

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. 2018-001325

William Ray Ward, #91566 Respondent,

v.

South Carolina Department of Corrections Appellant.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

The Appellant in the instant matter, William Ray Ward [“Ward”], challenged various aspects of the pay remitted to him by the Appellant, the South Carolina Department of Corrections [“SCDC”], while he voluntarily participated in a federally certified prison industries project operated by SCDC within the confines of Evans Correctional Institution [“Evans”].

Ward litigated his challenges to the pay SCDC remitted to him for his labor under the provisions of SCDC’s Inmate Grievance Policy System, designated as Policy Number GA-01.12 [“GA-01.12”]. SCDC denied Ward’s challenges, and he appealed SCDC’s denial to the South Carolina Administrative Law Court [“ALC”].

On June 20, 2018, the ALC issued its “Final Order” concerning Ward’s appeal (R. pp. ___ - ___). By its order, the ALC affirmed in part and reversed in part SCDC’s final decision regarding Ward’s challenges to his prison industries pay.

SCDC appeals the ALC’s order, but, as reflected by its July 18, 2018 Notice of Appeal (R. pp. ___ - ___), it appeals *only* the following rulings issued by the ALC:

The items set out in the contract as the hourly rate charged to the private sector business for the inmate labor furnished SCDC 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)].¹ 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 [SCDC] to disburse the money based on the gross wages.” [*Id.*]. (R. p. ___).

...

¹ Ward and Thomas Torrence, an inmate who also participated in the prison industries project operated by SCDC at Evans, were the lead plaintiffs in *Torrence*. (R. p. ___). Torrence separately filed a grievance with SCDC under GA-01.12 in which he articulated a variety of claims associated with his prison industries pay, including a claim of back pay of \$1.92 per hour for every hour of his labor. SCDC denied Torrence’s claims, and he appealed SCDC’s final decision to the ALC. The ALC issued two (2) orders by which it affirmed in part and reversed in part SCDC’s denial of Torrence’s claims. SCDC appealed to this Court the rulings from the ALC’s two (2) orders by which the ALC reversed SCDC’s denial of Torrence’s claims, and SCDC’s appeal remains pending. *See Thomas Torrence v. S.C. Dep’t of Corr.*, Appellate Case No. 2016-000285. *See also* note 3 below.

Also, [SCDC] 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.² Thus, this portion of [SCDC’s] decision is REVERSED and REMANDED.³ **[SCDC] 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). [*Id.*]. (R. p. ____).

...

SCDC’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 [SCDC’s] decision dealing with the prevailing wage rate and gross wages are REVERSED and REMANDED. [SCDC] 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)]. **[SCDC] must also classify the entire contract amount as the hourly gross wages** and calculate deductions and distributions from [Ward’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. (R. p. ____).

[emphasis supplied].

² In the footnote associated with this passage, the ALC stated as follows (R. p. ____):

In addition to addressing the issues raised by [Ward], [SCDC] contends that [it] is required by law to make the prison system self-sustaining. *See* S.C. Code Ann. § 24-3-20. Specifically, [SCDC] 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.” ([SCDC] 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.). [SCDC] concludes that recalculating the wage structure as argued by [Ward] 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. [emphasis supplied].

As discussed below, SCDC’s instant appeal covers the above-quoted footnote.

³ The ALC in *Torrence* affirmed SCDC’s denial of *Torrence*’s claim that the agency owed him \$1.92 for every hour of labor he performed while he participated in the federally certified project it operated at Evans, and *Torrence* did not appeal the ALC’s ruling on this issue. *See* note 1 above.

Accordingly, SCDC respectfully presents the following issues on appeal:

- I. Was the procedure by which the ALC fashioned its ruling reversing the SCDC's denial of Ward's \$1.92 per labor hour back pay claim imbued with evidentiary error?
- II. Did the ALC erroneously anchor its decision to reverse SCDC's denial of Ward's \$1.92 back pay claim upon dicta from *Torrence*?
- III(A). Did the ALC err by ruling that SCDC must classify "Workers' Compensation premiums" as a component of the hourly gross wage it paid Ward for his prison industries labor?
- III(B). Did the ALC err by ruling that SCDC must classify "Social Security withholding payments" as a component of the hourly gross wage it paid Ward for his prison industries labor?
- III(C). Did the ALC err by ruling that SCDC must classify the "SCDC Surplus Fund Amount" as a component of the hourly gross wage it paid Ward for his prison industries labor?

STATEMENT OF THE CASE

I. WARD'S GRIEVANCE

A. WARD'S STEP 1

Ward voluntarily participated in a federally certified Prison Industries Enhancement Certification Program ["PIECP"] project operated by SCDC at Evans in which ESCOD, Inc. and, later, Insilco, Inc. participated as the private industry sponsors.⁴

Ward filed a Step 1 grievance form with SCDC dated June 19, 2007 (R. pp. __ - __), in which, in pertinent part, he asserted the following (R. p. __):

[SCDC] is in violation of wages earned by me while working for private sector [companies] ESCOD and Insilco at Evans.⁵ [SCDC has] withheld

⁴ SCDC operates three (3) types of projects within its prison industries program: "traditional" projects (*see* S.C. Code Ann. §§ 24-3-320 and 330), "service work" projects (*see* §§ 24-1-290 and 295; *see also* § 24-3-310(3)), and projects certified by the federal government under its PIECP. SCDC must operate its PIECP projects, such as the project at Evans in which Ward participated, in conformity with federal law (*see* 18 USC § 1761, the Ashurst-Sumners Act), federal regulations (*see* 64 FR 17000, *et seq.*), and state law (*see* §§ 24-3-40 and 24-3-310, *et seq.*).

⁵ For clarity's sake, Ward's claim that he "worked for" or was otherwise employed by ESCOD and/or Insilco is negated by our Supreme Court's decision in *Williams, et al., v. S.C. Dep't of Corr. et al.*, 641 S.E.2d 885, 887 – 88 (S.C. 2007). Ward's claim is also negated by federal precedent. *See Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) ("People are not imprisoned for the purpose of enabling them to earn a living. ... **But prisoners are not employees.**"). [emphasis supplied]. Ward's claim is also negated by *S.C. Dep't of Corr. v. Cartrette*, 694 S.E.2d 18,

illegally all these wages. I grieve all wages owed tome by SCDC under [Torrence and § 24-3-40(A)]. [SCDC] is in violation of statute and [Torrence, 646 S.E.2d at 870, n. 4]. Therefore, **SCDC owes me back wages of \$1.92 for every single hour that I worked at Evans ... plus proper interest on these monies.** [emphasis supplied].

Ward then requested the following action: “That I be paid \$1.92 for every hour I ever worked for ESCOD/Insilco ... plus proper interest on these monies.” (R. p. __).

B. SCDC’S RESPONSE TO WARD’S STEP 1

SCDC, by and through the appropriate official, denied the claim(s) Ward articulated in his Step 1. (R. pp. __ - __).

Regarding Ward’s claim that SCDC pay him \$1.92 for every hour of the labor he performed, SCDC determined as follows (R. pp. __ - __):

I conclude that SCDC does not owe you \$1.92 or any other amount for every labor hour you voluntarily provided to the federally certified prison industries project operated by SCDC at Evans. Under the contracts struck between SCDC and ESCOD and/or INSILCO, SCDC legitimately charges ESCOD and/or INSILCO an hourly rate for “overhead cost” in addition to the hourly rate SCDC pays inmates in accordance with both state and federal law.

The circuit court in [Adkins] concluded that SCDC’s practice of invoicing private industry sponsors, like ESCOD and INSILSO, such an hourly “overhead cost” was accepted by the BJA,⁶ the federal agency responsible for certification of both the prison industries projects at issue in [Adkins] and the prison industries project at issue in the instant case.⁷

23 (S.C. Ct. App. 2010), in which this Court relied upon § 24-3-40(A) and *Williams*, 641 S.E.2d at 887, when it ruled that an inmate was not a private industry sponsor’s employee. As an aside, the dissent in *Cartrette* quoted the above-provided passage from *Bennett*. 694 S.E.2d at 24.

⁶ As it also stated in its response to Ward’s Step 1, the “BJA” is the United States Department of Justice’s Bureau of Justice Administration, which “published the guidelines applicable to [the Prison Industries Enhancement Certification Program] in the Federal Register, Specifically 64 FR 17000.” (R. p. __). The PIECP Guidelines from the Federal Register address the provisions of 18 U.S.C. § 1761, known as the Ashurst-Sumners Act. See note 4 above.

⁷ The reference to the circuit court’s conclusion in “Adkins” from the above-quoted passage in SCDC’s response to Ward’s Step 1 consists of the order filed October 30, 2002 by the circuit court in *Adkins v. S.C. Dep’t of Corr., C/A No. 2000-CP-40-4761*. The litigation history of *Adkins* before the circuit court is available on-line via the Richland County Public Index. See <http://www5.rcgov.us/SCJDWEB/PublicIndex/PISearch.aspx>. SCDC submitted the circuit court’s order filed October 30, 2002 as an exhibit in support of the brief it filed April 11, 2016 with the ALC in the

SCDC's assessment of this "overhead cost" does not violate any applicable South Carolina statute, because the assessment of this cost allows SCDC to comply with a variety of the applicable prison industries statutes, including [S.C. Code § 24-3-400].⁸ These statutes, including § 24-3-400, either directly or indirectly compel SCDC to collect an hourly "overhead cost" or "administrative charge" from private industry sponsors, like ESCOD and INSILCO, so that it may cover the expenses it incurs as a consequence of operating the project in which you voluntarily participated at Evans.

C. WARD'S STEP 2 AND SCDC'S FINAL DECISION

By his Step 2 (R. p. ___), Ward appealed SCDC's initial denial of the wage claims he articulated in his Step 1, including his \$1.92 per hour back pay claim.

By its final decision (R. pp. ___ - ___), SCDC, by the appropriate official, affirmed its denial of Ward's Step 1 and likewise denied his Step 2.

Regarding Ward's claim that SCDC pay him \$1.92 for every hour of the labor he performed, SCDC determined as follows (R. pp. ___ - ___):

I concur with the warden's determination that SCDC does not owe you \$1.92 or any other amount for every labor hour you voluntarily provided to the federally certified PI project operated by SCDC at Evans. Again, ESCOD was and remains the private industry sponsor for the PI project operated at Evans. Under the contracts struck between SCDC and ESCOD, SCDC legitimately charges ESCOD an hourly rate for "overhead cost" in addition to the hourly rate SCDC pays inmates in accordance with both state and federal law. Neither 18 USC 1761(c), 64 FR 17000, [S.C. Code § 24-3-315], nor the decisions in [*Adkins*] and [*Torrence*] contradict this reality. **The "overhead cost" SCDC charges ESCOD is simply not a part of your inmate pay and it is not deducted from your inmate pay.**

instant matter. (R. pp. ___ - ___). The plaintiffs in *Adkins* consisted of current and former inmates who participated in a federally certified PIECP project operated by SCDC at Tyger River Correctional Institution. Again, the project operated by SCDC at Evans in which Ward participated was, like the project at issue in *Adkins*, a federally certified PIECP project. The plaintiffs in *Adkins* appealed the circuit court's decision to this Court, but our Supreme Court later accepted the case on direct review. By its decision in *Adkins v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (S.C. 2004), our Supreme Court affirmed in result the circuit court's decision in SCDC's favor, specifically by ruling that the plaintiffs did not possess a private right of action under the applicable prison industries statutes by which to sue SCDC. In its decision, however, our Supreme Court approvingly noted the circuit court's decision in SCDC's favor. 602 S.E.2d at 55, n. 6.

⁸ See note 2 above.

Furthermore, I note that the circuit court in [*Adkins*] concluded that SCDC's practice of invoicing a private industry sponsor, like ESCOD, such an hourly "overhead cost" was accepted by BJA, the federal agency responsible for certifying both the PI project at issue in [*Adkins*] and the PI project operated at Evans.

As the warden accurately explained in his response, **SCDC's assessment of this "overhead cost" does not violate any applicable South Carolina statute**, because the assessment of this cost allows the agency to comply with the various applicable PI statutes, including § 24-3-400. These statutes, including § 24-3-400, either directly or indirectly compel SCDC to collect an hourly "overhead cost" or "administrative charge" from private industry sponsors so that the agency may cover the expenses it incurs as a consequence of operating these projects.

[emphasis supplied].

II. WARD'S NOTICE OF APPEAL TO THE ALC

Torrence timely appealed SCDC's denial of his grievance by filing a Notice of Appeal with the ALC on October 18, 2015. (R. p. __), in which, in relevant part, he asserted as follows:

Also, due to [*Torrence*, 646 S.E.2d at 870, n. 4], **I should be paid by SCDC \$1.92 for every hour** I worked in the [federally certified PIECP project operated by SCDC at Evans]. [emphasis supplied].

III. PROCEEDINGS BEFORE THE ALC

By motion dated January 25, 2016, Ward began proceedings before the ALC regarding the final decision by which SCDC denied his prison industries pay claims. (R. pp. __ - __).

Ward followed his January 25, 2016 motion with his "Brief in Support of his Appeal" dated January 27, 2016 (R. pp. __ - __), in which he asserted as follows regarding his \$1.92 per hour back pay claim (R. p. __):

Moreover, following the completion of his training, **SCDC withheld \$1.92 per hour from [Ward's] paychecks** and, once again, paid him less than the prevailing wage in violation of South Carolina law.⁹ [emphasis supplied].

⁹ The ALC, in its June 20, 2018 "Final Order," remanded the determination of the applicable "prevailing wage" back to SCDC. (R. pp. __ - __). Neither party appealed the ALC's remand to this Court. As explained below, SCDC did not "withhold \$1.92 per hour from [Ward's] paychecks."

In both of the above-referenced filings, however, Ward accurately asserted that SCDC had not yet filed a complete record with the ALC, and, on February 11, 2016, the ALC issued its “Order for Completed Record.” (R. pp. __ - __).

In conformity with the ALC’s February 11, 2016 order, SCDC, by a motion filed February 17, 2016, submitted a complete record reflecting the grievances in which Ward asserted his prison industries pay claims and its responses thereto. (R. pp. __ - __).

Ward then filed another brief with the ALC dated March 8, 2016 (R. pp. __ - __), in which he asserted as follows regarding his \$1.92 per hour back pay claim (R. p. __ - __):

Moreover, SCDC **withheld \$1.92 per hour from [Ward’s] wages** for the entirety of his work with the Project.

...
SCDC was not entitled to **collect \$1.92 per hour from [Ward’s] wages.**

...
In addition to SCDC’s failure to pay [Ward] the prevailing wage for his work as required by law, **SCDC also withheld \$1.92 per hour from [Ward’s] compensation for “overhead” costs.** (Step 1 Grievance). SCDC claims that South Carolina law “compel[s]” SCDC to collect an hourly overhead cost from private industry sponsors. (Step 1 Grievance Response, p. 5). However, the court in *Torrence*, **referencing the \$1.92 deduction by SCDC**, noted that if the agency “removes any of the money remitted by the private industry sponsor and then disburses the percentages listed in [§ 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.¹⁰” [*Torrence*, 646 S.E.2d at 870, n. 4]. The only support SCDC provides with respect to its **\$1.92 deduction** is the threadbare assertion that the agency required “overhead costs” for the program. However, there is no explanation or discussion that breaks down those costs, or demonstrates that SCDC did in fact disburse the money based on gross wages. Without more, the agency fails to adequately rebut this issue, and as a result, **SCDC should compensate [Ward] for the hourly deductions from his paycheck.**

[emphasis supplied].

¹⁰ As shown on page 10 below, Ward did not fully quote the footnote in *Torrence* upon which he anchored his claim.

SCDC filed its brief with the ALC on April 11, 2016 (R. pp. ___ - ___), within which it squarely addressed Ward’s claim regarding the \$1.92 per labor hour “deduction” it purportedly assessed on his gross prison industries pay. (R. p. ___ - ___).

To facilitate its explanation, SCDC introduced a copy of its March 3, 2001 contract with Insilco, ESCOD’s successor as the private industry sponsor for the federally certified PIECP project it operated at Evans, as an exhibit in support of its brief. (R. pp. ___ - ___).

Using data from the contract, SCDC explained in its brief that contrary to Ward’s assertion, the \$1.92 hour figure at issue did not represent its “overhead costs.” Instead, the \$1.92 per hour figure consisted of three (3) separate costs, *none of which were included* in the inmates’ gross hourly wage (R. pp. ___ - ___):

- 1) \$0.40 designated as “Prorata Social Security,”
- 2) \$0.20 designated as “Prorata Workers’ Compensation Premium,” and
- 3) \$1.32 designated as “SCDC Surplus Fund Amount.”

The entirety of the operative section from the contract (i.e. Section 3.3.1) reflected these three (3) separate costs, as well as other information essential to the proper resolution of SCDC’s instant appeal (R. pp. ___ - ___):

1. Hourly Rate: [Insilco] and SCDC agree to an hourly rate determined as follows:

| | |
|---------------------------------------|-------------|
| Prevailing Wage (See Appendix D) | \$5.25 |
| Prorata Social Security | .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. **The prevailing wage rate is to be established annually by the S.C. Employment Security Commission.**¹¹ Upon receipt of the annual wage rate, SCDC will notify [Insilco] in writing and adjust its charge accordingly. In the event the prevailing wage, **prorata social security withholding payments, or prorata Workers' Compensation premium** increase during the term of this agreement, [Insilco] agrees to increase the prevailing inmate wage on a dollar for dollar basis, immediately upon the effective date of such increase.

SCDC and [Insilco] will negotiate the “**SCDC Surplus Fund Amount**” annually.

...
Pursuant to Federal guidelines, inmates working in excess of forty (40) hours per week shall be paid overtime at one and a half times the rate of the prevailing wage.

The **SCDC Surplus Fund amount** will not be charged one and a half times on overtime hours.

[emphasis supplied].

As SCDC ultimately demonstrated in its brief, Ward’s claim, in which he demanded back pay of \$1.92 per hour for every hour of labor he performed while voluntarily participating in the federally certified PIECP project SCDC operated at Evans, failed under the purportedly applicable footnote from *Torrence* upon which he relied.

Ward’s claim was inherently defective, because, as stated above,¹² he did not fully quote the footnote from *Torrence*. In entirety, the operative language from the footnote in *Torrence*, 646 S.E.2d at 870, n. 4, provided as follows:

..., *if appellants prove true* their allegation that [SCDC] *removes* any of the money remitted by the private industry sponsor and then disburses the percentages listed in [§ 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). [italicized emphasis supplied; bold emphasis supplied by the Court].

¹¹ See note 9 above.

¹² See note 10 above.

Ward failed to “prove true,” as required by the above-quoted footnote from *Torrence*, his allegation that SCDC withheld, collected or deducted, or removed \$1.92 per hour, or any of the three (3) costs that comprised the \$1.92 per hour figure, from his gross wages. Ward failed to “prove true” his allegation, because, under the structure of the hourly rate at which SCDC invoiced the private industry sponsor for inmate labor costs reflected by their contract, Ward’s gross hourly pay never included the \$1.92 per hour figure.

Not long after it received the parties’ briefs, the ALC, on July 13, 2016, issued an “Order of Abeyance” (R. p. ___ - ___), by which it declared that it would hold the instant matter in abeyance pending a final decision from our appellate courts in the matter styled as *Ackerman v. S.C. Dep’t of Corr.*, 782 S.E.2d 757 (S.C. Ct. App. 2016), *cert. denied* (May 31, 2017).

On June 15, 2017, after our Supreme Court denied certiorari in *Ackerman*, the ALC issued its “Order Lifting Abeyance” (R. pp. ___ - ___), by which it permitted the parties to submit supplemental briefs.

In his supplemental brief dated July 5, 2017 (R. pp. ___ - ___), Ward conceded the following (R. p. ___):

SCDC argues that while it collected \$1.92 for each hour [Ward] worked in the Project, the fee was part of the total hourly rate charged to the private industry sponsor for overhead costs and certain withholdings. [SCDC’s Brief, pp. 24 – 26]. **To the extent SCDC treated the \$1.92 as a separate charge to the Project’s sponsor, rather than a deduction from [Ward’s] gross wages, [Ward] acknowledges that SCDC was within its rights to do so.** Assuming, however, that SCDC has provided this Court with an accurate reflection of its treatment of [Ward’s] wages, the \$1.92 fee should not impact the calculation and payment of back wages owed to Mr. Ward discussed above, as SCDC has already received \$1.92 for each hour worked per its contract with the private sponsor. [footnote omitted and emphasis supplied].

SCDC filed its supplemental brief with the ALC on August 1, 2017 (R. pp. ___ - ___), and, in response to the above-quoted passage from Ward’s supplemental brief, SCDC offered the following (R. pp. ___ - ___):

SCDC reiterates that it did not include the \$1.92 per hour figure in Ward’s \$5.25 per hour gross wage, and it **concurs with Ward’s acknowledgment the SCDC “was within its rights” to separately charge the project’s sponsor \$1.92 per inmate labor hour.** [footnote omitted and emphasis supplied].

IV. THE ALC’S JUNE 20, 2018 “FINAL ORDER”

As illustrated above in Section III, Ward conceded in his supplemental brief to the ALC that SCDC “was within its rights” to separately charge the project’s private industry sponsor (i.e. ESCOD and, later, Insilco) \$1.92 per inmate labor hour *along with* the hourly rate for inmate labor (i.e. the “Prevailing Wage” designated in the line item from the contract) it charged the project’s private industry sponsor.

As also illustrated above in Section III, SCDC demonstrated in its first brief and then reiterated in its supplemental brief that it did not “withhold,” “collect,” “deduct,” or “remove” \$1.92 per hour from the gross hourly rate at which it paid Ward and his fellow inmates for their labor. Instead, SCDC separately charged the private industry sponsor, in accordance with the applicable section of their contract, \$1.92 per inmate labor hour *along with* the gross hourly rate it charged the private industry sponsor for inmate labor.¹³

Notwithstanding Ward’s concession and the operative section of the contract between SCDC and the private industry sponsor, the ALC, in its June 20, 2018 “Final Order,” reversed SCDC’s denial of Ward’s claim that SCDC owes him \$1.92 per hour for every hour of labor he performed in the federal certified prison industries project it operated at Evans.

¹³ SCDC assessed the deductions mandated by § 24-3-40(A) to an inmate’s gross pay, which was the product of the inmate’s gross hourly pay rate (i.e. the “Prevailing Wage” designated in the line item from the contract) multiplied by the number of hours worked by the inmate.

Among the provisions of its June 20, 2016 “Final Order” by which it reversed SCDC on this issue,¹⁴ the ALC ruled as follows (R. p. ___):¹⁵

[The ALC] 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 [SCDC] (for example the contract and proof of the actual wages paid during [Ward’s] work for the project, as well as how much was deducted from [Ward’s] wages) was not properly in the record. Also, [SCDC] 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 our Supreme Court’s note in *Torrence* and is thus an error of law. **Thus, this portion of [SCDC’s] decision is REVERSED and REMANDED.** [SCDC] 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). [*Id.*]. [footnote omitted and emphasis supplied].

STANDARD OF REVIEW

ALC Rule of Procedure 65 states that “[j]udicial review of any decision of the [ALC] in a matter heard on appeal from final decisions pursuant to [*Al-Shabazz v. State*, 527 S.E.2d 742 (S.C. 2000)] shall be as provided in [§ 1-23-610].” *See also S.C. Dep’t of Corr. v. Mitchell*, 659 S.E.2d 233, 234 (S.C. Ct. App. 2008) (“Section 1-23-610 ... sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency.”).

The ALC considered this matter pursuant to our Supreme Court’s decisions in *Al-Shabazz*, as well as *Adkins* and *Wicker v. S.C. Dep’t of Corr.*, 602 S.E.2d 56 (2004). Thus, the provisions of § 1-23-610, specifically § 1-23-610(B), establish the standard of review applicable to this Court’s consideration of SCDC’S appeal of the ALC’s orders.

In its entirety, § 1-23-610(B) reads as follows:

¹⁴ See pp. 1 – 2 above.

¹⁵ See p. 2 and note 2 above.

The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. **The court of appeals may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if substantial rights of the petitioner have been prejudiced** because the finding, conclusion, or decision is:

- (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.

Pursuant to § 1-23-610(B), this Court “may reverse or modify the [ALC’s] decision only if [SCDC proves its] substantive rights [have] been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law.” *Mitchell*, 659 S.E.2d at 236 (reversing the ALC’s order because the “order [was] devoid of any finding of evidence adduced by [the Appellant] warranting the ALC’s reversal of [SCDC].”).

Moreover, SCDC must “distinctly and specifically direct the court’s attention to the errors or abuses allegedly committed by the [ALC]. [SCDC] must include all that is necessary to enable [this Court] to decide whether the [ALC] made an erroneous or unsubstantiated ruling. A mere expression of dissatisfaction with the ruling is not sufficient.” *Al-Shabazz*, 527 S.E.2d at 755 [citations omitted].

SCDC bears the burden of proving convincingly that the ALC’s decision to reverse SCDC’s final decision is unsupported by substantial evidence. *Mitchell*, 659 S.E.2d at 235. Substantial evidence is relevant evidence “when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the ALC arrived at in justifying its decision.”

S.C. Coastal Conservation League v. S.C. Dep't of Health & Env'tl. Control, 669 S.E.2d 899, 905 (S.C. Ct. App. 2008), *reversed on other grounds*, 702 S.E.2d 246 (S.C. 2010).

SCDC also has the burden of proving the ALC's decision is arbitrary and otherwise characterized by an abuse of discretion. *Mitchell*, 659 S.E.2d at 234. A decision is arbitrary if no rational basis for the conclusion exists, or when it is based on one's will and not upon any course of reasoning and exercise of judgment. A decision may also be arbitrary if it is made at pleasure without adequate determining principles or is governed by no fixed rules or standards. *Converse Power Corp. v. S.C. Dep't of Health & Env'tl. Control*, 564 S.E.2d 341, 345 (S.C. Ct. App. 2002). An "abuse of discretion occurs when the judge's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the judge is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case." *Ex parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464, 467 (S.C. 2006).

ARGUMENT

I. THE PROCEDURE BY WHICH THE ALC FASHIONED ITS RULING REVERSING SCDC'S DENIAL OF WARD'S \$1.92 PER LABOR HOUR BACK PAY CLAIM WAS IMBUED WITH EVIDENTIARY ERROR

A. THE ALC CONTRADICTORILY DECLARED THAT THE CONTRACT BETWEEN SCDC AND THE PRIVATE INDUSTRY SPONSOR WAS NOT PROPERLY INCLUDED IN THE RECORD WHILE IT RELIED UPON THE SAME CONTRACT TO CRAFT ITS RULING

SCDC first addresses the following observation offered by the ALC in its June 20, 2018 "Final Order" (R. p. ___):

In this case, much of the evidence relied on by [SCDC] (for example the contract and proof of the actual wages paid during [Ward's] work for the project, as well as how much was deducted from [Ward's] wages) was not properly in the record.

The above-quoted observation echoed the first footnote from the ALC's June 20, 2018 "Final Order," which appeared on the order's first page (R. p. ____):

The "record" in this appeal includes [Ward's] grievances and [SCDC's] rulings on these grievances. In addition, [SCDC] 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.¹⁶ Likewise, wage surveys from the Bureau of Labor Statistics attached to [Ward's] Supplemental Brief cannot be considered.

Despite declaring in the above-quoted passages from its June 20, 2018 "Final Order" that the contract between SCDC and the project's private industry sponsor, which SCDC introduced as an exhibit supporting its April 11, 2016 brief, "was not properly in the record," the ALC relied upon the contract to craft its decision reversing SCDC's denial of Ward's claim.

Specifically, the ALC embedded the operative line items and data from the contract directly in its June 20, 2018 "Final Order."¹⁷ (R. p. ____).

The ALC even formulated the second issue it identified on appeal exclusively from the operative line items from the contract (R. p. ____):

¹⁶ The ALC also stated the following in a footnote from its June 20, 2018 "Final Order" regarding the section of the contract between SCDC and the private industry sponsor that articulated the components of the gross hourly rate at which SCDC charge the private industry sponsor (R. p. ____):

This information was not included in the Record on Appeal, nor was it provided to [Ward] prior to service of the [SCDC'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 [Ward's] brief.

Again, SCDC introduced the contract as an exhibit in support of its April 11, 2016 brief. The ALC concluded the instant footnote by referring to the first footnote on the first page of its order.

¹⁷ The identical line items and data appear on pages 8 and 9 above.

Whether **Social Security withholding payments, SCDC Surplus Fund Amount, and Workers' Compensation premiums**, collectively, were required to be included in [Ward's] gross wages for purposes of the calculations mandated in [§ 24-3-40(A)]. [emphasis supplied].

Later in its "Final Order," after accounting for the deductions mandated by § 24-3-40(A), the ALC again explicitly referenced the contract, which it declared "[had] not been properly included in the record [for its review]," by observing as follows (R. p. ___):

The [contract] between SCDC and the [private industry sponsor] establishes an hourly rate that includes a wage, Social Security withholding, a Workers' Compensation premium, and [an] "SCDC Surplus Fund Amount." [Ward] contends that all these items are part of his hourly gross wage and should be part of the back pay owed. [emphasis supplied].

The ALC continued as follows (R. p. ___ - ___):

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 [§ 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*, 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*, 646 S.E.2d at 870, n. 4].

[emphasis supplied].

In Section I(C) below, SCDC addresses the ALC's stark error in completely overlooking two (2) realities associated with its reliance on the footnote from *Torrence*: (1) our Supreme

Court placed a burden upon Ward, Torrence, and their fellow inmates to “prove true their allegation that [SCDC] *removes* any of the money remitted by the private industry sponsor and then disburses the percentages listed in [§ 24-3-40] based on the lower rate” and (2) Ward, as admitted by the ALC in its “Final Order” (R. p. ___), introduced no evidence in or with his Step 1 grievance, Step 2 appeal, or any of the briefs he filed with the ALC to satisfy this burden.

Turning back to the contract between SCDC and the private industry sponsor, the ALC, on the one hand, declared that the contract, including the operative section setting forth the components of the total hourly rate at which SCDC charged the private industry sponsor for inmate labor, was not part of the record. As such, the ALC also declared that it would not consider the contract’s terms in adjudicating Ward’s appeal of SCDC’s denial of his \$1.92 per labor hour back pay claim. On the other hand, the ALC clearly and repeatedly considered the operative section from the contract in its analysis.

By engaging in such glaringly contradictory and flawed procedure, SCDC respectfully asserts that the ALC erred under § 1-23-610(B)(c) and (d) when it reversed SCDC’s denial of Ward’s claim. Moreover, SCDC respectfully asserts that under § 1-23-610(B)(e), the ALC’s reversal of SCDC’s denial of Ward’s claim was “clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record,” or, more accurately, the lack of any such evidence introduced by Ward on the whole record.

B. SCDC’S RULINGS ON WARD’S STEP 1 GRIEVANCE AND HIS STEP 2 APPEAL, IN WHICH IT REFERENCED ITS CONTRACT WITH THE PRIVATE INDUSTRY SPONSOR, CONSTITUTED LEGITIMATE EVIDENCE IN THE RECORD

SCDC clearly referenced its contract with the project’s private industry sponsor in its rulings denying Ward’s Step 1 grievance and Step 2 appeal:

I conclude that SCDC does not owe you \$1.92 or any other amount for every labor hour you voluntarily provided to the federally certified prison industries project operated by SCDC at Evans. **Under the contracts struck between SCDC and ESCOD and/or INSILCO, SCDC legitimately charges ESCOD and/or INSILCO an hourly rate for “overhead cost” in addition to the hourly rate SCDC pays inmates in accordance with both state and federal law.** (R. p. ____).

...

I concur with the warden’s determination that SCDC does not owe you \$1.92 or any other amount for every labor hour you voluntarily provided to the federally certified PI project operated by SCDC at Evans. Again, ESCOD was and remains the private industry sponsor for the PI project operated at Evans. **Under the contracts struck between SCDC and ESCOD, SCDC legitimately charges ESCOD an hourly rate for “overhead cost” in addition to the hourly rate SCDC pays inmates in accordance with both state and federal law. Neither 18 USC 1761(c), 64 FR 17000, [S.C. Code § 24-3-315], nor the decisions in [Adkins] and [Torrence] contradict this reality.** The “overhead cost” SCDC charges ESCOD is simply not a part of your inmate pay and it is not deducted from your inmate pay. (R. p. ____).

In its June 20, 2018 “Final Order,” the ALC clearly referenced SCDC’s above-quoted rulings as legitimately part of the record in Ward’s appeal. (R. p. ____).

Again, Ward conceded in his supplemental brief that SCDC “was within its rights” to separately charge the project’s private industry sponsor \$1.92 per inmate labor hour *along with* the hourly rate for inmate labor (i.e. the “Prevailing Wage” designated in the line item from the contract) it charged the sponsor.

Ward offered his concession after considering not only the contract SCDC introduced as an exhibit to its April 11, 2016 brief, but also the above-quoted rulings denying Ward’s Step 1 grievance and Step 2 appeal.

SCDC respectfully asserts that its denial of Ward’s \$1.92 per labor hour back pay claim, manifested in its rulings denying Ward’s Step 1 grievance and Step 2 appeal, constituted legitimate evidence by which the ALC should have affirmed SCDC’s denial of Ward’s claim. Therefore, under § 1-23-610(B)(c), the ALC erred by reversing SCDC’s denial of Ward’s claim.

C. WARD DID NOT MEET THE BURDEN MANDATED BY OUR SUPREME COURT IN THE FOOTNOTE FROM *Torrence*

Ward, as the party who appealed SCDC's denial of his \$1.92 per labor hour back pay claim to the ALC, shouldered the burden of proof and persuasion. However, Ward did not submit any of his "paychecks" or any of his pay records as exhibits to the Step 1 grievance or Step 2 appeal he filed with SCDC so that such material would appear in the record.

Likewise, Ward moved neither SCDC nor the ALC to amend the record to include such material, and, unlike SCDC, Ward did not include any such material as exhibits supporting either his brief or his supplemental brief.

The ALC determined that the materials upon which SCDC relied in responding in opposition to Ward's appeal and the briefs he submitted in prosecuting his appeal were "not properly in the record." SCDC respectfully asserts that the ALC should have likewise determined that the record was devoid of any evidence supporting Ward's assertions that SCDC "withheld," "collected," "deducted," or "removed" \$1.92 per labor hour, or any of the three (3) costs which comprised this figure, from the gross hourly pay SCDC remitted to him.

SCDC further respectfully asserts that under the operative footnote from *Torrence*, Ward possessed the burden of "proving true" his allegation that SCDC "withheld," "collected," "deducted," or "removed" \$1.92 per labor hour, or any of the three (3) costs which comprised this figure, from the gross hourly pay SCDC remitted to him and then disbursed the percentages listed in § 24-3-40 "based on the lower rate."

Ultimately, the ALC conceded in its June 20, 2018 "Final Order" that no evidence existed in the record to support Ward's allegation (R. p. ___):

In its brief, [SCDC] also refers to training wages for the first 320 hours of [Ward's] labor, but **there is nothing in the record to establish what rate of pay was paid for training other than [Ward's] claim that, based on *Torrence*, was improperly removed from his gross wages.** [emphasis supplied].

SCDC, therefore, respectfully asserts that the ALC erred, under §1-23-610(B)(f), by arbitrarily and capriciously reversing SCDC's denial of Ward's \$1.92 per labor hour back pay claim when no evidence existed in the record supporting Ward's allegation that SCDC "withheld," "collected," "deducted," or "removed" \$1.92 per labor hour, or any of the three (3) costs which comprised this figure, from the gross hourly pay SCDC remitted to him as required under the operative footnote from *Torrence*. See also *Mitchell*, 659 S.E.2d at 236. (reversing the ALC's order because the "order [was] devoid of any finding of evidence adduced by [the Appellant] warranting the ALC's reversal of [SCDC].").

D. THE ALC ERRED BY NOT REMANDING WARD'S \$1.92 PER HOUR PAY CLAIM BACK TO SCDC

The ALC had another option at its disposal, which it exercised on another issue raised by Ward in his appeal. As explained above,¹⁸ the ALC remanded the determination of the precise hourly prevailing wage it should have paid to Ward for his prison industries labor back to SCDC for further proceedings under GA-01.12.

SCDC alternatively asserts that the ALC erred by not remanding this issue back to SCDC for further proceedings under GA-01.12.

Had it done so, the ALC would have allowed both parties the opportunity to submit evidence into the record, including Ward's prison industries pay records, to resolve the issue of whether SCDC withheld, collected or deducted, or removed \$1.92 per hour, or any of the three (3) costs that comprised the \$1.92 per hour figure, from Ward's gross wages.

¹⁸ See notes 9 and 11 above.

Under § 1-23-610(B), this Court may do what the ALC erroneously failed to do, namely remand this issue back to SCDC for further proceedings under GA-01.12 so that the parties may introduce such materials into the record.

SCDC respectfully asserts that no prejudice would befall either party if this Court did so, since the ALC remanded a closely related issue (i.e. the determination of the precise hourly prevailing wage SCDC should have paid Ward for his labor) back to the agency.

II. THE ALC ERRONEOUSLY ANCHORED ITS DECISION TO REVERSE SCDC'S DENIAL OF WARD'S \$1.92 PER HOUR BACK PAY CLAIM UPON DICTA FROM *Torrence*

As illustrated above, Ward exclusively relied upon a single footnote from *Torrence*, 646 S.E.2d at 870, n. 4, in his Step 1 grievance, his Step 2 appeal, and all the briefs he submitted to the ALC to support his \$1.92 per labor hour back pay claim.

As it made clear in its June 20, 2018 "Final Order," the ALC exclusively relied upon the same footnote from *Torrence* in reversing SCDC's denial of Ward's \$1.92 per labor hour back pay claim.

However, neither Ward nor, more importantly, the ALC, ever recognized, let alone resolved, the challenge presented by the following reality: the operative footnote from *Torrence* constituted only dicta.

The following standard from this Court's decision in *State v. Addison*, 525 S.E.2d 901, 904 (S.C. Ct. App. 1999), applies to the operative footnote from *Torrence* relied upon by both Ward and the ALC:

Second, the sentence Addison extracts from [*State v. Wiggins*, 500 S.E.2d 489, 492 – 493 (S.C. 1998)] in support of his argument is dicta and is neither binding nor illuminating on the issue at bar. See [*Drummond v. Beasley*, 503 S.E.2d 455 (S.C. 1998)] (characterizing as dicta certain language in a case concerning a subject not within the question before the court); [*Hampton v. Richland County Council*, 370

S.E.2d 714, 714 (S.C. 1988)] (concluding discussion of a legal principle in an opinion was dicta where it was “clearly unnecessary to a resolution of the issue before the court”); [*Welborn v. Dixon*, 49 S.E. 232 (S.C. 1904)] (**dicta is not binding as precedent**); [*Dennis v. South Carolina Nat’l Bank*, 382 S.E.2d 237, 240 (S.C. Ct. App. 1988)] (construing language in a case as dicta because it was “an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof”). [emphasis supplied].

The sole issue before our Supreme Court in *Torrence* was whether the circuit court had properly granted SCDC’s summary judgment motion and, by doing so, dismissed the declaratory judgment motion filed by Ward, Torrence and their fellow inmates.

Our Supreme Court, relying on its prior decisions in *Adkins*,¹⁹ *Wicker*, and *Williams v. S.C. Dep’t of Corr.*, 641 S.E.2d 885 (2007), ruled that Ward, Torrence, and their cohorts did not have a private right of action available to them under our state’s various prison industries statutes.

The operative footnote from *Torrence* appeared like a proverbial bolt of lightning from an otherwise tranquil sky, and, under *Addison*, it was “neither binding nor illuminating on the issue at bar” in *Torrence*.²⁰

SCDC, therefore, respectfully asserts that the ALC erred, under §1-23-610(B)(d), by explicitly and exclusively relying upon dicta, namely the operative footnote from *Torrence*, in reversing SCDC’s denial of Ward’s \$1.92 per hour back pay claim.

¹⁹ See note 7 above.

²⁰ Notwithstanding this Court’s ruling in *Addison*, SCDC is mindful of its later ruling in *Sherlock Holmes Pub, Inc., v. City of Columbia*, 697 S.E.2d 619, 621 (S.C. Ct. App. 2010): “But those who disregard dictum, either in law or in life, do so at their peril.” (quoting *Yaeger v. Murphy*, 354 S.E.2d 393, 396, n. 2 (S.C. Ct. App. 1987)).

III. THE ALC ERRONEOUSLY RULED THAT THE \$1.92 PER LABOR HOUR FIGURE SCDC SEPARATELY CHARGED THE PRIVATE INDUSTRY SPONSOR SHOULD BE INCLUDED IN WARD'S GROSS HOURLY PAY RATE

A. FEDERAL AND STATE LAW OBLIGATED SCDC TO CHARGE THE PRIVATE INDUSTRY SPONSOR FOR THE INMATES' "PRORATA WORKERS' COMPENSATION PREMIUM"

In its "Final Order," the ALC recognized that SCDC attributed \$0.20 of the \$1.92 per hour figure Ward claim SCDC owed him for every hour of labor he performed while he voluntarily participated in the federally certified PIECP project SCDC operated at Evans to a "Prorata Workers' Compensation Premium." (R. p. ____).

The ALC acknowledged that "federal law **allows** inmates to have benefits such as Workers' Compensation but specifically disqualifies them from receiving unemployment compensation while incarcerated." [emphasis supplied]. (R. p. ____). The ALC's above-quoted acknowledgment, however, was erroneous.

18 U.S.C. § 1761 is known as the Ashurst-Sumners Act,²¹ and it serves as the guiding light for all federally certified PIECP projects operated not only in our state but nationwide.

18 U.S.C. § 1761(c)(3) states that inmates may not be "deprived of the right to participate in benefits made available by the Federal or State Government to other individuals on the basis of their employment." Section 1761(C)(3) explicitly mentions "workmen's compensation" as one of the benefits it contemplates, and, obviously, Ward's participation in our state's Workers' Compensation system qualifies as such a benefit.²²

Contrary to the ALC's interpretation, federal law is not permissive on this subject. Sections 1761(c)(1) and(3), when read together, mandates that inmates participating in such

²¹ See note 4 above.

²² See also BJA Program Brief, <https://www.ncjrs.gov/html/bja/piecp/bja-prison-industr.html>.

prison industries projects certified by the BJA under its PIECP not be “deprived of the right to participate” in such benefits, including Workers’ Compensation in our state.

Not only did it misinterpret the applicable federal law, the ALC completely omitted any reference to our state’s code of laws, and, specifically, S.C. Code Ann. § 42-1-480. Section 42-1-480 articulates the workers’ compensation provisions applicable to inmates in our state.

Thus, as a matter of both federal and state law, SCDC was obligated to cover Workers’ Compensation premiums for inmates, including Ward, who participated in the federally certified PIECP project it operated at Evans.

Accordingly, SCDC respectfully asserts that this Court should at least reverse, under § 1-23-610(B)(d), the ALC’s erroneous declaration that the \$0.20 per hour “Prorata Workers’ Compensation Premium,” which SCDC charged the private industry sponsor separately from Ward’s hourly rate of pay, should be included in any calculation of Ward’s gross hourly wages.

B. FEDERAL LAW OBLIGATED SCDC TO CHARGE THE PRIVATE INDUSTRY SPONSOR FOR THE INMATES’ “PRORATA SOCIAL SECURITY WITHHOLDING PAYMENT”

In its “Final Order,” the ALC also recognized that SCDC attributed \$0.40 of the \$1.92 per hour figure Ward claimed SCDC owed him for every hour of labor he performed while he voluntarily participated in the federally certified PIECP project SCDC operated at Evans to a “Prorata Social Security Withholding Payment.” (R. p. ____).

SCDC respectfully asserts that this Court should at least reverse the ALC’s erroneous declaration that the \$0.40 per hour “Prorata Social Security Withholding Payment” should be included in any calculation of Ward’s gross hourly wages on remand.

As stated in Section III(A) above, 18 U.S.C. § 1761(c)(3) states that inmates may not be “deprived of the right to participate in benefits made available by the Federal or State

Government to other individuals on the basis of their employment,” and Ward’s participation in our nation’s Social Security system qualifies as such a benefit.²³

By charging ESCOD the rate of \$0.40 per hour for “Prorata Social Security Withholding Payment,” SCDC complied with the operative federal requirement. Thus, as a matter of law, SCDC was obligated to cover Social Security payments for inmates, including Ward, who participated in the federally certified PIECP project it operated at Evans.

Accordingly, SCDC respectfully asserts that this Court should at least reverse, again under § 1-23-610(B)(d), the ALC’s erroneous declaration that the \$0.40 per hour for “Prorata Social Security Withholding Payment,” which SCDC charged the private industry sponsor separately from Ward’s hourly rate of pay, should be included in any calculation of Ward’s gross hourly wages.

C. STATE LAWS PROHIBITING SCDC FROM OPERATING AT A DEFICIENCY OBLIGATED IT TO CHARGE THE PRIVATE INDUSTRY SPONSOR A COST ATTRIBUTED TO THE “SCDC SURPLUS FUND ACCOUNT”

In its “Final Order,” the ALC further recognized that SCDC attributed \$1.32 of the \$1.92 per hour figure Ward claim SCDC owed him for every hour of labor he performed while he voluntarily participated in the federally certified PIECP project to the “SCDC Surplus Fund Account.” (R. p. ____).

In the footnote near the end of its “Final Order,”²⁴ the ALC stated as follows (R. p. ____):

In addition to addressing the issues raised by [Ward], [SCDC] contends that [it] is required by law to make the prison system self-sustaining. *See* S.C. Code Ann. § 24-3-20. Specifically, [SCDC] 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

²³ *See also* note 22 above.

²⁴ *See* note 2 above.

penitentiary.” ([SCDC] 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). [SCDC] concludes that recalculating the wage structure as argued by [Ward] 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. [emphasis supplied].

SCDC respectfully asserts that the ALC erred when it concluded that SCDC’s argument concerning the creation of a deficiency in the prison industries program was “outside the scope of this appeal,” because SCDC relied upon the provisions of § 24-3-20, 24-3-190, and 24-3-400 in its denial of Ward’s demand that it pay him \$1.92, which includes the \$1.32 per hour cost attributed to a “SCDC Surplus Fund Amount,” for every hour of labor he performed while participating in the federally certified PIECP project SCDC operated at Evans.²⁵

Succinctly but respectfully stated, the ALC’s unwillingness to analyze, consider, or even substantively address the reality that SCDC cannot conduct create a deficiency by its operation of its prison industries program was, under § 1-23-610(B)(f), arbitrary and capricious.

The “SCDC Surplus Fund Amount,” unlike the Workers’ Compensation premium and Social Security withholding, discussed in Sections III(A) and (B) above, is not explicitly addressed in federal or state law.

However, the contract at issue in *Adkins*, just like the contract at issue here, reflected that SCDC separately charged the private industry sponsor \$1.32 per inmate labor hour, in addition to the inmates’ gross hourly wage.

²⁵ See notes 2 and 9 above.

The circuit court in *Adkins* addressed the \$1.32 per hour charge as follow (R. p. ____):²⁶

In the course of advising BJA of [SCDC's] training wage policy and schedule, [former Division of Industries Director Tony Ellis] also advised BJA of [SCDC's] \$1.32 per hour overhead charge. **BJA did not object to this \$1.32 per hour overhead charge**, and the [inmates] did not introduce any evidence indicating such a charge for overhead violated any applicable state or federal law. [emphasis supplied].

The circuit court's decision in *Adkins*, which our Supreme Court noted in approval when it affirmed the circuit court's decision in result, is not binding precedent. However, the circuit court's decision in *Adkins* represents an instance when a circuit judge, having conducted a days-long bench trial, examined the applicable federal law, federal regulations, and state law associated with a prison industries project operated by SCDC for which it had secured, like the project in which Ward participated, federal certification under BJA's PIECP. The circuit judge in *Adkins* also considered the voluminous documentary evidence and expansive testimonial evidence introduced during the trial over which he presided. While not binding precedent, the circuit court's decision in *Adkins* is certainly enlightening, and SCDC respectfully submits that it should be afforded at least some weight.

Just as he didn't introduce any evidence to the record demonstrating that SCDC "withheld," "collected," "deducted," or "removed" \$1.92 per labor hour, or any of the three (3) costs which comprised this figure, from the gross hourly pay SCDC remitted to him, Ward didn't introduce any evidence into the record indicated that the \$1.32 per hour charge designated as "SCDC Surplus Fund" violated any applicable state or federal law.

Instead, Ward conceded in his supplemental brief that that SCDC "was within its rights" to separately charge the project's private industry sponsor \$1.92 per inmate labor hour *along with* the hourly rate for inmate labor (i.e. the "Prevailing Wage" designated in the line item from

²⁶ See note 7 above.

the contract) it charged the project's private industry sponsor. (R. p. ____). Obviously, the \$1.32 per hour "SCDC Surplus Fund" charge represents the largest cost amongst the three (3) costs which comprise the \$1.92 per inmate labor hour figure protested by Ward.

Accordingly, SCDC respectfully asserts that this Court should at least reverse, once again under § 1-23-610(B)(d), the ALC's erroneous declaration that the \$1.32 per hour "SCDC Surplus Fund" charge, which SCDC invoiced the private industry sponsor separately from Ward's hourly rate of pay, should be included in any calculation of Ward's gross hourly wages.

CONCLUSION

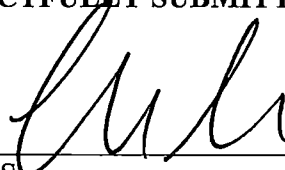
For all the above-provided reasons, SCDC respectfully asserts that the ALC, in its June 20, 2018 "Final Order," made findings that were clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, employed reasoning detrimentally affected by errors of law, and rendered arbitrary and capricious conclusions.

Therefore, SCDC respectfully urges this Court, under the various provisions of §§ 1-23-610(B), to reverse the ALC's ruling which itself reversed SCDC's denial of Ward's demand for back pay consisting of \$1.92 per hour for every hour of labor he provided to the federally certified PIECP project SCDC operated at Evans.

Alternatively, SCDC respectfully urges this Court, under the same authority, to remand this matter back to SCDC for further proceedings under the provisions of GA-01.12 and, specifically, allow the parties the opportunity to submit evidence into the record, including Ward's prison industries pay records, to resolve the issue of whether SCDC withheld, collected or deducted, or removed \$1.92 per hour, or any of the three (3) costs that comprised the \$1.92 per hour figure, from Ward's gross wages.

RESPECTFULLY SUBMITTED,

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October 22, 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

Appellate Case No. 2018-001325

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SC Court of Appeals

William Ray Ward, #91566 Respondent,

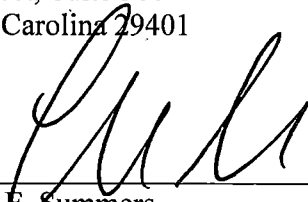
v.

South Carolina Department of Corrections Appellant.

PROOF OF SERVICE

I certify that I have served the **APPELLANT'S INITIAL BRIEF** on the above-named Respondent/Appellant 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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