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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
Lower Court Case No. 2012-ALJ-04-0143-AP

Thomas J. Torrence, #094651 ……..……...……. Respondent,

v.

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

BRIEF ON CERTIORARI
BY THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

STATUTES

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF QUESTIONS ON CERTIORARI

On March 12, 2020, this Court granted the petition for a writ of certiorari filed September 30, 2019 by the South Carolina Department of Corrections ["SCDC"] in the instant matter.

SCDC now respectfully urges this Court to reverse the final decision issued by the Court of Appeals, 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).

By its November 28, 2018 decision, the Court of Appeals dismissed as interlocutory SCDC's appeal of two (2) rulings from an order issued January 20, 2016 by the South Carolina Administrative Law Court ["ALC"]. (Apx. pp. 1036 – 50).

By these two (2) rulings, the ALC reversed several final decisions made by SCDC concerning prison industries wage claims articulated in an administrative grievance filed by the Respondent, Thomas Torrence, under SCDC's Inmate Grievance Policy System, designated as Policy Number GA-01.12.

Along with urging it to reverse the Court of Appeals' decision, SCDC respectfully urges this Court to reverse the two (2) rulings rendered by the ALC in its order.

Thus, pursuant to South Carolina Appellate Court Rule [SCACR] 242(i), SCDC respectfully presents the following three (3) questions for review:

I. Did the ALC err in its order by ruling that Torrence worked for ESCOD while he participated in the prison industries project SCDC operated at Evans Correctional Institution?

II. Did the ALC err in its order by defining and then determining the "prevailing wage" SCDC should have paid Torrence for his prison industries labor?

III. Did the Court of Appeals err by dismissing as interlocutory SCDC's appeal of the two (2) rulings rendered by the ALC in its order?

STATEMENT OF THE CASE

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

Torrence voluntarily participated in a federally certified Prison Industries Enhancement Certification Program ["PIECP"] project operated by SCDC at Evans Correctional Institution ["Evans"] between 1997 and 2004 in which ESCOD, Inc. and, later, INSILCO, Inc. participated as the private industry sponsors. (Apx. p. 148).

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

By written response (Apx. pp. 127 and 133 – 38), SCDC denied the merits of Torrence's wage claims (Apx. p. 137):

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

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

> **labor you voluntarily provided to the prison industries project it operates at Evans**.[2] [emphasis supplied].

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

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

By its final decision (Apx. pp. 139 and 150 – 57), SCDC affirmed its denial of Torrence's Step 1, and it likewise denied his Step 2. In doing so, SCDC rejected the arguments offered by Torrence concerning the merits of his claims, and it affirmed the analysis of Torrence's wage claims provided in its denial of his Step 1. (Apx. p. 155).

III. TORRENCE'S APPEAL TO THE ALC

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

IV. THE ALC'S JANUARY 20, 2016 ORDER

The first two (2) issues associated with Torrence's appeal identified by the ALC in its January 20, 2016 order concerned the merits of his wage claims (Apx. p. 1038):[3] (1) whether

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

[3] The ALC issued two (2) orders in the instant matter: the first on January 30, 2014, and the second, two (2) rulings of which are the subject of the instant writ of certiorari, on January 20, 2016. (Apx. pp. 399 – 408 and 1036 – 50). SCDC appealed both orders to the Court of Appeals. However, the Court of Appeals' subsequent decision in *Ackerman, et al. v. S.C. Dep't of Corr.*, 782 S.E.2d 757 (S.C. Ct. App. 2016), *cert. denied* (May 30, 2017), rendered moot the issues identified by SCDC in its appeal of the ALC's January 30, 2014 order.

SCDC improperly failed to pay Torrence the "prevailing wage" during training,[4] and (2) whether SCDC improperly failed to pay Torrence the "prevailing wage" after training.[5]

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

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

> Finally, [SCDC] argues that the $5.25 regular hourly rate conformed to the wage data collected and published by the [South Carolina Employment Security Commission ("ESC")] for the type of work in question. **While the Court agrees that verification of wage rates by the ESC is the method of determining the prevailing wage that the federal Guideline and state statutes contemplate**, *the Court does not agree that the $5.25 regular hourly rate conforms to the ESC data in the record.*
>
> *[Torrence] has asked this Court to determine the prevailing wage based on the record in this case*. **In so doing, the Court reaches an issue not yet addressed by South Carolina courts.** While it has been decided that [SCDC] may not pay less than the prevailing wage during training**, no inmate has successfully raised the issue of** *how the prevailing wage is calculated.*

[italicized and bold emphasis supplied].

The ALC then endeavored to define the term "prevailing wage," and, after doing so, it declared SCDC must pay Torrence "the mean average South Carolina wage of an electronic

[4] *See* note 2 above.

[5] An unpublished decision by the Court of Appeals, *Baum v. S.C. Dep't of Corr.*, Opinion No. 2019-UP-104, -- S.E.2d --, 2019 WL 1164316 (S.C. Ct. App. Mar. 13, 2019), *cert. denied* (Aug. 16, 2019), addressed the third issue on appeal identified by the ALC in its January 20, 2016 order, and, consequentially, SCDC's September 30, 2019 petition to this Court did not cover the third issue. Neither SCDC nor Torrence appealed the ALC's rulings on the final two (2) issues it identified in its January 20, 2016 order. (Apx. p. 1038).

assembler," which, according to the ALC, equaled $8.82 per hour in 1997 and $9.92 per hour in "1998-1999." (Apx. pp. 1044 – 46).

Thus, the ALC ruled that paying Torrence at the rate of $5.25 per hour rather than "the mean average South Carolina wage of an electronic assembler" constituted "an error of law" by SCDC. (Apx. pp. 1046).

While it found some evidence in the record "demonstrate[d] that the data necessary to calculate [the mean average South Carolina wage of an electronic assembler] is available from [the South Carolina Department of Employment and Workforce ("DEW")],[6]" the ALC determined the entirety of "the evidence in the record [was] insufficient to calculate [the mean average South Carolina wage of an electronic assembler] for all" the years Torrence participated in the project SCDC operated at Evans (i.e. 1997 to 2004). (Apx. p. 1046).

The ALC then ordered SCDC to "obtain the data to determine [the mean average South Carolina wage of an electronic assembler] from [DEW]" (Apx. p. 1046), and it remanded Torrence's claim back to SCDC "**to determine the prevailing wage, as defined by the Court above**, for all hours of regular and overtime labor performed by [Torrence] for ESCOD." [emphasis supplied]. (Apx. p. 1050).

V. THE COURT OF APPEALS' NOVEMBER 28, 2018 DECISION

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

> Appeal dismissed pursuant to [SCACR 220(b)], and the following authorities: [*Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health and Env'l Control,* 692 S.E.2d 894, 895 (S.C. 2010)] ("The order of the ALC in this case is not a final order. If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory" and not immediately appealable.); S.C.

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

> Code Ann. § 1-23-610(A)(1) (Supp. 2018) (providing for judicial review by this court of "a final decision" of the ALC).

STANDARDS OF REVIEW

I. THE COURT OF APPEALS' DECISION

The second authority upon which the Court of Appeals relied in its above-quoted decision consisted of § 1-23-610(A)(1), the first sentence of which reads as follows:

> For judicial review of a **final decision** of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party and the [ALC] not more than thirty days after the party receives the final decision and order of the administrative law judge. [emphasis supplied].

The first authority upon which the Court of Appeals relied in its above-quoted decision consisted of *Charlotte-Mecklenburg*, an order issued April 8, 2010 by this Court in which it framed the controversy as follows, 692 S.E.2d at 894:

> Petitioners and Respondent/Appellant Amisub of South Carolina, Inc. filed notices of appeal in the Court of Appeals from an order of the [ALC] dated December 9, 2009. That order granted Amisub's motion for partial summary judgment, granted petitioners motion for summary judgment, and **remanded the case to the Department of Health and Environmental Control (DHEC) for a determination as to which party, if any, was entitled to a certificate of need**. The Court of Appeals consolidated the appeals.
>
> Petitioner Presbyterian Healthcare System has now filed a motion to certify the appeals to this Court pursuant to [SCACR 204(b)] and a motion to expedite the proceedings. Neither Petitioner Charlotte-Mecklenburg Hospital Authority nor Amisub oppose the motions. We hereby certify the appeals to this Court pursuant to [SCACR 204(b)].

[emphasis supplied].

Despite having certified them pursuant to Presbyterian Healthcare System's unopposed motion, this Court nevertheless dismissed the appeals, and, in doing so, it ruled at the outset of its order that the ALC's December 9, 2009 order was not immediately appealable. *Id*.

This Court ended its order with a more expansive ruling, *Id.*, 692 S.E.2d at 895:

> The ALC's order upholds DHEC's finding that Amisub was a competing applicant for the certificate of need at issue in this matter. However, the ALC found DHEC erroneously interpreted the State Health Plan to allow only existing providers to obtain a certificate of need. Based on this finding, the ALC remanded the matter to DHEC to determine whether any of the applicants were entitled to the certificate of need. **Although the ALC decided questions of law involved in this matter, a final determination as to the certificate of need has not been made.** Therefore, the order of the ALC is interlocutory and is not a final decision which is immediately appealable under § 1-23-610. Accordingly, we dismiss this matter. [emphasis supplied].

In crafting its ruling, this Court obviously considered § 1-23-610, and specifically § 1-23-610(A)(1), as well as the following authorities, *Id.*, 692 S.E.2d at 894 – 895:

> **If there is some further act which must be done by the court** prior to a determination of the rights of the parties, the order is interlocutory. [*Hooper v. Rockwell,* 513 S.E.2d 358 (S.C. 1999); *Mid-State Distributors, Inc. v. Century Importers, Inc.,* 426 S.E.2d 777 (S.C. 1993)]; *Adickes v. Allison & Bratton,* 21 S.C. 245 (1884). A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment. *Hooper v. Rockwell, supra; Mid-State Distributors, Inc. v. Century Importers, Inc., supra;* [*Good v. Hartford Accident & Indemnity Co.,* 21 S.E.2d 209 (S.C. 1942)]. **A final judgment** disposes of the whole subject matter of the action or terminates the particular proceeding or action, **leaving nothing to be done but to enforce by execution what has been determined**. *Good v. Hartford Accident & Indemnity Co., supra.* [emphasis supplied].

SCDC respectfully seeks to avoid the fate suffered by Presbyterian Healthcare System in *Charlotte-Mecklenburg*, namely having this Court grant a writ of certiorari in response to SCDC's petition only to have this Court dismiss it as improvidently granted. *See also Rent-a-Center East, Inc. v. S.C. Dep't of Revenue*, 839 S.E.2d 882 (S.C. 2020).

This Court's order in *Charlotte-Mecklenburg*, contrary to the Court of Appeals' November 28, 2018 decision, supports SCDC's argument that the two (2) rulings rendered by the ALC in its January 20, 2016 order constituted "final" decisions, and the precedent upon which this Court crafted its order in *Charlotte-Mecklenburg* likewise supports SCDC's argument.

In *Charlotte-Mecklenburg*, this Court invoked *Adickes v. Allison & Bratton*, 21 S.C. 245 (1884), and the following standard from *Adickes*, 21 S.C. at 258 – 259, applies to the instant controversy:

> A judgment is registration of what the court decides. In order to authorize an execution, its first requisite is that **it must be final**. Section 266 of our code defines a judgment to be "the final determination of the rights of the parties in the action." And in reference to what is such a final determination, Mr. Freeman, at section 12 of his work on judgments, says: "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory; **but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final**." See [*Ex parte Farrars*, 13 S.C. 254, 258 (S.C. 1880)]. Taking this as the test, it seems to us that the decision of Judge Kershaw was a final judgment. It disposed of every issue in the case, directed judgment for the amount remaining unpaid upon the first judgment of H. F. Adickes against Allison & Bratton, and ordered execution to issue. **Nothing else was left for the Court to do**.
>
> But it is suggested that, although the whole case was decided, the decision was not sufficiently definite, inasmuch as it failed to name the precise amount in dollars and cents. The objection really goes to the form rather than the substance. The decision did give judgment for a particular amount, to wit, the balance due on a record of the court, which in the summons was set out particularly. **Nothing was lacking but a calculation of the interest, which was not necessary; but if so, being a mere clerical matter, it was referred to the officer of the court, whose duty it was to enter the formal judgment of the court**. It is a proper case for the application of the maxim: ***Id certum est quid certum reddi potest.***

[emphasis supplied].

The maxim offered by the *Adickes* court translates as "that is certain which may be made certain," and, as demonstrated below, the two (2) rulings rendered by the ALC in its January 20, 2016 order conform to the maxim.

Decisions by this Court since *Charlotte-Mecklenburg* clearly support SCDC's argument that the two (2) rulings rendered by the ALC in its order constituted final decisions.

II. THE ALC'S ORDER

ALC Rule of Procedure 65 states "[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).

In its January 20, 2016 order, the ALC considered Torrence's appeal of SCDC's final decision regarding his prison industries wage claims pursuant to *Al-Shabazz*, as well as this Court's decisions in the companion cases of *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 (S.C. 2004).

Thus, § 1-23-610(B) establishes the standard of review applicable to SCDC'S appeal of the two (2) final rulings rendered by the ALC in its order:

> 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.

In *Kiawah Dev. Partners II v. S.C. Dep't of Health & Envtl. Control*, 766 S.E.2d 707, 715 (S.C. 2014), this Court recognized the above-quoted provisions of § 1-23-610(B) as the standard of review applicable to appeals from ALC decisions, and it added the following operative guidance:

> In determining whether the ALC's decision was supported by substantial evidence, the Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC. [*Hill v. S.C. Dep't of Health & Envtl. Control,* 698 S.E.2d 612, 617 (S.C. 2010)]. **However, the Court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law**. [*Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue,* 731 S.E.2d 869, 870 – 871 (S.C. 2012)]. [emphasis supplied].

In *CareAlliance Health Services v. S.C. Dep't. of Revenue*, 787 S.E.2d 475, 477 (S.C. 2016), this Court again recognized that § 1-23-610(B) provides applicable standard of review to an appeal from an ALC decision, cited *Kiawah Dev. Partners II*, and offered the following additional guidance:

> While an appellate court will not substitute its judgment for that of the ALC as to findings of fact, **we may reverse or modify decisions that are controlled by an error of law or are clearly erroneous in view of the substantial evidence on the record as a whole**. [*Mitchell,* 659 S.E.2d at 235]. [emphasis supplied].

Circling back to *Al-Shabazz*, 527 S.E.2d at 755, SCDC must "distinctly and specifically direct [this Court's] attention to the errors or abuses allegedly committed by the [ALC]" and "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 [by SCDC] is not sufficient." *Id*.

As SCDC persuasively demonstrates below, the ALC erred, under § 1-23-610(B) and precedent from this Court, in the two (2) rulings from its January 20, 2016 order under review in the instant writ of certiorari.

ARGUMENT

I. THE ALC ERRONEOUSLY RULED TORRENCE WORKED FOR ESCOD

From the inception of the instant controversy, Torrence asserted, and SCDC disputed, he was an employee of ESCOD, the private industry sponsor.

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

> **I was employed by [ESCOD]**, in the SCDC Private Sector Industries Program at [Evans] from June 1997 thru November, 2004. **During the course of my employment**, I learned that SCDC was withholding certain wages and monies from me in contravention of state law, to which I have a property interest. [emphasis supplied].

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

> **To the extent that you claim in your Step 1 that you worked for or were otherwise "employed" by ESCOD, I conclude that you never "worked" for nor were you ever "employed" by ESCOD**.
>
> I also conclude that neither [*Adkins*][7] nor [*Wicker*] declared that you or inmates in your position were "employed" by SCDC, or, for that matter, any other agency or company. I make this conclusion in reliance [on *Williams v. S.C. Dep't of Corr. and Williams Tech., Inc.*, 641 S.E.2d 885 (S.C. 2007)] in which the Court recognized both that inmates are not "employees" of the State of South Carolina and that inmates are not the "employees" of private industry sponsors like ESCOD.
>
> Therefore, to the extent you use the terms "worked for," "employee," "employed," or "employment" within your Step 1 grievance to describe your participation, I reject your use of that term. You and the other inmates in your position have been, are, and remain inmates lawfully confined within an SCDC facility, and you performed all of your labor in this prison industries project inside the walls of Evans.

[emphasis supplied].

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

> The parties also argue vociferously about whether it is proper to use the terms "employee" or "hire" with respect to [Torrence's] labor and his relationship with the 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*]. Nor is

[7] *See* note 2 above.

> [Torrence] an "employee" for purposes of unemployment benefits. [§ 24-3-430(G)]. **Yet, it is also true that for some other purposes [Torrence] has the same rights and responsibilities afforded to employees**. [Torrence] is required to pay state and federal income taxes and Social Security taxes. [§ 24-3-40(A)(6)]. [Torrence] is entitled to worker's compensation benefits for on-the-job injuries. [18 U.S.C. § 1761(e)(3)]. ***None of these rights and duties (or lack thereof) directly bear on the disposition of this case***. [italicized and bold emphasis supplied].

Notwithstanding the above-quoted footnote, the ALC declared that Torrence "performed [his labor] ***for*** **ESCOD.**" [italicized and bold emphasis supplied]. (Apx. p. 1050).

The ALC so declared when it remanded the "prevailing wage" issue back to SCDC with instructions for SCDC to calculate the "prevailing wage" in conformity the definition the ALC dubiously fashioned for the term.

Moreover and *contrary* to the above-quoted footnote, the ALC completely embraced Torrence's position by explicitly ruling that he "must be paid the mean average South Carolina wage of an electronic assembler, including overtime, **for the years he worked** as a harness assembler ***for*** **ESCOD**." [italicized and bold emphasis supplied]. (Apx. p. 1046).

Frankly but respectfully stated, the ALC committed plain error when it completely embraced Torrence's position and explicitly ruled that "**he worked … *for* ESCOD**."

The ALC's ruling runs afoul of the guidelines published by the United States Department of Justice's BJA, which apply to projects certified by the federal government under its PIECP, like the project SCDC operated at Evans in which Torrence participated.

The operative guidelines, 64 FR 17007, clearly state that "[t]he requisite payment of at least a minimum wage, by a [project], **is in no way intended by BJA to imply that PIECP inmate workers are employees** for purposes of the PIECP statute or any other federal law." [emphasis supplied].

Federal precedent also flatly negates the ALC's ruling. *See Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) ("Both public agencies and private firms have employees. **But prisoners are not employees**."). [emphasis supplied].

Most significantly, precedent from our Court of Appeals, flatly negates the ALC's ruling. In *S.C. Dep't of Corr. v. Cartrette*, 694 S.E.2d 18, 21 (S.C. Ct. App. 2010), *cert. denied* (Feb. 22, 2012), our Court of Appeals relied upon *Williams* in recognizing the following:

> Our supreme court has held the [Fair Labor Standards Act ("FLSA")] does not extend to inmate workers because, for purposes of payment of wages, ***inmate workers are not employees of [private industry] sponsors***. [*Williams*, 641 S.E.2d at 888]. **Other courts, including the Federal Court of Appeals for the Fourth Circuit, have also declined to extend the protections of the FLSA and state labor statutes to inmates**. *See, e.g., Harker v. State Use Indus.*, 990 F.2d 131, 135 (4th Cir. 1993). [italicized and bold emphasis supplied].

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

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

Our Court of Appeals in *Cartrette*, *Id.* at 23, again relied upon *Williams* by unequivocally ruling that the inmate was not an employee of the private industry sponsor:

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

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

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

A side-by-side comparison between the interpretation of *Williams* by our Court of Appeals in *Cartrette*, 694 S.E.2d at 23, and *Tomlin*, 694 S.E.2d at 29, and the ALC's interpretation of *Williams* (Apx. p. 1042) reveals the following differences:

Cartrette and *Tomlin*	ALC
"… a prison industries program sponsor is not an employer of inmates because the sponsor does not exclusively control the payment of inmate wages and finding agreement among other jurisdictions that examined this issue."	"[Torrence] is not an 'employee' of either the state or the private industry sponsor for purposes of the Payment of Wages Act."

Unlike our Court of Appeals, the ALC misapprehended this Court's decision in *Williams* by limiting its scope to only the Payment of Wages Act.

By so limiting *Williams*, the ALC allowed itself to indulge, within its above-quoted footnote (Apx. p. 1042), in a misguided "on the one hand but on the other" rationalization of Torrence's claim that he worked for ESCOD.

By allowing itself to indulge in such a misguided rationalization, the ALC set the conditions which allowed it to explicitly rule, later in its order, that Torrence "must be paid the mean average South Carolina wage of an electronic assembler, including overtime, **for the years he worked** … ***for*** **ESCOD**." [italicized and bold emphasis supplied]. (Apx. p. 1046).

Beyond misapprehending *Williams*, the ALC glaringly and erroneously ignored *Cartrette*, *Tomlin*, and *Bennett* not only in the above-quoted footnote but in its entire order.

SCDC respectfully asserts, as dictated by *Al-Shabazz*, 527 S.E.2d at 755, that by its above-provided analysis, it has "distinctly and specifically [directed this Court's] attention to the errors or abuses" committed by the ALC on this question in its order

SCDC further respectfully asserts that such clear error constitutes sufficient grounds for this Court to reverse the ALC's decision that Torrence worked for ESCOD under both §§ 1-23-610(B)(d) and (f) (the ALC's ruling was both "affected by other error of law" and "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."). *See Kiawah Dev. Partners, II*, 766 S.E.2d at 715 (this Court "may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law") and *CareAlliance*, 787 S.E.2d at 477 (this Court may reverse decisions of the ALC "that are controlled by an error of law").

As SCDC has demonstrated the ALC erred in its ruling on this question from its January 20, 2016 order, SCDC demonstrates further below that the ALC's ruling on this question was, contrary to the Court of Appeals' November 28, 2018 decision, final and not interlocutory.

II. THE ALC ERRONEOUSLY DEFINED AND THEN DETERMINED THE "PREVAILING WAGE" SCDC SHOULD HAVE PAID TORRENCE

As it transitioned in its January 20, 2016 order from examining the term "prevailing wage" to defining and then determining the "prevailing wage" SCDC should have paid Torrence for his prison industries labor, the ALC reacted to a request by Torrence (Apx. p. 1044):[8]

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

[8] At the conclusion of the second footnote in his brief to the Court of Appeals, Torrence admitted that he asked the ALC "**to formulate a calculation** [of the 'prevailing wage' SCDC should have paid him for his prison industries labor] **for the sake of brevity and judicial economy** where the record is replete with the information to perform such a task, and which was the nexus of the grievance." [emphasis supplied]. (Apx. p. 1152).

> **inmate has successfully raised the issue of *how the prevailing wage is calculated***. [italicized and bold emphasis supplied].

The ALC accommodated Torrence's request by both defining and determining the "prevailing wage" in the following rulings from its order, and it inextricably coupled these rulings with its erroneous ruling that Torrence worked for ESCOD (Apx. p. 1046):

> [Torrence] must be paid the mean average South Carolina wage of an electronic assembler, including overtime, *for the years he worked as a harness assembler for ESCOD*. [SCDC] must obtain the data to determine this wage from [DEW]. **Specifically, [SCDC] must pay [Torrence] the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999 and the mean average wage reflected by that code or its counterpart for the years data is not contained in the record**. [italicized emphasis supplied by SCDC; bold emphasis supplied by the ALC].

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

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

> The PIECP Guideline refers to this rate of pay as the "prevailing wage" and states that **the prevailing wage must be obtained from the state agency that determines wage rates**. [64 FR 17010]. The Guideline states that this agency is usually the "Department of Economic Security." **In South Carolina, this agency would have been the [ESC] at the times relevant to this case**, but would now be the [DEW].[9] [emphasis supplied].

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

> The federal minimum wage is the *lowest possible* acceptable wage to pay inmates, because it is legally impossible for the prevailing wage to be any lower. The minimum wage would only satisfy the prevailing wage standard in all instances if all non-inmate workers were paid only the minimum wage. However, workers in this state earn different rates of pay according to their skillset and the type job in which they work. The Guideline cited by [SCDC] also states that the federal law "requires that the PIECP wage amount be set *exclusively* in relation to the amount of pay received by similarly situated non-inmate workers." [64 FR 17009-10]

[9] *See* note 6 above.

> (emphasis added). **[SCDC] cites no evidence that the minimum wage was the prevailing wage for workers in jobs similar to the one performed by [Torrence].** The law clearly states that "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." [§ 24-3-430(D)]. [italicized emphasis supplied by the ALC; bold emphasis supplied by SCDC].

In representing that SCDC cited "no evidence that the minimum wage was the prevailing wage for workers in jobs similar to the one performed by" Torrence, the ALC ignored the reality that no evidence existed in the record as to the hourly rate at which ESCOD *actually paid* the non-inmate workers it employed at its production facilities located in our state.10 The ALC also overlooked the reality that no evidence existed in the record to verify Torrence performed the same or similar job tasks as those job tasks *actually performed* by the non-inmate workers ESCOD employed at its facilities.

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

> SCDC suggests, [in] compliance with 18 USC § 1761(c)(2), § 24-3-315, and [§ 24-3-430(D)], that Torrence was paid ten cents above the federal minimum wage, [Apx. p. 1132]. This [suggestion] contradicts **the substantial evidence in the record does not contain the hourly wage ESCOD actually paid its employees for work similar to Torrence**. **Torrence suggests that neither party to this action has access to those records*, but common sense dictates it was within the average/mean wage range*.** [italicized and bold emphasis supplied].

The ALC defined the "prevailing wage" as "the mean average wage of an electronic assembler." (Apx. p. 1046). SCDC respectfully asserts the ALC did so in yet another instance of it simply adopting positions advocated by Torrence with no evidentiary support, namely that he performed the same job tasks as "an electronic assembler" and that SCDC should have paid him the average hourly wage of "an electronic assembler."

[10] *See* note 13 below.

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

The ALC then ruled "**the evidence in the record is insufficient *to calculate***" the mean average wage of an electronic assembler between 2000 and 2004, the final five (5) years Torrence participated in the prison industries project SCDC operated at Evans. [italicized and bold emphasis supplied]. (Apx. p. 1046).

Consequentially, the ALC ruled that, on remand, SCDC "**must** pay [Torrence] the mean average wage reflected by OEC Code 93114 for [1997, 1998, and 1999] and the mean average wage reflected by that code or its counterpart **for the years data *is not contained* in the record**" (i.e. 2000, 2001, 2002, 2003, and 2004). [italicized and bold emphasis supplied]. (Apx. p. 1046).

As they lack any support beyond the "common sense" described by Torrence, it's entirely possible that the ALC's above-recited final rulings could result in SCDC paying Torrence an hourly rate *greater than* the hourly rate ESCOD *actually paid* its employees.

Even more corrosive to the viability of the ALC's rulings is its glaring misapprehension of the data collected and disseminated by the ESC.

In fashioning its erroneous ruling that Torrence worked for ESCOD, the ALC dramatically misinterpreted *Williams* and totally ignored *Cartrette*, *Tomlin*, and *Bennett*. Likewise, in determining the "prevailing wage" SCDC should have paid Torrence, the ALC overlooked, misinterpreted, and misapprehended evidence in the record which revealed the true nature of the data generated by the ESC.

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

> **The Merriam-Webster Dictionary defines "prevail" as "to be frequent: predominate."** Merriam-Webster, www.merriam-webster.com/prevail (Dec. 14, 2015). **Predominate is defined as "to hold advantage in numbers or quantity."** Id. at www.merriam-webster.com/predominate. **The affidavit in the record of Rebecca Eleazer of the ESC** supports the conclusion that the "average" wage in South Carolina for a given occupational category would be the ordinary interpretation of the statutory phrase prevailing wage. **The Court therefore concludes that the "prevailing wage" equals the mean average wage for an occupation**. [emphasis supplied].

Contrary to the ALC's above-quoted representation, no affidavit from Ms. Eleazer exists in the record.

Instead, only deposition testimony from Ms. Eleazer appears in the record, which she provided August 10, 2004 during the litigation of the declaratory judgment action filed in circuit court in which Torrence initially presented his prison industries wage claims. (Apx. pp. 539 and 610 – 645). *See Torrence, et al., v. S.C. Dep't of Corr.*, Case No. 2001-CP-40-3409 (S.C. Cir. Ct. May 31, 2005).[11]

Not only did it misrepresent the method by which she offered her testimony, the ALC completely misrepresented the substance of Ms. Eleazer's testimony.

At her deposition, Ms. Eleazer testified she worked "with the [ESC's Occupation Employment Statistics Program] where [they] survey employers to collect occupation, employment, and wage data." (Apx. p. 611).

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

In a profound departure from the ALC's description of her testimony, Ms. Eleazer testified that *the ESC*, the agency exclusively tasked under BJA guidelines to verify the "prevailing wage" (64 FR 170009-10(B)), *does not* **"provide or publish a wage that's called prevailing wage,"** *nor does it* **"have a wage classification called prevailing wage."** [emphasis supplied]. (Apx. p. 623).

Thus, as a result of its erroneous understanding of the record and its equally erroneous reasoning, the ALC did something that, according to Ms. Eleazer, the *ESC itself did not do*, namely declare a precise hourly rate of pay for a specified job as "the prevailing wage."

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

The August 2002 bench trial conducted by the circuit court in *Adkins* remains the only instance in which such claims have ever been subjected to trial,[12] and, in its order granting summary judgment in SCDC's favor, the circuit court in *Adkins* accurately chronicled the method by which the ESC collected wage data in our state (Apx. p. 893):

> The evidence introduced by the parties at trial showed that the [ESC], the state agency responsible for collecting and publishing wage data for non-institutional businesses throughout South Carolina, reviewed and approved the permanent $5.15 per hour wage SCDC pays the Plaintiffs for their [prison industries] labor.
>
> On July 27, 2000, [SCDC Division of Industries Tony Ellis] wrote Mr. Ted Gladden, ESC's Assistant Director for Labor Market Information, and asked him to review the hourly wage rate for the [prison industries] project in which the Plaintiffs participate. [Mr.] Ellis clearly stated SCDC pays

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

> the Plaintiffs $5.15 per hour.[13] On August 4, 2000, **Mr. Gladden responded to [Mr.] Ellis' inquiry by providing [Mr.] Ellis with a range of wages articulated as follows**: "Low" = $6.05, **"Mean" = $7.48**, and "High" = $8.29. (footnotes omitted).

[emphasis supplied].

The "Mr. Gladden" referenced in the above-quoted passages from the circuit court's order in *Adkins* is the very same "Mr. Gladden" referenced by the ALC in its order (Apx. pp. 1045 – 46), but, unlike the circuit court in *Adkins*, the ALC erroneously interpreted correspondence from Mr. Gladden in ruling that the "prevailing wage" SCDC should have paid Torrence in 1997 equaled $8.82 per hour and that the "prevailing wage" SCDC should have paid Torrence in 1998 and 1999 equaled $9.92 per hour. (Apx. pp. 1045 – 46).

The "Ms. Eleazer" referenced by the ALC in its order is the very same "Ms. Eleazer" who testified during the bench trial conducted by the circuit court in *Adkins*, and the circuit court in *Adkins* accurately chronicled her testimony as follows (Apx. p. 894):

> Ms. [Eleazer] resolved any confusion surrounding the meaning of Mr. Gladden's August 4, 2000 response. **The Plaintiffs called Ms. Eleazer, an ESC representative, during *their* case-in-chief, because she actually prepared Mr. Gladden's response**. Ms. Eleazer clarified and explained Mr. Gladden's response.
>
> According to Ms. Eleazer, the designations "Low, **Mean**, and High" simply reflect percentile designations. The designation "Low" corresponds to the 25th percentile, **the designation "Mean" corresponds to the 50th percentile**, and the designation "High" corresponds to the 75th percentile. In other words, 25% of the non-institutional businesses surveyed by the ESC reported an hourly wage at or below $6.05, **50% of the non-institutional businesses surveyed by the ESC reported an hourly wage at or below $7.48**, and 75% of the noninstitutional business surveyed by the ESC reported an hourly wage at or below $8.29.

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

[13] Excerpts from the deposition testimony provided September 12, 2002 by Mr. Ellis in the litigation of the declaratory judgment action in which Torrence first presented his prison industries pay claims appears, like the deposition testimony of Ms. Eleazer, in the record on the instant matter. (Apx. pp. 539 and 567 – 89). For clarity's sake, Mr. Ellis testified that ESCOD was in North Myrtle Beach. (Apx. p. 570).

In its order, the ALC did not endeavor to determine the precise import of the "mean" hourly wage as reported by the ESC, nor did it explain that the "mean" hourly wage is but one (1) of three (3) benchmarks tabulated and reported by the ESC.

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

> Critically, however, **the "floor" for the wage range described by Ms. Eleazer is the federal minimum wage of $5.15 per hour, the rate alleged by the Plaintiffs in their first cause of action to be below the "prevailing wage" for work of a similar nature**. With this critical information, the wage range provided by Mr. Gladden's August 4, 2000 letter maybe further refined as follows: 25% of the non-institutional businesses surveyed by the ESC reported an hourly wage from $6.05 down to $5.15, **50% of the non-institutional businesses surveyed by the ESC reported an hourly wage from $7.48 down to $5.15**, and 75% of the non-institutional [businesses] surveyed by the ESC reported an hourly wage from $8.29 down to $5.15.
>
> According to **Ms. Eleazer**, no business surveyed by her agency reported an hourly wage below the federal minimum wage of $5.15 per hour. Therefore, the $5.15 hourly wage SCDC pays the Plaintiffs for their [prison industries labor] at Tyger River [Correctional Institution**] falls within ESC's wage range** as recited by **Mr. Gladden** in his August 4, 2000 letter to [Mr.] Ellis.

[emphasis supplied].

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

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

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

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

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

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

SCDC fully acknowledges that the circuit court's rulings in *Adkins* were not binding on the ALC. Nonetheless, SCDC respectfully asserts that the circuit court's precise factual findings concerning the wage data generated by the ESC, including the trial testimony of Ms. Eleazer in which she clarified terms of art such as "mean" and, of course, "prevailing wage," are essential to a proper understanding of Torrence's claims.

Such precise factual findings by the circuit court in *Adkins* reflect the ALC misinterpreted and misapprehended the operative terms of art associated with the proper adjudication of Torrence's claims.

Consequentially, the ALC propounded the following erroneous rulings in its January 20, 2016 order (Apx. p. 1046):

> [Torrence] must be paid **the mean average South Carolina wage of an electronic assembler**, including overtime, for the years he worked as a harness assembler for ESCOD. [SCDC] must obtain the data to determine this wage from [DEW]. Specifically, [SCDC] must pay [Torrence] **the mean average wage reflected by OEC Code 93114** for the years 1997 through 1999 and **the mean average wage reflected by that code or its counterpart** for the years data is not contained in the record. [emphasis supplied].

By its above-provided analysis, SCDC respectfully asserts it has, as dictated by *Al-Shabazz*, 527 S.E.2d at 755, "distinctly and specifically [directed this Court's] attention to the errors or abuses" committed by the ALC on this question in its January 20, 2016 order.

SCDC further respectfully asserts that such abject error constitutes sufficient grounds to reverse the ALC's rulings by which it defined and then determined the "prevailing wage" SCDC should have paid Torrence for his prison industries labor under §§ 1-23-610(B)(d), (e), and (f) (the ALC's ruling was "affected by other error of law," "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record," and "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."). *See Kiawah Dev. Partners, II*, 766 S.E.2d at 715 (this Court "may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law") and *CareAlliance*, 787 S.E.2d at 477 (this Court may reverse decisions of the ALC "that are controlled by an error of law or are clearly erroneous in view of the substantial evidence on the record as a whole" (citing *Mitchell*, 659 S.E.2d at 235)).

As SCDC has demonstrated the ALC erred in its ruling on this question from its January 20, 2016 order, SCDC demonstrates immediately below that the ALC's ruling on this question was final and, contrary to the Court of Appeals' November 28, 2018 decision, not interlocutory.

III. THE COURT OF APPEALS ERRONEOUSLY DISMISSED SCDC'S APPEAL OF THE ALC'S ORDER

In *Charlotte-Mecklenburg*, 692 S.E.2d at 894 – 895, this Court articulated the following statements defining the term "final judgment," which is interchangeable with the term "final decision" from §1-23-610(A)(1):

> A judgment which determines the applicable law, **but leaves open questions of fact**, is not a **final judgment**. [*Good*; other citations omitted]. A **final judgment** disposes of the whole subject matter of the

> action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined. [*Good*]. [emphasis supplied].

This Court reiterated the same standard in its subsequent decision in *Bone v. U.S. Food Service*, 744 S.E.2d 552, 557 (S.C. 2013):

> On its face, the statute refers to a "**final judgment**," **which is a well-established term of art in the law to which great significance is attached**. *See* [*Good*] (holding if a judgment determines the applicable law while leaving open questions of fact, it is not a **final judgment**); *see also* [*Charlotte-Mecklenburg*, 692 S.E.2d at 895] ("A **final judgment** disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." (citing *Good*)).

Notwithstanding the "on the one hand but on the other" examination in which it engaged in a footnote in its order (Apx. p. 1042), the ALC left open no question of fact concerning Torrence's employment status by ruling he worked for ESCOD. (Apx. pp. 1046 and 1050).

Contrary, however, to the ALC's ruling and as made abundantly clear by this Court in *Williams*, our Court of Appeals in *Cartrette* and *Tomlin*, and the Seventh Circuit in *Bennett*, Torrence simply never worked for ESCOD while he voluntarily participated in the federally certified PIECP project operated by SCDC at Evans, for which ESCOD served only as the private industry sponsor.

Thus, the ALC's erroneous ruling that Torrence worked for ESCOD constitutes, contrary to the Court of Appeals' decision (Apx. pp. 1231 – 32), a final decision, the first of two (2) defective final decisions SCDC respectfully urges this Court to reverse on certiorari.

The ALC's erroneous final decision that Torrence worked for ESCOD set the table for the ALC's other erroneous final decision by which it defined and then calculated the "prevailing wage" SCDC should have paid him for his prison industries (Apx. pp. 1045 – 46):

The Merriam-Webster Dictionary defines "prevail" as "to be frequent: predominate." Merriam-Webster, www.merriam-webster.com/prevail (Dec. 14, 2015). Predominate is defined as "to hold advantage in numbers or quantity." Id. at www.merriam-webster.com/predominate. The affidavit in the record of Rebecca Eleazer of the ESC supports the conclusion that the "average" wage in South Carolina for a given occupational category would be the ordinary interpretation of the statutory phrase prevailing wage. **The Court therefore concludes that the "prevailing wage" equals the mean average wage for an occupation.**

The PIECP Guideline requires that the prevailing wage must be obtained from the state agency that determines wage rates. [64 FR 17010]. In South Carolina, this agency would have been the [ESC] at the times relevant to this case, but would now be [DEW].[14] Further, the Guideline states that the prevailing wage must be set exclusively in relation to the amount of pay received by similarly situated non-inmate workers and that no other cost variables may be taken into consideration. [64 FR 17009-10]. In referring to the ESC data in the record, the Court concludes that "locality" means the state of South Carolina. Further, **the Court concludes that the data necessary to determine the mean average wage for "work of a similar nature" as contemplated by the state statutes and federal guidelines may be found by referring to the appropriate Occupational Employment Statistics (OES) or OCC code used by ESC/DEW**. The record simply does not support a finding that the mean average wage for an assembler is as low as the $5.25 paid [Torrence]. For example, in 1999, Ted Gladden of the [ESC] informed [SCDC] by letter that the mean average wage in 1997 for electronic assemblers was $8.82. In 2000, Gladden informed [SCDC] that the mean average wage in 1998-1999 for electronic assemblers was $9.92. While this evidence demonstrates that the data necessary to calculate the mean average wage is available from DEW, the evidence in the record is insufficient **to calculate the wage** for all of the relevant years.

There is no evidence whatsoever in the record to support the [SCDC's] argument that its wage payment was in conformity with ESC data. To pay [Torrence] less than the prevailing wage is an error of law. [footnote omitted]. By failing to pay the correct wage, [SCDC] subverts the purpose of the laws enacted by Congress and the General Assembly and harms not only inmates, but the victims and family members who receive disbursements from the inmates' gross wages and the public at large.

[Torrence] ***must*** **be paid the mean average South Carolina wage of an electronic assembler, including overtime, for the years he worked as a harness assembler** ***for*** **ESCOD**. [SCDC] ***must*** **obtain** the data to determine this wage from [DEW]. Specifically, [SCDC] ***must*** **pay**

[14] See note 6 above.

> [Torrence] the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999 and the mean average wage reflected by that code or its counterpart for the years data is not contained in the record.

[italicized and bold emphasis supplied].

The above-quoted final decision by the ALC represents the ultimate manifestation of the ALC treating Torrence like an ESCOD employee, again contrary to *Williams*, *Cartrette*, *Tomlin*, and *Bennett*, and it leaves nothing for SCDC to do but to calculate, as Torrence requested,[15] the "prevailing wage" in the manner the ALC clearly, unambiguously, and erroneously prescribed.

Under the above-quoted final decision, SCDC need only (1) pay Torrence "the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999," (2) collect the data from DEW for "the mean average wage reflected by OEC Code 93114" for the years 2000 through 2004, and (3) then pay Torrence "the mean average wage reflected by OEC Code 93314" for the years 2000 through 2004.

The ALC's decision on this question exemplifies the maxim "that is certain which may be made certain" ("*Id certum est quid certum reddi potest"*) from *Adickes*, the 1884 decision upon which this Court relied in *Charlotte-Mecklenburg*, 692 S.E.2d at 894 – 895.

The ALC's decision on this question obviously decided the merits of Torrence's prison industries wage claims, and, by do deciding, it constitutes a final decision under *Nucor Corp. v. S.C. Dep't of Employment and Workforce*, 765 S.E.2d 558, 562 (S.C. 2014):

> In proceedings governed by the APA, "[a] **final judgment** disposes of the whole subject matter of the action or terminates the particular proceeding or action, **leaving nothing to be done but to enforce by execution what has been determined**." [*Charlotte-Mecklenburg*, 692 S.E.2d at 895 (citation omitted)]. "An agency decision which does not **decide the merits of a contested case** is not a final agency decision subject to judicial review." [*Bone*, 744 S.E.2d at 556] (internal marks omitted) (citing [*S.C. Baptist Hosp. v. S.C. Dep't of Health & Envtl. Control,* 353 S.E.2d 277, 279 (S.C. 1987]) (finding an order remanding matter to the administrative

[15] *See* note 8 above.

> agency was not a final order and was not immediately appealable). [emphasis supplied].

Finally, the substance of the ALC's decision on this question rendered it a final decision under *Spalt v. S.C. Dep't of Motor Vehicles*, 816 S.E.2d 579, 583 (S.C. 2018):

> **Whether an order is final depends**—as we explained in *Charlotte-Mecklenburg*—**on the substance of the order**: whether it "disposes of the whole subject matter of the action or terminates the particular proceeding or action, **leaving nothing to be done but to enforce by execution what has been determined**." [692 S.E.2d at 895]. [emphasis supplied].

CONCLUSION

For all the foregoing reasons, SCDC respectfully urges this Court to reverse the Court of Appeals' November 28, 2018 decision which dismissed SCDC's appeal of the two (2) final rulings from the ALC's January 20, 2016 final decision.

Likewise, SCDC respectfully urges this Court to reverse the ALC's final ruling that Torrence worked for ESCOD while he voluntarily participated in the federally certified PIECP project operated by SCDC at Evans.

Should, for whatever reason, it decline to reverse the ALC on this question, SCDC still respectfully urges this Court to issue a decision or order in which it explicitly declares that, under *Williams*, *Cartrette*, *Tomlin*, and *Bennett*, Torrence never worked for ESCOD while he voluntarily participated in the prison industries project SCDC operated at Evans.

SCDC next respectfully urges this Court to reverse the ALC's final ruling in which it first defined the term "prevailing wage" and then calculated the "prevailing wage" SCDC should have paid Torrence for his prison industries labor.

SCDC further respectfully urges this Court to, in the course of reversing the ALC on this question, remand the "prevailing wage" issue back to SCDC for further proceedings, which, at a minimum, should allow the parties and opportunity to introduce evidence into the record

reflecting the hourly wage(s) ESCOD paid its employees who performed some or all the job tasks as those performed by Torrence and his fellow inmate workers while they voluntarily participated in the prison industries project at Evans.

RESPECTFULLY SUBMITTED,

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