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. 2018-001322

Elliott Hatton, #158373 ..... 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, Elliott Hatton ["Hatton"], 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"].

Hatton 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 Hatton'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 Hatton's appeal (R. pp. __ - __). By its order, the ALC affirmed in part and reversed in part SCDC's final decision regarding Hatton'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,[2] a "violation of the plain language of the statute which

[1] Hatton participated in the same federally certified prison industries project operated by SCDC at Evans as Thomas Torrence, the lead plaintiff 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.

[2] In so ruling, the ALC acknowledged that "[SCDC] takes the position that the additional itemized expenses totaling $1.79 [per inmate labor hour] under the 1995 contract and $1.92 [per labor hour] under the 2000 and 2001 contracts were not 'lawfully' part of [Hatton's] gross wages, a position that is contrary to our Supreme Court's [footnote] in *Torrence* and is thus an error of law." (R. p. ___). In the footnote associated with this passage, the ALC stated as follows (R. p. ___):

directs [SCDC] to disburse the money based on the gross wages." [*Torrence*, 646 S.E.2d at 870, n. 4].

...

SCDC's failures to demonstrate that it paid [Hatton] 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.**[3] Accordingly, the parts of [SCDC's] decision dealing with the prevailing wage rate and **gross wages** are REVERSED and REMANDED. [SCDC] must demonstrate that [Hatton] 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. § 24-3-430(D)]. **SCDC 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.

...

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

(R. pp. ___ - ___). [emphasis supplied].

In addition to addressing the issues raised by [Hatton], [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 [Hatton] 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 Prison Industries Enhancement Certification Program ["PIECP"] 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 Hatton'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 Hatton'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 Hatton 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 Hatton 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 Hatton for his prison industries labor?

STATEMENT OF THE CASE

I. HATTON'S GRIEVANCE

A. HATTON'S STEP 1

Hatton 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]

Hatton filed a Step 1 grievance form with SCDC dated June 21, 2007 (R. p. __), in which, in pertinent part, he asserted the following (R. p. __):

> [SCDC] is in violation of wages earned by me, and withheld illegally by SCDC. I grieved all wages owed to me by SCDC, under [*Torrence*], under [§ 24-3-40(A)]. **SCDC owes me back wages of $1.92 for every hour I worked for [ESCOD and/or Insilco] at Evans** ... [emphasis supplied].[5]

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[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 Hatton 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, Hatton'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

Hatton then requested the following action: "That SCDC pay me $1.92 for every hour that I worked for private sector at [Evans] ... along with proper interest on all monies owed to me by SCDC." (R. p. __).

B. SCDC'S RESPONSE TO HATTON'S STEP 1

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

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

> I also 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]

(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, 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 Hatton'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 Hatton'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 August 15, 2017 with the ALC in the 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

> 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. HATTON'S STEP 2 AND SCDC'S FINAL DECISION

By his Step 2 (R. p. ___), Hatton 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. p. __), SCDC, by the appropriate official, affirmed its denial of Hatton's Step 1 and likewise denied his Step 2.

II. HATTON'S NOTICE OF APPEAL TO THE ALC

Hatton timely appealed SCDC's denial of his grievance by filing a Notice of Appeal with the ALC dated April 8, 2016. (R. p. __), in which, in relevant part, he asserted as follows:

> I appeal for the fact SCDC is in violation of wages earned by me, and withheld illegally by SCDC. I grieved all wages owed to me by SCDC. Under [*Torrence* and § 24-3-40(A)]. **SCDC owes me back wages of $1.92 for every hour I worked for Insilco at [Evans]**. [emphasis supplied].

III. PROCEEDINGS BEFORE THE ALC

Hatton began proceedings before the ALC with his "Brief in Support of his Appeal" dated July 15, 2016 (R. pp. __ - __).

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operated by SCDC at Evans in which Hatton 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 approving noted the circuit court's decision in SCDC's favor. 602 S.E.2d at 55, n. 6.

[8] *See* note 2 above.

Hatton asserted as follows regarding his $1.92 per hour back pay claim in his brief (R. p. __):

> SCDC paid less than the prevailing wage during the training period.[9] Moreover, **SCDC withheld $1.92 per hour for the entirety of his work with the Project**. SCDC denied Step 1 and Step 2 of my grievance.
>
> ...
>
> SCDC erred in denying [my] grievance for back wages owed to [me] for his work in the Prison Industries Project. SCDC's denial of [my grievance] is flawed for multiple reasons. ... **SCDC was not entitled to collect $1.92 per hour from [my] wages**. ... . [emphasis supplied].

Soon after Hatton filed his brief, SCDC submitted, on July 28, 2016, a filing to the ALC in which it moved the ALC to hold further proceedings in Hatton's appeal in abeyance pending a final decision from our appellate courts in the matters 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) and *Gatewood v. S.C. Dep't of Corr.*, 785 S.E.2d 600 (S.C. Ct. App. 2016), *cert. denied* (May 31, 2017). (R. pp. ___ - ___).

By an order issued August 11, 2016, the ALC granted SCDC's motion to hold in abeyance further proceedings in Hatton's appeal. (R. p. ___ - ___).

On June 15, 2017, after our Supreme Court denied certiorari in *Ackerman* and *Gatewood*, the ALC issued its "Order Lifting Abeyance" (R. pp. ___ - ___), by which it permitted Hatton to submit a supplemental brief and SCDC to thereafter file its brief.

In conformity with the ALC's June 15, 2017 order, Hatton filed a supplemental brief with the ALC dated June 27, 2017 in which he again identified his claim that "**SCDC withheld $1.92 per hour from [his] wages for the entirety of [his] work with the Project**" as an issue on appeal. [emphasis supplied]. (R. p. ___).

Hatton later asserted as follows in his supplemental brief (R. p. ___):

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[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 [Hatton's] wages."

> SCDC erred in denying [my] grievance for back wages owed to [me] for [my] work in the Prison Industries Project. SCDC's denial of [my grievance is flawed] for multiple reasons. ... **SCDC was not entitled to collect $1.92 per hour from [my] wages**. Accordingly, this Court should resolve [in my] favor and award him back wages owed for [my] participation in the Project.
>
> ...
>
> **SCDC also withheld $1.92 per hour from [my] compensation for "overhead" cost**. SCDC claims that South Carolina Laws compels [it to] collect an hourly overhead cost from private industry sponsors. However, the court in *Torrence*, **referencing the $1.92 per hour deduction by SCDC**, noted that if [SCDC] removes any money remitted by the private industry sponsor [and then] disburses the percentages listed in [§] 24-3-40 based on [a] lower rate, [SCDC] would be in violation of [the] plain language of [the] statute which directs it to disburse the money on the gross wages.[10] [*Torrence*, 646 S.E.2d at 870, n. 4]. The only support SCDC provides [is the required] overhead cost for the program. However, there is no explanation or discussion that [breaks] down this cost or demonstrates that SCDC did in fact disburse the money based on gross wages. Without more, **SCDC should compensate [me] for hourly deductions from [my] pay check**.

[emphasis supplied].

SCDC filed its brief with the ALC on August 15, 2017 (R. pp. __ - __), in which it squarely addressed Hatton'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 copies of its 1995, 2000, and 2001 contracts with ESCOD, the private industry sponsor for the federally certified PIECP project it operated at Evans, as exhibits in support of its brief. (R. pp. ___ - ___).

SCDC referenced these three (3) contracts given the reality that the pay records associated with Hatton's participation in the project in question reflected that SCDC began paying Hatton at the rate of at least $5.15 per hour on or about December 16, 1999, and it remitted its final payment to him on or about March 21, 2006. (R. p. ___).

[10] As shown on page 10 below, Hatton did not fully quote the operative footnote from *Torrence*.

The expressly stated purpose of each of the three (3) contracts was "to fulfill the intent of [S.C. Code Ann. 24-3-310].[11]" (R. p. ___, ___, and ___).

Using data from the contracts, SCDC explained in its brief that contrary to Hatton'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. ___, ___, and ___):

1) "Prorata Social Security Withholding Payment,"
2) "Prorata Workers' Compensation Premium," and
3) "SCDC Surplus Fund Amount."

The entirety of the operative section from the 2001 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: [Insilso] and SCDC agree to an hourly rate determined as follows:
>
> | | |
> |---|---|
> | Prevailing Wage (See Appendix D) | $5.25 |
> | Prorata Social Security Withholding Payment | **.40** |
> | Prorata Workers' Compensation Premium | **.20** |
> | SCDC Surplus Fund Amount | **1.32** |
> | 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.**[12] 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

[11] Section 24-3-310 is entitled "Declaration of Intent," and it's the first section that appears in Article 3 of Chapter 3 from Title 24 of the South Carolina Code of Laws.

[12] *See* note 9 above.

> **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].

The operative section from the 2000 contract between SCDC and ESCOD reflected the identical itemization of the three (3) costs at issue (i.e. "Prorata Social Security Withholding Payment" at $0.40 per inmate labor hour, "Prorata Workers' Compensation Premium" at $0.20 per inmate labor hour, and "SCDC Surplus Fund Amount" at $1.32 per inmate labor hour). (R. p. ___).

The operative section from the 1995 contract between SCDC and ESCOD reflected a slightly different itemization of the three (3) costs at issue (i.e. "Prorata Social Security Withholding Payment" at $0.32 per inmate labor hour, "Prorata Workers' Compensation Premium" at $0.15 per inmate labor hour, and "SCDC Surplus Fund Amount" at $1.32 per inmate labor hour). (R. p. ___).

Thus, SCDC invoiced ESCOD and Insilco $1.79 per inmate labor hour *in addition to* the inmates' hourly wage under the terms of the 1995 contract and $1.92 per inmate labor hour *in addition to* the inmates' hourly wage under the terms of both the 2000 and 2001 contracts.

As SCDC ultimately demonstrated in its brief, Hatton'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,[13] failed under the purportedly applicable footnote from *Torrence* upon which he relied.

Hatton's claim was inherently defective, because, as stated above,[14] 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].

Hatton 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. Hatton 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, Hatton's gross hourly pay never included the $1.92 per hour figure.

IV. THE ALC'S JUNE 20, 2018 "FINAL ORDER"

The ALC, in its June 20, 2018 "Final Order," reversed SCDC's denial of Hatton'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.

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[13] Hatton did not distinguish between the $1.79 and $1.92 per inmate labor hour cost in any of his filings, and, for simplicity's sake, SCDC does not distinguish between the two (2) figures in its instant brief. SCDC's analysis and arguments regarding the validity of the $1.92 per inmate labor hour cost SCDC assessed the private industry sponsor *in addition to* the inmates' gross hourly wage, under the 2000 and 2001 contracts applies with equal vigor to the $1.79 per inmate labor hour cost SCDC assessed the private industry sponsor, *in addition to* the inmates' gross hourly wage, under the 1995 contract.

[14] See note 10 above.

In its order, the ALC discussed the federal laws applicable to the federally certified PIECP project SCDC operated at Evans in which Hatton participated,[15] and, in doing so, the ALC acknowledged that "the federal law ***allows*** inmates to have benefits **such as Workers' Compensation** but specifically disqualifies them from receiving unemployment compensation while incarcerated." [bold and italicized emphasis supplied]. (R. p. ___).

The ALC later characterized the parties' respective positions as follows (R. p. ___):

> [Hatton] contends that for every hour he worked his gross pay was reduced **by an improper redirection** of part of his pay to SCDC. [SCDC] argues that the items charged to the private company *in addition to* [Hatton'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.

[bold and italicized emphasis supplied].

After quoting the deductions from the inmates' gross wages mandated by §§ 24-3-40(A)(1) – (A)(6), the ALC erroneously ruled as follows (R. p. ___):[16]

> The agreement between SCDC and [ESCOD/Insilso] establishes ***an hourly rate that includes*** **a wage, Social Security withholding, a Workers' Compensation premium,** ***and a*** **"SCDC Surplus Fund Amount."** [Hatton] contends that all these items are part of his hourly gross wage should be part of the back pay owed. The Supreme Court referred to the sum of these items **as a diversion** from the hourly rate paid for inmate labor and stated:
>
> > [I]f [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].

[15] *See* note 4 above.

[16] *See* pp. 1 – 2 above.

> **Based on the analysis in *Torrence* and the contract excerpts quoted above**, these items comprise [Hatton's] gross hourly wages, which must be determined on remand and be recalculated and disbursed accordingly.
>
> ...
>
> **The items set out in the contact 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 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." [*Torrence,* 646 S.E.2d at 870, n. 4].
>
> [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 [Hatton's] work for the project, as well as how much was deducted from [Hatton's] wages) was not in the record. **Also, [SCDC] takes the position that the additional itemized expenses totaling $1.79 [per inmate labor hour] under the 1995 contract and $1.92 [per inmate labor hour] under the 2000 and 2001 contracts were not "lawfully" part of [Hatton's] gross wages, a position that is contrary to our Supreme Court's note in *Torrence* and is thus an error of law.**[17]

[bold and italicized 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 v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (S.C. 2004) 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-

[17] The footnote associated with this passage appears in note 2 above.

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:

> 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.

[emphasis supplied].

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 & Envtl. 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 & Envtl. 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 HATTON'S $1.92 PER 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 [Hatton's] work for the project, as well as how much was deducted from [Hatton's] wages) **was not in the record**. [emphasis supplied].

The above-quoted observation echoed an earlier footnote from the ALC's order regarding the section of the contract between SCDC and the private industry sponsor that set forth 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 [Hatton] prior to service of the [SCDC's] brief. Furthermore, Appendix C referenced in the pay schedule (which presumably provides a basis for the prevailing wage) was neither included in the Record on Appeal nor in [SCDC's] brief.

Despite declaring in the above-quoted passages from its June 20, 2018 "Final Order" that the contracts between SCDC and the project's private industry sponsor, which SCDC introduced as exhibits supporting its August 15, 2017 brief, "was not properly in the record," the ALC relied upon the contracts to craft its decision reversing SCDC's denial of Hatton's claim.

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

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

> Whether **Social Security withholding payments, SCDC Surplus Fund Amount, and Workers' Compensation premiums**, collectively, were required to be included in [Hatton'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 [contracts] 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." [Hatton] 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 [contracts]** 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) Hatton, 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 contracts, including the operative sections 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 contracts' terms in adjudicating Hatton'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 Hatton's claim. Moreover, SCDC respectfully asserts that under § 1-23-610(B)(e), the ALC's reversal of SCDC's denial of Hatton'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 Hatton on the whole record.

B. SCDC'S RULINGS ON HATTON'S STEP 1 GRIEVANCE, IN WHICH IT REFERENCED ITS CONTRACTS 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 Hatton's Step 1 grievance (R. p. ___):

> 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. [emphasis supplied].

In its June 20, 2018 "Final Order," the ALC clearly referenced SCDC's above-quoted rulings as legitimately part of the record in Hatton's appeal. ("[Hatton] filed a Step 1 Grievance on June 21, 2007, claiming that he was owed back wages of $1.92 for each hour worked during his participation in the Projects, … . The grievance was denied on June 1, 2012, served June 21, 2012."). (R. p. ___).

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

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

Hatton, 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. More precisely, Allen, as the appealing party, "had the burden of providing a sufficient record." *See Helms Reality, Inc. v. Gibson-Wall Co.*, 611 S.E.2d 485, 487 – 488 (S.C. 2005).

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

As demonstrated above, the ALC explicitly conceded in its "Final Order" that no evidence existed in the record to support Allen's allegation(s) (R. p. ___):

> [Section 3.3.1 of the contracts between SCDC and ESCOD and/or Insilco, which provided an itemized table of the components of the hourly rate SCDC charged Carolina Consoles,] **was not included in the Record on Appeal**, nor was it provided to [Hatton] prior to service of the [SCDC's] brief. Furthermore, Appendix C referenced in the pay schedule (which presumably provides a basis for the prevailing wage) **was neither included in the Record on Appeal nor in [SCDC's] brief**. [emphasis supplied].

Accordingly, SCDC respectfully asserts that the ALC should have determined that under *Helms Realty, Inc.*, Hatton did not satisfy his "burden of providing a sufficient record," and consequentially, the record was devoid of any evidence supporting Hatton's assertions that SCDC "withheld," "collected," "deducted," "removed," or "diverted" $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.

Under the operative footnote from *Torrence*, Hatton possessed the burden of "proving true" his allegation that SCDC "withheld," "collected," "deducted," "removed," or "diverted" $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."

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

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

Thus, as he failed to satisfy his burden as the appealing party under *Helms Realty, Inc.*, SCDC respectfully asserts that Allen likewise failed to satisfy his burden from the footnote in *Torrence* upon which he relied in offering his $2.01 per labor hour back pay claim.

SCDC, therefore, respectfully asserts that the ALC erred, under § 1-23-610(B)(f), by arbitrarily and capriciously reversing SCDC's denial of Hatton's $1.92 per labor hour back pay claim when no evidence existed in the record supporting Hatton's allegation that SCDC "withheld," "collected," "deducted," "removed," or "diverted" $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 HATTON'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 Hatton in his appeal. As shown above,[18] the ALC remanded the determination of the precise hourly prevailing wage it should have paid to Hatton for his prison industries labor back to SCDC for further proceedings under GA-01.12 (R. pp. ___ - ___):

> SCDC's failures to demonstrate that it paid [Hatton] the prevailing wage rate and to include the Social Security withholding, Workers'

[18] *See* notes 9 and 12 above.

> Compensation premium, and SCDC/Prison Industries Administrative Cost in the gross wages prior to making deductions thereto was an error of law. Accordingly, the parts of [SCDC's] decision dealing with the prevailing wage rate and gross wages are **REVERSED and REMANDED**. [SCDC must demonstrated that [Hatton] was paid [the] prevailing wage rate for the type of labor he provided at the time and in the area that he provided it, pursuant to [§] 24-3-430(D). [SCDC] must 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). [emphasis supplied].

SCDC alternatively asserts that the ALC erred by not remanding for further proceedings under GA-01.12 the issue(s) of whether SCDC "withheld," "collected," "deducted," "removed," or "diverted" $1.92 per labor hour, or any of the three (3) costs which comprised this figure, from the gross hourly pay it remitted to Hatton as contemplated under the operative footnote from *Torrence*.

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

Under § 1-23-610(B), this Court may do what the ALC erroneously failed to so, 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 Hatton for his labor) back to the agency.

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

As illustrated above, Hatton 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 Hatton's $1.92 per labor hour back pay claim.

However, neither Hatton 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 Hatton 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 Hatton's $1.92 per hour back pay claim.

III. THE ALC ERRONEOUSLY RULED THAT THE $1.92 PER LABOR HOUR FIGURE SCDC SEPARATELY CHARGED THE PRIVATE INDUSTRY SPONSOR SHOULD BE INCLUDED IN HATTON'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 Hatton 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 Workers' Compensation Premium.[21]" (R. p. ___).

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[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)).

[21] The $0.20 per hour figure appeared in the 2000 and 2001 contracts. The ALC also recognized that in its 1995 contract with ESCOD, SCDC attributed $0.15 of the $1.79 per hour figure to the same cost. (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, known as the Ashurst-Sumners Act,[22] 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, Hatton's participation in our state's Workers' Compensation system qualifies as such a benefit.[23]

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 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 Hatton, who participated in the federally certified PIECP project it operated at Evans.

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[22] *See* note 4 above.

[23] *See also* BJA Program Brief, https://www.ncjrs.gov/html/bja/piecp/bja-prison-industr.html.

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 Hatton's hourly rate of pay, should be included in any calculation of Hatton'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 Hatton 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.[24]" (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 Hatton'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 Hatton's participation in our nation's Social Security system qualifies as such a benefit.[25]

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 Hatton, who participated in the federally certified PIECP project it operated at Evans.

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[24] The $0.40 per hour figure appeared in the 2000 and 2001 contracts. The ALC also recognized that in its 1995 contract with ESCOD, SCDC attributed $0.32 of the $1.79 per hour figure to the same cost. (R. p. __).

[25] *See also* note 23 above.

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 Hatton's hourly rate of pay, should be included in any calculation of Hatton'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 Hatton 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.[26]" (R. pp. ___ - ___).

SCDC respectfully asserts, however, that the ALC erred when it concluded that the $1.32 per labor hour cost SCDC charged ESCOD and/or Insilco should have been included Hatton's gross hourly pay rate.

In the footnote near the end of its "Final Order,[27]" the ALC stated as follows (R. p. ___):

> In addition to addressing the issues raised by [Hatton], [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 [§ 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 [§ 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 [Hatton] 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

[26] The $1.32 per hour figure for the "SCDC Surplus Fund" cost appeared in the 1995, 2000, and 2001 contracts.

[27] *See* note 2 above.

> 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 Hatton'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.[28]

In its brief to the ALC (R. ___ - ___), SCDC discussed the provisions of our code of laws applicable to its operations, including its federally certified PIECP projects:

> [Section] § 24-3-190, which is entitled "Appropriation of balances for Penitentiary," states that the "balance in the hands of [SCDC] at the close of any year, together with all other amounts received or to be received from the hire of convicts or from any other source during the current fiscal year, are appropriated for the support of the penitentiary."
>
> [Section] § 24-3-310 provides that SCDC must "utilize the labor of inmates for self-maintenance and for reimbursing this State for expenses incurred by reason of their crimes and imprisonment,[29]" and it conforms to [§ 24-1-20], which establishes that SCDC must be managed in a "manner consistent with the operation of a modern prison system, and with a view of making the system self-sustaining."
>
> [Section] § 24-3-400 explicitly contemplates how SCDC must cover the expenses it incurs as it operates its prison industries program:
>
> > All monies collected by the [SCDC] from the sale or disposition of articles and products manufactured or produced by convict labor, in accordance with the provisions of this article, must be forthwith deposited with the State Treasurer to be kept and maintained as a special revolving account designated 'Prison Industries Account,' and **the monies so collected and deposited must be used solely**

[28] *See* notes 2 and 8 above.

[29] *See* note 11 above.

> **for the purchase of manufacturing supplies, equipment, machinery, and buildings used to carry out the purposes of this article, as well as for the payment of the necessary personnel in charge, and to otherwise defray the necessary expenses incident thereto** ... When, in the opinion of [SCDC's Director], the Prison Industries Account has reached a sum in excess of the requirements of this article, the excess must be used by [SCDC] for operating expenses and permanent improvements to the state prison system, subject to the approval of the State Budget and Control Board. [emphasis supplied].

SCDC then argued as follows in its brief to the ALC regarding the $1.32 per labor hour "SCDC Surplus Fund Amount" (R. p. ___ - ___):

> **Without ESCOD $1.79 per hour and then $1.92 per hour *in addition* to the inmates' lawful gross wage of $4.25 per hour and then $5.25 per hour**, SCDC would have been unable to comply with the provisions of § 24-3-400, as § 24-3-40 sets aside no monies for SCDC by which it may defray the expenses associated with the operation of its prison industries program.[30]
>
> If it recalculated the wage structure in the manner urged by Hatton, SCDC would have undoubtedly incurred a deficiency by continuing to operate its prison industries program, and such a contingency would animate [§ 11-9-220], which makes it "unlawful for any department, institution, commission or board of the State government or officer or agent of the State government authorized to make contracts or draw appropriations to contract indebtedness in excess of the amount specifically provided in the annual appropriations act."

[bold and italicized emphasis supplied].

SCDC respectfully asserts that the ALC didn't rule upon, let alone address, the above-quoted argument SCDC offered in its brief. 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.

[30] In the footnote associated from this passage in its brief, SCDC recognized "[§] 24-3-40(A)(3) mandates that SCDC must withhold 25% of an inmate's gross wages only to 'defray the cost of the prisoner's room and board' and only if the inmate possesses no child support obligations."

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 contracts 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. (R. p. ___).

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. As explained above, the project operated by SCDC at Evans in which Hatton participated was, like the project at issue in *Adkins*, a federally certified PIECP project.

In the October 30, 2002 order it issued in SCDC's favor, which SCDC introduced as an exhibit in support of its brief to the ALC (R. pp. ___ - ___), the circuit court in *Adkins* addressed the $1.32 per hour charge as follows (R. p. ___):

> 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 with approval when it affirmed the circuit court's decision in result,[31] is not binding precedent. However, the circuit court's decision in *Adkins* represents an instance where 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 Hatton participated, federal certification under BJA's PIECP.

[31] *See* note 7 above.

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 considered persuasive.

Just as he didn't introduce any evidence to the record demonstrating that SCDC "withheld," "collected," "deducted," "removed," or "diverted" $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, Hatton 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.

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 Hatton's hourly rate of pay, should be included in any calculation of Hatton'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 Hatton'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 Hatton'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 Hatton's gross wages.

RESPECTFULLY SUBMITTED,

BY: _____

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November 13, 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. 2018-001322

Elliott Hatton, #158373 ..... 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 *pro se* Respondent by mailing a copy to him, first class postage pre-paid, at the following address:

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