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.

APPELLANT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

The Appellant in the instant matter, Reyes Cabrera Pena ["Pena"], challenged various aspects of the pay remitted to him by the Appellant, the South Carolina Department of Corrections ["SCDC"], while he voluntarily participated in a federally certified prison industries project operated by SCDC within the confines of Perry Correctional Institution ["Perry"].

Pena litigated his challenges to the pay SCDC remitted to him for his labor under the provisions of SCDC's Inmate Grievance Policy System, designated as Policy Number GA-01.12 ["GA-01.12]. SCDC denied Pena's challenges, and he appealed SCDC's denial to the South Carolina Administrative Law Court ["ALC"].

On June 20, 2018, the ALC issued its "Final Order" concerning Pena's appeal (R. pp. 79 – 87). By its order, the ALC affirmed in part and reversed in part SCDC's final decision regarding Pena's challenges to his prison industries pay.

SCDC appeals the ALC's order, but, as reflected by its July 18, 2018 Notice of Appeal (R. pp. 88 – 90), it appeals *only* the following rulings issued by the ALC:

> 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." [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 [SCDC] 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, [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)].

[*Torrence v. S.C. Dep't of Corr.*, 646 S.E.2d 866, 870, n. 4 (S.C. 2007)].[1]

> 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 [SCDC] 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 [SCDC's] decision dealing with gross wages are **REVERSED and REMANDED.**[2] [SCDC] 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 SCDC'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."

[emphasis supplied by ALC]. (R. pp. 86 – 87).

Accordingly, SCDC respectfully presents the following issues on appeal:

I. Was the procedure by which the ALC fashioned its ruling reversing the SCDC's denial of Pena's $2.01 per labor hour back pay claim imbued with evidentiary error?

II. Did the ALC erroneously anchor its decision to reverse SCDC's denial of Pena's $2.01 back pay claim upon dicta from *Torrence*?

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[1] Pena participated in the same type of federally certified prison industries project as Thomas Torrence, who served as the lead plaintiff in *Torrence*. (R. p. 79). After our Supreme Court affirmed the circuit court's decision in *Torrence*, Torrence filed a grievance with SCDC under GA-01.12 in which he articulated a variety of claims associated with his prison industries pay, including a claim of back pay of $1.92 per hour for every hour of his labor. As discussed below, Pena asserted a back pay claim of $2.01 per hour for every hour of his labor. SCDC denied Torrence's claims, and he appealed SCDC's final decision to the ALC. The ALC issued two (2) orders by which it affirmed in part and reversed in part SCDC's denial of Torrence's claims. SCDC appealed to this Court the rulings from the ALC's two (2) orders by which the ALC reversed SCDC's denial of Torrence's claims, and SCDC's appeal remains pending. *See Thomas Torrence v. S.C. Dep't of Corr.*, Appellate Case No. 2016-000285. *See also* note 2 below.

[2] The ALC in *Torrence* affirmed SCDC's denial of Torrence's claim that the agency owed him $1.92 for every hour of labor he performed while he participated in the federally certified Prison Industries Enhancement Certification Program ["PIECP"] project it operated at Evans Correctional Institution, and Torrence did not appeal the ALC's ruling on this issue. *See* note 1 above.

III(A). Did the ALC err by ruling that SCDC must classify the "Workers' Compensation premium" as a component of the hourly gross wage it paid Pena for his prison industries labor?

III(B). Did the ALC err by ruling that SCDC must classify the "Social Security withholding payment" as a component of the hourly gross wage it paid Pena for his prison industries labor?

III(C). Did the ALC err by ruling that SCDC must classify the "SCDC/Prison Industries Administrative Cost" as a component of the hourly gross wage it paid Pena for his prison industries labor?

STATEMENT OF THE CASE

I. PENA'S GRIEVANCE

A. PENA'S STEP 1

Pena voluntarily participated in a federally certified Prison Industries Enhancement Certification Program ["PIECP"] project operated by SCDC at Perry in which Carolina Consoles participated as the private industry sponsor.[3]

SCDC received Pena's Step 1 grievance form June 3, 2007, and, in pertinent part, Pena asserted the following therein (R. p. 1):

> [SCDC] is in violation of the plain language of the statue which directs it to disburse the money paid [by] private sector program to [it] for inmate labor based on gross wages. [§ 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 [$2.01] for every single hour I worked for Carolina Consoles here at [Perry],[4] ... .

[3] SCDC operates three (3) types of projects within its prison industries program: "traditional" projects (*see* S.C. Code Ann. §§ 24-3-320 and 330), "service work" projects (*see* §§ 24-1-290 and 295; *see also* § 24-3-310(3)), and projects certified by the federal government under its PIECP. SCDC must operate its PIECP projects, such as the project at Perry in which Pena participated, in conformity with federal law (*see* 18 USC § 1761, the Ashurst-Sumners Act), federal regulations (*see* 64 FR 17000, *et seq.*), and state law (*see* §§ 24-3-40 and 24-3-310, *et seq.*).

[4] Throughout the grievances he filed with SCDC, as well as the briefs he filed with the ALC, Pena asserted that SCDC owed him $1.92 for every hour of labor he performed while he voluntarily participated in the federally certified PIECP project SCDC operated at Perry. SCDC mistakenly responded in kind. However, as the ALC recognized in its June 20, 2018 "Final Order" (R. p. 85) and as demonstrated below, the actual amount in controversy totaled $2.01 per labor hour rather than $1.92 per labor hour.

At the bottom of his Step 1 form, Pena acknowledged that the May 7, 2017 opinion issued by our Supreme Court was *Torrence*. (R. p. 1).

Pena then requested the following action: "SCDC [pay] me [$2.01] for every hour I worked in private sector company here at Perry ... and proper interest on all money owed to me by SCDC.[5]" (R. p. 1).

SCDC, by and through the appropriate official, denied the claim(s) Allen articulated in his Step 1. (R. p. 2).

B. PENA'S STEP 2

By his Step 2, Pena appealed SCDC's initial denial of the wage claims he articulated in his Step 1, including his $2.01 per hour back pay claim (R. p. 3):

> ... Therefore, SCDC will still be in violation of the plain language of the statutes which directs [it] to return the money owed to me which is **[$2.01] for every hour** I worked for the private sector [sponsor] ... [emphasis supplied].

By its final decision, SCDC, by the appropriate official, affirmed its denial of Pena's Step 1 and likewise denied his Step 2. (R. p. 3).

II. PENA'S NOTICE OF APPEAL TO THE ALC

Pena timely appealed SCDC's denial of his grievance by filing a Notice of Appeal with the ALC, in which, in relevant part, he offered verbatim the above-quoted passage from the Step 2 he filed with SCDC. (R. p. 4).

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[5] For clarity's sake, Pena's claim that he "worked for" or was otherwise employed by Carolina Consoles is negated by our Supreme Court's decision in *Williams, et al., v. S.C. Dep't of Corr. et al.*, 641 S.E.2d 885, 887 – 88 (S.C. 2007). Pena's claim is also negated by federal precedent. *See Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) ("People are not imprisoned for the purpose of enabling them to earn a living. ... **But prisoners are not employees.**"). [emphasis supplied]. Pena's claim is also negated by *S.C. Dep't of Corr. v. Cartrette*, 694 S.E.2d 18, 23 (S.C. Ct. App. 2010), in which this Court relied upon § 24-3-40(A) and *Williams*, 641 S.E.2d at 887, when it ruled that an inmate was not a private industry sponsor's employee. As an aside, the dissent in *Cartrette* quoted the above-provided passage from *Bennett*. 694 S.E.2d at 24.

III. PROCEEDINGS BEFORE THE ALC

Pena began proceedings before the ALC by filing his brief dated July 5, 2016, in which he identified his claim that "**SCDC withheld [$2.01] per hour for the entirety of [my] work with the project**" as an issue on appeal. [emphasis supplied]. (R. p. 7).

Pena then asserted as follows in his brief to the ALC (R. pp. 7 – 8):

> SCDC erred in denying [my] grievance for back wages owed to [me] for [my] work in the [project]. ... **SCDC was not entitled to collect [$2.01] per hour for [my] wages.**
>
> ...
>
> ... **SCDC should compensate [me] for the hourly deductions from [my] paycheck of [$2.01] an hour for every hour [I] worked,**[6] ...

[emphasis supplied].

After Pena filed his brief, SCDC submitted, on August 29, 2016, a filing to the ALC in which it moved the ALC to hold further proceedings in Pena's appeal in abeyance pending a final decision from our appellate courts in the matters styled as *Ackerman 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). (R. pp. 10 – 11).

By an order issued August 30, 2016, the ALC granted SCDC's motion to hold in abeyance further proceedings in Pena's appeal. (R. p. 12).

On June 15, 2017, after our Supreme Court denied certiorari in *Ackerman* and *Gatewood*, the ALC issued its "Order Lifting Abeyance" (R. p. 13), by which it permitted Pena to submit a supplemental brief and SCDC to thereafter file its brief.

In conformity with the ALC's June 15, 2017 order, Pena filed a supplemental brief with the ALC dated June 26, 2017 in which he again identified his claim that "**SCDC withheld**

[6] As comprehensively addressed in its instant brief, SCDC did not "collect," "withhold," "remove," "deduct," or "divert" $2.01 per hour, or any other amount, from Pena's gross hourly wage.

[$2.01] per hour from [my] wages for the entirety of [my] work with the Project" as an issue on appeal. [emphasis supplied]. (R. p. 2).

Pena later asserted as follows in his supplemental brief (R. pp. 2 – 3):

> 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. ... **SCDC was not entitled to collect $1.92 per hour from [my] wages** ...
>
> ...
>
> ... **SCDC also withheld [$2.01] per hour from [my] compensation for "overhead cost."** SCDC claims that South Carolina law "compels" [it] to collect an hourly overhead cost from [the] private industry sponsor. However, the court in *Torrence*, referring to the [$2.01] deduction by SCDC, noted that if the agency removes any money remitted by the private industry sponsor and then disburses the percentages listed in [§] 2-3-40 based on [the lower rate, SCDC] would be in violation of [the] plain language of the statute which directs it to disburse the money on the gross wages. [*Torrence*, 646 S.E.2d at 870, n. 4].[7] The only support SCDC provides with respect to its [$2.01 per hour] deduction is the thread bare 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] pay check.**

[emphasis supplied].

SCDC filed its brief with the ALC on August 15, 2016 (R. pp. 18 – 78), within which it squarely addressed Pena's claim regarding the $2.01 per labor hour "deduction" it purportedly assessed on his gross prison industries pay. (R. pp 26 – 32).

To facilitate its explanation, SCDC introduced a copy of its 2001 contract with Carolina Consoles, the private industry sponsor for the federally certified PIECP project it operated at Perry, as an exhibit in support of its brief. (R. pp. 35 – 46). SCDC and Carolina Consoles were

[7] As shown below, Pena did not fully quote the footnote in *Torrence* upon which he anchored his claim.

the only parties to the contract, and its expressly stated purpose was "to fulfill the intent of [S.C. Code Ann. 24-3-310].[8]"

Using data from the contract, SCDC explained in its brief that contrary to Pena's assertion, the $2.01 hour figure at issue did not represent its "overhead costs." Instead, the $2.01 per hour figure consisted of three (3) separate costs, *none of which were included* in the inmates' gross hourly wage (R. p. 40):

1) $0.46 designated as "Prorata Social Security Withholding Payment,"
2) $0.23 designated as "Prorata Workers' Compensation Premium," and
3) $1.32 designated as "SCDC/Prison Industries Administrative Cost."

The entirety of the operative section from the contract (i.e. Section 3.3) reflected these three (3) separate costs, as well as other information essential to the proper resolution of SCDC's instant appeal (R. pp. 40 – 41):

> 1. Inmate Pay: [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 |
> | + | |
> | SCDC/Prison Industries Administrative Cost | 1.32 |
> | Hourly Rate charged to [CAROLINA CONSOLES] | $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 is to be established annually by the S.C. Employment Security Commission**. Upon receipt of the annual wage rate, SCDC will notify [Carolina Consoles] 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, [Carolina Consoles] agrees to increase the "hourly rate" on a dollar for dollar basis, immediately upon the effective date of such

[8] 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.

> increase. Inmate comparable wages should be reviewed for compensation similar to the wage plan established by [Carolina Consoles]. Accordingly, **if wages are increased then FICA and workers' compensation rates should be adjusted**. A wage plan should be submitted to SCDC for [its] review.
>
> **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. ...
>
> ...

[emphasis supplied].

As SCDC ultimately demonstrated in its brief to the ALC, Pena's claim, in which he demanded back pay of $2.01 per hour for every hour of labor he performed while voluntarily participating in the federally certified PIECP project SCDC operated at Perry, failed under the purportedly applicable footnote from *Torrence* upon which he relied.

Pena's claim was inherently defective, because, as stated above,[9] he did not fully quote the footnote from *Torrence*. In entirety, the operative language from the footnote in *Torrence*, 646 S.E.2d at 870, n. 4, provided as follows:

> ..., *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 failed to "prove true," as required by the above-quoted footnote from *Torrence*, his allegation that SCDC withheld, collected, deducted, or removed any of the three (3) costs that comprised the $2.01 per hour figure, from his gross wages. Pena failed to "prove true" his allegation, because, under the structure of the hourly rate at which SCDC invoiced the private

[9] See note 7 above.

industry sponsor for inmate labor costs reflected by their contract, Pena's gross hourly pay *never included* the $2.01 per hour figure.

IV. THE ALC'S JUNE 20, 2018 "FINAL ORDER"

In its June 20, 2018 order, the ALC characterized the parties' respective positions as follows (R. p. 85):

> In his Step 1 and Step 2 Grievances, [Pena] claims that **[SCDC] wrongfully withheld wages from him** in violation of [§ 24-3-40(A)], and that he is owed [$2.01] "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 ... that was **improperly deducted from his wages** during his work in the Project.
>
> **[SCDC] argues that the items charged to the private company *in addition* to [Pena's] gross hourly wages** [were] 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.

[bold and italicized emphasis supplied].

The ALC then rather superficially discussed the federal laws applicable to the federally certified PIECP project SCDC operated at Perry in which Pena participated, and, in doing so, the ALC acknowledged that "the federal law ***allows*** inmates to have benefits **such as Workers' Compensation** but specifically disqualifies them from receiving unemployment compensation while incarcerated.[10]" [bold and italicized emphasis supplied]. (R. p. 85).

After quoting the deductions from the inmates' gross wages mandated by §§ 24-3-40(A)(1) – (A)(6), the ALC erroneously ruled as follows (R. pp 8 – 9):[11]

> The agreement between SCDC and [Carolina Consoles] 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

[10] *See* note 3 above.

[11] *See* pp. 1 – 2 above.

> 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 [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)].
>
> [*Torrence,* 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 [SCDC] to calculate the statutory deductions from the gross hourly sum of $8.01, if it cannot show that it has already done so.

[bold and italicized emphasis supplied].

STANDARD OF REVIEW

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

The ALC considered this matter pursuant to our Supreme Court's decisions in *Al-Shabazz*, as well as *Adkins 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 (2004). Thus, the provisions of § 1-23-610, specifically § 1-23-610(B), establish the standard of review applicable to this Court's consideration of SCDC'S appeal of the ALC's orders.

In its entirety, § 1-23-610(B) reads as follows:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. **The court of appeals** may affirm the decision **or remand the case for further proceedings; or it may reverse or modify the decision if substantial rights of the petitioner have been prejudiced** because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

[emphasis supplied].

Pursuant to § 1-23-610(B), this Court "may reverse or modify the [ALC's] decision only if [SCDC proves its] substantive rights [have] been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law." *Mitchell,* 659 S.E.2d at 236 (reversing the ALC's order because the "order [was] devoid of any finding of evidence adduced by [the Appellant] warranting the ALC's reversal of [SCDC].").

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

SCDC bears the burden of proving convincingly that the ALC's decision to reverse SCDC's final decision is unsupported by substantial evidence. *Mitchell*, 659 S.E.2d at 235.

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

SCDC also has the burden of proving the ALC's decision is arbitrary and otherwise characterized by an abuse of discretion. *Mitchell*, 659 S.E.2d at 234. A decision is arbitrary if no rational basis for the conclusion exists, or when it is based on one's will and not upon any course of reasoning and exercise of judgment. A decision may also be arbitrary if it is made at pleasure without adequate determining principles or is governed by no fixed rules or standards. *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 564 S.E.2d 341, 345 (S.C. Ct. App. 2002). An "abuse of discretion occurs when the judge's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the judge is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case." *Ex parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464, 467 (S.C. 2006).

ARGUMENT

I. THE PROCEDURE BY WHICH THE ALC FASHIONED ITS RULING REVERSING SCDC'S DENIAL OF PENA'S $2.01 PER LABOR HOUR BACK PAY CLAIM WAS IMBUED WITH EVIDENTIARY ERROR

A. THE ALC CONTRADICTORILY DECLARED THAT THE CONTRACT BETWEEN SCDC AND THE PRIVATE INDUSTRY SPONSOR WAS NOT PROPERLY INCLUDED IN THE RECORD WHILE IT RELIED UPON THE SAME CONTRACT TO CRAFT ITS RULING

In crafting its June 20, 2018 "Final Order," the ALC relied upon materials SCDC submitted as exhibits in support of the brief it filed August 7, 2017.

Specifically, the ALC included in its "Final Order" the provisions from Section 3.3 of SCDC's 2001 contract with Carolina Consoles (R. p. 80), the private industry sponsor for the federally certified PIECP project it operated at Perry, which SCDC introduced as an exhibit in support of its brief. (R. pp. 40 – 41).[12]

In so doing, however, the ALC, in a footnote, observed as follows regarding the 2001 contract between SCDC and Carolina Consoles (R. pp. 80 – 81):

> This information was neither included in the Record on Appeal nor provided to [Pena] prior to service of [SCDC's] brief. Furthermore, Appendix C referenced in the pay schedule (which presumably provides a basis for the prevailing wage) was not included in the Record on Appeal, nor in [SCDC's] brief.

Thus, despite declaring in the above-quoted footnote from its "Final Order" that the contract between SCDC and the project's private industry sponsor, which SCDC introduced as an exhibit supporting its brief, was "not in the Record on Appeal," the ALC relied upon the contract to craft its decision reversing SCDC's denial of Pena's claim, and, again, the ALC embedded the operative line items and data from the contract directly in its "Final Order. [13]"

The ALC even formulated the sole issue it identified on appeal exclusively from the operative line items from the contract (R. p. 3):

> **Whether Social Security withholding payments, SCDC/Prison Industries Administrative Costs, and Workers' Compensation premiums**, collectively, were required to be included in [Pena's] gross wages for purposes of the calculations mandated in [§ 24-3-40(A)]. [emphasis supplied].

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[12] SCDC provided the identical provisions from Section 3.3 of its 2001 contract with Carolina Consoles in its instant brief. *See* Section III, p. 7 above.

[13] *See* note 12 and Section III, p. 7 above.

Later in its "Final Order," after accounting for the deductions mandated by § 24-3-40(A), the ALC again explicitly referenced the contract, which it declared was "not in the Record on Appeal," by observing as follows (R. p. 86):

> **The agreement between SCDC and [Carolina Consoles]** establishes an hourly rate that includes a wage, **Social Security withholding, a Workers' Compensation premium, and a ["SCDC/Prison Industries Administrative Cost."]** [Pena] contends that all of these items are part of his hourly gross wage should be part of the back pay owed. [emphasis supplied].

The ALC continued as follows (R. pp. 86 – 87):

> 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 [SCDC] 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, [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)].
>
> [*Torrence*, 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 [SCDC] to calculate the statutory deductions from the gross hourly sum of $8.01, if it cannot show that it has already done so.

[emphasis supplied].

In Section I(B) immediately below, SCDC addresses the ALC's stark error in completely overlooking two (2) realities associated with its reliance on the footnote from *Torrence*: (1) our Supreme Court placed a burden upon Ward, Torrence, and their fellow inmates, including Pena, to "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"

and (2) Pena, as the appealing party, introduced no evidence in or with his Step 1 grievance, Step 2 appeal, or any of the briefs he filed with the ALC to satisfy this burden.

Turning back to the contract between SCDC and the private industry sponsor, the ALC, on the one hand, declared that the contract, including the operative section setting forth the components of the total hourly rate at which SCDC charged the private industry sponsor for inmate labor, was not part of the record. On the other hand, the ALC clearly and repeatedly considered the operative section from the contract in its analysis.

By engaging in such glaringly contradictory and flawed procedure, SCDC respectfully asserts that the ALC erred under § 1-23-610(B)(c) and (d) when it reversed SCDC's denial of Pena's claim. Moreover, SCDC respectfully asserts that under § 1-23-610(B)(e), the ALC's reversal of SCDC's denial of Pena's claim was "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record," or, more accurately, the lack of any such evidence introduced by Pena on the whole record.

B. PENA DID NOT MEET THE BURDEN MANDATED BY OUR SUPREME COURT'S FOOTNOTE IN *Torrence*

Pena, as the party who appealed SCDC's denial of his $2.01 per labor hour back pay claim to the ALC, shouldered the burden of proof and persuasion. More precisely, Pena, as the appealing party, "had the burden of providing a sufficient record." *See Helms Reality, Inc. v. Gibson-Wall Co.*, 611 S.E.2d 485, 487 – 488 (S.C. 2005).

However, Pena did not submit any of his "paychecks" or any of his pay records as exhibits to the Step 1 grievance or Step 2 appeal he filed with SCDC so that such material would appear in the record. Likewise, Pena moved neither SCDC nor the ALC to amend the record to include such material, and, unlike SCDC, Pena did not include any such material as exhibits supporting either his brief or his supplemental brief.

Towards the end of its "Final Order," the ALC implicitly conceded in its "Final Order" that no evidence existed in the record to support Pena's allegation (R. p. 87):

> **From the record provided**, this Court can only direct [SCDC] to calculate the statutory deductions from the gross hourly sum of $8.01, if it cannot show that it has already done so. [emphasis supplied].

Accordingly, SCDC respectfully asserts that the ALC should have determined that under *Helms Realty, Inc.*, Pena did not satisfy his "burden of providing a sufficient record," and consequentially, the record was devoid of any evidence supporting Pena's assertions that SCDC "withheld," "collected," "deducted," or "removed" $2.01 per labor hour, or any of the three (3) costs which comprised this figure, from the gross hourly pay SCDC remitted to him.

Under the operative footnote from *Torrence*, Pena also possessed the burden of "proving true" his allegation that SCDC "withheld," "collected," "deducted," "removed," or "diverted" $2.01 per labor hour, or any of the three (3) costs which comprised this figure, from the gross hourly pay SCDC remitted to him and then disbursed the percentages listed in § 24-3-40 "based on the lower rate."

Given that he failed to satisfy his burden as the appealing party under *Helms Realty, Inc.*, SCDC respectfully asserts that Pena likewise failed to satisfy his burden from the footnote in *Torrence* upon which he relied in offering his $2.01 per labor hour back pay claim.

SCDC, therefore, respectfully asserts that the ALC erred, under §1-23-610(B)(f), by arbitrarily and capriciously reversing SCDC's denial of Pena's $2.01 per labor hour back pay claim when no evidence existed in the record supporting Pena's allegation that SCDC "withheld," "collected," "deducted," "removed," or "diverted" $2.01 per labor hour, or any of the three (3) costs which comprised this figure, from the gross hourly pay SCDC remitted to him as required under the operative footnote from *Torrence*. *See also Mitchell,* 659 S.E.2d at 236.

(reversing the ALC's order because the "order [was] devoid of any finding of evidence adduced by [the Appellant] warranting the ALC's reversal of [SCDC].").

C. THE ALC ERRED BY NOT REMANDING PENA'S $2.01 PER HOUR PAY CLAIM BACK TO SCDC

The ALC had another option at its disposal, which it declined to exercise. As shown above,[14] the ALC remanded the determination of the gross hourly wage it should have paid to Pena for his prison industries labor back to SCDC for further proceedings under GA-01.12 (R. p. 87):

> 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 [SCDC's] decision dealing with gross wages are **REVERSED and REMANDED**. [SCDC] 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)]. [emphasis supplied].

SCDC alternatively asserts that the ALC erred by not remanding for further proceedings under GA-01.12 the issue(s) of whether SCDC "withheld," "collected," "deducted," "removed," or "diverted" $2.01 per labor hour, or any of the three (3) costs which comprised this figure, from the gross hourly pay it remitted to Pena as contemplated under the operative footnote from *Torrence*.

Had it done so, the ALC would have allowed both parties the opportunity to submit evidence into the record, including Pena's prison industries pay records, to resolve the issue of whether SCDC withheld, collected, deducted, removed, or diverted $2.01 per hour, or any of the three (3) costs that comprised the $2.01 per hour figure, from Pena's gross hourly wages.

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[14] *See* "Statement of Issues on Appeal," p. 2 above.

Under § 1-23-610(B), this Court may do what the ALC erroneously failed to so, namely remand this issue back to SCDC for further proceedings under GA-01.12 so that the parties may introduce such materials into the record.

SCDC respectfully asserts that no prejudice would befall either party if this Court did so, since the ALC itself remanded a closely related issue (i.e. the determination of the gross hourly wage SCDC should have paid Pena for his labor) back to the agency.

II. THE ALC ERRONEOUSLY ANCHORED ITS DECISION TO REVERSE SCDC'S DENIAL OF PENA'S $2.01 PER HOUR BACK PAY CLAIM UPON DICTA FROM *Torrence*

As illustrated above, Pena exclusively relied upon a single footnote from *Torrence*, 646 S.E.2d at 870, n. 4, in his Step 1 grievance, his Step 2 appeal, and all the briefs he submitted to the ALC to support his $2.01 per labor hour back pay claim.

As it made clear in its June 20, 2018 "Final Order," the ALC exclusively relied upon the same footnote from *Torrence* in reversing SCDC's denial of Pena's $2.01 per labor hour back pay claim. However, neither Pena nor, more importantly, the ALC, ever recognized, let alone resolved, the challenge presented by the following reality: the operative footnote from *Torrence* constituted only dicta.

The following standard from this Court's decision in *State v. Addison*, 525 S.E.2d 901, 904 (S.C. Ct. App. 1999), applies to the operative footnote from *Torrence* relied upon by both Pena and the ALC:

> Second, **the sentence Addison extracts from** [*State v. Wiggins*, 500 S.E.2d 489, 492 – 493 (S.C. 1998)] **in support of his argument is dicta and is neither binding nor illuminating on the issue at bar**. *See* [*Drummond v. Beasley,* 503 S.E.2d 455 (S.C. 1998)] (characterizing as dicta certain language in a case concerning a subject not within the question before the court); [*Hampton v. Richland County Council,* 370 S.E.2d 714, 714 (S.C. 1988)] (concluding discussion of a legal principle in an opinion was dicta where it was "clearly unnecessary to a resolution of

> the issue before the court"); [*Welborn v. Dixon,* 49 S.E. 232 (S.C. 1904)] **(dicta is not binding as precedent)**; [*Dennis v. South Carolina Nat'l Bank,* 382 S.E.2d 237, 240 (S.C. Ct. App. 1988)] (construing language in a case as dicta because it was "an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof"). [emphasis supplied].

The sole issue before our Supreme Court in *Torrence* was whether the circuit court had properly granted SCDC's summary judgment motion and, by doing so, dismissed the declaratory judgment motion filed by Ward, Torrence, and their fellow inmates.

Our Supreme Court, relying on its prior decisions in *Adkins, Wicker*, and *Williams v. S.C. Dep't of Corr.*, 641 S.E.2d 885 (2007), ruled that Ward, Torrence, and their cohorts did not have a private right of action available to them under our state's various prison industries statutes.

The operative footnote from *Torrence* appeared like a proverbial bolt of lightning from an otherwise tranquil sky, and, under *Addison,* it was "neither binding nor illuminating on the issue at bar" in *Torrence*.[15]

SCDC, therefore, respectfully asserts that the ALC erred, under §1-23-610(B)(d), by explicitly and exclusively relying upon dicta, namely the operative footnote from *Torrence*, in reversing SCDC's denial of Pena's $2.01 per hour back pay claim.

III. THE ALC ERRONEOUSLY RULED THAT THE $2.01 PER LABOR HOUR FIGURE SCDC SEPARATELY CHARGED THE PRIVATE INDUSTRY SPONSOR SHOULD BE INCLUDED IN PENA'S GROSS HOURLY PAY

A. FEDERAL AND STATE LAW OBLIGATED SCDC TO CHARGE THE PRIVATE INDUSTRY SPONSOR FOR THE INMATES' "PRORATA WORKERS' COMPENSATION PREMIUM"

In its "Final Order," the ALC recognized that SCDC attributed $0.23 of the $2.01 per hour figure Pena claimed SCDC owed him for every hour of labor he performed while he

[15] Notwithstanding this Court's ruling in *Addison*, SCDC is mindful of its later ruling in *Sherlock Holmes Pub, Inc., v. City of Columbia*, 697 S.E.2d 619, 621 (S.C. Ct. App. 2010): "But those who disregard dictum, either in law or in life, do so at their peril." (quoting *Yaeger v. Murphy*, 354 S.E.2d 393, 396, n. 2 (S.C. Ct. App. 1987)).

voluntarily participated in the federally certified PIECP project SCDC operated at Perry to a "Prorata Workers' Compensation Premium." (R. p. 80).

The ALC acknowledged that "federal law **allows** inmates to have benefits **such as Workers' Compensation** but specifically disqualifies them from receiving unemployment compensation while incarcerated." [emphasis supplied]. (R. p. 85). The ALC's above-quoted acknowledgment, however, was erroneous.

18 U.S.C. § 1761, the Ashurst-Sumners Act,[16] serves as the guiding light for all federally certified PIECP projects operated not only in our state but nationwide.

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." Section 1761(C)(3) explicitly mentions "workmen's compensation" as one of the benefits it contemplates, and, obviously, Pena's participation in our state's Workers' Compensation system qualifies as such a benefit.[17]

Contrary to the ALC's interpretation, federal law is *not permissive* on this subject. Sections 1761(c)(1) and (3), when read together, *mandate* that inmates participating in such prison industries projects certified by the BJA under its PIECP *not be* "deprived of the right to participate" in such benefits, including Workers' Compensation in our state.

Not only did it misinterpret the applicable federal law, the ALC omitted any reference to our state's code of laws, and, specifically, S.C. Code Ann. § 42-1-480. Section 42-1-480 articulates the workers' compensation provisions applicable to inmates in our state.

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[16] *See* note 3 above.

[17] *See also* BJA Program Brief, https://www.ncjrs.gov/html/bja/piecp/bja-prison-industr.html.

Thus, as a matter of both federal and state law, SCDC was obligated to cover Workers' Compensation premiums for inmates, including Pena, who participated in the federally certified PIECP project it operated at Perry.

Accordingly, SCDC respectfully asserts that this Court should at least reverse, under § 1-23-610(B)(d), the ALC's erroneous declaration that the $0.23 per hour "Prorata Workers' Compensation Premium," which SCDC charged the private industry sponsor separately from Pena's hourly rate of pay, should be included in any calculation of Pena's gross hourly wages.

B. FEDERAL LAW OBLIGATED SCDC TO CHARGE THE PRIVATE INDUSTRY SPONSOR FOR THE INMATES' "PRORATA SOCIAL SECURITY WITHHOLDING PAYMENT"

In its "Final Order," the ALC also recognized that SCDC attributed $0.46 of the $2.01 per hour figure Pena claimed SCDC owed him for every hour of labor he performed while he voluntarily participated in the federally certified PIECP project SCDC operated at Perry to a "Prorata Social Security Withholding Payment." (R. p. 80).

SCDC respectfully asserts that this Court should at least reverse the ALC's erroneous declaration that the $0.46 per hour "Prorata Social Security Withholding Payment" should be included in any calculation of Pena's gross hourly wages on remand.

As stated in Section III(A) above, 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.[18]

By charging Carolina Consoles the rate of $0.46 per hour for "Prorata Social Security Withholding Payment," SCDC complied with the operative federal requirement. Thus, as a

[18] *See also* note 17 above.

matter of law, SCDC was obligated to cover Social Security payments for inmates, including Pena, who participated in the federally certified PIECP project it operated at Perry.

Accordingly, SCDC respectfully asserts that this Court should at least reverse, again under § 1-23-610(B)(d), the ALC's erroneous declaration that the $0.46 per hour for "Prorata Social Security Withholding Payment," which SCDC charged the private industry sponsor separately from Pena's hourly rate of pay, should be included in any calculation of Pena's gross hourly wages.

C. STATE LAWS PROHIBITING SCDC FROM OPERATING AT A DEFICIENCY OBLIGATED IT TO CHARGE THE PRIVATE INDUSTRY SPONSOR THE "SCDC/PRISON INDUSTRIES ADMINISTRATIVE COST"

In its "Final Order," the ALC further recognized that SCDC attributed $1.32 of the $2.01 per hour figure Pena claimed SCDC owed him for every hour of labor he performed while he voluntarily participated in the federally certified PIECP project to the "SCDC/Prison Industries Administrative Cost." (R. p. 80).

SCDC respectfully asserts, however, that the ALC erred when it concluded that the $1.32 per labor hour cost SCDC charged Carolina Consoles should have been included Pena's gross hourly pay rate.

In its brief to the ALC (R. p. 31), SCDC discussed the provisions of our code of laws applicable to its operations, including its federally certified PIECP projects:

> 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."
>
> S.C. Code Ann. § 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,[19]" 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."

S.C. Code Ann. § 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].

SCDC then argued as follows in its brief to the ALC regarding the $1.32 per labor hour "SCDC/Prison Industries Administrative Cost" (R. pp. 14 – 15):

> **Without charging Carolina Consoles $2.01 per hour *in addition* to the inmates' lawful gross wage of $6.00 per hour**, SCDC would not have complied with § 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.[20]
>
> If it recalculated the wage structure in the manner urged by Pena, then 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

[19] *See* note 8 above.

[20] 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.

> 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."

[bold and italicized emphasis supplied].

SCDC respectfully asserts that the ALC didn't rule upon, let alone address, the above-quoted argument SCDC offered in its brief. Succinctly, but respectfully stated, the ALC's unwillingness to analyze, consider, or even substantively address the reality that SCDC cannot create a deficiency by its operation of its prison industries program was, under § 1-23-610(B)(f), arbitrary and capricious.

The "SCDC/Prison Industries Administrative Cost," unlike the Workers' Compensation premium and Social Security withholding, discussed in Sections III(A) and (B) above, is not explicitly addressed in federal or state law.

However, the contract considered by the circuit court in *Adkins*,[21] just like the contract at issue here, reflected that SCDC separately charged the private industry sponsor $1.32 per inmate labor hour, *in addition* to the inmates' gross hourly wage.

The plaintiffs in *Adkins* consisted of current and former inmates who participated in a federally certified PIECP project operated by SCDC at Tyger River Correctional Institution. The project operated by SCDC at Perry in which Pena participated was, like the project at issue in *Adkins*, a federally certified PIECP project.

In the October 30, 2002 order it issued in SCDC's favor, which SCDC introduced as an exhibit in support of its brief to the ALC (R. pp. 47 – 78), the circuit court in *Adkins* addressed the $1.32 per hour charge as follow (R. p. 62):

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[21] The litigation history of *Adkins* before the circuit court is available on-line via the Richland County Public Index. *See* http://www5.rcgov.us/SCJDWEB/PublicIndex/PISearch.aspx. *See Adkins v. S.C. Dep't of Corr.*, C/A No. 2000-CP-40-4761.

> 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].

The circuit court's decision in *Adkins*, which our Supreme Court noted in approval when it affirmed the circuit court's decision in result,[22] is not binding precedent. However, the circuit court's decision in *Adkins* represents an instance when a circuit judge, having conducted a days-long bench trial, examined the applicable federal law, federal regulations, and state law associated with a prison industries project operated by SCDC for which it had secured, like the project in which Pena participated, federal certification under BJA's PIECP.

The circuit judge in *Adkins* also considered the voluminous documentary evidence and expansive testimonial evidence introduced during the trial over which he presided. While not binding precedent, the circuit court's decision in *Adkins* is certainly enlightening, and SCDC respectfully submits that it should be afforded at least some weight.

Just as he didn't introduce any evidence to the record demonstrating that SCDC "withheld," "collected," "deducted," "removed," or "diverted" $2.01 per labor hour, or any of the three (3) costs which comprised this figure, from the gross hourly pay SCDC remitted to him, Pena, as the appealing party, didn't introduce any evidence into the record demonstrating that the $1.32 per hour charge designated as "SCDC/Prison Industries Administrative Cost" violated any applicable state or federal law.

Accordingly, SCDC respectfully asserts that this Court should at least reverse, once again under § 1-23-610(B)(d), the ALC's erroneous declaration that the $1.32 per hour "SCDC/Prison

[22] *See Adkins*, 602 S.E.2d at 55, n. 6. The plaintiffs in *Adkins* appealed the circuit court's decision to this Court, but our Supreme Court later accepted the case on direct review. By its decision, our Supreme Court affirmed in result the circuit court's decision in SCDC's favor, specifically by ruling that the plaintiffs did not possess a private right of action under the applicable prison industries statutes by which to sue SCDC.

Industries Administrative Cost," which SCDC invoiced the private industry sponsor separately from Pena's hourly rate of pay, should be included in any calculation of Pena's gross hourly wages.

CONCLUSION

For all the above-provided reasons, SCDC respectfully asserts that the ALC, in its June 20, 2018 "Final Order," made findings that were clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, employed reasoning detrimentally affected by errors of law, and rendered arbitrary and capricious conclusions.

Therefore, SCDC respectfully urges this Court, under the various provisions of §§ 1-23-610(B), to reverse the ALC's ruling which itself reversed SCDC's denial of Pena's demand for back pay consisting of $2.01 per hour for every hour of labor he provided to the federally certified PIECP project SCDC operated at Perry.

Alternatively, SCDC respectfully urges this Court, under the same authority, to remand this matter back to SCDC for further proceedings under the provisions of GA-01.12 and, specifically, allow the parties the opportunity to submit evidence into the record, including Pena's prison industries pay records, to resolve the issue of whether SCDC withheld, collected, deducted, removed, or diverted $2.01 per hour, or any of the three (3) costs that comprised the $2.01 per hour figure, from Pena's gross hourly wages.

RESPECTFULLY SUBMITTED,

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

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