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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 BRIEF ON CERTIORARI**

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**TABLE OF CONTENTS**

I.	CONTRARY TO HIS RETURN, THE COURT OF APPEALS ERRED WHEN IT DISMISSED AS INTERLOCUTORY SCDC’S APPEAL OF THE ALC’S ORDER .....	1
II.	CONTRARY TO HIS RETURN, THE ALC ERRONEOUSLY DEFINED AND CALCULATED THE “PREVAILING WAGE” SCDC SHOULD HAVE PAID TORRENCE FOR HIS PRISON INDUSTRIES LABOR .....	5
III.	CONTRARY TO HIS RETURN, THE ALC RULED TORRENCE “WORKED FOR” ESCOD, AND SCDC PRESERVED THIS ISSUE FOR REVIEW .....	9
IV.	CONCLUSION .....	12

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 to its May 18, 2020 brief on certiorari in the instant matter.

As it did in its brief, SCDC respectfully urges this this Court to reverse the Court of Appeals’ November 28, 2018 decision which dismissed as interlocutory SCDC’s appeal of two (2) final rulings from the January 20, 2016 final decision issued by South Carolina Administrative Law Court [“ALC”] in the instant matter. (Apx. pp. 1036 – 50).

Contrary to the Court of Appeals’ November 18, 2018 decision, as well as the analysis and argument Torrence offered in his return, the ALC’s ruling from its January 20, 2016 order that Torrence worked for ESCOD, the private industry sponsor, while he participated in the prison industries project SCDC operated at Evans Correctional Institution constituted a final decision. Likewise, the ruling by which the ALC, in its January 20, 2016 order, defined and then determined the “prevailing wage” SCDC should have paid Torrence for his prison industries labor constituted a final decision.

The November 28, 2018 decision by the Court of Appeals is 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).

**I. CONTRARY TO HIS RETURN, THE COURT OF APPEALS ERRED WHEN IT DISMISSED AS INTERLOCUTORY SCDC’S APPEAL OF THE ALC’S ORDER**

SCDC respectfully begins its reply by addressing Torrence’s opposition to SCDC’s argument that the Court of Appeals erred in its November 28, 2018 decision by dismissing as interlocutory SCDC’s appeal of two (2) final rulings from the ALC’s January 20, 2016 order.

Torrence focused his attention on the final section of argument SCDC articulated in its May 18, 2018 brief (Brief, pp. 24 – 28), and he offered the following opposing argument (Return, p. 15):

**SCDC argues the judgment is final where there is nothing left to be done in the matter.** SCDC erroneously argues that the ALC’s [January 16, 2016] Order, “left open no question of fact concerning [my] employment status.” [Brief, p. 25]. Note that even SCDC cannot avoid using “employment” terminology in its [description] of the action(s).

SCDC’s argument here is moot where the ALC was clear [I] was NOT an employee; aside from the procedural bar.

Although the ALC decided questions of law involved in this matter, a final determination as to the methodology of determining the mean average wage (prevailing wage) by the OES Codes for the years [I] participated in the program has not been made and submitted to the Court. **This subject remains open.**

[I submit] that under [*Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep’t of Health and Env’l Control*, 692 S.E.2d 894 (S.C. 2010)], the order here was not final and did not dispose of the matter. **The ALC order remanded to [SCDC] to obtain wage data from [the South Carolina Department of Employment and Workforce (DEW)], calculate [the back pay it owes me] and pay [me].**

[emphasis supplied].

By so arguing, Torrence unintentionally, but nonetheless clearly, supported SCDC’s assertion that the Court of Appeals erroneously dismissed as interlocutory SCDC’s appeal of two (2) final rulings from the ALC’s January 20, 2016 order.

As SCDC illustrated in its brief (Brief, p. 8), this Court, in crafting its ruling in *Charlotte-Mecklenburg*, invoked *Adickes v. Allison & Bratton*, 21 S.C. 245 (1884), and, in *Adickes*, 21 S.C. at 258 – 59, the following applicable passages appeared:

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)].<sup>1</sup> 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].

In its January 20, 2016 order (Apx. p. 1045), the ALC concluded “that the ‘prevailing wage’ **equals** the mean average wage for an occupation.” [emphasis supplied]. Thus, the ALC explicitly defined the “prevailing wage” to be “the mean average wage for an occupation,” and, by defining the “prevailing wage,” the ALC explicitly acknowledged it had considered “an issue not yet addressed by South Carolina courts.” (Apx. p. 1044).

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<sup>1</sup> The *Ex Parte Farrars* court, 13 S.C. at 259, also offered the following applicable guidance:

The Supreme Court of the United States, in the case of *Forgay v. Conrad*, 6 How. 201, have declared the rule to be (the italics being ours): “When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, *or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court*, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.” This rule is re-affirmed in the same language in the more recent case of *Thomson v. Dean*, 7 Wall. 342. [bold emphasis supplied; italicized emphasis in original].

Of precise import to the argument Torrence offered in his return, the ALC, as contemplated by the first of the above-quoted paragraphs from *Adickes*, began to *completely fix the rights of the parties* (i.e. Torrence and SCDC), by defining the “prevailing wage” as “the mean average wage for an occupation.”

Having started to *completely fix the rights of the parties* by defining the “prevailing wage” in its January 20, 2016 order, the ALC finished the task by ruling SCDC must pay Torrence “the mean average South Carolina wage of an electronic assembler” (Apx. p. 1046).

In reaching this ruling, the ALC ruled Torrence performed the job of an electronic assembler, and it did so by “referring to the appropriate Occupational Employment Statistics (OES) or OCC code used by [DEW].” (Apx. p. 1045). In reaching this ruling, the ALC also ruled that the “mean average wage” in our state for an electronic assembler, derived from data collected by DEW for the “appropriate” OES or OCC code attributable to electronic assemblers, equaled \$8.82 per hour in 1997 and \$9.92 per hour in “1998-1999.” (Apx. pp. 1045 – 46).

Thus, contrary to the assertion from his return that “the subject remains open,” the ALC *completely fixed the rights of the parties* for three (3) years by ruling SCDC must pay Torrence “the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999” (Apx. p. 1046), which the ALC had ruled, as explained immediately above, was \$8.82 per hour in 1997 and \$9.92 per hour in both 1998 and 1999.

The ALC also *completely fixed the rights of the parties* for all other years in which Torrence participated in the prison industries project SCDC operated at Evans by also ruling SCDC must pay him “the mean average wage reflected by [OEC Code 93114] or its counterpart for the years data is not contained in the record.” (Apx. p. 1046).

Torrence conceded as much by asserting in his return that the ALC remanded the instant matter back to SCDC for SCDC to simply obtain “wage data from DEW, calculate [the back pay it owes him] and pay [him].”

*As there’s nothing else left to do* for 1997, 1998, and 1999, the ALC’s decision on the “prevailing wage” SCSC owed Torrence for these three (3) years is final.

Likewise, *there’s nothing else left to do* for all other years in which Torrence participated in the project, except for SCDC having to obtain from DEW data for “the mean average wage reflected by [OEC Code 93114] or its counterpart” for said years and then paying Torrence said wage(s) as the ALC ordered in its January 20, 2016 order. Thus, under the maxim from *Adickes* (i.e. *that is certain which may be made certain*), the ALC’s decision on the “prevailing wage” SCSC owed Torrence for all years aside from 1997, 1998, and 1999, is also is final.

Given such realities, the Court of Appeals erred in its November 28, 2018 decision by dismissing as interlocutory SCDC’s appeal of two (2) final rulings from the ALC’s January 20, 2016 order, and SCDC respectfully urges this Court to reverse the Court of Appeals’ decision.

## **II. CONTRARY TO HIS RETURN, THE ALC ERRONEOUSLY DEFINED AND CALCULATED THE “PREVAILING WAGE” SCDC SHOULD HAVE PAID TORRENCE FOR HIS PRISON INDUSTRIES LABOR**

In its brief (Brief, p. 15, n. 8), SCDC observed as follows:

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).

The record was not, as Torrence asserted in footnote 2 from his brief to the Court of Appeals, replete with information for the ALC to formulate a calculation of the “prevailing

wage,” because the ALC, in its January 20, 2016 order, remanded the instant matter back to SCDC with two (2) orders: (1) for SCDC to obtain data from DEW for the “prevailing wage” (i.e. “the mean average wage reflected by [OEC Code 93114] or its counterpart”) for all years Torrence participated in the prison industries project at Evans aside from 1997, 1998, and 1999, and (2) for SCDC to pay Torrence the “prevailing wage” as defined by the ALC (i.e. “the mean average wage reflected by [OEC Code 93114] or its counterpart”).

Torrence addressed SCDC’s above-quoted observations in his return (Return, p. 11):

SCDC mischaracterizes [my] words and intent ... when it cites the last sentence of footnote 2 [from my brief to the Court of Appeals], (Apx. p. 1152) as a request to abuse the Court’s discretion. [Footnote 2] is a reference to [my] prayer for relief [Apx. pp. 780 – 81] indicating the nexus of the original agency complaint – SCDC’s failure to pay the correct prevailing wage for [my] labor (Apx. pp. 16-17, 61).

None of the context Torrence articulated in the above-quoted passage from his return appeared in footnote 2 from his brief to the Court of Appeals. Moreover, the prayer for relief to which he referred in his return (Apx. pp. 780 – 81) appeared in Torrence’s “Original Brief” to the ALC dated March 26, 2015 (Apx. pp. 728 – 90). Further, in his third enumerated demand for relief (Apx. p. 780), Torrence articulated the following:

**[SCDC] shall determine from [the ALC] the prevailing wage** in the private sector for the work [I] performed during [my] participation in the prison industries program and any change in the rate during [my] participation until the completion of the project or employment at issue. [italicized and bold emphasis supplied].

With all due respect to his advocacy, SCDC respectfully asserts the above-quoted demand for relief from his “Original Brief” to the ALC clearly shows, as he admitted in footnote 2 from his brief to the Court of Appeals, Torrence asked the ALC to both define and then calculate “prevailing wage” SCDC should have paid him for his prison industries labor.

Moreover, the ALC, in its January 20, 2016 order (Apx. p. 1044), did exactly what Torrence asked it to do in his March 26, 2015 “Original Brief” (Apx. p. 780):

[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].

As it defined and then calculated the “prevailing wage” SCDC should have paid Torrence for his prison industries labor, the ALC, as SCDC demonstrated in its brief (Brief, pp. 19 – 20), committed a series of errors interpreting and applying material in the record attributable to Rebecca Eleazer, a representative from DEW’s predecessor agency, the South Carolina Employment Security Commission [“ESC”].

As SCDC explained in its brief (Brief, p. 19), Ms. Eleazer provided deposition testimony during the litigation of the declaratory judgment action filed in circuit court in which Torrence first presented his wage claims. (Apx. pp. 539 and 610 – 645).<sup>2</sup>

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), and, most importantly, she testified the ESC *did not* “**provide or publish a wage that’s called prevailing wage,**” *nor did it* “**have a wage classification called prevailing wage.**” [emphasis supplied]. (Apx. p. 623).

In his return (Return, pp. 12 – 13), Torrence asserted SCDC “[mischaracterized] Ms. Eleazer’s deposition testimony and attempts to introduce or characterize testimony not in the record here.”

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<sup>2</sup> See *Torrence, et al., v. S.C. Dep’t of Corr.*, Case No. 2001-CP-40-3409 (S.C. Cir. Ct. May 31, 2005), and *Torrence, et al., v. S.C. Dep’t of Corr.*, 646 S.E.2d 866 (S.C. 2007).

Torrence's assertions, however, are meritless, because (1) Torrence himself introduced excerpts and exhibits from Ms. Eleazer's August 10, 2004 deposition testimony (Apx. pp. 533, 609 – 47, 656 – 57, and 659 – 61) into the record as a supporting appendix to the Step 2 grievance appeal he submitted to SCDC in 2011 (Apx. pp. 519 – 29 and 532 – 688) and, (2) as reflected by the excerpt from her deposition transcript, Ms. Eleazer actually testified the ESC *did not* “provide or publish a wage that’s called prevailing wage,” *nor did it* “have a wage classification called prevailing wage.” (Apx. p. 623).

In his return (Return, p. 13), Torrence also asserted “[t]he ALC did not misapprehend Mr. Eleazer’s testimony but applied a sound analysis directed by state and federal statutes on what constitutes the prevailing wage.” Torrence is technically correct when he asserts the ALC did not misapprehend Ms. Eleazer’s deposition testimony, but only because the ALC completely overlooked the above-quoted passages from her deposition testimony.

The folly of the ALC’s efforts to define and then calculate the prevailing wage SCDC should have paid Torrence for his prison industries labor is acutely revealed by the following assertion from his return (Return, p. 14): “SCDC cannot perform the wage verification ... it must be the controlling agency, DEW.”

Thus, by Torrence’s own admission, the ALC both defined and calculated a term, namely the “prevailing wage,” which DEW, the successor “controlling agency” to the ESC, did not provide, publish, define, calculate, or even quantify.

Given such realities, the ALC erred in its January 20, 2016 order by defining and calculating the “prevailing wage” SCDC owed Torrence for his prison industries labor, it respectfully urges this Court to reverse the ALC’s final decision on this issue.

### III. CONTRARY TO HIS RETURN, THE ALC RULED TORRENCE “WORKED FOR” ESCOD, AND SCDC PRESERVED THIS ISSUE FOR REVIEW

In his return (Return, p. 3), Torrence asserted “the ALC did not rule [he] was an employee [of ESCOD], but utilized phraseology of South Carolina statutes and precedent.<sup>3</sup>”

As SCDC observed in its brief (Brief, pp. 11 – 12), the ALC addressed the parties’ dispute on this issue 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 [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].

Regarding the above-quoted footnote from the ALC’s January 20, 2016 order, Torrence asserted as follows in his return (Return, p. 8):

... the intent and purpose of the ALC was to describe [my] labor in a work environment, not to declare that [I] was an employee of [ESCOD]. The ALC’s position was clear that [I] was “not an employee” and any descriptives in ordering the calculation and payment of wages was common terms associated with or related to the facts of the case. [SCDC] position is based on a mischaracterization of the ALC’s specific holding [I am] not an employee, nor would the ALC address such argument.

Contrary to his assertions, the ALC’s footnote speaks for itself, and the ALC did not explicitly declare that Torrence wasn’t an employee of ESCOD or that Torrence never worked for ESCOD.

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<sup>3</sup>Torrence also discussed the ALC’s “phraseology” later in his return. (Return, pp. 8 – 9).

Instead, as SCDC asserted in its brief (Brief, p. 25), the ALC engaged in an “on the one hand but on the other” analysis in the above-quoted footnote from its January 20, 2016 order, and, despite such purported neutrality, the ALC explicitly declared in its order that he worked for ESCOD. (Apx. pp. 1046 and 1050).

Torrence alternatively asserted in his return that even if the ALC ruled he worked for ESCOD while he participated in the prison industries project SCDC operated at Evans, SCDC “failed to preserve this issue for consideration by the ALC, and by extension, the Court of Appeals.” (Return, pp. 4 – 5).

The record flatly contradicts Torrence’s assertion, as, SCDC, from the inception of the instant litigation, challenged and preserved its challenge to the assertion that Torrence was an employee of ESCOD or otherwise worked for ESCOD. In his response to his original Step 1 grievance, the responsible SCDC official asserted as follows (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 v. S.C. Dep’t of Corr.*, 602 S.E.2d 51 (S.C. 2004)] nor [*Wicker v. S.C. Dep’t of Corr.*, 602 S.E.2d 56 (S.C. 2004)] declared that you or inmates in your position were “employed by SCDC, ESCOD, or, for that matter, any other agency or company. I make this conclusion in reliance [on] the South Carolina Supreme Court’s decision in [*Williams, et al., v. S.C. Dep’t of Corr. & Williams Technologies, 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.

Torrence did not assert in his Step 2 grievance appeal that he was employed by or otherwise worked for ESCOD, leaving the responsible SCDC official no assertions to refute. (Apx. pp. 519 – 37). Additionally, the responsible SCDC official who denied Torrence’s Step 2 concurred with the entirety of the response he received to his Step 1. (Apx. p. 537).

SCDC raised this issue in the brief it filed July 9, 2012 with the ALC (Apx. p. 90). Later, in response to Torrence’s arguments and assertions, SCDC challenged any assertion he was employed by ESCOD or otherwise worked for ESCOD in the brief it filed June 29, 2015 with the ALC. (Apx. pp. 813 – 814).

Pursuant to its appeal of the ALC’s January 20, 2016 order, SCDC again raised this issue in its January 3, 2017 brief to the Court of Appeals (Apx. pp. 1093 and 1105), and, after the Court of Appeals issued its November 28, 2018 decision currently subject to review on certiorari, and SCDC again raised this issue in its January 10, 2019 petition for rehearing to the Court of Appeals. (Apx. pp. 1242 – 45).

Thus, the ALC erroneously ruled in its January 20, 2016 order that Torrence “worked for” ESCOD, and the voluminous record before this Court clearly shows SCDC adequately preserved its appeal of the ALC’s erroneous ruling. Accordingly, SCDC respectfully urges this Court to reverse the ALC’s final decision on this issue.

#### **IV. CONCLUSION**

For the foregoing reasons, as well as the reasons articulated in its May 18, 2020 brief on certiorari, SCDC again respectfully urges this Court to reverse the Court of Appeals’ November 28, 2018 decision which dismissed as interlocutory SCDC’s appeal of the two (2) final rulings from the ALC’s January 20, 2016 final decision.

For the foregoing reasons, as well as the reasons articulated in its May 18, 2020 brief on certiorari, SCDC again respectfully urges this Court to reverse the ALC’s ruling that Torrence worked for ESCOD while he voluntarily participated in the federally certified PIECP project operated by SCDC at Evans.

For the foregoing reasons, as well as the reasons articulated in its May 18, 2020 brief on certiorari, SCDC again 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.

**RESPECTFULLY SUBMITTED:**

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