THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2016-000285
Administrative Law Court Docket No. 12-ALJ-04-00143-AP

Thomas J. Torrence, #094651 ..... Respondent,

v.

South Carolina Department of Corrections ..... Appellant.

APPELLANT'S PETITION FOR REHEARING

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TABLE OF CONTENTS

Table of Authorities ii

I. SCDC'S PETITION FOR REHEARING 1

II. SCOPE OF SCDC'S PETITION FOR REHEARING 1

III. THE RULING BY THE ALC IN ITS JANUARY 20, 2016 ORDER ALLOWING TORRENCE IMMEDIATE ACCESS TO HIS ESCROWED WAGES IS NOT INTERLOCUTORY, AND, THEREFORE, THIS COURT SHOULD ADJUDICATE SCDC'S APPEAL ON THIS ISSUE 3

IV. THE ALC'S RULING THAT TORRENCE "WORKED AS A HARNESS ASSEMBLER FOR ESCOD" IS NOT INTERLOCUTORY, AND, THEREFORE, THIS COURT SHOULD ADJUDICATE SCDC'S APPEAL ON THIS ISSUE 5

V. THE ALC'S DECISIONS THAT IT POSSESSED THE AUTHORITY TO CALCULATE THE "PREVAILING WAGE" SCDC OWED TORRENCE FOR HIS PRISON INDUSTRIES LABOR AND THE METHODOLOGY IT USED TO CALCULATE THE "PREVAILING WAGE" WERE NOT INTERLOCUTORY, AND THEREFORE, THIS COURT SHOULD ADJUDICATE SCDC'S APPEAL ON THESE ISSUES 9

VI. CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Ackerman, et al., v. S.C. Dep't of Corr.,
782 S.E.2d 757 (S.C. Ct. App. 2016), *cert. denied* (May 30, 2017) 2

Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005) 6

Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health and Env'l Control,
692 S.E.2d 894, 894 (S.C. 2010) ..... 1, 3 – 4, 8, 14

S.C. Dep't of Corr. v. Cartrette, 694 S.E.2d 18 (S.C. Ct. App. 2010) ..... 6 – 8, 16

S.C. Dep't of Corr. v. Tomlin, 694 S.E.2d 25, 29 (S.C. Ct. App. 2010) ..... 7 – 8, 16

Torrence, et al., v. S.C. Dep't of Corr., Case No. 2001-CP-40-3409
(S.C. Cir. Ct. May 31, 2005) 13

Torrence, et al., v. S.C. Dep't of Corr., 640 S.E.2d 866 (S.C. 2007) 6

Williams, et al., v. S.C. Dep't of Corr., et al., 641 S.E.2d 885 (S.C. 2007) ..... 6 – 8, 16

STATUTES

18 U.S.C § 1761(c)(2) 12

18 U.S.C § 1761(e)(3) 7

S.C. Code Ann. § 1-23-610(A) 2

S.C. Code Ann. § 1-23-610(A)(1) 1

S.C. Code Ann. § 1-23-610(B) 4, 14

S.C. Code Ann. § 24-3-40(A) 6

S.C. Code Ann. § 24-3-40(A)(5) ..... 2 – 4, 8

S.C. Code Ann. § 24-3-40(A)(6) 7

S.C. Code Ann. § 24-3-40(B)(2) ..... 3 – 4

S.C. Code Ann. § 24-3-315 12

S.C. Code Ann. § 24-3-430(D) ..... 11 – 12

TABLE OF AUTHORITIES

S.C. Code Ann. § 24-3-430(F) 6

S.C. Code Ann. § 24-3-430(G) 6

OTHER AUTHORITIES

64 FR 17000, *et seq.* ..... 8, 10 – 11, 13

South Carolina Appellate Court Rule 221(a) 1

I. SCDC'S PETITION FOR REHEARING

The Appellant, the South Carolina Department of Corrections ["SCDC"], respectfully petitions the Court, under South Carolina Appellant Court Rule ["SCACR"] 221(a), to rehear its November 28, 2018 unpublished opinion in the instant matter. *See* -- S.E.2d --, 2018 WL 6199185 (S.C. Ct. App. Nov. 28, 2018).

II. SCOPE OF SCDC'S PETITION FOR REHEARING

In its entirety, the Court's November 28, 2018 unpublished decision, by which it dismissed the entirety of SCDC's appeal, read as follows:

> Appeal dismissed pursuant to Rule 220(b), SCACR, and the following authorities: [*Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health and Env'l Control,* 692 S.E.2d 894, 894 (S.C. 2010)] ("The order of the [South Carolina Administrative Law Court] in this case is not a final order. If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory" and not immediately appealable.); S.C. Code Ann. § 1-23-610(A)(1) (Supp. 2018) (providing for judicial review by this court of "a final decision" of the ALC).

The passage from *Charlotte-Mecklenburg* quoted by the Court in its November 28, 2018 unpublished decision comprises the first two (2) sentences of the below-quoted passage from *Charlotte-Mecklenburg*, 692 S.E.2d at 894 – 895:

> The order of the ALC in this case is not a final order. If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory. (citations omitted). A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment. (citations omitted). **A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.** (citation omitted).
>
> The ALC's order upholds DHEC's finding that Amisub was a competing applicant for the certificate of need at issue in this matter. However, the ALC found DHEC erroneously interpreted the State Health Plan to allow only existing providers to obtain a certificate of need. Based on this finding, the ALC remanded the matter to DHEC to determine whether any

> of the applicants were entitled to the certificate of need. **Although the ALC decided questions of law involved in this matter, a final determination as to the certificate of need has not been made.** Therefore, the order of the ALC is interlocutory and is not a final decision which is immediately appealable under § 1-23-610. Accordingly, we dismiss this matter.

[emphasis supplied].

Obviously, this Court's decision in *Ackerman, et al. v. S.C. Dep't of Corr.*, 782 S.E.2d 757 (S.C. Ct. App. 2016), *cert. denied* (May 30, 2017), impacted SCDC's appeal of the ALC's two (2) orders (i.e. January 30, 2014 and January 20, 2016) in the instant matter. Both this Court and our Supreme Court considered *Ackerman* during the period of time in which SCDC's instant appeal of the orders issued the ALC on January 30, 2014 and January 20, 2016 was pending.

This Court's decision in *Ackerman* rendered moot the issues identified by SCDC in its instant appeal of the ALC's January 30, 2014 order, which addressed *only* whether Torrence timely filed the administrative grievance by which he challenged various aspects of his prison industries pay.

This Court's decision in *Ackerman*, however, did not impact the following issues raised by SCDC in its instant appeal of the ALC's January 20, 2016 order (R. pp. 1029 – 1043):

A. Whether the ALC erred in its January 20, 2016 order by ruling that SCDC must allow Torrence to designate persons or entities to receive an immediate distribution of his monies held in escrow pursuant to § 24-3-40(A)(5);[1]

B. Whether the ALC misapprehended the applicable state law, federal law, and federal regulations when it ruled in its January 20, 2016 order that Torrence "worked as a harness assembler for ESCOD" sponsor during the time he participated in the prison industries project SCDC operated at Evans Correctional Institution ["Evans"];[2] and

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[1] SCDC identified this issue as the fourth and final issue in its "Statement of Issues on Appeal." *See* SCDC's Brief filed January 3, 2017, pp. 1 and 47 – 49.

[2] SCDC challenged the determination by the ALC that Torrence worked for the private industry sponsor in the argument it provided in support of the third issue it identified in its "Statement of Issues on Appeal." *See* SCDC's Brief, pp. 1; 2, n. 3; 4, 21; and 47.

C. Whether the ALC erred in its January 20, 2016 order when it decided that it possessed the authority to calculate the "prevailing wage" SCDC owed Torrence for the labor he provided to the project SCDC operated at Evans and by the methodology it used to calculate the "prevailing wage" SCDC owed Torrence for the same.[3]

SCDC respectfully asserts that the decisions rendered by the ALC in its January 20, 2016 order concerning the above-listed issues represent, under *Charlotte-Mecklenburg*, the ALC's final determinations of them, and this Court should not have, by its November 28, 2018 unpublished opinion, dismissed SCDC's appeal without adjudicating the above-listed issues.

III. THE RULING BY THE ALC IN ITS JANUARY 20, 2016 ORDER ALLOWING TORRENCE IMMEDIATE ACCESS TO HIS ESCROWED WAGES IS NOT INTERLOCUTORY, AND, THEREFORE, THIS COURT SHOULD ADJUDICATE SCDC'S APPEAL ON THIS ISSUE

As chronicled in SCDC's brief,[4] the ALC, in its January 20, 2016 order (R. pp. 1039 – 41), addressed Torrence's access to his monies held in escrow under § 24-3-40(A)(5) as follows:

> The parties contest the meaning of [§] 24-3-40(B)(2). ... The parties disagree on when [Torrence's] escrowed wages may be distributed to persons or entities of the inmate's choosing-i.e. whether they may be distributed only after the inmate's death. While there is nothing in the statute explicitly stating that the distribution of the funds to persons or entities chosen by the inmate can occur only after the inmate's death, [SCDC's] interpretation of an ambiguous statute that it administers is entitled to deference unless there is a compelling reason to differ. ... Therefore, the Court turns to the rules of statutory construction to determine the intent of the legislature. [citation omitted].
>
> ...
>
> On the one hand, the meaning urged by [Torrence] ignores the language of [§ 24-3-40(B)(2)]. ... This subsection specifically provides for the distribution of the escrowed wages of a prisoner serving a life sentence, and immediate personal access to the funds is not an allowed option. On the other hand, SCDC's interpretation ignores the language of [§ 24-3-40(A)(5)]. ... [SCDC's] interpretation that the escrowed funds may not be distributed to a person or entity of the inmate's choosing during the inmate's lifetime ignores the fact that the funds are to be for the benefit of

[3] SCDC identified this issue as the third issue in its "Statement of Issues on Appeal." *See* SCDC's Brief, pp. 1 and 33 – 47.

[4] *See* SCDC's Brief, pp. 47 – 48.

> the prisoner, not the benefit of the prisoner's heirs. Therefore, the Court concludes that a construction of the statute that gives full effect to both [§ 24-3-40(B)(2)] and [§ 24-3-40(A)(5)] requires reading [§ 24-3-40(B)(2)] to allow a prisoner serving a life sentence without opportunity for parole the option of having the escrowed funds distributed to the persons or entities of his choice during his lifetime.

As also chronicled in SCDC's brief,[5] the ALC, in its January 20, 2016 order (R. p. 1042), ruled that Torrence "**must be allowed the opportunity to designate persons or entities to receive an immediate distribution of funds held in escrow pursuant to [§] 24-3-40(A)(5).**" [footnote omitted and emphasis supplied].

Nothing about the ALC's above-quoted ruling regarding Torrence's immediate access to his escrowed wages concerns the "prevailing wage" SCDC should have paid Torrence for his labor. Likewise, the ALC's above-quoted ruling is not contingent upon further proceedings on remand regarding the calculation of the "prevailing wage" SCDC should have paid Torrence for his labor.

Instead, the above-quoted ruling from the ALC's January 20, 2016 order clearly constitutes a final judgment, which, if unchallenged by SCDC's instant appeal, would allow Torrence immediate access to his escrowed wages so that he may "designate persons or entities to receive an immediate distribution of funds held in escrow pursuant to [§] 24-3-40(A)(5)."

Concerning its opposition to the ALC's final decision on this issue, SCDC relies upon the analysis and argument it offered in its brief, and, in doing so, SCDC respectfully reiterates that this Court, under the provisions of § 1-23-610(B), should reverse the above-quoted ruling from the ALC's January 20, 2016 order.

Concerning its instant petition, SCDC respectfully asserts that, under *Charlotte-Mecklenburg*, the above-quoted ruling from the ALC's January 20, 2016 order constitutes a final

[5] *See* SCDC's Brief, p. 48.

judgment that "disposes of the whole subject matter of" Torrence's demand for immediate access to his escrowed wages "or terminates" Torrence's demand for immediate access to his escrowed wages, "leaving nothing to be done but to enforce by execution" of Torrence's ability to, as authorized by the above-quoted ruling from the ALC's January 20, 2106 order, immediately access his escrowed wages.

Accordingly, this Court should withdraw its November 28, 2018 unpublished opinion and fully adjudicate whether the ALC erred by ruling that Torrence should have immediate access to his escrow wages so that he may distribute them to the persons or entities of his choice.

IV. THE ALC'S RULING THAT TORRENCE "WORKED AS A HARNESS ASSEMBLER FOR ESCOD" IS NOT INTERLOCUTORY, AND, THEFORE, THIS COURT SHOULD ADJUDICATE SCDC'S APPEAL ON THIS ISSUE

As chronicled in SCDC's brief,[6] as well as in SCDC's reply brief,[7] the ALC, in its January 20, 2016 order (R. p. 1039), ruled as follows:

> [Torrence] must be paid the mean average South Carolina wage of an electronic assembler, including overtime, *for the years he worked as a harness assembler for ESCOD*. [SCDC] must obtain the data to determine this wage from the Department of Employment and Workforce. **Specifically, [SCDC] must pay [Torrence] the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999 and the mean average wage reflected by that code or its counterpart for the years data is not contained in the record**. [italicized emphasis supplied by SCDC; bold emphasis supplied by the ALC].

By ruling in the first sentence of the above-quoted paragraph from is January 20, 2016 order that Torrence "worked as a harness assembler for ESCOD," the ALC explicitly accepted the assertion Torrence uttered in the first two (2) sentences of his Step 1 grievance (R. p. 121):

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[6] *See* SCDC's Brief, p. 14.

[7] *See* SCDC's Reply Brief filed January 3, 2017, p. 3.

> **I was employed by [ESCOD]**, in the SCDC Private Sector Industries Program at [Evans] from June 1997 thru November, 2004. **During the course of my employment**, I learned that SCDC was withholding certain wages and monies from me in contravention of state law, to which I have a property interest. The S.C. Supreme Court recently ruled in [*Torrence, et al., v. S.C. Dep't of Corr.*, 640 S.E.2d 866 (S.C. 2007)] (filed May 7, 2007) (received by [me] on May 21, 2007), that I must file a Grievance under [GA-01.12]. [emphasis supplied].

Regarding Torrence's above-quoted assertion from the first two (2) sentences of his Step 1 grievance, SCDC explained as follows in its brief:[8]

> Torrence's [claim] that he "employed" by or otherwise worked for ESCOD ... are 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). Torrence'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]. Torrence's claims are 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. Notwithstanding *Williams*, *Bennett*, and *Cartrette*, the ALC declined to reject Torrence's repeated assertions that he was an "employee" or was otherwise "employed" by the private industry sponsor, SCDC, or the State in footnote 3 of its January 20, 2016 order. (R. p. 1035).

In footnote 3 of his January 20, 2016 order (R. p. 1035), the ALC observed as follows:

> The parties also argue vociferously about whether it is proper to use the terms "employee" or "hire" with respect to [Torrence's] labor and his relationship with the [Prison Industries Enhancement Certification Program]. The Court declines to address in detail the parties' arguments concerning [Torrence's] status as an "employee," since they are not necessary for the disposition of this case. It is true that [Torrence] is not classified as an "employee" of the State. [§ 24-3-430(F)]. [Torrence] is not an "employee" of either the state or the private industry sponsor for purposes of the Payment of Wages Act. [*Williams v. S.C. Dep't. of Corr.*, 641 S.E.2d 885 (2007)]. Nor is [Torrence] an "employee" for purposes of unemployment benefits. [§ 24-3-430(G)]. **Yet, it is also true that for some other purposes [Torrence] has the same rights and responsibilities afforded to employees**. [Torrence] is required to pay

[8] *See* SCDC's Brief, p. 2, n. 3.

> state and federal income taxes and Social Security taxes. [§ 24-3-40(A)(6)]. [Torrence] is entitled to worker's compensation benefits for on-the-job injuries. [18 U.S.C. § 1761(e)(3)]. None of these rights and duties (or lack thereof) directly bear on the disposition of this case. [emphasis supplied].

Despite its "on the one hand/on the other" exploration of this issue and its statement that the issue did not "directly bear on the disposition of this case," the ALC, in its January 20, 2016 order, nevertheless sided with Torrence when, in the course of issuing its erroneous ruling quantifying the "prevailing wage" SCDC should have paid him, it erroneously ruled that Torrence "worked as a harness assembler for ESCOD."

Respectfully stated, no need existed for the ALC to conduct its "on the one hand/on the other" exploration of whether Torrence worked for ESCOD. As SCDC explained in the above-quoted footnote from its brief, this Court, relying upon our Supreme Court's decision in *Williams*, unequivocally declared in *Cartrette*, 694 S.E.2d at 23, that inmates participating in prison industries projects operated by SCDC are not employees of the private industry sponsor. *See also S.C. Dep't of Corr. v. Tomlin*, 694 S.E.2d 25, 29 (S.C. Ct. App. 2010).

While the ALC recognized our Supreme Court's decision in *Williams* in its January 20, 2016 order, it ignored this Court's decision in *Cartrette*, and, for that matter, in *Tomlin*. The ALC ignored *Cartrette* and *Tomlin* despite SCDC's discussion of both cases in the brief it submitted to the ALC on June 29, 2015. (R. pp. 793 – 794, 798, and 810 – 811).

Moreover, the federal guidelines published by the United States Department of Justice's Bureau of Justice Administrative ["BJA"], which apply to projects certified by the federal government under its "Prison Industries Enhancement Certification Program" ["PIECP"], like the project SCDC operated at Evans in which Torrence participated, clearly state that "[t]he requisite payment of at least a minimum wage, by a [project], is in no way intended by BJA to

imply that PIECP inmate workers are employees for purposes of the PIECP statute or any other federal law." 64 FR 17007.[9]

Just as the ruling by the ALC in its January 20, 2016 order that he "must be allowed the opportunity to designate persons or entities to receive an immediate distribution of funds held in escrow pursuant to [§] 24-3-40(A)(5)" is not contingent upon further proceedings on remand concerning the calculation of the "prevailing wage," the ALC's erroneous declaration that Torrence "worked as a harness assembler for ESCOD" is likewise not contingent upon further proceedings on remand. Instead, the ALC's erroneous declaration is baked into the ruling(s) from its January 20, 2016 order (R. p. 1039):

> [Torrence] must be paid the mean average South Carolina wage of an electronic assembler, including overtime, *for the years he worked as a harness assembler for ESCOD.* [SCDC] must obtain the data to determine this wage from the Department of Employment and Workforce. **Specifically, [SCDC] must pay [Torrence] the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999 and the mean average wage reflected by that code or its counterpart for the years data is not contained in the record.** [italicized emphasis supplied by SCDC; bold emphasis supplied by the ALC].

According, the ALC's declaration that Torrence "worked as a harness assembler for ESCOD" clearly constitutes a final judgment under *Charlotte-Mecklenburg*, and this Court should withdraw its November 28, 2018 unpublished opinion and fully adjudicate whether the ALC erred by its above-quoted declaration.

At the very least, SCDC respectfully urges this Court to withdraw its November 28, 2018 unpublished opinion and issue a new opinion, unpublished or published, by which it makes clear that under *Williams*, *Cartrette*, and *Tomlin*, inmates who participate in prison industries projects operated by SCDC are not employees of the private industry sponsor.

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[9] *See* SCDC's Brief, p. 35.

V. THE ALC'S DECISIONS THAT IT POSSESSED THE AUTHORITY TO CALCULATE THE "PREVAILING WAGE" SCDC OWED TORRENCE FOR HIS PRISON INDUSTRIES LABOR AND THE METHODOLOGY IT USED TO CALCULATE THE "PREVAILING WAGE" WERE NOT INTERLOCUTORY, AND, THEREFORE, THIS COURT SHOULD ADJUDICATE SCDC'S APPEAL ON THESE ISSUES

As SCDC illustrated in its reply brief,[10] Torrence admitted at the outset of his brief to this Court that he asked the ALC "to formulate a calculation [of the "prevailing wage" SCDC should have paid him for his prison industries labor] **for the sake of brevity and judicial economy** where the record is replete with the information to perform such a task, and which was the nexus of the grievance.[11]" [emphasis supplied].

The ALC accommodated Torrence's request by the same ruling discussed above in Section III (R. p. 1039):

> [Torrence] must be paid the mean average South Carolina wage of an electronic assembler, including overtime, *for the years he worked as a harness assembler for ESCOD.* [SCDC] must obtain the data to determine this wage from the Department of Employment and Workforce. **Specifically, [SCDC] must pay [Torrence] the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999 and the mean average wage reflected by that code or its counterpart for the years data is not contained in the record.** [italicized emphasis supplied by SCDC; bold emphasis supplied by the ALC].

As SCDC argued in both its brief and its reply brief, the ALC clearly and profoundly erred by the rulings in the second and third sentences from the above-quoted paragraph from its January 20, 2016 order.

In the analysis associated with its rulings from the second and third sentences of the above-quoted paragraph, the ALC addressed BJA's controlling guidelines (R. p. 1033):[12]

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[10] *See* SCDC's Reply Brief, p. 6.

[11] *See* Torrence's Brief dated December 30, 2016, p. 1, n. 2.

[12] *See* SCDC's Brief, pp. 36 – 37.

> **The PIECP Guideline refers to this rate of pay as the "prevailing wage" and states that the prevailing wage *must be obtained from the state agency that determines wage rates*.** [64 FR 17010]. The Guideline states that this agency is usually the "Department of Economic Security." **In South Carolina, this agency would have been the Employment Security Commission (ESC) at the times relevant to this case**, but would now be the Department of Employment and Workforce (DEW).
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> Further, **the Guideline states that the prevailing wage must be set exclusively in relation to the amount of pay received by similarly situated non-inmate** workers and that no other cost variables may be taken into consideration. [64 FR 17009-10]. Additionally, the Guideline states that the prevailing wage cannot be less than the federal minimum wage, but that payment of the minimum wage does not achieve compliance with the law unless the comparable private sector industry wage is indeed the federal minimum wage. [64 FR 17010].

[emphasis supplied].

After addressing BJA's guidelines, the ALC then began deviating from the methodology actually used by the South Carolina Employment Security Commission ["ESC"] when the ESC collected and analyzed wage data (R. p. 1036):[13]

> ..., [SCDC] argues that so long as the wage paid exceeds the federal minimum wage it is a lawful wage. SCDC argues that nothing in the statutes establishes a specific rate as the prevailing wage with respect to the wages an inmate must be paid. The final agency decision states: "BJA declared that the rate at which inmates are paid for the labor they voluntarily provide to PIECP projects ... cannot be set below the federal minimum wage. Except for the period of time it paid you a 'training wage,' SCDC paid you at least the federal minimum wage for your labor." However, [SCDC] neglected to note in this statement that the Guideline's language in question also provides: "Payment of the Federal minimum wage, however, does not automatically achieve compliance with the prevailing wage requirement unless the prevailing wage for the comparable private sector industries is, in fact, the Federal minimum wage." [64 FR 170010].
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> The federal minimum wage is the *lowest possible* acceptable wage to pay inmates, because it is legally impossible for the prevailing wage to be any lower. The minimum wage would only satisfy the prevailing wage standard in all instances if all non-inmate workers were paid only the minimum wage. However, workers in this state earn different rates of pay

[13] *See* SCDC's Brief, pp. 40 – 41.

> according to their skillset and the type job in which they work. **The Guideline cited by [SCDC] also states that the federal law "requires that the PIECP wage amount be set *exclusively* in relation to the amount of pay received by similarly situated non-inmate workers."** [64 FR 17009-10] (emphasis added). **[SCDC] cites no evidence that the minimum wage was the prevailing wage for workers in jobs similar to the one performed by [Torrence].** The law clearly states that "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." [§ 24-3-430(D)].

[emphasis supplied].

As SCDC asserted in its brief,[14] however, the ALC overlooked several important realities, among them were the realities (1) that no evidence exists in the record as to the hourly wage ESCOD *actually paid* its employees who worked at ESCOD's production facilities located in our state other than the facility at Evans in which SCDC operated the prison industries project in which Torrence participated and who performed job tasks identical or similar to those performed by Torrence and (2) that the ESC did not even use the term "prevailing wage" in its operations.

As SCDC illustrated in its reply brief,[15] Torrence, in his brief to this Court,[16] rationalized the absence of any evidence in the record confirming the hourly wage ESCOD *actually paid* its employees who performed job tasks identical or similar to those he performed while participating in the prison industries project at Evans, by arguing as follows:[17]

> SCDC suggests, as compliance with 18 USC § 1761(c)(2), § 24-3-315, and [§ 24-3-430(D)], that Torrence was paid ten cents above the federal minimum wage, [SCDC's Brief, p. 41]. This application contradicts the substantial evidence in the record **does not contain the hourly wage ESCOD actually paid its employees for work similar to Torrence.**

[14] *See* SCDC's Brief, p. 41.

[15] *See* SCDC's Reply Brief, p. 10.

[16] *See* Torrence's Brief, p. 44.

[17] *Id.*

> Torrence suggests that neither party to this action has access to those records, but **common sense dictates it was within the average/mean wage range.** [emphasis supplied].

Torrence's argument demonstrates one of the numerous profound flaws in the ALC's January 20, 2016 order, namely that the ALC had no absolutely no idea what ESCOD *actually paid* its employees who performed job tasks identical to or similar to those performed by Torrence when it ruled that "[SCDC] must pay [Torrence] the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999 and the mean average wage reflected by that code or its counterpart for the years data is not contained in the record." (R. p. 1039).

Thus, it's entirely possible that the ALC's above-quoted ruling, if left undisturbed, could result in SCDC remitting back pay to Torrence based upon an hourly rate of pay *greater than* the hourly rate of pay ESCOD *actually paid* its employees. Such an absurd result is not contemplated in any way by the applicable federal law, the applicable federal guidelines, the applicable state law, the applicable precedent from federal court, or the applicable precedent from our state's appellate courts.

Another of the numerous profound flaws in the ALC's January 20, 2016 order consists of the ALC's fundamental misapprehension of the data collected and disseminated by the ESC. In offering what it claimed as legitimate authority supporting not only its ability to calculate the "prevailing wage" SCDC should have paid Torrence but the calculations themselves, the ALC stated as follows (R. p. 1038):[18]

> The Merriam-Webster Dictionary defines "prevail" as "to be frequent: predominate." Merriam-Webster, www.merriam-webster.com/prevail (Dec. 14, 2015). Predominate is defined as "to hold advantage in numbers or quantity." Id. at www.merriam-webster.com/predominate. **The affidavit in the record of Rebecca Eleazer of the ESC** supports the conclusion that the "average" wage in South Carolina for a given occupational category would be the ordinary interpretation of the statutory

[18] *See* SCDC's Brief, p. 44.

> phrase prevailing wage. The Court therefore concludes that the "prevailing wage" equals the mean average wage for an occupation. [emphasis supplied].

As SCDC explained in its brief,[19] no affidavit from Ms. Eleazer appears in the record. Instead, as SCDC also explained in its brief,[20] only deposition testimony provided by Ms. Eleazer on August 10, 2004 during the litigation of *Torrence* in circuit court appears in the record. (R. pp. 533 and 604 – 639). *See Torrence, et al., v. S.C. Dep't of Corr.*, Case No. 2001-CP-40-3409 (S.C. Cir. Ct. May 31, 2005)

More importantly, the ALC overlooked the substance of Ms. Eleazer's deposition testimony when she attested that **the ESC**, the agency exclusively tasked under BJA guidelines to verify the "prevailing wage," **does "not provide or publish a wage that's called prevailing wage," nor does it "have a wage classification called prevailing wage."** (R. p. 617). *See* 64 FR 170009 – 10(B).

Thus, by the above-quoted paragraph from its January 20, 2016 order, the ALC clearly and erroneously deviated from not only from the applicable BJA guideline regarding the entity solely responsible for determining or certifying the "prevailing wage," but it also engaged in legal alchemy when it ruled that "the 'prevailing wage' equals the mean average wage for an occupation." SCDC frankly but respectfully asserts that the ALC fashioned such a remedy precisely because the ESC had no standard for the "prevailing wage" other than an hourly wage equal to or greater than the federal minimum wage.

Concerning its opposition to the ALC's final decision on this issue, SCDC again relies upon the entirety of the analysis and argument it offered in its brief, and, in doing so, SCDC

[19] *See* SCDC's Brief, p. 44.

[20] *Id.*

respectfully reiterates that this Court, under the provisions of § 1-23-610(B), should reverse the above-quoted ruling(s) from the ALC's January 20, 2016 order.

Concerning its instant petition, SCDC respectfully asserts that, under *Charlotte-Mecklenburg*, the following rulings from the ALC's January 20, 2016 order constitutes a final judgment (R. p. 1039):

> **[Torrence] must be paid the mean average South Carolina wage of an electronic assembler**, including overtime, for the years he worked as a harness assembler for ESCOD. [SCDC] must obtain the data to determine this wage from the Department of Employment and Workforce. **Specifically, [SCDC] must pay [Torrence] the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999 and the mean average wage reflected by that code or its counterpart for the years data is not contained in the record**. [emphasis supplied].

If this Court does not rehear SCDC's appeal on this issue, the above-quoted rulings, which represent a clearly defective standard by which to determine the "prevailing wage" at which Torrence should have been paid, will be baked into the action.

On remand, SCDC will then be compelled, in accordance with the directive on the final page of the ALC's January 20, 2016 order, to collect data reflecting "the mean average wage" and then calculate the "mean average wage." ["... this matter is REMANDED to [SCDC] to determine the prevailing wage, as defined by the Court above, for all hours of regular and overtime labor performed by [Torrence] for ESCOD."]. (R. p. 1043).

Under such realities, SCDC respectfully asserts that the above-quoted rulings from the ALC's January 20, 2016 order regarding the "prevailing wage" dispose of the whole subject matter of the action, namely how much back pay SCDC owes Torrence.

Accordingly, this Court should withdraw its November 28, 2018 opinion and fully adjudicate whether the ALC erred in its January 20, 2016 order by deciding that it possessed the authority to calculate the "prevailing wage" SCDC owed Torrence for the labor he provided to

the project SCDC operated at Evans and by the methodology it used to calculate the "prevailing wage" SCDC owed Torrence for the same.

Alternatively, SCDC respectfully urges this Court to withdraw its November 28, 2018 unpublished opinion and issue a new opinion, unpublished or published, by which it does the following:

1. Direct and/or permit SCDC to secure evidence from ESCOD and/or INSILCO, the private industry sponsor(s) for the federally certified prison industries project SCDC operated at Evans in which Torrence participated, regarding the hourly rate of pay earned by those of its employees at its production facilities in South Carolina who performed the same or similar job tasks as Torrence. This Court should then direct SCDC to introduce such evidence into the record in the course of conducting proceedings on remand under the ALC's January 20, 2016 order.

2. Permit SCDC to introduce into the record, as explicitly offered by Torrence in his brief to this Court, the entirety of the transcript from the deposition of ESC representative Rebecca Eleazer in the course of conducting proceedings on remand under the ALC's January 20, 2016 order.[21]

[21] On page 42 of his brief, Torrence, in arguing that the ALC properly defined and calculated the "prevailing wage" for his labor, asserted as follows regarding Ms. Eleazer:

> Rebecca W. Eleazer of the ESC/DEW, during her August 10, 2004 deposition for *Torrence,* R. pp. 604 – 655, **despite South Carolina having no legal definition of [the term "prevailing wage"]**, made a specific correlation of the term, as the agency official in charge of such, that for "prevailing wage," she would provide "our *average* wage," R. pp. 616 – 627. [emphasis supplied].

SCDC respectfully asserts that Torrence conceded that the ALC defined or otherwise created a definition for the term "prevailing wage" in its January 20, 2016 order despite the reality that the ESC did not use the term "prevailing wage" in the course of conducting its operations. Torrence, in the footnote associated with the above-quoted passage from his brief, also made the following offer:

> All portions of the deposition and relevant exhibits pertaining to defining and calculating the "prevailing wage" are contained in the record. **The Court or SCDC may have the entire contents of that deposition supplemented into the record**. [emphasis supplied].

Should this Court grant SCDC's instant petition on this issue, SCDC respectfully seeks leave to supplement the record on appeal with the entirety of the transcript and all exhibits from Ms. Eleazer's August 10, 2004 deposition.

VI. CONCLUSION

In light of the foregoing analysis and argument, SCDC respectfully petitions the Court to adjudicate the following issues SCDC raised in its appeal of the ALC's January 20, 2016 order:

A. Whether the ALC erred in its January 20, 2016 order by ruling that SCDC must allow Torrence to designate persons or entities to receive an immediate distribution of his monies held in escrow pursuant to § 24-3-40(A)(5);

B. Whether the ALC misapprehended the applicable state law, federal law, and federal regulations when it ruled in its January 20, 2016 order that Torrence "worked as a harness assembler for ESCOD" sponsor during the time he participated in the prison industries project SCDC operated at Evans Correctional Institution ["Evans"]; and

C. Whether the ALC erred in its January 20, 2016 order when it decided that it possessed the authority to calculate the "prevailing wage" SCDC owed Torrence for his prison industries labor and by the methodology it used to calculate the "prevailing wage" SCDC owed Torrence for his prison industries labor.

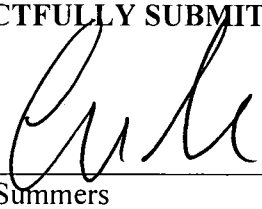
SCDC alternatively and respectfully petitions the Court to, at a minimum, withdraw its November 28, 2018 unpublished opinion and issue a new opinion, unpublished or published, by which it does the following:

1. Adds language which makes clear that under *Williams*, *Cartrette*, and *Tomlin*, inmates who participate in prison industries projects operated by SCDC are not employees of the private industry sponsor.

2. Direct and/or permit SCDC to secure evidence from ESCOD and/or INSILCO, the private industry sponsor(s) for the federally certified prison industries project SCDC operated at Evans in which Torrence participated, regarding the hourly rate of pay earned by those of its employees at its production facilities in South Carolina who performed the same or similar job tasks as Torrence. This Court should then direct SCDC to introduce such evidence into the record in the course of conducting proceedings on remand under the ALC's January 20, 2016 order.

3. Permit SCDC to introduce into the record, as explicitly offered by Torrence in his brief to this Court, the entirety of the transcript from the deposition of ESC representative Rebecca Eleazer in the course of conducting proceedings on remand under the ALC's January 20, 2016 order.

RESPECTFULLY SUBMITTED,



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Columbia, South Carolina
January 10, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2016-000285
Administrative Law Court Docket No. 12-ALJ-04-00143-AP

Thomas J. Torrence, #094651 ..... Respondent,

v.

South Carolina Department of Corrections ..... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's **Petition for Rehearing** on the above-named Respondent by mailing a copy of it to his counsel, first class postage pre-paid, at the following address:

Thomas J. Torrence, #094651
Perry Correctional Institution
430 Oaklawn Drive
Pelzer, South Carolina 29669

January 10, 2019

LAKE E. SUMMERS