requirement.” Guideline at 17010.

The purpose of these programs is to employ inmates without creating an economic advantage either to the private sector entity or to favor inmate labor by providing a supply of labor cheaper than that which could be furnished by the law-abiding citizens of South Carolina. Accordingly, the Court agrees with Respondent that the matter should be remanded for further proceedings to determine the prevailing wage for the labor furnished and/or what the private sector entities

¹¹ These statutes were amended during the period in question in this case, but the amendments do not affect the resolution of the issues before this Court.

(ESCOD and INSILCO) paid non-inmate workers for the same or substantially similar tasks performed in South Carolina during the period he worked on the Project. This portion of Respondent's decision is also REVERSED and REMANDED. Respondent shall calculate back pay owed based on a wage rate that is not less than the Federal minimum wage and is not less than that paid for work of a similar nature in the locality in which the work was performed during the period during which it was performed. These back wages shall be calculated not only for the first 320 hours (i.e., training period) that Appellant worked, but for all of the hours Appellant worked on 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 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:

* * *

(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 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.

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 properly in the record. Also, Respondent takes the position that the additional itemized expenses totaling \$1.92 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.¹² Thus, this portion of Respondent’s decision is REVERSED and REMANDED. Respondent shall classify the entire contract amount as the hourly gross wage for the purpose of determining not only whether the wage meets the prevailing wage requirement but also for the purpose of ~~calculating deductions and distribution of Appellant’s pay as set forth in § 24-3-40(A).~~ See *Torrence*, 373 S.C. at 594 n.4, 646 S.E.2d at 870 n.4.

III. Whether Appellant is entitled to immediate access to monies escrowed pursuant to S.C. Code Ann. § 24-3-40(B)(2).

Finally, Appellant, who is serving a life sentence, contends that he is entitled to immediate access

¹² 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.

to the portion of his gross wages held in an interest-bearing escrow account as set aside by § 24-3-40(A)(5). Appellant argues that keeping the wages held in escrow until his death deprives him of a liberty interest.

Section 24-3-40(B) provides, in pertinent part, for return of the inmate's wages held in escrow as follows:

- (2) A prisoner serving life in prison or sentenced to death shall be given the option of having his escrowed wages included in his estate or distributed to the persons or entities of his choice.

"Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction."

Georgia-Carolina Bail Bonds, Inc. v. Cty. of Aiken, 354 S.C. 18, 24, 579 S.E.2d 334, 337 (Ct. App. 2003).

Reading S.C. Code Ann. § 24-3-40 as a whole clearly indicates that the section contemplates distribution of the escrowed funds at the end of SCDC's custody of an inmate, that is at the inmate's release with or without community supervision (Section 24-3-40(B)(1), (3)), or at death. An inmate serving a life sentence or sentenced to death should not have access to escrowed funds sooner than an inmate who is to be released. It is also possible that an inmate may have his sentence commuted, he may be pardoned, or he may be released for some other reason. Should these escrowed funds be disposed of earlier, then the purpose of the statute would be frustrated. For these reasons, Respondent's decision on this issue is AFFIRMED.

Conclusion

SCDC's failures to demonstrate that it paid Appellant the prevailing wage rate and to include the 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 Sections 24-3-410(B)(7) and -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. Finally, the part of Respondent's

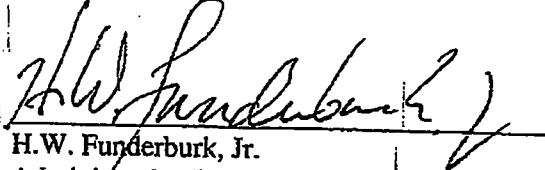
decision dealing with Appellant's immediate access to funds in his escrow account is **AFFIRMED**.
Appellant is not entitled to immediate access to funds in his escrow account.

ORDER

IT IS THEREFORE ORDERED that those parts of SCDC's decision dealing with Appellant's prison industry wages, including training wages, and their disposition are **REVERSED and REMANDED** for proceedings consistent with this Order. As to the escrowed funds, the decision of the SCDC is **AFFIRMED**.

AND IT IS SO ORDERED.

June 20, 2018
Columbia, South Carolina


H.W. Funderburk, Jr.
Administrative Law Judge

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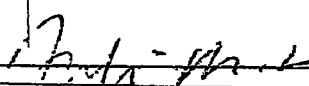
CERTIFICATE OF SERVICE

I, Julia M. Miller, 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).

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June 20, 2018
Columbia, South Carolina


Julia M. Miller
Judicial Law Clerk

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