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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2019-001490

Thomas J. Torrence, Respondent,

v.

South Carolina Department of Corrections Petitioner.

**PETITION FOR WRIT OF CERTIORARI
BY THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS**

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Under the authority of South Carolina Appellant Court Rule [“SCACR”] 242, the South Carolina Department of Corrections [“SCDC”] respectfully petitions this Court to issue a writ of certiorari to review the final decision issued by the Court of Appeals in the instant matter, styled as *Thomas J. Torrence, Respondent, v. S.C. Dep’t of Corr., Appellant*, Opinion No. 2018-UP-432, -- S.E.2d --, 2018 WL 6199185 (S.C. Ct. App. Nov. 28, 2018).

SCDC originally challenged two (2) orders issued in the instant matter by the Administrative Law Court [“ALC”] in its February 17, 2016 notice of appeal to the Court of Appeals (Apx. pp. 1051 – 52). The ALC issued the first order January 30, 2014 (Apx. pp. 1053 – 1062), and the second order January 20, 2016. (Apx. pp. 1063 – 77).

The Court of Appeals dismissed SCDC’s appeal by a November 28, 2018 unpublished decision, which, in its entirety, read as follows (Apx. pp. 1231 – 32):

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 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” 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).

I. CERTIFICATION BY COUNSEL

In accordance with SCACR 242(d)(1), SCDC’s undersigned counsel respectfully certifies that he filed a petition for rehearing on SCDC’s behalf with the Court of Appeals on January 10, 2019. (Apx. pp. 1234 – 1255). SCDC’s undersigned counsel further certifies that the Court of Appeals denied SCDC’s petition for rehearing by an order filed August 8, 2019. (Apx. p. 1256).

II. QUESTIONS PRESENTED FOR REVIEW

As it explained in its January 10, 2019 petition for rehearing to the Court of Appeals (Apx. p. 1239), SCDC did not prosecute its appeal of the rulings from the ALC’s January 30,

2014 order, because a decision by the Court of Appeals after SCDC filed its February 17, 2016 notice of appeal rendered the issues associated with the rulings moot. *See 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).

Furthermore, SCDC's instant petition does not cover the ruling from the ALC's January 20, 2016 order under which 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), because an unpublished decision issued by the Court of Appeals earlier this year addressed the identical issue. *See Baum v. S.C. Dep't of Corr.*, Opinion No. 2019-UP-104, -- S.E.2d --, 2019 WL 1164316 (S.C. Ct. App. Mar. 13, 2019), *cert. denied* (Aug. 16, 2019).

By its instant filing, therefore, SCDC petitions this Court to consider only the following two (2) questions animated by the ALC's January 20, 2016 order (Apx. pp. 1069 – 73):

- A. **DID THE COURT OF APPEALS ERR BY DISMISSING AS INTERLOCUTORY SCDC'S APPEAL OF THE ALC'S RULING THAT TORRENCE WORKED FOR ESCOD WHILE HE PARTICIPATED IN THE PRISON INDUSTRIES PROJECT SCDC OPERATED AT EVANS CORRECTIONAL INSTITUTION?**
- B. **DID THE COURT OF APPEALS ERR BY DISMISSING AS INTERLOCUTORY SCDC'S APPEAL OF THE ALC'S RULINGS DEFINING AND THEN DETERMINING THE "PREVAILING WAGE" SCDC SHOULD HAVE PAID TORRENCE FOR HIS PRISON INDUSTRIES LABOR?**

III. STATEMENT OF THE CASE

A. TORRENCE'S STEP 1 AND SCDC'S RESPONSE

Torrence voluntarily participated in a federally certified prison industries project operated by SCDC at Evans Correctional Institution between 1997 and 2004 in which ESCOD, Inc. and, later, INSILCO, Inc. participated as the private industry sponsors. (Apx. p. 148).

Torrence filed a Step 1 grievance form with SCDC dated May 21, 2007 (Apx. pp. 126 – 32), and he articulated eight (8) claims by which he asserted SCDC unconstitutionally deprived him of his property (i.e. his wages) in an “Addendum” attached to his Step 1 form, and he requested the following action: “Payment of wages, withholdings and [interest] as set forth in subsections 1 thru 8 of the Addendum attached hereto.” (Apx. pp. 128 and 126).

By written response dated December 1, 2011 (Apx. pp. 127 and 133 – 38), SCDC denied the merits of Torrence’s wages claims, and it anchored its denial on the reality that the project in which he participated was certified by the federal government (Apx. p. 137):

Even if you have a viable claim for relief under § 24-3-430(D), I conclude that SCDC paid you the proper rate of pay for the labor you voluntarily provided to the federal certified project industries project at Evans.¹ In making this conclusion, I rely upon the guidelines established by the federal government, specifically the United States Department of Justice’s Bureau of Justice Administration [known as “BJA”]. BJA published the guidelines application to the PIECP in the Federal Register, specifically 64 FR 17000. Within these guidelines, BJA declared that the rate at which inmates are paid for the labor they voluntarily provide to PIECP projects, like the project in which you participated at [Evans], cannot be set below the federal minimum wage. With the exception of the period of time SCDC paid you “training wages,” SCDC paid you at least the federal minimum wage for the labor you voluntarily provided to the prison industries project it operates at Evans.² [emphasis supplied].

Torrence received SCDC’s denial of his Step 1 on December 1, 2011. (Apx. p. 127).

¹ 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 “Prison Industries Enhancement Certification Program” [“PIECP”]. SCDC must operate its PIECP projects, such as the project at Evans in which Torrence 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.*).

² SCDC paid Torrence a “training wage” of \$0.25 per hour for the first 160 hours of his labor, and \$0.75 for the second 160 hours of his labor. SCDC thereafter paid Torrence \$5.25 per hour for regular hours and \$7.86 per hour for overtime hours. (Apx. pp. 1036 – 37). SCDC stopped paying “training wages” effective July 1, 1999. *See Adkins v. S.C. Dep’t of Corr.*, 602 S.E.2d 51, 53, n. 1 (S.C. 2004).

B. TORRENCE'S STEP 2 AND SCDC'S FINAL DECISION

By his Step 2 dated December 5, 2011 (Apx. pp. 139 – 49), Torrence appealed SCDC's initial denial of the wage claims he articulated in his Step 1, and he specifically disputed the rationale by which SCDC denied the merits of his wage claims. (Apx. pp. 144 – 45).

By its final decision dated February 9, 2012 (Apx. pp. 139 and 150 – 57), SCDC affirmed its denial of Torrence's Step 1 and likewise denied his Step 2. In doing so, SCDC rejected the arguments offered by Torrence concerning the merits of his wage claims, and it affirmed the analysis of Torrence's wage claims provided in its response to his Step 1, in which it relied upon the applicable guidelines published by BJA in the Federal Register concerning PIECP projects, such as the project at Evans in which Torrence participated, and the provisions of 18 U.S.C. § 1761, known as the Ashurst-Sumners Act. (Apx. p. 155).

Torrence received the denial of his Step 2 on February 15, 2012. (Apx. p. 139).

C. TORRENCE'S APPEAL TO THE ALC

On March 2, 2012, Torrence appealed SCDC's denial of his grievance to the ALC, and, by the first two (2) grounds for appeal, he challenged SCDC's conclusion that it paid him wages which conformed to the applicable state law, federal law, and federal regulations. (Apx. p. 61).

D. THE ALC'S JANUARY 20, 2016 ORDER

The first two (2) issues associated with Torrence's appeal identified by the ALC in its January 20, 2016 order concerned the merits of his wage claims (Apx. p. 1038): (1) whether SCDC improperly failed to pay Torrence the "prevailing wage" during training,³ and (2) whether SCDC improperly failed to pay Torrence the "prevailing wage" after training.⁴

³ See note 2 above.

⁴ Neither SCDC nor Torrence appealed the ALC's rulings on the final two (2) issues it identified in its January 20, 2016 order. (Apx. p. 1038).

The ALC concluded SCDC should have paid Torrence the “prevailing wage required by law” during his training period, and it ruled that SCDC’s “decision to pay [Torrence] less than the prevailing wage for regular hours and time-and-a-half the prevailing wage for overtime hours during [his training period] is erroneous as a matter of law.” (Apx. p. 1041).

The ALC next considered whether SCDC paid Torrence the “prevailing wage required by law” after the conclusion of his training period, and, in analyzing the term “prevailing wage,” the ALC declared as follows (Apx. pp. 1043 – 44):

Finally, [SCDC] argues that the \$5.25 regular hourly rate conformed to the wage data collected and published by the [South Carolina Employment Security Commission (“ESC”)] for the type of work in question. **While the Court agrees that verification of wage rates by the ESC is the method of determining the prevailing wage that the federal Guideline and state statutes contemplate, the Court does not agree that the \$5.25 regular hourly rate conforms to the ESC data in the record.**

[Torrence] has asked this Court to determine the prevailing wage based on the record in this case. In so doing, the Court reaches an issue not yet addressed by South Carolina courts. While it has been decided that [SCDC] may not pay less than the prevailing wage during training, no inmate has successfully raised the issue of how the prevailing wage is calculated.

[italicized and bold emphasis supplied].

The ALC then endeavored to define the term “prevailing wage.” (Apx. pp. 1044 – 46).

After doing so, the ALC declared that SCDC must pay Torrence “the mean average South Carolina wage of an electronic assembler,” which, according to the ALC, equaled \$8.82 per hour in 1997 and \$9.92 per hour in “1998-1999.” (Apx. pp. 1045 – 46). Thus, the ALC ruled that paying Torrence at the rate of \$5.25 per hour rather than “the mean average South Carolina wage of an electronic assembler” constituted “an error of law” by SCDC. (Apx. pp. 1046).

While it found that some of the evidence in the record “demonstrate[d] that the data necessary to calculate [the mean average South Carolina wage of an electronic assembler] is

available from [the South Carolina Department of Employment and Workforce (“DEW”)],⁵” the ALC determined that the entirety of “the evidence in the record [was] insufficient to calculate [the mean average South Carolina wage of an electronic assembler] for all” the years Torrence participated in the project SCDC operated at Evans (i.e. from 1997 to 2004). (Apx. p. 1046).

Consequentially, the ALC ordered SCDC to “obtain the data to determine [the mean average South Carolina wage of an electronic assembler] from [DEW]” (Apx. p. 1046), and it remanded Torrence’s claim back 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.**” [emphasis supplied]. (Apx. p. 1050).

IV. SUPPORTING ARGUMENT FOR QUESTIONS PRESENTED BY SCDC

A. THE ALC’S RULING THAT TORRENCE WORKED FOR ESCOD WAS NOT INTERLOCUTORY, AND THE COURT OF APPEALS ERRED BY DISMISSING SCDC’S APPEAL OF THIS RULING

From the inception of his claim, Torrence asserted and SCDC disputed that he was an employee of ESCOD, the private industry sponsor, while he participated in the project.

The first two (2) sentences of Torrence’s Step 1 reflects his position (Apx. p. 126):

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. [emphasis supplied].

The following passage from SCDC’s denial of Torrence’s Step 1 reflects its position, and, it respectfully submits, the proper characterization of Torrence’s status (Apx. pp. 136 – 37):

To the extent that you claim in your Step 1 that you worked for or were otherwise “employed” by ESCOD, I conclude that you never “worked” for nor were you ever “employed” by ESCOD.

⁵ The South Carolina Department of Employment and Workforce [“DEW”] is the successor state agency to the South Carolina Employment Security Commission [“ESC”].

I also conclude that neither [*Adkins v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (S.C. 2004)]⁶ nor [*Wicker v. S.C. Dep't of Corr.*, 602 S.E.2d 56 (S.C. 2004)] declared that you or inmates in your position were “employed” by SCDC, or, for that matter, any other agency or company. I make this conclusion is reliance [on *Williams v. S.C. Dep't of Corr. and Williams Tech., Inc.*, 641 S.E.2d 885 (S.C. 2007)] in which the Court recognized both that inmates are not “employees” of the State of South Carolina and that inmates are not the “employees” of private industry sponsors like ESCOD.

Therefore, to the extent you use the terms “worked for,” “employee,” “employed,” or “employment” within your Step 1 grievance to describe your participation, I reject your use of that term. You and the other inmates in your position have been, are, and remain inmates lawfully confined within an SCDC facility, and you performed all of your labor in this prison industries project inside the walls of Evans.

[emphasis supplied].

Recognizing the conflict between Torrence and SCDC on this fundamental question, the ALC observed as follows in a footnote from its January 20, 2016 order (Apx. p. 1042):

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*]. 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 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.* [italicized and bold emphasis supplied].

Notwithstanding the above-quoted footnote from its January 20, 2016 order, the ALC, when it remanded the “prevailing wage” issue back to SCDC for proceedings consistent with the

⁶ See note 2 above.

definition of “prevailing wage” it dubiously fashioned, declared that Torrence “performed [his labor] for ESCOD.” [emphasis supplied]. (Apx. p. 1050).

Moreover and *contrary* to the above-quoted footnote from its January 20, 2016 order, the ALC completely embraced Torrence’s position by explicitly ruling that “[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.**” [emphasis supplied]. (Apx. p. 1046).

Respectfully but directly stated, the ALC committed plain error by completely embracing Torrence’s position and explicitly ruling that “**he worked ... for ESCOD.**”

The ALC’s ruling runs afoul of the 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. The operative guidelines, 64 FR 17007, 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.” [emphasis supplied].

The ALC’s ruling is flatly negated by federal precedent. *See Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) (“Both public agencies and private firms have employees. **But prisoners are not employees.**”). [emphasis supplied].

The ALC’s ruling is also flatly negated by binding precedent in our state, namely the Court of Appeals’ decision in *S.C. Dep’t of Corr. v. Cartrette*, 694 S.E.2d 18 (S.C. Ct. App. 2010). In *Cartrette*, 694 S.E.2d at 21, relied upon this Court’s decision in *Williams* when recognized the following:

Our supreme court has held the [Fair Labor Standards Act (“FLSA”)] does not extend to inmate workers because, for purposes of payment of wages,

inmate workers are not employees of [private industry] sponsors. [*Williams*, 641 S.E.2d at 888]. **Other courts, including the Federal Court of Appeals for the Fourth Circuit, have also declined to extend the protections of the FLSA and state labor statutes to inmates.** *See, e.g., Harker v. State Use Indus.*, 990 F.2d 131, 135 (4th Cir. 1993). [emphasis supplied].

The Court of Appeals in *Cartrette, Id.*, then invoked on this Court's decision in *Adkins* as it continued discussing the status of inmates, like Torrence, who participate in prison industries projects operated by SCDC:

Nonetheless, **South Carolina law requires that inmate workers in [the prison industries program] enjoy pay and working conditions comparable to those enjoyed by non-inmate workers.** According to our supreme court, the overall purpose of these statutes "is to prevent unfair competition." [*Adkins*, 602 S.E.2d at 54]. [italicized and bod emphasis supplied].

Most significantly, the Court of Appeals in *Cartrette, Id.* at 23, unequivocally ruled, unlike the ALC in its January 20, 2016 order, that the inmate was not an employee of the private industry sponsor:

As to whether *Cartrette* was an employee of the private sponsor: [§ 24-3-40(A)] ("Unless otherwise provided by law, the employer of a prisoner authorized to work ... in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages [SCDC]."); [*Williams*, 641 S.E.2d at 887] (holding **a prison industries program sponsor is not an employer of inmates** because the sponsor does not exclusively control the payment of inmate wages and finding agreement among other jurisdictions that examined this issue). [emphasis supplied].

In so ruling, the Court of Appeals, unlike the ALC in its January 20, 2016 order, affirmed SCDC's determination that the inmate in *Cartrette* was not an employee of the private industry sponsor that participated in the prison industries project under review. *Id.*

The Court of Appeals articulated the identical ruling in *S.C. Dep't of Corr. v. Tomlin*, 694 S.E.2d 25, 29 (S.C. Ct. App. 2010) (overruled on other grounds by *Allison v. W.L. Gore & Assoc.*, 714 S.E.2d 547 (S.C. 2011)), the companion case to *Cartrette*.

The ALC mentioned *Williams* in the above-quoted footnote from its January 20, 2016 order. However, a side-by-side comparison between the interpretation of this Court’s decision in *Williams* by the Court of Appeals in *Cartrette* and *Tomlin* and the ALC’s interpretation reflects that the ALC misapprehended this Court’s decision in *Williams*:

<i>Cartrette and Tomlin</i>	The ALC
“... a prison industries program sponsor is not an employer of inmates because the sponsor does not exclusively control the payment of inmate wages and finding agreement among other jurisdictions that examined this issue.”	“[Torrence] is not an ‘employee’ of either the state or the private industry sponsor for purposes of the Payment of Wages Act.”

The ALC glaringly and erroneously ignored *Bennett*, *Cartrette*, and *Tomlin* not only in the above-quoted footnote from its January 20, 2016 order but in the entirety of its order. Moreover, the ALC, unlike the Court of Appeals, fundamentally misapprehended this Court’s decision in *Williams* even when it accounted for it.

In the November 28, 2018 decision by which it dismissed SCDC’s appeal of this ruling from the ALC’s January 20, 2016 order, the Court of Appeals determined that, under *Charlotte-Mecklenburg* and § 1-23-610(A)(1), the ALC’s ruling did not constitute a “final decision.” (Apx. pp. 1231 – 32). SCDC respectfully disagrees, and, in doing so, it relies upon the following passage from *Charlotte-Mecklenburg*, 692 S.E.2d at 894 – 95:

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). [emphasis supplied].

The erroneous “back door” ruling that Torrence worked for ESCOD constituted a final judgment by the ALC, and it set the table for the ALC to define and determine the “prevailing

wage” in a manner by which the ALC treated Torrence like an “employee,” contrary to the Seventh Circuit Court of Appeals in *Bennett*, our Court of Appeals’ decisions in *Cartrette* and *Tomlin*, and this Court’s decision in *Williams*.

Furthermore, the ALC’s explicit ruling that Torrence worked for ESCOD is the first instance in which any court in our state has made such a declaration, and, as such, it represents a novel question of law as contemplated under SCACR 242(b)(1). Thus, SCDC respectfully urges this Court to grant SCDC’s instant petition to fully adjudicate whether the ALC erred by its ruling, which the Court of Appeals allowed to stand in its November 28, 2018 decision.

B. THE RULINGS BY WHICH THE ALC DEFINED AND DETERMINED THE “PREVAILING WAGE” SCDC SHOULD HAVE PAID TORRENCE FOR HIS PRISON INDUSTRIES LABOR WERE NOT INTERLOCUTORY, AND THE COURT OF APPEALS ERRED BY DISMISSING SCDC’S APPEAL OF THESE RULINGS

As it transitioned from examining the term “prevailing wage” to defining and ultimately determining the “prevailing wage” SCDC should have paid Torrence for his prison industries labor, the ALC acknowledged that it would define and determine the applicable “prevailing wage” in response to Torrence’s request: “[Torrence] has asked this Court to determine the prevailing wage based on the record in this case.⁷” (Apx. p. 1044).

The ALC then acknowledged the following (Apx. 1044):

In [determining the prevailing wage based on the record in this case], the Court reaches an issue not yet addressed by South Carolina courts. While it has been decided that [SCDC] may not pay less than the prevailing wage during training, no inmate has successfully raised the issue of how the prevailing wage is calculated. [emphasis supplied].

⁷ At the conclusion of the second footnote in his brief to the Court of Appeals, Torrence admitted 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.” (Apx. p. 1152).

By its own above-quoted acknowledgment, therefore, the rulings from the ALC's January 20, 2016 order by which it defined and determined the "prevailing wage" SCDC should have paid Torrence for his prison industries labor raise novel questions of law for consideration by this Court as contemplated under SCACR 242(b)(1).

The ALC ultimately accommodated Torrence's request by both defining and determining the "prevailing wage" in the following rulings from its January 20, 2016 order, and it inextricably coupled its rulings defining and determining the "prevailing wage" with its above-examined "back door" ruling that Torrence worked for ESCOD (Apx. p. 1046):

[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 [DEW]. **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].

The above-quoted rulings by the ALC are erroneous, as they are the product of an erroneous analysis undertaken by the ALC.

In its analysis of the applicable law regarding the term "prevailing wage," the ALC addressed BJA's controlling guidelines (Apx. p. 1040):

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 [ESC] at the times relevant to this case**, but would now be the [DEW].⁸ [emphasis supplied].

After addressing BJA's guidelines, the ALC continued its flawed analysis (Apx. p. 1043):

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

⁸ See note 5 above.

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 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)]. [italicized emphasis supplied by the ALC; bold emphasis supplied by SCDC].

In asserting that SCDC cited “no evidence that the minimum wage was the prevailing wage for workers in jobs similar to the one performed by” Torrence, the ALC overlooked the reality that no evidence existed in the record as to the hourly rate at which ESCOD *actually paid* the non-inmate workers it employed, as contemplated this Court in *Williams* and as recognized by the Court of Appeals in *Cartrette* and *Tomlin*, at its production facilities located in our state.

The ALC also overlooked the reality that no evidence existed in the record to verify that Torrence performed the same or similar job tasks as those job tasks *actually performed* by the non-inmate workers ESCOD employed, again as contemplated this Court in *Williams* and as recognized by the Court of Appeals in *Cartrette* and *Tomlin*, at the same facilities.

Torrence, in his brief to the Court of Appeals, rationalized the absence of any such evidence by asserting as follows (Apx. p. 1195):

SCDC suggests, [in] 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, [Apx. p. 1132]. This [suggestion] contradicts [that] the substantial evidence in the record **does not contain the hourly wage ESCOD actually paid its employees for work similar to Torrence. 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].

The ALC defined the “prevailing wage” in its January 20, 2016 order as “the mean average wage of an electronic assembler.” (Apx. p. 1046). With the benefit of hindsight, it appears that the ALC did so in yet another instance of it simply adopting positions advocated by Torrence with no evidentiary support, namely that he performed the same job tasks as “an electronic assembler” and that SCDC should have paid him the average hourly wage of “an electronic assembler.”

The ALC “gussied up” the ruling by which it defined the “prevailing wage” as “the mean average wage of an electronic assembler” by selectively relying upon correspondence from an ESC official stating that “the mean average wage of an electronic assembler” equaled \$8.82 per hour in 1997 and \$9.92 per hour in “1998-99.” (Apx. pp. 1045 – 46).

The ALC then ruled that the evidence in the record did not permit it to calculate the “the mean average wage of an electronic assembler” between 2000 and 2004, the final five (5) years during which Torrence participated in the prison industries project SCDC operated at Evans. (Apx. p. 1046). Consequentially, the ALC directed SCDC to, on remand, “pay [Torrence] the mean average wage reflected by OEC Code 93114 for [1997, 1998, and 1999] **and** the mean average wage reflected by that code or its counterpart for the years data is not contained in the record” (i.e. 2000, 2001, 2002, 2003, and 2004). (Apx. p. 1046).

Given that they lack any support beyond the “common sense” described by Torrence, it’s entirely possible that the ALC’s above-recited rulings could result in SCDC paying Torrence on remand at an hourly rate *greater than* the hourly rate ESCOD *actually paid* its employees.

Even more problematically to the viability of the ALC’s rulings is its profound misapprehension of the data collected and disseminated by the ESC.

In fashioning the “back door” ruling from its January 20, 2016 order that Torrence worked for ESCOD, the ALC completely ignored *Barrett*, *Cartrette*, and *Tomlin*, and it dramatically misinterpreted this Court’s decision in *Williams*. Likewise, in determining the “prevailing wage” SCDC should have paid Torrence, the ALC overlooked, misinterpreted, and misapprehended evidence in the record which revealed the true nature of the data generated by the ESC.

Rather than relying on evidence in the record revealing the true nature – and impact – of the data generated by the ESC, the ALC instead erroneously blended a definition of “prevail” from the dictionary with an erroneous representation of testimony provided by an ESC testimony (Apx. p. 1045):

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

Contrary to the ALC’s above-quoted representation, no affidavit from Ms. Eleazer appears in the record. Instead, only deposition testimony from Ms. Eleazer appears in the record, which she provided August 10, 2004 during the litigation of the declaratory judgment action filed in circuit court in which Torrence initially pressed his prison industries pay claims. (Apx. pp. 539 and 610 – 645). *See Torrence, et al., v. S.C. Dep’t of Corr.*, Case No. 2001-CP-40-3409 (S.C. Cir. Ct. May 31, 2005).⁹

⁹ The circuit court granted SCDC’s summary judgment motion, and this Court affirmed in result the circuit court’s grant of summary judgment. *See Torrence, et al., v. S.C. Dep’t of Corr.*, 646 S.E.2d 866 (S.C. 2007).

Not only did it mischaracterize the method by which she offered her testimony, the ALC completely overlooked the substance of Ms. Eleazer's testimony. At her deposition, Ms. Eleazer testified that she worked "with the [ESC's Occupation Employment Statistics Program] where we survey employers to collect occupation, employment, and wage data." (Apx. p. 611).

Of supreme importance to a proper understanding of the ALC's profoundly erroneous rulings, Ms. Eleazer testified that **the ESC**, the agency exclusively tasked under BJA guidelines to verify the "prevailing wage" and relied upon by the ALC in its January 20, 2016 order,¹⁰ **does "not provide or publish a wage that's called prevailing wage," nor does it "have a wage classification called prevailing wage."** (Apx. p. 623).

By the rulings it articulated in its January 20, 2016 order, the ALC did something that the ESC itself did not do and, presumably, the DEW doesn't currently do, namely declare a precise hourly rate of pay for a specified job as "the prevailing wage."

The circuit court in *Adkins* conducted a bench trial in August 2002 during which it considered documentary and testimonial evidence regarding the prison industries claims of inmates who participated in a federally certified prison industries project. *See Adkins, et al., v. S.C. Dep't of Corr.*, Case No. 2000-CP-40-4761 (S.C. Cir. Ct. Oct. 31, 2002). The August 2002 bench trial conducted by the circuit court in *Adkins* remains the only instance in which such claims have ever been subjected to trial.¹¹

In its order granting judgment in SCDC's favor on all claims asserted by the inmates, the circuit court in *Adkins* chronicled the testimony provided by Ms. Eleazer regarding the method by which the ESC collected wage data in our state (Apx. pp. 893):

¹⁰ See 64 FR 170009 – 10(B).

¹¹ This Court affirmed, albeit in result, the circuit court's decision in *Adkins*. 602 S.E.2d 51.

The evidence introduced by the parties at trial showed that the [ESC], the state agency responsible for collecting and publishing wage data for non-institutional businesses throughout South Carolina, reviewed and approved the permanent \$5.15 per hour wage SCDC pays the Plaintiffs for their [prison industries] labor.

On July 27, 2000, [SCDC Division of Industries] Director Ellis wrote Mr. Ted Gladden, ESC's Assistant Director for Labor Market Information, and asked him to review the hourly wage rate for the [prison industries] project in which the Plaintiffs participate. Director Ellis clearly stated SCDC pays the Plaintiffs \$5.15 per hour.¹² On August 4, 2000, **Mr. Gladden responded to Director Ellis' inquiry by providing Director Ellis with a range of wages articulated as follows: "Low" = \$6.05, "Mean" = \$7.48, and "High" = \$8.29.** (footnotes omitted).

[emphasis supplied].

Mr. Gladden is the ESC official referenced by the ALC in its January 20, 2016 order (Apx. pp. 1045 – 46), and it erroneously relied upon correspondence from Mr. Gladden in ruling that the “prevailing wage” SCDC should have paid Torrence in 1997 equaled \$8.82 per hour and that the “prevailing wage” SCDC should have paid Torrence in 1998 and 1999 equaled \$9.92 per hour. (Apx. pp. 1072 – 73).

The circuit court in *Adkins* continued as follows (Apx. pp. 894):

Ms. [Eleazer] resolved any confusion surrounding the meaning of Mr. Gladden's August 4, 2000 response. The Plaintiffs called Ms. Eleazer, an ESC representative, during *their* case-in-chief, because she actually prepared Mr. Gladden's response. Ms. Eleazer clarified and explained Mr. Gladden's response.

According to Ms. Eleazer, the designations “Low, **Mean**, and High” simply reflect percentile designations. The designation “Low” corresponds to the 25th percentile, **the designation “Mean” corresponds to the 50th percentile**, and the designation “High” corresponds to the 75th percentile. In other words, 25% of the non-institutional businesses surveyed by the ESC reported an hourly wage at or below \$6.05, **50% of the non-institutional businesses surveyed by the ESC reported an**

¹² Excerpts from the deposition testimony provided September 12, 2002 by Director Ellis in the litigation of the declaratory judgment action in which Torrence first pressed his prison industries pay claims appears, like the deposition testimony of Ms. Eleazer, in the record on the instant matter. (Apx. pp. 539 and 567 – 89).

hourly wage at or below \$7.48, and 75% of the noninstitutional business surveyed by the ESC reported an hourly wage at or below \$8.29.

[italized emphasis provided by the circuit court; bold emphasis supplied by SCDC].

In its January 20, 2016 order, the ALC did not endeavor to determine the precise import of the “mean” hourly wage as reported by the ESC, nor did it explain that the “mean” hourly wage is but one (1) of three (3) benchmarks that the ESC historically reported.

The circuit court in *Adkins* then provided these essential observations (Apx. p. 894):

Critically, however, **the “floor” for the wage range described by Ms. Eleazer is the federal minimum wage of \$5.15 per hour, the rate alleged by the Plaintiffs in their first cause of action to be below the “prevailing wage” for work of a similar nature.** With this critical information, the wage range provided by Mr. Gladden’s August 4, 2000 letter maybe further refined as follows: 25% of the non-institutional businesses surveyed by the ESC reported an hourly wage from \$6.05 down to \$5.15, 50% of the non-institutional businesses surveyed by the ESC reported an hourly wage from \$7.48 down to \$5.15, and 75% of the non-institutional [businesses] surveyed by the ESC reported an hourly wage from \$8.29 down to \$5.15.

According to Ms. Eleazer, no business surveyed by her agency reported an hourly wage below the federal minimum wage of \$5.15 per hour. **Therefore, the \$5.15 hourly wage SCDC pays the Plaintiffs for their [prison industries labor] at Tyger River [Correctional Institution] falls within ESC’s wage range as recited by Mr. Gladden in his August 4, 2000 letter to Director Ellis.**

[emphasis supplied].

Unlike the ALC, the circuit court in *Adkins* recognized the reality associated with the ESC’s use, or lack thereof, of the term “prevailing wage” (Apx. p. 895):

Ms. Eleazer emphasized [the ESC] does not recognize or even use the term “prevailing wage” in compiling or publishing its wage data. Thus, no evidence introduced by the Plaintiffs supported their allegation [that] the prevailing wage for work performed by the Plaintiffs in the [prison industries project] with [the private industry sponsor,] Standard Plywoods ranges between \$9 and \$14 per hour. [emphasis supplied].

In the footnote associated with this passage, the circuit court in *Adkins* stated as follows (Apx. p. 895):

The evidence clearly demonstrated Standard Plywoods' Clinton employees, who perform a wider breadth of job tasks than the Plaintiffs, receive hourly wages well below the \$9 and \$14 per hour range the Plaintiffs alleged is the range of the prevailing wage for similar work. [reference to exhibit omitted and emphasis supplied].

Given its findings, the circuit court in *Adkins* concluded as follows (Apx. p. 895):

As the evidence clearly demonstrated at trial, the Plaintiffs' permanent hourly wage of \$5.15 falls within the ESC's established wage range, as it equals the federal minimum wage. Thus, SCDC pays the Plaintiffs an acceptable hourly wage for their [prison industries] labor. [emphasis supplied].

SCDC acknowledges that the circuit court's rulings in *Adkins* were not binding on the ALC. Nonetheless, SCDC respectfully submits that the circuit court's precise factual findings concerning the wage data generated by the ESC, including Ms. Eleazer's clarification of terms of art such as "mean" and, of course, "prevailing wage," are essential to a proper understanding of Torrence's claims. Such precise factual findings by the circuit court in *Adkins* reflect that the ALC, in its January 20, 2016 order, misinterpreted and misapprehended the essential terms of art associated with a proper adjudication of Torrence's claims.

Accordingly, the ALC, in contravention of § 1-23-380(5), improperly substituted its judgment for SCDC's judgment as to the weight of the evidence on questions of fact when it rendered the following rulings (Apx. p. 1046):

[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].

In the November 28, 2018 decision by which it dismissed SCDC's appeal of these rulings from the ALC's January 20, 2016 order, the Court of Appeals determined that, under *Charlotte-Mecklenburg* and § 1-23-610(A)(1), the ALC's ruling did not constitute a "final decision." (Apx. pp. 1231 – 32). SCDC respectfully disagrees, and, in doing so, it again relies upon the following passage from *Charlotte-Mecklenburg*, 692 S.E.2d at 895:

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).

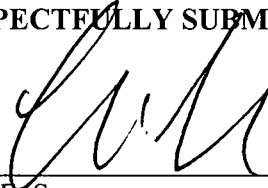
The above-quoted ruling from the ALC's January 20, 2016 order clearly leaves nothing for SCDC to do but to enforce by execution what it had determined, namely (1) pay Torrence "the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999," (2) collect the data from DEW for "the mean average wage reflected by OEC Code 93114" for the years 2000 through 2004, and then (3) pay Torrence "the mean average wage reflected by OEC Code 93314" for the years 2000 through 2004.

Accordingly, SCDC respectfully urges this Court to grant SCDC's instant petition to fully adjudicate whether the ALC erred by its rulings, which the Court of Appeals allowed to stand in its November 28, 2018 decision.

V. CONCLUSION

For the foregoing reasons, this Court should grant, under the provisions of SCACR 242(b), SCDC's instant petition for writ of certiorari and review the two (2) questions SCDC presented herein.

RESPECTFULLY SUBMITTED,



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September 30, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2019-001490

Thomas J. Torrence, Respondent,

v.

South Carolina Department of Corrections Petitioner.

PROOF OF SERVICE

I certify that I have served the **PETITION FOR WRIT OF CERTIORARI BY THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS AND ITS ALLIED APPENDIX** on the above-named pro se Respondent by mailing a copy of the same to him at the following address:

Thomas J. Torrence, #094651
Perry Correctional Institution – 3B102
430 Oaklawn Drive
Pelzer, South Carolina 29669

September 30, 2019



LAKE E. SUMMERS