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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**

**APPENDIX
VOLUME 4 OF 4**

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2016-000285
Trial Court Case No. 2012ALJ040143AP

Thomas J. Torrence, #094651, Respondent,

v.

South Carolina Department of Corrections, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Table of Authorities	iv
Statement of Issues on Appeal	1
Statement of the Case	2
I. TORRENCE’S GRIEVANCE	2
A. TORRENCE’S STEP 1	2
B. SCDC’S RESPONSE TO TORRENCE’S STEP 1	3
C. TORRENCE’S STEP 2	6
D. SCDC’S RESPONSE TO TORRENCE’S STEP 2	8
II. TORRENCE’S NOTICE OF APPEAL TO THE ALC	10
III. PROCEEDINGS BEFORE THE ALC AND ITS TWO (2) ORDERS	11
A. THE ALC’S JANUARY 30, 2014 ORDER	11
B. PROCEEDINGS BETWEEN THE ALC’S TWO (2) ORDERS	12
C. THE ALC’S JANUARY 20, 2016 ORDER	13
Standard of Review	15
Argument	17
I. THE ALC ERRED IN ITS JANUARY 30, 2014 ORDER BY RULING THAT TORRENCE TIMELY FILED HIS GRIEVANCE	17
A. OUR SUPREME COURT’S DECISION IN <i>Okeru</i>	17
B. TORRENCE DID NOT RAISE PARAGRAPH 13.9’S EXCEPTION TO THE 15-DAY FILING DEADLINE IN HIS STEP 1, HIS STEP 2, HIS NOTICE OF APPEAL, OR HIS BRIEFS TO THE ALC	19
C. TORRENCE DID NOT REQUEST AN EXCEPTION TO THE FILING DEADLINE AS REQUIRED BY PARAGRAPH 13.9.....	21
D. TORRENCE’S GRIEVANCE WAS SUBJECT TO THE 15-DAY FILING DEADLINE, AS HE PRESENTED CLAIMS CONSTITUTING “INMATE PROPERTY COMPLAINTS” UNDER PARAGRAPH 7.4	24

TABLE OF CONTENTS

II.	THE ALC ERRED IN ITS JANUARY 30, 2014 ORDER BY RULING THAT EQUITABLE TOLLING APPLIED TO TORRENCE’S GRIEVANCE	27
A.	THE ALC’S INTERPRETATION OF EQUITABLE TOLLING	28
B.	FACTS UNDERMINE THE ALC’S RATIONALE	29
C.	THE STANDARDS ASSOCIATED WITH EQUITABLE TOLLING AS FASHIONED BY COURTS IN OUR STATE	30
D.	THE ALC ERRED BY APPLYING EQUITABLE TOLLING	32
III.	THE ALC ERRED IN ITS JANUARY 20, 2016 ORDER BY CALCULATING THE “PREVAILING WAGE”	33
A.	THE ALC MISAPPREHENDED THE APPLICABLE STATE LAW, FEDERAL LAW, AND FEDERAL REGULATIONS	33
1.	Section 24-3-430	33
2.	The Ashurst-Sumners Act, 18 U.S.C. § 1761	34
3.	64 FR 17000, <i>et seq.</i>	35
4.	The ALC Ignored the Circuit Court’s Analysis in <i>Adkins</i>	36
5.	The Circuit Court in <i>Adkins</i> Considered Both §§ 24-3-410(B)(7) and 24-3-430(D)	39
B.	THE ALC’S ERRONEOUS DECISION TO CALCULATE THE “PREVAILNG WAGE” AND ITS FLAWED CALCULATION OF THE “PREVAILING WAGE”	40
1.	Conclusions upon which the ALC Erroneously Decided to Calculate the “Prevailing Wage”	40
2.	The ALC Erroneously Deviated from Both ESC Methodology and the Operative Federal Regulation	42
3.	The ALC’s Flawed Calculation of the “Prevailing Wage”	45
IV.	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)	47

TABLE OF CONTENTS

A. THE ALC'S ANALYSIS AND HOLDINGS	47
B. THE ALC ERRED WHEN IT REVERSED SCDC'S DECISION	48
Conclusion	49

TABLE OF AUTHORITIES

CASES

Abbott v. State, 979 P.2d 994 (Alaska 1999) 28

Ackerman, et al., v. S.C. Dep't of Corr., 782 S.E.2d 757 (S.C. Ct. App. 2016) 21, 26 – 27

Adkins, et al. v. S.C. Dep't of Corr., Case No. 2000-CP-40-4761
(S.C. Cir. Ct. Oct. 30, 2002) *passim*

Adkins v. S.C. Dep't of Corr., 602 S.E.2d 51 (S.C. 2004) *passim*

Al-Shabazz v. State, 354 S.E.2d 742 (S.C. 2000) 15 – 16, 25, 27

Bennett v. Frank, 395 F.3d 409 (7th Cir. 2005) 2, 14

Campbell v. Guignard, -- S.E.2d --, 2015 WL 3819059 (S.C. Ct. App. June 17, 2015) 30

Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control,
564 S.E.2d 341 (S.C. Ct. App. 2002) 16

Critcher v. Rhodes, -- S.E.2d --, 2015 WL 4757067 (S.C. Ct. App. Aug. 12, 2015) 21

Ex parte Capital U-Drive-It, Inc., 630 S.E.2d 464 (S.C. 2006) 17

Griffis v. Cherry Hill Estates, LLC, -- S.E.2d --, 2015 WL 1517412
(S.C. Ct. App. Apr. 1, 2015) 30

Holmes v. Marion School Dist. One, 2011 WL 4591647 (D.S.C. Sept. 30, 2011) 30 – 31

Home Med. Sys., Inc. v. S.C. Dept. of Rev., 677 S.E.2d 582 (S.C. 2009) 14 – 15, 21, 24

Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 687 S.E.2d 29 (S.C. 2009) 28, 30 – 32

Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990) 31 – 32

Magnolia North Property Owners' Ass'n, Inc., v. Heritage Communities, Inc.,
725 S.E.2d 112 (S.C. Ct. App. 2012), *petition for writ of certiorari*
as improvidently granted, 777 S.E.2d 831 (S.C. 2015) 31

McQuiddy v. Ware, 20 Wall. 14, 22 L.Ed. 311 (1874) 32

Okerá v. S.C. Dep't of Corr., Docket No. 08-ALJ-04-00887-AP
(S.C.A.L.J.D. June 29, 2009) 18

Okerá v. S.C. Dep't of Corr., -- S.E.2d --,
2012 WL 10907962 (No. 2012-MO-042) (S.C. 2012) 17 – 19

TABLE OF AUTHORITIES

Pace v. DiGuglielmo, 544 U.S. 408 (2005) 31 – 32

S.C. Coastal Conservation League v. S.C. Dep’t of Health & Envtl. Control,
669 S.E.2d 899, 905 (S.C. Ct. App. 2008), *reversed on other grounds*,
702 S.E.2d 246 (S.C. 2010) 16

S.C. Dep’t of Corr. v. Cartrette, 694 S.E.2d 18 (S.C. Ct. App. 2010) 2, 14

S.C. Dep’t of Corr. v. Mitchell, 659 S.E.2d 233 (S.C. Ct. App. 2008) 15 – 16

Teal v. Hickman-Tedder, -- S.E.2d --, 2015 WL 9393946 (S.C. Ct. App. Dec. 23, 2015) 30

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

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

Toth v. Square D Co., 377 S.E.2d 584 (S.C. 1989) 18 – 19

Wellin v. Wellin, 2014 WL 234216 (D.S.C. Jan. 22, 2014) 31

Wicker v. S.C. Dep’t of Corr., 2001 WL 1005574
(S.C.A.L.J.D. Aug. 13, 2001) *passim*

Wicker v. S.C. Dep’t of Corr., 602 S.E.2d 56 (S.C. 2004) *passim*

Wilder Corp. v. Wilke, 497 S.E.2d 731 (S.C. 1998) 21

Williams, et al., v. S.C. Dep’t of Corr. & Williams Technologies, Inc.,
641 S.E.2d 885 (S.C. 2007) 2, 14, 27

STATUTES

18 U.S.C. § 1761 2, 33

18 U.S.C. § 1761(a) 34

18 U.S.C. § 1761(c) 33 – 35

18 U.S.C. § 1761(c)(1) 34 – 35

18 U.S.C. § 1761(c)(2) 33, 35 – 36

18 U.S.C. § 1761(c)(4) 33

29 U.S.C. § 206 1, 35

TABLE OF AUTHORITIES

29 U.S.C. § 207(a) 36

S.C. Code Ann. § 1-23-610 15 – 16

S.C. Code Ann. § 24-1-290 2

S.C. Code Ann. § 24-1-295 2

S.C. Code Ann. § 24-3-40 2, 5, 25, 35

S.C. Code Ann. § 24-3-40(A) 2, 5, 35

S.C. Code Ann. § 24-3-40(A)(5) 6, 8, 10, 12, 47 – 49

S.C. Code Ann. § 24-3-40(B)(1) 48 – 49

S.C. Code Ann. § 24-3-40(B)(2) 6, 8, 10, 25, 47 – 49

S.C. Code Ann. § 24-3-40(B)(3) 48 – 49

S.C. Code Ann. § 24-3-310, *et seq.* 2

S.C. Code Ann. § 24-3-315 25, 35 – 36, 40, 44

S.C. Code Ann. § 24-3-320 2

S.C. Code Ann. § 24-3-330 2

S.C. Code Ann. § 24-3-400 6

S.C. Code Ann. § 24-3-410 1, 36 – 38, 44

S.C. Code Ann. § 24-3-410(A) 38

S.C. Code Ann. § 24-3-410(B)(7) 5, 9, 36 – 39

S.C. Code Ann. § 24-3-430 33 – 34, 37, 40

S.C. Code Ann. § 24-3-430(A) 33

S.C. Code Ann. § 24-3-430(C) 34

S.C. Code Ann. § 24-3-430(D) *passim*

S.C. Code Ann. § 24-3-430(E) 34

TABLE OF AUTHORITIES

S.C. Code Ann. § 24-3-430(G) 33

OTHER AUTHORITIES

64 FR 17000, *et seq.* *passim*

Rules of Procedure for the Administrative Law Court, Rule 25 42

Rules of Procedure for the Administrative Law Court, Rule 25 42

Rules of Procedure for the Administrative Law Court, Rule 51, *et seq.* 42

South Carolina Department of Corrections Policy Number GA-01.12,
entitled "INMATE GRIEVANCE SYSTEM" *passim*

STATEMENT OF ISSUES ON APPEAL

The Appellant, the South Carolina Department of Corrections ["SCDC"], appeals several rulings from the January 30, 2014 and January 2, 2016 orders issued by the South Carolina Administrative Law Court ["ALC"] in the instant matter. By these orders, the ALC reversed several final decisions made by SCDC concerning prison industries wage claims articulated in an administrative grievance filed by the Respondent, Thomas Torrence, under SCDC's Inmate Grievance Policy System, designated as Policy Number GA-01.12 ["GA-01.12"].

Accordingly, SCDC respectfully presents the following issues on appeal:

- I. Did the ALC err in its January 30, 2014 order by ruling that Torrence timely filed his grievance?
- II. Did the ALC err in its January 30, 2014 order by ruling that equitable tolling applied to Torrence's grievance?
- III. Did the ALC err in its January 20, 2016 order by calculating the "prevailing wage" that SCDC should have paid Torrence for his prison industries labor?
- IV. Did the ALC err in its January 20, 2016 order by ruling that Torrence must be allowed to designate persons or entities to receive an immediate distribution of funds held in escrow for his benefit pursuant to S.C. Code Ann. § 24-3-40(A)(5)?

¹ S.C. Code Ann. § 24-3-430(D) provides in its entirety that "[n]o inmate participating in the [prison industries] program may earn less than the prevailing wage for work of similar nature in the private sector." [emphasis supplied]. Neither § 24-3-430(D) nor any other section of § 24-3-430 quantifies the "prevailing wage." For that matter, no other prison industries statute enacted by our legislature quantifies the "prevailing wage." Likewise, no applicable federal statute or regulation quantifies the term. In *Wicker v. S.C. Dep't of Corr.*, 2001 WL 1005574, *2, n. 3 (S.C.A.L.J.D. Aug. 13, 2001), the ALC observed that "[t]he federal minimum wage is currently \$5.15 per hour, see 29 U.S.C.A. § 206; thus, the prevailing wage in the private sector would have to be at least \$5.15 per hour." In *Wicker*, the ALC considered prison industries pay claims presented by an inmate who participated in the same federally certified prison industries project as Torrence. Based upon its observation of the federal minimum wage, the ALC in *Wicker*, 2001 WL 1005574, *2, held that the "prevailing wage for work of a similar nature in the private sector is \$5.25 per hour." While it affirmed the ALC by its decision in *Wicker*, 602 S.E.2d 56 (S.C. 2004), our Supreme Court did not consider the ALC's holding regarding the "prevailing wage." Until the ALC's January 20, 2016 order in Torrence's case, no other court in our state had calculated the "prevailing wage" due any inmate who participated in federally certified prison industries projects operated by SCDC, like the project in which Torrence participated. See notes 2, 8, 20, and 38 below.

STATEMENT OF THE CASE

I. TORRENCE'S GRIEVANCE

A. TORRENCE'S STEP 1

From 1997 to 2004, Torrence voluntarily participated in a federally certified prison industries project operated by SCDC at Evans Correctional Institution ["Evans"] in which ESCOD, Inc. and, later, INSILCO, Inc. participated as the private industry sponsors.

Torrence filed a Step 1 grievance form with SCDC dated May 21, 2007 (R. pp. 121 – 27), in which he asserted the following (R. p. 121):

I was employed by [ESCOD], in the SCDC Private Sector Industries Program at [Evans] from June 1997 thru November, 2004.² During the course of my employment,³ 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].⁴ [emphasis supplied].

² 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 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.*).

³ Torrence's claims that he "employed" by or otherwise worked for ESCOD or that he was "employed" by or otherwise worked for SCDC 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). Moreover, in ruling in the same order that SCDC should have paid Torrence "the mean average South Carolina wage of an electronic assembler," the ALC explicitly stated that SCDC should have done so for the years Torrence "worked as a harness assembler for ESCOD." [emphasis supplied]. (R. p. 1039). *See* note 21 below.

⁴ In an affidavit he submitted with this Step 2 form, Torrence attested that he, with the assistance of counsel, filed the civil class action, which our Supreme Court eventually considered in *Torrence* in 2001 in the "Richland County Court of Common Pleas." Torrence provided the civil action number associated with the litigation in his affidavit: 2001-CP-40-3409. After the circuit court dismissed his civil class action, Torrence and his fellow plaintiffs, with

Torrence articulated eight (8) claims by which he asserted SCDC had unconstitutionally deprived him of his property (i.e. his wages) in an “Addendum” attached to his Step 1 form. (R. p. 123).

Torrence then requested the following action: “Payment of wages, withholdings and interests as set forth in subsections 1 thru 8 of the Addendum attached hereto.” (R. p. 121).

Torrence specified how and when he attempted to informally resolve the claim(s) he articulated within his Step 1: “This matter was pending before S.C. courts from 2001 until the recent May 7, 2007 decision. SCDC intends to petition the state supreme court for a rehearing on this matter within 30 days.”⁵ (R. p. 121).

Significantly, Torrence did not claim or otherwise assert anywhere in his Step 1 form, his “Addendum,” or their allied documents that his prison industries wage claims challenged SCDC policies and/or procedures, nor did he request a waiver or exception anywhere in his Step 1 or its allied documents from the filing deadline established by paragraph 13.9 in GA-01.12.

B. SCDC’S RESPONSE TO TORRENCE’S STEP 1

By written response dated December 1, 2011 (R. pp. 122 and 128 – 33), SCDC, by and through the appropriate official, denied the claim(s) articulated by Torrence in his Step 1 by concluding that Torrence did not timely file his Step 1.

the continued assistance of counsel, appealed to our Court of Appeals, and, as he accurately stated, our Supreme Court accepted the case on direct review. (R. pp. 143 – 44). As an important aside, no part of *Torrence* stated that Torrence or any of his fellow inmate plaintiffs “must file” an administrative grievance under GA-01.12. Instead, our Supreme Court only acknowledged that under *Wicker*, Torrence “can present [his wage claims] via [GA-01.12].” *Torrence*, 646 S.E.2d at 870.

⁵ As discussed in note 17 below, SCDC respectfully asserts that the ALC misapprehended the chronology associated with our Supreme Court’s decision in *Torrence*, when Torrence filed his Step 1, representations purportedly made by SCDC to Torrence concerning its petition for rehearing in *Torrence*, and when our Supreme Court ruled on SCDC’s petition for rehearing in *Torrence*.

SCDC first determined that Torrence did not file his Step 1 within the applicable filing deadline established by various editions GA-012. SCDC stated that Torrence's prison industries pay records reflected the following (R. p. 129):

These records confirm that you voluntarily participated in the prison industries project operated by SCDC at Evans in which ESCOD participated as the private industry sponsor before SCDC ended its policy of paying inmates a "training wage" for their initial 320 hours of labor. SCDC ended its policy of paying a "training wage" on July 1, 1999.⁶ These pay records reflect that SCDC began paying you on or about August 15, 1997 at the rate of at least \$5.25 per hour for the labor you voluntarily provided in the project at Evans, and they reflect that SCDC remitted its final payment to you on or about November 16, 2004.

SCDC found that Torrence filed his Step 1 nearly 10 years after he began participating in the project, approximately 2½ years after he finished participating in the project, and nearly 2½ years after our Supreme Court issued *Adkins v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (S.C. 2004) and its companion case, *Wicker v. S.C. Dep't of Corr.*, 602 S.E.2d 56 (S.C. 2004). SCDC then decided that since Torrence did not file his Step 1 within either seven (7) or 15 days of the incident upon which he grounded his wage claims (i.e. the date upon which SCDC both first began paying him for his prison industries labor), Torrence failed to timely file his Step 1. (R. pp. 130 – 31).

SCDC also denied the merits of Torrence's wages claims, and, in doing so, it anchored its conclusion on the fact that the project in which Torrence participated was certified by the federal government and upon the examination of such federally certified projects undertaken by the circuit court in *Adkins* (R. p. 132):

Additionally, I deny your claim that you are entitled to any relief under § 24-3-430(D), the so-called "prevailing wage" provision. Specifically, as the prison industries project in which you participated at Evans was a

⁶ See *Adkins v. S.C. Dep't of Corr.*, 602 S.E.2d 51, 53, n. 1 (S.C. 2004). 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. (R. pp. 1030 – 31).

project for which SCDC received certification under the federal government's Prison Industries Enhancement Certification Program ["PIECP"],⁷ I conclude that the provisions of § 24-3-410(B)(7) and not [§] 24-3-430(D) applied to the rate of pay SCDC was required to remit to you under [§] 24-3-40(A) for the labor you voluntarily provided to this project. In making this conclusion, I rely upon the decision issued by the circuit court in [Adkins], which concluded that inmates who participated in an identically certified SCDC prison industries project did not possess a viable claim for back wages or higher wages under the provisions of § 24-3-430(D).

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. 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.⁸ 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. Again, I find that you did not timely file your grievance in which you demanded back pay allegedly owed to you by SCDC including any back pay associated with the period of time SCDC paid you a "training wage." [emphasis supplied].

SCDC also concluded that SCDC did not owe Torrence \$1.92, \$2.79, or any other amount for every labor hour Torrence provided to the federally certified project it operated at Evans. (R. p. 132).

⁷ See note 2 above.

⁸ As discussed further below, SCDC respectfully asserts that the ruling from the ALC's January 20, 2016 order 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" is at odds with the applicable federal guidelines published by BJA and applicable precedent from federal courts. (R. pp. 1034 – 39). SCDC also respectfully asserts that the ALC's ruling represents a novel issue for review by our state's appellate courts. See note 1 above and notes 20 and 38 below.

In so concluding, SCDC again relied upon the circuit court's decision in *Adkins*, as well as the provisions of § 24-3-400.⁹ (R. p. 133).

Finally, SCDC concluded that contrary to Torrence's claim, Torrence was not entitled, under § 24-3-40(B)(2), to complete and immediate access to the portion of his wages SCDC had deducted and held in an interest bearing escrow account for his benefit in conformity with § 24-3-40(A)(5). (R. p. 133).

Torrence received the denial of his Step 1 on December 1, 2011, and the denial advised him that he could appeal the official's decision within five (5) days of receipt. (R. p. 122).

C. TORRENCE'S STEP 2

By his Step 2 dated December 5, 2011 (R. pp. 134 – 44 and 153 – 62), Torrence appealed SCDC's initial denial of the wage claims he articulated in his Step 1. In an affidavit he submitted with his Step 2 (R. p. 143), Torrence confirmed that he participated in the prison industries project operated by SCDC at Evans "from June 1997 through November 2004," and he also acknowledged that he filed the original complaint which eventually resulted in the decision by our Supreme Court in *Torrence* in 2007.

In his Step 2, Torrence argued that he timely filed his Step 1 (R. pp. 137 – 38):

The Warden asserts that [I am] barred by the statute of limitations established in [GA-01.12] by not filing [my] grievance within seven or fifteen days – either the date upon which SCDC both first began paying [me] and applying statutorily mandated deductions. The Warden further asserted the Step 1 grievance was filed 10 years after participation began and 2 ½ years following the [*Wicker*] decision; that [GA-01.12] does not provide any exception to prison industries disputes; and that [I] exceeded a reasonable time with filing the Step 1 Grievance [reference omitted].

[I contend that] the Warden's assertions are moot where the pendency [of *Torrence*], filed four (4) years before the decision in [*Wicker*], tolls the filing of [my grievance].

⁹ As discussed in note 44 below, the ALC affirmed SCDC's decision on this issue.

[I submit that my] counsel notified [me] of the Court's decision in Torrence in correspondence dated May 17, 2007 and received May 21, 2007, App. I.¹⁰ In that correspondence counsel advised [me that] "we are preparing the papers for the grievance process and will circulate for your review once the Supreme Court Order has become final." Id. Counsel recognized and informed [me] of the tolling. [I] filed [my] Step 1 immediately, App. H.¹¹

In correspondence dated August 27, 2007 counsel advised "proceeding through the grievance process to address your claims and ultimately the [ALC] appeal process is the legal requirement," [App. J].¹² [Torrence] was still pending, [SCDC's] petition for rehearing was subsequently denied.

[SCDC] filed a Motion to Dismiss [Torrence] (2001-CP-40-3409) from Circuit Court, however, that court found the Complaint properly stated a declaratory judgment action which involved novel issues and initially denied that motion in November 2002. [SCDC] renewed that motion, successfully, only after the decision in [Wicker] that the procedure to utilize is the grievance system. [emphasis supplied].

Torrence articulated the following relevant assertion in his Step 2 (R. p. 138):

[I object to the] Warden's mischaracterization of a "pre-existing right" to file grievances, [reference omitted]. The Court in [Torrence] was clear in stating that the procedure to follow was an agency grievance, as established in, and unavailable prior to [Wicker]. [emphasis supplied].¹³

¹⁰ "Appendix I" to Torrence's Step 2 appears in the record. (R. pp. 155 – 57).

¹¹ "Appendix H" to Torrence's Step 2 also appears in the record. (R. pp. 153 – 54). In the affidavit he submitted with his Step 2, Torrence accurately observed that our Supreme Court released its opinion in *Torrence* on May 7, 2007. (R. p. 143). See note 4 above. Torrence stated in this affidavit that he received notice of the *Torrence* decision via correspondence from his counsel dated May 17, 2007, and he stated that he received the correspondence on May 21, 2007. (R. p. 143). Torrence included the May 17, 2007 letter from counsel as "Appendix I" in support of his Step 2. Torrence argued in his affidavit that he filed his Step 1 "on May 21, 2007, within seven (7) days of receipt of his right to file a grievance in this matter." (R. p. 143). See note 5 above and note 17 below.

¹² Torrence mistakenly referenced "Appendix I" regarding the August 27, 2007 correspondence from his counsel. Instead, Torrence included the August 27, 2007 correspondence from his counsel as "Appendix J" in support of his Step 2. "Appendix J" appears in the abbreviated Record on Appeal. (R. pp. 158 – 59).

¹³ The ALC erroneously embraced Torrence's argument in its January 30, 2014 order when it concluded that SCDC "did not recognize a wage claim as grievable until the Supreme Court upheld" the ALC's decision in *Wicker* in August 2004, and, therefore, any attempt by Torrence "to file a grievance prior to August 2004 would have been futile." (R. p. 399). *Adkins* and *Wicker* were issued August 23, 2004. See note 16 below.

Torrence disputed the rationale by which SCDC denied the merits of his wage claims (R. pp. 139 – 40).

Torrence likewise disputed the rationale by which SCDC denied his claim for immediate access, under § 24-3-40(B)(2), to his wages escrowed by operation of § 24-3-40(A)(5) (R. pp. 140 – 41), and, in doing so, he asserted that SCDC's interpretation of § 24-3-40(B)(2) was unconstitutional. (R. p. 140).

Torrence again did not claim or otherwise assert anywhere in his Step 2 form or its allied documents that his prison industries wage claims challenged SCDC policies and/or procedures, nor did he request a waiver or exception anywhere in his Step 2 or its allied documents from the filing deadline established in GA-01.12 by invoking paragraph 13.9.

D. SCDC'S REPLY TO TORRENCE'S STEP 2

By its final decision dated February 9, 2012 (R. pp. 134 and 145 – 52), SCDC affirmed its denial of Torrence's Step 1 and likewise denied his Step 2.

In denying his Step 2, SCDC rejected the arguments offered by Torrence concerning whether he timely filed his Step 1 and concluded as follows (R. pp. 148 – 49):

I fully concur with the warden's determination that the grievance filing deadline established in every edition of the relevant policy applied and continues to apply to nearly every aspect of inmate activity, and no special exception exists when it comes to [prison industries] pay disputes. Consequently, the deadline applied to your Step 1. Moreover, as the warden accurately chronicled in his response [to Torrence's Step 1], you filed your Step 1 nearly 10 years after you began participating in the [prison industries] project at Evans and approximately 2½ years after you concluded your participation in this project. For that matter, you filed your Step 1 over 2½ years after the decisions in *Adkins* and *Wicker* had been issued.

You also filed your Step 1 approximately 6 years after you, as you claimed in your affidavit, that you "discovered" that SCDC was "collecting \$7.17 per hour for [your] labor" and almost 8 years after you, as you claimed in

your affidavit, discovered a “discrepancy” in your pay.¹⁴ I fully concur with the warden’s determination that you clearly exceeded any reasonable time frame associated with filing a grievance under [GA-01.12].

I also fully concur with the warden’s determination that the fact that you first sought relief by participating in a class action lawsuit filed in circuit court instead of filing a Step 1 by which you challenged the rate at which SCDC both paid you for your [prison industries] labor and applied statutorily mandated deductions to your pay does not change the filing deadline(s) from [GA.01.12]. **You served as the lead plaintiff in *Torrence*, and your attorneys filed their amended declaratory judgment complaint on your behalf on November 5, 2001. Obviously, you knew before your attorneys filed the complaint that you wanted to challenge the rate at which SCDC had been paying you for your [labor].**

Moreover, the filing of your class action lawsuit in circuit court did not toll the deadline(s) by which you were required to file your Step 1. The appendices you submitted in support of your Step 2 simply do not support your assertion that your participation in the class action lawsuit tolled the deadline by which you were required to file your Step 1. Moreover, these same appendices simply do not establish that date upon which your right to file a grievance in this matter accrued. **The appendices you relied upon to support your assertion include correspondence that you received from your own counsel in *Torrence*, and this correspondence has absolutely no bearing on the filing deadline associated with your Step 1.** [emphasis supplied].

In denying his Step 2, SCDC also 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 analysis provided by the circuit court in *Adkins*, the provisions of § 24-3-410(B)(7), the applicable guidelines published by BJA in the Federal Register concerning PIECP projects, such as the project at Evans in which Torrence

¹⁴ In the affidavit he submitted in support of his Step 2 (R. pp. 143 – 44), Torrence attested that he “had no knowledge of [any] discrepancy in pay until the July 1, 1999 change in law, at which time [he] began diligent research,” and he attested that he “discovered in 2000 that [SCDC] was collecting \$7.17 per hour for [his] labor and during ‘training hours.’” [emphasis supplied]. Torrence never asserted and the record does not reflect that SCDC prevented or otherwise hindered him from discovering his wage claims in any way. Furthermore, the ALC denied Torrence’s appeal concerning the rate at which SCDC invoiced ESCOD for inmate labor, and Torrence did not appeal the ALC’s ruling on this or any other point to this Court. See note 44 below.

participated, and the provisions of 18 U.S.C. § 1761, known as the Ashurst-Sumners Act. (R. pp. 150 – 51).

In denying his Step 2, SCDC likewise rejected the arguments offered by Torrence concerning his demand for immediate access, under § 24-3-40(B)(2), to his wages escrowed by operation of § 24-3-40(A)(5), and it affirmed the analysis of Torrence's demand it provided in response to his Step 1 (R. pp. 151 – 52).

Torrence received the denial of his Step 2 on February 15, 2012. (R. p. 134).

II. TORRENCE'S NOTICE OF APPEAL TO THE ALC

Torrence then timely appealed SCDC's denial of his grievance by filing a Notice of Appeal dated March 2, 2012 with the ALC. (R. p. 56).

Torrence addressed the timeliness issue by his sixth ground for appeal: "Time to file grievance equitably tolled by pendency of this action in [*Torrence*]." Yet again, however, Torrence did not claim or otherwise assert in his Notice of Appeal that his prison industries wage claims challenged SCDC policies and/or procedures, nor did he claim or otherwise assert in his Notice of Appeal that he had requested a waiver or exception from the filing deadline established in paragraph 13.9 of GA-01.12.

By his first and second grounds for appeal, Torrence also challenged SCDC's determination that it had paid him wages which conformed to the provisions of the applicable state law, federal law, and federal regulations.

Finally, by his fourth ground for appeal, Torrence challenged SCDC's conclusion that he is not, under § 24-3-40(B)(2), entitled to immediate access to the monies withheld from his gross wages and escrowed by operation of § 24-3-40(A)(5).

III. PROCEEDINGS BEFORE THE ALC AND ITS TWO (2) ORDERS

A. THE ALC'S JANUARY 30, 2014 ORDER

In footnote 2 of its January 30, 2014 order (R. p. 394), the ALC acknowledged that Torrence “raised multiple issues related to the payment of wages,” but, by an order it issued June 7, 2012 (R. p. 82), the ALC determined that the only issue it would initially address consisted of “the timeliness of [Torrence’s] Step 1 grievance.” The parties then filed briefs and supplemental materials addressing the timeliness of Torrence’s Step 1.¹⁵ (R. pp. 83 – 194 and 197 – 392).

The ALC considered only these issues in its January 30, 2014 order: (1) whether our Supreme Court’s decisions in *Adkins* and *Wicker* created new substantive or grievance rights; (2) whether Torrence timely filed his Step 1; and (3) whether the time to file Torrence’s grievance was equitably tolled when he filed a class action in circuit court. (R. pp. 394 – 95).

The ALC ruled that *Adkins* and *Wicker* did not create new substantive rights or new grievance rights.¹⁶ (R. pp. 396 – 97). The ALC next ruled that the prison industries pay claims articulated by Torrence concerned “policies/procedures” as defined under paragraph 13.9 of GA-01.12, and, therefore, the 15-day filing deadline from paragraph 13.1 of GA-01.12 did not apply to the filing of Torrence’s Step 1. (R. pp. 398 – 99). Finally, the ALC ruled that since Torrence filed his Step 1 “within days” of him receiving our Supreme Court’s opinion in *Torrence* (i.e. the

¹⁵ By its June 7, 2012 order, the ALC, in the interests of judicial economy, agreed to consider the threshold issue of whether Torrence “timely filed his Step 1 within the 15-day filing deadline established by the applicable paragraphs of [GA-01.12]” before it considered the merits of Torrence’s wage claims and his demand for immediate access to the monies withheld from his gross wages and escrowed by operation of § 24-3-40(A)(5). Paragraph 13.1 of GA-01.12 established the 15-day filing deadline referenced by the ALC in its June 7, 2012 order, and exceptions to the deadline appear in paragraph 13.9.

¹⁶ SCDC does not appeal the ALC’s ruling on this issue. Likewise, Torrence did not appeal the ALC’s ruling on this issue or, for that matter, any ruling from its January 30, 2014 and January 20, 2016 orders. However, SCDC respectfully asserts that the ALC’s ruling that *Adkins* and *Wicker* did not create new substantive rights or new grievance rights is inconsistent with its finding that “any attempt by [Torrence] to file a grievance prior to August 23, 2004 would have been futile.” (R. p. 399). *See* note 13 above. Succinctly stated, inmates, like Torrence, possessed the right to file prison industries wage grievances before our Supreme Court issued *Adkins* and *Wicker* on August 23, 2004.

class action filed by Torrence in circuit court),¹⁷ the doctrine of equitable tolling applied. (R. pp. 400 – 01).

B. PROCEEDINGS BETWEEN THE ALC'S TWO (2) ORDERS

As it concluded that Torrence timely filed his Step 1, the ALC directed the parties on the final page of its January 30, 2014 order to next litigate outstanding motions concerning the record and then to subsequently file their briefs addressing the merits of Torrence's wage claims, as well as his demand for immediate access to his wages escrowed by operation of § 24-3-40(A)(5). (R. p. 402).

Recognizing the impact of the rulings from the ALC's January 30, 2014 order not only on the litigation of Torrence's appeal but potentially in all inmate grievances under GA-01.12, SCDC appealed the ALC's January 30, 2014 to this Court. However, this Court dismissed SCDC's appeal by an order filed April 17, 2014. (R. p. 441).

¹⁷ In its January 30, 2014 order (R. p. 394), the ALC provided the following chronology of the filing of Torrence's Step 1 as it related to our Supreme Court's decision in *Torrence*:

In [*Torrence*], the South Carolina Supreme Court held that the plaintiffs did not hold a private right of action against [SCDC]. However, the court held that all members of the class action could file an internal grievance with [SCDC] to seek any monies owed. Upon the issuance of the Supreme Court decision, [Torrence] filed a Step 1 grievance with [SCDC] on May 21, 2007. [SCDC] notified [Torrence] that his Step 1 grievance would not be answered until the Supreme Court decided on [SCDC's] petition for rehearing. In December 2011, the petition for rehearing was denied by the court.

SCDC respectfully asserts that the record contradicts the above-quoted chronology provided by the ALC. As reflected by the decision itself, our Supreme Court denied SCDC's petition for rehearing in *Torrence* on July 29, 2007 and not in December 2011. Moreover, nothing in the record supports the ALC's finding that SCDC notified Torrence that it would not respond to his Step 1 until our Supreme Court ruled on SCDC's petition for rehearing. Instead, Torrence himself mentioned SCDC's petition for rehearing in the relevant passage from his Step 1. (R. p. 121). Thus, to the extent that it relied upon its own erroneous review of the record in ruling that Torrence timely filed his Step 1 and that the doctrine of equitable tolling applied to Torrence's Step 1 (R. pp. 398 – 401), the ALC's rulings are not only unsupported by the record, they are contradicted by the record. *See also* note 5 above.

The parties accordingly filed briefs and supplemental materials with the ALC in which they addressed the remaining issues associated with Torrence's appeal of SCDC's final decision by which SCDC denied the wage claims from his Step 1. (R. pp. 403 – 26 and 443 – 1028).

C. THE ALC'S JANUARY 20, 2016 ORDER

In the final order it issued on January 20, 2016, the ALC identified five (5) issues associated with Torrence's appeal, and the first three (3) issues it identified concerned his wage claims and his demand for immediate access to his escrowed wages (R. p. 1031):¹⁸ (1) whether SCDC improperly failed to pay Torrence the "prevailing wage" during training; (2) whether SCDC improperly failed to pay Torrence the "prevailing wage" after training; and (3) whether SCDC improperly denied Torrence immediate access to his escrowed wages.

The ALC ruled that SCDC should have paid Torrence the "prevailing wage required by law" for the labor he voluntarily performed during the initial training period, and the ALC concluded 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 the first 320 hours of his labor is erroneous as a matter of law.¹⁹ (R. p. 1034).

The ALC next considered whether SCDC paid Torrence the "prevailing wage required by law" for the labor he voluntarily performed after he concluded the initial training period. In analyzing the term "prevailing wage," the ALC concluded as follows (R. pp. 1036 – 37):

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] for the type of work in question. While the Court

¹⁸ Neither party appealed the ALC's rulings on the final two (2) issues from its January 20, 2016 order.

¹⁹ SCDC challenges the ALC's ruling that it owes Torrence monies attributable to the first 320 hours of his labor on two (2) grounds. First, SCDC argues that Torrence did not timely file his Step 1 and, consequentially, any claims associated with the first 320 hours of his labor are time-barred. If such claims are not time barred, SCDC respectfully asserts that the ALC erred by calculating the purportedly applicable "prevailing wage" in contravention of the applicable federal regulations and that the "prevailing wage" figure(s) yielded by the ALC's calculations are themselves erroneous.

agrees verification 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.**²⁰ 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].

In contravention of the very federal regulation it referenced in the above-quoted passage, the ALC itself calculated the applicable “prevailing wage” (R. pp. 1037 – 39), and it ultimately ruled as follows (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.*²¹ [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].

The ALC then declared that paying Torrence less than the “prevailing wage,” as the ALC quantified the term in its analysis, constituted an error of law by SCDC. (R. p. 1039).

Finally, the ALC agreed with Torrence that SCDC unlawfully denied him and continues to deny him immediate access to his escrowed wages. (R. p. 1039 – 42). The ALC ruled Torrence “must be allowed to designate persons or entities to receive an immediate distribution of funds held in escrow pursuant to [§ 24-3-40(A)(5)].²²” (R. p. 1042).

²⁰ See notes 1 and 8 above.

²¹ Again, under *Williams, Bennett, and Cartrette*, Torrence never “worked ... for ESCOD.” See note 3 above.

²² In the associated footnote, the ALC ruled as follows: “[Torrence] also argues that SCDC’s application of [§ 24-3-40(B)(2)] operates as a bill of attainder, an *ex post facto* law, and violates his constitutional right to equal protection. None of these issues were raised in the grievance before [SCDC], and therefore they may not be taken up by

STANDARD OF REVIEW

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

The ALC considered this matter Court pursuant to our Supreme Court’s decisions in *Al-Shabazz*, as well as *Adkins* and *Wicker*. Thus, the provisions of § 1-23-610, specifically § 1-23-610(B), establish the standard of review applicable to this Court’s consideration of SCDC’S appeal of the ALC’s orders. In its entirety, § 1-23-610(B) reads as follows:

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

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Pursuant to § 1-23-610(B), this Court “may reverse or modify the [ALC’s] decision only if [SCDC proves its] substantive rights [have] been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or

this Court. *See [Home Med. Syss., Inc. v. S.C. Dept. of Rev., 677 S.E.2d 582, 586 (S.C. 2009)]*.” [emphasis supplied]. (R. p. 1042).

otherwise characterized by an abuse of discretion, or affected by other error of law.” *Mitchell*, 659 S.E.2d at 236 (reversing the ALC’s order because the “order [was] devoid of any finding of evidence adduced by [the Appellant] warranting the ALC’s reversal of [SCDC].”).

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

SCDC bears the burden of proving convincingly that the ALC’s decision to reverse SCDC’s final decision is unsupported by substantial evidence. *Mitchell*, 659 S.E.2d at 235. Substantial evidence is relevant evidence “when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the ALC arrived at in justifying its decision.” *S.C. Coastal Conservation League v. S.C. Dep’t of Health & Envtl. Control*, 669 S.E.2d 899, 905 (S.C. Ct. App. 2008), *reversed on other grounds*, 702 S.E.2d 246 (S.C. 2010).

SCDC also has the burden of proving the ALC’s decision is arbitrary and otherwise characterized by an abuse of discretion. *Mitchell*, 659 S.E.2d at 234. A decision is arbitrary if no rational basis for the conclusion exists, or when it is based on one’s will and not upon any course of reasoning and exercise of judgment. A decision may also be arbitrary if it is made at pleasure without adequate determining principles or is governed by no fixed rules or standards. *Converse Power Corp. v. S.C. Dep’t of Health & Envtl. Control*, 564 S.E.2d 341, 345 (S.C. Ct. App. 2002). An “abuse of discretion occurs when the judge’s ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the judge is vested with discretion, but the

ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case.” *Ex parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464, 467 (S.C. 2006).

ARGUMENT

I. THE ALC ERRED IN ITS JANUARY 30, 2014 ORDER BY RULING THAT TORRENCE TIMELY FILED HIS GRIEVANCE

A. OUR SUPREME COURT’S DECISION IN *Okera*

Before addressing the substance of ALC’s erroneous ruling on this issue, SCDC respectfully urges this Court to consider a compelling memorandum opinion issued by our Supreme Court in *Okera v. S.C. Dep’t of Corr.*, -- S.E.2d --, 2012 WL 10907962 (No. 2012-MO-042) (S.C. 2012).

Okera and *Torrence* participated in the identical project operated by SCDC at Evans.²³ *Okera* and *Torrence* were both members of the same class of prisoners in *Torrence*, and, therefore, they both were subject to the chronology of the litigation of *Torrence* as described by *Torrence* in his Step 1 and Step 2.

Like *Torrence*, *Okera* also filed a grievance with SCDC in which he claimed that SCDC did not pay him correct wages for his prison industries labor that conformed to the applicable state law, federal law, and federal regulations. As it did to *Torrence*’s grievance, SCDC applied the 15-day filing deadline to *Okera*’s grievance, and it denied *Okera*’s grievance.

²³ As explained above in notes 1 and 2, the project operated by SCDC at Evans, in which both *Torrence* and *Okera* participated, was certified BJA under its PIECP. *See Torrence*, 646 S.E.2d at 867.

Okera appealed to the ALC, and the ALC affirmed SCDC's decision. Okera then appealed to our Court of Appeals, but our Supreme Court accepted his appeal on direct review.²⁴

In its *per curiam* opinion, our Supreme Court affirmed the ALC's ruling as follows:

This is a direct appeal from an order of the [ALC] dismissing the appeal from [SCDC's] denial of [Okera's] inmate grievance based on his failure to comply with the relevant statute of limitations set forth in [GA-01.12]. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: [Al-Shabazz] (approving [SCDC's] internal procedures for discipline and grievances, which specify a fifteen-day time limit for filing for grievances). [emphasis supplied].

The following passage from our Supreme Court's decision in *Toth v. Square D Co.*, 377 S.E.2d 584, 586 – 87 (S.C. 1989), supports SCDC's analysis and argument on this point:

Finally, we point out that this Court has already given retroactive effect to the [Small v. Springs Industries, Inc., 357 S.E.2d 452 (S.C. 1987)] decision through our holding in *Francisco v. Black River Electric Cooperative*, Mem. Op. 87-MO-325 (S.C. filed July 27, 1987). ... Although we recognize that *Francisco* is a memorandum opinion without precedential value (footnote omitted), it nonetheless indicates that we have already implicitly allowed retroactive application of *Small*. By our holding today, we explicitly hold that *Small* is to be retroactively applied to causes of action arising prior to the date it was filed. [emphasis supplied].

²⁴ On the first page of its June 29, 2009 order, designated as ALC Docket No. 08-ALJ-04-00887-AP, the ALC ruled against Okera and affirmed SCDC's denial of his grievance as follows:

This matter was remanded to [SCDC] on July 17, 2008 to determine if [Okera] filed his grievance in the instant matter while he was employed under the prison industries program or within fifteen days of the time he completed, terminated, or cease employment under the prison industries program. The Record on Appeal was supplemented on December 29, 2008. In the record, it appears [Okera] failed to file his step one grievance [until] six years after his last day of work in the prison industries. Therefore, [Okera's] Appeal was untimely.

Based on the Record on Appeal, this appeal must be dismissed because [Okera] failed to file his grievance in the instant matter while he was employed under the prison industries program, or within fifteen days of the time he completed, terminated, or ceased employment under the prison industries program. [emphasis supplied].

Therefore, by its memorandum opinion in *Okeru*, our Supreme Court, under *Toth*, has implicitly affirmed the application of the 15-day filing deadline to a grievance in a posture identical to that of Torrence's grievance, and SCDC respectfully urges this Court to do the same.

B. TORRENCE DID NOT RAISE PARAGRAPH 13.9'S EXCEPTION TO THE 15-DAY FILING DEADLINE IN HIS STEP 1, HIS STEP 2, HIS NOTICE OF APPEAL, OR HIS BRIEFS TO THE ALC

The ALC observed in its January 30, 2014 order that SCDC had decided that Torrence's Step 1 was untimely, because he did not file it within 15 days of the date upon which SCDC began paying Torrence for his labor. (R. p. 398). The ALC then summarized Torrence's position as follows (R. p. 398):

[Torrence] points out that prior to [*Wicker*] decision no such grievance was recognized by [SCDC], so any attempt to file an internal grievance would have been futile.²⁵ [Torrence] also argues that, at that time, he had no judicially recognized constitutional right to file a grievance, so he "logically elected" to file a claim in Circuit Court. [Torrence] states that he timely filed his grievance with [SCDC] within 15 days after the Supreme Court issued a final ruling which stated: "[c]learly, [Torrence] can present this claim via the inmate grievance procedure." [*Torrence*, 646 S.E.2d at 870].

The ALC's next discussed paragraphs 13.1 and 13.9 of GA-01.12 and, critically, it observed as follows (R. p. 398):

Paragraph 13.1 of GA-01.12 generally requires that Step 1 grievances be filed "within 15 days of the alleged incident." ... However, Paragraph 13.9 of GA-01.12 provides that "[e]xceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures." ... In the present case, [Torrence] contends that his grievance concerns "policies/procedures" and, therefore the 15 day time limit requirement does not apply to the filing of his grievance. I agree. [emphasis supplied].

However, the record contradicts the ALC's observation that Torrence contended that his wage claims concerned SCDC "policies" and/or "procedures." Instead, as repeatedly noted

²⁵ See notes 13 and 16 above and note 28 below.

above and as confirmed by the record, Torrence never raised the exception to the 15-day filing deadline from paragraph 13.1 of GA-01.12 available to him under paragraph 13.9 in his Step 1, Step 2, or his Notice of Appeal to the ALC.

Paragraph 13.9, in its entirety, reads as follows:

Exceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures. Exceptions may also be made for incident grievances by the Chief/designee, Inmate Grievance Branch, provided that documented reasonable cause can be demonstrated as to why the original time frame was not met, e.g., inmate physically unable to initiate grievance due to hospitalization, court appearance, etc. The waiver must be requested by the grievant. [emphasis supplied].

The “15 day time limit requirement” referenced in paragraph 13.9 comes from paragraph 13.1, which, in pertinent part, provides as follows:

Inmates must make an effort to informally resolve a grievance by either submitting a Request to Staff Member Form or by discussing their complaint with the appropriate supervisor/staff. However, in certain cases, informal resolution may not be appropriate or possible (e.g., when the matter concerns staff not working at the institution, or when the matter involves allegations of criminal activity). An informal resolution is not necessary when appealing a disciplinary conviction or a custody reduction. If informal resolution is not possible, the grievant will complete Form 10-5, Step 1, ... and will submit the Form ... within 15 days of the alleged incident. An inmate will submit a grievance within the time frames established in the policy. [italicized emphasis from GA-01.12; bold emphasis supplied by SCDC].

In his brief to the ALC dated May 23, 2012, Torrence exclusively invoked equitable tolling as the basis upon which he asserted that he timely filed his Step 1. (R. pp. 68 – 69). Torrence did not raise paragraph 13.9’s exception or even discuss the notion that his wage claims challenged SCDC “policies” or “procedures” in his May 23, 2012 brief. Likewise, in his reply brief dated November 12, 2012, Torrence once again failed to raise paragraph 13.9’s exception to the filing deadline or even discuss the notion that his wage claims challenged SCDC “policies” or “procedures.” (R. pp. 369 – 92).

Instead, Torrence rebutted the arguments raised by SCDC in its July 9, 2012 brief,²⁶ and he again invoked equitable tolling, along with equitable estoppel, as the basis upon which he asserted that he timely filed his Step 1. (R. pp. 385 – 91).

Consequentially, Torrence failed to preserve this issue for review, and the ALC erred by taking up the issue in its January 30, 2014 order under the standard it subsequently articulated in its January 20, 2016 order. See *Home Med. Sys., Inc. v. S.C. Dept. of Rev.*, 677 S.E.2d 582, 586 (S.C. 2009).²⁷ See also *Wilder Corp. v. Wilke*, 497 S.E.2d 731, 733 (S.C. 1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”). See also *Critcher v. Rhodes*, -- S.E.2d --, 2015 WL 4757067, *1 (S.C. Ct. App. Aug. 12, 2015) (applying axiom from *Wilder Corp.* to equitable tolling claim).

C. TORRENCE DID NOT REQUEST AN EXCEPTION TO THE FILING DEADLINE AS REQUIRED BY PARAGRAPH 13.9

After erroneously stating that Torrence contended his wage claims concerned “policies/procedures,” and, therefore, the 15-day filing deadline did not apply to his Step 1 and then agreeing with the contention never uttered by Torrence, the ALC observed that GA-01.12 “failed to define either ‘incident’ or ‘policies/procedures.’” (R. p. 398).

²⁶ In footnote 28 of its July 9, 2012 brief, SCDC noted that Torrence did not seek the exception to the filing deadline available under GA-01.12. (R. pp. 108 – 09). In its July 9, 2012 brief, SCDC referenced the ALC’s decision in *Ackerman, et al., v. S.C. Dep’t of Corr.*, ALC Docket Nos. 07-ALJ-04-00444-AP, *et seq.* In the aforementioned footnote, SCDC observed that the inmates in *Ackerman* made a variety of assertions concerning the exception available under GA-01.12 for grievances concerning SCDC “policies/procedures,” and SCDC observed that the ALC rejected them when it affirmed SCDC’s denial of their grievances based upon their failure to comply with the 15-day filing deadline. Obviously, this Court reversed the ALC’s decision in *Ackerman* by its February 10, 2016 decision. 782 S.E.2d 757 (S.C. Ct. App. 2016). By its order dated March 24, 2016, this Court denied SCDC’s petition for rehearing in *Ackerman*. However, SCDC filed a petition for writ of certiorari with our Supreme Court on May 2, 2016 by which it seeks review of this Court’s decision in *Ackerman* by our Supreme Court. SCDC’s petition for rehearing in *Ackerman* remains pending as of the date of SCDC’s instant brief. Notwithstanding *Ackerman*’s current procedural posture, the assertions and arguments offered by the inmates in *Ackerman* are clearly distinguishable from those made by Torrence, because, unlike Torrence, the inmates in *Ackerman* actually raised the “policies/procedures” exception to the 15-day filing deadline from paragraph 13.9 of GA-01.12.

²⁷ See note 22 above.

After considering dictionary definitions of these terms, the ALC reasoned as follows (R. pp. 398 – 99):

Based on the “plain and ordinary meaning” of both of these words, it is clear that an incident would be a one-time, specific event, and a policy would be continuous course of action. In the present case, it was not a one-time event, in which [Torrence] was not paid a prevailing wage. [SCDC] continuously failed to pay [Torrence] a prevailing wage. Therefore, the grievance involved is related to a policy or procedure.

Despite having seemingly negated any filing deadline applicable to Torrence’s Step 1 by applying paragraph 13.9, the ALC nevertheless stated “it must determine a reasonable time limitation that gives effect to the statutory or regulatory scheme” in the absence of an “express time limit” for “policies/procedures” grievances under GA-01.12. (R. p. 399). The ALC then recognized the following (R. p. 399):

The fact that other grievances must be filed within 15 days indicates a policy requiring the utmost promptness in raising a grievance. In the case of a challenge to the agency’s policies and practices, such as the one raised here, it seems reasonable to require the grievance be raised within 15 days of the time some action has been taken under the policy relevant to the grievance.

After examining both the position taken by SCDC concerning prison industries wage grievances in the litigation of *Wicker* before the ALC in 2001 and the provisions of paragraph 7 of GA-01.12, the ALC concluded as follows (R. p. 399):

Clearly, [SCDC] did not recognize a wage claim as grievable until the Supreme Court upheld the ALC’s decision [in *Wicker*] in August 2004. Thus, any attempt by [Torrence] to file a grievance prior to August 22, 2004 would have been futile. By that time, [Torrence’s] lawsuit initiated as a class action in Circuit Court was pending before the courts, representing ongoing litigation between these same parties over the same issue. [Torrence] filed his grievance within fifteen days of the date the Supreme Court issued its decision in his case stating, “[c]learly, [Torrence] can present this claim via the inmate grievance procedure.” [Torrence, 646 S.E.2d at 870].

With all due deference to the ALC, its conclusion that it would have been futile for Torrence to file his grievance before August 22, 2004 constitutes plain error. In making this conclusion, the ALC clearly embraced and adopted Torrence's argument on this point.²⁸

However, the ALC ignored the reality that by *reversing* SCDC's denial of the inmate's prison industries wage grievance in *Wicker*, the ALC actually held, by its August 13, 2001 decision, that inmates, like Torrence, could file grievances under GA-01.12 in which they presented such claims. Moreover, as our Supreme Court clarified in its August 23, 2004 decision in *Wicker*, 602 S.E.2d at 56, the inmate who filed the grievance participated in the same project at Evans as Torrence. Thus, Torrence could have and should have followed the ALC's 2001 decision in *Wicker* and filed his Step 1 sometime between 2001 and when he actually filed his Step 1 in May 2007.

By its January 30, 2014 order, the ALC seemingly concluded that the ALC's August 13, 2001 decision in *Wicker* did not constitute binding precedent until affirmed by our Supreme Court on August 23, 2004 and that Torrence was somehow excused from filing his grievance until our Supreme Court issued *Torrence* in 2007.

Nothing, however, prevented Torrence from filing his Step 1 at any time before May 2007, and, rather than discouraging him from filing his Step 1 before 2007, the ALC's August, 13, 2001 decision in *Wicker* encouraged him to do so, or at least it should have. If the ALC's decision in *Wicker* didn't encourage him sufficiently, certainly the Supreme Court's decision in *Wicker* should have provided Torrence ample motivation to file his Step 1 sooner rather than later. Had he filed his Step 1 after the August 13, 2001 decision in *Wicker* and had SCDC denied his Step 1, it's entirely possible that the ALC, as it did in *Wicker*, would have reversed SCDC's

²⁸ See notes 13, 16, and 25 above.

denial of his Step 1. Even if the ALC affirmed SCDC's denial of his Step 1, Torrence could have appealed the ALC's decision to this Court.

Torrence would still have confronted the 15-day filing deadline from paragraph 13.1 of GA-01.12 had he filed his Step 1 sometime after the ALC's August 13, 2001 decision in *Wicker*, or even after our Supreme Court's August 23, 2004 decision affirming the ALC's decision in *Wicker*, but before May 2007 when he actually filed his Step 1.²⁹ Torrence could have attempted to overcome the filing deadline by invoking any part of paragraph 13.9, and, as required by paragraph 13.9's final sentence, requesting a waiver from the filing deadline.

Obviously, however, Torrence failed to file his Step 1 until May 2007. Moreover, when he actually did file his Step 1 and Step 2, Torrence failed to request a waiver of the 15-day filing deadline as required by paragraph 13.9's final sentence. Likewise, Torrence failed to claim in either his Step 1 or Step 2 that his wage claims concerned SCDC "policies/procedures," and, for that matter, he did not even utter the term "policies/procedures" in either filing.

Accordingly, the ALC erred in its January 30, 2014 order by granting the "policies/procedures" exception from paragraph 13.9 to Torrence's Step 1 when he failed to raise a request such relief in his Step 1 or Step 2. *See Home Med. Sys., Inc. v. S.C. Dept. of Rev.*, 677 S.E.2d 582, 586 (S.C. 2009).

D. TORRENCE'S GRIEVANCE WAS SUBJECT TO THE 15-DAY FILING DEADLINE, AS HE PRESENTED CLAIMS CONSTITUTING "INMATE PROPERTY COMPLAINTS" UNDER PARAGRAPH 7.4

In his Step 1 dated May 21, 2007, Torrence broke down his prison industries wage claim into eight (8) subsections, and he articulated the following specific claims in the first, second, fourth, and fifth subsections of the "Addendum" to his Step 1 (R. p. 123):

²⁹ As discussed below, the ALC applied the doctrine of equitable tolling to fill this gap.

Sections 24-3-40, 24-3-315, and 24-3-430(D) created a property interest in the prevailing wage (\$7.17) [I] earned during “regular” hours performed for the period by SCDC as Training Hours and [I am] entitled to said monies.

Sections 24-3-40, 24-3-315, and 24-3-430(D) created a property interest in the prevailing wage (\$10.75) [I] earned during “overtime” hours performed for the period described by SCDC as Training Hours, in [the first subsection], above, and [I am] entitled to said monies.

Sections 24-3-40, 24-3-315, and 24-3-430(D) created a property interest in the \$1.92 difference between the prevailing wage (\$7.17) paid by the private sector employer [ESCOD] for [my] “regular” hour labor and the wage (\$5.25) paid [me] by SCDC during the course of [my] private sector employment [August 1997 thru November 2004], including any change in the rate during [my] participation and [I am] entitled to said monies.

Sections 24-3-40, 24-3-315, and 24-3-430(D) created a property interest in the \$2.79 difference between the prevailing wage (\$10.75) paid by the private sector employer [ESCOD] for [my] “overtime” hour labor and the wage (\$7.86) paid [me] by SCDC during the course of [my] private sector employment [August 1997 thru November 2004], including any change in the rate during [my] participation and [I am] entitled to said monies. [emphasis supplied].

In the seventh subsection of his “Addendum,” Torrence articulated the following claim

(R. p. 123):

Section 24-3-40, 24-3-315, 24-3-430(D), 24-3-430(A)(5) and 24-3-430(B)(2) created a property interest in escrowed wages wherein [I am] entitled to complete and immediate access to the amount of [my] escrowed wages [\$5,368.00 as of November, 2004] to distribute them to persons or entities of his choice at the time said wages were escrowed for [my] benefit, but [I am] denied [my] personal benefit because of serving a life sentence. [emphasis supplied].

In the final order it issued January 20, 2016, the ALC, in articulating the applicable standard of review, observed as follows (R. p. 1031):

The Court's jurisdiction to hear this matter is derived from the South Carolina Supreme Court decisions in [*Al-Shabazz*]. The [*Al-Shabazz*] decision explained that “procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property.” [*Wicker*, 602 S.E.2d at 58] (citation omitted). The statutory mandate that inmates be paid

the prevailing wage creates a property interest that may not be denied without due process of law. [*Id.*] (citation omitted). Thus, when [SCDC] denies an inmate, dependent, victim, or other interested party property to which he or she is entitled by law, the matter is reviewable by the ALC via [GA-01.12]. [*See Torrence*, 646 S.E.2d at 869 – 70]. [emphasis supplied].

Therefore, based not just upon above-quoted passages from the “Addendum” to his May 27, 2007 Step 1, but also the above-quoted passage from the ALC’s January 20, 2016 order, Torrence’s claims clearly constituted complaints by him that SCDC unconstitutionally deprived him of his property by purportedly failing to pay him an hourly wage for his prison industries labor that conformed to the applicable state laws and, for that matter, the applicable federal laws, and federal regulations. As such, Torrence’s claims fell under paragraph 7.4 of GA-01.12 rather than paragraph 7.1.

Paragraph 7 is entitled “GRIEVABLE ISSUES,” and paragraph 7.1 provides that “[SCDC] policies/procedures, directives or conditions which directly affect an inmate” constitute issues which “will be considered grievable.” The term “policies/procedures” appears in the first sentence of paragraph 13.9, the paragraph which provides, upon an inmate’s request, an exception to the 15-day filing deadline. Paragraph 7 enumerates six (6) other grievable issues. *See Paragraphs 7.2 – 7.7.*

Of profound impact to the ALC’s January 30, 2014 ruling, “Inmate property complaints” are explicitly grievable under paragraph 7.4 of GA-01.12.

In its recent decision in *Ackerman, et al., v. S.C. Dep’t of Corr.*, 782 S.E.2d 757, 761 (S.C. Ct. App. 2016), this Court held as follows: “It logically follows that the remaining items in

paragraph 7, i.e., 7.2 through 7.7, were meant to serve as “incidents” for purposes of paragraphs 13.1 and 13.9.³⁰ [emphasis supplied].

As he explicitly alleged in his Step 1 and as the ALC explicitly recognized in its January 20, 2016 order, Torrence’s prison industries wages unquestionably constituted his property. *See Wicker*, 602 S.E.2d at 57 – 58 (“We find that where, as here, the state has created a statutory right to the payment of a prevailing wage, it cannot thereafter deny that right without affording due process of law ... The *Al-Shabazz* Court explained that procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment’s protection of ... property. [527 S.E.2d at 750].”) and *Williams*, 641 S.E.2d at 886, n. 1 (“In the companion case of [*Wicker*], we further held that inmates may not be deprived of this property interest without due process; accordingly, inmates were directed to file grievances if they wished to protest [SCDC’s] failure to pay a prevailing wage.”).

Therefore, the wage claims he articulated in his Step 1 unquestionably constituted “Inmate property complaints” as explicitly contemplated by paragraph 7.4. Consequentially, Torrence’s grievance constituted an “incident” grievance, and the ALC erred in its January 30, 2014 order by not ruling that the 15-day filing deadline from paragraph 13.1 barred his claims.

II. THE ALC ERRED IN ITS JANUARY 30, 2014 ORDER BY RULING THAT EQUITABLE TOLLING APPLIED TO TORRENCE’S GRIEVANCE

As illustrated in the previous argument, Torrence did not preserve the issue of whether the exception to the 15-day deadline for “policies/procedure” grievances from paragraph 13.9 applied to his Step 1, because he never raised the issue before SCDC in either his Step 1 or Step

³⁰ In its petition for rehearing in *Ackerman*, SCDC argued that the inmates’ claims were subject to the 15-day filing deadline as “incidents” under paragraphs 7.4 and 13.1. In its March 24, 2016 order denying SCDC’s petition for rehearing, this Court provided further clarification of the above-quoted passage from its decision and paragraph 7.4. SCDC raised this specific point in the petition for writ of certiorari it filed with the Supreme Court on May 2, 2016. *See* note 26 above.

2, nor did he identify the issue in his Notice of Appeal to the ALC. Instead, Torrence asserted exclusively in his grievance that he timely filed his Step 1 under the doctrine of equitable tolling, and he identified equitable tolling as an issue for review in his Notice of Appeal to the ALC.

A. THE ALC'S INTERPRETATION OF EQUITABLE TOLLING

In its January 30, 2014 order, the ALC framed the equitable tolling issue as follows (R. p. 400):

[Torrence] maintains that by filing his class action lawsuit in the Court of Common Pleas, he effectively tolled the filing requirement of his internal grievance. [Torrence] argues that a defective action, filed within the statute of limitations, maintained in a court of competent jurisdiction tolled the time to file an agency grievance. [SCDC] maintains that [Torrence] did not toll the time to file a grievance by filing a claim in the Court of Common Pleas.

The ALC embraced Torrence's invocation of the doctrine, and it did so by relying upon *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 687 S.E.2d 29, 32 – 33 (S.C. 2009). (R. pp. 400 – 01). According to the ALC's interpretation of *Hooper*, equitable tolling typically "applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." (citing *Hooper*, 687 S.E.2d at 32 and 54 C.J.S. *Limitations of Actions*, § 133 (2013)). The ALC also relied upon a precedent far outside our state, *Abbott v. State*, 979 P.2d 994, 998 (Alaska 1999), or the following proposition: "Under the doctrine of equitable tolling, when a party has more than one legal remedy available, the statute of limitations is tolled while the party pursues one of the possible remedies."

The ALC ruled as follows (R. p. 401):

In this case, [Torrence] did not have more than one legal remedy available, but no statute, regulation, or precedent established the proper procedure for bringing his claim. ... [Torrence's] case, originally filed as a class action in the Court of Common Pleas, was pending before the courts on August 23, 2004 when the *Wicker* and *Adkins* decisions were issued. This case presents the type of extraordinary circumstances in

which fairness demands that the doctrine of equitable tolling be applied. [Torrence's] existing lawsuit, filed prior to the time [SCDC] recognized grievances regarding pay claims, equitably tolled the time for filing a grievance during the period that lawsuit was pending. [Torrence] filed his Step 1 grievance within days of receiving the Supreme Court's final order and decision in [Torrence] holding that he could present his claim via the inmate grievance procedure. [emphasis supplied].

B. FACTS UNDERMINE THE ALC'S LOGIC AND REASONING

The above-quoted rationale by which the ALC applied equitable tolling to Torrence's Step 1 is undermined by the relevant and operative facts.

The ALC's conclusion that no "precedent established the proper procedure for bringing his claim" is decisively undermined by the reality that our Supreme Court issued *Wicker*, as well as *Adkins*, on August 23, 2004. Significantly, the ALC issued its decision in *Wicker* on August 13, 2001, three (3) days before counsel for Torrence and his fellow plaintiffs filed the class action which our Supreme Court eventually considered in *Torrence*.³¹

The notion that SCDC didn't recognize "grievances regarding pay claims" is likewise decisively undermined by the reality that it accepted, processed, and adjudicated the prison wage grievance filed by the inmate in *Wicker*. While it denied the inmate's wage claim, SCDC nonetheless defended the inmate's appeal to the ALC, and, once the ALC reversed its denial by the decision it issued on August 13, 2001, SCDC appealed the ALC's decision to this Court. Once our Supreme Court accepted *Wicker* on direct review, SCDC prosecuted its appeal of the ALC's decision in that forum.

SCDC's conduct in defending its legal position in no way shape or form constitutes any action – active or passive – on its behalf which interfered with or otherwise hindered Torrence's

³¹ As observed above, the civil action number for *Torrence* was 2001-CP-40-3409. The circuit court history for *Torrence* is available on-line via the Richland County Public Index. According to the Public Index, Torrence's counsel filed the class action on August 16, 2001, and the circuit court dismissed the class action on May 31, 2005. See <http://www5.rcgov.us/SCJDWEB/PublicIndex/PISearch.aspx>.

ability to discover his wage claims or to pursue his wage claims via an administrative grievance under GA-01.12.

C. THE STANDARDS ASSOCIATED WITH EQUITABLE TOLLING AS FASHIONED BY COURTS IN OUR STATE

SCDC respectfully contends that the ALC misapprehended the doctrine of equitable tolling, particularly the contours of the doctrine developed by this Court, our Supreme Court, federal courts in our state, and the United States Supreme Court.

This Court has recently declined to apply the doctrine of equitable tolling from *Hooper* in several of its unpublished opinions. See *Teal v. Hickman-Tedder*, -- S.E.2d --, 2015 WL 9393946, *1 (S.C. Ct. App. Dec. 23, 2015) (“... we conclude equitable tolling would not be proper in this case: See [*Hooper*, 687 S.E.2d at 32] (“Equitable tolling is judicially created; it stems from the judiciary’s inherent power to formulate rules of procedure where justice demands it.”); [*Id.*, 687 S.E.2d at 33] (“Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.”); [*Id.*] (“The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong *at the hands of the other.*” [emphasis by this Court]).

See also *Campbell v. Guignard*, -- S.E.2d --, 2015 WL 3819059, *1 (S.C. Ct. App. June 17, 2015) (quoting *Hooper*, 687 S.E.2d at 33); and *Griffis v. Cherry Hill Estates, LLC*, -- S.E.2d --, 2015 WL 1517412, *3 (S.C. Ct. App. Apr. 1, 2015) (quoting *Hooper*, 687 S.E.2d at 33).

Likewise, our federal courts have declined to apply the doctrine as established in *Hooper*. For example, in *Holmes v. Marion School Dist. One*, 2011 WL 4591647, *1 (D.S.C. Sept. 30, 2011), the federal court offered the following applicable analysis:

Additionally, the Court has carefully considered the plaintiffs' argument that the doctrine of equitable tolling applies to this case and their citation to [*Hooper*] in support. However, the Court finds that **equitable tolling does not apply here and that *Hooper* is inapposite to the facts here because *Hooper* involved the question of whether equitable tolling should apply in limited circumstances such as when a defendant fails to properly list its registered agent for service with the South Carolina Secretary of State, as required by state law. [*Hooper*, 687 S.E.2d at 32 – 34]. The South Carolina Supreme Court noted equitable tolling “should be used sparingly.” *Id.* at 33. [emphasis supplied].**

The federal court in *Wellin v. Wellin*, 2014 WL 234216, *4, (D.S.C. Jan. 22, 2014), offered a more robust analysis when it considered both *Hooper* and this Court's decision in *Magnolia North Property Owners' Ass'n, Inc., v. Heritage Communities, Inc.*, 725 S.E.2d 112 (S.C. Ct. App. 2012):

In South Carolina, equitable tolling “is a doctrine that should be used sparingly and only when the interests of justice compel its use.” [*Hooper*, 687 S.E.2d at 33]. It is generally applied only where the defendant's actions hinder the plaintiff's discovery of or ability to pursue the claim. [*Hooper*, 687 S.E.2d at 33 – 34]; see also [*Magnolia North*] (tolling the statute of limitations for a homeowners association to file claims against the developer for the time that the developer controlled the homeowners association). “Equitable tolling does not [, however,] require a showing that the defendant has made a misrepresentation to the plaintiff.” [*Magnolia North*, 725 S.E.2d at 125].³² [emphasis supplied].

In *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005), the United States Supreme Court relied on *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990), when it observed that, generally, “a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has

³² Our Supreme Court granted certiorari in *Magnolia North* on June 26, 2014, but it subsequently dismissed the writ as improvidently granted. 777 S.E.2d 831, 832 (S.C. 2015).

been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. See, e.g., [*Irwin*, 498 U.S. 89 at 96].”

D. THE ALC ERRED BY APPLYING EQUITABLE TOLLING

The ALC erred by applying equitable tolling in order to rescue Torrence’s Step 1 from the 15-day deadline, as, contrary to any allegation by Torrence or any finding by the ALC, SCDC literally did nothing whatsoever to hinder Torrence’s discovery of his wage claims or his ability to pursue his claims.

As explained above in Sections I(C) and II(B) of SCDC’s argument, Torrence confronted numerous instances in which he received notice that he should file a grievance under GA-01.12 in order to prosecute or at least preserve his wage claims.

If he couldn’t discern from these milestones that he urgently needed to file a Step 1 by which to pursue his wage claims, the circuit court’s dismissal of *Torrence* on May 31, 2005 surely alerted Torrence of the need to do so.³³ Any action by Torrence’s counsel which discouraged or otherwise restrained him from filing his Step 1 is simply not attributable to SCDC, particularly within the context of an equitable tolling analysis.

In *Pace v. DiGuglielmo*, 544 U.S. at 418, the United States Supreme Court observed that “[u]nder long-established principles, petitioner’s lack of diligence precludes equity’s operation. See [*Irwin*, 498 U.S. at 96]; *McQuiddy v. Ware*, 20 Wall. 14, 19, 22 L.Ed. 311 (1874) (‘Equity always refuses to interfere where there has been gross laches in the prosecution of rights’).”

Nothing, and certainly no action of any kind by SCDC, prevented or hindered Torrence from filing his Step 1 before May 21, 2007. As observed in *Pace*, a decision very close in kinship to *Hooper*, the ALC erred by allowing equity interfere with Torrence’s dilatory prosecution of his wage claims via an administrative grievance under GA-01.12.

³³ See note 31 above.

III. THE ALC ERRED IN ITS JANUARY 20, 2016 ORDER BY CALCULATING THE “PREVAILING WAGE”

A. THE ALC MISAPPREHENDED THE APPLICABLE STATE LAW, FEDERAL LAW, AND FEDERAL REGULATIONS

As illustrated above, SCDC discussed and relied upon the circuit court’s order in *Adkins* in the response it provided to Torrence’s Step 1 and the reply it provided to his Step 2. Obviously, our Supreme Court in *Adkins* considered not only the record generated during the trial conducted by the circuit court, but the circuit court’s order.

1. Section 24-3-430

The circuit court in *Adkins*, like the ALC, found that the project operated by SCDC in which the inmates participated “is and has been since its inception certified by” BJA pursuant to its PIECP, and it also found that “[t]he PIECP is codified at 18 U.S.C. Section 1761(c).” (R. p. 865).

Echoing the Ashurst-Sumners Act (18 U.S.C. § 1761), § 24-3-430(A) allows SCDC to “establish a program involving the use of inmate labor ... in private industry for **the manufacturing and processing of goods, wares, or merchandise ... or another business or commercial enterprise considered by the director to enhance the general welfare of South Carolina.**” [emphasis supplied].

Section 24-3-430(G) specifically references federally certified projects administered by BJA by declaring that “[n]o inmate who participates in a **project designated by the Director of [BJA]** pursuant to Public Law 90-351 is eligible for unemployment compensation upon termination from the program.” [emphasis supplied].

Our legislature assimilated the key provisions of Ashurst-Sumners, specifically 18 U.S.C.A. § 1761(c)(2) and (c)(4), by enacting the following subsections to § 24-3-430:

- (C) An inmate may participate in the program established pursuant to this section only on a **voluntary basis** and only after he has been informed of the conditions of his employment.
- (D) No inmate participating in the program may **earn less than the prevailing wage for work of similar nature in the private sector.**
- (E) Inmate participation in the program may not result in the displacement of **employed workers in the State of South Carolina** and may not impair existing contracts for services. [emphasis supplied].

2. The Ashurst-Sumners Act, 18 U.S.C. § 1761

The first component of Ashurst-Sumners, 18 U.S.C.A. § 1761(a), criminalized the transportation in interstate commerce of “any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners,” and our legislature assimilated this standard in § 24-3-410(A). Another component of Ashurst-Sumners, 18 U.S.C. § 1761(c), provided an exception to the criminal penalties established by subsection (a) for such items that are “manufactured, produced, or mined by convicts or prisoners” who:

- (1) are participating in—**one of not more than 50 non-Federal prison work pilot projects designated by the Director of the [BJA];**
- (2) have, in connection with such work, 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,** except that such wages may be subject to deductions which shall not, in the aggregate, exceed 80 per centum of gross wages, and shall be limited as follows:
 - (A) **taxes (Federal, State, local);**
 - (B) **reasonable charges for room and board, as determined by regulations issued by the chief State correctional officer, in the case of a State prisoner;**
 - (C) **allocations for support of family pursuant to State statute, court order, or agreement by the offender;**

(D) contributions to any fund established by law to **compensate the victims of crime** of not more than 20 per centum but not less than 5 per centum of gross wages.³⁴ [emphasis supplied].

However, §1761(c)(2) does not include, define, or quantify the term “prevailing wage.”

3. 64 FR 17000, et seq.

The BJA, as recognized by 18 U.S.C. § 1761(c)(1) and as acknowledged by both the circuit court in *Adkins* and the ALC, is the arm of the federal government which coordinates with state correctional authorities, such as SCDC, to establish, certify, and monitor PIECP projects, such as the project in which Torrence participated at Evans. BJA acts, under the authority of Ashurst-Sumners, through federal regulation, specifically 64 FR 17000.

BJA, 64 FR 17007, articulated the following definitions applicable to the PIECP projects it certifies and monitors:

Minimum wage refers to the Federal minimum wage which is the lowest possible wage that can be paid to private sector employees under the Fair Labor Standards Act, 29 U.S.C. 206. ... **The 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].

BJA, 64 FR 17007, articulated the following additional applicable definitions:

Prevailing wage is a wage rate which is not less than that paid for work of a similar nature in the locality in which the work is to be performed, 18 U.S.C. 1761(c)(2).³⁵ [emphasis supplied].

BJA, 64 FR 17009 – 10, also specifically addressed wages for inmates who participate in PIECP projects in the following manner:

PIECP inmate workers must receive wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work is to be performed. This requirement benefits society by allowing for the

³⁴ The legislature assimilated the provisions of 18 U.S.C. § 1761(c)(2)(A) – (D) when it amended S.C. Code § 24-3-40 in 1999. See § 24-3-40(A).

³⁵ Our legislature assimilated this language into our state's prison industries statutes by enacting § 24-3-315.

development of prison industries while protecting the private sector labor force and business from unfair competition that could otherwise stem from the flow of low-cost, prisoner-made goods into the marketplace. PIECP participants must, therefore, implement the prevailing wage requirements under like conditions experienced by private sector competition. Toward this end, the following requirements are applicable:

...
(B) **Prevailing wage verification must be obtained by the appropriate state agency which determines wage rates (usually the Department of Economic Security).**

...
(G) **The PIECP prevailing wage [cannot] be set below the Federal minimum wage, as defined in the [FLSA]. 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.**

(H) **Overtime, at one and a half times the rate of regular or prevailing wage, must be paid for prisoner hours worked in excess of 40 hours per week. See 29 U.S.C. 207(a) (a payment standard imposed on private sector competition). [emphasis supplied].**

4. **The ALC Ignored the Circuit Court's Analysis in *Adkins***

In its January 20, 2016 order, the ALC first accounted for the Ashurst-Sumners Act (R. p. 1033):

The federal statute requires that inmates in BJA-administered programs “[receive] wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work [is] performed.” [18 U.S.C. § 1761(c)(2)]. From these wages, deductions of up to 80% may be made for taxes, room and board, family support, and victim compensation. [*Id.*]

The ALC next accounted for BJA's controlling regulations (R. p. 1033):

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). [emphasis supplied].

The ALC continued as follows (R. p. 1033):

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].

The ALC next examined §§ 24-3-315 and 24-3-430(D) (R. p. 1033). The ALC, however, did not include § 24-3-410 in the above-quoted passages from its January 20, 2016 order. The circuit court in *Adkins* relied upon § 24-3-410, specifically § 24-3-410(B)(7), and SCDC referenced the circuit court's decisions in *Adkins* in its response to Torrence's Step 1 and its reply to his Step 2.

The ALC purposefully and, SCDC respectfully asserts, detrimentally ignored the circuit court's order in *Adkins*, and it did so as follows (R. p. 1035):

First, [SCDC] argues that "comparable wages" and "prevailing wage" are different concepts and that the requirement to pay a comparable wage does not require [SCDC] to pay the prevailing wage. **The term "comparable wages" is used in [§ 24-3-410]. This section is similar to the Ashurst-Sumners Act, in that it bans the sale of inmate-manufactured goods, with certain exceptions. The exception applicable to the PSPIP provides that the "inmate workers participate voluntarily, receive comparable wages, and the work does not displace employed workers." [§ 24-3-410(B)(7)]. [SCDC] cites a Circuit Court order in another case as support for the theory that [§ 24-3-410(B)(7)], and not [§ 24-3-430(D)], governs the wage standard applicable in this case. Not only is this Circuit Court order not binding, the argument for which it is cited contradicts the statements of the higher courts in this state. This Court declines to further address the argument that only [§ 24-3-410] applies, noting that the South Carolina Supreme Court has already stated that the program at issue in this case operated under [§] 24-3-430. [See *Torrence*, 646 S.E.2d at 867]. [emphasis supplied].**

The “Circuit Court order” referenced by the ALC in the above-quoted paragraph from its January 20, 2016 order is the order filed October 30, 2002 by the circuit court in *Adkins*.³⁶ (R. pp. 860 – 91). The ALC cited no authorities to support its assessment that “statements of the higher courts” in our state have contradicted of the circuit court’s rulings in *Adkins* concerning §§ 24-3-410(B)(7) and 24-3-430. If not contrary to the ALC’s assessment than at least in contrast to it, our Supreme Court, in affirming in result the circuit court’s rulings in *Adkins*, approvingly noted the circuit court’s decision. 602 S.E.2d at 55, n. 6.

Furthermore, the ALC’s assertion that our Supreme Court in *Torrence* stated that the project in which Torrence participated “operated under [§ 24-3-430]” is misleading. Unlike the circuit court in *Adkins*, the circuit court in *Torrence* never conducted a trial. The circuit court in *Torrence*, unlike the circuit court in *Adkins*, never considered the breadth of our state’s prison industries statutes, including § 24-3-410, nor did it consider these statutes in depth. Instead, the circuit court in *Torrence*, after the Supreme Court affirmed in result the circuit court’s in *Adkins* and affirmed the ALC in *Wicker*, granted SCDC’s motion for summary judgment on May 31, 2005.³⁷ The circuit court in *Torrence*, unlike the circuit court in *Adkins*, never considered exhibits or heard live sworn testimony from inmates, SCDC officials, and ESC officials.

Thus, the ALC declined to avail itself of the benefit of the circuit court’s work in *Adkins*, and it intentionally ignored § 24-3-410. The legislature enacted both §§ 24-3-410 and 24-3-430, and no subsequent enactment by the legislature or precedent issue by our appellate courts diminishes the reality that § 24-3-410 and 24-3-430 apply with equal force to SCDC’s federally certified prison industries projects.

³⁶ The civil action number for *Adkins* was 2000-CP-40-4761, and, just like *Torrence*, the litigation history of *Adkins* in circuit court is available on-line via the Richland County Public Index. See note 31 above.

³⁷ See note 31 above.

5. The Circuit Court in *Adkins* Considered Both §§ 24-3-410(B)(7) and 24-3-430(D)

The circuit court in *Adkins* rejected the inmates' contention that § 24-3-430(D) even applied to their demand for the "prevailing wage." It ruled that the provisions of § 24-3-410 and, specifically, § 24-3-410(B)(7) governed the inmates hourly wage "in the federally certified PIECP project operated by [SCDC], in conjunction with Standard Plywoods, at Tyger River."

As it recognized, § 24-3-410(B)(7) must be read in conjunction with the rest of § 24-3-410, and, specifically, § 24-3-410(A) (R. pp. 879 – 80):

- (A) It is unlawful to sell or offer for sale on the open market of this State articles or projects manufactured or produced wholly or in part by inmates in this or another state.
- (B) The provisions of this section do not apply to:
 - (7) products sold intrastate or interstate produced by inmates of [SCDC] employed in a *federally certified private sector/prison industries program* if the *inmate workers participate voluntarily, receive comparable wages, and the work does not displace employed workers.* ... The Department of Labor shall develop guidelines to determine if the work displaces employed workers. [italicized and underlined emphasis supplied by the circuit court].

The circuit court in *Adkins* concluded that § 24-3-410(B)(7) "precisely addresses activity in the [SCDC] project in which the [inmates] participate, which is a 'federal certified private sector/prison industries program.'" It then ruled that the inmates' "demand for the 'prevailing wage' is unsupported by the precisely applicable statutory authority," as § 24-3-410(B)(7) only provides that they "should receive comparable wages and not the 'prevailing wage' for their [prison industries] labor."

Finally, it ruled that the permanent hourly wage that SCDC paid the inmates after the inmates completed the first 320 hours of their labor, "i.e. the federal minimum wage of \$5.15 per hour, conforms to both the 'comparable wage' standard from [§ 24-3-410(B)(7)] *and* the

‘prevailing wage’ standard from [§ 24-3-430(D)] under the guidelines published by the [ESC].” [emphasis supplied]. (R. pp. 880 – 81).

Thus, following the template provided by the circuit court in *Adkins*, SCDC, by paying Torrence a regular hourly rate of \$5.25 (ten cents *above* the federal minimum wage applicable during the entirety of his participation) and an overtime hourly rate of \$7.86 once he completed the first 320 hours of his labor, satisfied the requirements imposed by state law, federal law, and federal regulations. While it understands that the circuit court’s order in *Adkins* does not represent binding precedent, SCDC urged the ALC, and it respectfully urges this Court, to consider the circuit court’s analysis and holdings in *Adkins*.

The reality is that no court in our state, including the circuit court in *Torrence*, has undertaken a comprehensive and comparative analysis of the various terms concerning prison industries wages in the federally certified projects operated by SCDC under the applicable statutes enacted by our legislature, which include §§ 24-3-315, 24-3-430, and, the ALC’s position notwithstanding, 24-3-410 in the same manner as the circuit court in *Adkins*. Of more precise significance to SCDC’s instant argument, the circuit court in *Adkins*, as illustrated below, had the immeasurable benefit of presiding over testimony elicited from the actual ESC representative whom the ALC identified in its January 20, 2016 order.

B. THE ALC’S ERRONEOUS DECISION TO CALCULATE THE “PREVAILING WAGE” AND ITS FLAWED CALCULATION OF THE “PREVAILING WAGE”

1. Conclusions upon which the ALC Erroneously Decided to Calculate the “Prevailing Wage”

The ALC, intent on depriving itself of the benefit of the circuit court’s rulings in *Adkins*, began deviating from the methodology actually used by the ESC when it collected and analyzed wage data as follows (R. p. 1036):

Third, [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].

The ALC continued as follows (R. p. 1036):

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 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)].

The ALC, however, overlooked several important realities. First, SCDC paid Torrence an hourly wage of \$5.25, ten cents above the federal minimum wage, as a base wage for the entirety of his labor after he completed his first 320 hours in the project, and SCDC calculated the overtime wage it paid Torrence upon the base wage. Second, no evidence exists in the record to confirm the hourly wage ESCOD *actually paid* its employees who performed job tasks identical or similar to those performed by Torrence. Finally, as discussed below, the ESC does not even use the term “prevailing wage” in its activities.

The ALC concluded as follows (R. pp. 1036 – 37):

Finally, [SCDC] argues that the \$5.25 regular hourly rate conformed to the wage data collected and published by the 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. [emphasis supplied].**

2. The ALC Erroneously Deviated from Both ESC Methodology and the Operative Federal Regulation

Having erroneously concluded that the \$5.25 hourly regular rate did not constitute a lawful wage, the ALC next observed as follows (R. p. 1037):

[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. [emphasis supplied].**

By stating that the calculation of the “prevailing wage” had not yet been addressed by courts in our state, the ALC overlooked the 2001 decision in *Wicker*, in which the ALC determined that the “prevailing wage” for the very project in which Torrence participated was \$5.25 per hour.³⁸ 2001 WL 1005574, *2. Likewise, the ALC purposefully ignored the analysis, conclusions, and rulings fashioned by the circuit court in *Adkins* after it conducted a two (2) day bench trial on August 8 and 9, 2002 during which it heard testimony from 10 inmates, two (2) employees of the private industry sponsor, two (2) official from SCDC, and Ms. Rebecca Eleazer, a key representative from the ESC. (R. pp. 861 and 864).

Again, the circuit court in *Torrence* never considered exhibits or heard testimony from inmates, SCDC officials, and ESC officials. For that matter, the ALC, in considering Torrence’s appeal of SCDC’s final decision, did not conduct a contested hearing at which the parties

³⁸ See notes 1, 8, and 20 above.

submitted evidence and presented witness testimony. *See* ALC Rules of Procedure 25 and 29. Instead, the ALC sat in its appellate capacity as it considered Torrence's appeal of SCDC's final decision. *See* ALC Rules of Procedure 51, *et seq.* SCDC, in considering Torrence's Step 1 and Step 2, also did not conduct a contested hearing, because GA-01.12 authorizes no such hearing.

Nevertheless, the ALC began calculating the "prevailing wage" (R. p. 1037):

In its argument that \$5.25 constitutes a permissible wage, [SCDC] seems to misapprehend the policy of the laws governing this private-sector program. [SCDC] argues in its brief that "[Torrence's] claim that the hourly rate of pay for his prison industries labor should have been identical to the hourly rate at which ESCOD paid its true employees is wholly without merit." While, it is true that the law does not require "identical" rates of pay to those paid by the same employer for similar work, there are strong policy reasons why inmates working in the private sector must be paid the prevailing wage of that sector.

Again, no evidence exists in the record which reflects the hourly wage ESCOD *actually paid* its employees who performed job tasks identical or similar to those performed by Torrence. The ALC could have directed the parties to introduce such evidence into the record when it ultimately remanded the matter back to SCDC for further proceedings, but it elected not to do so. Instead, the ALC continued apace (R. p. 1037):

Inmates must be paid the prevailing wage so that inmate labor does not create a cheaper alternative to non-inmate labor. *See* [Cartrette, 694 S.E.2d at 22] (Failure to pay inmates overtime "would create an impermissible and unfair advantage for inmate labor over private labor.");³⁹ [Adkins, 602 S.E.2d at 55] ("Given that the overall purpose of the prevailing wage statute is to prevent unfair competition, and to aid society and the public in general, we cannot conclude that the statutes in question were enacted for the special benefit of Inmates.")⁴⁰

³⁹ *See* SCDC's discussion of *Cartrette* in notes 3 and 21 above.

⁴⁰ Again, our Supreme Court, in affirming in result the circuit court's rulings in *Adkins*, approvingly noted the circuit court's decision. 602 S.E.2d at 55, n. 6.

The ALC then circled back language from §§ 24-3-315 and 24-3-430(D), but again it ignored § 24-3-410. (R. pp. 1037 – 38). The ALC next offered the following authorities as standards for its “prevailing wage” calculations (R. p. 1038):

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].

In yet another example of the ALC’s unfortunate misapprehension of the record,⁴¹ no affidavit from Ms. Eleazer appears in the record. Instead, Torrence included only selected excerpts from the deposition testimony provided August 10, 2004 by Ms. Eleazer during the litigation of *Torrence* in circuit court as an appendix to the Step 2 he filed with SCDC, and these excerpts appear in the record considered by the ALC.⁴² (R. pp. 533 and 604 – 39).

More importantly, the ALC overlooked the substance of Ms. Eleazer’s deposition testimony when she affirmed that the ESC, the agency by whom she was employed and the agency exclusively tasked by BJA to verify the “prevailing wage,” does “not have a wage classification called prevailing wage.” (R. p. 617). *See* 64 FR 17009 – 10(B).

The ALC also overlooked the reality that Ms. Eleazer’s deposition testimony in *Torrence* is totally consistent with the testimony she provided before the circuit court in *Adkins* during the two-day trial it conducted in August 2002 (R. pp. 887 – 88):

⁴¹ *See* notes 5 and 17 above.

⁴² Unsurprisingly, the excerpts of Ms. Eleazer’s deposition testimony submitted by Torrence with his Step 2 and upon which the ALC apparently relied reflect only responses Ms. Eleazer provided to questions posed by Torrence’s counsel, and these excerpts reflect objections to such questions by SCDC’s counsel.

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, Director [Tony Ellis] wrote Mr. Ted Gladden, ESC's Assistant Director for Labor Market Information, and asked him to review the hourly wage rate for the [project] in which the Plaintiffs participate. Director Ellis clearly stated that SCDC pays the Plaintiffs \$5.15 per hour. 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.

Ms. Rebecca 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.

...
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.

...
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 falls within ESC's wage range as recited by Mr. Gladden in his August 4, 2000 letter to Director Ellis. [emphasis supplied].**

Critically, the circuit court in *Adkins* noted that "Ms. Eleazer emphasized her agency **does not recognize or even use the term 'prevailing wage'** in compiling or publishing its wage data." (R. pp. 886 – 88).

3. The ALC's Flawed Calculation of the "Prevailing Wage"

The ALC nonetheless continued its efforts to calculate the "prevailing wage," a term not recognized or even used by the ESC, as follows (R. pp. 1038 – 39):

The PIECP Guideline requires that the prevailing wage must be obtained from the state agency that determines wage rates. [64 FR 17010]. In

South Carolina, this agency would have been the [ESC] at the times relevant to this case, but would now be the Department of Employment and Workforce (DEW). 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]. In referring to the ESC data in the record, the Court concludes that “locality” means the state of South Carolina. Further, the Court concludes that the data necessary to determine the mean average wage for “work of a similar nature” as contemplated by the state statutes and federal guidelines may be found by referring to the appropriate Occupational Employment Statistics (OES) or OCC code used by [ESC]. The record simply does not support a finding that the mean average wage for an assembler is as low as the \$5.25 [SCDC] paid [Torrence]. For example, in 1999, Ted Gladden of the [ESC] informed [SCDC] by letter that the mean average wage in 1997 for electronic assemblers was \$8.82. In 2000, Gladden informed [SCDC] that the mean average wage in 1998-1999 for electronic assemblers was \$9.92. While this evidence demonstrates that the data necessary to calculate the mean average wage is available from [the ESC], the evidence in the record is insufficient to calculate the wage for all of the relevant years.⁴³

The ALC then held that no evidence existed “in the record to support [SCDC’s] argument that [the hourly wages it paid Torrence conformed] with ESC data” and that to pay Torrence “less than the prevailing wage is an error of law.”⁴⁴ (R. p. 1039).

The ALC then, in contravention of the regulation published by BJA which explicitly states that “prevailing wage verification must be obtained by the appropriate state agency which

⁴³ The circuit court in *Adkins*, as reflected by the above-quoted passage from its order, accounted for correspondence provided by Mr. Gladden concerning the federally certified project it reviewed.

⁴⁴ In the associated footnote, the ALC provided the following critical ruling (R. p. 1039):

The Court acknowledges the footnote statement of the South Carolina Supreme Court, that “if appellants prove true their allegation that [SCDC] removes any of the money remitted by the private industry sponsor and then disburses the percentages listed in section 24-3-40 based on the lower rate, [SCDC] would be in violation of the plain language of the statute.” [*Torrence*, 646 S.E.2d at 870 n. 4] (citing § 24-3-40(A)) (emphasis in original)). Upon review, this Court concludes that [§] 24-3-40 does not bar [SCDC] from invoicing ESCOD for services provided in addition to inmate labor, such as the use of workspace. Here, [SCDC] did not remove any of the money intended to constitute wages prior to disbursing the percentages. Only money intended for other purposes was separated from the wages.

For the sake of clarity, SCDC does not appeal this ruling by the ALC, and Torrence did not appeal this or any other ruling by the ALC in either its January 30, 2014 order or its January 20, 2016 order.

determines wage rates” (i.e. 64 FR 17009 – 10(B)), erroneously quantified the “prevailing wage”

SCDC should have paid Torrence for his labor (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 [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. [bold emphasis supplied by the ALC].

In light of the foregoing analysis of the ALC’s January 20, 2016 order, SCDC respectfully argues that the ALC clearly erred not just by its decision to calculate the “prevailing wage” SCDC should have paid Torrence for his prison industries labor but in the methodology it used to calculate the purportedly applicable “prevailing wage” SCDC should have paid Torrence. Accordingly, this Court should reverse the ALC’s rulings on these issues.

IV. THE ALC ERRED IN ITS JANUARY 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)

A. THE ALC’S ANALYSIS AND HOLDINGS

The ALC framed the issue as follows (R. pp. 1039 – 40):

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. [emphasis supplied and citation omitted].

The ALC examined precedent concerning statutory construction and continued as follows:

(R. p. 1041):

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 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.** [emphasis supplied].

The ALC then held 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]. (R. p. 1042).

B. THE ALC ERRED WHEN IT REVERSED SCDC'S DECISION

With all due deference to the ALC and with SCDC's apologies for the invocation of the following phrase, SCDC respectfully asserts that the ruling fashioned by the ALC "splits the baby" by providing at least part of the relief demanded by Torrence but just not all of the relief he demanded.

As recognized by the ALC, § 24-3-40(B)(2) reads, in its entirety, as follows: "A prisoner **serving life in prison or sentenced to death** shall be given the option of having his escrowed wages included in his estate or distributed to the persons or entities of his choice" [emphasis supplied]. No need existed for the ALC to harmonize §§ 24-3-40(A)(5) and (B)(2) by resorting to the rules of statutory construction, because a plain reading of § 24-3-40(B)(2), within the context of both §§ 24-3-40(B)(1) and (B)(3), makes it clear that Torrence, as an inmate serving a

life sentence in SCDC's custody, may only distribute the monies held in escrow for his benefit by operation of § 24-3-40(A)(5) upon his natural death.

The ALC overlooked §§ 24-3-40(B)(1) and (B)(3) in its analysis. Moreover, by concluding that a plain reading of § 24-3-40(B)(2) does not conform to § 24-3-40(A)(5)'s intent that the monies withheld from his wages are for Torrence's benefit, the ALC overlooked the reality that Torrence will indeed benefit by having monies available for distribution to family members or even charitable causes upon his natural death.

Therefore, SCDC respectfully asserts that the ALC committed plain error by reversing SCDC's denial of Torrence's demand for immediate access to his monies held in escrow by operation of § 24-3-40(A)(5).

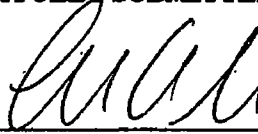
CONCLUSION

In the four (4) rulings in its January 30, 2014 and January 20, 2016 orders subject to the instant appeal, SCDC respectfully argues the ALC made findings that were clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, employed reasoning detrimentally affected by errors of law, and rendered arbitrary and capricious conclusions.

Accordingly, SCDC respectfully urges this Court, under the provisions of §§ 1-23-610(B)(d), (e), and (f), to reverse each of the ALC's four (4) rulings.

RESPECTFULLY SUBMITTED,

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**Columbia, South Carolina
January 3, 2017**

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
Trial Court Case No. 2012ALJ040143AP

Thomas J. Torrence, #094651, Respondent,

v.

South Carolina Department of Corrections, Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Appellant's Final Brief complies with Rule 211(b), SCACR.

January 3, 2017



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify that I have served **THE APPELLANT'S FINAL BRIEF** on the above named *pro se* Appellant by mailing a copy to him, first class postage pre-paid, at the following address:

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January 3, 2017


LAKE E. SUMMERS

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JAN 03 2017

SC Court of Appeals

Page 1 of 1

**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

Trial Court Case No. 12ALJ0400143AP

Thomas J. Torrence, #094651 Respondent,

v.

South Carolina Department of Corrections Appellant.

RESPONDENT'S FINAL BRIEF

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TABLE OF CONTENTS

Table of Authorities	iv.
Statement of Issues on Appeal	1
Statement of the Case	2
I. TORRENCE’S PRE-GRIEVANCE LITIGATION	2
II. TORRENCE’S AGENCY GRIEVANCE	4
A. TORRENCE’S STEP 1	5
B. SCDC’S RESPONSE TO TORRENCE’S STEP 1	7
C. TORRENCE’S STEP 2	8
D. SCDC’S RESPONSE TO TORRENCE’S STEP 2	9
III. TORRENCE’S NOTICE OF APPEAL TO THE ALC	9
IV. THE ALC ORDERS ON APPEAL	10
A. THE ALC’S JANUARY 30, 2014 ORDER	10
B. SCDC’S APPEAL OF THE JANUARY 30, 2014 ORDER	12
C. SCDC’S MOTION TO HOLD FURTHER ALC RESOLUTION OF THE APPEAL IN ABEYANCE	13
D. THE ALC’S JANUARY 20, 2016 ORDER	13
Standard of Review	17
Argument	19
I. THE ALC’S JANUARY 30, 2014 ORDER PROPERLY HELD THAT TORRENCE TIMELY FILED HIS GRIEVANCE	19
A. TORRENCE’S GRIEVANCE DISTINGUISHED FROM <i>Okeru</i>.....	19
B. TORRENCE’S STEP 1, STEP 2, NOTICE OF APPEAL TO THE ALC AND HIS ALC BRIEFS CHALLENGED SCDC’S POLICIES AND PROCEDURES IN PAYING LESS THAN THE PREVAILING WAGE	20
C. SCDC RAISED THE DEFENSE OF STATUTE OF LIMITATIONS ..	24

D.	SCDC’S POLICY GA-01.12 PARAGRAPH 13.9 AND SCDC FORM 10.5 ESTABLISH A WAIVER OF THE 15-DAY FILING DEADLINE..	26
E.	TORRENCE’S GRIEVANCE CHALLENGING SCDC’S POLICY OF PAYING A TRAINING WAGE AND LESS THAN THE PREVAILING WAGE CONFORMED TO THE 15-DAY FILING DEADLINE EXCEPTION	28
F.	TORRENCE’S GRIEVANCE PRESENTED CLAIMS CONSTITUTING “CONDITIONS WHICH DIRECTLY AFFECT THE INMATE” BY PAYING LESS THAN THE PREVAILING WAGE MANDATED BY STATUTE	30
G.	TORRENCE’S GRIEVANCE CONCERNS POLICIES/PROCEDURES UNDER PARAGRAPH 7.1 AND NOT A PROPERTY CLAIM UNDER PARAGRAPH 7.4	31
H.	THE FILING OF <i>Torrence</i> IN CIRCUIT COURT WITHIN ANY APPLICABLE FILING DEADLINE PLACED SCDC ON NOTICE OF TORRENCE’S CLAIMS	32
II.	THE ALC’S JANUARY 30, 2014 ORDER PROPERLY HELD THAT EQUITABLE TOLLING APPLIED TO TORRENCE’S GRIEVANCE	32
A.	THE ALC’S ANALYSIS OF THE FACTS AND LAW IN DETERMINING EQUITABLE TOLLING APPLIED TO TORRENCE’S GRIEVANCE	32
B.	MONEY DAMAGES WERE NOT AN AVAILABLE REMEDY UNDER GA-01.12 AT THE TIME TORRENCE FILED A CIVIL ACTION	34
C.	THE CIVIL ACTION <i>Torrence, et al v. South Carolina Department of Corrections</i> , C/A NO. 01-CP-40-3409 EQUITABLY TOLLED TORRENCE FILING AN AGENCY GRIEVANCE	35
D.	THE NOVEMBER 25, 2002 AND MAY 24, 2005 CIRCUIT COURT ORDERS IN <i>Torrence</i> , C/A NO. 01-CP-40-3409 DEMONSTRATE SCDC’S POSITION AND THE PROCEDURAL POSTURE OF THE CASE WAS CONTROLLED BY <i>Wicker</i> AND SUPPORTED EQUITABLE TOLLING	36
E.	TORRENCE’S FILING OF <i>Torrence</i> ESTOPPED SCDC FROM PLEADING THE STATUTE OF LIMITATIONS	37
III.	THE JANUARY 20, 2016 ORDER OF THE ALC PROPERLY DEFINED AND CALCULATED THE “PREVAILING WAGE”	39

A.	THE ALC PROPERLY ANALYZED APPLICABLE STATE LAW, FEDERAL LAW, AND FEDERAL REGULATIONS	39
1.	Section 24-3-315	39
2.	Section 24-3-430	40
3.	Section 18 U.S.C. §1761	40
4.	64 FR 17000, et seq.	40
5.	Circuit Court Analysis in <i>Adkins</i>	41
B.	THE ALC PROPERLY DEFINED AND CALCULATED THE “PREVAILING WAGE”	42
1.	The definition of the term “prevailing wage”	42
2.	The ALC Properly Applied ESC/DEW Methodology and the Operative Federal Regulation	43
C.	THE ALC PROPERLY HELD THAT TORRENCE WAS ENTITLED TO THE “PREVAILING WAGE”	44
1.	The ALC properly held Torrence was entitled to the prevailing wage during the “training period”	44
2.	The ALC properly held Torrence was entitled to the prevailing wage for the post-training hours	44
IV.	THE ALC’S JANUARY 20, 2016 ORDER CORRECTLY HELD 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) AND (B)(2)	45
A.	THE ALC’S ANALYSIS AND HOLDINGS	45
B.	THE ALC CORRECTLY REVERSED SCDC’S DECISION	45
V.	THE APPELLATE COURT MAY AFFIRM THE JANUARY 30, 2014 AND JANUARY 20, 2016 ORDERS OF THE ALC ON ANY GROUND IT FINDS IN THE RECORD	46
	Conclusion	47
	Certificate of Pro Se Counsel	48

TABLE OF AUTHORITIES

CASES

<i>Abbott v. State</i> , 979 P.2d 994 (Alaska 1999)	34
<i>Ackerman et al., v. S.C. Dep't of Corr.</i> , 782 S.E.2d 757 (S.C. Ct. App. 2016)	passim
<i>Ackerman et al., v. S.C. Dep't of Corr.</i> , Docket No. 07-ALJ-04-00444-AP- et seq. (ALJD July 26, 2012)	11 - 13, 28
<i>Adkins et al., v. S.C. Dep't of Corr.</i> , Case No. 2000-CP-40-4761 (S.C. Cir. Ct., October 30, 2002)	9, 23, 41, 44
<i>Adkins et al., v. S.C. Dep't of Corr.</i> , 602 S.E.2d 51 (S.C. 2004)	passim
<i>Al-Shabazz, v. State</i> , 527 S.E.2d 742 (S.C. Ct. App. 2000)	passim
<i>Brown v. Bi-Io, Inc.</i> , 581 S.E.2d 838 (S.C. 20036)	23
<i>Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control</i> , 564 S.E.2d 341 (S.C. Ct. App. 2002)	18
<i>Calcutt v. Calcutt</i> , 320 S.E.2d 55 (S.C. Ct. App. 1984)	25-26
<i>Calhoun v. Calhoun</i> , 529 S.E.2d 14 (S.C. 2000)	20
<i>Eason v. Eason</i> , 682 S.E.2d 804 (S.C. 2009)	27
<i>Eubank v. Eubank</i> , 555 S.E.2d 413 (S.C. Ct. App. 2009)	26
<i>Henderson v. Griffin</i> , 5 Pet. 151, 30 U.S. S.Ct. 151 (1831)	37
<i>Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.</i> 687 S.E.2d 29 (S.C. 2009)	33
<i>In re: Robert D.</i> , 530 S.E.2d 137 (S.C. Ct. App. 2000)	24
<i>Irvin v. Dept. of Veteran Affairs</i> , 498 U.S. 89 (1990)	35
<i>Johnson v. Johnson</i> , 425 S.E.2d 426 (S.C. Ct. App. 1992)	25
<i>Lyles v. BMI, Inc.</i> , 355 S.E.2d 282 (S.C. Ct. App. 1987)	27
<i>McCummings v. S.C. Dept. of Corrections</i> , 462 S.E.2d 271 (S.C. 1995)	33
<i>McKissick v. J. F. Cleckley & Co.</i> , 479 S.E.2d 67 (S.C. Ct. App. 1996)	17

<i>Moriarity v. Garden Sanctuary Church of God</i> , 534 S.E. 2d 672 (S.C. 2000)	36
<i>Murphy v. S.C. Dept of Health and EnvH. Control</i> , 723 S.E.2d 191 (S.C. 2012)	33
<i>Okera v. S.C. Dep't. of Corr.</i> , 2012 WL 10907962 (2012-MO-042)	19 – 20
<i>Okera v. S.C. Dep't. of Corr.</i> , 08-ALJ-04-00887 (ALJ June 29, 2009)	20
<i>Pace v. DiGuglielmo</i> , 554 U.S. 408 (2005)	33
<i>Parsons v. Gibbes</i> , 37 S.E. 753 (S.C. 1901)	26
<i>Peterson v. Richland County</i> , 515 S.E.2d 553 (S.C. Ct. App. 1999)	24
<i>Piatt v. McDougall</i> , 773 F.2d 1032 (9 th Cir. 1985)	31
<i>Rosemond v. SCDC</i> , 00-ALJ-04-00021-AP (ALJD 2000)	9
<i>Rink v. Richland Memorial Hospital</i> , 422 S.E. 2d 747 (S.C. 1992)	37
<i>S.C. Coastal Conservation League v. S.C. Dep't. of Health & Envtl. Control</i> , 669 S.E.2d 899 (S.C. Ct. App. 2008), <i>rev'd</i> 702 S.E.2d 246 (S.C. 2010)	18
<i>S.C. Dep't. of Corr. v. Cartrette</i> , 694 S.E.2d 18 (S.C. Ct. App. 2010)	passim
<i>S.C. Dep't. of Corr. v. Mitchell</i> , 659 S.E.2d 233 (S.C. Ct. App. 2008)	17
<i>State v. Russell</i> , 546 S.E.2d 202 (S.C. Ct. App. 2001)	24
<i>StearnsMiller v. SCDC</i> , 00-ALJ-04-00021-AP	9
<i>Swentor v. Swentor</i> , 520 S.E.2d 330 (S.C. Ct. App)	26
<i>Thomas Torrence and Henry Hubbard, Jr., v. S.C. Dep't. of Corr. and S.C. Budget & Control Bd.</i> (C/A No. 2001-CP-40-3409) (Original Complaint)	2
<i>Torrence et al., v. S.C. Dep't. of Corr.</i> (C/A No. 2001-CP-40-3409) (Second Amended Complaint)	3
<i>Torrence et al., v. S.C. Dep't. of Corr.</i> (C/A No. 2001-CP-40-3409) (Cir. Ct. Order November 25, 2002)	3
<i>Torrence et al., v. S.C. Dep't. of Corr.</i> (C/A No. 2001-CP-40-3409) (Cir. Ct. Order May 24, 2005)	3

<i>Torrence et al., v. S.C. Dep't. of Corr.</i> 646 S.E.2d 866 (S.C. 2007)	passim
<i>Wicker v. S.C. Dep't. of Corr.</i> 602 S.E.2d 56 (S.C. 2004)	passim
<i>Wicker v. S.C. Dep't. of Corr.</i> 2001 WL 1005574 (ALJD August 13, 2001) [ALC Docket No. 00-ALJ-04-00781-AP; Grievance No. Ker-0353-00]	passim

STATUTES

18 U.S.C. § 1761(c)	4, 14, 39
18 U.S.C. § 1761(c)(2)	passim
18 U.S.C. § 1761(c)(4)	23
S.C. Code Ann. § 1-23-380	14, 17
S.C. Code Ann. § 1-23-380(A)(6)	10, 16
S.C. Code Ann. § 1-23-610(B)	17
S.C. Code Ann. § 24-3-40	passim
S.C. Code Ann. § 24-3-40(A)(5)	passim
S.C. Code Ann. § 24-3-40(B)(2)	3, 10, 16, 23
S.C. Code Ann. § 24-3-315	passim
S.C. Code Ann. § 24-3-410(B)(7)	7, 9, 41, 42
S.C. Code Ann. § 24-3-430	passim
S.C. Code Ann. § 24-3-430(C)	22, 23, 29, 31
S.C. Code Ann. § 24-3-430(D)	passim

REGULATIONS

64 FR 17000, et seq	passim
---------------------------	--------

OTHER AUTHORITIES

South Carolina Appellate Court Rules, Rule 220(C) 46

S.C. 1987 Act No. 177, § 2 4, 39

S.C. 1995 Act No. 7, Part II, § 43 4, 40

S.C. 1999 Act No. 68, § 2 2, 45

54 C. J. S. Limitations of Actions § 133 (2013) 33

S.C. 1999 House Bill 3216 45

S.C. 1999 House Bill 384 45

AGREEMENT (March 3, 2001)
(Parties: South Carolina Department of Corrections and Insilco Technologies) 5, 42

Black's Law Dictionary, Eighth Edition (2004) 21

South Carolina Department of Corrections
General Administration Policy Number GA-01.12 passim

South Carolina Department of Corrections Form 10-5
Grievance Form – Step 1 27

The American Heritage College Dictionary, Third Edition 10, 21

Webster's New Universal Unabridged Dictionary 21

STATEMENT OF ISSUES ON APPEAL

The Appellant, the South Carolina Department of Corrections ["SCDC" or "Department"], appeals the January 30, 2014 and January 20, 2016 Orders issued by the South Carolina Administrative Law Court ["ALC"]¹ in the instant matter. By these orders, pursuant to S.C. Code §1-23-380, the ALC reversed several final decisions made by SCDC concerning prison industries wage claims articulated in an administrative grievance filed by the Respondent, Thomas J. Torrence ["Torrence"], under SCDC's Inmate Grievance Policy System, designated as General Administration Policy Number GA-01.12 ["GA-01.12"].

- I. Did the ALC's January 30, 2014 order properly find that Torrence timely filed his grievance?
- II. Did the ALC's January 30, 2014 order properly find that equitable tolling applied to Torrence's grievance?
- III. Did the ALC's January 20, 2016 order properly define and calculate the "prevailing wage"² that SCDC should have paid Torrence for his prison industries labor?
- IV. Did the ALC's January 20, 2016 order properly rule that Torrence must be allowed to designate persons or entities to receive an immediate distribution of funds held in escrow for his benefit pursuant to S.C. Code §24-3-40(A)(5)?
- V. The Appellate Court may affirm the January 30, 2014 and January 20, 2016 Orders of the ALC on any ground it finds in the record.

¹ The Honorable Deborah Brooks Durden, Administrative Law Judge.

² S.C. Code §24-3-315, without using the specific nomenclature "prevailing wage," states in part "... and that the rates of pay and other conditions of employment are not less than those paid and provided for work of a similar nature in the locality in which the work is performed." That statute was later supported by §24-3-430(D), "No inmate participating in the program may earn less than the prevailing wage for work of a similar nature in the private sector." Both South Carolina statutes contemplate 18 USC §1761(c)(2) and 64 FR 17010 as defining the substance of the phrase and process for obtaining the "prevailing wage." The ALC in *Wicker v. S.C. Dep't of Corr.*, 2001 WL 1005574 was not asked to calculate the prevailing wage, but was asked by Wicker for the wage rate paid following the "training wage" period (\$5.25 per hour), which was the focus of Wicker's grievance. This Court of Appeals remanded *S.C. Dep't of Corr. v. Carrette*, 694 S.E.2d 18 (S.C. Ct. App. 2010) back to the ALC with seven (7) questions to determine the prevailing wage. Torrence asked the ALC here to formulate a calculation 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.

STATEMENT OF THE CASE.

I. TORRENCE'S PRE-GRIEVANCE LITIGATION

Torrence voluntarily participated in a federally certified prison industries project at Evans Correctional Institution from June 1997 to November 2004, (R p.393). The private sector industry sponsor was ESCOD Industries or Insilco Global Technologies.

The South Carolina Legislature amended S.C. Code §§24-3-40 and 24-3-430 by 1999 Act No. 68, §2. In 1999, Torrence and other prisoners complained to SCDC Division of Industries personnel, with no results. In 2000, Torrence and Inmate William Ray Ward petitioned the Department under the South Carolina Administrative Procedures Act ("APA") to change the wage payment practice. That petition went unanswered.³ At that time, the SCDC Grievance Policy (GA. 01.12, Paragraph 10.2) did not have a remedy for monetary claims other than the value for the loss/damage of personal property.

Upon receiving no answer to the APA petition, in 2000, Mr. Ward filed the wage policy claims in the United States District Court for South Carolina naming the SCDC Director, Prison Industries and Financial Accounting Personnel.⁴ Mr. Ward filed for a voluntary dismissal in order to file the claims in state court.

Torrence and Inmate Henry Hubbard filed a civil action in the Richland County Court of Common Pleas.⁵ Torrence and Ward obtained counsel, who amended the declaratory judgment action, adding additional plaintiff class representatives in May 2002.⁶

³ March 26, 2015 APPELLANT'S ORIGINAL BRIEF, p. 6. (Neither party made that petition part of the Record before the ALC, but it is not contested.); See Torrence's Affidavit in support of Step 2, Item No. 3, R. pp. 143 - 144.

⁴ Case/Docket Number unavailable

⁵ *Thomas Torrence and Henry Hubbard Jr. v. South Carolina Department of Corrections and the South Carolina Budget and Control Board*, C/A 2001- CP- 40-3409 [Original complaint].

⁶ *Thomas J. Torrence and William Ray Ward on behalf of themselves and all others similarly situated; Kimberly Dubose on behalf of herself and others similarly situated; and Susan Smith, on behalf of herself and all others*

On July 25, 2002, SCDC, by and through counsel in the instant appeal, filed a Motion to Dismiss the Second Amended Complaint for failure to state a claim. The Honorable J. Ernest Kinard, Jr. conducted a hearing on October 14, 2002. In a four (4)-page written Order dated November 25, 2002, Judge Kinard denied SCDC's Motion to Dismiss. That order was *after* the time of the Circuit Court and ALC orders in *Wicker* but *preceding* the Supreme Court's 2004 decision, in *Wicker*.

On February 14, 2005, in light of the companion *Adkins*⁷ and *Wicker*⁸ decisions, SCDC renewed its Motion to Dismiss in *Torrence, et al.* The Honorable D. Garrison Hill conducted a hearing on March 8, 2005 and in a May 24, 2005 Order, granted SCDC's Motion to Dismiss based upon:

"[A]ny access to such wages to which Plaintiff Torrence may be entitled must be addressed under *Wicker*, by Plaintiff Torrence filing a Grievance, *if he so elects*, to protest SCDC's alleged failure to provide him access he seeks in accordance with his interpretation of §24-3-40. SCDC would adjudicate any such grievance from Plaintiff Torrence in accordance with its applicable inmate grievance procedures, and, if SCDC denies the relief sought in such a grievance, Plaintiff Torrence may appeal any such denial to the Administrative Law Court."⁹

Torrence, through counsel, appealed Judge Hill's Order and denial of Motion for Reconsideration to the Court of Appeals. Our Supreme Court took jurisdiction of the case, and *affirmed* the Circuit Court in *Torrence, et al. v. S.C. Dep't of Corr.*, 640 S.E.2d 866 (S.C. 2007).

similarly situated, Plaintiffs, vs. South Carolina Department of Corrections and the State of South Carolina, Defendants [Second Amended Complaint].

⁷ *Adkins, et al. v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (2004)

⁸ *Wicker v. S.C. Dep't of Corr.*, 602 S.E.2d 56 (2004)

⁹ May 24, 2005 Order of Judge Hill, pg. 22. (Emphasis added); May 24, 2005 Order, p. 17, (Regarding Torrence's Long Term Savings Account claim under §24-3-40(A)(5) and (B)(2)); and May 24, 2005 Order, p. 18 (in regards to overtime pay and other benefits.)

Torrence diligently pursued his legal rights in regards to SCDC's private sector prison industries wage practice and procedures.

II. TORRENCE'S AGENCY GRIEVANCE

Torrence's agency grievance was predicated upon the claims sought in *Torrence* and at all times challenged the policy, practice or procedures in which SCDC paid, withheld, disbursed, or granted access to prisoner wages earned in the federally certified private sector prison industries program operated in contravention of Federal¹⁰ and South Carolina Law.¹¹ Since program inception, *no written SCDC policy or procedure* existed to authorize or support SCDC in regards to the private sector prison industries' wage practice and procedure for participating prisoners. See September 12, 2002 deposition of Tony Ray Ellis (former SCDC Prison Industries Director), "...[b]ut I can tell you how we practice it and what we're doing," (R. p.568); "we administratively allow it," (R. p.569); "that is an administrative decision made by the agency," (R. p.574) and:

- Q: Do you have any documents out there to tell why you started this *procedure* of putting the wages down and adding to it the Social Security withholding and the workmen's compensation premium and then the Surplus Fund? Is there anywhere I can find out why this came about and how you decided to do that?
- A: We sat down with staff at the inception of the program when we first started with our accounting staff and our legal staff and *we came up and derived this*.
- Q: Is there some kind of document that sets forth how that was arrived and under what authority you did it and so forth?
- A: *We set it as an administrative exercise* with these three entities: the legal staff, the accounting staff, and me.

¹⁰ 18 USC §1761(c) and 64 FR 17000 et seq.

¹¹ S.C. Code §24-3-315 (1987 Act No. 177 §2) (enacted for specific purpose of certifying assurance of authority by state legislation to comply with federal guidelines. A certified copy was attached to SCDC's application to the Department of Justice ("DOJ") Bureau of Justice Assistance ("BJA")). Later 1995 legislation enacted S.C. Code §24-3-430 (1995 Act No. 7, Part II, §43.)

Q: And there's no writing about it, ya'll just decided to do it and you did it.

A: *We decided to do it that way*, that's correct.

Q: And I *can't find any writings about it* or anything that you know of?

A: *Not that I'm aware of.*

R. p.579 (Emphasis Torrence's).

A. TORRENCE'S STEP I

Torrence filed a Step I grievance form and addendum with SCDC at Broad River and Evans Correctional Institutions on May 21, 2007, within fifteen (15) days of notice of the Supreme Court's May 7, 2007 decision in *Torrence* (R. pp. 500 -504).

SCDC failed to timely process Torrence's instant grievance [ECI-980-10]. Torrence made two (2) attempts via correspondence [April 21, 2010 and June 24, 2011] to have SCDC process his Step I Grievance.

SCDC Grievance Branch Chief Mary Coleman responded that attorney Lake Summers was reviewing the grievance and would respond after the review. Previous correspondence from SCDC Grievance Administrators intimated that "no response to ECI-980-10 will be forthcoming until a disposition by the Appellate Court in a lawsuit to which this Petitioner is not a party." SCDC clearly stated "we cannot serve you with a response."¹²

On October 5, 2011, Torrence filed a Petition for Writ of Mandamus in the Supreme Court of South Carolina "to compel SCDC to perform the ministerial duty of filing, docketing and resolving Petitioner's agency grievance."¹³ On October 17, 2011, the Honorable Clerk of the Supreme Court notified SCDC of the Petition and instructed SCDC to

¹² Torrence's PETITION FOR WRIT OF MANDAMUS, AMENDED REPLY TO RESPONDENT'S RETURN, November 10, 2011, pg. 1 (R. p. 50)

¹³ Torrence's PETITION FOR WRIT OF MANDAMUS, October 5, 2011, p.1 (R. p. 0003)

enter and serve a response by October 27, 2011. SCDC, by and through instant counsel, entered a RETURN TO PETITION FOR WRIT OF MANDAMUS in which counsel submitted it would "... process and adjudicate the Petitioner's agency grievance..."¹⁴

Torrence's Step 1 articulated no "claim" as to being recognized as an employee of any entity, as SCDC asserted in its Initial Brief, p. 2 n. 3. Torrence's May 26, 2015 Original Brief, p. 3 n. 7, wrestled with the appropriate "description" of his labor in light of being a taxpayer and SCDC's own *AGREEMENT* with the private sector sponsor (Escod / Insilico Technologies) utilizing such language as "ARTICLE 3. Conditions Related to Employment of Inmates" (R. p.674) (Original emphasis); "the Contractor shall employ a minimum of 60 inmates full time" (R. p.674), (Emphasis added); "the Contractor shall then select those inmate workers that they wish to hire," (R. p.674) (Emphasis added); and "the inmates employed in the project," (R. p. 676), (Emphasis added).

Torrence's Step 1 and Addendum thereto (R. pp. 121 - 124) clearly indicates, absent any specific nomenclature, that SCDC's procedures and practices in the prevailing wage rates and distribution of those wages earned by prisoners in the private sector program, and the practice of denying access to such wages escrowed for the benefit of the prisoner, are issues regarding policies and procedure

B. SCDC'S RESPONSE TO TORRENCE'S STEP I

SCDC entered a Step I Grievance Response dated December 1, 2011 (R. pp. 128 - 133), three and one-half (3½) years after the date Torrence filed the grievance. SCDC's

¹⁴ SCDC's RETURN TO PETITION FOR WRIT OF MANDAMUS, October 27, 2011, p. 10 (R. p.36)

response to Step 1 followed only after Torrence sought the Writ of Mandamus to order SCDC to adjudicate his grievance.¹⁵

SCDC's Step I Response pled the statute of limitations where Torrence filed his Step 1 "nearly 10 years after he began participating in the project, and nearly 2½ years after our Supreme Court issued *Adkins* and its companion case of *Wicker*," (R. p. 131); SCDC's Initial Brief, p. 4 (citations omitted).

SCDC's Step 1 Response conceded that Torrence's Step 1 complained of the *practice* of "pay remitted to you by the agency," (R. p.128); that "SCDC paid you [] a 'training wage,'" (R. p.128); and SCDC's response stated "SCDC ended its *policy of paying* a 'training wage,'" (R. p.129), (Emphasis added).

SCDC's Step 1 Response concluded that the provisions of §24-3-410(B)(7) and not §24-3-430(D) applied to the rate of pay SCDC was required to remit, Appellant's Initial Brief, p. 5. In *Torrence*, our Supreme Court found that §§24-3-40, 24-3-315, and 24-3-430 were the controlling statutes in *Torrence's* prevailing wage, wage disbursement, and long-term account claims.

SCDC's Step 1 Response also concluded that SCDC paid Torrence the proper rate of pay in the project, relying upon "the guidelines established by the federal government,"

¹⁵ SCDC, in footnotes 5 (p. 3) and 17 (p. 12) of his Initial Brief, focuses on the chronology of the ALC order regarding the decision in *Torrence*, the Supreme Court's decision on SCDC's petition for rehearing, and "representations purportedly made by SCDC to Torrence." The ALC merely misconstrued those facts in the following manner. 1) Torrence's Step 1 Form section as to how informal resolution was sought by Torrence (R. p.121). 2) Torrence's petition for writ of mandamus to order SCDC to respond to Step 1. 3) Torrence's April 21, 2010 correspondence to Inmate Grievance Administration that "SCDC [in response to the writ of mandamus] has informed the State Supreme Court that the agency would process the grievance," (R. pp. 125 - 126). And in a June 10, 2010 response to Torrence's May 21, 2007 SCDC Request to Staff Member (R. p. 10), Mary Coleman, the Inmate Grievance Branch Chief, informed Torrence that "upon review by outside counsel Lake Summers [SCDC's counsel in the instant appeal], you will receive a Warden's Step 1 response upon completion of attorney Summers' review." Additional correspondence from SCDC Grievance Administration informed Torrence that his grievance was being held in abeyance pending cases currently before South Carolina appellate courts. In either event, the chronology error complained of by SCDC in footnotes 5 and 17 would have no bearing on the filing deadline holding or any other factor relevant to the ALC's January 30, 2014 holding.

specifically referring to the BJA Guidelines published in the Federal Register, 64 FR 17000, SCDC's Initial Brief, p. 5. SCDC's footnote 8 incorrectly asserts the ALC's January 20, 2016 order "is at odds with the applicable federal guidelines," which Torrence will discuss below.

SCDC's Step 1 Response concluded that the agency's Grievance Policy concerning deadlines "continues to apply to nearly every aspect of inmate activity, and *no special exception applies to prison industries pay disputes*," (R. pp. 130-131) (Emphasis supplied).

SCDC's Step 1 Response concluded that it did not owe Torrence any additional wage amount for every labor hour, (R. p.132). SCDC's Initial Brief, p. 5, following its Step 1 Response (R. p.132), relied upon *Adkins* for the proposition inmates did not have a viable claim for back wages, despite the nexus of the Supreme Court's *Adkins* holding was that a tort claim was the incorrect method of pursuing the claim. SCDC's Step 1 Response also concluded that Torrence was not entitled to complete and immediate access to the portion of his wages escrowed pursuant to §24-3-40(A)(5), (R. p.133).

C. TORRENCE'S STEP 2

Torrence's December 5, 2011 Step 2 Appeal (R. pp. 134-144) and appendices in support (R. pp. 532-682) demonstrated SCDC's Step 1 Response contradicts statutory law (R. pp. 943-947). Torrence's Step 2 articulated the Supreme Court's decision in *Wicker* was an exception "in a very limited circumstance" to the Court's holding in *Al-Shabazz v. State*, 527 S.E.2d 742 (S.C. 2000), (R. p.137) [regarding the types of cases reviewable by the ALC]. Torrence's Step 2 also articulated that prior to the holding in *Wicker*, the agency grievance system could not award monetary damages¹⁶ and relied upon ALC precedent that

¹⁶ GA-01.12, Note to §10.5 (The Warden's decision to grant *restitutional monetary reimbursement* will not require additional approval to have state provided *like/issued items or deposits made* to the grievant's E. H.

claims for money damages fell under the Tort Claims Act, citing *Rosemond v. SCDC*, 00-ALJ-04-01026-AP and *Stearns Miller v. SCDC*, 00-ALJ-04-00021-AP, (R. p.137).

SCDC's Initial Brief, p. 7 n. 13 stated the ALC erred in embracing Torrence's argument in its January 30, 2014 order that SCDC "did not recognize a wage claim as grievable until the Supreme Court upheld" the ALC's decision in *Wicker* in August 2004. The record in *Wicker*, up to the Supreme Court's holding in *Wicker*, demonstrates SCDC's position was that the wage claim advanced was "non-grievable," *Wicker*, 2001 WL 1005574 *1.

Torrence's Step 2 included appendices A-L that demonstrated that SCDC's practice and procedure of wage payment, withholding and disbursement were the intentional policy of the agency, R. pp. 139 - 140. Torrence's Step 2 reiterated the challenges to the custom, practice, policy and procedure raised in the Step 1.

D. SCDC'S REPLY TO TORRENCE'S STEP 2

SCDC's Response to Step 2 (R. pp. 145-152) affirmed the denial of Torrence's Step 1 and denied his Step 2. SCDC's Response to Step 2 asserted an analysis of the circuit court in *Adkins*, applying §24-3-410(B)(7), an order that is of no precedential value where it proceeded to the Appellate Courts on other grounds. SCDC's Step 2 Response also concluded that Torrence "will not receive any personal benefit by immediately distributing such monies to persons or entities of your choice," (R. p.151).

III. TORRENCE'S NOTICE OF APPEAL TO THE ALC

Torrence timely appealed the February 9, 2012 denial of his Step 2 grievance by filing a Notice of Appeal, dated March 2, 2012 in the ALC, (R. p.56).

Cooper Account *so long as the amount of reimbursement is within the monetary limits of SCDC Policy/Procedure OP-22.03...*) (Emphasis added).

SCDC's Initial Brief, p.10, asserted that the Notice of Appeal did not "challenge [d] SCDC policies and/or procedures" nor did Torrence "claim or otherwise assert" "that he had requested a waiver or exception from the filing deadline."

Torrence's March 2, 2012 Notice of Appeal conformed to the criteria for the Notice of Appeal form to the ALC. First, the form published by the State requires "A **general**"¹⁷ statement of the grounds for appeal is (See S.C. Code Ann. §1-23-380(A)(6)):" (Original emphasis). The Form requires no specificity other than compliance with §1-23-380(A)(6). Second, the grounds for appeal may be amended, supplemented or modified in the statement of issues in the brief.

Torrence's Notice of Appeal to the ALC sufficed to challenge SCDC's policies and procedures of paying less than the statutory mandated prevailing wage, and SCDC's practice and procedure of escrowed wages under §24-3-40(A)(5) and (B)(2), all of which constitute "conditions" that affected Torrence.

IV. ALC ORDERS ON APPEAL

A. THE ALC'S JANUARY 30, 2014 ORDER

Torrence did not appeal any aspect of the ALC's January 30, 2014 order.

The ALC's January 30, 2014 order finding Torrence timely filed his grievance and that equitable tolling applied to the filing of Torrence's grievance was a result of SCDC's June 5, 2012 "MOTION BY THE DEPARTMENT TO ADDRESS ONLY ONE (1) ISSUE IN ITS BRIEF AND TO FILE ITS BRIEF NO LATER THAN JUNE 15, 2012"¹⁸ (R. pp. 76-81), and the ALC's subsequent June 7, 2012 Order granting the Motion, R. p. 82.

¹⁷ **General:** adjective. 4. a. Not limited in scope, area, or application... 5. Involving only the main features rather than precise details. Noun 3. A statement, *The American Heritage Dictionary* (Third Edition) p. 566

¹⁸ SCDC's June 5, 2012 Motion pled that "the issue of whether the [Appellant] timely filed his Step 1 grievance form with the Department was identical to the central issue associated with a consolidated

SCDC asserts in its Initial Brief, p. 11 n. 16, that the ALC's finding that *Adkins* and *Wicker* did not create new substantive rights or new grievance rights is inconsistent with its finding that "any attempt by [Torrence] to file a grievance prior to August 23, 2004 would have been futile" (R. p. 399). The ALC's finding concerning the futility of Torrence filing a grievance before the *Wicker* holding was not premised on whether *Adkins* and *Wicker* created new rights;¹⁹ but by the time of filing *Torrence* in circuit court, SCDC's position up to and including arguing *Wicker* before the circuit court, the ALC, and the Supreme Court, was that associated claims were "nongrievable;"²⁰ and that no remedy for monetary claims existed at the time Torrence pursued his claims in circuit court.

The ALC correctly held that the prison industries pay claims articulated by Torrence concerned "policies/procedures" as defined under paragraph 13.9 of GA-01.12, and therefore, the 15-day filing deadline from paragraph 13.1 of GA-01.12 did not apply to the filing of Torrence's Step 1 (R. p. 398), where the prevailing wage claims in *Wicker* were found to be based on the DOC's policies and procedures.

The ALC's mistake in the chronology of the denial of SCDC's petition for rehearing by the Supreme Court in *Torrence*, as set forth in footnote 15, above, had no bearing on the filing deadline. The ALC did not rely on an erroneous review of the record. SCDC notified

matter recently heard by this Court, *Ackerman*, #266928, et al., S.C. Dep't of Corr., Docket No. 07-ALJ- 04-00444-AP, et, seq." (R. p.77) (Emphasis supplied)

¹⁹ The ALC correctly held that *Adkins* and *Wicker* did not create new substantive rights. The substantive right at issue in *Adkins* and *Wicker* - i.e., the right to the prevailing wage - was granted to inmates in 1995 pursuant to S.C. Code Ann. §24-3-430(D). *Adkins* and *Wicker* simply addressed the appropriate procedure for seeking redress for a denial of that existing right. (R. p. 397). The ALC also correctly analyzed that our Supreme Court in *Wicker*, recognizing the state created a statutory right to the payment of a prevailing wage, cannot thereafter deny that right without affording due process of law, *Wicker*, 602 S.E.2d at 57; and that prevailing wage claims were grievable and could be appealed to the ALC, *Id* at 57-58 (R. p. 396).

²⁰ The ALC also recognized that in the case before the ALC, and ultimately the Supreme Court, "the Department contended that prevailing wage claims were "nongrievable," see *Wicker v. S.C. Dept. of Corrections*, 00-ALJ-04-00781-AP, 2001 WL 1005574 (S.C. Admin. Law Ct. Aug 13, 2001), (R. p. 397). Our Supreme Court acknowledged SCDC's position was that prevailing wage claims were "non-grievable," *Wicker*, 602 S.E.2d at 56-57.

Torrence via correspondence that it would not process the Step 1 until a case in which Torrence was not a party was decided. This was not a consideration in the equitable tolling finding. The ALC's findings are supported by the record with the exception of the wrong date for an action-taking place after the filing of Step 1.

B. SCDC'S APPEAL OF THE JANUARY 30, 2014 ORDER

On March 2, 2014, SCDC filed a Notice of Appeal in this Court from the January 30, 2014 Order of the ALC. On March 10, 2014, Torrence filed a MOTION TO DISMISS THE INSTANT APPEAL. In SCDC'S RETURN TO THE RESPONDENT'S MOTION TO DISMISS THE INSTANT APPEAL, dated April 4, 2014 (R. pp. 427-440), SCDC presented a section titled "**THIS COURT IS CURRENTLY CONSIDERING ANOTHER APPEAL IN WHICH THE IDENTICAL OR NEARLY IDENTICAL ISSUES CONCERNING TIMELINESS ARE IN CONTROVERSY,**" (R. pp. 433-434). In that section, SCDC urged this Court to deny Torrence's motion to dismiss "in light of the reality that another decision issued by the ALC involving identical or nearly identical issues," citing *Ackerman's* ALC July 26, 2012 Order, are "currently under review by this Court," (R. p. 433), and note 11 citing Appellate Case Number 2012-210588 (*Ackerman*).

SCDC argued "the issues concerning timeliness considered by the ALC in its January 30, 2014 written order in the instant matter were identical or nearly identical to some of the issues concerning timeliness considered by the ALC in its July 26, 2012 written order in *Ackerman*," (R. p.433). SCDC went on to state in footnote 12 that the ruling(s) rendered by this Court in *Ackerman* will undoubtedly impact the rulings rendered by the ALC in the January 30, 2014 final decision in this matter.

This Court dismissed that appeal in an April 17, 2014 Order as the January 30, 2014 order was not a final decision. (R. pp. 441 - 442).

C. SCDC'S MOTION TO HOLD ALC ACTION IN ABEYANCE

On March 3, 2012, simultaneously with SCDC's Notice of Appeal discussed in § IV. B, above, SCDC filed THE DEPARTMENT'S MOTION TO HOLD IN ABEYANCE OR OTHERWISE STAY FURTHER PROCEEDINGS IN THE INSTANT MATTER (R. pp. 411-416) in the ALC. The foundation for SCDC's motion was entirely predicated upon ALC Chief Judge Anderson's July 26, 2012 decision in *Ackerman, # 266928, et al. v. S.C. Dept' of Corrections*, Docket No. 07-ALJ-04-00444-AP, et seq., which was then under review by this Court as Appellate Case No. 2012-210588.²¹ As it did before this Court, SCDC's motion before the ALC advanced the argument that "the issue of whether the Appellant timely filed his Step 1 administrative grievance is *identical* to the central issue associated in *Ackerman*," (R. p.414) (Emphasis supplied); and "any decision issued in the Court of Appeals in *Ackerman will undoubtedly directly impact the parties' further litigation of the instant matter.*" (R. p. 414). (Emphasis supplied).²² The DOC argued further that "any further proceedings undertaken by the parties in the instant matter would turn out to represent an exercise in futility." (R. p. 414).. The ALC denied SCDC's Motion on March 20, 2014.

D. THE ALC'S JANUARY 20, 2016 ORDER

The ALC's January 20, 2016 order correctly applied the applicable standard of review before the ALC for procedural due process when an inmate is deprived of an interest of liberty and property, citing *Al-Shabazz*; and in prevailing wage claims creating a property

²¹ *Reversed* by this Court, 782 S.E.2d 757 (S.C. Ct. App. Feb 10, 2016) (Petition for Rehearing denied)

²² A position that SCDC strenuously argues does not apply to Torrence now. See Appellant's Initial Brief, pp. 21 n. 26; pp. 26-27, and now attempts to distinguish Torrence from *Ackerman*.

interest, *Wicker*, 602 S.E.2d at 58, that may be reviewable by the ALC via the Department's internal grievance procedure, *Torrence*, 646 S.E.2d at 869-70 (R. p.1031). The ALC's ruling correctly relied upon S.C. Code Ann. §1-23-380 in regards to guidance for its review (R. pp. 1031 - 1032).

The ALC's ruling correctly discussed the applicable federal law, 18 USC §1761(c) and the guidelines in 64 FR 17000 et. seq. ("Guidelines") in regards to the "prevailing wage,"²³ as well as the method for obtaining that wage rate (R. p.1033, 1035 - 1039). The ALC also determined S.C. Code Ann. §24-3-315 was "enacted to comply with federal law" (R. p.1033), and cites the Department "must determine... that the rates of pay... are not less than those paid... for work of a similar nature in the locality in which the work is performed," §24-3-315 (2007) (R. p.1033). The order also finds applicable the "prevailing wage" statute in S.C. Code Ann. §24-3-430 (2007) (R. p.1033).

The ALC correctly discussed the distribution of inmate wages pursuant to S.C. Code Ann. §24-3-40, (R. pp. 1033 - 1034).

On the issue of training wages, the ALC found that our Supreme Court held "there is simply nothing in the statutory scheme authorizing the DOC to pay [Appellant] a training wage less than the prevailing wage," citing *Wicker*, 602 S.E.2d at 58. The Court held further that "it is beyond argument that SCDC must pay [Appellant] the difference between the 'training wages' and the prevailing wage. Furthermore, the statutory mandate of comparable pay and conditions means that inmates are entitled to time-and-a-half overtime pay in situations non-inmate workers would receive such overtime pay," citing *Cartrette*, 694 S.E.2d at 21 and *Guideline* at 17000-01, (R. p. 1034). Applying the correct standard of

²³ *Guideline* at 17010

review, the ALC found the Department's decision to pay Torrence less than the prevailing wage for regular and time-and-a-half for overtime hours during his initial 320 hours of labor is "erroneous as a matter of law." (R. pp. 1034).

On the issue of post-training wages, as stated in the above holding, the ALC also held, "there is no construction of the law under which the Department could pay [Appellant] less than the prevailing wage," (R. p.1034-1035).

The Court next made an appropriate analysis of the definition of the term "prevailing wage" holding that the Court in *Torrence* "has already stated that the program at issue in this case operated under Section 24-3-430," 646 S.E.2d at 867 (R. p. 1035). The Court applied the *Guideline* to its analysis of the prevailing wage (R. p.1036) and 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," (R. p.1037). The Court did not agree that the \$5.25 regular hourly rate conforms to the ESC data in the record (R. p.1037).

The ALC next performed a logical calculation of the prevailing wage based on South Carolina Statutes §§24-3-315 and 24-3-430, (R. pp 1037-1039).

The Court recognized the *Guideline* at 17010 requires the prevailing wage must be obtained from the state agency that determines wage rates, (R. p.1038), and that the prevailing wage must be set "exclusively in relation to the amount of pay received by similarly situated non-inmate workers and no other cost variables may be taken into consideration, *Guideline* at 17009-10," (R. p.1038). The Court determined "locality" meant South Carolina, (R. p.1038), and "work of a similar nature" as contemplated by federal guidelines and state statutes is found by "referring to the appropriate Occupational Employment Statistics (OES) or OCC Code used by ESC/DEW," (R p.1038).

The ALC utilized documentation in the instant record regarding the wage rates for various years of Torrence's employment in the project, (R. pp. 1038-1039).

The Court held that "to pay [Appellant] less than the prevailing wage is an error of law," that "by failing to pay the correct wage, the Department subverts the purpose of the laws enacted by Congress and the General Assembly..." (R. p.1039).

The ALC properly ordered SCDC "**must pay [Appellant] the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999 and the mean average wage reflected that by that code or its counterpart for the years data is not contained in the record,**" (R. p.1039) (Original emphasis).

The ALC correctly analyzed SCDC's denial of Torrence's access to the escrowed portion of his wages under S.C. Code §24-3-40(B)(2) and applied South Carolina rules of statutory interpretation, (R. pp. 1039-1042). The Court analyzed the provisions escrowed "for the benefit of the inmate" under §24-3-40(A)(5) as they apply to an "inmate sentenced to life imprisonment" (R. pp. 1040-1041) under subsection (B)(2) and concluded "both subsections (B)(2) and (A)(5) requires reading subsection (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,*" (R. p. 1041) (Emphasis added). The Court found the legislative history surrounding the enactment of the statute provides compelling reasons to reach that conclusion, (R. pp. 1041-1042).

STANDARD OF REVIEW

The ALC considered this matter pursuant to our Supreme Court's decisions in *Al-Shabazz*, R. p.395 (the January 30, 2014 Order); in addition to *Wicker and Torrence*, R. p.1031 (the January 20, 2016 Order); as well as S.C. Code Ann. §1-23-380(A)(6). Therefore, the sister statute to § 1-23-380, specifically §1-23-610(B), establishes the standard of review applicable to this Court's consideration of SCDC's appeal of the ALC's two (2) Orders.

Section 1-23-610(B) provides:

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

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Under this standard of review this Court may reverse or modify the decision of the ALC only if SCDC is able to prove that [its] substantive rights were prejudiced because the decision was clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or characterized by an abuse of discretion, or affected by other error of law. See *S.C. Dep't of Corr. v. Mitchell*, 659 S.E.2d 233 (S.C. Ct. App. 2008) (applying §1-23-610 as the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency). Even if SCDC can demonstrate error,

an Appellant seeking reversal must show error and prejudice, *McKissick v. J. F. Cleckley & Co.*, 479 S.E.2d 67 (S.C. Ct. App. 1996)

SCDC bears the burden of proving convincingly that the ALC's decision to reverse SCDC's final decision is unsupported by substantial evidence. Substantial evidence is relevant evidence "when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the ALC arrived at in justifying its decision," *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 669 S.E.2d 899, 905 (S.C. Ct. App. 2008) *reversed on other grounds*, 702 S.E.2d 246 (S.C. 2010).

Additionally, SCDC has the burden of proving the ALC's decision is arbitrary or otherwise characterized by an abuse of discretion. A decision is arbitrary where no rational basis for the conclusion exists, or when it is based on one's will and not upon any course of reasoning and exercise of judgment; or if made at pleasure without adequate determining principles or is not governed by any fixed rules or standards, *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 564 S.E.2d 341 (S.C. Ct. App. 2002). An abuse of discretion occurs when the judge's ruling is based upon an error of law, such as the application of the wrong legal principle, or, when based upon factual conclusions, the ruling is without evidentiary support.

ARGUMENT

I. THE ALC'S JANUARY 30, 2014 ORDER PROPERLY HELD THAT TORRENCE TIMELY FILED HIS GRIEVANCE

A. TORRENCE'S GRIEVANCE DISTINGUISHED FROM *Okera*

The Supreme Court in *Torrence*, footnote 1, stated that “We note that the issue of class certification was not ruled upon by the trial court.”

SCDC urges this Court to consider a memorandum opinion in *Okera v. S.C. Dep't of Corr.*, 2012 WL 10907962 (2012-MO-042) (S.C. 2012) where the Court *affirmed* the ALC's ruling that *Okera* failed to comply with the relevant statute of limitations. In its June 29, 2009 Order in 08-ALJ-04-00887-AP the ALC affirmed SCDC's denial of *Okera*'s grievance where the record shows “it appears [*Okera*] failed to file his Step one (1) grievance [until] six years after his last day of work in the prison industries.”

The instant case is clearly distinguished from *Okera*. First, *Torrence* filed the civil action *Torrence* in the Richland County Court of Common Pleas *while* he was still employed in prison industries and the grievance *within* 15 days of notice of the Supreme Court's decision in *Torrence*. Second, *Torrence* and SCDC are the same parties in both actions, thus, SCDC was on notice of *Torrence*'s claims at the initiation and service of the Original and Second Amended Complaints. Third, *Okera* was not a named party in *Torrence*. Fourth, *Okera* filed his grievance two (2) years after being terminated from prison industries for disciplinary reasons.

SCDC would suggest (Initial Brief p. 17 and p. 23) that *Okera* would control *Torrence* here based upon employment in the identical project, at Evans. If that suggestion bore any logic, then it would encompass the decision in *Wicker*, who, also employed at that

project, was also terminated for disciplinary reasons and filed his grievance **more than 15 days after termination.**²⁴ SCDC's assertion has no merit on that rationale.

The SCDC determination that Okera did not file his grievance within 15 days, that decision being affirmed by the ALC, and subsequently our Supreme Court, is clearly distinguishable from the instant appeal.

B. TORRENCE'S STEP 1, STEP 2, NOTICE OF APPEAL TO THE ALC AND HIS ALC BRIEFS CHALLENGED SCDC'S POLICIES AND PROCEDURES IN PAYING LESS THAN THE PREVAILING WAGE.

At all times relevant to this appeal, from Step 1 and Addendum, Step 2, and Torrence's briefs in the ALC, Torrence's claims have challenged on the custom, practice, policy and procedure of SCDC's prison industries wage rate, training pay, wage disbursement, and escrowed wages. Although not invoking specific nomenclature,²⁵ it has been a matter of law where the ALC in *Wicker* determined prevailing wage claims were based on the DOC's policies and procedure, *Wicker*, 2001 WL 1005574 *1.

Even SCDC acknowledged the pay practices as policy in their Step 1 Response, "[y]ou challenged *the rate* at which SCDC both *paid you* for your prison industries labor *and applied* statutorily mandated deductions to your pay," R. p.131. (Emphasis added). SCDC further acknowledged these practices as "policy" in holding "SCDC ended *its policy* of paying inmates a training wage..." R. p.129 (Step 1 Response) (Emphasis added).

Torrence suggests that the appendices submitted in support of Step 2 detail the "administrative" policy of prison industries pay;²⁶ "how we 'practice' it," (R. p. 568); "We

²⁴ Wicker did not file Grievance No. Ker-0353-00 until transferred to another institution after his termination.

²⁵ See, e.g., *Calhoun v. Calhoun*, 529 S.E.2d 14 (S.C. 2000). Petitioner did not limit the issue on appeal even though she failed to refer to the term ["transmutation"] in her statement of the issue on appeal where her argument on the issue contained discussion and citations to authority on "transmutation."

²⁶ Deposition of Tony Ellis, Division of Industries Director. (R. pp. 561 – 583)

administratively allow that,” (R. p.569); and “that is an administrative decision made by the agency,” (R. p.574). (Emphasis added)

Torrence suggests the established methods employed by SCDC concerning private sector prison industries payroll constitutes custom, practice, policy and procedure.

Custom is defined as “a practice that by its common adoption and long, unvarying habit has come to have the force of law.” *Black’s Law Dictionary*, Deluxe Eighth Edition (2004), p. 413; *Custom* is also defined as “frequent or common use or practice; a frequent repetition of the same act; usage; or habit,” *Webster’s New Universal Unabridged Dictionary*, Deluxe Second Edition (1985), p. 449.

Policy is defined as “a plan or course of action, as of a government, political party, or business, intended to influence and determine decisions, actions, and other matters.” *The American Heritage College Dictionary*, Third Edition, p. 1058.

Practice is defined as “a habitual or customary action or way of doing something,” *Id.* at 1073.

Procedure is defined as “the act, method, or manner of proceeding in some process or course of action,” *Id.* at 1434.

Torrence’s challenge to wage payment and distribution pursuant to §§24-3-430(D) and 24-3-40 is a specific challenge to the policies of the DOC where these statutes imbue SCDC with the fiduciary duty in the annual wage verification, payment of the prevailing wage, disbursement of wages and management of the long-term savings account.

Torrence’s March 26, 2015 Original Brief before the ALC challenges SCDC’s policies and procedures in several forms, to wit: a) “conditions of employment,” R. p.733; b)

conditions that “informed that he would be required to work a ‘Training Period’²⁷ of 320 hours prior to working for ‘minimum wage,’”²⁸ (R p.733-734); c) that Torrence and Ward “petitioned the DOC to change the *wage payment practice* then in effect,” (R. p. 735)²⁹ (Emphasis added); d) citing §24-3-315 for “*the rates of pay and other conditions of employment,*” R. p. 737 - 738) (Original emphasis); e) neither Federal or South Carolina statutory authority “contemplate or leave any inference of an ‘authority’ to pay a ‘training wage,’” (R p. 740); f) being “*informed of the conditions of his employment,*”³⁰ (R. p.740); (Original emphasis); g) “training hours or pay a substandard wage below *statutory guidelines,*” (R. p. 741) (Emphasis added); h) “conditions of employment” citing §24-3-315 (R. p.743); i) “conditions of employment” citing of §24-3-315, 18 USC §1761(C)(2) and 64 FR 17009-10, (R .p.744); j) “*shall pay the prisoner’s wages,*” (R. p. 745) (Original emphasis); k) “*admit acting without authority,*” (R. p. 746) (Original emphasis); l) “We have not been advised by SCDC as to specific legal or regulatory guidelines governing the wage and displacement information SCESC has provided,” (R. pp. 747 - 748);³¹ m) “but I can tell you *how we practice it* and what we we’re doing,” (R. p.750) (Emphasis added); n) “*we administratively* allow that,” (R. p. 750); o) “public policy,” (R. pp. 752, 761); that applicable Federal and South Carolina statutes “do not contemplate or create any inference of authority to misdirect a portion of or make deductions,” (R. p. 756) ; p) in SCDC’s statutory

²⁷ A practice that SCDC concedes is policy in their Step 1 Response, “SCDC ended *its policy* of paying inmates a ‘training wage,’” R. p. 129. (Emphasis added)

²⁸ Footnote 11 of Torrence’s Original Brief (R. p.734) demonstrated the SCDC’S “policies” of the Division of Human Resources in the Employment Tax Deductions forms Torrence was required to execute or was issued bi-weekly.

²⁹ See also Torrence’s December 5, 2011 Affidavit, Item No. 3, in support of Step 2 Appeal, R. pp. 522 - 523.

³⁰ In relation to the statutory requirement of §24-3-430(C).

³¹ October 30, 2003 Correspondence from Roosevelt T. Halley, Executive Director of SCESC to George L. Schroeder, Director of the Legislative Audit Council. Torrence’s March 26, 2015 ALC Original Brief demonstrating SCDC’s “Legal or regulatory guidelines” noncompliant with the SCESC/DEW wage verification.

interpretation, a court “generally gives deference to an administrative agency’s interpretation of an applicable statute or *its own regulations*,”³² R. p. 758.

Torrence’s August 27, 2015 REPLY BRIEF continued to present claims that were based on SCDC policy governing private sector prison industry wage practices and procedure, to wit: a) citing §24-3-315 for the “conditions of employment,” R. p. 1005 - 1006; b) arguing against the Circuit Court order in *Adkins* that the “training wage policy conformed to the Federal Register” and that the BJA advised SCDC [they] could “continue his training wage policy,” R. p.1008; c) “conditions of employment” in requiring SCDC to inform Torrence pursuant to §24-3-430(C) and 18 USC §1761(c)(4), R. pp. 1008 - 1009; and d) in relation to a fiduciary duty upon SCDC created by the relevant prison industries statutes, the “conditions” for work of a similar nature and the failure “to pay those rates or make deductions outside statutory guidelines,” R. pp. 1018 - 1019.

Torrence’s November 12, 2012 REPLY BRIEF IN SUPPORT OF A TIMELY FILED GRIEVANCE thoroughly supports Torrence’s claims being based upon the policy and procedure of wage practices and procedures, R. pp. 369 - 392.

Torrence submits that the ALC properly found [his] claims were based on “policy/procedures” and exempted by GA-01.12 ¶ 13.9. As such, SCDC’s assertion that Torrence did not claim an exemption for policy/procedures is wholly without merit based upon the foregoing showings. This premise is supported further where this Court in *Ackerman v. S.C. Dep’t of Corrections*, 782 S.E.2d 757 (S.C. Ct. App. 2016) held that inmate’s grievances to amount of pay received under prevailing wage statute and contract for work performed as part of prison industry program were grievances to South Carolina

³² Citing *Brown v. Bi-Lo, Inc.*, 581 S.E.2d 838 (S.C. 2003), Original Brief, p. 30, arguing SCDC’s interpretation and application of §24-3-40(A)(5) and (B)(2).

Department of Corrections' "policies/procedures" rather than to incidents and, thus, were excepted from grievance system policy's 15-day filing deadline for incident grievances.

Torrence submits that the record before the ALC (Grievance Steps 1 and 2, Notice of Appeal, and Torrence's Briefs) demonstrate substantial evidence that the issue of statute of limitations has been properly raised to the court, *see, e.g., Peterson v. Richland County*, 515 S.E.2d 553 (S.C. Ct. App. 1999). Even SCDC stated there were "exceptions to the deadline" in Step 1 Response (R. p.509); SCDC's Step 2 Response (R. pp. 526-527); in SCDC's July 9, 2012 Brief on timelines of the grievance (R. pp. 107 and 108); and SCDC's Initial Brief, pp. 19-24. However, SCDC has adamantly asserted since its Step 1 Response that "**no special exception applies to prison industries pay disputes**" (R. p.509 - 510), and their Step 2 Response, (R. p. ___). Each of these assertions by SCDC clearly implicate and acknowledge the exception for policy/procedure to the filing deadline, and that SCDC did not recognize prison industries wage claims under those exceptions.

Torrence suggests that a party need not use the exact name of a legal doctrine in order to preserve it, but that it was clear that the argument has been presented on that ground, *see State v. Russell*, 546 S.E.2d 202 (S.C. Ct. App. 2001); and *In re: Robert D.*; 530 S.E.2d 137 (S.C. Ct. App. 2000).

C. SCDC RAISED THE DEFENSE OF STATUTE OF LIMITATIONS

SCDC initially raised the defense of statute of limitations in its Step 1 Response, R. pp. 509-510, 512, and continued the assertion in its Step 2 Response, R. pp. 526-527, 531.

On June 5, 2012, following the filing of Torrence's Original Brief in the ALC, SCDC entered "MOTION BY THE DEPARTMENT TO ADDRESS ONLY ONE (1) ISSUE IN IT'S BRIEF AND TO FILE IT'S BRIEF NO LATER THAN JUNE 5, 2012," R. pp. 76 -81.

In SCDC's June 5, 2012 Motion to address only the issue of timeliness, SCDC "proposed" that if the ALC found Torrence did not file his grievance timely, that Torrence could appeal only that issue, R. pp. 78 - 79. SCDC further proposed that, "on the other hand," if the ALC found Torrence's grievance was timely filed, "then the Court could direct the Department to submit a supplemental brief on any remaining issues animated by [Torrence's] claims," R. p.79.

By written Order dated June 7, 2012, the ALC granted SCDC's proposed Motion, R. p. 82. On January 30, 2014, pursuant to SCDC's request, the ALC found that Torrence timely filed his grievance.

Essentially, SCDC raised the defense of statute of limitations at the agency level. At the ALC level, in lieu of the issues raised by the Notice of Appeal, SCDC sought consent to address only the issue of timeliness in a preliminary matter and proposed to proceed on the merits only if the Court ruled in Torrence's favor. SCDC *requested* this action regarding the statute of limitations defense and must now abide by its requested action.

Torrence asserts that there was no specificity to the statute of limitations defense. The defense of "timeliness" and "statute of limitations" was too general and did not require specific nomenclature in response.

SCDC raised the defense and requested an order from the ALC to determine timeliness as a preliminary matter. Ultimately, Judge Durden's January 30, 2014 Order was the Order SCDC requested/proposed. Ordinarily, where a judgment or order is entered by consent, it is binding and conclusive and cannot be attacked by the parties either by direct appeal or in a collateral proceeding, *Johnson v. Johnson*, 425 S.E.2d 46 (S.C. Ct. App. 1992). The right of appeal from such an order is regarded as waived, *Calcutt v. Calcutt*, 320 S.E.2d

55 (S.C. Ct. App. 1984). A party cannot appeal from an order or judgment that he has requested, *Parsons, v. Gibbes*, 37 S.E. 753 (S.C. 1901).

Torrence further suggests this Court may consider the statute of limitations exceptions “lumped together under one issue on appeal,” *see Swentor v. Swentor*, 520 S.E.2d 330 (S.C. Ct. App. 1999). Further, the issue, read in conjunction with the argument adequately raised the issue at each stage of this litigation, *Eubank v. Eubank*, 555 S.E.2d 413 (S.C. Ct. App. 2001).

SCDC requested an order regarding the timeliness or statute of limitations and may not now appeal that order.

D. SCDC’S POLICY GA-01.12 PARAGRAPH 13.9 AND SCDC FORM 10.5 ESTABLISH A WAIVER OF THE 15-DAY DEADLINE.

SCDC Policy GA-01.12, §13.1 generally requires Step 1 grievances be filed “within 15 days of the alleged incident.” However, Paragraph 13.9 provides that “exceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures.”

This Court of Appeals recently held that inmates’ grievances to amount of pay received under the prevailing wage statute and contract for work performed as part of prison industry program were grievances to SCDC “policies/procedures” rather than to incidents and, thus, were excepted from the grievances deadline, *Ackerman et al., v. S.C. Dep’t of Corr.*, 782 S.E.2d 757 (S.C. Ct. App. 2016).

The ALC similarly determined that Wicker’s wage dispute also fell under GA-01.12, §7, “Department policies/procedures, directives, or conditions which directly affect an inmate,” and Wicker was directly affected by DOC’s arrangement with private industry to pay less than the “prevailing wage for work of a similar nature in the private sector,” *Wicker*

v. S.C. Dep't of Corrections, 2001 WL 1005574 *1. Our Supreme Court affirmed the ALC's holding in *Wicker*, 602 S.E.2d 56.

Torrence submits that the ALC, this Court of Appeals, and our Supreme Court have all determined that prisoner's prevailing wage claims were grievances to SCDC's "policies / procedures." Such claims are entitled to an exemption pursuant to GA-01.12, ¶ 13.9.

South Carolina Department of Corrections Form 10-5 (SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, INMATE GRIEVANCE FORM, STEP 1), on the reverse side, contains the section "INSTRUCTIONS FOR COMPLETING STEP 1 GRIEVANCE FORM." Instruction Number 4 reads in full:

Submit the completed form to the Institutional Grievance Coordinator within fifteen (15) days of an alleged incident; **policy grievances at any time**. Do not write in the space provided for the Warden's response.

SCDC Form 10-5 (Emphasis supplied).

These instructions are clearly present on the Step 1 in the instant record, R. pp. 500 - 501, despite SCDC's continuous assertion in its Step 1 and 2 Responses and July 9, 2012 Brief against timeliness of Torrence's Step 1, that "no special exception applies to prison industries pay disputes."

SCDC has asserted that Torrence must request a waiver to GA-01.12, ¶ 13.1 under ¶ 13.9. However, the Step 1 Form and ¶ 13.9 provide an exception to the fifteen-day filing deadline for grievances concerning "policies/procedures," thus, an *express waiver* to the fifteen-day deadline.

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right," *Eason v. Eason*, 682 S.E.2d 804, 807 (S.C. 2009). It may be either express or implied, *Lyles v. BMI, Inc.*, 355 S.E.2d 282, 285 (S.C. Ct. App. 1987).

The ALC's July 26, 2012 order in *Francis Ackerman, # 266928, et al, v. S.C. Dep't of Corrections*, ALC Docket Nos. 07-ALJ-04-00444 et seq. *14-15 (R. pp. 213-214), considered the same issues of ¶ 13.9 of GA-01.12 and SCDC Form 10-5 (Step 1). Judge Anderson's July 26, 2012, Order found that the "policies/procedure" exception in ¶13.9 and the Step 1 Form were inapplicable as a waiver based solely upon "nothing in the Department's grievance policy or in the language of the pre-printed Step 1 Form suggested that prevailing wage claims constitute policies/procedures grievances under Paragraph 13.9," *Ackerman*, *15 (R. p. 214). This Court of Appeals has since reversed Judge Anderson's July 26, 2012 Order that prevailing wage claims did not constitute "policies/procedures," *Ackerman*, 782 S.E.2d 757.

Therefore, GA-01.12, ¶ 13.9 provided an exception to ¶ 13.1 for polices/procedures, encompassing wage claims; and SCDC Form 10-5 (Step 1) provided an *express waiver* of "policy grievances at any time."

E. TORRENCE'S GRIEVANCE CHALLENGING SCDC'S POLICY OF PAYING A TRAINING WAGE AND LESS THAN PREVAILING WAGE MANDATED BY STATUTE CONFORMED TO THE 15 - DAY FILING DEADLINE EXCEPTION.

Torrence's Step 1 Grievance challenged SCDC's policies and procedures regarding the training wage practice, the prevailing wage practice, and the escrowed account practice, R. pp. 121 - 123.

SCDC conceded in their Step 1 response that the "training wage" practice was a "policy," R. p.129.

Our Supreme Court held in *Wicker* that "there is simply nothing in the statutory scheme authorizing the DOC to pay Wicker a training wage less than the prevailing wage," 602 S.E.2d at 57.

The Court of Appeals considered the case of *South Carolina Department of Corrections v. Cartrette*, 694 S.E.2d 18 (S.C. Ct. App. 2010) in which Cartrette filed a grievance concerning “conditions of his participation in the Prison Industries Program” and complaining his “hourly wage was insufficient compared to the prevailing wage for similar work performed in the private sector,” 694 S.E.2d at 19.

South Carolina Code Ann. §24-3-430(C) states “an inmate may participate in the program established pursuant to this section only on a voluntary basis and only after he has been informed of the *condition of his employment*,” (Emphasis added). Section 24-3-315 states in part the DOC must determine “that the rates of pay and other conditions of employment are not less than those paid for work of a similar nature...,” *see Torrence*, 646 S.E.2d at 868.

Based upon this Court’s holding in *Ackerman*, Torrence’s grievance concerning SCDC’s training wage, prevailing wage and escrowed wage practices are based on “policies/procedures” and are exempt pursuant to GA-01.12, ¶ 13.9. This assertion is further supported by the “Instructions” language on Form 10-5 (Step 1) that “policy grievances [may be filed] at anytime,” R. p.122.

SCDC’s Initial Brief (p. 21 and n. 26) asserts Torrence “failed to preserve this issue for review.” In note 26, SCDC argued that it’s July 9, 2012 Brief, p.108 n. 28, referenced *Ackerman’s* ALC case, R. pp. 108 - 109, that the Ackerman prisoners made a variety of assertions regarding the policies and procedures exception of Paragraph 13.9. In note 17 of their July 9, 2012 Brief, (R. p.93), SCDC represented that “[N]early all if not all of the arguments articulated by the Appellant [Torrence] in his Step 2 and his initial brief to [this] Court are identical or nearly identical to arguments articulated by nearly 200 current and

former inmates in a consolidated matter very recently considered by Chief Judge Anderson,”
“designated as *Ackerman*...”

SCDC, in their Initial Brief here, p. 21, n. 26, reiterated the *Ackerman* inmates “made a variety of such assertions,” (Paragraph 13.9).

SCDC now argues, that “the assertions and arguments offered by the inmates in *Ackerman* are clearly distinguishable from those made by Torrence,” Initial Brief, p. 21, n. 26. Torrence submits that in the July 12, 2012 Order in *Ackerman*, Judge Anderson held “as reflected by the record, *no Appellant requested a waiver* to the fifteen day time limit in his Step 1 grievance by which he asserted “reasonable cause” as permitted by Paragraph 13.9,” *Ackerman*, *11. (R. p. 210) (Emphasis added). Judge Anderson further held that “[T]herefore, no Appellant satisfied the procedural requirements set forth in Paragraph 13.9,” *Id.* Judge Anderson further found that “the vast majority of the Appellants first explicitly invoked such a ‘reasonable cause’ exception in their Notices of Appeal to this Court,” *Id.*

Unlike *Ackerman*, Torrence’s grievance addressed the “conditions” of employment and wage practices since his Step 1 and Addendum.

F. TORRENCE’S GRIEVANCE PRESENTED CLAIMS CONSTITUTING “CONDITIONS WHICH DIRECTLY AFFECT THE INMATE” BY PAYING LESS THAN THE PREVAILING WAGE MANDATED BY STATUTE.

Torrence submits that his wage disputes articulated since Step 1 fall under the issues considered grievable in GA-01.12, ¶ 7.1 “Department policies/procedures, directives, or *conditions which directly affect an inmate*,” (Emphasis added). This same rationale was applied by the ALC in *Wicker*, 2001 WL 1005574 *2, and supported by the Supreme Court affirming the result in *Wicker*, 602 S.E.2d 56.

Torrence suggests that the statutory language of §24-3-430(C) “*conditions* of employment” and §24-3-315 “the DOC must determine that the rates of pay and other *conditions* of employment...” (Emphasis added) support Torrence’s premise of equating to GA-01.12, ¶ 7.1, the language “conditions which directly affect an inmate” where Torrence has been at all times a participant in the program and has money escrowed affected by such “conditions.”

G. TORRENCE’S GRIEVANCE CONCERNS POLICIES/PROCEDURES UNDER PARAGRAPH 7.1 AND NOT A PROPERTY CLAIM UNDER PARAGRAPH 7.4.

Torrence submits that this Court’s February 10, 2016 opinion in *Ackerman* clearly sets forth that grievances to wage claims in prison industries concern “policies/procedures,” which is set forth in GA-01.12, ¶ 7.1 and excepted in ¶ 13.9.

SCDC argues in their Initial Brief, pp. 24-27 that Torrence has articulated a “property” claim that falls under ¶ 7.4 instead of ¶ 7.1 of GA-01.12. This argument is based on Torrence’s language in his Step 1 Addendum, “*created a property interest,*” Initial Brief, pp. 25-26, claims one, two, four and five, (SCDC’s Emphasis).

Our Supreme Court found that procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment’s protection of liberty and property, *Wicker*, 602 S.E.2d at 57, citing *Al-Shabazz v. State*, 527 S.E.2d 742, 750 (1999). The Court found that “the state’s statutory mandate that inmates be paid the prevailing wage creates such an interest,” *Wicker*, 602 S.E.2d at 57 - 58, citing *Piatt v. McDougall*, 773 F.2d 1032 (9th Cir. 1985).

Torrence suggests that based on the above precedent SCDC's argument that Torrence's claim is a "property" claim under Paragraph 7.4 of GA-01.12 instead of one based on "policies/procedures" under Paragraph 7.1 is without merit.

H. THE FILING OF *Torrence* IN CIRCUIT COURT WITHIN ANY APPLICABLE FILING DEADLINE PLACED SCDC ON NOTICE OF TORRENCE'S CLAIMS

Torrence suggests that the issues presented in his Step 1 Grievance and Addendum are identical to the claims presented in *Torrence*, 2001-CP-40-3409, filed three (3) years prior to *Wicker* and *during the time Torrence was participating* in the ESCOD/Insilco project at Evans. Torrence therefore suggests that SCDC was placed on notice of the claims here when served the Summons in *Torrence* and cannot now complain it was not aware of his claims three (3) years prior to leaving the Evans project.

II. THE ALC'S JANUARY 30, 2014 ORDER PROPERLY HELD THAT EQUITABLE TOLLING APPLIED TO TORRENCE'S GRIEVANCE.

The ALC's January 30, 2014 Order properly analyzed the facts of Torrence's case and correctly applied applicable law to determine Torrence was entitled to the doctrine of equitable tolling in filing his agency grievance.

A. THE ALC'S ANALYSIS OF THE FACTS AND LAW IN DETERMINING EQUITABLE TOLLING APPLIED TO TORRENCE'S GRIEVANCE.

The ALC stated Torrence's position, based upon SCDC's policy not recognizing prevailing wage grievances prior to *Wicker*, that Torrence had no judicially recognized constitutional right to file a grievance,³³ so Torrence "logically elected" to file a claim in Circuit Court, R. p.398.

³³ The two exceptions enumerated in *Al-Shabazz*, 527 S.E.2d at 750, were not *judicially recognized* to apply in a "very limited circumstance" as reviewable by the ALC until our Supreme Court's ruling in *Wicker*, 602 S.E.2d at 58, (Original emphasis).

The ALC set forth the language of GA-01.12, ¶ 13.1 requiring Step 1 grievances be filed “within 15 days of the alleged incident,” R. p.398, and further set forth the exceptions to that 15 day limit for grievances concerning policies/procedures, R. p. 398.

The ALC analyzed the concept of interpreting a regulation [policy] under *Murphy v. S.C. Dep’t. of Health and Env’tl. Control*, 723 S.E.2d 191, 195 (S.C. 2012), R. pp. 398 - 399, and found that “[I]n the absence of an express time limit for grievance of a policy or procedure this Court must determine a reasonable time limitation that gives effect to the statutory or regulatory scheme,” citing *McCummings v. S.C. Dept. of Corrections*, 462 S.E.2d 271 (S.C. 1995).

The ALC found that prior to *Wicker*, the Department maintained that wage issues were not grievable under the internal grievance system and acknowledged such by SCDC’s ALC brief in *Wicker*. The ALC found that “[C]learly the Department did not recognize a wage claim as grievable until the Supreme Court upheld the ALC’s decision in August 2004. Thus, any attempt to file a grievance would have been futile,” R. p.399. The ALC’s factual analysis concluded that our Supreme Court in *Torrence* held “[c]learly [Torrence] can present this claim via the inmate grievance procedure,” 646 S.E.2d at 870.

The ALC applied *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 687 S.E.2d 29, 32 (S.C. 2009) in holding “[W]here a statute sets forth a limitation period for commencement of an action, courts have invoked the doctrine of equitable tolling to suspend the statutory period ‘to ensure fundamental practicality and fairness,’” R. pp. 400 - 401. The ALC further held that equitable tolling applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control, citing *Hooper*, 687 S.E.2d at 32; and 54 C.J.S. *Limitations of Actions* §133 (2013), R. p.400.

The ALC also correctly found that “[u]nder the doctrine of equitable tolling when a party has more than one legal remedy available, the statute of limitations is tolled while the party pursues one of the possible remedies,” citing *Abbott v. State*, 979 P.2d 994, 998 (Alaska 1999) R. p.401.

Based upon that analysis, the ALC found that Torrence:

“[d]id not have more than one legal remedy available, but no statute, regulation or precedent established the proper procedure for bringing his claim. Because the Department refused to consider the issue under the grievance procedures, [Torrence] was effectively prevented from utilizing the procedure that the Supreme Court ultimately determined to be the appropriate method to raise prison industry pay claims. [Torrence’s] case, originally filed as a class action in the Court of Common Pleas, was pending before the courts on August 23, 2004 when the *Wicker* and *Adkins* decisions were issued. This case presents the type of extraordinary circumstances in which fairness demands that the doctrine of equitable tolling be applied. [Torrence’s] existing lawsuit, filed prior to the time the department recognized grievances regarding pay claims, equitably tolled the time for filing a grievance during the period that lawsuit was pending. [Torrence] filed his Step 1 grievance within days of receiving the Supreme Court’s final order and decision in that matter holding that he could present his claim via the inmate grievance procedure.

R p. 401.

Torrence submits that the ALC’s January 30, 2014 ruling that equitable tolling be applied where that decision was based on the reliable and substantial evidence of the whole record and where the substantial rights of Torrence were prejudiced by SCDC’s final agency decision.

B. MONEY DAMAGES WERE NOT AN AVAILABLE REMEDY UNDER GA-01.12 AT THE TIME TORRENCE FILED A CIVIL ACTION

SCDC Policy GA-01.12, note to ¶ 10.5, allowed money damages *only* for the *damage or loss of an inmate’s personal property, and then only within the limits* of SCDC Policy OP-22.03, setting amounts that would be compensated or replaced with like items.

Thus, at the time of Torrence filing *Torrence* in the Court of Common Pleas on August 18, 2001, SCDC's policy, practice and procedure provided monetary reimbursement specifically for personal property but not for wage type claims, therefore, Torrence "logically elected" to pursue the matter in circuit court.

In discussing the grievance policy, Judge Anderson noted the correlation between GA-01.12 and OP-22.03 insofar as money damages being grievable in his July 26, 2012 Order in *Ackerman*, *8, R. p.207.

The ALC properly found that despite the 2004 Supreme Court holding in *Wicker*, at the time Torrence filed his action in the Court of Common Pleas, SCDC Policy did not provide a remedy for the recovery of money beyond personal property. January 30, 2014 Order, pp. 7, 9 R. p. 399.

C. THE CIVIL ACTION *Torrence et al., v. South Carolina Department of Corrections*, C/A No. 01-CP-40-3409 EQUITABLY TOLLED TORRENCE FILING AN AGENCY GRIEVANCE.

As set forth above, the ALC's January 30, 2014 Order properly applied the doctrine of equitable tolling based upon the pendency of *Torrence* in the Circuit, and ultimately, our State Supreme Court, R. pp. 398 - 401.

Torrence, at all times since the filing of the APA Petition with SCDC, and in filing the Circuit Court action prior to the 2004 *Wicker* decision, exercised due diligence in preserving his legal rights given the extraordinary circumstances of SCDC's originally mute and then vacillating position on the prevailing wage issue. At no time was Torrence negligent or delinquent in pursuit of his legal rights. Equitable tolling has been allowed where the claimant has *actively pursued* his judicial remedies by filing a defective pleading *during* the statutory period. See *Irvin v. Dept. of Veteran Affairs*, 498 U.S. 89, 96 (1990). Torrence

neither neglected his rights or failed to exercise reasonable diligence in enforcing his rights and it is not the policy of the law to unjustly deprive an injured person of a remedy, see *Moriarity v. Garden Sanctuary Church of God*, 534 S.E.2d 672 (S.C. 2000).

D. THE NOVEMBER 25, 2002 AND MAY 24, 2005 CIRCUIT COURT ORDERS IN *Torrence*, C/A No. 01-CP-40-3409 DEMONSTRATES SCDC'S POSITION AND THE PROCEDURAL POSTURE OF THE CASE WAS CONTROLLED BY *Wicker* AND SUPPORTED EQUITABLE TOLLING.

SCDC has argued in their Step 1 Response, R. p.131 and Step 2 Response, R. p.148 and their July 9, 2012 Brief, R. p.87 concerning timeliness that Torrence filed his grievance "over 2 ½ years after the South Carolina Supreme Court issued its decision in *Adkins* and *Wicker*," thus establishing a starting point for grievances for prevailing wage claims from the August 2004 *Wicker* decision.

In the 2001 *Wicker* decision before the ALC, the Department argued that Wicker's complaint was "non-grievable," 2001 WL 1005574 *1. The ALC disagreed because Wicker's pay represented conditions which directly affect an inmate. SCDC continued its position before the Supreme Court that the wage claim was not grievable, which the Supreme Court rejected and affirmed the ALC's decision, *Wicker*, 602 S.E.2d at 56 - 57.

The November 25, 2002 Order of the Honorable J. Ernest Kinard, Jr., in *Torrence*, C/A 01-CP-40-3409, denied SCDC's Motion and did not argue the "grievable" status or *Wicker's* 2001 ALC decision.

In a May 24, 2005 Order,³⁴ the Honorable D. Garrison Hill dismissed Torrence's Second Amended Complaint citing "[I]n light of the *Adkins* and *Wicker* decisions, SCDC renewed its 12(b)(6) motion on February 14, 2005." Judge Hill gave a summary of the opinions in *Adkins* and *Wicker* in granting SCDC's motion to dismiss. It is important to note

³⁴ 2001-CP-40-3409

that Judge Hill's Order consistently stated "Any [] to which Plaintiff Torrence may be entitled must be addressed under *Wicker*, by Plaintiff Torrence filing a grievance, if he so elects..." R. pp. 17 - 22. Judge Hill's 2005 Order instructed all parties that Torrence may file a grievance "if he so elects," was four years *after* the 2001 ALC order in *Wicker* and the year *after* our Supreme Court affirming that 2001 decision.

SCDC's continued position up to the Supreme Court in *Wicker* supports Torrence's contention that until the Court affirmed that prevailing wage claims were grievable and reviewable by the ALC in a "very limited circumstance," SCDC maintained that those claims were non-grievable.

SCDC's position regarding the grievable status of prevailing wage claims up until 2004 supports the doctrine of equitable tolling by the ALC in this matter.

E. TORRENCE'S FILING OF *Torrence* ESTOPPED SCDC FROM PLEADING THE STATUTE OF LIMITATIONS

SCDC was a party to *Torrence* and was properly served within the time limitations periods and may not now assert the defense of statute of limitations, especially in light of Judge Hill's May 24, 2005 Order that Torrence may file a grievance "if he so elects." Torrence's diligence affects his right to have SCDC estopped from pleading the statute of limitations. *Torrence*, commenced within any conceived agency, regulatory or statutory time proscribed thereby, arrested the running of limitations, *Henderson v. Griffin*, 5 Pet. 151, 30 U.S. S.C. 151 (1831) and equitable estoppel may nullify SCDC's statute of limitations defense, *see, e.g., Rink v. Richland Memorial Hospital*, 422 S.E.2d 747 (S.C. 1992).

The ALC's rationale is supported by the relevant, reliable facts and substantial evidence of the whole record where Torrence was required to maintain *Torrence* in order to preserve judicial review where SCDC's adamant position was the issue was non-grievable.

SCDC asserts the ALC issued its 2001 decision in *Wicker* three (3) days before counsel for *Torrence* filed the class action, SCDC's Initial Brief, p. 29. Torrence contends two points; 1) SCDC refers to counsel filing the Second Amended Complaint; Torrence and Henry Hubbard filed the Original Complaint *pro se*. 2) the *Wicker* decision in the ALC, 2001 WL 1005574, was not binding precedent. Further, not in 2001, nor today, where institutional law libraries have Westlaw Terminals, are ALC decisions available to prisoners.

SCDC asserted that its conduct in defending its legal position in no way, shape or form constitutes any action - active or passive - on its behalf which interfered with or otherwise hindered Torrence's ability to pursue his wage claims via a grievance under GA-01.12, Initial Brief, and p. 29.

Torrence submits that SCDC's conduct in continuously asserting that wage claims were "non-grievable" is the very animus that rendered the filing of a grievance futile when filing a civil action SCDC was required to respond to the complaint. SCDC's negligence in responding to Torrence's Step 1 three (3) years after filing, and only based on Torrence's Petition for a Writ of Mandamus, is reliable and substantial evidence supported by the record.

In *Pace v. DiGuglielmo*, 554 U.S. 408 (2005),³⁵ a case considering the statute of limitations under 28 USC §2244 in a federal habeas corpus petition, the Supreme Court observed that, *generally*, "a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way.

Torrence submits that it is without contention that he has been diligently pursuing his rights, regardless of the venue, since 2000, at all times which SCDC has been aware and a party. Second, Torrence submits that extraordinary circumstance existed to interfere with his

³⁵ Relied upon by SCDC in Initial Brief, p. 31.

prosecution via grievance where, as the record demonstrates, up to 2004, SCDC maintained the issue was non-grievable and agency policy provided no remedy for monetary damages not associated with personal property loss.

III. THE JANUARY 20, 2016 ORDER OF THE ALC PROPERLY DEFINED AND CALCULATED THE “PREVAILING WAGE”

The ALC January 20, 2016 Order properly defined the “prevailing wage,” R. pp. 1062 - 1064 and correctly calculated the “prevailing wage,” R. pp. 1064 - 1066, based upon the relevant and substantial evidence in the record as a whole that would allow reasonable minds to reach the same conclusion as the ALC.

A. THE ALC PROPERLY ANALYZED APPLICABLE STATE LAW, FEDERAL LAW, AND FEDERAL REGULATIONS

The record supports the substantial evidence that the ALC properly applied applicable state law, federal law, and federal regulations in finding and calculating the prevailing wage, R. pp. 1059 - 1066.

1. SECTION 24-3-315

The ALC correctly identified the S.C. statute that originally enables, directs and controls that inmate’s rates of pay and other conditions of employment are not less than those paid and provided ‘for work of a similar nature in the locality in which the work is performed,’” R. pp. 1064 - 1065.³⁶

SCDC’s argument completely ignores the fact that §24-3-315 is directly predicated upon 18 USC §1761(c) in compliance. The South Carolina Legislature’s intent was to craft a state assurance and authorization to comply with federal law, to be attached to SCDC’s application to the DOJ’s BJA for PIECP certification, in order for SCDC to operate a private

³⁶ §24-3-315, 1987 Act No. 177 §2

sector prison industries program.³⁷ SCDC's only treatment of §24-3-315 was at Initial Brief, p. 35 & n. 35 that "Our legislature assimilated this language into our state's prison industries statutes..." and at p. 40 as an "applicable statute[s] enacted by our legislature." Regardless, §24-3-315 was the statute created to demonstrate South Carolina compliance with federal guidelines and remained the sole governing law of private sector prison industries operation from 1987 to 1995 when Act No. 7, Part II, §43 crafted §24-3-430.

SCDC also overlooks that the Court of Appeals in *Cartrette* found §24-3-315 "resolved" Cartrette's dispute regarding the same rates of pay and employment conditions as their non-inmate peers.³⁸

2. SECTION 24-3-430

The ALC correctly identified, analyzed, and applied §24-3-430 as a controlling statute where "no inmate participating in the program may earn less than the prevailing wage for work of a similar nature in the private sector,"³⁹ R. pp. 1060, 1062 - 1065.

3. SECTION 18 U.S.C. §1761

The ALC correctly analyzed and applied 18 USC §1761 as the governing federal law by which SCDC must operate their private sector prison industries program, R. pp. 1059 - 1064, specifically, that participating inmates "receive[] wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work [is] performed," 18 USC §1761(c)(2) (2012), R. p. 1060.

4. 64 FR 17000, et seq.

³⁷ See specifically 64 FR 17012, IV. A. 2. (Application content) (A) (Assurances of Authority).

³⁸ Our Supreme Court found in *Torrence* that, "The program is federally certified and operates under various state statutes". See, e.g., §§ 24-3-40, 24-3-315 & 24-3-430 (2007)

³⁹ 1995 Act No. 7, Part II, §43; 1998 Act No. 355, §1.

The ALC correctly analyzed and applied 64 FR 17000, et seq. as the BJA's final PIECP *Guideline* for programs such as the instant one before this Court, specifically, "that payment of the minimum wage⁴⁰ does not achieve compliance with the law unless the comparable private sector industry wage is indeed the federal minimum wage," R. p. 1063. citing 64 FR 17010.

SCDC correctly noted, Initial Brief, p. 35, that the "[p]revailing wage is a wage rate which is not less than that paid for work of a similar nature in the locality in which the work is to be performed," (SCDC's emphasis), citing 64 FR 17007, but correctly cited as 64 FR 17008.

5. Circuit Court Analysis in *Adkins*

SCDC argues that the ALC "did not include §24-3-410 in the above-quoted passages from its January 26, 2016 Order," "specifically §24-3-410(B)(7)" where SCDC referenced the circuit court decision in *Adkins* in its response to Torrence's Step 1 and Step 2 Reply, Initial Brief, pp. 36-40.

The record fully supports the ALC's rationale for its decision concerning the circuit court order in *Adkins*. The ALC considered §24-3-410(B)(7) (2007) and "comparable wages" under §24-3-410 and determined a Circuit Court order in another case is not binding and it "contradicts the statements of the higher courts in this state," R. p. 1062, where the Supreme Court in *Torrence* has already stated the program at issue operates under §24-3-430, R. p.1062.

SCDC argued, Initial Brief, pp. 38-40, that the Circuit Court in *Adkins* has precedential value where our Supreme Court, in affirming the circuit court, "approvingly noted the circuit

⁴⁰ The Federal Minimum Wage at all times relevant herein was \$ 5.15 per hour. SCDC paid Torrence \$ 5.25 per hour.

court's decision," citing *Adkins*, 602 S.E.2d at 55, n. 6. However, that footnote only states 18 USC §1761 does not give rise to a private cause of actions in inmates. The *Adkins* Court noted the Prevailing Wage Statute is §24-3-430(D), 602 S.E.2d at 54, and n. 3. The Court's analysis of §24-3-410 was predominantly to reiterate no private cause of action. The Court made no holding in the regards to affirming the context of the circuit court holding asserted by SCDC here.

B. THE ALC PROPERLY DEFINED AND CALCULATED THE "PREVAILING WAGE"

The ALC's January 20, 2016 Order properly defined and calculated the "prevailing wage," R. pp. 1062 - 1066.

1. The definition of the term "prevailing wage"

The ALC correctly defined the prevailing wage as "the PIECP wage amount be set *exclusively* in relation to the amount of pay received by similarly situated non-inmate workers," citing *Guideline* at 17009-10 (Court's emphasis).

Rebecca W. Eleazer of the ESC/DEW, during her August 10, 2004 deposition for *Torrence*,⁴¹ R. pp. 604 - 655, despite South Carolina having no legal definition of the term, 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.

SCDC has "admitted" that §24-3-430(D) applies to the prison industry program and *Torrence*, R. pp. 657 - 658.

Torrence further submits that SCDC's own *Agreement* with the private sector specifically states:

⁴¹ 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.

"At no time during this agreement will inmates be paid less than the *prevailing wage* as set forth in Appendix D. The prevailing wage rate for inmate labor is to be *established* annually by the *S.C. Employment Security Commission*," R. p.677 (Emphasis supplied).⁴²

2. The ALC Properly Applied ESC / DEW Methodology and the Operative Federal Regulation

The ALC's January 20, 2016 Order properly applied the ESC/DEW methodology and the federal regulation to calculate the prevailing wage in the instant matter, R. pp. 1065 - 1066.

First, the ALC applied §24-3-315 and §24-3-430 in a statutory analysis, R. pp. 1064 - 1065. Next, the ALC, in noting the method of obtaining the prevailing wage from *Guideline* at 17010; applied the deposition of Rebecca Eleazer and documents associated in the record, R. pp. 1065 - 1066, to ascertain the prevailing, or mean/average wage for the OES or OCC Code for Electronic Assemblers for years between 1997 – 1999.

The ALC correctly held that there is "no evidence whatsoever in the record to support the Department's argument that its wage payment was in conformity with ESC data." That "to pay [Appellant] less than the prevailing wage is an error of law," R. p. 1066. The ALC found that "the record simply does not support a finding that the mean average wage for an assembler is as low as the \$5.25 paid [Torrence]," R. p. 1065. The ALC also relied upon the record containing correspondence from Ted Gladden of the ESC that informed SCDC that the mean average wage in 1997 for electronic assemblers was \$8.82, and for the years 1998 - 1999, the wage of \$9.92.

⁴² SCDC continually asserts the ESC/DEW does not have a term "prevailing wage," despite SCDC's own use of the term in their *AGREEMENT*, or the "mean" / "average" wage language correlated between documents, R. pp. 640, 782 and agency correspondence, R. pp. 647 - 654, utilized by both SCDC and ESC/DEW in their PIECP wage verification communications and explained by Ms. Eleazer in her deposition. Torrence notes that SCDC failed to apply or comply with every wage verification from ESC/DEW.

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, 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. 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.

SCDC suggests reliance upon the Circuit Court proceedings in *Adkins* as to a determination of the prevailing wage. Torrence suggests that *Adkins* was appealed, but the wage verification process in *Adkins* was not ruled upon by the Supreme Court in *Adkins*, 602 S.E.2d 51, and that the testimony and evidence *now in the record* is relevant to and specific to the case on appeal here.

C. THE ALC PROPERLY HELD THAT TORRENCE WAS ENTITLED TO THE PREVAILING WAGE.

- 1. The ALC properly held Torrence was entitled to the prevailing wage during the training period.**

Following an analysis of the applicable statutory law, *Wicker* and *Cartrette*, the ALC properly reversed 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 as it was erroneous as a matter of law, R. pp. 1032 - 1034.

- 2. The ALC properly held Torrence was entitled to the prevailing wage for the post-training hours.**

Based upon its analysis of the applicable statutory and case law in Section III. C. 1, above, in relation to each hour of labor after the training period, the ALC properly held "there is no construction of law under which the Department could pay [Appellant] less than the prevailing wage," R. pp. 1034 - 1035.

IV. THE ALC'S JANUARY 20, 2016 ORDER CORRECTLY HELD 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) AND (B)(2).

A. THE ALC'S ANALYSIS AND HOLDINGS

The ALC correctly analyzed and conducted a statutory construction of §§ 24-3-40(A)(5) as to the wages escrowed for the benefit of the prisoner; and (B)(2) providing how those wages are returned to a prisoner serving a sentence of life without parole. R. pp. 1039-1042.

The ALC correctly analyzed 1999 Act No. 68, §2 and 1999 House Bills 3562 (R. pp. 936 – 942) and amended 3216, (R. pp. 933 – 935), that contained the language “included upon his death,” and compared it with 1999 Senate Bill 384, (R. pp. 909 – 932), which actually became Act No. 68, that changed the above language to “include in his estate or distributed to the persons or entities of his choice.” The ALC’s rationale led to the conclusion that if the legislature had intended for the escrowed money to be distributed only “upon death,” it would have enacted that proposed language rather than amending it, R. p.1042.

B. THE ALC CORRECTLY REVERSED SCDC'S DECISION

The ALC correctly held that, based on §24-3-40(A)(5), “ten percent must be held in an interest bearing escrow account **for the benefit of the prisoner**” R. p.1041. (Court’s emphasis). The ALC correctly rationalized SCDC’s interpretation that the funds may not be distributed during the inmate’s choosing or lifetime ignores the fact “the funds are to be for the benefit of the prisoners; not the benefit for prisoner’s heirs,” R. p. 1041.

As such, the ALC held that Torrence must be allowed the opportunity to designate persons or entities to receive an immediate distribution of funds held pursuant to §24-3-40(A)(5) R. p.1042.

V. THE APPELLATE COURT MAY AFFIRM THE JANUARY 30, 2014 AND JANUARY 20, 2016 ORDERS OF THE ALC ON ANY GROUND IT FINDS IN THE RECORD.

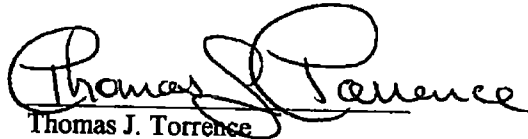
Torrence submits that pursuant to Rule 220(C), SCACR, this Honorable Court may affirm both orders on appeal based upon any ground it finds in the record.

CONCLUSION

Respondent respectfully prays this Honorable Court affirm the January 30, 2014 and January 20, 2016 Orders of the Administrative Law Court.

Respectfully submitted,

December 30, 2016



Thomas J. Torrence
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RESPONDENT, *pro se*

**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

Trial Court Case No. 12ALJ0400143AP

Thomas J. Torrence, #094651 Respondent,

v.

South Carolina Department of Corrections Appellant.

CERTIFICATE OF *PRO SE* COUNSEL

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

December 30, 2016



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Page 48 of 48

Thomas J. Torrence
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December 30, 2016

The Honorable Jenny Abbott Kitchens
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29472

Re: *Thomas J. Torrence # 094651, Respondent v. South Carolina
Department of Corrections, Appellant*
Trial court Case No. 12ALJ0400143AP
Appellant Case No. 2016-000285

Dear Ms. Kitchens:

Please find enclosed for filing the original RESPONDENT'S FINAL BRIEF and CERTIFICATE OF *PRO SE* COUNSEL in the above-referenced appeal. Also enclosed is proof of service on counsel for Appellant.

If the brief does not conform to the Appellate Court Rules, please advise me so I may correct any such deficiency immediately. Your assistance is sincerely appreciated.

With kindest regards, I remain.

Sincerely,



Thomas J. Torrence
RESPONDENT, *pro se*

Cc: Lake E. Summers, Esquire ✓
Counsel for SCDC

LAW OFFICES

JAN 06 2017

MALONE, THOMPSON
SUMMERS & OTT, LLC

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

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Thomas J. Torrence, #094651 Respondent,

v.

South Carolina Department of Corrections Appellant.

PROOF OF SERVICE

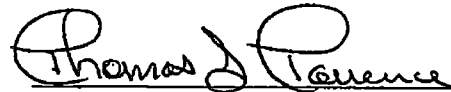
The undersigned *pro se* Respondent hereby certifies that he has served a copy of **RESPONDENT'S FINAL BRIEF** on counsel for Appellant by placing a copy in the United States Mail, first-class postage affixed thereto, this 3rd day of January, 2017, addressed as follows:

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JAN 06 2017

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RESPONDENT, *Pro se*

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
Trial Court Case No. 2012ALJ040143AP

Thomas J. Torrence, #094651, Respondent,

v.

South Carolina Department of Corrections, Appellant:

APPELLANT'S REPLY BRIEF

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SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities ii

I. TORRENCE’S STATEMENT OF ISSUES ON APPEAL 1

II. THE ALC ABUSED ITS DISCRETION BY CALCULATING THE
“PREVAILING WAGE” IN ITS JANUARY 20, 2016 ORDER 2

III. EVEN IF IT DID NOT ABUSE ITS DISCRETION BY CALCULATING THE
“PREVAILING WAGE” IN ITS JANUARY 20, 2016 ORDER, THE ALC
ERRONEOUSLY IGNORED § 24-3-410(B)(7) IN ITS CALCULATIONS 12

IV. TORRENCE’S MISTAKEN ASSERTIONS REGARDING HIS NOTICE OF
APPEAL TO THE ALC 18

V. SCDC IS NOT PRECLUDED FROM APPEALING THE ALC’S JANUARY 30,
2014 ORDER 21

VI. CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Ackerman, et al., v. S.C. Dep't of Corr., 782 S.E.2d 757 (S.C. Ct. App. 2016) 16

Adkins, et al., v. S.C. Dep't of Corr., 602 S.E.2d 51 (S.C. 2004) 14 – 18

Adkins, et al. v. S.C. Dep't of Corr.,
Case No. 2000-CP-40-4761 (S.C. Cir. Ct. Oct. 30, 2002) 13 – 18

Al-Shabazz v. State, 354 527 S.E.2d 742 (S.C. 2000) 7 – 9, 18

Brown v. S.C. Dep't of Health & Envtl. Control, 560 S.E.2d 410 (S.C. 2002) 21

Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control,
564 S.E.2d 341 (S.C. Ct. App. 2002) 11

Goins v. S. C. Dep't of Corr., Opinion No. 2014-UP-390,
2014 WL 5840482 (S.C. Ct. App. Nov. 12, 2014) 20

Risher v. S.C. Dep't of Health & Envtl. Control, 712 S.E.2d 428 (S.C. 2011) 20

S.C. Dep't of Corr. v. Cartrette, 694 S.E.2d 18 (S.C. Ct. App. 2010) 5, 9

S.C. Dep't of Corr. v. Cartrette, 772 S.E.2d 805 (S.C. 2012) 9

Torrence, et al., v. S.C. Dep't of Corr., 646 S.E.2d 866 (S.C. 2007) 12 – 14, 16

Wicker v. S.C. Dep't of Corr., 2001 WL 1005574 (S.C.A.L.J.D. 2001) 5 – 6, 8

Wicker v. S.C. Dep't of Corr., 602 S.E.2d 56 (S.C. 2004) 8, 14 – 16

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

STATUTES

18 U.S.C. § 1761 17

18 U.S.C § 1761(c)(2) 6

S.C. Code Ann. § 1-23-380(A)(5) 7, 9, 18 – 19

S.C. Code Ann. § 1-23-610(B) 11, 18

S.C. Code Ann. § 24-3-40 6, 13 – 14

S.C. Code Ann. § 24-3-315 4, 6, 9 – 10, 13, 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) 16

Adkins, et al., v. S.C. Dep't of Corr., 602 S.E.2d 51 (S.C. 2004) 14 – 18

Adkins, et al. v. S.C. Dep't of Corr.,
Case No. 2000-CP-40-4761 (S.C. Cir. Ct. Oct. 30, 2002) 13 – 18

Al-Shabazz v. Staté, 354 S.E.2d 742 (S.C. 2000) 7 – 9, 18

Brown v. S.C. Dep't of Health & Envtl. Control, 560 S.E.2d 410 (S.C. 2002) 21

Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control,
564 S.E.2d 341 (S.C. Ct. App. 2002) 11

Goins v. S. C. Dep't of Corr., Opinion No. 2014-UP-390,
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Risher v. S.C. Dep't of Health & Envtl. Control, 712 S.E.2d 428 (S.C. 2011) 20

S.C. Dep't of Corr. v. Cartrette, 694 S.E.2d 18 (S.C. Ct. App. 2010) 5, 9

S.C. Dep't of Corr. v. Cartrette, 772 S.E.2d 805 (S.C. 2012) 9

Torrence, et al., v. S.C. Dep't of Corr., 646 S.E.2d 866 (S.C. 2007) 12 – 14, 16

Wicker v. S.C. Dep't of Corr., 2001 WL 1005574 (S.C.A.L.J.D. 2001) 5 – 6, 8

Wicker v. S.C. Dep't of Corr., 602 S.E.2d 56 (S.C. 2004) 8, 14 – 16

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

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18 U.S.C. § 1761 17

18 U.S.C § 1761(c)(2) 6

S.C. Code Ann. § 1-23-380(A)(5) 7, 9, 18 – 19

S.C. Code Ann. § 1-23-610(B) 11, 18

S.C. Code Ann. § 24-3-40 6, 13 – 14

S.C. Code Ann. § 24-3-315 4, 6, 9 – 10, 13, 16

In accordance with South Carolina Appellant Court Rules [“SCACR”] 208(a)(3), 208(b)(3), and 208(b)(5), the Appellant in the instant matter, the South Carolina Department of Corrections [“SCDC”], respectfully submits its instant reply brief to the brief filed by the Respondent, Thomas J. Torrence [“Torrence”].

SCDC’s instant reply brief accompanies the brief it filed with this Court in support of its appeal of two (2) orders issued by the Administrative Law Court [“ALC”] in this instant matter. The ALC issued its first order on January 30, 2014, and it issued its second order on January 20, 2016. (R. pp. 393 – 402 and 1029 – 43).

I. TORRENCE’S STATEMENT OF ISSUES ON APPEAL

A comparison of the first four (4) issues on appeal identified by Torrence in his brief to the four (4) issues on appeal identified by SCDC in its brief reveal that they are nearly identical:¹

Issue	SCDC	Torrence
I.	Did the ALC err in its January 30, 2014 order by ruling that Torrence timely filed his grievance?	Did the ALC’s January 30, 2014 order properly find that Torrence timely filed his grievance?
II.	Did the ALC err in its January 30, 2014 order by ruling that equitable tolling applied to Torrence’s grievance?	Did the ALC’s January 30, 2014 order properly find that equitable tolling applied to Torrence’s grievance?
III.	Did the ALC err in its January 20, 2016 order by calculating the “prevailing wage” that SCDC should have paid Torrence for his prison industries labor?	Did the ALC’s January 20, 2016 order properly define and calculate the “prevailing wage” that SCDC should have paid Torrence for his prison industries labor?
IV.	Did the ALC err in its January 20, 2016 order by ruling that Torrence must be allowed to designate persons or entities to receive an immediate distribution of funds held in escrow for his benefit pursuant to S.C. Code Ann. § 24-3-40(A)(5)?	Did the ALC’s January 20, 2016 order properly rule that Torrence must be allowed to designate persons or entities to receive an immediate distribution of funds held in escrow for his benefit pursuant to S.C. Code § 24-3-40(A)(5)?

¹ See Torrence’s Brief, p. 1, and SCDC’s Brief, p. 1.

However, Torrence identified five (5) issues on appeal in his brief, and he identified his fifth issue as follows:² “The Appellate Court may affirm the January 30, 2014 and January 20, 2016 Orders of the ALC on any ground it finds in the record.”

SCDC respectfully asserts that the fifth issue on appeal identified by Torrence in his brief actually constitutes one of Torrence’s arguments, and the argument which comprises Torrence’s fifth issue is simply his restatement of the final sentence from SCACR 208(b)(2).

SCACR 208(b)(2) is entitled “Brief of Respondent,” and its final sentence provides that the “Respondent’s brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by [SCACR] 220(c).”

In Section V of his brief,³ Torrence seemingly confirms SCDC’s assertion by arguing that “pursuant to [SCACR 220(c)], this Honorable Court may affirm both orders on appeal based upon [any] ground it finds in the record.”

Nevertheless, SCDC respectfully urges the Court to, for clarity’s sake, strike Torrence’s fifth issue on appeal, and, accordingly, SCDC respectfully urges the Court to accept the four (4) issues on appeal it identified in its brief.

II. THE ALC ABUSED ITS DISCRETION BY CALCULATING THE “PREVAILING WAGE” IN ITS JANUARY 20, 2016 ORDER

As reflected by the above-provided table, the parties, in the third issue on appeal they presented in their respective briefs to this Court, addressed the reality that the ALC calculated the “prevailing wage” at which SCDC should have paid Torrence for his prison industries labor.

In doing so, the ALC ruled as follows (R. p. 1039):

² See Torrence’s Brief, p. 1.

³ *Id.*, p. 46.

[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 by the ALC].

Before articulating the above-quoted ruling, the ALC offered the following analysis (R.

p. 1038):

The PIECP Guideline requires that the prevailing wage must be obtained from the state agency that determines wage rates. Guideline at 17010. 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). 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. Id. at 17009-10. In referring to the ESC data in the record, the Court concludes that “locality” means the state of South Carolina. Further, the Court concludes that the data necessary to determine the mean average wage for “work of a similar nature” as contemplated by the state statutes and federal guidelines may be found by referring to the appropriate Occupational Employment Statistics (OES) or OCC code used by ESC/DEW.

The ALC then concluded as follows (R. pp. 1038 – 39):

The record simply does not support a finding that the mean average wage for an assembler is as low as the \$5.25 paid [Torrence]. For example, in 1999, Ted Gladden of the Employment Security Commission informed [SCDC] by letter **that the mean average wage in 1997 for electronic assemblers was \$8.82.** In 2000, Gladden informed [SCDC] **that the mean average wage in 1998-1999 for electronic assemblers was \$9.92.** While this evidence demonstrates that the data necessary to calculate the mean average wage is available from DEW, the evidence in the record is insufficient to calculate the wage for all of the relevant years. [emphasis supplied].

Thus, as reflected by above-quoted passages from its January 20, 2016 order, the ALC made three (3) factual determinations regarding the “prevailing wage” SCDC should have paid

Torrence for his prison industries labor, namely that SCDC should have paid Torrence \$8.82 per hour in 1997, \$9.92 per hour in 1998, and \$9.92 per hour in 1999.

In his efforts to support the ALC's factual determination(s) of the applicable "prevailing wage," Torrence offered the following assertions in his brief to this Court:

The ALC's ruling correctly discussed the applicable federal law, 18 USC § 1761(c) and the guidelines in 64 FR 17000 et. seq. ("Guidelines") in regards to the "prevailing wage," as well as the method for obtaining that wage rate. The ALC also determined S.C. Code Ann. § 24-3-315 was "enacted to comply with federal law" and cites [SCDC] "must determine ... that the rates of pay ... are not less than those paid ... for work of a similar nature in the locality in which the work is performed," § 24-3-315 (2007). [The ALC's January 20, 2016 order] also finds applicable the "prevailing wage" statute in S.C. Code Ann. § 24-3-430 (2007).⁴ [footnote omitted, references to record omitted, and emphasis supplied].

...

The [ALC] next made an appropriate analysis of the definition of the term "prevailing wage" holding that [our Supreme Court] in *Torrence* "has already stated that the program at issue in this case operated under Section 24-3-430,"⁵ [646 S.E.2d 866, 867]. The [ALC] applied the *Guideline* to its analysis of the prevailing wage and 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 [ALC] did not agree that the \$5.25 regular hourly rate conforms to the ESC data in the record. [references to record omitted and emphasis supplied].

The ALC next performed a logical calculation of the prevailing wage based on South Carolina Statutes §§ 24-3-315 and 24-3-430.⁶ [references to record omitted and emphasis supplied].

...

The ALC utilized documentation in the instant record regarding the wage rates for various years of Torrence's employment in the project.⁷ [references to record omitted and emphasis supplied].

⁴ See Torrence's Brief, p. 14.

⁵ As discussed below, the ALC relied upon its own erroneous interpretation of our Supreme Court's decision in *Torrence* in an effort to avoid or, more accurately, ignore § 24-3-410 and, specifically, § 24-3-410(B)(7).

⁶ See Torrence's Brief, p. 15.

⁷ *Id.*, p. 16.

Later in his brief to this Court, Torrence further supported the methods by which the ALC determined the actual “prevailing wage” purportedly applicable to his prison industries labor as follows:

[The ALC’s] January 20, 2016 Order properly defined the “prevailing wage,” and correctly calculated the [“prevailing wage,”] based upon the relevant and substantial evidence in the record as a whole **that would allow reasonable minds to reach the same conclusion as the ALC.**⁸ [references to record omitted and emphasis supplied].

The record supports the substantial evidence that the ALC properly applied applicable state law, federal law, and federal regulations in **finding and calculating the prevailing wage.**⁹ [references to record omitted and emphasis supplied].

The ALC’s January 20, 2016 Order properly applied the ESC/DEW methodology and the federal regulation to calculate the prevailing wage in the instant matter.¹⁰ [references to record omitted and emphasis supplied].

At the outset of his brief to this Court,¹¹ Torrence asserted as follows:

The ALC in [*Wicker v. S.C. Dep’t of Corr.*, 2001 WL 1005574 (S.C.A.L.J.D. 2001)] was not asked to calculate the prevailing wage, but was asked by Wicker for the wage rate paid following the “training wage” period (\$5.25 per hour), which was the focus of Wicker’s grievance. This Court of Appeals remanded *S.C. Dep’t of Corr. v. Cartrette*, 694 S.E.2d 18 (S.C. Ct. App. 2010) back to the ALC with seven (7) questions to determine the prevailing wage.

In so asserting, Torrence simply ignored the reality that in its August 13, 2001 decision in *Wicker*, 2001 WL 1005574, *2, the ALC explicitly determined that the “prevailing wage” for the inmate’s labor equaled \$5.25 per hour. (“The record reflects that after the initial 320 hours of work, Wicker was paid at the rate of \$5.25 per hour. ([SCDC] Staff Memorandum dated May 4,

⁸ See Torrence’s Brief, p. 39.

⁹ *Id.*

¹⁰ *Id.*, p. 43.

¹¹ *Id.*, p. 1, n. 2.

2000). Thus, the prevailing wage for work of a similar nature in the private sector is \$5.25 per hour.” [emphasis supplied]).¹²

Torrence then admitted at the outset of his brief to this Court that he asked the ALC “to formulate a calculation 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.”¹³ [emphasis supplied].

The following two (2) passages from his brief to the ALC dated March 26, 2015 reflect instances in which Torrence asked the ALC to “formulate a calculation” of the “prevailing wage” SCDC should have paid him for his prison industries labor:

[Torrence] suggests this Court make a determination independent of [SCDC] of the prevailing wage for work of a similar nature during the “training period.” [emphasis supplied]. (R. p. 741).

... [Torrence] suggests this Court determine what the prevailing wage, pursuant to S.C. Code Ann. §§ 24-3-40; 24-3-315; 24-3-430(D) and 18 U.S.C. § 1761(c)(2) for such labor actually was during that period. See “Prevailing Wage Verification,” 64 FR 17010. [emphasis supplied]. (R. p. 746).

As reflected by the above-quoted passages from its January 20, 2016 order, the ALC did exactly what Torrence asked it to do in his March 26, 2015 brief, namely render independent determinations of fact by actually declaring the “prevailing wage” SCDC should have paid Torrence for the years 1997, 1998, and 1999.

¹² In the footnote associated with this passage from its August 13, 2001 decision, the ALC in *Wicker*, 2001 WL 1005574, *2, n. 3, also offered the following critical observation:

The federal minimum wage is currently \$5.15 per hour, see 29 U.S.C.A. § 206; thus, the prevailing wage in the private sector would have to be at least \$5.15 per hour. Additionally, no argument has been made and nothing is in the record before me to suggest that the “prevailing wage for work of similar nature in the private sector” should be the amount authorized under a special certificate of learners. See 29 C.F.R. § 520.408. [emphasis supplied].

¹³ See Torrence’s Brief, p. 1, n. 2.

However, in doing so, SCDC respectfully asserts that the ALC completely lost sight of the reality that it considered Torrence's appeal of SCDC's final decision exclusively in its appellate capacity, and, accordingly, the provisions of S.C. Code Ann. § 1-23-380(A)(5) dictated its standard of review:¹⁴

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. [emphasis supplied].

SCDC emphasized this reality in the brief it filed June 29, 2015 with the ALC (R. p. 802):

In South Carolina, the provisions of the APA, specifically § 1-23-380(A)(5), govern the circumstances in which an appellate body may reverse or modify an agency decision. Under the APA, this Court sits in an appellate capacity rather than as an independent finder of fact. See also [*Al-Shabazz v. State*, 527 S.E.2d 742, 754 (S.C. 2000)]. [emphasis supplied].

Moreover, SCDC respectfully asserts that the ALC completely lost sight of the reality that Torrence's appeal of SCDC's final decision fell under Section V of the ALC Rules of Procedure, which is entitled "Special Appeals." ALC Rule 51, which is the first rule in Section V, declares that the rules of Section V "shall apply "exclusively in matters heard on appeal from final decisions pursuant to [*Al-Shabazz*]."

¹⁴ Torrence quoted the entirety of § 1-23-380(5) in his brief to the ALC dated March 26, 2015. (R. p. 731).

Not only did it lose sight of the reality that Torrence's appeal fell under Section V of the ALC Rules of Procedure, the ALC further lost sight of the reality that the provisions of Policy GA-01.12, SCDC's Inmate Grievance System Policy, do not provide or contemplate that SCDC must conduct a contested hearing of prison industries pay claims, such as the claims Torrence asserted in his Step 1 grievance.

Accordingly, the following provisions of our Supreme Court's decision in *Al-Shabazz*, 572 S.E.2d at 754, precisely apply to the standard of review the ALC should have applied in its January 20, 2016 order but failed to do so:

We decline, as we did with certain [Administrative Procedures Act] provisions discussed above, to apply these contested case rules to non-collateral and administrative matters decided by [SCDC]. [SCDC's] procedures provide a sufficient method of resolving administrative matters pertaining to inmates without the need for a contested-case hearing before an [Administrative Law Judge].

An inmate may, however, seek review of [SCDC's] final decision by an ALJ in a non-collateral or administrative matter. *Cf. [Bennett v. S.C. Dep't of Corr., 408 S.E.2d 230 (S.C. 1991)]* (statutory requirements proffering administrative remedy and requiring exhaustion before seeking judicial review mean administrative agency has exclusive right to decide issues before it, subject only to appeal for judicial review of its decision). The [Administrative Law Judge] sits in an appellate capacity to review [SCDC's] decisions. *Cf. [Reliance Ins. Co. v. Smith, 489 S.E.2d 674, 677 (S.C. Ct. App.1997)]* (explaining that [the Administrative Law Judge] is not restricted to merely reviewing decision below when hearing a contested case, which is in the nature of a *de novo* hearing; thus indicating the converse proposition that an [Administrative Law Judge] is restricted to reviewing the decision below when acting in an appellate capacity). [emphasis supplied].

Our Supreme Court, when it affirmed the ALC's 2001 decision in *Wicker*, relied upon its earlier decision in *Al-Shabazz* when it ruled that inmates, such as Torrence, may litigate their prison industries pay claims through Policy GA-01.12. *See Wicker v. S.C. Dep't of Corr., 602 S.E.2d 56, 57 – 58 (S.C. 2004).*

Thus, under both § 1-23-380(A)(5) and our Supreme Court's decision in *Al-Shabazz*, the ALC was not, and is not, authorized to act as an independent finder of fact, and, accordingly, the ALC, by Torrence's own characterization, clearly exceeded its authority by so acting. SCDC respectfully asserts that the ALC clearly erred by rendering a factual conclusion, namely its declaration of "prevailing wage" SCDC should have paid Torrence in 1997, 1998, and 1999.

Notwithstanding these realities, Torrence, in his brief to this Court, invoked this Court's decision in *Cartrette* to support the ALC's erroneous factual determination (i.e. calculations) of the "prevailing wage."¹⁵

SCDC also overlooks that the Court of Appeals in *Cartrette* found § 24-3-315 "resolved" Cartrette's dispute regarding the same rates of pay and employment conditions as their non-inmate peers.

Torrence, however, overlooked the essential reality that in its decision in *Cartrette*, this Court, sitting in an appellate capacity just as the ALC did in the instant matter, did not calculate the "prevailing wage" attributable to the inmate's prison industries labor.

Instead, this Court in *Cartrette*, 694 S.E.2d at 22, acknowledged that "the question of the prevailing wage to which [the inmate] is entitled has been remanded to the ALC for further proceedings," and SCDC respectfully asserts that the ALC in *Cartrette*, once it finally begins proceedings in according with the Court of Appeals' decision,¹⁶ cannot sit as an independent

¹⁵ See Torrence's Brief, p. 40.

¹⁶ Cartrette challenged this Court's rulings by filing a petition for writ of certiorari with our Supreme Court, and our Supreme Court granted his petition. However, by the decision it issued February 12, 2012, our Supreme Court dismissed the writ of certiorari as having been improvidently granted. See *S.C. Dep't of Corr. v. Cartrette*, 772 S.E.2d 805 (S.C. 2012). Cartrette did not subsequently prosecute his claims before the ALC in the aftermath of our Supreme Court's dismissal of the writ of certiorari. Instead, Cartrette filed a declaratory judgment action in circuit court in which he attempted to litigate the prison industries pay claims which this Court explicitly remanded back to the ALC in its 2010 decision. In early 2015, the circuit court granted SCDC's motion to dismiss Cartrette's declaratory judgment action. Rather than prosecuting his claims before the ALC after the circuit court dismissed his declaratory judgment action, Cartrette appealed the circuit court's decision to this Court. See *Cartrette v. S.C. Dep't of Corr.*, Trial Court Case No. 2014-CP-23-5969, Appellate Case No. 2015-000759. As of the filing date of SCDC's instant reply brief, the parties have filed with this Court all materials associated with Cartrette's appeal of the circuit court's decision, and his appeal remains pending.

finder of fact regarding the question of whether SCDC paid the inmate the correct “prevailing wage” for his prison industries labor.

In further rationalizing the ALC’s erroneous factual determinations (i.e. calculations) of the “prevailing wage,” Torrence offered the following argument in his to this Court, which reflects the ultimate folly inherent with the ALC’s factual determination of the “prevailing wage” SCDC purportedly should have paid him: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. 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].

Obviously, Torrence does not serve his own interests by acknowledging that in its January 20, 2016 order, the ALC order should have remanded the issue of whether SCDC paid him a lawful “prevailing wage” for his prison industries labor back to SCDC so that the parties could submit evidence into the record and argue the merits of their respective positions.

As SCDC accurately observed in the brief it filed with this Court, “no evidence exists in the record to confirm the hourly wage ESCOD *actually paid* its employees who performed job tasks identical or similar to those performed by Torrence.¹⁸” As SCDC also accurately observed in its brief, “[t]he ALC could have directed the parties to introduce such evidence into the record when it ultimately remanded the matter back to SCDC for further proceedings, but it elected not to do so.¹⁹”

¹⁷ See Torrence’s Brief, p. 44.

¹⁸ See SCDC’s Brief, p. 41.

¹⁹ *Id.*, p. 43.

Thus, the ALC's calculation of the "prevailing wage" SCDC should have paid Torrence during 1997, 1998, and 1999 raises the very real possibility that the ALC fashioned a "prevailing wage" for Torrence that exceeded the actual hourly wage ESCOD and INSILCO paid their non-inmate workers. No state statute, federal statute or federal regulation even contemplates such an absurd result.

Instead, Torrence effectively advocated that this Court should affirm the ALC's improper factual determinations even though the ALC lacked such critical evidence under some undefined notion of "common sense."

Ironically, Torrence unwittingly embraced the authority which succinctly states SCDC's ultimate argument in his brief to this Court:²⁰

Additionally, SCDC has the burden of proving the ALC's decision is arbitrary or otherwise characterized by an abuse of discretion. A decision is arbitrary where no rational basis for the conclusion exists, or when it is based on one's will and not upon any course of reasoning and exercise of judgment; or if made at pleasure without adequate determining principles or is not governed by any fixed rules or standards, [*Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 564 S.E.2d 341 (S.C. Ct. App. 2002)]. **An abuse of discretion occurs when the judge's ruling is based upon an error of law, such as the application of the wrong legal principle, or, when based upon factual conclusions, the ruling is without evidentiary support. [emphasis supplied].**

SCDC respectfully asserts that the ALC clearly abused its discretion by actually calculating the "prevailing wage" SCDC should have paid Torrence for his prison industries labor, and, therefore, SCDC respectfully urges this Court to, at the very least, reverse the ALC's rulings on this issue as contemplated by under § 1-23-610(B)(c), (d), (e), and (f).

²⁰ See Torrence's Brief, p. 18. SCDC respectfully submits that Torrence's above-quoted paragraph simply echoes the assessment of the applicable standard it articulated in its brief. See SCDC's Brief, p. 16.

III. EVEN IF IT DID NOT ABUSE ITS DISCRETION BY CALCULATING THE “PREVAILING WAGE” IN ITS JANUARY 20, 2016 ORDER, THE ALC ERRONEOUSLY IGNORED § 24-3-410(B)(7) IN ITS CALCULATIONS

Again, in the third issue on appeal they presented in their respective briefs to this Court, the parties addressed the reality that the ALC calculated the “prevailing wage” at which SCDC should have paid Torrence for his prison industries labor.

As SCDC argued in Section II immediately above, the ALC abused its discretion by calculating the actual “prevailing wage” SCDC should have paid Torrence for his prison industries labor in 1997, 1998, and 1999. However, even if the ALC did not abuse its discretion by doing so, SCDC respectfully asserts that the ALC erroneously ignored § 24-3-410 and, specifically, § 24-3-410(B)(7) in making its calculations.

The ALC referenced § 24-3-410(B)(7) only once in its January 20, 2016 order, and it did so as follows (R. p. 1035):

First, [SCDC] argues that “comparable wages” and “prevailing wage” are different concepts and that the requirement to pay a comparable wage does not require [SCDC] to pay the prevailing wage. The term “comparable wages” is used in [§ 24-3-410]. This section is similar to the Ashurst-Sumners Act, in that it bans the sale of inmate-manufactured goods, with certain exceptions. The exception applicable to the PSPIP provides that the “inmate workers participate voluntarily, receive comparable wages, and the work does not displace employed workers.” [§ 24-3-410(B)(7)]. [SCDC] cites a Circuit Court order in another case as support for the theory that [§ 24-3-410], and not [§ 24-3-430], governs the wage standard applicable in this case. Not only is this Circuit Court order not binding, the argument for which it is cited contradicts the statements of the higher courts in this state. This Court declines to further address the argument that only [§ 24-3-410] applies, noting that the South Carolina Supreme Court has already stated that the program at issue in this case operated under Section 24-3-430. [See *Torrence, et al., v. S.C. Dep’t of Corr.*, 646 S.E.2d 866, 867 (S.C. 2007)]. [emphasis supplied].

Torrence offered the following assertions in his brief to this Court in his efforts to support the ALC’s stark unwillingness to consider the full spectrum of our state’s prison industries

statutes, a spectrum which obviously includes § 24-3-410(B)(7), as it embarked upon a course which ultimately resulted in the ALC rendering factual determinations as to the “prevailing wage” SCDC should have paid Torrence in 1997, 1998, and 1999:

In *Torrence*, our Supreme Court found that §§ 24-3-40, 24-3-315, and 24-3-430 were the controlling statutes in Torrence’s prevailing wage, wage disbursement, and long term account claims.²¹

The record fully supports the ALC’s rationale for its decision concerning the circuit court order in [*Adkins, et al. v. S.C. Dep’t of Corr.*] The ALC considered [§ 24-3-410(B)(7)] and “comparable wages” under § 24-3-410 and determined a Circuit Court order in another case is not binding and it “contradicts the statements of the higher courts in this state,” where the Supreme Court in *Torrence* has already stated the program at issue operates under § 24-3-430, *Id.*²² [References to record omitted].

Contrary to Torrence’s assertions, the ALC didn’t consider the provisions of § 24-3-410(B)(7). Instead, the ALC flatly ignored them, and, for that matter, it completely dodged whether the provisions of § 24-3-410(B)(7) even applied to the hourly rate at which SCDC paid Torrence for his prison industries labor, and, if it did, whether § 24-3-410(B)(7) may have applied in lieu of both §§ 24-3-315 and 24-3-430(D).

The ALC so ignored § 24-3-410(B)(7) and so dodged the issues animated by the very existence of the statute, because the ALC erroneously believed that our Supreme Court, by its 2007 decision in *Torrence*, ruled on the merits of Torrence’s prison industries wage claims.

As recognized by our Supreme Court in its decision in *Torrence*, 646 S.E.2d at 867, Torrence and his fellow plaintiffs filed class action declaratory judgment complaint by which they sought “certain declarations of rights under various statutes related to the Prison Industries Program. See [S.C. Code Ann. §§ 24-3-40 and 24-3-310 through 24-3-430].” As our Supreme Court recognized, *Id.*, Torrence and his fellow plaintiffs sought “a declaration from the circuit

²¹ See Torrence’s Brief, p. 7.

²² *Id.*, p. 41.

court that [SCDC] has violated South Carolina law,” and the only two (2) statutes referenced by our Supreme Court consisted of §§ 24-3-40 and 24-3-430.

Thus, contrary to both the arguments offered by Torrence and the analysis offered by the ALC in its January 20, 2016 order, Torrence and his fellow plaintiffs never sought any declaration of their rights under § 24-3-410, and a review of the entirety of the decision issued by our Supreme Court in *Torrence* reveals that it never once discussed or even cited § 24-3-410.

Our Supreme Court in *Torrence*, 646 S.E.2d at 868, observed as follows regarding the motions to dismiss SCDC filed before the circuit court:

[SCDC] filed a motion to dismiss the Second Amended Complaint pursuant to Rule 12(b)(6), SCRCP. Finding that the complaint properly stated a declaratory judgment action which involved novel issues, the trial court initially denied the motion in November 2002. However, after this Court issued its opinions in [*Adkins, et al., v. S.C. Dep’t of Corr.*, 602 S.E.2d 51 (S.C. 2004)], and [*Wicker*], [SCDC] renewed its motion to dismiss.

The trial court ruled that *Adkins* and *Wicker* barred the entire declaratory action and therefore granted the dismissal. The trial court found the circuit court was not the proper forum for members of the Prisoner Subclass to use for an adjudication of their rights. Instead, the trial court noted that, pursuant to *Wicker*, these members could pursue their claims via [Policy GA-01.12].

Our Supreme Court in *Torrence* affirmed the circuit court’s decision to grant SCDC’s motion for summary judgment by ruling as follows, 646 S.E.2d at 869:

Appellants claim that despite the holdings of *Adkins* and *Wicker*, the Prisoner Subclass should be able to proceed in circuit court in the posture of a declaratory judgment action. We disagree. The clear rule emerging from the *Adkins* and *Wicker* cases is this: inmates working in the Prison Industries Program have a cognizable, state-created interest in having [SCDC] pay them according to the statutory scheme governing the Program, but they do not have a private right of action; instead, [Policy GA-01.12], with recourse to the [ALC], is the appropriate way to have a prisoner’s wage claim adjudicated. Therefore, the trial court correctly applied *Adkins* and *Wicker* to the Prisoner Subclass. To hold otherwise would contravene our precedent on these issues by allowing inmates

access to the circuit court merely by styling their cases as declaratory judgment actions.

Rather obviously, by granting SCDC's motion to dismiss in *Torrence*, the circuit court never considered the merits of Torrence's prison industries pay claims, including Torrence's claim that SCDC failed to pay him the lawful "prevailing wage" for his labor. Consequentially, our Supreme Court, in the decision by which it affirmed the circuit court in *Torrence*, never considered the merits of Torrence's prison industries pay claims, as it left the determination of the merits of Torrence's prison industries pay claims to the process which unfolded when Torrence finally, nearly three (3) years after our Supreme Court issued its decision in *Wicker* and *Adkins*, filed his Step 1 grievance under the provisions of Policy GA-01.12.

Torrence offered a more full-throated support of the ALC's decision to flatly ignore § 24-3-410(B)(7) in response to argument SCDC offered in its brief to this Court:²³

SCDC argued, [Brief, pp. 38-40], that the Circuit Court in *Adkins* has precedential value where our Supreme Court in affirming the circuit court. "approvingly noted the circuit court's decision," citing *Adkins*, 602 S.E.2d at 55, n. 6. However, that footnote only states 18 USC § 1761 does not give rise to a private cause of actions in inmates. The *Adkins* Court noted the Prevailing Wage Statute is § 24-3-430(D), 602 S.E.2d at 54, and n. 3. The Court's analysis of § 24-3-410 was predominantly to reiterate no private cause of action. The Court made no holding in the regards to affirming the context of the circuit court holding asserted by SCDC here. [emphasis supplied].

SCDC did not state in the brief it filed with this Court that the circuit court's decision in *Adkins* had precedential value. Instead, SCDC explicitly acknowledged in its brief that "the circuit court's order in *Adkins* does not represent binding precedent."²⁴

²³ See Torrence's Brief, pp. 41 – 42.

²⁴ See SCDC's Brief, p. 40.

Before affirming the circuit court's decision to grant SCDC's motion to dismiss, our Supreme Court in *Torrence*, 646 S.E.2d at 869, offered the following assessment of its earlier decision in *Adkins*:

In *Adkins*, the inmates filed tort claims in circuit court against [SCDC] alleging violations of the prevailing wage statutes. The Court affirmed the circuit court's determination that these statutes provided no private right of action for inmates. Noting that "the overall purpose of the prevailing wage statute is to prevent unfair competition, and to aid society and the public in general," we decided the statutes were not enacted for the special benefit of inmates. [*Adkins*, 602 S.E.2d at 54]. Nonetheless, the *Adkins* Court stated the inmates were not without a remedy because *Wicker* allowed them an avenue of relief through the inmate grievance system.²⁵

Like §§ 24-3-315 and 24-3-430(D), § 24-3-410(B)(7) does not provide inmates, like the inmates in *Adkins* or *Torrence*, a private right of action. Thus, our Supreme Court in *Torrence* did not determine how § 24-3-410(B)(7) or, for that matter, §§ 24-3-315 and 24-3-430(D) impacted the merits of the "prevailing wage" claims asserted by *Torrence* and his fellow inmates.

However, the circuit court in *Adkins* actually considered both §§ 24-3-430 and 24-3-410(B)(7) in the course of conducting a trial on the merits of the inmates' prison industries pay claims, and it determined that § 24-3-410(B)(7) applied to their claims.

As SCDC asserted in its brief to this Court,²⁶ the circuit court in *Adkins* ruled that the permanent hourly wage that SCDC paid the inmates after they completed the first 320 hours of their labor; "i.e. the federal minimum wage of \$5.15 per hour, conforms to both the 'comparable wage' standard from [§ 24-3-410(B)(7)] and the 'prevailing wage' standard from [§ 24-3-

²⁵ In the footnote associated with this passage from its decision, the *Torrence* Court, 646 S.E.2d at 869, n. 3, observed as follows: "More recently, we held in [*Williams, et al., v. S.C. Dep't of Corr., et al.*, 641 S.E.2d 885 (2007)], that a class of inmates could not maintain a prison industry program suit against the private industry sponsor who paid the prisoners' wages to [SCDC]." Many of the current and former inmates in *Williams* are now litigants in *Ackerman v. S.C. Dep't of Corr.*, 782 S.E.2d 757 (S.C. Ct. App. 2016). All materials associated with the petition for writ of certiorari filed by SCDC in *Ackerman* have now been filed with our Supreme Court and, as of the filing date of SCDC's instant reply brief, SCDC's petition for writ of certiorari remains pending.

²⁶ See SCDC's Brief, pp. 39 – 40.

430(D)] under the guidelines published by the South Carolina Employment Security Commission.” (R. pp. 880 – 81).

Since the parties litigated § 24-3-410 before the circuit court in *Adkins*, our Supreme Court in *Adkins*, when considering the inmate plaintiffs’ appeal of the circuit court’s decision, at least addressed § 24-3-410. Despite SCDC raising § 24-3-410 and, specifically, § 24-3-410(B)(7) in its response to Torrence’s Step 1 (R. p. 132), its response to his Step 2 (R. pp. 149 – 50), and in its June 29, 2015 brief to the ALC (R. pp. 803, 823, and 827 – 28), the ALC knowingly and purposefully ignored it in its January 20, 2016 order.

Our Supreme Court in *Adkins*, 602 S.E.2d at 54 – 55, discussed the provisions of § 24-3-410 as follows:

Section 24-3-410 is entitled “Sale of prison-made products on open market generally prohibited; penalties.” Violation of the statute is a misdemeanor and, upon conviction, a person must be fined not less than two hundred nor more than five thousand dollars or imprisoned for not less than three months nor more than one year, or both. [§ 24-3-410(C)]. Although [§ 24-3-430] does not specifically set forth criminal penalties, [§ 24-3-420] states that “Any person who willfully violates any of the provisions of this article other than § 24-3-410 shall be guilty of a misdemeanor and, upon conviction, shall be confined in jail not less than ten days nor more than one year, or fined not less than ten dollars nor more than five hundred dollars, or both, in the discretion of the court.” Nothing in the statutes indicates a legislative intent to create civil liability for a violation of the statutes. Accordingly, they do not give rise to a private right of action. [footnotes and citations omitted; emphasis supplied].

It was in the footnote associated with the very last sentence of the above-quoted passage that the *Adkins* Court, 602 S.E.2d at 55, n. 6, added the following observation:

The [circuit court] relied upon federal cases interpreting the Ashurst-Sumners Act, 18 U.S.C. § 1761, to support its findings that the prevailing wage statute does not give rise to a private cause of action in inmates. In light of our holding, we need not address federal caselaw. However, we note the trial court’s ruling is supported by the caselaw. See *Harker v. State Use Industries*, 990 F.2d 131 (4th Cir.), *cert. denied* 510 U.S. 886,

114 S.Ct. 238, 126 L.Ed.2d 192 (1993); *McMaster v. Minnesota*, 819 F.Supp. 1429 (D.Minn. 1993).

Rather than conduct its own analysis of § 24-3-410(B)(7), the ALC, unlike both the circuit court and our Supreme Court in *Adkins*, simply ignored it and set it aside. In his brief to this Court, Torrence did the same, and, like the ALC, he never asserted any analysis or rationale by which § 24-3-410, and, specifically, § 24-3-410(B)(7) should not apply to his prison industries pay claims.

Since our legislature obviously enacted § 24-3-410 and, specifically, § 24-3-410(B)(7) for legitimate reasons, SCDC respectfully asserts that the ALC, even if it possessed the authority under § 1-23-380(A)(5) and *Al-Shabazz* to calculate the “prevailing wage” SCDC should have paid Torrence for 1997, 1998, and 1999, could not have legitimately calculated the “prevailing wage” SCDC should have paid Torrence at any point during the many years he voluntarily participated in the prison industries project operated by SCDC without substantively addressing, at least in some fashion, § 24-3-410 and, specifically, § 24-3-410(B)(7).

Therefore, SCDC respectfully submits that the ALC erred in its January 20, 2016 order by intentionally failing to substantively address § 24-3-410 and, specifically, § 24-3-410(B)(7) in the course of calculating the “prevailing wage” purportedly due Torrence. SCDC respectfully urges this Court to reverse the ALC on this issue under § 1-23-610(B)(d) and (f).

IV. TORRENCE’S MISTAKEN ASSERTIONS REGARDING HIS NOTICE OF APPEAL TO THE ALC

In its brief to this Court,²⁷ SCDC asserted as follows:

Torrence addressed the timeliness issue by his sixth ground for appeal [to the ALC]: “Time to file grievance equitably tolled by pendency of this action in [*Torrence*].” Yet again, however, Torrence did not claim or otherwise assert in his Notice of Appeal [to the ALC] that his prison industries wage claims challenged SCDC policies and/or procedures, nor

²⁷ See SCDC’s Brief, p. 10.

did he claim or otherwise assert in his **Notice of Appeal [to the ALC]** that he had requested a waiver or exception from the filing deadline established in paragraph 13.9 of GA-01.12. [emphasis supplied].

Later in its brief,²⁸ SCDC asserted as follows:

However, the record contradicts the ALC's observation that Torrence contended that his wage claims concerned SCDC "policies" and/or "procedures." Instead, as repeatedly noted above and as confirmed by the record, Torrence never raised the exception to the 15-day filing deadline from paragraph 13.1 of GA-01.12 available to him under paragraph 13.9 in his Step 1, Step 2, or his **Notice of Appeal to the ALC**. [emphasis supplied].

SCDC further asserted the following in its brief:²⁹

As illustrated in the previous argument, Torrence did not preserve the issue of whether the exception to the 15-day deadline for "policies/procedure" grievances from paragraph 13.9 applied to his Step 1, because he never raised the issue before SCDC in either his Step 1 or Step 2, nor did he identify the issue in his Notice of Appeal to the ALC. Instead, Torrence asserted exclusively in his grievance that he timely filed his Step I under the doctrine of equitable tolling, and he **identified equitable tolling as an issue for review in his Notice of Appeal to the ALC**. [emphasis supplied].

In response to SCDC's arguments regarding the Notice of Appeal he filed with the ALC,

Torrence asserted as follows in his brief to this Court:³⁰

Torrence's March 2, 2012 Notice of Appeal conformed to the criteria for the Notice of Appeal form to the ALC. First, the form published by the State requires "A general statement of the grounds for appeal is (See S.C. Code Ann. § 1-23-380(A)(6)):" (Original emphasis). The Form requires no specificity other than compliance with § 1-23-380(A)(6). Second, the grounds for appeal may be amended, supplemented or modified in the statement of issues in the brief. [footnote omitted and emphasis supplied].

²⁸ See SCDC's Brief, pp. 19 – 20.

²⁹ *Id.*, p. 27.

³⁰ See Torrence's Brief, p. 10.

In offering his above-quoted assertions regarding his Notice of Appeal to the ALC, Torrence once again overlooked Section V of the ALC Rules of Procedure.

As explained above, Torrence's appeal to the ALC of SCDC's denial of his grievance was governed by Section V of the ALC Rules of Procedure, which is entitled "Special Appeals."

ALC Rule 59 falls under Section V, and the first paragraph of ALC Rule 59, which is entitled "Notice of Appeal," provides that the "notice of appeal from the final decision to be heard by the [ALC] shall be filed with the Court and a copy served on each party, including the agency, within thirty (30) days of receipt of the decision from which the appeal is taken." The next sentence of ALC Rule 59 provides as follows:

The notice shall be on the form prescribed by the Court pursuant to Rule 57 and shall contain the following information:

- A. the name, address, SCDC number, and telephone number of the party requesting the appeal, and the name, address, and telephone number of the attorney or other authorized representative, if any, representing that party;
- B. **a brief factual basis for each expressly and specifically asserted constitutional violation;**
- C. a copy of the final decision which is the subject of the appeal and the date received;
- D. proof of service of the notice of appeal on all parties.
[emphasis supplied].

Torrence did not, within his Notice of Appeal to the ALC (R. p. 56), assert as an issue on appeal that his prison industries wage claims challenged SCDC "policies" and/or "procedures" as required by the above-quoted provisions from ALC Rule 59(B).

Accordingly, SCDC respectfully asserts that Torrence failed to preserve this issue for consideration by the ALC, and, by extension, this Court. *See Goins v. S. C. Dep't of Corr.*, Opinion No. 2014-UP-390, 2014 WL 5840482, at *1 (S.C. Ct. App. Nov. 12, 2014) (citing *Risher v. S.C. Dep't of Health & Envtl. Control*, 712 S.E.2d 428, 433, n. 5 (S.C. 2011) ("[T]his Court has long enforced and relied upon issue preservation rules in administrative appeals.") and

Brown v. S.C. Dep't of Health & Envtl. Control, 560 S.E.2d 410, 417 (S.C. 2002) (“[I]ssues not raised to and ruled on by the [ALC] are not preserved for appellate consideration.”)).

V. SCDC IS NOT PRECLUDED FROM APPEALING THE ALC’S JANUARY 30, 2014 ORDER

In his brief to this Court,³¹ Torrence offered the following argument:

SCDC raised the defense and requested an order from the ALC to determine timeliness as a preliminary matter. Ultimately, [the ALC’s] January 30, 2014 Order was the Order SCDC requested/proposed. Ordinarily, where a judgment or order is entered by consent, it is binding and conclusive and cannot be attacked by the parties either by direct appeal or in a collateral proceeding, *Johnson v. Johnson*, 425 S.E.2d 46 (S.C. App. 1992.). The right of appeal from such an order is regarded as waived, *Calcutt v. Calcutt*, 320 S.E.2d 55 (S.C. Ct. App. 1984). A party cannot appeal from an order or judgment that he has requested, *Parsons, v. Gibbes*, 37 S.E. 753 (S.C. 1901).

...

SCDC requested an order regarding the timeliness or statute of limitations and may not now appeal that order.

In its June 5, 2012 motion to the ALC (R. p. 76),³² SCDC stated as follows:

By an order issued May 8, 2012, this Court granted the motion filed by [SCDC] to file the Record on Appeal and its brief no later than Friday, June 8, 2012.

In light of developments in other similar cases, [SCDC] now hereby respectfully moves this Court for an Order by which it permits [SCDC] to address only (1) issue in the initial brief it will and must submit to this Court.

Later in its June 5, 2012 motion (R. p. 78), SCDC stated the following:

Thus, should this Court favorably consider this proposal, [SCDC] would file its brief focusing only on the timeliness issue. [Torrence], even though he has already filed his brief in this matter, would then have an opportunity to file a brief specifically rebutting [SCDC’s] argument that it

³¹ See Torrence’s Brief, pp. 25 – 26.

³² SCDC did not identify its June 5, 2012 motion to the ALC for inclusion into the record in its designation of matter. However, Torrence proposed SCDC’s June 5, 2012 motion as the second item for inclusion in his designation of matter. As reflected by its motion to strike items from Torrence’s designation of matter, which it filed separately, SCDC agreed to include its June 5, 2012 motion to the ALC into the record.

properly denied the prison industries pay claims he articulated in his administrative grievance because he did not timely file his Step 1.

SCDC did not, at any point in its June 5, 2012 motion (R. pp. 76 – 81), consent to accept whatever ruling the ALC issued as to whether Torrence timely filed his Step 1 grievance as the law of the case if the ALC granted its June 5, 2012. Likewise, SCDC did not, at any point in its June 5, 2012 motion, waive or forsake any right to appeal any order the ALC would issue regarding whether Torrence timely filed his Step 1 if the ALC granted its June 5, 2012 motion.

Finally, nowhere in the order issued June 7, 2012 by the ALC, by which it granted SCDC's June 5, 2012 motion, did the ALC state, hint, or otherwise infer that SCDC had consented to accept whatever ruling it would issue as to whether Torrence timely filed his Step 1. Instead, the relevant language of the ALC's June 7, 2012 order declared as follows (R. p. 82):

The issue [SCDC] seeks to address as a preliminary matter is whether [Torrence] timely filed his Step 1 within the 15-day filing deadline established by the applicable paragraphs of [Policy GA-01.12].

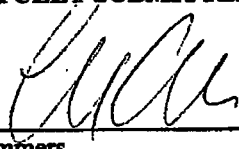
This Court agrees that the interests of judicial economy would be served by considering the timeliness of the filing as a preliminary matter and will grant [SCDC] additional time to prepare an abbreviated record dealing solely with that issue.

SCDC respectfully urges this Court to reject Torrence's argument on this point.

VI. CONCLUSION

For the foregoing reasons, as well as all of the reasons articulated in its brief, SCDC again respectfully urges this Court to reverse the decisions issued January 30, 2014 and January 20, 2016 by the ALC in the instant matter.

RESPECTFULLY SUBMITTED:



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Columbia, South Carolina
January 3, 2017

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
Trial Court Case No. 2012ALJ040143AP

Thomas J. Torrence, #094651, Respondent,

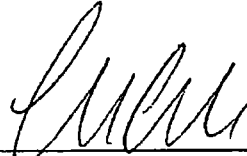
v.

South Carolina Department of Corrections, Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Appellant's Final Reply Brief complies with Rule 211(b), SCACR.

January 3, 2017



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SC Court of Appeals

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
Trial Court Case No. 2012ALJ040143AP

Thomas J. Torrence, #094651, Respondent,

v.

South Carolina Department of Corrections, Appellant.

PROOF OF SERVICE

I certify that I have served **THE APPELLANT'S FINAL REPLY BRIEF** on the above named *pro se* Appellant by mailing a copy to him, first class postage pre-paid, at the following address:

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SB-23
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January 3, 2017



LAKE E. SUMMERS

RECEIVED
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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

LAW OFFICES

NOV 29 2018

Thomas J. Torrence, Respondent,

**MALONE, THOMPSON
SUMMERS & OTT, LLC**

v.

South Carolina Department of Corrections, Appellant.

Appellate Case No. 2016-000285

Appeal From The Administrative Law Court
Deborah Brooks Durden, Administrative Law Judge

Unpublished Opinion No. 2018-UP-432
Submitted May 1, 2018 – Filed November 28, 2018

APPEAL DISMISSED

Lake E. Summers, of Malone, Thompson, Summers &
Ott, LLC, of Columbia, Appellant.

Thomas J. Torrence, pro se.

PER CURIAM: 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't'l Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 894 (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).

APPEAL DISMISSED.¹

HUFF, GEATHERS, and MCDONALD, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.



The South Carolina Court of Appeals

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Re: Thomas Torrence #094651 v. SCDC
Appellate Case No. 2016-000285

Dear Counsel and Mr. Torrence:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: The Honorable Deborah Brooks Durden

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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

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, THEREFORE, 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):

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.

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

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).

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].

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

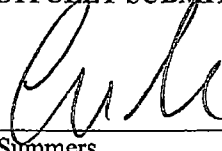
In light of the foregoing analysis and argument, SCDC respectfully petitions the Court to adjudicate the following issues SCDC raised in its appeal of the ALC's January 20, 2016 order:

- 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

RECEIVED
JAN 10 2019
SC Court of Appeals

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

The South Carolina Court of Appeals

Thomas J. Torrence #094651, Respondent,

v.

South Carolina Department of Corrections, Appellant.

Appellate Case No. 2016-000285

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Huff

J.

John D. Jester

J.

Stephen P. McDonald

J.

Columbia, South Carolina

LAW OFFICES

AUG 19 2019

cc:

Lake Eric Summers, Esquire
Thomas J. Torrence #094651

MALONE, THOMPSON
SUMMERS & OTT, LLC

FILED

August 2, 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,

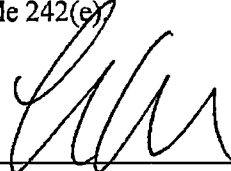
v.

South Carolina Department of Corrections Petitioner.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appendix contains material in conformity with the provisions of South Carolina Appellate Court Rule 242(e)

September 30, 2019



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