THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

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

Administrative Law Court Docket No. 15-ALJ-04-0560-AP

Appellate Case No. 2018-001325

William Ray Ward, #91566 ..... Respondent,

v.

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

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

While incarcerated at Evans Correctional Institute, a prison operated by the South Carolina Department of Corrections ("SCDC"), Respondent William Ray Ward participated in a prison employment program. He was assigned to a wire harness assembly facility[1] where he worked for two private companies, ESCOD and Insilco. Sometime prior to June 30, 1995, Ward performed 320 hours of training work, for which he was paid first 25 cents per hour and then 75 cents per hour. On or about June 30, 1995, SCDC began paying Ward an hourly rate of "at least" $4.25, which was the federal minimum wage in effect at that time and through September 30, 1996.[2] The minimum wage was increased to $4.75 per hour on October 1, 1996, a rate that remained in effect until September 1, 1997, when it was increased to $5.15 per hour.[3] Ward was paid $5.25 per hour from November 1, 1996 to November 14, 2003, when his participation in the prison industries program ended. In addition to these amounts, Ward's private-sector employers remitted to SCDC an additional sum of $1.92 for each hour of his labor.

Ward was a co-plaintiff in the case of *Torrence v. South Carolina Department of Corrections*.[4] In *Torrence*, Ward contended that SCDC improperly diverted $1.92 per hour from the total wage of $7.17, paid at that time by Insilco. *Torrence*, 373 S.C. at 586, 646 S.E.2d at 866. Ward also alleged that $7.17 was less than the prevailing wage for wire harness assembly work. *Id.* On May 7, 2007, the South Carolina Supreme Court affirmed the dismissal of Ward's declaratory judgment action, ruling that the plaintiffs' complaints were properly raised in a grievance proceeding before SCDC. *Id.* at 593, 646 S.E.2d at 869.

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[1] *See Torrence v. S.C. Dep't of Corr.*, 373 S.C. 586, 590, 646 S.E.2d 866, 867 (2007).

[2] 29 U.S.C. § 206(a)(1) (1989); 29 U.S.C. § 206(a)(1) (1996).

[3] 29 U.S.C. § 206(a)(1) (1996).

[4] *Supra* note 1.

On June 19, 2007, Ward submitted a "Step 1" grievance to SCDC seeking back wages of $1.92 for each hour worked for ESCOD and Insilco, along with payment at the prevailing wage for his 320 training hours. SCDC denied Ward's Step 1 grievance on May 7, 2012. In its grievance response, SCDC characterized the $1.92 payment from ESCOD and Insilco as an hourly "overhead cost" over and above the hourly wage rate paid to inmates. SCDC asserted that the collection of such an overhead cost was permissible under state and federal law. Ward filed a Step 2 grievance in accordance with SCDC's grievance procedure on May 25, 2012. SCDC denied the Step 2 grievance on October 14, 2015.

Ward filed a Notice of Appeal from SCDC's denial of his grievances with the Administrative Law Court on October 16, 2015. On June 20, 2018, the Honorable H.W. Funderburk, Jr., Administrative Law Judge, issued an order reversing SCDC's decision with respect to Ward's prison industry wages and remanding the case with instructions to determine the prevailing wage for Ward's previous work. This appeal followed.

STANDARD OF REVIEW

Appellate review of the Administrative Law Court ("ALC") is governed by S.C. Code Ann. § 1-23-610. Pursuant to this section, the reviewing court must "not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-610(B). The appellate tribunal may reverse or modify the decision of the ALC where it is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record" or where it is "affected by . . . error of law." *Id.* §§ 1-23-610(B)(e), (d).

ARGUMENT

This appeal involves the rights of an inmate who participated in a prison industries program. Federal law generally prohibits the transportation in interstate commerce of goods,

wares, and merchandise manufactured or produced by prisoners. 18 U.S.C. § 1761(a). An exception is available for prisoners participating in a work pilot project administered by the Bureau of Justice Assistance ("BJA"), an agency of the Department of Justice. 18 U.S.C. § 1761(c). Convicts participating in such programs must have "received wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed." *Id.* § 1761(c)(2). Those wages are subject to certain listed deductions, including federal, state, and local taxes. *Id.*

BJA guidelines published in the Federal Register state that "[p]revailing wage verification must be obtained by the appropriate state agency which determines wage rates (usually the Department of Economic Security)." 64 Fed. Reg. 17000, 17010 (Apr. 7, 1999). In the absence of such verification, the program participant is "responsible for establishing a reasonable prevailing wage." *Id.* The participant must then retain on file for the BJA's review "relevant wage data from a sufficient number of competitors in the locality," "data analyses for determining a reasonable prevailing wage result," and "if possible, a written assessment of the reasonableness of the resulting prevailing wage determination by an appropriate state agency which normally determines wage rates." *Id.* The prevailing wage "can not be set below the Federal minimum wage, as defined in the Fair Labor Standards Act." *Id.* "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." *Id.*

In 1995, South Carolina passed legislation enabling its prison industries program to participate in the private sector. *See Gatewood v. S.C. Dep't of Corrs.*, 416 S.C. 304, 785 S.E.2d 600 (Ct. App. 2016). In particular, South Carolina adopted S.C. Code Ann. § 24-3-430, requiring

that "no inmate participating in the program may earn less than the prevailing wage" for similar private-sector work. S.C. Code Ann. § 24-3-430(D); 1995 S.C. Acts 79. The legislature also amended S.C. Code Ann. § 24-3-40 to provide that a prisoner's wages were to be paid directly to SCDC and to specify the manner in which a prisoner's earnings were to be disbursed. *Id.* Section 24-3-40 was amended again in 1999 to further detail the distribution of the "gross wages of the prisoner." 1999 S.C. Acts 232.

The rights of individual prisoners under these statutes have been addressed in a series of decisions. In the companion cases of *Adkins v. S.C. Dep't of Corrs.*, 360 S.C. 413, 602 S.E.2d 51 (2004) and *Wicker v. S.C. Dep't of Corrs.*, 360 S.C. 421, 602 SE.2d 56 (2004), inmates complained that they had not been paid the prevailing wage during training hours or thereafter. The South Carolina Supreme Court held that, although South Carolina's prevailing wage statute did not create a private right of action, the inmates were still entitled to due process in the form of a grievance to protest SCDC's failure to pay them the proper wage. *Wicker*, 360 S.C. at 424, 602 S.E.2d at 57; *Adkins*, 360 S.C. at 419, 602 S.E.2d at 55. In *Torrence*, the Supreme Court reaffirmed *Adkins* and *Wicker*, holding that inmates protesting their wages were confined to a grievance proceeding rather than a declaratory action. The *Torrence* court also stated in a footnote that it would violate the plain language of Section 24-3-40 if SCDC were to "remove[] any of the money remitted by the private industry sponsor" before distributing a prisoner's gross wages as required by that statute. *Torrence*, 373 S.C. at 594 n.4, 646 S.E.2d at 869 n.4.

Here, Respondent Ward's position is simple: By law, he should have earned the prevailing wage for his work in the prison industries program. If the prevailing wage included the $1.92 remitted by ESCOD and Insilco, that money should have been disbursed strictly in accordance with S.C. Code Ann. § 24-3-40. If not, and the $1.92 overhead figure was separate

and apart from Ward's own wages, those wages plainly fell short of the prevailing wage requirement. Whatever the case, the ALC properly reversed SCDC's Step 1 and Step 2 grievance denials and remanded for a determination of whether Ward's gross wages, properly considered, met the requirement that he earn the prevailing wage for his work.[5] SCDC offers no reason for overturning the ALC's decision in this regard.

I. ANY EVIDENTIARY ERROR ON THE PART OF THE ADMINISTRATIVE LAW COURT WAS HARMLESS

In the first section of its brief, SCDC complains that the ALC refused to consider a contract document that SCDC attempted to introduce for the first time as an attachment to its brief before the ALC. The contract in question, which was between SCDC and Insilco, appears to break out the amount remitted by that sponsor into a wage, a Social Security withholding, a workers' compensation premium, and a payment to the "SCDC Surplus Fund." The latter three components equal the $1.92 which the *Torrence* plaintiffs claimed was wrongfully diverted from their wages. (R. p. 134, 140).

Although the ALC properly ruled that SCDC's contract was not part of the administrative record, it is not clear how this ruling, even if wrong, could have resulted in harm. The thrust of SCDC's argument is that the Social Security and workers' compensation withholdings and the SCDC Surplus Fund payments all fall outside the meaning of "gross wages" for purposes of S.C. Code Ann. § 24-3-40. The ALC appears to have considered this argument, but to have determined, based on *Torrence*, that "[t]he items set out in the contract as the hourly rate charged to the private-sector business for the inmate labor furnished by SCDC are 'the gross wages of the prisoner.'" (R. p. 184). While it may differ with the ALC on this point, SCDC does not appear to

[5] Ward would raise the issue of whether the ALC's decision was final for purposes of appeal, given that the ALC remanded for a determination of Ward's proper wages. *See Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 894 (2010).

have been harmed by the ALC's accurate observation that the contract between SCDC and Insilco was not properly included in the record. Similarly, the ALC considered, but rejected, SCDC's argument that the $1.92 amount was actually a separate hourly "overhead" rate paid by first ESCOD and then Insilco. This (along with a since-abandoned timeliness argument) was SCDC's official basis for denying Ward's Step 1 and Step 2 grievances. (R. p. 31-33, 40).

II. WARD ESTABLISHED THAT $1.92 WAS DIVERTED FROM HIS GROSS WAGES

SCDC also argues that Ward failed to prove that SCDC in fact removed $1.92 from his gross wages contrary to law. Although SCDC's arguments in this regard are spread over separate sections of its brief, they reduce to the following propositions: The *Torrence* footnote acknowledging the impropriety of such a removal was mere *dictum*, and Ward supposedly failed to "prove true" his claim that SCDC removed a portion of the money remitted for his labor by his prison industry sponsors.

With respect to SCDC's first argument, Ward acknowledges that footnote 4 was not essential to the *Torrence* court's narrow holding that, although the plaintiffs' rights could be vindicated in a grievance action, they could not maintain a declaratory action in court. That said, the footnote spoke to the very essence of the claim asserted by the *Torrence* plaintiffs: namely, that SCDC could not divert a portion of the amounts paid by prison industry sponsors before disbursing the amounts authorized by S.C. Code Ann. § 24-3-40. The Supreme Court stated in so many words that to "remove[] any of the money remitted by the private industry sponsor" and then to "disburse[] the percentages listed in section 24-3-40" would violate the plain language of that statute. *Torrence*, 373 S.C. at 594 n.4, 646 S.E.2d at 869 n.4. If this statement was *dictum*, it was a nevertheless an unmistakable signal of the Supreme Court's views on the matter. Not

surprisingly, the ALC applied footnote 4 of *Torrence* and ruled that SCDC was not entitled to divert $1.92 of the total amount remitted by private industry sponsors.[6]

SCDC's second argument, namely that Ward failed to prove that SCDC removed a portion of the money remitted by the prison industry sponsors, borders on frivolous. SCDC admits that it collected $1.92 of the total remitted by ESCOD and Insilco and applied that amount other than as provided for in Section 24-3-40. In its Step 1 grievance response, SCDC denied owing Ward $1.92 per hour because "[u]nder the contracts struck between SCDC and ESCOD and/or INSILCO, SCDC legitimately charges ESCOD and/or INSILCO an hourly rate for 'overhead cost' in addition to the hourly rate SCDC pays inmates in accordance with both state and federal law." (R. p. 32). SCDC reiterated this position in response to Ward's Step 2 Grievance. (R. p. 40). Before the ALC, SCDC expressly contended that, as of March 2001, a prison industry sponsor[7] paid a total hourly rate of $7.17 for Ward's labor, only $5.25 of which was described as a "prevailing wage." (R. p. 83-84).

It is abundantly clear from the record that SCDC did not treat all of the hourly remittances from the prison industry sponsors as Ward's "gross wages." Rather, it and the sponsor agreed between themselves to treat a *portion* of those remittances as "prevailing wages," subject to disbursement under Section 24-3-40, and the balance as "overhead," which SCDC disposed of as it pleased. Whether SCDC was in fact within its rights to allocate the sponsor's hourly remittance in this fashion is a question of law and one the ALC decided adversely to

[6] SCDC makes a great deal of Ward's statement that SCDC would be "within its rights" to charge private industry sponsors an amount over and above the prevailing wage, so long as participating inmates were paid the prevailing wage and their wages were disbursed according to Section 24-3-40. But such "dicta" in Ward's own filings do not have the force of law. If SCDC seeks to have the ALC reversed on any legal grounds, it must demonstrate to the appellate tribunal the manner in which the ALC erred. SCDC's substantive arguments in that regard (versus those based on so-called concessions in Ward's prior briefing) are confined to the last section of SCDC's brief; accordingly, they will be taken up in the final section of this brief.

[7] SCDC's brief before the ALC identified the sponsor as ESCOD, although a contract filed with SCDC's brief was between SCDC and Insilco.

SCDC. But the claim that Ward somehow failed to meet an evidentiary burden ignores the position taken by SCDC in response to Ward's grievances and before the ALC. Ward did not need to submit additional proof of facts already conceded by SCDC.

Furthermore, it does not matter whether Ward "proved" that $1.92 was removed from his gross wages. His gross wages were at all times to have equaled the prevailing wage for his labor. SCDC has thus far managed to sidestep the question of whether Ward was paid the prevailing wage for wire harness assembly work. Although the BJA guidelines required SCDC to verify the prevailing wage for prison industry work, nowhere in its filings to date does SCDC provide that information for Ward's prior labor. *See* 64 Fed. Reg. at 17010. Instead, in denying Ward's Step 1 grievance, SCDC asserted that, after completion of his training hours, Ward was paid "at least" the federal minimum wage. (R. p. 32). But SCDC is well aware that payment of the minimum wage "does not automatically achieve compliance with the prevailing wage requirement." 64 Fed. Reg. at 17010. Even the contract excerpt attached to SCDC's brief before the ALC manages to omit the appendix that, according to the contract, establishes the "prevailing wage" for inmate labor.[8] (R. p. 140, 134-45; R. p. 174). The ALC properly remanded Ward's grievance for a determination of whether Ward was paid the prevailing wage for his labor, as required by law. SCDC does not appear to contest this aspect of the ALC's decision. *See Appellant's Initial Brief* at 6 n. 9.

[8] The contract actually recites that "[t]he prevailing wage rate for inmate labor is to be established annually by the S.C. Employment Security Commission." (R. p. 140). One can only wonder why SCDC has failed throughout these proceedings to include the Employment Security Commission's prevailing wage information for wire harness assembly work in the record. Given the laws and regulations discussed above, SCDC should have this information readily at hand.

III. SCDC HAS NOT DEMONSTRATED ANY ERROR IN THE ALC'S TREATMENT OF THE "OVERHEAD" AMOUNT DEDUCTED FROM PRISON INDUSTRY SPONSOR REMITTANCES

The ALC refused to accept SCDC's position that it was entitled to treat a portion of the hourly remittance from a prison industries sponsor as the "prevailing wage" and dispose of the remainder of that remittance as "overhead." The law clearly entitles SCDC to hire out prison labor to private-sector industries so long as it charges at least the prevailing wage for that labor. But SCDC has yet to cite any law for the proposition that it can tack on an additional charges for "overhead" items, including workers' compensation insurance payments, employer Social Security contributions, and what appears to be a "general fund." While Ward's position remains that, one way or another, he is entitled to be paid the prevailing wage (the real prevailing wage, not one SCDC establishes by fiat in a contract), SCDC has not made a case for overturning the ALC's conclusion that the entire private-sector hourly remittance must be considered the "gross wages" of the prisoner.

A. SCDC'S OVERHEAD CHARGE IS NOT COMPELLED BY SOUTH CAROLINA'S WORKERS' COMPENSATION LAW

SCDC takes issue with the fact that $0.20 of the $1.92 remitted by ESCOD and Insilco was allegedly allocated for payment of a workers' compensation premium. It is correct that prison inmates are entitled to receive workers' compensation benefits under S.C. Code Ann. § 42-1-480. Payments to claimant-inmates, however, are to be paid through the State Accident Fund in the same manner as state employees. S.C. Code Ann. § 42-490. According to S.C. Code Ann. § 42-7-75, state agencies are required to pay workers' compensation premiums as determined by the State Accident Fund. *Id.* § 42-7-75. It is apparently SCDC's practice to pass the cost of workers' compensation insurance for inmates to the private companies who make use of their labor. An employer may not require an employee to pay for workers' compensation

insurance. Such a practice is expressly forbidden by S.C. Code Ann. § 42-5-200. Thus under no circumstances can the $0.20 apparently allotted to a pro rata workers' compensation premium be deducted from Ward's wages. SCDC does not explain why it should not simply pay for the cost of workers' compensation insurance for prison industry participants in the same manner as ordinary SCDC employees, *i.e.*, by payment of a premium to the State Accident Fund. The fact that inmates employed in the prison industries program are supposed to receive workers' compensation does not automatically imply that private users of prison labor must cover the additional premium.

B. SCDC'S OVERHEAD CHARGE IS NOT COMPELLED BY SOCIAL SECURITY LAWS

Similarly, SCDC would not be authorized to deduct the employer's contribution to Social Security taxes from Ward's pay. Ward's own Social Security tax liability, if any, would be properly deductible from his wages under S.C. Code Ann. § 24-3-40(A)(6). But the employer's separate Social Security contribution would not count towards a determination of whether Ward was paid the prevailing wage for his labor. Again, SCDC's apparent objective is to transfer this cost to private-sector users of prison labor. But the propriety of this practice does not follow from the mere fact that prison inmates are entitled to employment-related benefits such as Social Security. Again, it is unclear why Social Security contributions for inmates working in the prison industries programs should not be paid in the same fashion as with ordinary SCDC employees.

C. THERE IS NO LEGAL REQUIREMENT THAT THE PRISON INDUSTRIES PROGRAM OPERATE AT A SURPLUS

Finally, SCDC argues that it is authorized to charge private users of prison labor $1.32 per hour, and allocate that charge to the "SCDC Surplus Fund," because to do otherwise would require SCDC's prison industries program to operate at a deficit. But SCDC offers no authority for this proposition. The main support for this argument seems to be S.C. Code Ann. § 24-3-190,

which states that various funds, including amounts received from the hire of convicts, are appropriated to the support of SCDC. But SCDC is still required to spend its appropriations in accordance with law. SCDC cites no law requiring that SCDC or its prison industries program operate at a surplus. There is certainly no reason to suppose that some unidentified self-sufficiency directive authorizes SCDC to divert any portion of a prisoner's wages in violation of S.C. Code Ann. § 24-3-40.

Ultimately, SCDC complains that the net effect of South Carolina's prison industries laws may be to force SCDC to absorb various "overhead" expenses rather than passing them on to the private sector. If so, that is a matter to take up with the legislature. And as the ALC noted, there are other ways to offset these costs than to deduct funds from the industry sponsors' hourly remittance for prisoner labor. (R. p. 184 n. 12). Those sponsors are supposed to pay the prevailing wage for that labor, and those wages are to be disbursed according to existing law.

CONCLUSION

By law, Respondent Ward was to earn no less than the prevailing wage for his years of work as a wire harness assembler, including his training hours. It is apparent that Ward was paid at or near the federal minimum wage the entire time (other than during training, when it is conceded that he did not even receive minimum wage). If the prevailing wage calculation includes the $1.92 "overhead" amount remitted by private industry sponsors, those funds could only be disbursed in accordance with S.C. Code Ann. § 24-3-40. If, on the other hand, the overhead amount can be viewed as separate from Ward's own earnings, those earnings clearly fell short of the prevailing wage requirement. The ALC properly reversed the denial of Ward's Step 1 and Step 2 grievances and remanded for a determination of the amount of back wages he is owed. If it does not dismiss this appeal on the grounds that the ALC's order was not final, this Court should affirm the ALC.

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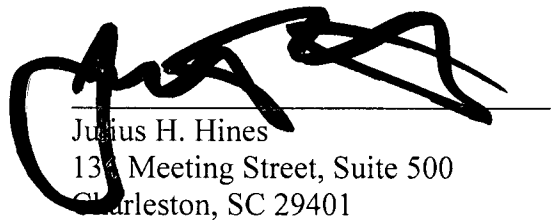

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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