

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

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

Appellate Case No. 2018-001324

Reyes Cabrera Pena, #265665 Respondent,

v.

South Carolina Department of Corrections Appellant.

RECORD ON APPEAL

RECEIVED

AUG 29 2019

SC Court of Appeals

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Perry Correctional Institution Q-1-A-207
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Pelzer, South Carolina 29669
pro se Respondent

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SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
INMATE GRIEVANCE FORM

STEP 1

INMATE NAME: Royes Cabrera
SCDC NUMBER: #205665
INSTITUTION: Perry C.I. 2/29/2007
HOUSING UNIT: Q4 B-213
WORK ASSIGNMENT: P-I

Office Use Only
Grievance No. PEL 1069-07
Code: General NY
Policy _____
Disc. Hear. _____
Class _____
Date Received JUL 03 2007
IGC Initials ML

STATE GRIEVANCE (include documentation, and date of incident if SCDC Policy indicates which policy) GA-01-12.

South Carolina Department of Corrections is in violation of the plain language of the statute which directs it to disburse the money paid by Private Sector program to SCDC for inmate labor based on gross wages. STATUTE 24-3-40(A) S.C. Code Ann. I grieve SCDC for wages they withheld from me in violation of this statute through the Supreme Courts opinion No. 26328 Filed MAY 7, 2007. Therefore SCDC owes me \$19.2 for every single hour I worked for Carolina Consolida here at Perry C.I along with the long term savings held in Escrow by SCDC under S.C. Code Ann. 24-3-40 (2). Also, SCDC owes proper interest on all monies SCDC owes me

ACTION REQUESTED: That SCDC pay me \$19.2 for every hour I worked in Private Sector Company here at Perry, along with immediate access to my long term savings held in Escrow by SCDC. And proper interest on all money owed to me by SCDC.

SPECIFY HOW AND WHEN INFORMAL RESOLUTION WAS ATTEMPTED BY GRIEVANT:

Through Case Thomas Lawrence, et al, v SCDC and the STATE OF SOUTH CAROLINA. SUPREME COURT OPINION NO. 26328 FILED MAY 7, 2007, AND S.C. Code 24-3-40 (A)(2).

Royes Cabrera
Grievant Signature Date

ACTION TAKEN BY IGC:

Grievance reviewed by SCDC counsel. See Warden's response.

I accept the action taken by the IGC and consider the matter closed.
 I do not accept the action taken and wish to appeal.

SCDC 103 (Rev. November 1997)

(CONTINUE ON REVERSE SIDE)

ML 7/23/07
IGC Signature Date
NA
Grievant Signature Date

MFLDNE*THOMPSONMLLC

Fax: 803-254-0309

Jul 20 2007 10:49

P.05

Perry PI Back Wage Claim Step 1 Reply

Cabrera, Reyes	265665	PCI-1069-07
----------------	--------	-------------

I have reviewed your undated Step 1 grievance. The Inmate Grievance Coordinator's Office at Perry received your Step 1 grievance on July 3, 2007. After carefully considering your grievance and the arguments you made justifying the action you request, I deny your grievance.

In your grievance, you claim that a recent ruling from the South Carolina Supreme Court requires SCDC to pay you \$1.92 per labor hour in back wages for each labor hour you performed during the period of time you have voluntarily participated in the prison industries project SCDC operates at Perry CI.

Additionally, you claim that the same ruling from the South Carolina Supreme Court requires SCDC to reimburse you for all monies SCDC has deducted from your gross prison industries wages and held "in escrow" in "long term savings" under S.C. Code Ann. § 24-3-40(B)(2).

The case you reference in your Step 1 grievance is known properly as Torrence, et al. v. S.C. Dept of Corrections, and, as you accurately stated, the South Carolina Supreme Court's decision in this case was filed May 7, 2007.

However, you failed to account for the fact that SCDC, on June 5, 2007, filed a Petition for Rehearing with the South Carolina Supreme Court concerning its May 7, 2007 opinion in Torrence. As of July 16, 2007, SCDC's Petition for Rehearing is still under consideration with this South Carolina Supreme Court.

Therefore, the South Carolina Supreme Court's May 7, 2007 decision in Torrence is not final, and you cannot properly use this decision justify the arguments you raise in your Step 1 grievance.

Accordingly, I deny your grievance.

[Signature] 7-20-07
Warden Signature Date

- I accept the Warden's decision and consider the matter closed.
- I do not accept the Warden's decision and wish to appeal.

[Signature] 7/30/07
Grievant Signature Date

[Signature] 7/30/07
IGC Signature Date

715-117

Perry

8/8/07

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SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
INMATE GRIEVANCE FORM
STEP 2 OF 2007

Office Use Only
Grievance No. 21-1069-07
Code: General MY
Policy _____
Disc. Hear _____
Class _____
Date Received 8/2/07
IGC Initials WBC

INMATE NAME: Reyes Cabrera INMATE GRIEVANCE
SCDC NUMBER: #265669
INSTITUTION: Perry C.I.
HOUSING UNIT: Q4B-213
WORK ASSIGNMENT: P.I.

INMATE'S REASON FOR APPEAL (state specific dissatisfaction):

The FACT that SCDC Filed a petition for Rehearing with the Supreme Court will not change the Statutes 24-3-40(A) SC Code ANN or SC Code ANN 24-3-40(B)(2). The Court decision on rehearing May change the time frame so as SCDC can have a little more time but it will not change the outcome, Therefore SCDC will still be in violation of the plain language of the STATUTES which directs them to return the money owed to me which is \$192 for every hour I worked for Private Sector and admittiate access to my long term savings that is being held in Escrow.

Reyes Cabrera 8/3/07
Grievant Signature Date

RESPONSIBLE OFFICIAL'S DECISION AND REASON:

I have reviewed your grievance. It appears that you voluntarily participated in the prison industries project while incarcerated at South Carolina Department of Corrections (SCDC). In your grievance, you claim that rulings from the South Carolina Supreme Court (SC Supreme Court) require SCDC to pay you "prevailing wages". SC Supreme Court ruled in Adkins et al v. SCDC and Wicker v. SCDC that inmates may file a grievance by which to protest any provision of "prevailing wages" statute, that applied to the prison industries project, and that such grievance must be filed, processed, and determined in accordance with the provisions of SCDC's Inmate Grievance System Policy. However, contrary to your claim, Adkins and Wicker ordered that you or inmates in a similar position could file a grievance demanding the end of that you seek in your grievance. Those rulings did not give you or inmates in a similar position a right to receive "prevailing wages" nor did those rulings order SCDC to pay "prevailing wages" or back wages with or without interest. Those rulings simply acknowledged that for the first time you and other inmates in a similar position could file a grievance if you desired.

The SC Supreme Court has long recognized that inmates are not employees of South Carolina or of the companies that serve as the prison industry sponsors. No decision by the SC Supreme Court (including Adkins and Wicker) has granted employees status to you or inmates in a similar position. The United States Constitution, the South Carolina Constitution, and/or the Fair Labor Standards Act do not entitle you or inmates in a similar position a wage that is different from what SCDC has paid you for the labor you voluntarily provided to the prison industries project. Without authority in the contrary, inmates are not employees. Finally, the South Carolina Legislature enacted budget provisions and statutes which authorize SCDC to pay you and inmates in a similar position a wage that is less than the "prevailing wage" for work of a similar nature in the private sector.

Therefore, your grievance is denied.

You may appeal this decision under the Administrative Procedures Act to the Administrative Law Court in order to seek a review of the decision. You must file out the attached Notice of Appeal Form (Form) and submit it as instructed on the Form with 30 days of receipt.

[Signature] 3/28/16
Signature Date

The decision rendered by the responsible official exhausts the appeal process of the Inmate Grievance Procedure. I hereby acknowledge receipt of the official's response and understand this is the Agency's final response to this matter.

Reyes Cabrera 4-21-16 [Signature] 4-21-16
Grievant Signature Date IGC Signature Date

(SEE REVERSE SIDE FOR INSTRUCTIONS)

SCDC (D-44) (Revised 1/97)

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MAY 11 2016

Appellant,
Reyes Cabrera P
vi.
South Carolina Department of Corrections,
Respondent.

GENERAL COUNSEL

NOTICE OF APPEAL

DOCKET NO. ALJ-04
GRIEVANCE NO.: P.C.J. 1067-07

Notice is hereby given that Reyes Cabrera does hereby appeal the final decision of the South Carolina Department of Corrections dated 3/28/16 and received on 4/21/16, a copy of which is attached. A general statement of the grounds for appeal is (See S.C. Code Ann. § 1-23-380(A)(6)):

The fact that SCDC filed a petition for rehearing with the Supreme Court will not change the statute 24-3-40 (A) SC code Ann on SC code Ann 24-3-40 (A)(2) the court decision on rehearing may change the time frame so as SCDC can have a little more time but it will not change the outcome therefore SCDC will still be in violation of the plain language of the statutes which directs them to return the money owed to me which is \$1.92 for every hour I worked for private sector and admittiate access to my lone term savings that is being held in Escrow.

Note to Court: SCDC held this grievance for (9) Years.

Reyes Cabrera P #265665
Appellant's Name Q4B-117 P.C.J.
430 Oaklawn Road
Mailing Address

Reyes Cabrera P
Signed
5/2/16
Dated

Polzer SC 29669
City, State, Zip Code

CERTIFICATE OF SERVICE

I hereby certify that I, Reyes Cabrera (your name), on the 2 day of MAY, 2016, in Polzer (city), South Carolina, served a copy of the foregoing Notice of Appeal on all parties to this matter by depositing the same in the United States Mail, postage paid, or in the mail room of the undersigned's institution and addressed as follows:

Name of person/Agency served: David Tatarsky SCDC Attorney
Address: 444 Broad River Road

City, State, Zip Code: Columbia SC 29221

Print your name: Reyes Cabrera
(See reverse side for instructions)

Sign your name: Reyes Cabrera

State of South Carolina
Administrative Law Court

Reyes Cabrera P #265665
Appellant
VS
South Carolina Department
of Corrections
Respondent

Docket # 16C0397
Appellant's Brief
In Support of Appeal

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JUL 08 2018

GENERAL COUNSEL

Pro Se
Reyes Cabrera P #265665
PCI Q4B-117
430 Oaklawn Road
Pelzer, SC. 29669

David Tartarsky
South Carolina Dept of Corr.
4444 Broad River Road
P.O. Box 21787
Columbia, SC. 29221
(803) 896-8508

(1)

State of South Carolina
Administrative Law Court

Reyes Cabrera P # 265665 Appellant v South Carolina Department Of Corrections Respondent

Docket # 16L0397
Appellant's Brief
In Support of Appeal

To: Clerk of Administrative Law Court and South Carolina Department of Corr, Attorney David Tatarsky.

Pursuant to Rule 60 of the South Carolina Rules of Procedure for the Administrative Law Court ["ALC Rules"] Appellant Reyes Cabrera P. Respectfully Submits this Brief in Support of his Appeal of Respondent South Carolina Department of Corrections (SCDC) Final denial of his grievance PCT 1269-07.
Statement of Issues on Appeal.

Whether SCDC erred in denying Mr. Cabrera, grievance for back wages owed to Mr. Cabrera, for his work in the prison Industries project at Perry Correctional Institution.

Statement of the Case

Mr. Cabrera, participated in the prison Industries project Carolina Cables - private at Perry Correctional Inst for around a year and half.

(2)

(step 1 grievance) Mr Cabrera, worked a perry Goss Inst, at Carolina Consoles-private project. The prison Industries project is federally Certified and Operates under various state statutes, including S.C. Code Ann § 24-3-930, also known as the "prevailing wage statute," which Mandates that all inmates participating in the project earn at least "the prevailing wage for work of a similar nature in the private sector." S.C. Code Ann § 24-3-430 CD), see also S.C. Code Anns 24-3-40, 24-3-315. SCDC paid less than the prevailing wage during the training period. Moreover, SCDC withheld \$1.92 per hour for the entirety of his work with the project. SCDC denied step 1 and step 2 of my grievance.

Argument.

1) SCDC erred in denying Mr Cabrera, grievance for back wages owed to Mr Cabrera, for his work in the prison Industries project. SCDC's denial of Mr Cabrera, is flawed for multiple reasons. (1) SCDC failed to pay me the prevailing wage in accordance, with § 24-3-430 CD), during his work in the project; and (2) SCDC was not entitled to collect \$1.92 per hour from Mr Cabrera wages. Accordingly, this Court should resolve the Appeal in Mr Cabrera, Favor and award Mr Cabrera, back wages owed from his participation in the project. More importantly, § 24-3-430 CD) requires SCDC to pay the prevailing wage, not the Federal minimum wage; "There is simply nothing statutory scheme authorizing the DOC to pay [an inmate] a training wage less than that prevailing wage."

(3)

Therefore, SCDC was required to pay Mr Cabrera the prevailing wage for his work in the project. As a result, SCDC owes Mr Cabrera Back wages from his participation in the project to compensate for the difference between the wages Mr Cabrera received and the prevailing wage in South Carolina in effect at that time. With out more, the agency fails to adequately rebut this issue, and as a result, SCDC should compensate Mr Cabrera for the hourly deductions from his paycheck of a \$ 1.92 an hour for every hour he worked, along with any other wages paid to him that was less than the prevailing wage.

Conclusion.

- A) Resolve the appeal in Mr Cabrera, Favor by directing SCDC to grant him the relief requested in his grievance; an
- B) For any other relief this Court deems just and proper.

Reyes Cabrera P #265665
 Perry Corr. Inst Q4B117
 430 Oaklawn Road
 Pelzer, SC 29669

Oute July 5, 2016
 Pelzer, SC

(4)

Certificate of Service

I hereby certify that on the 5th of July 2016 in
Pelzer, South Carolina. I serve a copy of the
Foregoing Appellant's Brief in support of Appeal
on all parties to this matter by depositing the
same in the United States Mail, Postage paid, or
in mail room of the Undersigned's Institution
and addressed as follows:

David Tatarsky
South Carolina Department
of Corrections
4444 Broad River Road
Columbia, SC. 29221

Reyes Cabrera
Pro Se

Pelzer, South Carolina

Date: _____

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JUL 05 2016

RC.I. MAILROOM

(5)

FILED

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

AUG 20 2016

Reyes Cabrera Pena, #265665,
Appellant,
v.
South Carolina Department of Corrections,
Respondent.

SC ADMIN. LAW COURT
Docket No.: 16-ALJ-04-0397-AP

Hon. H.W. Funderburk, Jr.

MOTION TO HOLD IN ABEYANCE

This matter is before the Administrative Law Court ("ALC") pursuant to the appeal of Reyes Cabrera Pena ("Appellant"), an inmate incarcerated with the South Carolina Department of Corrections ("SCDC").

Appellant is challenging SCDC's payment of his wages under the Prison Industries service project. Appellant contends he has been paid wages which do not conform to state and federal law and seeks back pay. This very issue is currently awaiting cert before the South Carolina Supreme Court in two cases. *Gatewood v. S. Carolina Dep't of Corr.* and *Ackerman v. S. Carolina Dep't of Corr.* both address the same issue before the court in this case and are both awaiting cert by the South Carolina Supreme Court. 416 S.C. 304, 785 S.E.2d 600, 603 (Cl. App. 2016), *reh'g denied* (June 2, 2016); 415 S.C. 412, 414, 782 S.E.2d 757, 758 (Cl. App. 2016), *reh'g denied* (Mar. 24, 2016). On July 13, 2016, Administrative Law Court Judge H. W. Funderburk, Jr. held a similar case in abeyance for this very reason. *Ward v. SC Dep't of Corr.*, 15-ALJ-04-0560-AP (July 13, 2016). Respondent requests that this case be held in abeyance until there is a final ruling in the above cases.

Signature block on following page.

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SEP 02 2016

GENERAL COUNSEL

Respectfully submitted,



Annie Laurie Rumber
Staff Attorney
Office of General Counsel
S.C. Department of Corrections
4444 Broad River Rd.
Columbia, SC 29221
(803)896-1355

August 29, 2016
Columbia, South Carolina

FILED

AUG 29 2018

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Reyes Cabrera Pena, #265665,
Appellant,
vs.
South Carolina Department of Corrections,
Respondent.

) Docket No. 16-ALJ-04-0397-AP
) Grievance No.: KPCI 1069-07

) ORDER OF ABEYANCE

) **FILED**

) AUG 30 2016

) SC ADMIN. LAW COURT

This matter is before the South Carolina Administrative Law Court ("ALC") pursuant to the Notice of Appeal filed by Reyes Cabrera Pena, an inmate in the custody of the South Carolina Department of Corrections.

Two cases controlling of the issues here, *Gatewood v. S. Carolina Dep't of Corr.* and *Ackerman v. S.C. Dep't of Corr.*, are awaiting a decision on whether the South Carolina Supreme Court will grant certiorari. Therefore, this Court will hold this case in abeyance pending a final decision of the South Carolina Supreme Court. It is therefore,

ORDERED that this case be held in abeyance pending the final dispositions of *Gatewood v. S.C. Dep't of Corr.* and *Ackerman v. S.C. Dep't of Corr.*

AND IT IS SO ORDERED.

Columbia, South Carolina
August 30, 2016

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

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This is to certify that the foregoing and the date
received are true and correct as shown on the
records in this cause and a copy hereof,
as the same are true, shall be given,
to the person named in the foregoing (1).
the 30th day of August 2016
By: *[Signature]*
Administrative Law Judge

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SEP 02 2016
GENERAL COUNSEL

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Reyes Cabrera Pena, #265665,
)
)
 Appellant,
)
 vs.
)
 South Carolina Department of Corrections.
)
 Respondent.
)

Docket No. 16-ALJ-04-0397-AP
Grievance No.: KPCI 1069-07

ORDER LIFTING ABEYANCE

FILED

JUN 15 2017

SC ADMIN. LAW COURT

This matter is before the South Carolina Administrative Law Court ("ALC") pursuant to the Notice of Appeal filed by Reyes Cabrera Pena ("Appellant"), an inmate in the custody of the South Carolina Department of Corrections ("SCDC").

Two cases controlling of issues here, *Gatewood v. S.C. Dep't of Corr.*, 416 S.C. 304, 785 S.E.2d 600 (Cl. App. 2016), cert. denied (May 31, 2017) and *Ackerman v. S.C. Dep't of Corr.*, 415 S.C. 412, 782 S.E.2d 757 (Cl. App. 2016), cert. denied (May 31, 2017), have reached final dispositions. Therefore, this Court will lift its Order of Abeyance in this case. The Record and Appellant's brief have already been filed in this case. However, this Court will grant Appellant until July 5, 2017, to supplement his brief to address the impact of *Gatewood* and *Ackerman* if he chooses. Respondent shall have until July 25, 2017, to file and serve his brief. Any reply brief is due by August 4, 2017. It is therefore,

ORDERED that the Order of Abeyance in this case is LIFTED.
AND IT IS SO ORDERED.

Columbia, South Carolina
June 15, 2017

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

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JUN 20 2017

GENERAL COUNSEL

[Faint stamp and signature]

State of South Carolina
 Administrative Law Court
 Reyes Cabrera # 265665 ^{Pena} Docket No 16-ALI-04-0397-AP
 Appellant
 V
 South Carolina Department
 of Corrections
 Respondent

Appellant's Brief
in support of Appeal

Pro se:

Reyes Cabrera, 265665
 Perry Corr Inst Q1-A-207
 430 Oaklawn Road
 Palzer SC 29669

6/26/17 RECEIVED
 JUN 30 2017

GENERAL COUNSEL

To: David Tatarsky Attorney for South Carolina
 Department of Corrections Pursuant to Rule 60 of
 the South Carolina Rules of Procedure for the
 Administrative Law Court ("ALC Rules"). Appellant Mr
 Reyes Cabrera by Pro Se, respectfully submits this
 Brief in support of his Appeal of Respondent,
 South Carolina Department of Corrections (SCDC)
 Final denial of his grievance No KPCS, 1069-07

Statement of Issues on Appeal

whether SCDC erred in denying Mr Cabrera
 grievance for back wages owed to Mr Cabrera
 for his work in Prison Industries Project
 at Perry Correctional Institution.

Statement of the Case

Mr. Cabrera participated in the Prison Industries Project operated by SCDC at Perry Corr Inst. The Prison Industries Project is Federally Certified and Operates under various state statutes, including S.C. Code Ann § 24-3-430, Also Known as the "prevailing wage statute," which mandates that all inmates participating in the project earn at least "the prevailing wage for work of a similar nature in the private sector." S.C. Code Ann § 24-3-430 (D); See Also S.C. Code Ann § 24-3-40, 24-3-315.

Mr Cabrera was paid less than prevailing wages also SCDC withheld \$1.92 per hour from Mr Cabrera wages for the entirety of his work with the Project.

Argument

1) SCDC erred in denying Mr Cabrera grievance for back wages owed to him for his work in the Prison Industries Project. SCDC denial of Mr Cabrera, grievance flawed for multiple reasons, (1) Mr Cabrera filed a timely, grievance under the doctrine of equitable tolling; (2) S.C. Code Ann § 24-3-430 (D) Applies to Mr Cabrera under the project. (3) SCDC failed to pay Mr Cabrera the prevailing wage in accordance with § 24-3-430 (D) during his work in the project; and (4) SCDC was not entitled to collect \$1.92 per hour from Mr Cabrera wages favor and Award him back wages owed for his participation in the project.

A: SCOC was not entitled to deduct \$1.92 per hour from Mr. Cabrera wages.

In addition to SCOC's failure to pay Mr. Cabrera the prevailing wage for his work as required by law, SCOC also withheld \$1.92 per hour from his compensation for "overhead cost." SCOC claims that South Carolina Law "Compels" SCOC to collect an hourly overhead cost from private industry sponsors. However, the Court in Torrence, referring to the \$1.92 deduction by SCOC, noted that if the agency removes any money remitted by the private industry sponsor and then disburses the percentages, listed in section 24-3-40 based on lower rates. [SCOC] would be in violation of plain language of the statute which directs it to disburse the money on the gross wages. Torrence, 373 S.E. 2d at 594 N. 4, 646 S.E. 2d at 870. The only support SCOC provides with respect to its \$1.92 deduction is the thread bare assertion that agency required "overhead costs" for the program. However, there is no explanation or discussion that breaks down those costs or demonstrates that SCOC did in fact disburse the money based on gross wages without more. The agency falls to adequately rebut this issue, and as a result, SCOC should compensate Mr. Cabrera, for the hourly deductions from his paycheck.

Conclusion

Wherefore Mr. Cabrera prays this Court; (A) Resolve the Appeal in Mr. Cabrera favor by directing SCOC to grant him the relief requested in his grievance; and (B) for any other relief this Court deems just and proper.

Certificate of service

I here by certify that on the ~~26~~ day of ~~June~~ 2017 in Polzer South Carolina. I served a copy on the foregoing Appellant's Brief in support of Appeal on all parties to this matter by depositing the same in the United States mail, postage paid, or in the mail room of the under signed's institution, and addressed as follows.

cc: David Tatarsky
South Carolina Department
of Corrections
4444 Broad River Road
P.O. Box 21787
Columbia, SC 29221

Reyes Cabrera-peña

Reyes Cabrera-peña 265665
PCI Q+A-207
430 Oaklawn Road
Polzer SC 29669

41

**THE STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

Reyes Cabrera Pena, #265665,	)	Docket No. 16-ALJ-04-00397-AP
	)	Grievance No. PCI-1069-07
Appellant,)	
)	
vs.	)	RESPONDENT'S BRIEF
)	
South Carolina Department of Corrections,)	
)	
Respondent.)	

In accordance with the June 15, 2017 and July 26, 2017 orders issued by the Court, the Respondent, the South Carolina Department of Corrections ["SCDC"], by and through its undersigned outside counsel, hereby respectfully submits its brief in the instant case.

STANDARD OF REVIEW

As Pena challenged SCDC's denial of the prison industries wage claims he presented in a grievance, designated as PCI-1069-07, he filed under SCDC Policy Number GA-01.12, the Court's jurisdiction to hear the instant matter derives from *Al-Shabazz v. State*, 527 S.E.2d 742 (S.C. 2000), *Adkins, et al., v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (S.C. 2004), and *Wicker v. S.C. Dep't of Corr.*, 602 S.E.2d 56 (S.C. 2004).

Under our state's Administrative Procedures Act and *Al-Shabazz*, 527 S.E.2d at 754, the Court sits in an appellate capacity rather than as an independent finder of fact, and, under S.C. Code Ann. § 1-23-380(5), the following standard of review applies to Pena's appeal:

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

FILED
AUG 15 2017

SC ADMIN LAW COURT

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.

STATEMENT OF THE CASE

I. PENA'S STEP 1

Pena articulated two (2) claims in a Step 1 grievance form he submitted in 2007:¹

[SCDC] is in violation of the plain language of the statute which directs it to disburse the money paid [by] private sector program to [it] for inmate labor based on gross wages. [S.C. Code Ann. § 24-3-40(A)]. I grieve SCDC for wages [it] withheld from me in violation of this statute through the Supreme Court Opinion No. 26328 filed May 7, 2007. Therefore, SCDC owes me \$1.92 for every single hour I worked for Carolina Consoles here at Perry C.I.,² along with the long term savings held in escrow by SCDC under [S.C. Code Ann. § 24-3-40(B)(2)]. Also, SCDC owes proper interest on all monies [it] owes me.

At the bottom of his Step 1 form, Pena acknowledged that the May 7, 2017 opinion issued by our Supreme Court was *Torrence v. S.C. Dep't of Corr.*, 646 S.E.2d 866 (S.C. 2007).³

¹ Neither Pena's 2007 Step 1 nor SCDC's response to his Step 1 appeared in the Record filed and served July 7, 2016 by SCDC's Office of General Counsel. Pena's Step 2 appeal, with his signature at the very bottom of the form, also did not appear in the Record filed and served July 7, 2016. SCDC, by and through its undersigned outside counsel, respectfully files and serves an Amended Record on Appeal along with its instant brief.

² Pena did not "work for" nor was he otherwise "employed" by Carolina Consoles, the private industry sponsor for the prison industries project in which he voluntarily participated. See S.C. Code Ann. § 24-3-27(B); *Watson v. Graves*, 909 F.2d 1549, n. 7 (5th Cir. 1990); *S.C. Dep't of Corr. v. Cartrette*, 694 S.E.2d 18, 23 (S.C. Ct. App. 2010); *Williams v S.C. Dep't. of Corr.*, 641 S.E.2d 885, 887 (S.C. 2007); and *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005).

³ In *Torrence*, 646 S.E.2d at 867, our Supreme Court observed that the prison industries project operated by SCDC at Evans Correctional Institution was certified by the United States Department of Justice's Bureau of Justice Assistance ["BJA"] under BJA's Prison Industries Enhancement Certification Program ["PIECP"]. Pena voluntarily participated in a PIECP project at Perry in which Carolina Consoles was the private industry sponsor.

In his Step 1, Pena demanded that "SCDC [pay] me \$1.92 for every hour I worked in private sector company here at Perry along with immediate access to my long term savings held in escrow by SCDC and proper interest on all money owed to me by SCDC."

Pena did not claim or assert in his Step 1 that SCDC failed to pay him the "prevailing wage" under S.C. Code Ann. § 24-3-430(D), and, for that matter, he did not reference or even mention § 24-3-430(D) in his Step 1.

Pena also did not claim or assert in his Step 1 that SCDC ran afoul of § 24-3-430(D) or any other applicable statute by paying him "training wages" for the first 320 hours of his labor.

II. PENA'S STEP 2

SCDC denied Pena's Step 1, and Pena submitted a Step 2 appeal form dated August 3, 2007 by which he challenged SCDC's denial of the two (2) claims he articulated in his Step 1.

Just as in his Step 1, Pena did not claim or assert in his Step 2 that SCDC failed to pay him the "prevailing wage" under § 24-3-430(D), nor did he reference or otherwise mention § 24-3-430(D) in his Step 2.

Just as in his Step 1, Pena also did not claim or assert in his Step 2 that SCDC ran afoul of § 24-3-430(D) by paying him "training wages" for the first 320 hours of his labor.

III. PENA'S NOTICE OF APPEAL

SCDC denied Pena's Step 2, and he filed a Notice of Appeal dated May 2, 2016 with the Court. In his Notice of Appeal, Pena challenged SCDC's denial of the two (2) claims he asserted in his Step 1, namely that SCDC owed him, under *Torrence*, \$1.92 per hour for every hour of his prison industries labor and that he was entitled, under § 24-3-40(B)(2), to immediate access to the monies SCDC deducted from his gross industries pay and held in an interest-bearing escrow account for his benefit by operation of § 24-3-40(A)(5).

Just like his Step 1 and Step 2, Pena did not claim or assert as a ground in his Notice of Appeal that SCDC failed to pay him the "prevailing wage" under § 24-3-430(D) or that SCDC owed him back pay for paying him "training wages" for the first 320 hours of his labor.

IV. PENA'S BRIEF

In his brief dated July 5, 2016, Pena identified the following issues on appeal (July 5, 2016 Brief, pp. 2 – 3):

[Pena] participated in the prison industries project Carolina Consoles – private at [Perry] for around a year and [a] half.

(Step 1 Grievance) [Pena] worked [at Perry], at Carolina Consoles – private project. The [project] is federally certified and operates under various state statutes, including [§ 24-3-430(D)], also known as the "prevailing wage statute," which mandates that all inmates participating in the project earn at least "the prevailing wage for work of a similar nature in the private sector. [Section] 24-3-430(D), see also [§§] 24-3-40, 24-3-315. SCDC paid less than the prevailing wage during the training period. Moreover, SCDC withheld \$1.92 per hour for the entirety of [my] work with the project.

Pena later asserted as follows (July 5, 2016 Brief, p. 3):

SCDC erred in denying [my] grievance for back wages owed to [me] for [my] work in the [project]. SCDC's denial of [my grievance] is flawed for multiple reasons. (1) SCDC failed to pay me the prevailing wage in accordance with § 24-3-430(D) during [my] work in the project and (2) SCDC was not entitled to collect \$1.92 per hour for [my] wages. ... More importantly, § 24-3-430(D) requires SCDC to the prevailing wage, not the federal minimum wage; "There is simply nothing in the statutory scheme authorizing [SCDC] to pay [an inmate] a training wage less than [the] prevailing wage."⁴

⁴ While he did not cite any authority for this declaration, Pena undoubtedly quoted our Supreme Court's decision in *Wicker*, 602 S.E.2d at 58: "Finally, we concur with the [ALC] and the circuit court that there is simply nothing in the statutory scheme authorizing [SCDC] to pay Wicker a training wage less than the prevailing wage." [emphasis supplied]. Significantly, our Supreme Court, in affirming the ALC's decision which reversed SCDC's denial of the inmate's grievance, also acknowledged in *Wicker*, 602 S.E.2d at 56, that the ALC held the inmate "was entitled to be compensated the prevailing wage of \$5.25 per hour for the time he was in training for his [participation in the project SCDC operated at Evans Correctional Institution]." [emphasis supplied]. The inmate in *Wicker* participated in the same PIECP project as the inmates in *Torrence*.

Pena identified as an issue on appeal in his July 5, 2016 brief his claim that, under *Torrence*, SCDC owes him \$1.92 per hour for every hour of his prison industries labor.

Pena also identified as an issue on appeal in his July 5, 2016 brief his claim that SCDC paid him "training wages" rather than the "prevailing wage" for the first 320 hours of his prison industries labor. As illustrated above, however, Pena never articulated such a claim in his Step 1, Step 2, or Notice of Appeal.

Pena further identified as an issue on appeal in his July 5, 2016 brief his claim that SCDC failed to pay him the "prevailing wage" during the entirety of the time he participated in the project. However, as also illustrated above, Pena never articulated such a claim in his Step 1, Step 2, or Notice of Appeal.

Importantly, Pena did not identify as an issue on appeal in his July 5, 2016 brief any claim under § 24-3-40(B)(2), nor did he offer argument on such a claim in July 5, 2016 Brief.

V. APPEAL HELD IN ABEYANCE

After Pena submitted his brief dated July 5, 2016, SCDC moved the Court on August 29, 2016 to hold the instant matter in abeyance pending the resolution of two (2) cases that were pending before our Court of Appeals (i.e. *Ackerman, et al. v. S.C. Dep't of Corr.* and *Gatewood v. S.C. Dep't of Corr.*), and the Court issued an order on August 30, 2016 by which it granted SCDC's motion and held further proceedings in the instant matter in abeyance.

Upon the final disposition of *Ackerman, et al., v. S.C. Dep't of Corr.*, 782 S.E.2d 757 (S.C. Ct. App. 2016), *cert. denied* (May 31, 2017) and *Gatewood v. S.C. Dep't of Corr.*, 785 S.E.2d 600 (S.C. Ct. App. 2016), *cert. denied* (May 31, 2017), the Court, by an order it issued June 15, 2017, lifted the abeyance it imposed in 2016.

VI. PENA'S SUPPLEMENTAL BRIEF

By its June 15, 2017 order, this Court also permitted Pena to file a supplemental brief "to address the impact of *Gatewood* and *Ackerman* if he" choose to do so.

Pena filed a supplemental brief dated June 26, 2017 in which he identified the following issue(s) on appeal (June 26, 2017 Brief, p. 2):

[I] was paid less than the prevailing wages also SCDC withheld \$1.92 per hour from [my] wages for the entirety of [my] work with the project.

Pena later asserted as follows (June 26, 2017 Brief, p. 2):

SCDC erred in denying [my] grievance for back wages owed to [me] for [my] work in the prison industries project. SCDC's denial of [my] grievance [is] flawed for multiple reasons. (1) [I] filed a timely grievance under the doctrine of equitable tolling; (2) [§] 24-3-430(D) applies to [me] under the project; (3) SCDC failed to pay [me] the prevailing wage in accordance with [§] 24-3-430(D) during [my] work in the project; and (4) SCDC was not entitled to collect \$1.92 per hour from [my] wages ...

While he asserted the doctrine of equitable tolling in his supplemental brief as a response to SCDC finding that he did not timely file his Step 1, Pena did not assert the doctrine in his Step 2, his Notice of Appeal, or his July 5, 2016 Brief.

While he identified his claim for back pay associated with SCDC failing to pay him the "prevailing wage" under § 24-3-430(D) as an issue on appeal in both his briefs, Pena, as shown above, never articulated the claim in his Step 1, Step 2, or Notice of Appeal.

Unlike his July 5, 2016 Brief, Pena did not identify as an issue on appeal in his supplemental brief a claim for back pay for the "training wages" SCDC paid him for the first 320 hours of his labor.

Like his July 5, 2016 Brief, Pena did not identify as an issue on appeal in his supplemental brief any claim under § 24-3-40(B)(2), nor did he offer any argument concerning such a claim.

Pena also never discussed or cited *Gatewood* or *Ackerman* in his supplemental brief.

Finally, just as he did in his July 5, 2016 Brief, Pena identified as an issue on appeal in his supplemental brief his claim that under *Torrence*, SCDC owes him \$1.92 per hour for every hour of his prison industries labor.

STATEMENT OF ISSUES ON APPEAL

Given the above-provided accounting of the claims Pena actually raised and preserved for review, SCDC respectfully submits that only a single issue is subject to review by the Court, namely whether SCDC could purportedly deduct or remove \$1.92 per hour from his gross wages.

ARGUMENT

I. CLAIMS ABANDONED BY PENA

SCDC respectfully asserts that Pena failed to raise claims for the “prevailing wage” under § 24-3-430(D) and for back pay associated with the “training wages” SCDC paid him for the first 320 hours of his labor in his Step 1, Step 2, or Notice of Appeal and that Pena failed to assert the doctrine of equitable tolling in his Step 2 or Notice of Appeal. Accordingly, Pena’s “prevailing wage” claim, his “training wage” claim, and his invocation of equitable tolling are not preserved for review by the Court under *Gatewood*, 785 S.E.2d at 611 – 12:

An issue that is not raised to an administrative agency is not preserved for appellate review by the ALC. Cf. [*Kiawah Resort Assocs. v. S.C. Tax Comm'n*, 458 S.E.2d 542, 544 (S.C. 1995)] (“In reviewing a final decision of an administrative agency under [S.C.Code Ann.] § 1-23-380, the circuit court essentially sits as an appellate court to review alleged errors committed by the agency. As such, the circuit court, like this [c]ourt, has a limited scope of review, and cannot ordinarily consider issues that were not raised to and ruled on by the administrative agency.” (citations omitted)). Even if the issue has been addressed by the agency, it is not preserved if the appellant did not raise it. Cf. [*Wierszewski v. Tokarick*, 418 S.E.2d 557, 559 n. 2 (S.C. Ct. App. 1992)] (“An issue is not preserved for appeal merely because the trial court mentions it.”). In *Wierszewski*, the family court judge “suggested at the hearing that attorney’s fees might be authorized under” a certain statute. *Id.* This court

declined to address the point “because it was not raised in the petition or addressed in the order.” *Id.* [emphasis supplied].

Likewise, Pena failed to argue or even mention in either of his briefs that he was entitled, under § 24-3-40(B)(2), to immediate access to the monies SCDC deducted from his gross industries pay and held in an interest-bearing escrow account for his benefit by operation of § 24-3-40(A)(5). Consequentially, SCDC’s denial of Pena’s claim for immediate access to these monies constitutes the law of the case. *See Burton v. County of Abbeville*, 440 S.E.2d 396, 398 (S.C. Ct. App. 1994) (“Burton never mentions or challenges this ruling in her brief, and, therefore, it is the law of this case.”) [citations omitted]. *See also State v. Fripp*, 721 S.E.2d 465, 468 (S.C. Ct. App. 2012) (citing *Burton*).

II. TIMELINESS OF PENA’S STEP 1

In the light most favorable to him, Pena may have obliquely referenced *Ackerman* when he asserted in his supplemental brief, without any supporting argument, that he “filed a timely grievance under the doctrine of equitable tolling.” (June 26, 2017 Brief, p. 2).

Obviously, SCDC must abide by *Ackerman*. SCDC respectfully asserts, however, that a key fact distinguishes the arguments asserted by the current and former inmates in *Ackerman* as to whether the fifteen-day filing deadline from Policy GA-01.12 applied to the grievances in which they articulated prison industries pay claims and the unsupported assertion by Pena that he timely filed his Step 1 under the doctrine of equitable tolling.

The current and former inmates in *Ackerman* argued that the pay claims in the grievances they filed under Policy GA-01.12 constituted challenges to SCDC “policies/procedures,” and, as such, the fifteen-day filing deadline did not apply to their grievances. *Ackerman*, 782 S.E.2d at 760 – 61. The Court of Appeals agreed with their argument. *Id.*, 782 S.E.2d at 761.

A review of Pena's Step 1, Step 2, Notice of Appeal, and filings to date with the Court reveal that he asserted no such argument. As he did not raise or otherwise preserve any argument that the prison industries pay claim he articulated in his grievance challenged SCDC "policies/procedures," SCDC respectfully asserts that Pena may not avail himself of *Ackerman*.

If he may not avail himself of *Ackerman*, SCDC respectfully asserts that Pena's claim for \$1.92 per hour for every hour of his labor under *Torrence* is time-barred.

Should the Court not recognize the above-noted distinction, SCDC respectfully addresses the merits of the sole issue Pena raised and preserved for review immediately below.

III. SCDC DID NOT REMOVE \$1.92 PER HOUR FROM PENA'S GROSS PAY

Pena asserted in his first brief that "SCDC withheld \$1.92 per hour for the entirety of [my] work with the project." (July 5, 2016 Brief, p. 3).

In his supplemental brief (June 26, 2017 Brief, p. 3), Pena asserted as follows:

SCDC was not [entitled] to deduct \$1.92 per hour from [my] wages.

SCDC also withheld \$1.92 per hour from [my] compensation for "overhead cost." SCDC claims that South Carolina Laws "compels" [it] to collect an hourly overhead cost from private industry sponsors. However, the court in [*Torrence*], referring [to] the \$1.92 [per hour] deduction by SCDC, noted that if [SCDC] removes any money remitted by the private industry sponsor and then [disburses] the percentages, listed in [§] 24-3-40 based on [a] lower rate, [SCDC] would be in violation of [the] plain language of the statute which directs it to disburse the money on the gross wages. [*Torrence*, 646 S.E.2d at 870, n. 4]. The only support SCDC provides with respect to its \$1.92 [per hour] deduction is the threadbare assertion that [it] required "overhead costs" for the program. However, there is no explanation or discussion that [breaks] down those costs or demonstrates that SCDC did in fact disburse the money based on gross wages. Without more, [SCDC fails] to adequately rebut this issue, and, as a result, SCDC should compensate [me] for the hourly deductions from [my] paycheck.

In the above-quoted paragraph from his supplemental brief, Pena invoked the following passage from *Torrence*, 646 S.E.2d at 870:

..., if appellants prove true their allegation that [SCDC] removes any of the money remitted by the private industry sponsor and then disburses the percentages listed in [§ 24-3-40] based on the lower rate, [SCDC] would be in violation of the plain language of the statute which directs it to disburse the money based on the gross wages. See § 24-3-40(A). [italicized emphasis supplied; bold emphasis supplied by the Court].

Pena has not proven true his allegation that SCDC deducted or removed \$1.92 per hour from his gross wages, because his gross wage never included the \$1.92 per hour figure.

A. THE CONTRACT BETWEEN SCDC AND CAROLINA CONSOLES

On or about June 25, 2001, SCDC struck a contract with Carolina Consoles for a PIECP project at Perry.⁵ The contract between SCDC and Carolina Consoles was for one (1) year in duration, renewable in one (1) year increments for a total of five (5) years.⁶ SCDC and Carolina Consoles were the only parties to the contract, and its purpose was "to fulfill the intent of [S.C. Code Ann. 24-3-310]."⁷

Section 3.3, entitled "Mutual Duties of the Parties," provided as follows:⁸

1. Hourly Rate: [Carolina Consoles] and SCDC agree to an "hourly rate" determined as follows:

Prevailing Wage Rate (See Appendix C)	\$6.00
+	
Prorata Social Security Withholding Payment	.46
+	
Prorata Workers' Compensation Premium	.23
+	
<u>SCDC/Prison Industries Administrative Cost</u>	<u>1.32</u>
Hourly Rate charged to [CAROLINA CONSOLES]	\$8.01

⁵ SCDC respectfully submits its contract with Carolina Consoles as Exhibit A in support of its instant brief. ["Contract"]. See Exhibit A, p. 7, § 3.3.2.

⁶ *Id.*, p. 8, § 4.1.1.

⁷ *Id.*, p. 1. Section 24-3-310 is entitled "Declaration of Intent," and it's the first section that appears in Article 3 of Chapter 3 from Title 24 of the South Carolina Code of Laws. Carolina Consoles represented in the contract that it intended "to engage in the business of manufacturing automobile consoles at [Perry]." *Id.*

⁸ *Id.*, pp. 6-7.

At no time during this agreement will inmates be paid less than the prevailing wage as set forth in Appendix C. The prevailing wage rate for inmate labor is to be established annually by the S.C. Employment Security Commission.

SCDC agrees that [the] "SCDC/Prison Industries Administrative Cost" shall remain fixed at \$1.32 for the first year of this Agreement. Thirty days prior to annual renewal, SCDC and [Carolina Consoles] through negotiations may increase [the] "SCDC/Prison Industries Administrative Cost" up to a maximum of ten (10) percent of the prior year's amount.

Apart from the lawful gross wage of \$6.00 per hour,⁹ the parties lawfully and properly negotiated, as reflected by § 3.3, for Carolina Consoles to pay SCDC both SCDC's pro rata Social Security withholdings (\$0.46 per inmate labor hour) and its pro rata Workers' Compensation premiums (\$0.23 per inmate labor hour). Likewise, the parties lawfully negotiated for Carolina Consoles to pay SCDC an additional \$1.32 per inmate labor hour as the "SCDC/Prison Industries Administrative Cost."

B. PENA'S \$1.92 PER HOUR FIGURE IS WRONG

The three (3) figures discussed above totaled \$2.01 per hour (e.g. \$1.32 + \$0.46 + \$0.23), not Pena's \$1.92 per hour figure, and they were lawfully not part of Pena's gross hourly wage.

Pena likely came up with the \$1.92 per hour figure from the decision by our Supreme Court in *Torrence*. In *Torrence*, 646 S.E.2d at 867, our Supreme Court observed as follows:

[Inmates] allege, however, that [the private industry sponsor] pays [SCDC] \$7.17 per hour for their labor. [Inmates'] main claim is that [SCDC] improperly diverts \$1.92 from the \$7.17 hourly wage received from [the private industry sponsor] and deposits this money into [an SCDC] Surplus Fund. As a result, members of all three subclasses allegedly lose money to which they are entitled under statute.¹⁰

⁹ In 2001, the federal minimum wage equaled \$5.15 per hour, and it remained \$5.15 per hour until July 24, 2007 when it climbed to \$5.85 per hour. See <https://www.dol.gov/whd/minwage/chart.htm>.

¹⁰ Neither the \$1.92 per hour figure asserted by Pena nor any other figure appears in footnote 4 from *Torrence*, which SCDC quoted above on page 10 of its instant brief.

The \$1.32 per hour figure from the contract between SCDC and Carolina Consoles, labeled as the "SCDC/Prison Industries Administrative Cost," has been previously subjected to judicial review, specifically by the trial court in *Adkins*.

By its decision in *Adkins*, 602 S.E.2d at 54, our Supreme Court declared that the overall purpose of our state's prison industries statutes "is to prevent unfair competition, and to aid society and the public in general," and, therefore, it could not "conclude that the [prison industries] statutes in question were enacted for the special benefit of Inmates." However, in the analysis which yielded the above-quoted declaration, our Supreme Court did not rule on the merits of the prison industries pay claims presented by the inmates in *Adkins*.

Like Pena, the inmates in *Adkins* participated in a federally certified PIECP project operated by SCDC under the identical statutes and federal regulations at Tyger River Correctional Institution.¹¹ The *Adkins* Court, 602 S.E.2d at n. 6, recognized this reality:

The trial 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 case law. 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, (1993)]; *McMaster v. Minnesota*, 819 F.Supp. 1429 (D.Minn. 1993).

Obviously, the *Adkins* Court considered not only the record generated during the trial, but the trial court's order.¹² The contract at issue in *Adkins* reflected that SCDC charged the private industry sponsor participating in the PIECP project at Tyger River \$1.32 per inmate labor hour in

¹¹ See note 3 above.

¹² SCDC respectfully submits a copy of the trial court's order in *Adkins*, filed October 30, 2002, in Exhibit B in support of its instant brief ["*Adkins* Order"].

addition to the inmates' gross hourly wage, and the trial court in *Adkins* addressed and endorsed the \$1.32 per hour charge as follows:¹³

In the course of advising BJA of [SCDC's] training wage policy and schedule, [former Division of Industries Director Tony Ellis] also advised BJA of [SCDC's] \$1.32 per hour overhead charge. BJA did not object to this \$1.32 per hour overhead charge, and the [inmates] did not introduce any evidence indicating such a charge for overhead violated any applicable state or federal law. [emphasis supplied].

Like the inmates in *Adkins*, Pena did not introduce any evidence, aside from his defective reliance upon a footnote from *Torrence*, that the \$1.32 per hour figure from the contract between SCDC and Carolina Consoles, labeled as the "SCDC/Prison Industries Administrative Cost," violated any applicable state or federal law.

18 U.S.C. § 1761(c)(3) states that inmates may not be "deprived of the right to participate in benefits made available by the Federal or State Government to other individuals on the basis of their employment," and Pena's participation in our nation's Social Security system qualifies as such a benefit.¹⁴ By charging Carolina Consoles the rate of \$0.46 per hour for the pro rata "Social Security Withholding Payment," SCDC complied with the operative federal requirement.

Section 1761(c)(3) also explicitly mentions "workmen's compensation" as one of the benefits it contemplates, and, critically, S.C. Code Ann. § 42-1-480 articulates the workers' compensation provisions applicable to inmates in our state. By charging Carolina Consoles the rate of \$0.23 per hour for the pro rata "Workers' Compensation Premium," SCDC again complied with both the applicable federal and state laws.

¹³ See Exhibit B (*Adkins* Order), p. 16.

¹⁴ See also BJA Program Brief, <https://www.ncjrs.gov/html/bja/plecp/bja-prison-industr.html>.

C. THE \$2.01 PER HOUR FIGURE WAS LAWFUL

S.C. Code Ann. § 24-3-190, which is entitled "Appropriation of balances for Penitentiary," states that the "balance in the hands of [SCDC] at the close of any year, together with all other amounts received or to be received from the hire of convicts or from any other source during the current fiscal year, are appropriated for the support of the penitentiary."

Section 24-3-310 provides that SCDC must "utilize the labor of inmates for self-maintenance and for reimbursing this State for expenses incurred by reason of their crimes and imprisonment,¹⁵" and it conforms to § 24-1-20, which establishes that SCDC must be managed in a "manner consistent with the operation of a modern prison system, and with a view of making the system self-sustaining."

Section 24-3-400 explicitly contemplates how SCDC must cover the expenses it incurs as it operates its prison industries program:

All monies collected by the [SCDC] from the sale or disposition of articles and products manufactured or produced by convict labor, in accordance with the provisions of this article, must be forthwith deposited with the State Treasurer to be kept and maintained as a special revolving account designated 'Prison Industries Account,' and the monies so collected and deposited must be used solely for the purchase of manufacturing supplies, equipment, machinery, and buildings used to carry out the purposes of this article, as well as for the payment of the necessary personnel in charge, and to otherwise defray the necessary expenses incident thereto ... When, in the opinion of [SCDC's Director], the Prison Industries Account has reached a sum in excess of the requirements of this article, the excess must be used by [SCDC] for operating expenses and permanent improvements to the state prison system, subject to the approval of the State Budget and Control Board. [emphasis supplied].

Without charging Carolina Consoles \$2.01 per hour *in addition* to the inmates' lawful gross wage of \$6.00 per hour, SCDC would have been unable to comply with the provisions of §

¹⁵ See note 7 above.

24-3-400, as § 24-3-40 sets aside no monies for SCDC by which it may defray the expenses associated with the operation of its prison industries program.¹⁶

If it recalculated the wage structure in the manner urged by Pena, SCDC would have undoubtedly incurred a deficiency by continuing to operate its prison industries program, and such a contingency would animate § 11-9-220, which makes it "unlawful for any department, institution, commission or board of the State government or officer or agent of the State government authorized to make contracts or draw appropriations to contract indebtedness in excess of the amount specifically provided in the annual appropriations act."

D. PENA FAILED TO PROVE TRUE HIS ALLEGATIONS ABOUT THE \$1.92 PER HOUR FIGURE

Pena did not prove true, as required by *Torrence*, 646 S.E.2d at 870, n. 4, his allegations that SCDC deducted or removed \$1.92 per hour or, for that matter, the actual \$2.01 per hour figure from his gross hourly wage before SCDC assessed § 24-3-40(A)'s deductions, because his gross hourly wage never included either figure. Therefore, SCDC respectfully urges this Court to affirm its denial of Pena's back pay claim of \$1.92 per hour for every hour of labor he voluntarily performed in the PIECP project SCDC operated at Perry.

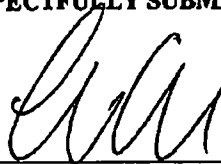
CONCLUSION

Pena's arguments do not satisfy any of the requirements from § 1-23-380(5)(a) through (f) by which this Court may reverse SCDC's final decision in the instant matter, and SCDC respectfully urges this Court to, for all the foregoing reasons, affirm its final decision in the instant matter.

¹⁶ Section 24-3-40(A)(3) mandates that SCDC must withhold 25% of an inmate's gross wages only to "defray the cost of the prisoner's room and board" and only if the inmate possesses no child support obligations.

Should it determine that it needs additional materials to fully consider and adjudicate the above-discussed issues, SCDC respectfully urges this Court to, under § 1-23-380(5), remand this matter so that the parties may supplement the Record.

RESPECTFULLY SUBMITTED:



August 15, 2017

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THE STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

Reyes Cabrera Pena, #265665,	)	Docket No. 16-ALJ-04-00397-AP
	)	Grievance No. PCI-1069-07
Appellant,)	
)	
vs.	)	RESPONDENT'S BRIEF
)	
South Carolina Department of Corrections,)	
	)	<u>CERTIFICATE OF SERVICE</u>
Respondent.)	

I certify that I have served the Respondent's Brief on the above-named *pro se* Appellant by mailing a copy of it to him, first class postage pre-paid, at the following address:

Reyes Cabrera Pena, #265665
Perry Correctional Institution Q-1-A-207
430 Oaklawn Road
Pelzer, South Carolina 29669

August 15, 2017


LAKE E. SUMMERS

FILED

AUG 15 2017

SC ADMIN LAW COURT

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

AGREEMENT

THE AGREEMENT is entered in to this 25 day of June, 2001, by and between the South Carolina Department of Corrections (hereinafter called "SCDC") and its authorized agent Gary D. Maynard, Director and Carolina Consoles (hereafter referred to as "Contractor") by its duly authorize agent Kevin John Bell.

WHEREAS, Prison Industries is a division of the South Carolina Department of Corrections charged with establishing business relationships with private enterprise so as to fulfill the intent of Section 24-3-310 Code of Laws of South Carolina, 1976 as amended; and,

WHEREAS, the Contractor represents and warrants that it is a duly qualified South Carolina corporation, licensed to conduct business in South Carolina; and,

WHEREAS, the Contractor intends to engage in the business of manufacturing automobile consoles at the Perry Correctional Institution (hereinafter referred to as "PCI"); and ,

WHEREAS, this agreement is made in the best interest of the State of South Carolina;

NOW, THEREFORE, the parties hereto do agree as follows:

ARTICLE 1 General:

SCDC shall provide space in an industry facility of approximately 3500 square feet located at PCI and will refer necessary inmates to the Contractor for potential employment.

ARTICLE 2 Conditions of Occupancy of the Industry Facility:

2.0 General:

The Contractor shall not have the right to sublease, assign transfer, or enter into any other agreement regarding the occupancy herein granted without the expressed written consent of SCDC.

2.1 The Duties of the Contractor:

1. Maintenance: The Contractor shall keep the occupied area clean, neat and tidy, and shall report any damage to

the building structure or material fixtures or unsafe conditions to the appropriate institutional authority.

2. Insurance: The contractor shall maintain insurance coverage for its equipment, supplies and material located in the Prison Industries building against casualty occurrences. Further the contractor shall maintain liability insurance coverage on itself, its agents, servants and employees in an amount no less than \$100,000 per person per claim, \$600,000 aggregate. The Contractor shall also maintain Workers Compensation insurance on its employees in accordance with the laws of the State of South Carolina. The contractor shall deliver to SCDC a duly authenticated certificate evidencing such insurance upon executing this agreement and upon each insurance renewal date.

3. Telephone Service: The Contractor may, with prior approval of SCDC, which will not be unreasonably withheld, install telephones and/or computer lines in the Prison Industries building, which must be secured at all times in accordance with SCDC guidelines. The cost of installation and maintenance of such telephones will be at the Contractor's sole expense.

4. Tools, Equipment and Supplies: The Contractor shall be responsible for providing all necessary tools, equipment, and/or supplies which may be necessary for the performance of the work herein contemplated. Such tools and equipment supplied by Contractor may be removed upon termination of the agreement.

5. Building Modification: The contractor shall provide SCDC specifications for equipment installation to ensure the appropriate modification of the existing structure within three weeks of the execution of this agreement. The Contractor shall not make any alterations or improvements to the Prison Industry building other than those outlined herein above without prior written approval of SCDC which shall not be unreasonably withheld. Any such improvements or equipment permanently installed or affixed shall become the property of SCDC.

6. Waiver of Subrogation: SCDC shall not be liable for any damages to the contractor's equipment, supplies and material located in the prison industries building caused by casualty occurrence, it being understood that the Contractor shall look to its insurer for reimbursement

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and shall obtain from its insurer waiver of subrogation rights against SCDC.

7. Loss of Property: All personal property, inventory, equipment, improvements and/or fixtures or other property of any kind or description whatsoever, installed or brought into the area by the Contractor or the Contractor's employees or agents, shall be at the Contractor's sole risk and neither the State of South Carolina, SCDC or any employee or agent thereof, shall be liable for any damage done to or loss of such real or personal property or loss suffered by the business or occupation of the Contractor arising from any acts or occurrences whatsoever except where the damage or loss is due to the malicious destruction of equipment caused by inmates (as determined by the SCDC). If SCDC is held liable, the loss or damage shall be limited to replacement cost or to the repair cost of damaged or destroyed property whichever is less. Consequential or punitive damages shall not be recoverable.

8. Payment for Occupancy: The Contractor shall pay a fixed monthly amount of One (\$1.00) Dollar for occupancy of the premises herein above described.

9. Condition of Property: Upon termination of this agreement, the Contractor will surrender the buildings, equipment and fixtures belonging to SCDC in the same condition it received it, normal wear and tear and casualty excepted.

10. Hazardous Waste: No hazardous waste shall be generated in the prison industries building by the Contractor.

2.2 The Duties of SCDC:

1. Premises to be Occupied: SCDC shall provide approximately 3500 square feet in the industry building at PCI. The occupancy of this area should be consistent with the terms of this agreement regarding work authorized and hours. SCDC will maintain its facility and fixtures in good condition throughout term of contract.

2. Utilities: SCDC shall provide water, electricity, natural gas, and trash removal services and pass through actual cost to contractor for its proportional use of the

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building or allow contractor to install at its own cost separate meters for calculating payment.

3. Insurance: SCDC will maintain insurance coverage on the building and its property therein as required by the laws of the State of South Carolina.

ARTICLE 3 Conditions Related to Employment of Inmates:

3.0 General:

SCDC shall provide referrals and the Contractor shall employ a minimum of 12 inmates. If employment of inmates by contractor remains below minimum established above thirty (30) consecutive days, SCDC may terminate this agreement.

3.1 Duties of Contractor:

The Contractor shall provide to SCDC job descriptions and personnel procedures. From the pool of pre-screened potential inmate employees, the Contractor may then select those inmates workers that they wish to hire; provided that at all times herein, the contractor shall adhere to SCDC's nondiscrimination provisions as set forth in the general terms and conditions of this agreement. The Contractor shall have the same authority to hire, fire, promote or suspend as it would in the normal course of business practices except as set forth in the nondiscrimination provisions referenced herein above and within limits established by SCDC.

1. Scope of Work: Prison Industry inmates will manufacture automobile consoles according to engineering design and manufacturing specifications developed and provided by the Contractor. It will be the sole responsibility of the Contractor to provide a quality control manual for these operations and to ensure compliance with the terms provided therein. The requirements contained within the quality control manual must be submitted in writing to Prison Industries for review for institutional safety and security prior to beginning of the assembly operations.

2. Raw Materials: The Contractor shall provide all raw materials and component parts for assembly. All raw materials, personal property, inventory, machinery, equipment and improvements and/or fixtures or other property of any kind or description whatsoever installed

or brought into the prison buildings by the Contractor or its employees or agents, shall be at the sole risk of Contractor and neither the State of South Carolina or SCDC or its employees and agents thereof, shall be liable for any damage or loss suffered except as provided in Section 2.1.7 contained herein above. SCDC will provide management and production supervision for all phases of the assembly work. SCDC will allow Contractor's trucks, common carrier and others transporting raw materials, equipment and finished products to and from PCI reasonable access during normal business hours subject to the Department's security requirements in Section 3.1.3.

3. Security: The Contractor understands and specifically agrees that its deliveries, shipments and employees are subject to search before entering or leaving the premises of SCDC.

4. Compliance With Rules and Regulations: The Contractor agrees that it and its employees must comply with all policies and procedures of SCDC and all applicable federal, state, and local laws, ordinances, regulations and accreditation standards.

5. Payment for Inmate Services: SCDC will invoice the Contractor on a bimonthly basis for inmate labor. The Contractor will pay all sums due and owing within fifteen days of receipt of invoice. Payments shall be made to S.C. Department of Corrections, Division of Industries account.

6. Training of Contractor's Staff: The Contractor shall make its civilian staff available for training in security concerns by SCDC's training staff.

3.2 Duties of SCDC:

1. Inmate Laborers: SCDC will provide a stable and available work force of inmates.

2. Screening of Potential Inmate Laborers: SCDC will pre-screen inmates for interview by the Contractor according to the job descriptions submitted.

3. Holidays: The inmates employed in the project will observe holidays as described in Appendix A attached hereto and incorporated herein.

4. Inmate Workers Security: SCDC shall be responsible for the security of the inmate labor force. However, Contractor will be charged actual cost if security is required over 40 hours per week.

5. Training of Contractor's Staff: SCDC shall train the Contractor's civilian staff in security matters.

6. Supervision: SCDC will provide civilian supervision to ensure that there is at least one (1) staff supervisor when manufacturing automobile consoles. SCDC will charge the Contractor for supervision at \$18.75 per hour for the first year. Thirty days (30) prior to the anniversary date of this agreement, SCDC and Contractor will renegotiate this rate.

7. Worker Displacement: Contractor agrees that its non-inmate employees, as well as other non-inmate workers who perform work of a similar nature in the same locality will not be displaced by the agreement.

3.3 Mutual Duties of the Parties:

1. Inmate Pay: Contractor and SCDC agree to an "hourly rate" determined as follows:

Prevailing Wage Rate (See Appendix C)	\$ 6.00
+	
Prorata Social Security Withholding Payment	.46
+	
Prorata Workers' Compensation Premium	.23
+	
<u>SCDC/Prison Industries Administrative Cost</u>	<u>1.32</u>
HOURLY RATE CHARGED TO CONTRACTOR	\$ 8.01

At no time during this agreement will inmates be paid less than the prevailing wage as set forth in Appendix C. The prevailing wage rate for inmate labor is to be established annually by the S.C. Employment Security Commission. Upon receipt of the annual wage rate, SCDC will notify the Contractor in writing and adjust its charge accordingly. In the event the wage, prorata social security withholding payments, or prorata Workers' Compensation premium increase during the term of this agreement, Contractor agrees to increase the "hourly rate" on a dollar for dollar basis, immediately upon the effective date of such increase. Inmate comparable wages should be reviewed for compensation similar to the wage plan established by the Contractor. Accordingly, if

wages are increased then FICA and workers' compensation rates should be adjusted. A wage plan should be submitted to SCDC for their review.

SCDC agrees that "SCDC/Prison Industries Administrative Cost" shall remain fixed at \$1.32 for the first year of this Agreement. Thirty days prior to annual renewal, SCDC and the Contractor through negotiations may increase "SCDC/Prison Industries Administrative Cost" up to a maximum of ten (10) percent of the prior year's amount.

(Contractor agrees to list in Appendix B each production job under this Agreement with the base wage to be paid hereunder.)

The Contractor and SCDC may mutually agree upon a bonus plan for inmates based on productivity and quality control. Such bonus will be paid in its entirety by the Contractor.

2. Federal Program Compliance: The Contractor and SCDC agree to follow the requirements the United States Department of Justice's "Private Sector/Prison Industries Enhancements Certificate" program as provided by Sections 609 B(0) and 609 K of the Justice Assistance Act of 1984, Pub. Law 98-173, Title II, Chapter VI, Section 609 B(0) amends Section 819 of the Omnibus Crime Control and Safe Streets Act of 1988, 42 U.S.C. 3701, as amended and Section 609 K amends 18 U.S.C. 178^o as outlined in Appendix D.

3. Compliance with Convict Labor Laws: The Contractor and SCDC agree that no goods produced under this agreement shall be placed in commerce in violation of the laws of the State of South Carolina or the United States as they relate to the utilization of prison labor. Should either Federal or State Law change preventing interstate shipments of goods produced under this agreement, Contract shall terminate without penalty under this contract.

ARTICLE 4 General Terms and Conditions:

4.1 General:

The Contractor, his/hex employees or agents performing under the agreement are not to be deemed to be employees or SCDC nor as agents of SCDC in any manner whatsoever. The contractor will not hold himself/herself out nor claim to be an officer or employee of SCDC or of the State of South Carolina by reason hereof and will not make any claim, demand, or application to, or for any right or privilege applicable to an officer or employee

of SCDC or the State of South Carolina, including, but not limited to, workers' compensation coverage, unemployment insurance benefits, social security benefits, or retirement membership or credit.

1. Period of Performance: The term of this Agreement shall be for one (1) year commencing on the date of the execution of this Agreement and may be renewed in one (1) year increments for a total of five (5) years. The Contractor and SCDC may mutually agree in writing thirty (30) days prior to each renewal date of this Agreement to extend the Contract in accordance with State procurement regulations and the terms and conditions set forth in the Agreement up to a five (5) year contract provided such renewal is mutually acceptable to both parties.

2. Hold Harmless: The Contractor agrees to protect, defend and hold harmless the State of South Carolina, SCDC or its employees or agents thereof, from any liability or claim for damage, including injury to the Contractor's employees or agents, except where such liability claim is due to negligence of the State of South Carolina, SCDC or employees or agents thereof, arising out of the performance of this contract. The contractor further agrees to protect, defend and hold harmless the State of South Carolina, SCDC or any employees or agents thereof, for any product liability claims relating to the products produced or services rendered under this contract. The Contractor expressly understands that SCDC or its employees or agents thereof, is not a guarantor of the work performed by the inmate workers referred by SCDC. Inmates shall not be considered employees of Contractor.

3. Notices: All notices regarding the terms of this contract, including terminations, amendments and disputes shall be sent by certified mail to SCDC as follows:

Gary D. Maynard, Director
South Carolina Department of Corrections
4444 Broad River Road
P. O. Box 21787
Columbia, South Carolina 29221-1787

to the Contractor as follows:

Kevin John Bell
Carolina Consoles
114 Chippewa Lane
Williamston, South Carolina 29697

4. Non-Discrimination in Employment: The Contractor shall not discriminate against any employee inmate worker or applicant for employment because of race, color, sex, religion, national origin, creed, marital status, age, or the presence of any sensory mental or physical handicap.

5. Noncompliance with Nondiscrimination Requirements: In the event the Contractor fails to comply with the discrimination laws, the contract may be rescinded, canceled or terminated in whole or in part, and the Contractor may be declared ineligible for further contracts from SCDC. The Contractor shall, however, be given a reasonable time in which to cure the noncompliance.

6. Records, Documents and Reports: The Contractor shall maintain books, records, documents and other evidence of accounting procedures and practices which sufficiently and properly reflect all direct and indirect cost of any nature expended in the performance of this agreement. These records shall be subject at all reasonable times for inspection, review or audit by SCDC personnel or other personnel duly authorized by SCDC, the office of the State Auditor and Federal Officials so authorized by law, rules regulations or contract such audit shall be at the expense of the auditing agency. The Contractor shall retain all books, records, documents and other materials relevant to this agreement for five (5) years after termination of the agreement and the authorities described herein above shall have full access to and the right to examine any of said materials during the extended period.

Only the Director of SCDC or his delegate, designee by writing shall have the expressed, implied, or apparent authority to alter, modify or waive any clause or condition in this contract. Furthermore, any alterations, amendment or modification or waiver of any clause or condition of this contract is not effective or binding unless made in writing and signed by the Director.

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7. Termination: It is understood and agreed that this Agreement shall terminate:

- a. Upon the written, mutual, agreement of the parties;
- b. Upon the material breach or default of any provision of this Agreement by either party, provided thirty (30) days written notice of the breach is given to the breaching party by the non-breaching party and the breaching party fails to cure within the thirty (30) days;
- c. If Contractor fails to employ a minimum of (12) inmates for a period of thirty (30) consecutive days;
- d. If Section 24-3-310 of the Code of Laws of the State of South Carolina, 1976, as amended, is materially changed, altered, amended, or repealed so as to abrogate this legislation charges with establishing business relationships with private enterprise;
- e. If federal, state, or local laws change to prevent the shipment of goods produced under this Agreement;
- f. If Contractor becomes bankrupt and such is not cured within sixty (60) days, insolvent, or makes an assignment for the benefit of creditors, or becomes subject to the administration of its assets in any kind of voluntary or involuntary creditors proceedings;
- g. If Contractor performs any intentional act which damages the reputation or property of SCDC;
- h. If Contractor loses its corporate charter in its state of incorporation or loses the authority to transact business in the State of South Carolina pursuant to mandate by the Secretary of State of South Carolina, or if Contractor's corporation is dissolved voluntarily or involuntarily;
- i. Failure of Contractor to pay promptly any inmate wages due hereunder for a period of fifteen (15) days after written notice from SCDC to contractor of such default;
- j. At the end of any fiscal year (June 30) after the commencement date of this Contract when sufficient appropriations, revenues, income, grants, or other funding from whatever source are not available to SCDC to carry on the purpose of program of SCDC, this sufficiency of funds to be solely determined by the State Budget and Control Board; and
- k. Immediately in the event that the safety or security of the institution, its personnel or inmates is jeopardized.

Upon termination of the contract the Contractor shall have thirty (30) days to vacate the facilities of SCDC.

8. Force Majeure: Neither party shall be liable nor deemed to be in default for any delay or failure in performance under this Agreement or otherwise for an interruption of service or employment deemed resulting from civil or military authority, from acts of God, riots, war, or any similar or dissimilar cause beyond reasonable control of either part.

9. Governing Law: This contract shall be governed by the laws of the State of South Carolina and venue shall be located in the County of Richland, State of South Carolina.

10. Severability: If any provision of this agreement or any provision of any document incorporated by reference shall be held invalid, such invalidity shall not affect the other provision of this contract which can be given effect without the invalid provision, and to this end the provisions of this agreement are to be declared to be severable.

11. All Writings Contained Herein: This agreement contain all the terms and conditions agreed upon by the parties, no other understandings oral or other wise, regarding the subject matter of this agreement shall be deemed binding.

IN WITNESS WHEREOF the parties have executed this contract on the first written herein above.

Witness

Richard R. Taver
John Carles

Witness

Jenne Metz
Charles E. Stephens

Gary D. Maynard
Gary D. Maynard, Director

APPROVED AS TO FORM
South Carolina Department of Corrections
OFFICE OF GENERAL COUNSEL
DATE: 6/19/01 AB

Kevin J. Bell
Kevin John Bell

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Richard Adkins, et al.,

Plaintiffs,

-versus-

South Carolina Department
of Corrections,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A No. 00-CP-40-4761

JUDGMENT FOR THE
DEFENDANT

FILED
02 OCT 30 PM 4:52
BARBARA A. SCOTT
C.C. & G.S.

Pursuant to this Court's scheduling order filed June 25, 2002, the parties tried this case before this Court alone on August 8 and 9, 2002.¹ Pursuant to the same scheduling order, this Court conducted the trial of this case in the parole hearing room located at South Carolina Department of Corrections (SCDC's) Broad River Road Correctional Facility.²

JTD
1 After thoroughly reviewing the evidence introduced by the parties, the applicable statutes, and the applicable precedent, this Court FINDS in favor of SCDC on both the Plaintiffs' first and second causes of action. As the Plaintiffs' last three (3) causes of action were dismissed pursuant to SCDC's summary judgment motion, this Court ENTERS judgment in favor of SCDC.

¹ By order filed April 30, 2002, the Honorable G. Thomas Cooper, Jr., Chief Judge for Administrative Purposes for the Court of Common Pleas for Fifth Judicial Circuit, denied the Plaintiffs' motion for a jury trial.

² This unique trial location permitted a maximum number of Plaintiffs to appear and observe the trial proceedings while ensuring the security of the Court, its staff, counsel, witnesses and observers. The Court extends its thanks and compliments to Warden William White and his entire staff for their professionalism and courtesy.

I. SUMMARY OF THE PLAINTIFFS' TWO (2) SURVIVING CAUSES OF ACTION

The Plaintiffs' Complaint originally alleged five distinct causes of action. However, the Honorable Clifton Newman, by his order filed March 2, 2002, dismissed the Plaintiffs' last three causes of action pursuant to SCDC's motion for summary judgment.

The Plaintiffs, metaphorically speaking, raised the umbrella of the South Carolina Tort Claims Act, South Carolina Code Section 15-78-10, *et seq.*, over their entire Complaint and, specifically, their first two causes of action.³

Each of the 83 Plaintiffs are or were incarcerated within SCDC. The Plaintiffs currently participate or at one time participated in a SCDC Division of Industries (DOI) project established under the authority of South Carolina Code Section 24-3-310 (Lawyers Coop. 1976), *et seq.* SCDC, in conjunction with a private industry, Standard Plywoods, Inc., of Clinton, South Carolina, operates the DOI project in which the Plaintiffs participate or at one time participated within the confinement facility now known as Tyger River Correctional Institution. The products manufactured inside Tyger River at the Standard Plywoods production facility carry the "Anderson Hardwood Floors" brand name.

The Plaintiffs' first cause of action alleged that SCDC violated the "plain and ordinary meaning"⁴ of Section 24-3-430(D). According to the Plaintiffs, SCDC violated Section 24-3-430(D) by failing to pay the Plaintiffs an hourly wage equal to the "prevailing wage for work of similar nature in the private sector."⁵ The Plaintiffs specifically alleged SCDC's former policy

³ Plaintiffs' Complaint, paragraph 1, page 1.

⁴ *Id.*, paragraph 8, page 4.

⁵ *Id.*

of paying each Plaintiff a "training wage" of \$0.25 per hour and then \$0.75 per hour when the Plaintiffs first began participating in this DOI project violated Section 24-3-430(D).⁶

The Plaintiffs also specifically alleged SCDC's permanent hourly wage of \$5.15 (the national minimum wage established under the Fair Labor Standards Act) violates Section 24-3-430(D), because the "prevailing wage" for "work of a similar nature performed by employees in the private sector of industry not confined in custody of SCDC ranges from \$9.00 per hour to \$14.00 per hour."⁷ The Plaintiffs further alleged an unnamed former SCDC director exercised his discretion in a grossly negligent manner by entering into contracts with private industry, in this case Standard Plywoods, that resulted in wages being paid to the Plaintiffs "in violation of the 'prevailing wage' provision of" Section 24-3-430.⁸

Am 3
The Plaintiffs' second cause of action alleged SCDC was "unjustly enriched"⁹ by receiving "payment of \$2.07 for each hour worked by Plaintiffs, ('man-hour') while Plaintiffs were paid at 'training wages' rates" as alleged in the Plaintiffs' first cause of action.¹⁰

II. SUMMARY OF TRIAL PROCEEDINGS

In accordance with this Court's June 25, 2002 scheduling order and by agreement of the parties, the following Plaintiffs, all of whom were incarcerated within SCDC on the dates of trial, attended and observed the entire proceedings: Richard Adkins, Christopher Brown, Donnie Clark, John Cooby, Robert Elmore, Anthony Frazier, Floyd Hamilton, David Harig, James

⁶ Id., paragraph 6.

⁷ Id., paragraphs 6 and 7, pages 3 and 4.

⁸ Id., paragraph 9, page 4.

⁹ Id., paragraph 13, page 6.

¹⁰ Id., paragraph 12, page 5.

Heatherty, Andrew Kelly, Christopher Smith, Leroy Sullivan, Albert Todd, and Frank Weathers.¹¹

The following Plaintiffs testified during their case-in-chief: Richard Adkins, Christopher Brown, John Cosby, Floyd Hamilton, David Harig, James Heatherty, Andrew Kelly, Leroy Sullivan, Albert Todd, and Frank Weathers. The Plaintiffs elicited testimony from the following additional witnesses during their case-in-chief: Gary Wallace, Standard Plywoods, Inc.; Brian Boggs, Standard Plywoods, Inc.; Rebecca Eleazer, South Carolina Employment Security Commission (BSC); John Carson, SCDC DOI; and Tony Ellis, Director, SCDC DOI. The Defendant called Sam McClary, also of the South Carolina BSC, as its sole witness during its case-in-chief.

Neither party offered any rebuttal witnesses.

III. FINDINGS OF FACT

Jan 2
04 Each of the Plaintiffs voluntarily executed participation agreements with SCDC under which the terms of their activities within this DOI project, including the withholding of certain percentages of their gross wages pursuant to Section 24-3-40, were precisely defined. Each of the Plaintiffs also completed SCDC DOI employment applications.

DOI Director Tony Ellis defined the different types of prison industries projects enabled under Section 24-3-310, *et seq.* Prison industries projects under this section include traditional projects where goods are manufactured solely for use by state agencies, service oriented projects where no goods are manufactured or produced (i.e. packing gloves into boxes for shipment), and

¹¹ Plaintiffs' counsel anticipated that Plaintiffs David Raines and Douglas Titus, who were paroled after the Plaintiffs' filed their action, would attend the trial and observe the trial proceedings. SCDC authorities cleared Plaintiffs Raines and Titus to attend the trial. However, neither Plaintiff Raines nor Plaintiff Titus presented themselves to SCDC security officials for entry into the courtroom on the morning of August 8, 2002 or at any time during the trial.

projects certified for operation under the federal government's Prison Industry Enhancement Program.

Director Ellis also confirmed SCDC's former training wage policy existed in the manner alleged by the Plaintiffs' Complaint until July 1, 1999, and he confirmed SCDC DOI currently pays the Plaintiffs an hourly wage of \$5.15 for their labor.¹²

Again, the Plaintiffs participate or at one time participated in an SCDC DOI project whereby they worked at a facility operated by Standard Plywoods. Standard Plywoods contracted with SCDC to construct and operate manufacturing plants within the confines of two SCDC confinement facilities: Cross Anchor C.I. and Dutchman C.I. SCDC later consolidated Cross Anchor and Dutchman to form Tyger River C.I. Standard Plywoods' manufacturing plant is located at what is now known as Tyger River.

Adkins
5
The DOI project involving Standard Plywoods at Tyger River is and has been since its inception certified by the United States Department of Justice, Office of Justice Programs, Bureau of Justice Assistance (BJA) pursuant to BJA's Prison Industry Enhancement Certification Program (PIECP).¹³ The PIECP is codified at 18 U.S.C. Section 1761(c).¹⁴

This Court specifically finds the Plaintiffs have not been and are not currently employees of Standard Plywoods. SCDC paid and pays each of the Plaintiffs' wages.¹⁵ None of the

¹² See notes 6 and, supra.

¹³ PIECP Guidelines from Federal Register, Vol. 50, No. 61, March 29, 1985 (Plaintiffs' Exhibit 2) and Vol. 64, No. 66, April 7, 1999. (Plaintiffs' Exhibit 1).

¹⁴ PIECP Guideline, Federal Register, Vol. 64, No. 66, April 7, 1999, p. 17000, Section I, entitled "Introduction: Program Purposes and Objectives." (Plaintiffs' Exhibit 1)

¹⁵ Plaintiff Adkins' SCDC earnings statements clearly reflect that SCDC and only SCDC paid Plaintiff Adkins' wages. (Defendant's Exhibits 7 and 8) This Court finds Plaintiff Adkins' earnings statements accurately represent the format of each Plaintiff's SCDC earnings statement.

Plaintiffs individually executed a single agreement of any kind with Standard Plywoods. Again, the Plaintiffs voluntarily executed participation agreements and employment applications with SCDC.¹⁶

SCDC tabulates the total number of labor hours worked by the Plaintiffs in a given pay period, and SCDC then invoices Standard Plywoods for the total number of labor hours. Standard Plywoods simply remits payment to SCDC for the amount invoiced by SCDC. SCDC, in turn, pays the Plaintiffs their wages subject to the provisions of Section 24-3-40.

The Plaintiffs have not been transformed from inmates into Standard Plywoods employees simply because they participate in an SCDC DOI project in which Standard Plywoods also participates. Each of the Plaintiffs who testified affirmed their status as inmates lawfully confined within an SCDC correctional facility. This Court clearly recognized the Plaintiffs were and remain inmates.

John Carson
John Carson, an SCDC employee who supervises the Plaintiffs' work and conduct in the DOI-Standard Plywoods project at Tyger River, confirmed the Plaintiffs perform their DOI labor exclusively within the confines of Tyger River. Mr. Carson also confirmed that, as inmates, the Plaintiffs must work while confined and that, if the Plaintiffs didn't work in the DOI-Standard Plywoods project at Tyger River, they would work in some other capacity at Tyger River and receive no wages for their work. The Plaintiffs, as inmates, most assuredly cannot leave the DOI program and apply for a job in the regular employment market. Mr. Carson also confirmed SCDC exercises total control over the Plaintiffs' movement and conduct 24 hours a day, seven days a week.

¹⁶ See Defendant's Exhibits 1 and 2.

Gary Wallace,¹⁷ a Standard Plywoods supervisor, and Brian Boggs, a Standard Plywoods executive, emphasized the distinction between inmates, like the Plaintiffs, and employees at Standard Plywoods' Clinton, South Carolina plant. These distinctions include the wide breadth of job tasks performed by Clinton employees as compared to the narrow breadth of job tasks performed by the Plaintiffs at Tyger River, the freedom of movement enjoyed by Clinton employees versus the persistent restrictions imposed upon the Plaintiffs at Tyger River, and the high level of security imposed upon the Plaintiffs and the tools they use during the production process at Tyger River compared to the open environment enjoyed by Standard Plywoods' Clinton employees.

Accordingly, this Court finds the Plaintiffs do not enjoy the same benefits and protections as non-inmate employees enjoy in the regular, non-institutional workforce. This distinction is critical to the Court's rulings in favor of SCDC on the Plaintiffs' two surviving causes of action.

J-7
IV. THE COURT'S RULINGS

This Court first details its ruling regarding the Plaintiffs' second cause of action.

A. THE COURT'S RULING IN SCDC'S FAVOR REGARDING THE PLAINTIFFS' SECOND CAUSE OF ACTION

This Court finds that the Plaintiffs failed to prove by a preponderance of the evidence SCDC was "unjustly enriched" by receiving "payment of \$2.07 for each hour worked by Plaintiffs, ('man-hour'), while Plaintiffs were paid at 'training wages' rates."

- 1. SCDC CORRECTLY INTERPRETED THE PLAINTIFFS' "UNJUST ENRICHMENT" ALLEGATION AS AN ALLEGATION THAT IT EXPLOITED THE PLAINTIFFS BY PAYING THEM TRAINING WAGES**

¹⁷ Mr. Wallace is a former inmate and participant in the DOI-Standard Plywoods project at Tyger River whom Standard Plywoods hired upon his parole.

In their second cause of action, the Plaintiffs alleged "the excessive payment provided by the industries to Defendant SCDC during Plaintiffs' periods of work at 'training wages' rates was given in exchange for labor obtained by the industries at less than minimum wage, at a rate less than allowed by law, and that the purpose and result of such arrangement was to unjustly enrich Defendant SCDC at the expense of Plaintiffs' labor."¹⁸ (emphasis added)

The Plaintiffs use of the phrase "at a rate less than allowed by law" echoes an allegation initially stated in their first cause of action; specifically, "no statute in South Carolina Code of Laws provides that a person may be paid less than minimum wage under the label or guise of a 'training wage'."¹⁹

SCDC correctly interpreted the Plaintiffs' second cause of action as alleging SCDC exploited the Plaintiffs by paying the Plaintiffs a graduated introductory training wage (\$0.25 per hour then \$0.75 per hour). This Court, however, specifically finds SCDC has not exploited the Plaintiffs at any time since the inception of the DOI federally certified project in which they participate.

The Plaintiffs' exploitation allegation fails in the face of EJA's endorsement of DOI's discontinued training wage policy as well as binding precedent that declares the Plaintiffs, as inmates and not employees, are not entitled to the federal minimum wage established under the Fair Labor Standards Act (FLSA).

2. SCDC CLEARLY STATED ITS TRAINING WAGE POLICY IN THE CONTRACTS IT EXECUTED WITH STANDARD PLYWOODS

¹⁸ Plaintiffs' Complaint, paragraph 12.

¹⁹ *Id.*, paragraph 6.

In the first contract between SCDC and Standard Plywoods, dated October 3, 1996,

SCDC clearly stated its training wage policy:

1. Training of Inmate Employees: The Contractor shall provide a maximum training period of 320 hours per inmate hired initial training after assuming work within the prison industries facility. ... During the second 160 hours training, the contractor shall pay \$3.75 per hour, plus \$1.32 per hour overhead for each inmate. ...²⁰ (emphasis added)

In the second contract between SCDC and Standard Plywoods, Inc., dated January 9,

1998, SCDC again clearly stated its training wage policy:

1. Training of Inmate Employees: The Contractor shall provide a maximum training period of 320 hours per inmate hired initial training after assuming work within the prison industries facility. ... During the second 160 hours training, the contractor shall pay \$3.75 per hour, plus \$1.32 per hour overhead for each inmate. After 320 hours training, the contractor will pay \$7.06 per hour, per inmate.²¹ (emphasis added)

3. THE PLAINTIFFS' UNJUST ENRICHMENT ALLEGATION TARGETS SCDC'S \$1.32 PER HOUR OVERHEAD CHARGE

Jan 9

The Plaintiffs specifically target the \$1.32 per hour overhead fee SCDC charged and continues to charge Standard Plywoods by alleging "Defendant SCDC received payment of \$2.07 for each hour worked by Plaintiff, ("man-hour") while Plaintiffs were paid at 'training wages' rate."²²

²⁰ October 3, 1996 agreement between SCDC and Standard Plywoods, Inc., paragraph 3.1(1), p. 5. (Plaintiffs' Exhibit 10) This contract contemplated the establishment of a production facility at Cross Anchor C.I. As the parties stipulated at trial, SCDC consolidated Cross Anchor C.I. with Dutchman C.I. Institution to form Tyger River.

²¹ January 9, 1998 agreement between SCDC and Standard Plywoods, Inc., paragraph 3.1(1), p. 4. (Plaintiffs' Exhibit 11) This contract contemplated the establishment of a production facility at Dutchman C.I. Again, as the parties stipulated at trial, SCDC consolidated Cross Anchor C.I. with its Dutchman C.I. to form Tyger River.

²² *Id.*, paragraph 12.

The \$2.07 figure used by the Plaintiffs in their second cause of action simply reflects the sum of two figures, one of which is SCDC's \$1.32 "overhead" charge. If one simply adds the \$0.75 per inmate hour "training wage" the Plaintiffs received during their second 160-hour training period to the \$1.32 per hour "overhead" charge SCDC assessed Standard Plywoods, the resulting sum is \$2.07 per hour ($\$0.75 + \$1.32 = \2.07). The Plaintiffs, therefore, effectively alleged that SCDC unjustly enriched itself by collecting from Standard Plywoods its \$1.32 per hour "overhead" charge.

4. **DOI DIRECTOR TONY ELLIS CONSULTED WITH BJA, THE FEDERAL AGENCY RESPONSIBLE FOR CERTIFYING THIS PARTICULAR PIECP PROJECT, REGARDING DOI'S TRAINING WAGE POLICY AND SCHEDULE**

This Court finds no "unjust enrichment" occurred as the DOI training wage policy resulted from the legitimate exercise of discretion by DOI Director Tony Ellis.

As the evidence demonstrated, Director Ellis based DOI's former training wage policy upon his interpretation of the applicable provisions of the Federal Register. Specifically, Director Ellis relied upon the following provisions from the March 29, 1985 version of the Federal Register:

*BJA's position is that the Federal minimum wage must be a floor for all program wage payments, since the Fair Labor Standards Act sets the Federal minimum wage as a floor for any training which results in its products being sold. The single exception to this rule, then, is pre-entry or vestibule training for new workers subject to the regulations and requirements set by State Fair Labor Standards, or Federal Fair Labor Standards legislation and procedures.*¹³ (emphasis added)

¹³ PIECP Guideline, Federal Register, Vol. 50, No. 61, March 29, 1985, p. 12662, "Section 3. Compensated Training, Response" (Plaintiff Exhibit 2).

Director Ellis developed DOI's training wage policy in reliance on this language, and Director Ellis advised a BJA representative of the precise training wage schedule he developed in a letter dated April 2, 1992. The pertinent language from Director Ellis' letter read as follows:

This is to confirm our telephone conversation yesterday concerning the training period and wages for our PIE projects. As I related to you, P.I. factors in a 90 day training period for each inmate that allows them to reach the production standards specified by the contractor. ... As I related, P.I. pays inmate wages during the first month. *During the second month, P.I. charges the contractor \$1.32 per hour for overhead and pays the inmate \$2.75 per hour.* During the final training month, P.I. charges \$1.32 per hour and \$.95 per hour. ... As we discussed, P.I. will continue this procedure.²⁴ (emphasis added)

The Plaintiffs introduced no evidence demonstrating anyone from BJA ever objected to Director Ellis' training wage policy and schedule as he articulated them in his April 2, 1992 letter. On the contrary, the evidence clearly demonstrates BJA officials advised Director Ellis he could continue his training wage policy. Specifically, Mr. Thomas Albrecht, Chief, Corrections Branch for BJA, advised Director Ellis in a December 31, 1997 letter that "[t]he training wage issue remains open on the understanding that you will continue current practices until the new BJA Program Guidelines is published."²⁵ (emphasis added)

Eventually, BJA published a new program Guidelines in the Federal Register, Vol. 64, No. 66, effective April 7, 1999.²⁶ BJA's new program Guideline clearly addressed the question

²⁴ April 29, 1992 letter from Director Ellis to Ms. Louis Lucas, Special Programs Manager, Bureau of Justice Assistance. (Plaintiffs' Exhibit 23) As the evidence revealed, DOI discontinued the last phase of its training wage schedule, where it paid inmates \$0.95 per labor hour for a third 160-hour period, by the time SCDC contracted with Standard Plywoods to begin the DOI project at what is now known as Tyger River C.I.

²⁵ December 31, 1997 letter to Director Ellis from Thomas F. Albrecht, Chief, Corrections Branch, Bureau of Justice Assistance. (Plaintiffs' Exhibit 22)

²⁶ Plaintiffs' Exhibit 1.

raised in 1992 by Director Ellis regarding DOI's training wage policy; the Guideline no longer authorized such a policy. Further, BJA's new program Guideline provided "existing participants will have until April 7, 2000 to achieve compliance with all of the new requirements set forth in this Guideline."²⁷

Director Ellis, however, accelerated DOI's compliance with the new BJA Guideline as evidenced by his June 21, 1999 letter to Mr. Don Finkell, President, Standard Plywoods, Inc.²⁸ Instead of waiting until April 7, 2000 to comply with the new BJA Guideline, Director Ellis ended DOI's training wage policy effective July 1, 1999.²⁹

5. SCDC IS IMMUNE FROM LIABILITY, BY OPERATION OF SECTION 15-78-60(5), FOR ANY LOSSES THE PLAINTIFFS PURPORTEDLY SUSTAINED UNDER THE TRAINING WAGE POLICY, BECAUSE DIRECTOR ELLIS EXERCISED HIS DISCRETION WITH DUE CARE

Director Ellis, by advising BJA of DOI's training wage policy in 1992 and discussing

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012 DOI's training wage policy with BJA in 1997, did not exercise his discretion as DOI director in a grossly negligent manner when he developed and implemented DOI's training wage policy.

A defendant is guilty of gross negligence if he is so indifferent to the consequences of his conduct as not to give slight care to what he is doing. (citation omitted) Gross negligence involves a conscious failure to exercise due care. (citation omitted) *Jackson v. SCDC*, 301 S.C. 125, 390 S.E.2d 467, 468 (1989).

²⁷ PIECF Guideline, Federal Register, Vol. 64, No. 66, April 7, 1999, p. 17000, "EFFECTIVE DATE." (Plaintiffs Exhibit 1)

²⁸ June 21, 1999 letter from Director Ellis to Mr. Finkell. (Plaintiffs' Exhibit 20)

²⁹ *Id.*

Director Ellis' interaction with BJA clearly evidences he was not at all indifferent to the consequences of his conduct and he afforded not just slight care but great care to his development of DOI's training wage policy.

[Section 15-78-60(5) of the Tort Claims Act] provides for immunity from liability for losses resulting from "... the exercise of discretion or judgment by the governmental entity or employee...." Section 15-78-60(25) provides an exception to immunity where the governmental entity exercises its responsibility or duty in a grossly negligent manner. Section 15-78-60(5) must be read in light of this exception. *If discretion is exercised in a grossly negligent manner, the exception to the normal rule of immunity applies. Jackson, 390 S.E.2d at 469. (emphasis added)*

As Director Ellis clearly did not exercise his discretion in a grossly negligent manner in implementing the training wage policy of which the Plaintiffs complain, SCDC is immune from liability by operation of Section 15-78-60(5) even if the Plaintiffs legitimately sustained losses under the former training wage policy. As the Plaintiffs' second cause of action, not to mention the Plaintiffs' entire Complaint, is sounded under the South Carolina Tort Claims Act, the Court rules in SCDC's favor.

Moreover, as developed below, the Plaintiffs did not sustain any losses as a result of DOI's former training wage policy, because the wages the Plaintiffs received under the training wage policy did not violate federal or state law.

6. ACCORDING TO THE FOURTH CIRCUIT COURT OF APPEALS, INMATES ARE NOT ENTITLED TO THE FEDERAL MINIMUM WAGE

This Court concludes, based upon the ruling of the Fourth Circuit Court of Appeals in *Harker v. State Use Industries*, 990 F.2d 131 (1994), that the Plaintiffs are not entitled to the protections afforded non-inmate workers under the Fair Labor Standards Act, 29 U.S.C Section 201 - 219, specifically the federal minimum wage.

The United States District Court for the District of South Carolina recently followed the *Harker* decision. United States Magistrate Judge Bristow Marchant, in his May 20, 2002 Report and Recommendation in *Sims v. Magla Products, LLC*, No. 3:02-676-19BD (D.S.C. 2002),³⁰ summarized the facts underlying *Harker* in the following manner:

In *Harker*, the Fourth Circuit Court of Appeals held that the FLSA did not apply to prison inmates working in a prison workshop located within a penal facility. In that case, an inmate (*Harker*) incarcerated by the Maryland Department of Corrections worked in a prison print shop run by State Use Industries of Maryland (SUI). ... *Harker* did not receive the federal minimum wage, but was instead paid a lower wage determined by the Maryland Department of Corrections. *Sims*, p. 5.

Judge Marchant then quoted *Harker* in the following manner:

While the Maryland program may not have involved a private company, as does the prison industries program in South Carolina, the Fourth Circuit nevertheless specifically found in *Harker* that the FLSA does not cover inmates because inmates do not meet the general criteria for which the FLSA was enacted (such as that they are not part of a free labor market and do not need a minimum wage in order to ensure their welfare and standard of living), and that in any event *the FLSA simply does not apply to "work done by inmates behind prison walls for any type of prison-operated industry or for the prison itself."* *Harker*, 990 F.2d at 133, 135 (emphasis added and other citations omitted) *Sims*, p. 6. (emphasis added)

The Fourth Circuit provided the following analysis in *Harker* that also applies to the Plaintiffs' present action:

SUI and the inmates also have not made the "bargained-for exchange of labor" for mutual economic gain that occurs in a true employer-employee relationship. (citations omitted) They do not deal at arms' length; the inmates enroll in SUI programs solely at the prerogative of the DOC, which both initiates the programs and allows the inmates to participate. Because the inmates are involuntarily incarcerated, the DOC wields virtually absolute control over them to a degree simply not found in the free labor situation of true employment. (citation omitted) Inmates may

³⁰ United States District Judge Dennis Shedd accepted Judge Marchant's Report and Recommendation without revision or comment by his order dated July 1, 2002.

voluntarily apply for SUI positions, but they certainly are not free to walk off the job site and look for other work. When a shift ends, inmates do not leave DOC supervision, but rather proceed to the next part of their regimented day. *SUI and Harker do not enjoy the employer-employee relationship contemplated in the Act, but instead have a custodial relationship to which the Act's mandates do not apply.* Further, the FLSA does not cover these inmates because the statute itself states that Congress passed minimum wage standards in order to maintain a "standard of living necessary for health, efficiency, and general well-being of workers." (citing 29 U.S.C. Section 202(a)) While incarcerated, inmates have no such needs because the DOC provides them with the food, shelter, and clothing that employees would have to purchase in a true employment situation. So long as the DOC provides for these needs, *Harker* can have no credible claim that inmates need a minimum wage to ensure their welfare and standard of living. (citations omitted) *Harker*, 990 F.2d at 133. (emphasis added)

The conditions and limitations on the Plaintiffs' labor in the present action are identical to the conditions and limitations on the inmates' labor described in *Harker*. Again, nothing associated with the Plaintiffs' participation in this DOI program transformed the Plaintiffs from inmates into employees.³¹ The Plaintiffs, just like the complaining inmates in *Harker* and *Sims*, "are not part of a free labor market and do not need a minimum wage in order to ensure their welfare and standard of living." Clearly, the Plaintiffs, just like the inmates in *Harker* and *Sims*, are not entitled to the federal minimum wage.

7. SCDC DID NOT VIOLATE ANY LAWS, UNJUSTLY ENRICH ITSELF, OR EXPLOIT THE PLAINTIFFS UNDER ITS FORMER TRAINING WAGE POLICY

³¹ This conclusion also conforms to precedent established in *Gordon v. SCDC*, et al., No. 99-CP-40-3675, by the Honorable James R. Barber, III, Circuit Court Judge for the Fifth Judicial Circuit, in his September 7, 2001 Order Granting SCDC's Motion for Summary Judgment, p. 7. ("The Plaintiffs here did not individually negotiate and execute contracts with a private sector employer; they executed agreements with [SCDC] to participate in the Prison Industries program. Therefore, none of the Plaintiffs, as Prison Industries participants, were 'able to acquire all the rights and liabilities of a private employee.'")

The Plaintiffs' inability under *Harker* to claim the federal minimum wage for their DOI labor completely and fatally undermines the Plaintiffs' second cause of action. This Court cannot sustain the Plaintiffs' allegation that "no statute in South Carolina Code of Laws provides that a person may be paid less than the minimum wage under the label or guise of a 'training wage'" under the holding and logic of *Harker*.³² Thus, SCDC legitimately paid the Plaintiffs wages below the federal minimum wage under its training wage policy.

Indeed, in 1992, Director Ellis advised BJA, the federal agency responsible for the certification of the very type of project in which the Plaintiffs' participated, of SCDC's former training wage policy. A BJA representative advised Director Ellis in 1997 the training wage policy could continue until a new BJA Guideline was published. Once the new BJA Guideline was published in 1999, Director Ellis ended DOI's training wage policy and schedule in compliance with the new Guideline.

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16 In the course of advising BJA of DOI's training wage policy and schedule, Director Ellis also advised BJA of DOI's \$1.32 per hour overhead charge.³³ BJA did not object to this \$1.32 per hour overhead charge, and the Plaintiffs did not introduce any evidence indicating such a charge for overhead violated any applicable state or federal law.

Consequently, the Plaintiffs failed to prove by a preponderance of the evidence that SCDC was "unjustly enriched" by invoicing and receiving from Standard Plywoods \$2.07 per labor hour during the second 160-hour phase of SCDC's former training wage schedule. In fact,

³² See note 17, *supra*. The South Carolina legislature has not enacted its own statute mandating the payment of a minimum wage to employees working in this state. Instead, the legislature enacted Section 41-3-80, which is entitled "Enforcement of the Fair Labor Standards Act of 1938." It provides that South Carolina's "Division of Labor may assist and cooperate ... in the enforcement within this State of the Fair Labor Standards Act of 1938 ..."

³³ See note 22, *supra*.

this Court finds the Plaintiffs introduced no evidence to support their "unjust enrichment" allegation and their implied allegation that SCDC exploited them under its discontinued training wage policy. Accordingly, this Court finds for SCDC on the Plaintiffs' second cause of action.

B. THE COURT'S RULING IN SCDC'S FAVOR REGARDING THE PLAINTIFFS' FIRST CAUSE OF ACTION

This Court also finds for SCDC regarding the Plaintiffs' first cause of action. This Court concludes the Plaintiffs' demand for the "prevailing wage" is based upon a statute that does not specifically apply to the DOI program in which the Plaintiffs participate. This Court also concludes the Plaintiffs are not entitled to a private right of action by which to demand higher wages for their DOI labor under any applicable South Carolina prison industries statute. Finally, this Court concludes the evidence introduced during trial clearly demonstrated the permanent hourly wage SCDC pays the Plaintiffs for their DOI labor conforms to the applicable guidance from the South Carolina Employment Security Commission (ESC).

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The above conclusions are supported by the underlying fact that, as acknowledged by both parties, the DOI project in which all of the Plaintiffs participated was and remains properly certified by BJA under the federal government's PIECP.

1. THE PLAINTIFFS INVOKE SECTION 24-3-430(D) AS THE BASIS FOR THEIR DEMAND FOR HIGHER WAGES, HOWEVER, SECTION 24-3-410(B)(7) SPECIFICALLY APPLIES TO THE PLAINTIFFS' DEMAND

The Plaintiffs alleged in their Complaint that, "[d]uring the course of [their] employment, Plaintiffs' wages were paid directly to Defendant SCDC as provided for by S.C. Code Ann. Section 24-3-40 and 24-3-430.³⁴" The Plaintiff then recite the following language from Section

³⁴ Plaintiffs' Complaint, paragraph 4. The Court, however, previously concluded the Plaintiffs are inmates and not Standard Plywoods employees. Accordingly, their DOI activities have not constituted and do not currently constitute "employment."

24-3-430(D): "no inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector."³⁵

The Plaintiffs alleged that, by paying the Plaintiffs a permanent wage of \$5.15 per hour, SCDC violated and continues to violate the provisions of Section 24-3-430.³⁶ The Plaintiffs also alleged the "[v]iolation of the plain and ordinary meaning of S.C. Code Ann. Section 24-3-430(a)(b)(d) which prohibits compensation to Plaintiffs at a rate of less than the prevailing wage for work of similar nature in the private sector constitutes gross negligence."³⁷

The Plaintiffs' entire first cause of action hinges upon the term "prevailing wage" from Section 24-3-430(D). This Court concludes, however, that Section 24-3-430, and specifically Section 24-3-430(D), is not the applicable statute under which the Plaintiffs' demand for higher wages should be considered. Instead, as urged by SCDC, Section 24-3-410(B)(7) specifically

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³⁵ Id., paragraph 6.

³⁶ Paragraph 3.3(1), pages 6 - 7, of the January 9, 1998 contract between SCDC and Standard Plywoods reads as follows:

- 1. Inmate Pay: Contractor and SCDC agree to a "minimum inmate wage" determined as follows:

Minimum Wage (See Appendix D)	\$5.15
+	
Prorate Social Security Withholding Payment	.39
+	
Prorate Social Security Withholding Payment	.20
+	
<u>SCDC Surplus Fund Amount</u>	<u>1.32</u>
MINIMUM INMATE WAGE (For Non-Export Production)	\$7.06

This paragraph also stated "[t]he prevailing wage rate for inmate labor (for non-export production) is to be established annually by the S.C. Employment Security Commission." (Plaintiffs' Exhibit 11)

³⁷ Id., paragraph 8.

governs the Plaintiffs' hourly wage in the federally certified PIECP project operated by DOI, in conjunction with Standard Plywoods, at Tyger River.

Section 24-3-410(B)(7) must be read in conjunction with the rest of Section 24-3-410, specifically Section 24-3-410(A). Read together, Section 24-3-410(A) and (B)(7) provide as follows:

- (A) It is unlawful to sell or offer for sale on the open market of this State articles or products 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 the Department of Corrections 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. (emphasis added)

Section 24-3-430(D), by contrast, does not specifically reference "a federally certified private sector/prison industries program." Just as Section 24-3-410(B)(7) must be considered with the rest of Section 24-3-410, Section 24-3-430(D) must be considered with the rest of Section 24-3-430.

Sections 24-3-430(C), (D), and (E), as shown below, echo the structure of Section 24-3-410(B)(7) regarding inmates' voluntary participation, wages, and displacement of employed workers in prison industries projects:

- (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.

Again, Section 24-3-430(D) uses the phrase "prevailing wage." Critically, however, nothing in Section 24-3-430 specifically connects the provisions of this section and its subsections to "a federally certified private sector/prison industries program."³¹

Accordingly, this Court concludes, while Section 24-3-430 covers all prison industries activity (i.e. traditional projects, service projects, and PIECP certified projects), Section 24-3-410(B)(7) precisely addresses activity in the DOI project in which the Plaintiffs participate, which is "a federally certified private sector/prison industries program." "Sections which are part of the same general statutory law of the state should be construed together and each given effect if it can be done by any reasonable construction." *Father v. South Carolina Department of Social Services*, 345 S.C. 57, 545 S.E.2d 523, 527 (n. 13) (Cl. App. 2001), quoting *Glover v. Sutu Constr. Co.*, 318 S.C. 465, 458 S.E.2d 534, 537 (1995).

Thus, the Plaintiffs' demand for the "prevailing wage" is unsupported by the precisely applicable statutory authority, as Section 24-3-410(B)(7) only provides the Plaintiffs should receive comparable wages and not the "prevailing wage" for their DOI labor.

However, as explained below, this Court finds neither Section 24-3-410(B)(7) nor Section 24-3-430(D) provides the Plaintiffs a private right of action by which to demand any wage let alone the "prevailing wage." Therefore, the Plaintiffs may not invoke either Section 24-3-410(B)(7) or Section 24-3-430(D) in an effort to receive higher wages for their DOI labor.

Moreover, this Court also concludes the permanent hourly wage SCDC pays the Plaintiffs, i.e. the federal minimum wage of \$5.15 per hour, conforms to both the "comparable

³¹ Section 24-3-430(G) makes only an oblique reference to a federally certified PIECP project. This section provides "[n]o inmate who participates in a project designated by the Director of the Bureau of Justice Assistance (BJA) pursuant to Public Law 90-351 is eligible for unemployment compensation upon termination from the program."

wage" standard from Section 24-3-410(B)(7) and the "prevailing wage" standard from Section 24-3-430(D) under the guidelines published by the South Carolina Employment Security Commission (ESC).

2. SECTIONS 24-3-430(D) AND 24-3-410(B)(7), LIKE ALL SOUTH CAROLINA PRISON INDUSTRIES STATUTES, ARE CRIMINAL STATUTES

As discussed above, the statute that precisely applies to the Plaintiffs' demand for higher wages is not Section 24-3-430(D) but Section 24-3-410(B)(7).

Section 24-3-410 is a criminal statute; therefore, Section 24-3-410(B)(7) criminalizes the intrastate or interstate sale of products produced by inmates, such as the Plaintiffs, who participate in "a federally certified private sector/prison industries program" unless "the inmate workers participate voluntarily, receive comparable wages, and the work does not displace employed workers."

Section 24-3-410(C) articulates the criminal penalties for violating Section 24-3-410:

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A person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, 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.

However, Section 24-3-430 and all of the other South Carolina prison industries statutes, by operation of Section 24-3-420, are also a criminal statutes. Section 24-3-420 provides the following:

Any person who willfully violates any of the provisions of this article other than Section 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. (emphasis added)

3. THIS COURT APPLIES *McMASTER V. STATE OF MINNESOTA* IN REJECTING THE PLAINTIFFS' DEMAND FOR HIGHER WAGES

As the parties stipulated and as this Court has noted throughout this order, the DOI project in which the Plaintiffs participated was federally certified by BJA under its PIECP Guidelines. BJA's PIECP Guidelines is anchored upon 18 U.S.C. Section 1761(c),³⁹ a provision of the Ashurst-Sumners Act, 18 U.S.C. Section 1761 - 62.

Federal courts have, on several occasions, been called upon to interpret the Ashurst-Sumners Act in actions filed by inmates who invoked both the FLSA and the Ashurst-Sumners Act as the basis for their demand for higher wages for their prison industry labor. The leading case from the federal courts, and the case relied upon by SCDC in its defense of the Plaintiffs' first cause of action, is *McMaster v. State of Minnesota*, 819 F.Supp. 1429 (D. Minn. 1993), affirmed 30 F.2d 976 (8th Cir. 1994). In *McMaster*, the plaintiffs, inmates who participated in the Minnesota Department of Corrections prison industries program, invoked both the FLSA and the Ashurst-Sumners Act as the basis for demanding "minimum or prevailing wages for work performed in prison industries." *Id.*, 819 F.Supp. at 1433.

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The *McMaster* court rejected the inmates' demand for minimum wage for their prison industries labor under the FLSA. The *McMaster* court found "the relationship between the [inmates] and the state is not an employment relationship, but a custodial relationship to which the FLSA does not apply." *Id.*, 819 F.Supp. at 1438, citing *Harker*.⁴⁰

The *McMaster* court then analyzed the inmates' demand for the prevailing wage under the Ashurst-Sumners Act. It found the Ashurst-Sumners Act, just like all South Carolina

³⁹ See note 5, *supra*.

⁴⁰ The *McMaster* court repeatedly cited the Fourth Circuit's decision in *Harker* in its opinion. *McMaster*, 819 F.Supp. at 1436 - 1439. This Court also relies upon *Harker* in finding the SCDC on the Plaintiffs' second cause of action. See Section IV(A), *supra*.

prison industries statutes, is a criminal statute. The Ashurst-Sumners Act "criminalizes the transportation of prison-made goods in commerce." *McMaster*, 819 F.Supp. at 1438.

The *McMaster* court concluded the purpose of the Ashurst-Sumners Act was to ensure fair competition between private industries that participate in prison industries programs and private industries that do not participate in prison industries programs. *McMaster*, 819 F.Supp. at 1438 - 1439. Specifically, *McMaster* found

The Ashurst-Sumners Act contains an exemption allowing the interstate transportation of goods produced under the Bureau of Justice's Private Sector/Prison Industry Enhancement Certification Program [P.I.E.C.P.], provided that the inmates who produced the goods were paid the prevailing local rate for their work. (citing 18 U.S.C. 1761(e)) The prevailing wage requirement insures that the availability of prison-made goods will not hamper fair competition. (again citing *Harlow*) *McMaster*, 819 F.Supp. at 1439. (emphasis added)

The *McMaster* court also analyzed the legislative history surrounding the enactment of 18 U.S.C. 1761. *Id.*, 819 F.Supp at 1440 - 1441.

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In short, the legislative history cited by the plaintiffs indicates that the primary purpose of the prevailing wage provision [from 18 U.S.C. 1761(e)] was to benefit society in general by eliminating unfair competition, reducing the direct and indirect costs of incarceration, and enhancing rehabilitation efforts. The prevailing wage provision may also benefit prisoners such as plaintiffs, but the fact that a statute has the subsidiary purpose of benefiting a given class of persons does not establish that it creates enforceable rights in their favor. (citing *Curt v. Ash*, 422 U.S. 66, 80 - 81 (1975)) *McMaster*, 819 F.Supp. at 1441. (emphasis added)

Thus, the *McMaster* court concluded the plaintiffs in that case, Minnesota inmates participating in a Minnesota Department of Corrections prison industries program, were not entitled to the prevailing wage despite the apparently plain language of 18 U.S.C. 1761(e).

4. SECTIONS 24-3-430(D) AND 24-3-410(B)(7) DO NOT PROVIDE A PRIVATE RIGHT OF ACTION BY WHICH THE PLAINTIFFS MAY DEMAND HIGHER WAGES FOR THEIR DOI LABOR

SCDC urged this Court to apply *McMaster's* logic and holding to the present action, and this Court concludes *McMaster's* logic and holding applies. This Court finds federal courts in this state have followed *McMaster's* logic and holding.⁴¹ Further, this Court concludes under precedent established by our Court of Appeals, the Plaintiffs in the present case do not have a private right of action by which to demand either comparable wages or the prevailing wage for their DOI labor.

In *Watson v. Sellers*, 299 S.C. 426, 385 S.E.2d 369 (Ct. App. 1989), our Court of Appeals harmonized *Cort v. Ash*, 422 U.S. 66 (1975), cited in *McMaster*, with *Rayfield v. S.C. Department of Corrections*, 297 S.C. 91, 374 S.E.2d 910 (Ct. App. 1988). The issue presented in *Watson*, which led to the Court of Appeals harmonizing *Cort* and *Rayfield*, was whether a statute that did not expressly provide a private right of action impliedly provided a private right of action to a complaining party. After reciting the test fashioned by the United States Supreme Court in *Cort*, the Court of Appeals recited South Carolina authority on this subject:

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In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered, and (2) that he is a member of the class of persons the statute is intended to protect. (citing *Rayfield*, 374 S.E.2d at 914) ... we see no inconsistency with the test of *Cort v. Ash*. *Watson*, 385 S.E.2d at 373.

This Court concludes the Plaintiffs did not satisfy the *Watson* test. Clearly, neither Section 24-3-430(D), the statute the Plaintiff invokes in their Complaint, nor Section 24-3-

⁴¹ See *Smith v. Evez*, No. CA-95-317-6-OAK, p. 4 (D.S.C. 1996), affirmed 106 F.3d 392 (4th Cir. 1997 in an unpublished opinion) ("As the Court in *McMaster* stated, "Congress' purpose in enacting the Ashurst-Sumners Act was to protect private business, not to protect the inmate worker. Sections 1761-62 embody Congressional interest in free labor and were designed to protect private business from competition from goods produced with inexpensive convict labor." quoting the 8th Circuit's opinion affirming the district court's ruling in *McMaster*, 30 F.2d 976, 981.)

410(B)(7), the precisely applicable statute, expressly provides inmates a private right of action by which to demand either the prevailing wage or comparable wages for their DOI labor.⁴³ Therefore, the Plaintiffs effectively seek this Court to find these statutes impliedly provide them a private right of action.

However, the Plaintiffs failed to prove by a preponderance of the evidence that the essential purpose of Section 24-3-430(D) is to protect them from receiving an hourly wage for their DOI labor that was or is below the "prevailing wage" for similar work. Additionally, the Plaintiffs failed to prove by a preponderance of the evidence that they are members of the class of persons either Section 24-3-430(D) or Section 24-410(B)(7) were intended to protect.

As the Plaintiffs introduced into the record no legislative history regarding the enactment of Section 24-3-430(D) or any other South Carolina prison industries statute, this Court applies the legislative history surrounding the enactment of 18 U.S.C. Section 1761 to the Plaintiffs' demand for higher wages. As *McMaster* concluded, Congress enacted 18 U.S.C. Section 1761 to address the potential perils of unfair competition between private industries that participate in prison industries programs and private business that do not participate in prison industries programs. Again, 18 U.S.C. Section 1761 is a criminal statute just as Sections 24-3-430(D), 24-3-410(B)(7), and all of the South Carolina prison industries statutes are criminal statutes. By analogy, therefore, the South Carolina legislature enacted both Sections 24-3-430(D) and 24-3-

⁴³ By contrast, the Fair Labor Standards Act expressly provides for a private right of action. See 29 U.S.C. Section 216(b) which provides, in pertinent part, "[a]n action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

410(B)(7) to address, at the state level, the potential perils of unfair competition addressed at the federal level by 18 U.S.C. Section 1761.

Accordingly, this Court concludes the Plaintiffs do not possess a private right of action by which to demand a higher wage for their DOI labor under Sections 24-3-430(D), 24-3-410(B)(7), or any other South Carolina prison industries statute. Consequentially, this Court finds for SCDC on the Plaintiffs' first cause of action.

Moreover, as discussed below, this Court concludes that SCDC pays the Plaintiffs an acceptable hourly wage for their DOI labor even under the parameters of Sections 24-3-430(D) and 24-3-410(B)(7).

5. ACCORDING TO THE SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION, SCDC PAYS THE PLAINTIFFS AN ACCEPTABLE HOURLY WAGE FOR THEIR DOI LABOR

The evidence introduced by the parties at trial showed that the South Carolina Employment Security Commission (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 DOI labor.

On July 27, 2000, Director Ellis wrote Mr. Ted Gladden, ESC's Assistant Director for Labor Market Information, and asked him to review the hourly wage rate for the DOI project in which the Plaintiffs participate.⁴³ Director Ellis clearly stated 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" = \$8.29.⁴⁴

⁴³ July 27, 2000 letter from Director Ellis to Mr. Gladden. (Defendant's Exhibit 14)

⁴⁴ August 4, 2000 letter from Mr. Gladden to Director Ellis. (Defendant's Exhibit 15)

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.

According to Ms. Eleazer, the designations "Low, Mean, and High" simply reflect percentile designations. The designation "Low" corresponds to the 25th percentile, the designation "Mean" corresponds to the 50th percentile, and the designation "High" corresponds to the 75th percentile. In other words, 25% of the non-institutional businesses surveyed by the ESC reported an hourly wage at or below \$6.05, 50% of the non-institutional businesses surveyed by the ESC reported an hourly wage at or below \$7.48, and 75% of the non-institutional business surveyed by the ESC reported an hourly wage at or below \$8.29.

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

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

Ms. Hleazer emphasized her agency does not recognize or even use the term "prevailing wage" in compiling or publishing its wage data. Thus, no evidence introduced by the Plaintiffs supported their allegation the prevailing wage for work performed by the Plaintiffs in the DOI project with Standard Plywoods ranges between \$9 and \$14 per hour.⁴⁵

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

6. BJA, THE FEDERAL AGENCY RESPONSIBLE FOR CERTIFYING THE DOI PROJECT IN WHICH THE PLAINTIFFS PARTICIPATE, KNOWS OF AND APPROVES OF THE \$5.15 HOURLY WAGE SCDC PAYS THE PLAINTIFFS

Just as he advised and sought review from the ESC of the \$5.15 hourly wage SCDC pays the Plaintiffs, Director Ellis advised BJA of DOI's payment of the federal minimum wage to the Plaintiffs. Director Ellis also advised BJA of his dialogue with the ESC regarding ESC's review of the Plaintiffs' permanent wage of \$5.15 per hour. This information is best reflected in an August 10, 2001 letter to Director Ellis from Mr. Robert T. Watkins, Program Manager, PIECP, BJA.⁴⁶

On July 27, 2000, you requested wage ranges for all of your PIECP CACs and received wage ranges in [an ESC] letter dated August 8, 2000.⁴⁷ That letter provided you with low, mean, and high wages for each job category you requested. In each case the "low" wage was above the Federal Minimum Wage (FMW). However, when you requested further clarification, by telephone from [the ESC], it was explained to you verbally that each of those numbers itself represented a range and the

⁴⁵ The evidence clearly demonstrated Standard Plywoods' Clinton employees, who perform a wider breadth of job tasks than the Plaintiffs, receive hourly wages well below the \$9 and \$14 per hour range the Plaintiffs alleged is the range of the prevailing wage for similar work. See Defendant's Exhibit 12.

⁴⁶ Plaintiffs' Exhibit 24.

⁴⁷ The ESC letter referenced by Mr. Watkins was actually dated August 4, 2000. See note 42, supra.

bottom of the "low" range in each case with the FMW. Based upon this information, you determined that the FMW was an acceptable wage in each of the six CACs that you operate.⁴⁸ ... BJA agrees that as long as the wage is at or above the "low" end of the scale, as determined by the ESCI, it will be considered as having met PIECP compliance criteria. (emphasis added by Mr. Watkins).⁴⁹

As discussed immediately above, the \$5.15 hourly wage SCDC pays the Plaintiffs is clearly "at or above the 'low' end" of the ESC's scale. Thus, BJA, the federal agency responsible for certifying the DOI PIECP project in which the Plaintiffs participate, approved the permanent \$5.15 hourly wage SCDC currently pays the Plaintiffs. Therefore, according to BJA, SCDC pays the Plaintiffs an acceptable hourly wage for their DOI labor. Consequently, this Court finds for SCDC on the Plaintiffs' first cause of action.

7. **EVEN IF THE PLAINTIFFS HAD SUSTAINED LOSSES AS A RESULT OF RECEIVING THE MINIMUM WAGE OF \$5.15 PER HOUR FOR THEIR DOI LABOR, SCDC WOULD BE IMMUNE FROM LIABILITY BY OPERATION OF SECTION 15-78-60(5)**

JWT
29

Finally, the Plaintiffs alleged in their first cause of action an unnamed former SCDC director exercised his discretion in a grossly negligent manner by entering into contracts with private industry that resulted in the Plaintiffs receiving wages "in violation of the 'prevailing wage' provision of" Section 24-3-430.⁵⁰ The Plaintiffs further alleged the "violation of the plain and ordinary meaning of S.C. Code Ann. Section 24-3-430(a)(b)(d) which prohibits compensation to Plaintiffs at a rate of less than the prevailing wage for work of similar nature in the private sector constitutes gross negligence."⁵¹ Both allegations fail for the same reasons.

⁴⁸ The DOI project at Tyger River in which the Plaintiffs participate or participated is one of the six CACs referenced by Mr. Watkins.

⁴⁹ August 10, 2001 letter to Director Ellis from Mr. Watkins, p. 2. (Plaintiffs' Exhibit 24)

⁵⁰ See note 7, *supra*.

⁵¹ See note 34, *supra*.

Director Ellis, as demonstrated above, submitted the \$5.15 per hour wage the Plaintiffs currently receive for review by both the South Carolina ESC and BJA. The \$5.15 hourly wage the Plaintiffs receive from SCDC falls within ESC's published range for similar work. As a result of the wage's conformity with ESC guidelines, BJA also approved the \$5.15 hourly wage SCDC pays the Plaintiffs for their DOI labor. Director Ellis' submission of the Plaintiffs' hourly wage for review by both ESC and BJA clearly demonstrates that Director Ellis afforded not just slight care but great care in determining the Plaintiffs' hourly wage. Accordingly, such great care means that Director Ellis did not act in a grossly negligent manner in determining the hourly wage the Plaintiffs currently receive. Thus, SCDC is immune from liability by operation of Section 15-78-60(5) even if the Plaintiffs had legitimately sustained losses as a result of receiving only the federal minimum wage of \$3.15 per hour for their DOI labor. See *Jackson v. SCDC*, 390 S.E.2d at 468 - 469.²³

John
30 As Section 24-3-430(B) provides, in part, that "[SCDC's] director may enter into contracts necessary to implement this program," the former director who entered into the contract with Standard Plywoods which provided that the Plaintiffs would receive an hourly wage of \$5.15 did not enter into the contract "in a grossly negligent manner," because both ESC and BJA deemed this wage as acceptable. Again, SCDC is immune from liability by operation of Section 15-78-60(5) even if the Plaintiffs had legitimately sustained losses. See *Jackson*, supra.

However, the Plaintiffs sustained no such losses as they are not entitled to a private right of action by which to demand higher wages, and the \$5.15 hourly wage they receive is

²³ Also see analysis on pages 12 and 13, supra.

acceptable according to ESC and BJA. Accordingly, this Court finds for SCDC on the Plaintiff's first cause of action.

V. CONCLUSION

For the reasons articulated above, this Court FINDS for SCDC on the Plaintiff's first and second causes of action.

As the Plaintiff's final three (3) causes of action did not survive SCDC's motion for summary judgment, this Court ENTERS judgment for SCDC in this action. IT IS SO ORDERED.

J. W.
31


JOSEPH M. STRICKLAND
Special Circuit Court Judge
Fifth Judicial Circuit

Columbia, South Carolina
October 30, 2002

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 00 -CP-40- 4761

Richard Adkins, et al.

S.C. Dept. of Corrections

PLAINTIFF(S)

DEFENDANT(S)

FILED
02 OCT 30 PM 1:52
DAVID R. A. SCOTT
CLERK OF COURT

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at _____, South Carolina, this _____ day of _____, 20____.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this 31 day of Oct, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

Harry L. Deane, Jr.

Vinton Lida

Lake Summers

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Richard A. Scott
CLERK OF COURT

SCRPC APP-24

SCRPC FORM 4 (Revised 5/08)

LAW OFFICES

JUN 21 2018

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MALONE, THOMPSON
SUMMERS & OTT, LLC

Reyes Cabrera Pena, #265665,	)	Docket No. 16-ALJ-04-0397-AP
	)	Grievance No.: KPCI 1069-07
Appellant,)	
)	
vs.	)	FINAL ORDER
)	
South Carolina Department of Corrections,)	
)	
Respondent.)	
<hr/>		

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to the Notice of Appeal filed by Reyes Cabrera Pena (Appellant), an inmate in the custody of the South Carolina Department of Corrections (SCDC or Respondent). Appellant challenges the hourly rate billed by SCDC for labor that Appellant performed.

FACTS/PROCEDURAL BACKGROUND

Appellant participated in a federally certified project manufacturing automobile consoles (Project) at Perry Correctional Institution. The Project complied with federal guidelines and operated under state statutes codified at S.C. Code Ann. § 24-3-310 et. seq. (1989, as amended). S.C. Code Ann. §§ 24-3-40 and 24-3-430 are directly at issue in this case.¹

Appellant worked in a Prison Industries Program providing labor to a private sector business for approximately one and a half years.² Appellant filed a Step 1 Grievance on June 29, 2007, in which he claimed he was owed back wages, including an amount withheld by SCDC that Appellant believed was \$1.92 an hour,³ for "every hour" worked during his participation in the Project. He

¹ This project was not a service project exempted from the prevailing wage requirement by annual budget provisos and finally by S.C. Code Ann. § 24-1-295 (effective August 1, 2007) because it involved original equipment manufacturing.

² The actual total hours worked will have to be established on remand in order to determine the relief requested.

³ In its brief Respondent respond refers to training wages for the first 320 hours of Appellant's labor, but there is nothing in the record to establish what rate of pay was paid for the training period other than Appellant's claim that, based on *Torrence*, a sum was improperly removed from his gross wages.

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SC ADMIN. LAW COURT

also demanded access to wages held in escrow by SCDC. The grievance was denied on July 25, 2007. Appellant renewed these claims in his Step 2 Grievance filed on August 3, 2007. SCDC denied the Step 2 Grievance on March 28, 2016, received by Appellant on April 21, 2016. Appellant filed his appeal to the ALC on May 5, 2016, claiming he was owed back pay for “every hour” worked and claiming he should have immediate access to wages held in escrow. On July 5, 2016, Appellant filed his initial brief. On July 7, 2016, Respondent filed the Record on Appeal. On August 29, 2016, Respondent filed a Motion to Hold in Abeyance because two issues controlling in the instant case were also at issue in two cases pending on petitions for writs of certiorari to the South Carolina Court of Appeals: *Gatewood v. S.C. Dep’t of Corr.*, 416 S.C. 304, 785 S.E. 2d 60 (2016), *cert. denied* (May 30, 2017) and *Ackerman, et al. v. S.C. Dep’t of Corr.*, 415 S.C. 412, 782 S.E.2d 757 (Ct. App. 2016), *cert. denied* (May 30, 2017). This Court issued an Order of Abeyance on August 30, 2016. After the Supreme Court issued its orders denying certiorari in *Gatewood* and *Ackerman*, this Court issued an Order Lifting Abeyance on June 15, 2017, allowing the parties to file a supplemental briefs. On June 26, 2017, Appellant filed a supplemental brief. On July 24, 2017, Respondent filed a Motion for Extension of Deadline to File Its Brief, which the Court granted. On August 15, 2017, Respondent filed an Amended Record on Appeal and its brief.

As an appendix to its brief, Respondent presents an itemized table included in a portion of a contract between SCDC and a private contractor. In the agreement, the referenced subsection defines “Inmate Pay” as follows:

Contractor and SCDC agree to an “hourly rate” determined as follows:	
Prevailing Wage Rate (See Appendix C [Not included])	\$ 6.00
+	
Prorata Social Security Withholding Payment	.46
+	
Prorata Workers’ Compensation Premium	.23
+	
<u>SCDC/Prison Industries Administrative Cost</u>	<u>1.32</u>
HOURLY RATE CHARGED TO CONTRACTOR	\$ 8.01

At no time during this agreement will inmates be paid less than the prevailing wage as set forth in Appendix C.⁴

⁴ This information was neither included in the Record on Appeal nor provided to Appellant prior to service of the

ISSUE ON APPEAL

Whether Social Security withholding payments, SCDC/Prison Industries Administrative Costs, and Workers' Compensation premiums, collectively, were required to be included in Appellant's gross wages for purposes of the calculations mandated in S.C. Code Ann. § 24-3-40(A).

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decisions of the South Carolina Supreme Court in *Adkins v. S.C. Dep't of Corr.*, 360 S.C. 413, 602 S.E.2d 51 (2004) and *Wicker v. S.C. Dep't of Corr.*, 360 S.C. 421, 602 S.E.2d 56 (2004), wherein the Court held that an inmate's claim that he was paid less than the prevailing wage for work performed in the Prison Industries program, in violation of a statute mandating payment of the prevailing wage, implicated a state-created property interest and was therefore reviewable by the ALC. Furthermore, when reviewing the Department's decisions in inmate grievance matters, the Court sits in an appellate capacity. *Al-Shabazz v. State*, 338 S.C. 354, 377, 527 S.E.2d 742, 754 (2000); *see also* S.C. Code Ann. § 1-23-600(E) (Supp. 2017) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). Section 1-23-380(5) states:

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.

S.C. Code Ann. § 1-23-380(5) (Supp. 2017). *See also* *Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 337 S.C. 133, 137, 522 S.E.2d 605, 607 (Ct. App. 1999); *S.C. Dep't of Labor, Licensing*

Respondent's brief. Furthermore, Appendix C referenced in the pay schedule (which presumably provides a basis for the prevailing wage) was neither included in the Record on Appeal nor in Respondent's brief.

and Regulation v. Girgis, 332 S.C. 162, 166, 503 S.E.2d 490, 492 (Ct. App. 1998).

DISCUSSION

Whether Social Security withholding payments, SCDC/Prison Industries Administrative Costs, and Workers' Compensation premiums, collectively, were required to be included in Appellant's gross wages for purposes of the calculation mandated in S.C. Code Ann. § 24-3-40(A).

In his Step 1 Grievance, Appellant states that he is grieving "wages withheld from [him] in violation of [S.C. Code Ann. § 24-3-40(A)]" in the amount of "\$1.92 for every single hour [he] worked" for the private sector company while at the prison. He asserts that these claims are supported by *Torrence v. S.C. Dep't of Corr.*, 373 S.C. 586, 646 S.E.2d 866 (2007).⁵ Appellant also asks for immediate access to wages held in escrow pursuant to S.C. Code Ann. § 24-3-40(B)(2). In his Step 2 Grievance and appeal, Appellant reasserts the issues raised in his Step 1 Grievance. In his initial brief, Appellant argues that SCDC failed to pay him the prevailing wage in accordance with Section 24-3-430(D) while he worked on the Project, and that he is entitled to recover \$1.92 in hourly deductions for every hour he worked on the Project. He reasserts these arguments in his supplemental brief, but also adds that his grievance was timely under the doctrine of equitable tolling.

Respondent argues that Appellant abandoned certain claims. First, it contends that Appellant failed to raise claims in his grievances (Step 1 or Step 2) or in his appeal for the "prevailing wage" under § 24-3-430(D) and for back pay for "training wages" for the first 320 hours of his labor. Respondent also contends that Appellant failed to assert the doctrine of equitable tolling in his Step 2 Grievance and in his appeal and that he did not raise or preserve an argument that his claim for back wages was a challenge to SCDC policies or procedures. Therefore, Respondent argues, Appellant's claim is time-barred.

Issue Preservation

At the outset, the Court must address Respondent's arguments that Appellant failed to preserve arguments not raised in Appellant's Step 1 and Step 2 Grievances. Appellant is required to exhaust

⁵ Appellant cites the case name for *Torrence*, as well as the correct opinion number (26328) and filing date, to support his position that Respondent had violated S.C. Code Ann. §§ 24-3-40 and 24-3-430(D). The Court will therefore consider this authority as support for Appellant's appeal.

his administrative remedies before appealing to this Court, unless an exception exists to excuse the failure to do so. See *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994) ("The general rule is that administrative remedies must be exhausted absent circumstances supporting an exception to application of the general rule."); *Brown v. James*, 389 S.C. 41, 48, 697 S.E.2d 604, 608 (Ct. App. 2010) ("The doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act."). The administrative remedies provided for inmates pursuant to the Department's Inmate Grievance Policy are Step 1 and Step 2 grievances. See also *Al-Shabazz*, 338 S.C. at 376, 527 S.E.2d at 754 (2000) (citing *Kiawah Resort Assocs. v. S.C. Tax Comm'n*, 318 S.C. 502, 505, 458 S.E.2d 542, 544 (1995) ("[I]ssues or arguments that were not raised to or ruled on by [an administrative agency] ordinarily are not preserved for review.")). Further, issues raised but not argued in Appellant's briefs have also been waived and are not properly before the ALC. *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court") (citations omitted).

In this case, Respondent asserts that Appellant "failed to raise claims for 'prevailing wage' under § 24-3-430(D) and for back pay associated with the 'training wages' SCDC paid him for the first 320 hours of his labor in his Step 1, Step 2, or Notice of Appeal," and that the prevailing wage claim cannot be raised on appeal. I agree. Appellant failed to reference "prevailing wage" or cite to Section 24-3-430(D) in his Step 1 and Step 2 Grievances and Notice of Appeal. Also, Appellant's argument in his Step 1 and Step 2 Grievances only reference his argument that \$1.92 was being deducted from his gross wages that should not have been pursuant to Section 24-3-40, and that he should have been paid that amount "for every single hour [he] worked" in the program. It was not until his initial brief that Appellant raised for the first time the prevailing wage issue under 24-3-430(D), which he listed as a separately enumerated issue from the \$1.92-deduction/gross wage issue. Similarly, Appellant never referred to or even suggested "training wages" in his Step 1 and Step 2 Grievances and Notice of Appeal. Therefore, the Court finds the prevailing wage argument, which includes the training wages argument, is not preserved for review on appeal.⁶

⁶ Although Appellant's training wage argument is not preserved with respect to the prevailing wage rate, Appellant

Respondent also contends that Appellant failed to assert the doctrine of equitable tolling in his Step 1 grievance, his Step 2 grievance, his appeal, and in his initial brief. Therefore, Respondent argues, Appellant's claim is time-barred. I disagree.

First, Respondent did not deny either the Step 1 Grievance or the Step 2 Grievance on the ground that either was time-barred.⁷ Moreover, in *Torrence*, the Supreme Court directed SCDC to provide "due process via the internal grievance system." *Torrence*, 373 S.C. 586 at 595, 646 S.E.2d 866 at 870. To limit that remedy to the grievance system's 15-day filing deadline at this stage would make the Court's 2007 order a nullity. Subsequently, in *Ackerman*, *supra*, the Court of Appeals held that the characterization of a wage grievance as an incident subject to the 15-day filing deadline "was arbitrary and capricious," and that the wage challenges "logically [fall] within [challenges to] policies and procedures as contemplated in [the inmate grievance system]. *Id.* at 421, 782 S.E.2d at 761. This decision has the effect of identifying a wage complaint as not subject to a "time bar" for missing the 15-day deadline. Therefore, the Court will not dismiss any preserved arguments from Appellant's Step 1 and Step 2 Grievances based on either of them being time-barred by the grievance system's 15-day deadline.

In addition, Respondent argues that one of Appellant's arguments from his Step 1 Grievance, specifically his claim for immediate access to his escrowed wages pursuant to Section 24-3-40(A)(5), (B)(2), is not preserved. I agree. Appellant only raised this argument in his Step 1 and Step 2 Grievances and Notice of Appeal but did not argue it in his brief. Because this issue was not preserved on appeal, the Court will not consider this argument. *See Wright, supra*.

Gross Wages

Having addressed unpreserved, waived, and inapplicable issues, the Court now turns to the sole preserved issue on appeal: whether Social Security withholding payments, SCDC/Prison Industries Administrative Costs, and Workers' Compensation premiums, collectively, were required to be included in Appellant's gross wages for purposes of the calculation mandated in

did preserve his argument that he should have been paid \$1.92 in deductions as part of his gross wages for every hour he worked in the program, which includes the 320 hours Appellant worked during the training period. Therefore, Appellant's gross wages includes the hours he worked during the training period to the extent the training period is covered by the contract.

⁷ Interestingly, Respondent took nearly nine (9) years to issue a decision on Appellant's timely-filed Step 2 Grievance.

S.C. Code Ann. § 24-3-40(A).

In his Step 1 and Step 2 Grievances, Appellant claims that Respondent wrongfully withheld wages from him in violation of Section 24-3-40(A), and that he is owed \$1.92 "for every single hour [he] worked" for the private company during the Project. In his initial and supplemental briefs, Appellant reasserts that he is owed back wages for a sum (which, under the contract, should be \$2.01) that was improperly deducted from his wages during his work in the Project.

Respondent argues that the items charged to the private company in addition to Appellant's gross hourly wages was lawful and that charging those items in addition to inmates' gross wages was necessary to defray the expenses associated with the operation of its prison industries program.

The Prison Industries Program is authorized and operated pursuant to federal and state laws. Federal law, 18 U.S.C. § 1761(a) (2011) limits the transportation in interstate commerce of goods, wares, or merchandise manufactured or produced wholly or in part by convicts or prisoners. Exceptions are established in 18 U.S.C. 1761 (c) for projects designated by the Director of the Bureau of Justice Assistance. Those exceptions require "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" but allow deductions not to exceed eighty percent (80%) of the gross wages to include federal and state taxes, reasonable charges for room and board, family support (according to court order or state statute), and contributions to a fund for victim compensation. Further, the federal law allows inmates to have benefits such as Workers' Compensation but specifically disqualifies them from receiving unemployment compensation while incarcerated.

S.C. Code Ann. § 24-3-40(A) provides for specific deductions from the gross wages of an inmate authorized to work in a community or in a prison industry program. These deductions are as follows:

The Director of the Department of Corrections, or the local detention or correctional facility manager, if applicable, shall deduct the following amounts from the gross wages of the prisoner:

(1) If restitution to a particular victim or victims has been ordered by the court, then twenty percent must be used to fulfill the restitution obligation. If a restitution payment schedule has been ordered by the court pursuant to Section 17-25-322, the twenty percent must be applied to the scheduled payments. If restitution to a particular victim or victims has been ordered but a payment schedule has not been specified by the court, the director shall impose a payment schedule of equal monthly payments and use twenty percent to meet the payment schedule so

imposed.

(2) If restitution to a particular victim or victims has not been ordered by the court, or if court-ordered restitution to a particular victim or victims has been satisfied then:

* * *

(b) if the prisoner is employed in a prison industry program, ten percent must be directed to the Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation, Victim Compensation Fund for use in training, program development, victim compensation, and general administrative support pursuant to Section 16-3-1410 and ten percent must be retained by the department to support services provided by the department to victims of the incarcerated population.

(3) Thirty-five percent must be used to pay the prisoner's child support obligations pursuant to law, court order, or agreement of the prisoner. These child support monies must be disbursed to the guardian of the child or children or to appropriate clerks of court, in the case of court ordered child support, for application toward payment of child support obligations, whichever is appropriate. If there are no child support obligations, then twenty-five percent must be used by the Department of Corrections to defray the cost of the prisoner's room and board. Furthermore, if there are no child support obligations, then ten percent must be made available to the inmate during his incarceration for the purchase of incidentals pursuant to subsection (4). This is in addition to the ten percent used for the same purpose in subsection (4).

(4) Ten percent must be available to the inmate during his incarceration for the purchase of incidentals. Any monies made available to the inmate for the purchase of incidentals also may be distributed to the person or persons of the inmate's choice.

(5) Ten percent must be held in an interest bearing [sic] escrow account for the benefit of the prisoner.

(6) The remaining balance must be used to pay federal and state taxes required by law. Any monies not used to satisfy federal and state taxes must be made available to the inmate for the purchase of incidentals pursuant to subsection (4).

The agreement between SCDC and the Contractor (the private sector entity) establishes an hourly rate that includes a wage, Social Security withholding, a Workers' Compensation premium, and a "SCDC Surplus Fund Amount." Appellant contends that all of these items are part of his hourly gross wage should be part of the back pay owed. The Supreme Court referred to the sum of these items as a diversion from the hourly rate paid for inmate labor and stated:

[I]f [Torrence and Ward] prove true their allegation that the DOC 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, the DOC would be in violation of the plain language of the statute which directs it to disburse the money based on the gross wages. *See* § 24-3-40(A).

Torrence, 373 S.C. at 594 n.4, 646 S.E.2d at 870 n.4.

Thus, all the items in this subsection of the contract are included in an inmate's gross wages. What must be proved is whether the statutory deductions were calculated after the removal of any of these items. From the record provided, this Court can only direct Respondent to calculate the statutory deductions from the gross hourly sum of \$8.01, if it cannot show that it has already done so.

As directed by these provisions, the gross wages as determined on remand and accounting for the three items (as noted by the Supreme Court) would be subject to recalculation of these deductions and disbursed accordingly. The Court further notes that under Section 24-3-40(A)(3) thirty-five percent (35%) of the gross hourly wage (in Appellant's case, \$8.01) would go to Appellant's child support obligation. If there is no child support obligation, ten percent (10%) is to be added to Appellant's "incidentals" account as provided in subsection (A)(4). Once in that account, the funds may be "distributed to the person or persons of the inmate's choice. The remaining twenty-five percent (25%) goes to SCDC to defray the cost of the inmate's room and board.

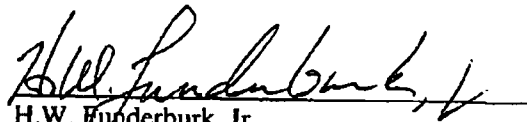
Conclusion

SCDC's failure to include the Social Security withholding, Workers' Compensation premium, and SCDC/Prison Industries Administrative Cost in the gross wages prior to making deductions thereto was an error of law. Accordingly, the parts of Respondent's decision dealing with gross wages are **REVERSED** and **REMANDED**. Respondent must classify the entire contract amount as the hourly gross wages and calculate deductions and distributions from Appellant's pay as set forth in Section 24-3-40(A).

ORDER

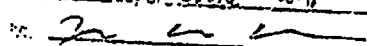
IT IS THEREFORE ORDERED that those parts of SCDC's decision dealing with Appellant's prison industry gross wages and their disposition are **REVERSED AND REMANDED** for proceedings consistent with this Order.

AND IT IS SO ORDERED.


H.W. Funderburk, Jr.
Administrative Law Judge

June 20, 2018
Columbia, SC

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency 9 Mail Service addressed to the parties) or their attorney(s).

the 20th day of June 2018
By: 

FILED

JUN 20 2018

SC ADMIN. LAW COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

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

Administrative Law Court Docket No. 16-ALJ-04-0397-AP

RECEIVED

JUL 18 2018

SC Court of Appeals

Reyes Cabrera Pena, #265665 Respondent,

v.

South Carolina Department of Corrections Appellant.

NOTICE OF APPEAL

In accordance with South Carolina Appellate Court Rule 203 and the provisions of S.C. Code Ann. § 1-23-610(A)(1), the South Carolina Department of Corrections ["the Department"] appeals the June 20, 2018 Final Order issued by the Honorable H.W. Funderburk, Jr., Administrative Law Judge.

The Department's undersigned counsel received written notice of the entry of Judge Funderburk's June 20, 2018 Final Order on June 21, 2018.

By his June 20, 2018 Final Order, Judge Funderburk affirmed in part and reversed in part the final decision issued by the Department in an administrative grievance filed by the Respondent.

For clarity's sake, the Department does not appeal the rulings by which Judge Funderburk affirmed its final decision regarding the Respondent's administrative grievance.

Instead, the Department appeals the following ruling(s) from Judge Funderburk's June 20, 2018 order:

The agreement between [the Department] and the Contractor (the private sector entity) establishes an hourly rate that includes a wage, Social Security withholding, a Workers' Compensation premium, and a "SCDC Surplus Fund Amount." [Pena] contends that all of these items are part of his hourly gross wage should be part of the back pay owed. The Supreme Court referred to the sum of these items as a diversion from the hourly rate paid for inmate labor and stated:

[I]f [Torrence and Ward] prove true their allegation that [the Department] removes any of the money remitted by the private industry sponsor and then disburses the percentages listed in [S.C. Code Ann. § 24-3-40] based on the lower rate, [the Department] would be in violation of the plain language of the statute which directs it to disburse the money based on the gross wages. *See* [S.C. Code Ann. § 24-3-40(A)].

[*Torrence v. S.C. Dep't of Corr.*, 646 S.E.2d 866, 870, n. 4 (S.C. 2007)].

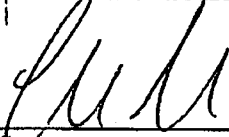
Thus, all the items in this subsection of the contract are included in an inmate's gross wages. What must be proved is whether the statutory deductions were calculated after the removal of any of these items. From the record provided, this Court can only direct [the Department] to calculate the statutory deductions from the gross hourly sum of \$8.01, if it cannot show that it has already done so.

SCDC's failure to include the Social Security withholding, Workers' Compensation premium, and SCDC/Prison Industries Administrative Cost in the gross wages prior to making deductions thereto was an error of law. Accordingly, the parts of [the Department's] decision dealing with gross wages are **REVERSED** and **REMANDED**. [The Department] must classify the entire contract amount as the hourly gross wages and calculate deductions and distributions from [Pena's] pay as set forth in [§ 24-3-40(A)].

IT IS THEREFORE ORDERED that those parts of [the Department's] decision dealing with [Pena's] prison industry gross wages, including for [Pena's] training period to the extent this period is covered by the contract, and their disposition are **REVERSED AND REMANDED** for proceedings consistent with this Order."

See Order, pp. 8 – 9. [emphasis supplied by ALJ].

RESPECTFULLY SUBMITTED:



July 18, 2018

Lake E. Summers

Malone, Thompson, Summers & Ott LLC
339 Heyward Street, Suite 200
Columbia, South Carolina 29201
(803) 254-3300

Outside Counsel for Appellant
South Carolina Department of Corrections

Pro Se Respondent:

Reyes Cabrera Pena, #265665
Perry Correctional Institution Q-1-A-207
430 Oaklawn Road
Pelzer, South Carolina 29669

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

JUL 18 2018

SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

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

Administrative Law Court Docket No. 16-ALJ-04-0397-AP

Reyes Cabrera Pena, #265665 Respondent,

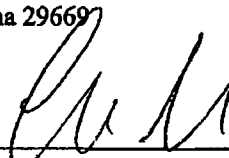
v.

South Carolina Department of Corrections Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Notice of Appeal on the above-named *pro se* Respondent by depositing a copy of it in the United States Mail, First Class Postage Pre-Paid, to the Respondent addressed as follows:

Reyes Cabrera Pena, #265665
Perry Correctional Institution Q-1-A-207
430 Oaklawn Road
Pelzer, South Carolina 29669



July 18, 2018

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Outside Counsel for Appellant
South Carolina Department of Corrections

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

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

Appellate Case No. 2018-001324

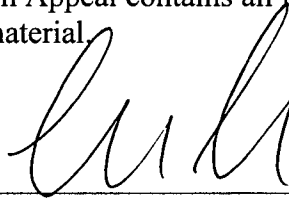
Reyes Cabrera Pena, #265665 Respondent,

v.

South Carolina Department of Corrections Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that, in conformity with the provisions of South Carolina Appellate Court Rule 210(g), the Record on Appeal contains all material proposed to be included by either of the parties and not any other material.



August 26, 2019

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Counsel for the Appellant

RECEIVED

AUG 29 2019