RECEIVED

NOV 14 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2019-001490

Thomas J. Torrence, ... Respondent,

v.

South Carolina Department of Corrections ..... Petitioner.

REPLY BY THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS TO TORRENCE'S RETURN TO ITS PETITION FOR WRIT OF CERTIORARI

Lake E. Summers
Malone, Thompson, Summers & Ott LLC
339 Heyward Street, Suite 200
Columbia, South Carolina 29201
Office: (803) 254-3300
Fax: (803) 254-0309
E-mail: summers@mtsolawfirm.com

Counsel for SCDC

TABLE OF CONTENTS

In accordance with South Carolina Appellant Court Rule ["SCACR"] 242(g), the South Carolina Department of Corrections ["SCDC"] respectfully submits its instant reply to the return filed by Thomas Torrence ["Torrence"] to its petition for this Court to issue a writ of certiorari by which to review Court of Appeals' decision in the instant matter, styled as *Thomas J. Torrence, Respondent, v. S.C. Dep't of Corr., Appellant*, Opinion No. 2018-UP-432, -- S.E.2d --, 2018 WL 6199185 (S.C. Ct. App. Nov. 28, 2018). (Apx. pp. 1231 – 32).

For clarity's sake, Torrence's return was dated November 1, 2019, but the proof of service associated with his return reflects that he served it upon SCDC's undersigned counsel via United States Mail on November 4, 2019. SCDC's undersigned counsel received Torrence's return on November 7, 2019.

I. CONTRARY TO THE ARGUMENT HE ARTICULATED IN HIS RETURN, THE ALC CLEARLY AND ERRONEOUSLY RULED THAT TORRENCE WORKED FOR ESCOD WHILE HE PARTICIPATED IN THE PRISON INDUSTRIES PROJECT SCDC OPERATED AT EVANS CORRECTIONAL INSTITUTION, AND THE COURT OF APPEALS ERRED BY DISMISSING SCDC'S APPEAL OF THE ALC'S RULING ON THIS QUESTION

In its petition,[1] SCDC offered the following as its first question presented for review:

> DID THE COURT OF APPEALS ERR BY DISMISSING AS INTERLOCUTORY SCDC'S APPEAL OF THE ALC'S RULING THAT TORRENCE WORKED FOR ESCOD WHILE HE PARTICIPATED IN THE PRISON INDUSTRIES PROJECT SCDC OPERATED AT EVANS CORRECTIONAL INSTITUTION?

SCDC demonstrated in its petition that the ALC clearly ruled that Torrence "worked as a harness assembler *for ESCOD*" (Apx. p. 1046), that the ALC's ruling on this question was not interlocutory, and that the Court of Appeals erred by dismissing as interlocutory SCDC's appeal of the ALC's ruling.[2]

---

[1] *See* SCDC's Petition, p. 2.

[2] *Id.*, pp. 6 – 11.

In his return, Torrence asserted that "the ALC did not rule that [he] was an employee of any specific entity," and his entire argument consisted of the following:[3]

> The ALC was crystal clear in its factual and legal analysis and position regarding Torrence ***NOT*** being an employee of either the State or the private sector sponsor in its January 20, 2016 order (Apx. p. 1042). The ALC declined to address arguments concerning Torrence's status since they were not necessary for nor bore directly upon the disposition of the case.
>
> Torrence's struggle with a label to define his labor in the participation of the private sector prison industries was just that; not a challenge to well-established precedent of this and other State and Federal Courts. [Torrence] submits SCDC's raising this issue is a skilled attempt to divert attention toward an area of law well settled and allow another bite at the apple where SCDC raises an issue not appearing numerated in either brief before the Court of Appeals, but which was available at any time in the appeal or petition for rehearing.

[emphasis supplied by Torrence].

Contrary to the first sentence in the second of the two above-quoted paragraphs from his return, Torrence didn't "struggle with a label to define" the labor he provided to the federally certified Prison Industries Enhancement Certification Program ["PIECP" or "PIE"] project SCDC operated at Evans in which ESCOD participated as the private industry sponsor.

Instead, Torrence unequivocally asserted in his Step 1 grievance form that he "was employed by [ESCOD], in the SCDC Private Sector Prison Industries Program at [Evans] from June 1997 through [November 2004]." (Apx. p. 16). Torrence uttered the same assertions in paragraphs #4 and #5 of the "addendum" he submitted with his Step 1. (Apx. p. 17). Thus, from the inception of the instant controversy, Torrence claimed that he was employed by or otherwise worked for ESCOD, the private industry sponsor.

Contrary to the second sentence in the same above-quoted paragraph from his return, SCDC preserved for review in its January 3, 2017 brief to the Court of Appeals the ALC's

[3] *See* Torrence's Return, p. 3.

explicit and erroneous ruling that Torrence "worked as a harness assembler *for ESCOD.*" (Apx. pp. 1093, n. 2; 1105, n. 21; and 1138). Moreover, SCDC clearly identified the ALC's erroneous ruling that Torrence "worked as a harness assembler *for ESCOD*" as an issue in its January 10, 2019 petition for rehearing to the Court of Appeals. (Apx. pp. 1235, 1239, and 1242 – 45).

In the first of the two (2) above-quoted paragraphs from his return, Torrence claimed "[t]he ALC declined to address arguments concerning [his] status since they were not necessary for nor bore directly upon the disposition of the case." By so claiming, Torrence relied upon the following footnote from the ALC's January 20, 2016 order (Apx. p. 1042, n. 3):

> The parties also argue vociferously about whether it is proper to use the terms "employee" or "hire" with respect to [Torrence's] labor and his relationship with the PIECP. **The Court declines to address in detail the parties' arguments concerning [Torrence's] status as an "employee," since they are not necessary for the disposition of this case.** It is true that [Torrence] is not classified as an "employee" of the State. [§ 24-3-430(F)]. [Torrence] is not an "employee" of either the state or the private industry sponsor for purposes of the Payment of Wages Act. [*Williams v. S. C. Dep't. of Corr.*, 641 S.E.2d 885 (2007)]. Nor is [Torrence] an "employee" for purposes of unemployment benefits. [§ 24-3-430(G)]. Yet, it is also true that for some other purposes [Torrence] has the same rights and responsibilities afforded to employees. [Torrence] is required to pay state and federal income taxes and Social Security taxes. [§ 24-3-40(A)(6)]. [Torrence] is entitled to worker's compensation benefits for on-the-job injuries. [18 U.S.C. § 1 76l(e)(3)]. **None of these rights and duties (or lack thereof) directly bear on the disposition of this case.** [emphasis supplied].

The above-quoted footnote refutes the notion advanced by Torrence in his return that the ALC was "crystal clear" in its January 20, 2016 order that he was "***NOT*** ... an employee of either the STATE or the private sector sponsor." The ALC made no such ruling or declaration in the above-quoted footnote or, for that matter, anywhere else in its January 20, 2016 order.

Instead, the ALC's ruling that Torrence "*worked as a harness assembler for ESCOD*" constituted plain error, as it ran afoul of the federal guidelines applicable to PIECP projects, federal precedent, and precedent from our Court of Appeals.

SCDC again respectfully asserts that contrary to the Court of Appeals' November 28, 2018 decision, the ALC's ruling on this question was not interlocutory. SCDC again respectfully submits that the ALC's ruling on this question represents a novel question of law as contemplated under SCACR 242(b)(1), and it again respectfully urges this Court to grant the instant petition in order to fully consider the same.

II. CONTRARY TO THE ARGUMENT HE ARTICULATED IN HIS RETURN, THE ALC IMPROPERLY DEFINED AND DETERMINED THE "PREVAILING WAGE" SCDC SHOULD HAVE PAID TORRENCE FOR HIS LABOR, AND THE COURT OF APPEALS ERRED BY DISMISSING SCDC'S APPEAL OF THE ALC'S RULING ON THIS QUESTION

In its petition,[4] SCDC offered the following as its second question presented for review:

> DID THE COURT OF APPEALS ERR BY DISMISSING AS INTERLOCUTORY SCDC'S APPEAL OF THE ALC'S RULINGS DEFINING AND THEN DETERMINING THE "PREVAILING WAGE" SCDC SHOULD HAVE PAID TORRENCE FOR HIS PRISON INDUSTRIES LABOR?

SCDC demonstrated in its petition that the ALC erroneously defined and then determined the "prevailing wage" applicable to Torrence's labor, that the ALC's ruling on this question was not interlocutory, and that the Court of Appeals erred by dismissing as interlocutory SCDC's appeal of the ALC's ruling.[5]

In his return, Torrence asserted that "the ALC properly defined and determined the 'prevailing wage' to be paid for [his] labor," and his entire argument consisted of the following:[6]

> [Torrence] continues to assert, as before the Court of Appeals in his [final brief] [Apx. p. 1152, n. 2], that S.C. Code §24-3-315, without using the specific [nomenclature] "prevailing wage," states in part, "... and that the rates of pay and other conditions of employment are not less than those paid and provided for work of a similar nature in the locality in which the

[4] *See* SCDC's Petition, p. 2.

[5] *Id.*, pp. 11 – 20.

[6] *See* Torrence's Return, pp. 3 – 4.

> work is performed.[7]" That statute was supported by §24-3-430(D), "No inmate participating in the program may earn less than the prevailing wage for work of a similar nature in the private sector[.]" Both South Carolina statutes contemplate 18 USC § 1761(c)(2) and 64 FR 17010 as defining the substance of the phrase and process for obtaining the "prevailing wage."
>
> In *S.C. Dept of Corr. v. Cartrette,* 694 S.E.2d 18 (S.C. Ct. App. 2010)[,] the Court of Appeals remanded the matter back to the ALC with seven (7) questions to determine the prevailing wage. The record here amply supports the proper method of determination by the appropriate agency and [SCDC] intentional payment of less than the prevailing wage for [Torrence's] labor despite the annual wage verification demonstrating [SCDC] was in violation of state and federal law. Therefore, the ALC in this matter was following precedent to order [SCDC] in the method and manner of determining the prevailing wage by the Employment Security Commission (ESC)/Department of Employment Workforce (DEW) Code for the years in question and amount of labor performed.

In echoing the second footnote from his brief to the Court of Appeals, Torrence omitted any reference its final sentence, in which he admitted to asking the ALC to define and then determine the "prevailing wage" SCDC should have paid him for his prison industries labor "for the sake of brevity and judicial economy where the record is replete with the information to perform such a task, and which was the nexus of [his] grievance." (Apx. p. 1152, n. 2).

The ALC, in its January 20, 2016 order, what Torrence admittedly asked it to do, namely define the "prevailing wage" and then precisely determine the hourly "prevailing wage" SCDC should have paid him for his prison industries labor. (Apx. pp. 1069 – 73). In doing so, the ALC offered the following critical admission (Apx. p. 1071):

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

[7] *See* note 8 below.

Such an admission by the ALC profoundly undermines the argument by Torrence in his return that the ALC "was following precedent" established by the Court of Appeals in *Cartrette*.

As an important aside, the Court of Appeals in *Cartrette*, in stark contrast to the ALC in its January 20, 2016 order, relied upon both S.C. Code Ann. § 24-3-40(A) and this Court's ruling in *Williams v. S.C. Dep't of Corr.*, 641 S.E.2d 885, 887 (S.C. 2007) when it determined that an inmate was not an employee of a private industry sponsor:

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

Cartrette, 694 S.E.2d at 23.

The Court of Appeals in *Cartrette*, 694 S.E.2d at 19, provided the following overview of its decision:

> Billy Joe Cartrette filed a grievance with [SCDC] concerning conditions of his participation in the Prison Industries Program (PIP). Cartrette appeals the circuit court's order remanding his case to the Administrative Law Court (ALC) for a determination of the prevailing wage for similar work, reversing the ALC's finding that Cartrette was an employee of the private sponsor, affirming the ALC's denial of overtime wages, and affirming the ALC's denial of reimbursement for certain pay deductions. (footnote omitted). We reverse as to overtime wages, remand that issue to the ALC for further proceedings as outlined in this opinion, and affirm the circuit court's decisions on all remaining issues. (footnote omitted).
>
> **After we issued our original opinion affirming in part and reversing in part, both parties petitioned for rehearing. We deny Cartrette's petition for rehearing, grant [SCDC's] petition for rehearing, withdraw our previous opinion, and substitute this opinion.**

[emphasis supplied by the Court of Appeals].

The Court of Appeals, 694 S.E.2d at 19 – 20, continued as follows:

> Cartrette filed a grievance with [SCDC] complaining his hourly wage was insufficient compared to the prevailing wage for similar work performed in the private sector. He asserted on-inmate employees earned $11.00 to $14.00 per hour for the same work. [He] further complained he did not receive additional pay for overtime hours and [SCDC] improperly withheld funds from his paychecks. Specifically, Cartrette challenged as unconstitutional the withholding of funds for his room and board and additional funds for Victim's Assistance. (footnote omitted).
>
> [SCDC] denied Cartrette's grievance, and [he] appealed to the ALC. The ALC reversed [SCDC's] refusal to pay Cartrette the prevailing wage and found the prevailing wage was $5.25. Furthermore, the ALC affirmed [SCDC's] denials of overtime and reimbursement for wage deductions.
>
> Both Cartrette and [SCDC] then appealed to the circuit court. **After a hearing, the circuit court found $5.25 was not the prevailing wage and remanded that issue to the ALC with seven questions for the ALC to consider in determining the correct prevailing wage.** The circuit court reversed the ALC's apparent finding that Cartrette "worked for ... or was otherwise ever an employee of Kwalu." Finally, the circuit court affirmed the ALC's determinations Cartrette was ineligible for overtime or reimbursement of wage deductions for room and board and for Victims Assistance. Cartrette now appeals.

[emphasis supplied].

In *Cartrette*, the ALC would have remanded the seven (7) questions, which Torrence referenced in his return, back to SCDC for further proceedings, because the ALC sits in an appellate capacity when it reviews appeals filed by inmates, like Cartrette and Torrence, in administrative proceedings undertaken pursuant to SCDC's Inmate Grievance System, designated as Policy Number GA-01.12. *See* S.C. Code Ann. 1-23-380(A)(5).

The ALC recognizes as much in Section V of its Rules of Procedure, which is entitled "Special Appeals." ALC Rule of Procedure 51, which is entitled "Applicability," provides that the rules in Section V "shall apply exclusively **in matters heard on appeal** from final decisions pursuant to [*Al-Shabazz v. State*, 527 S.E.2d 742 (S.C. 2000)]."

The 2009 Revised Notes associated with ALC Rule of Procedure 51 provide as follows:

> **The Special Appeals Rules are the exclusive rules of procedure used *in appeals* from final decisions of [SCDC]** and the Department of Probation, Parole and Pardon Services. The [ALC's] jurisdiction to hear such matters is derived entirely from the decisions of the South Carolina Supreme Court in [*Al-Shabazz*] and [*Furtick v. S.C. Dep't of Probation, Parole and Pardon Services*, 576 S.E.2d 146 (S.C. 2003)]. These Rules are based upon the Court's existing general procedural and appellate rules, with adaptations for this specific type of appeal.

[emphasis supplied].

Thus, by defining and then precisely determining the hourly "prevailing wage" SCDC should have paid him for his prison industries labor in its January 20, 2016 order, the ALC was not "following precedent" established by the Court of Appeals in *Cartrette* as argued by Torrence in his return. Instead, the ALC clearly exceeded the scope of its appellate capacity and abused its discretion by defining and then precisely determining the hourly "prevailing wage" SCDC should have paid him for his prison industries labor in its January 20, 2016 order.

Moreover, the ALC's act of defining and then precisely determining the hourly "prevailing wage" SCDC should have paid Torrence for his labor clearly violated the federal guidelines applicable to PIECP projects, such as the one in which he participated at Evans. Concerning inmate wages, the federal guidelines provide as follows, 64 FR 17009:

> PIECP inmate workers must receive wages at **a rate which is not less than that paid for work of a similar nature in the locality in which the work is to be performed**.[8] This requirement benefits society by allowing for the development of prison industries while protecting the private sector

[8] S.C. Code Ann. § 24-3-315, which Torrence cited in his return (*see* note 7 above), provides as follows:

> [SCDC] shall ensure that inmates participating in any prison industry program pursuant to the Justice Assistance Act of 1984 is on a voluntary basis. The director must determine prior to using inmate labor in a prison industry project that it will not displace employed workers, that the locality does not have a surplus of available labor for the skills, crafts, or trades that would utilize inmate labor, and that the **rates of pay** and other conditions of employment **are not less than those paid and provided for work of similar nature in the locality in which the work is performed**. [emphasis supplied].

Obviously, the language in the applicable federal guideline and § 24-3-315 concerning the hourly rate of pay SCDC must pay inmates, like Torrence, who participate in PIECP projects, such as the project SCDC operated at Evans, is identical or nearly identical.

> labor force and business from unfair competition that could otherwise stem from the flow of low-cost, prisoner-made goods into the marketplace. PIECP participants must, therefore, implement the prevailing wage requirements under like conditions experienced by private sector competition. [emphasis supplied].

The federal guidelines, 64 FR 17010, further provide that "[p]revailing wage verification ***must be*** **obtained by the appropriate state agency which determines wage rates (usually the Department of Economic Security).**" [emphasis supplied].

In our state, the appropriate agency to which SCDC turned for the "prevailing wage verification" was the South Carolina Employment Security Commission ["ESC"], now known as the South Carolina Department of Employment and Workforce ["DEW"]. However, in a development that obviously frustrated the ALC, the record in the instant matter clearly reflected the reality that the ESC and, now, DEW does "not provide or publish a wage that's called prevailing wage," nor does it "have a wage classification called prevailing wage." (Apx. p. 623).

In the face of this reality, the ALC, vested with absolutely no authority under state law to so act, erroneously fashioned a definition for the term "prevailing wage" and then erroneously determined the precise hourly "prevailing wage" SCDC should have paid Torrence for his labor during 1997 (i.e. $8.82 per hour), as well as 1998 and 1999 (i.e. $9.92 per hour). (Apx. pp. 1072 – 73). The ALC then directed SCDC to secure from DEW the hourly "prevailing wage" as defined by the ALC in its January 20, 2016 order "for the years data is not contained in the record" (i.e. 2000, 2001, 2002, 2003, and 2004) and then pay Torrence accordingly. (Apx. 1073).

For these reasons, SCDC again respectfully asserts that contrary to the Court of Appeals' November 28, 2018 decision, nothing concerning the ALC's ruling on this question was interlocutory.

SCDC further respectfully submits that the ALC's ruling on this question represents a novel question of law as contemplated under SCACR 242(b)(1) and as the ALC itself admitted in its January 20, 2016 order. (Apx. p. 1071). Therefore, SCDC again respectfully urges this Court to grant the instant petition in order to fully consider this question.

III. CONCLUSION

For the foregoing reasons, as well as the reasons articulated in its September 30, 2019 petition, SCDC again respectfully urges this Court to, under SCACR 242(b), review the both the Court of Appeals' November 28, 2018 decision and its August 8, 2019 order in the instant matter. (Apx. pp. 1231 – 32 and 1256).

RESPECTFULLY SUBMITTED:

Lake E. Summers
Malone, Thompson, Summers & Ott LLC
339 Heyward Street, Suite 200
Columbia, South Carolina 29201
Office: (803) 254-3300
Fax: (803) 254-0309
E-mail: summers@mtsolawfirm.com

Counsel for SCDC

Columbia, South Carolina
November 14, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2019-001490

Thomas J. Torrence, ... Respondent,

v.

South Carolina Department of Corrections ..... Petitioner.

PROOF OF SERVICE

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

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

November 14, 2019

LAKE E. SUMMERS