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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

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

Appellate Case No. 2018-001322

RECEIVED
JUN 03 2019
SC Court of Appeals

Elliott Hatton, #158373 Respondent,

v.

South Carolina Department of Corrections Appellant.

RECORD ON APPEAL

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Counsel for the Appellant

Elliott Hatton, #158373
Perry Correctional Institution Q-2-A-124
430 Oaklawn Road
Pelzer, South Carolina 29669
pro se Respondent

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**SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
INMATE GRIEVANCE FORM
STEP 1**

INMATE NAME: ELLIOTT HATTEN

SCDC NUMBER: 158373

INSTITUTION: PLCCY C.T.

HOUSING UNIT: G-4-B-211

WORK ASSIGNMENT: P.I.

25 2007

JUL 2 2007

ECI-1215-07

Office Use Only

Grievance No. PLC1070-07

Code: General MY

Policy

Disc. Hear

Class

Date Received JUN 25 2007

IGC Initials J.M.L.C.

9/4

STATE GRIEVANCE (include documentation, and date of incident; if SCDC Policy, indicate which policy)
GA-01-12. S.C. Dept of corrections is in violation of wages earned by me, and withheld illegally by SCDC. I grieved all wages owed to me by SCDC, under the case Thomas Torrence et. AL. V. SCDOC, under S.C. Code Ann. 24-3-40(A) SCDC owes me back wages of \$1.92 for every hour I worked for Insilco at Evans Inst. along with the training wages that I worked 320 hrs for less than the prevailing wages, under Statute 24-3-430(D) through the wicker case 360 S.C. At 424, 602 S.E. 2d at 57. along with immediate access to monies held in Escrow that I earned that is being held by SCDC. along with the proper interest on all monies owed to me by SCDC.

ACTION REQUESTED: that SCDC pay me \$1.92 for every hour that I worked for private sector at Evans com Inst. that I be paid by SCDC for training wages I worked for less than prevailing wage for 320 hrs. that the monies held in Escrow be paid to me by SCDC. along with proper interest on all monies owed to me by SCDC.

SPECIFY HOW AND WHEN INFORMAL RESOLUTION WAS ATTEMPTED BY GRIEVANT:
through case, Thomas Torrence, et AL. V SCDOC and the state of South Carolina under Statute S.C. Code Ann. 24-3-40(A) Supreme court opinion No. 26323 and wicker case, 360 S.C. At 424, 602 S.E. 2d at 57. Statute S.C. Code Ann. 24-3-430(D) and S.C. Code Ann. 24-3-40(B)(2).

Elliott Hatten 6-21-07
Grievant Signature Date

ACTION TAKEN BY IGC:

Forwarded to Evans 7/18/07 per instructions from Atty Lake Summers. just

See Wardens response

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

SCDC 10-5 (Rev. November 1997)

(CONTINUED ON REVERSE SIDE)

Chris Hadden 5-29-2007
IGC Signature Date
BC

Grievant Signature Date

WARDEN'S DECISION AND REASON:

SEE ATTACHED

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

Elmer [Signature] JUN 21 2012
Grievant Signature Date

Mark [Signature] 6-1-12
Warden Signature Date

A. [Signature]
IGC Signature Date

Served By: *[Signature]*
JUN 21 2012

INSTRUCTIONS FOR COMPLETING STEP 1 GRIEVANCE FORM

1. An informal resolution shall be attempted prior to the filing of Step 1.
2. Complete each section in its entirety, writing only in the space provided for inmate use.
3. Only one (1) issue is to be addressed on each form.
4. Submit the completed form to the Institutional Grievance Coordinator within fifteen (15) days of an alleged incident; policy grievances at any time. Do not write in the space provided for the Warden's response.
5. If you are not satisfied with the Warden's decision, you may appeal to the appropriate responsible official within five (5) days of your receipt of the Warden's decision, via the Institutional Grievance Coordinator.

Step 1 Grievance Response
May 14, 2012

Name	SCDC #	Grievance #	Project
Hatton, Elliott	158173	ECI-1215-07	Evans CI/ESCOD

I have reviewed your Step 1 grievance bearing your signature and dated June 21, 2007. The responsible SCDC official provided your Step 1 with the following designation: ECI-1215-07.

In your Step 1, you first invoked SCDC's Inmate Grievance System established under SCDC Policy Number GA-01.12. You then asserted as follows:

[SCDC] is in violation of wages earned by me and withheld illegally by SCDC. I grieve all wages owed to me by SCDC, under the case Thomas Torrence, et al., v. [SCDC], under S.C. Code Ann. 24-3-40(A). SCDC owes me back wages of \$1.92 for every hour for INSILCO at Evans Inst. Along with the training wages that I worked for 320 hours for less than prevailing wage, under statute 24-3-430(D) through the Wicker case, 360 S.C. at 424, 602 S.E.2d at 57. Along with immediate access to monies held in Escrow that I earned that is being held by SCDC. Along with proper interest on all monies owed to me by SCDC.

You then requested the following action in your Step 1:

That SCDC pay me \$1.92 for every hour that I worked for private sector at Evans Corr. Inst. That I be paid by SCDC for training wages I worked for less than prevailing wage for 320 hours. That the monies held in Escrow be paid to me by SCDC. Along with proper interest on all monies owed to me by SCDC.

Finally, you specified the following authorities as to how and when you attempted informal resolution of these claims in your Step 1:

Through case, Thomas Torrence, et al. v. [SCDC] and the State of South Carolina. Under statute S.C. Code Ann. 24-3-40(A), Supreme Court opinion no. 26328 and Wicker case, 360 S.C. at 424, 602 S.E.2d at 57. Statute S.C. Code Ann. 24-3-430(D) and S.C. Code Ann. 24-3-40(B)(2).

Your prison industries participation and pay records were reviewed by the responsible officials at SCDC Headquarters in Columbia. These records confirm that you voluntarily participated in the prison industries project operated by SCDC at Evans in which ESCOD, and later INSILCO, participated as the private industry sponsor before SCDC ended its policy of paying inmates a "training wage" for their initial 320 hours of labor. SCDC ended its policy of paying a "training wage" on July 1, 1999.

These pay records reflect that SCDC began paying you at the rate of at least \$5.15 per hour on or about December 16, 1999 for the labor you voluntarily provided in the project at Evans, and they reflect that SCDC remitted its final payment to you on or about March 31, 2006.

Step 1 Grievance Response
May 14, 2012

Name	SCDC #	Grievance #	Project
Hutton, Elliott	158373	ECI-1215-07	Evans CI/ESCOD

After carefully considering the arguments you made justifying the action you request, I deny the prison industries pay claims from your Step 1 grievance.

Two (2) decisions issued by the South Carolina Supreme Court in 2004 apply to the claims you presented in your Step 1: Adkins v. S.C. Dep't of Corr. and Wicker v. S.C. Dep't of Corr. Both of these cases discussed S.C. Code Ann. Section 24-3-40, Section 24-3-310, *et seq.* and, specifically, Section 24-3-430(D). The South Carolina Supreme Court issued these decisions on August 23, 2004. You specifically mentioned Wicker in your Step 1.

Adkins and Wicker recognized that inmates possessed a pre-existing right to file administrative grievances concerning their prison industries pay. Under Wicker, such grievances must be filed, processed, and determined in accordance with the provisions of the agency's Inmate Grievance System Policy.

In Torrence, which you also specifically mentioned in your Step 1, the South Carolina Supreme Court issued another decision which applies to your claims. In Torrence, the South Carolina Supreme Court again acknowledged that inmates could file grievances in accordance with the agency's Inmate Grievance System, currently designated as Policy Number GA-01.12, by which they could challenge their prison industries pay.

SCDC has published editions of its Inmate Grievance System Policy for nearly 20 years if not longer. Starting in the mid-1990s, SCDC's Inmate Grievance System Policy consisted of two (2) parts: Policy Number PS-10.01 and Policy Number PS-10.01 (OP). ¶ 14(a) of Policy Number PS-10.01 (OP) required that inmates submit their Step 1 grievance forms "within seven (7) days of the alleged incident." Exceptions to the deadline appeared in ¶ 14(g) and ¶ 15 of the policy.

On October 1, 1997, SCDC issued new editions of Policy Numbers PS-10.01 and PS-10.01 (OP). In the October 1, 1997 edition of Policy Number PS-10.01 (OP), SCDC changed ¶ 14(a) to require that inmates submit their Step 1 grievance forms "within 15 days of the alleged incident." Again, exceptions to this deadline appeared in ¶ 14(g) and ¶ 15 of the policy.

On January 30, 1998, SCDC issued a new edition of its Inmate Grievance System Policy, and, just as before, the policy consisted of two (2) parts. However, SCDC re-designated these two (2) parts as Policy Number GA-01.12 and Policy Number GA-01.12 (OP). ¶ 14(a) of Policy Number GA-01.12 (OP) required that inmates submit their Step 1 grievance forms "within 15 days of the alleged incident." Once again, exceptions to this deadline appeared in ¶ 14(g) and ¶ 15 of the policy.

The agency consolidated Policy Numbers GA-01.12 and GA-01.12 (OP) into a single policy when it issued a new edition of Policy Number GA-01.12 on April 1, 2000, and the 15-day filing deadline appeared in this edition of the policy as well as every edition issued since April 1, 2000.

I conclude, after reviewing your Step 1 in light of Adkins, Wicker, Torrence, the seven (7) day filing deadline in ¶ 14(a) of the mid-1990s version of Policy Number PS-10.01 (OP), the 15-day

Step 1 Grievance Response
May 14, 2012

Name	SCDC #	Grievance #	Project
Hutton, Elliott	158373	ECI-1215-07	Evans C/ESCOD

filing deadline from ¶ 14(a) of the October 1, 1997 edition of Policy Number PS-10.01 (OP), as well as the exceptions to these deadlines from ¶ 14(g) and ¶ 15 of these editions, that you did not submit your Step 1 grievance within either seven (7) days or even 15 days of the incident upon which you anchored the claims you presented in your Step 1, namely the date upon which SCDC both first began paying you for your prison industries labor and began applying statutorily mandated deductions to your pay pursuant to S.C. Code Ann. Section 24-3-40.

The grievance filing deadline established in every edition of the agency's Inmate Grievance System Policy applied and continues to apply to nearly every aspect of inmate activity, and no special exception applies to prison industries pay disputes. Consequentially, the deadline applies to your grievance.

Moreover, you filed your Step 1 approximately 7 1/4 years after you began participating in the prison industries project operated by SCDC at Evans in which ESCOD participated as the private industry sponsor and over one (1) year after you concluded your participation in this project. For that matter, you filed your Step 1 over 2 1/2 years after the South Carolina Supreme Court issued its decisions in Adkins and Wicker. Clearly, you exceeded any reasonable time frame associated with filing a grievance under the agency's Inmate Grievance System Policy.

In making this determination, I rely on the following decisions from the South Carolina Administrative Law Court ("ALC"): Daughtry, #250139, v. S.C. Dep't of Corr., Docket No. 04-ALJ-00783-AP; Grimmett, Jr., #102226, v. S.C. Dep't of Corr., Docket No. 05-ALJ-04-00757-AP; Larrimore, #238126, v. S.C. Dep't of Corr., Docket No. 09-ALJ-04-00470-AP; Manigault, #280550, v. S.C. Dep't of Corr., Docket No. 05-ALJ-04-00756-AP; McLemore, #127966, v. S.C. Dep't of Corr., Docket No. 09-ALJ-04-00023-AP; Pipkin, #283616, v. S.C. Dep't of Corr., Docket No. 05-ALJ-04-00733-AP; Sapp, #218694, v. S.C. Dep't of Corr., Docket No. 05-ALJ-04-00732-AP; Sumter, #242379, v. S.C. Dep't of Corr., Docket No. 05-ALJ-04-00749-AP; Smiley, #262734, v. S.C. Dep't of Corr., Docket No. 08-ALJ-04-00571-AP; Williams, #187203, v. S.C. Dep't of Corr., Docket No. 06-ALJ-04-622-AP; and Wright, #200123, v. S.C. Dep't of Corr., 2006 WL 1430140 (ALJD 2006).

I also rely upon the following decisions issued by the ALC since March 1, 2012: Ackerman, #266928, et al., v. S.C. Dep't of Corr., Docket Nos. 07-ALJ-04-00444-AP, et seq.; Arnold, #238375, v. S.C. Dep't of Corr., Docket No. 09-ALJ-04-00200-AP; Bridgeman, #130350, v. S.C. Dep't of Corr., Docket No. 09-ALJ-04-00610-AP; Gibson, #241326, v. S.C. Dep't of Corr., Docket No. 10-ALJ-04-00007-AP; Jones, #130817, v. S.C. Dep't of Corr., Docket No. 09-ALJ-04-0506-AP; Keitt, #277284, v. S.C. Dep't of Corr., Docket No. 09-ALJ-04-0519-AP; and Lampley, #97724, v. S.C. Dep't of Corr., Docket No. 09-ALJ-04-00489-AP.

Additionally, in light of the chronology associated with the filing of your Step 1, I find that your claim is barred by the doctrine of laches.

To the extent that you claim in your Step 1 grievance that you were required to file a grievance, I conclude that neither the opinions in Adkins or Wicker nor the decision in Torrence ordered you

Step 1 Grievance Response
May 14, 2012

Name	SCDC #	Grievance #	Project
Horton, Elion	158373	ECI-1215-07	Evans CI/ESCOD

or any other inmate in your position to file a grievance demanding the relief you demand in your Step 1. These opinions simply recognized your pre-existing right to file grievances presenting prison industries pay claims if you desired.

To the extent that you claim in your Step 1 that you worked for or were otherwise "employed" by ESCOD or INSILCO, I conclude that you never "worked" for nor were you ever "employed" by either ESCOD or INSILCO. I also conclude that neither Adkins nor Wicker declared that you or inmates in your position were "employed" by SCDC, ESCOD, INSILCO or, for that matter, any other agency or company. I make this conclusion in reliance of the South Carolina Supreme Court's decision in Darrell Williams, Class Representative, et al., v. SCDC and Williams Technologies, Inc., 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 and, later, INSILCO.

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.

Additionally, I deny your claim that you are entitled to any relief under Section 24-3-430(D), the so-called "prevailing wage" provision. Specifically, as the prison industries project in which you participated at Evans was a project for which SCDC received certification under the federal government's Prison Industries Enhancement Certification Program ("PIECP"), I conclude that the provisions of Section 24-3-410(B)(7) – not Section 24-3-430(D) – applied to the rate of pay SCDC was required to remit to you under Section 24-3-40(A) for the labor you voluntarily provided to this project. In making this conclusion, I rely upon the decision issued by the circuit court in Adkins, which concluded that inmates who participated in an identically certified SCDC prison industries project did not possess a viable claim for back wages or higher wages under the provisions of Section 24-3-430(D).

Even if you have a viable claim for relief under § 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 prison industries project it operates at Evans. 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 applicable 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.

Again, your prison industries pay records reflect that, after you completed the first 320 hours of your prison industries labor for which SCDC paid you "training wages," SCDC paid you an hourly rate of at least \$5.15 beginning on or about December 16, 1999. These same records also

Step 1 Grievance Response
May 14, 2012

Name	SCDC #	Grievance #	Project
Horton, Ellison	158373	ECI-1215-07	Evans CI/ESCOD

reflect that SCDC continued to pay you at least \$5.15 per hour for the entirety of the time you participated in the prison industries program until on or about March 31, 2006.

The federal minimum wage was \$5.15 per hour effective September 1, 1997, and it remained at that rate until July 23, 2007. Thus, SCDC paid you at least the federal minimum wage for the labor you voluntarily provided to the prison industries project it operates at Evans.

Again, however, I find that you did not timely file your grievance in which you demanded any back pay allegedly owed to you by SCDC including any back pay associated with the period of time SCDC paid you a "training wage."

I also conclude that SCDC does not owe you \$1.92 or any other amount for every labor hour you voluntarily provided to the federally certified prison industries project operated by SCDC at Evans. Under the contracts struck between SCDC and ESCOD and/or INSILCO, SCDC legitimately charges ESCOD and/or INSILCO an hourly rate for "overhead cost" in addition to the hourly rate SCDC pays inmates in accordance with both state and federal law.

The circuit court in Adkins concluded that SCDC's practice of invoicing private industry sponsors, like ESCOD and INSILCO, such an hourly "overhead cost" was accepted by BJA, the federal agency responsible for certification of both the prison industries project at issue in Adkins and the prison industries project at issue in the instant case.

SCDC's assessment of this "overhead cost" does not violate any applicable South Carolina statute, because the assessment of this cost allows SCDC to comply with a variety of the applicable prison industries statutes, including Section 24-3-400. These statutes, including Section 24-3-400, either directly or indirectly compel SCDC to collect an hourly "overhead cost" or "administrative charge" from private industry sponsors, like ESCOD and INSILCO, so that it may cover the expenses it incurs as a consequence of operating the project in which you voluntarily participated at Evans.

Furthermore, I find that your claim of being entitled to complete and immediate access to your escrowed wages pursuant to § 24-3-40(B)(2) is without merit. Section 24-3-40(A)(5) requires SCDC to deduct 10% of an inmates wages and hold them "in an interest bearing escrow account for the benefit of the prisoner." Section 24-3-40(B) directs SCDC to "return a prisoner's wages held in escrow pursuant to [§ 24-3-40(A)]" only when an inmate leaves SCDC's custody. When an inmate is serving a life sentence, Section 24-3-40(B)(2) provides the inmate with "the option of having his escrowed wages included in his estate or distributed to the persons or entities of his choice." This provision directs SCDC to distribute these escrowed monies only upon the inmate's death, and not prior to that event. Nothing in any provision of Section 24-3-40(B) authorizes an inmate to have complete and immediate access to any of these monies while still lawfully held in SCDC's custody. Any other interpretation would conflict with the remaining provisions of Section 24-3-40(B).

Step 1 Grievance Response
May 14, 2012

Name	SCDC #	Grievance #	Project
Hutton, Elliott	158373	ECI-1215-07	Evans C/ESCOD

To the extent that you claim that SCDC is denying you interest on your escrowed wages, I find this claim is also without merit. SCDC complies with Section 24-3-40(A)(5) by depositing the interest you have earned on your monies held in escrow into your account every month. Each pay period you receive an account statement showing the amount of interest deposited into your account.

To the extent you claim SCDC has unconstitutionally denied you of your property interest in these wages without due process of law, I deny your claim. Under Wicker, you and other inmates in your position may exercise your due process rights and litigate your pay disputes with SCDC through SCDC's inmate grievance system. Therefore, SCDC has not denied you due process of law and the filing deadline from the editions of the agency's Inmate Grievance System Policy applies to your claim.

Finally, to the extent that you demand "interest" in your grievance, no decision of the South Carolina Supreme Court nor any provision of any edition of the agency's Inmate Grievance System Policy entitles you or any other inmate to any pre or post-judgment interest, or for that matter, costs or attorneys' fees in connection with SCDC's review and processing of your grievance.

Therefore, for all of the above stated reasons, I deny the claims you articulated your Step 1 grievance designated as ECI-1215-07 in their entirety.

**SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
INMATE GRIEVANCE FORM**

STEP 2

INMATE NAME: Elliott Hutton
 SCDC NUMBER: 158373
 INSTITUTION: Perry CI
 HOUSING UNIT: Q1-B212
 WORK ASSIGNMENT: P.E. JUN 25 2012 PB

Office Use Only
 Grievance No. EC-1215-07
 Code: General MM
 Policy _____
 Disc. Hear. _____
 Class. _____
 Date Received 6-22-12
 IGC Initials SM

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

I'm appealing my step 1 ~~decision~~ decision on this grievance. My deprivation of camp was violated when step 1 wasn't answered in 180 days and that's with ext. It took this grievance 5 years to be answered. Appealing all issues in step 1.

Elliott Hutton 6-22-12
 Grievant Signature Date

RESPONSIBLE OFFICIAL'S DECISION AND REASON:

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

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

Therefore, your grievance is denied.

You may appeal this decision under the Administrative Procedures Act to the Administrative Law Court. In order to appeal you must fill out the attached Notice of Appeal Form (Form) and submit it as instructed on the Form within 30 days of receipt.

[Signature] 3/25/16 Date

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

Grievant Signature

Date

IGC Signature

Date

(SEE REVERSE SIDE FOR INSTRUCTIONS)

SCDC 10 SA (November 1997)

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

RECEIVED

APR 12 2016

Elliott Hatton

Appellant,

vs. [REDACTED]

South Carolina Department of Corrections,

Respondent.

GENERAL COUNSEL
NOTICE OF APPEAL

DOCKET NO. -ALJ-04-
GRIEVANCE NO.: FCT 12.15-07

Notice is hereby given that ELLIOTT HATTON does hereby appeal the final decision of the South Carolina Department of Corrections dated 3-28-16 and received on 4-7-16, a copy of which is attached. A general statement of the grounds for appeal is (See S.C. Code Ann. § 1-23-380(A)(6)):

I APPEAL for the FACT SCDC
IS IN VIOLATION OF WAGES EARNED BY ME, AND WITH HELD
ILLEGALLY BY SCDC I GRIEVED ALL WAGES OWED TO ME BY SCDC.
~~AT THAT TIME~~ UNDER CASE THOMAS TORRENCE, et AL. v. SCDC UNDER
SC CODE ANN. 24-3-40(A) SCDC OWES ME BACK WAGES OF
\$192 for every hour I worked for INSILCO AT EVANS INSTITUTION
(OR PEGGY) ALONG WITH PROPER INTEREST ON ALL MONIES OWED TO ME
BY SCDC. Note To Court SCDC has held this grievance for
9 years

ELLIOTT HATTON 158373

Appellant's Name P.O. Box 1-1112

430 CARLAW RD.

Mailing Address PELZER SC 29669

Signed Elliott Hatton

4-8-2016

Dated

City, State, Zip Code

CERTIFICATE OF SERVICE

I hereby certify that ELLIOTT HATTON (your name), on the 8 day of April, 2016, in Pelzer (city), South Carolina, served a copy of the foregoing Notice of Appeal on all parties to this matter by depositing the same in the United States Mail, postage paid, or in the mail room of the undersigned's institution and addressed as follows:

Name of person/Agency served: DAVID TATARSKY SCDC ATTORNEY

Address: 4444 Broad River Road

City, State, Zip Code: Columbia, SC 29221

Print your name: ELLIOTT HATTON
(See reverse side for instructions)

Sign your name: Elliott Hatton

State of South Carolina
Administrative Law Court

Elliot Matton SCDC# 158373,
Appellant,
and
South Carolina Department of
Corrections,
Respondent,

) Case No.: 16C0296
)
) Appellant's Brief in support of
) Appeal
)
)
)
)
)
)

RECEIVED

JUL 21 2016

GENERAL COUNSEL

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(803) 896-8508

Appellant's Brief in support of Appeal - 1

State of South Carolina
Administrative Law Court

Elliot Hatton SCDC# 158373,	) Docket No: 16C0296
	)
Appellant,	) Appellant's Brief in support of
and	) Appeal
	)
South Carolina Department of	)
Corrections,	)
	)
Respondent	)
	)

To: Clerk of Administrative Law Court and SCDC attorney David Tatarsky:

Pursuant to Rule 60 of the South Carolina procedure for administrative Law court ("ALC Rules") Appellant Elliot Hatton, respectfully submits this brief in support of his appeal of Respondent South Carolina Department of Corrections ("SCDC") final denial of his grievance, ECI 1215-07.

Statement of issues on Appeal

Whether SCDC erred in denying Mr. Hatton grievance for back wages owed to owed to Mr. Hatton for his work in the Prison Industries Project at the Evans Correctional Institution

Statement of the case

Mr. Hatton participated in the Prison Industries Project ("1st ESCOD") operated by SCDC at Evans Correctional Institution for 3 years and 2 months. (Step 1 Grievance) Mr. Hatton worked at Evans Correctional Institution. The Prison Industries Project is federally certified and operates under various state statutes,

Appellant's Brief in support of Appeal - 2

including S.C. Code. ANN §24-3-430, Also known as the "prevailing wages statute", "which mandates that all inmates participating in the project earn at least "the prevailing wage work of a similar nature in the private sector". S.C. Code. ANN §24-3-430 (D); see also, S.C. Code. ANN §24-3-430, 24-3-315.

SCDC paid less than the prevailing wage during the training period. Moreover, SCDC withheld \$1.92 per hour for the entirety of his work with the Project. SCDC denied Step 1 and Step 2 of my grievance.

Argument

I. SCDC erred in denying Mr. Hatton grievance for back wages owed to Mr. Hatton for his work in the Prison Industries Project. SCDC's denial of Mr. Hatton is flawed for multiple reasons. (1) SCDC failed to pay me the prevailing wage in accordance with § 24-3-430 (D) during his work in the project, and (2) SCDC was not entitled to collect \$1.92 per hour from Mr. Hatton's wages. Accordingly, this court should resolve the Appeal in Mr. Hatton's favor and award Mr. Hatton back wages owed from his participation in the project, more importantly, § 24-3-430 (D) requires SCDC to pay the prevailing wage, not the federal minimum wage; "there is simply nothing in the statutory scheme authorizing the DOC to pay [an inmate] a training wage less than the prevailing wage". Therefore, SCDC was required to pay Mr. Hatton the prevailing wage for his work in the project. As a result, SCDC owes Mr. Hatton back wages from his participation in the project to compensate for the difference between wages Mr. Hatton received and the prevailing wage in South Carolina in effect at that time. Without more, the agency fails to adequately rebuke this issue, and as a result, SCDC should compensate Mr. Hatton for the hourly

CERTIFICATE OF SERVICE

I hereby certify that on the July 15, 2016 in Pelzer South Carolina, I served a copy of the foregoing Appellants Brief in support of Appeal on all parties to this matter by depositing the same in the United States mail, postage paid, or in mailroom of the undersigned's Institution, and address as follows

David Tatarsky
South Carolina Department of Corrections
4444 Broadriver Road
P.O. Box 21787
Columbia SC, 29221
(803) 896-8508



PRO SE

Pelzer, South Carolina

Date: 7-15-16

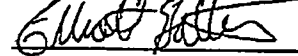
Appellant's Brief in support of Appeal - 5

deductions from his paycheck of a \$1.92 an hour for every hour he work, along with any other wages paid to him that was less than the prevailing wage.

Conclusion

- a. Resolve the appeal in Mr. Hatton favor by directing SCDC to grant the relief requested in his grievance; and
- b. For any other relief that the court deems just and proper.

Elliot Hatton



Perry Corr. Inst.

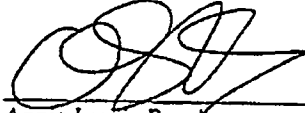
430 Oaklawn Road

Pelzer SC, 29669

Date: 7-15-16

Pelzer, SC

Respectfully submitted,



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

July 28, 2016
Columbia, South Carolina

FILED

JUL 28 2016

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Elliott Hatton, #158373,

Appellant,

vs.

South Carolina Department of Corrections,

Respondent.

) Docket No. 16-ALJ-04-0296-AP
)
) Grievance No.: ECI 1215-07
)
)
)

ORDER OF ABEYANCE

FILED

AUG 11 2016

SC ADMIN. LAW COURT

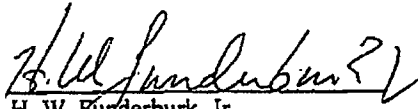
This matter is before the South Carolina Administrative Law Court ("ALC") pursuant to the Notice of Appeal filed by Elliott Hatton, an inmate in the custody of the South Carolina Department of Corrections.

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

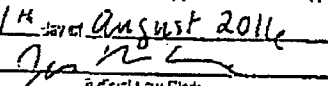
ORDERED that this case be held in abeyance pending the final dispositions of *Gatewood v. S. Carolina Dep't of Corr.* and *Ackerman v. S.C. Dep't of Corr.*

AND IT IS SO ORDERED.

Columbia, South Carolina
August 11, 2016


H. W. Funderburk, Jr.
Administrative Law Judge

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

This 11th day of August 2016
By: 
Judicial Law Clerk

RECEIVED

AUG 15 2016

GENERAL COUNSEL

LAW OFFICES

JUL 05 2017

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

MALONE, THOMPSON
SUMMERS & OTT, LLC

Elliott Hatton, #158373,

Appellant,

vs.

South Carolina Department of Corrections,

Respondent.

Docket No. 16-ALJ-04-0296-AP

Grievance No.: ECI 1215-07

ORDER LIFTING ABEYANCE

FILED

JUN 15 2017

SC ADMIN. LAW COURT

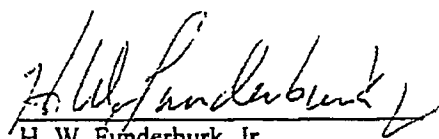
This matter is before the South Carolina Administrative Law Court ("ALC") pursuant to the Notice of Appeal filed by Elliott Hatton ("Appellant"), an inmate in the custody of the South Carolina Department of Corrections ("SCDC").

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

ORDERED that the Order of Abeyance in this case is **LIFTED**.

AND IT IS SO ORDERED.

Columbia, South Carolina
June 15, 2017

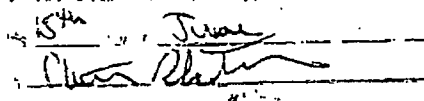

H. W. Funderburk, Jr.
Administrative Law Judge

RECEIVED

JUN 20 2017

GENERAL COUNSEL

FILED
JUN 15 2017
CLERK OF COURT
SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
COLUMBIA, SOUTH CAROLINA



STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

ELLIOTT HATTEN #158323

Appellant

vs

SOUTH CAROLINA Department of Corrections

Respondent

DOCKET No. 16-ALJ-04-0296-AP

GRIEVANCE No: ECI 1215-07

Appellants Brief

IN support of Appeal

RECEIVED

JUL - 3 2017

GENERAL COUNSEL

Pro Se:

ELLIOTT HATTEN #158323

PCI #2A-124

430 OAKLAND RD.

PELZER SC 29669

To DAVID TATARSKY Attorney for SC Department of
Corrections Pursuant to Rule 60 of the SOUTH CAROLINA
Rule of Procedure for the Administrative Law Court (ALC Rules)
Appellant ELLIOTT HATTEN by Pro Se, respectfully submits this brief
in support of his Appeal of Respondent SOUTH CAROLINA Department
of Corrections SCDC FINAL denial of his grievance, ECI 1215-07

STATEMENT OF ISSUES ON APPEAL

whether SCDC erred in denying Mr HATTEN grievance for back
wages owed to Mr HATTEN for his work in prison Industries
Project A4 EVANS Correctional Inst,

STATEMENT OF CASE

Mr. Hatten participated in the Prison Industries Project operated by S.C. DC at Evans Correctional Inst from Dec 99 until Jan 2002 and work at Percy Carolina console for six months in 2006. The Prison Industries Project is federally certified and operated under the various state statutes, including S.C. code ANN 24-3-430 also known as the prevailing wage statute which mandates that all inmates participating in the project earn at least the prevailing wage for work of the similar nature in the private sector. S.C. code ANN. 24-3-430 (d); see also S.C. code 24-3-40, 24-3-315. Mr. Hatten was paid less than the prevailing wages also S.C. DC withheld \$1.92 per hr. from Mr. Hatten wages for the entirety of his work with the project.

Argument

S.C. DC Erred in denying Mr. Hatten Grievance for back wages owed to him for his work in the Prison Industries Project. S.C. DC denial of Mr. Hatten grievance is flawed for multiple reasons (1) Mr. Hatten filed a timely grievance under the doctrine of equitable tolling; (2) S.C. code ANN 24-3-430 (d) applies to Mr. Hatten under the Project. (3) S.C. DC failed to pay Mr. Hatten the prevailing wages in accordance with 24-3-430 (d) during his work in the project. And (4) S.C. DC was not entitled to collect \$1.92 per hour from Mr. Hatten wages. Accordingly this court should resolve Appellant Mr. Hatten favor and award him back wages owed for his participation in the project.

A. SCDC WAS NOT ENTITLED TO DEDUCT \$1.92 PER HOUR FROM MR. HATTEN'S WAGES. IN ADDITION TO SCDC'S ~~CLAIM~~ FAILURE TO PAY MR. HATTEN THE PREVAILING WAGES FOR HIS WORK AS REQUIRED BY LAW; SCDC ALSO WITHHELD \$92 PER HOUR FROM HIS COMPENSATION FOR OVER HEAD COST. SCDC CLAIMS THAT SOUTH CAROLINA LAWS COMPELS SCDC COLLECT AN HOURLY OVER HEAD COST FROM PRIVATE INDUSTRY SPONSORS, ~~HOLD~~ OVER THE COURT IN TORRENCE, REFERRING THE \$1.92 PER HOUR DEDUCTION BY SCDC, NOTED THAT IF THE REMOVES ANY MONEY REMITTED BY THE PRIVATE ~~SECT~~ INDUSTRY SPONSOR THEN DISBURSES THE PERCENTAGES LISTED IN SECTION 24-3-40 BASED ON LOWER RATE, (SCDC) WOULD BE IN VIOLATION OF PLAIN LANGUAGE OF STATUTE WHICH DIRECTS IT TO DISBURSE THE MONEY ON THE GROSS WAGES. TORRENCE, 373 S.C. AT 594 N, 4.646.2d AT 870 THE ONLY SUPPORT SCDC PROVIDES REQUIRED OVER HEAD COST FOR THE PROGRAM. HOWEVER THERE IS NO EXPLANATION OR DISCUSSION THAT BREAKS DOWN THIS COST OR DEMONSTRATES THAT SCDC DID IN FACT DISBURSE THE MONEY BASED ON GROSS WAGES WITHOUT MORE. SCDC SHOULD COMPENSATE MR. HATTEN FOR HOURLY DEDUCTIONS FROM HIS PAY CHECK.

CONCLUSION

WHEREFORE MR. HATTEN PRAYS THIS COURT

A. RESOLVE THE APPEAL IN MR. HATTEN FAVOR BY DIRECTING SCDC TO GRANT HIM THE RELIEF REQUESTED IN HIS GRIEVANCE AND.

B. FOR ANY OTHER RELIEF THIS COURT DEEMS JUST AND PROPER.

Certificate of Service

I here by certify that on the JUNDY OF 27 2017
IN PELZER SOUTH CAROLINA I served A copy on the
Forgoing Appellants Brief in support of Appeal on All
Parties to this matter by depositing the same in the
United States mail postage paid or in the mail
rooms of the under signed institutions and Addressed
as follows

Cc DAVID TATARSKY
South Carolina Department of Corrections
444 Broad river road.
PO BOX 21787
Columbia SC 29221

pelzer SC
6/27/17

PO SE Elliott 158323
PCI PLA 124 430 Calkoun Rd.
pelzer SC 29668

Tamara Conwell
My Commission Expires
September 25, 2023

RECEIVED

JUN 27 2017

P.C.I. MAILROOM

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

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

Elliott Hatton, #158373,	)	Docket No. 16-ALJ-04-00296-AP
	)	Grievance No. ECI-1215-07
Appellant,	)	
	)	
vs.	)	RESPONDENT'S BRIEF
	)	
South Carolina Department of Corrections,	)	
	)	
<u>Respondent.</u>	)	

In accordance with the June 15, 2017, July 26, 2017, and August 9, 2017 orders issued by the Court, the Respondent, the South Carolina Department of Corrections ["SCDC"], by and through its undersigned outside counsel, hereby respectfully submits its brief in the instant case.

STANDARD OF REVIEW

As Hatton challenged SCDC's denial of the prison industries wage claims he presented in a grievance, designated as ECI-1215-07, he filed under SCDC Policy Number GA-01.12, the Court's jurisdiction to hear the instant matter derives from *Al-Shabazz v. State*, 527 S.E.2d 742 (S.C. 2000), *Adkins, et al., v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (S.C. 2004), and *Wicker v. S.C. Dep't of Corr.*, 602 S.E.2d 56 (S.C. 2004).

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

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial

rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

STATEMENT OF THE CASE

I. HATTON'S STEP 1 AND STEP 2

Hatton articulated three (3) claims in his Step 1 grievance form dated June 21, 2007:

[SCDC] is in violation of wages earned by me, and withheld illegally by SCDC. I grieved all wages owed to me by SCDC, under [*Torrence v. S.C. Dep't of Corr.*, 646 S.E.2d 866 (S.C. 2007)],¹ under S.C. Code Ann. [§ 24-3-40(A) SCDC owes me back wages of \$1.92 for every hour I worked for Insilco at Evans [Correctional Institution]² along with the training wages I worked 320 hours for less than the prevailing wages, under [S.C. Code Ann. § 24-3-430(D)] through [*Wicker*, 602 S.E.2d. at 57] along with immediate access to monies held in Escrow that I earned that is being held by SCDC along with the proper interest on all monies owed to me by SCDC.

In his Step 1, Hatton demanded the following action on his three (3) claims:

That SCDC pay me \$1.92 for every hour that I worked for private sector at [Evans]. That I be paid by SCDC for training wages I worked for less than prevailing wage for 320 hours. That the monies held in Escrow be paid to me by SCDC along with proper interest on all monies owed to me by SCDC.

¹ The named appellants in *Torrence* were "Thomas J. Torrence and William Ray Ward, on behalf of themselves and all others similarly situated." 646 S.E.2d at 866. In *Torrence*, 646 S.E.2d at 867, our Supreme Court observed that the project operated by SCDC at Evans in which Torrence and Ward voluntarily participated was certified by the United States Department of Justice's Bureau of Justice Assistance ["BJA"] under BJA's Prison Industries Enhancement Certification Program ["PIECP"].

² Hatton did not "work for" nor was he otherwise "employed" by ESCOD, the private industry sponsor for the PIECP project operated by SCDC at Evans in which he voluntarily participated. See S.C. Code Ann. § 24-3-27(B); *Watson v. Graves*, 909 F.2d 1549, n. 7 (5th Cir. 1990); *S.C. Dep't of Corr. v. Cartrette*, 694 S.E.2d 18, 23 (S.C. Ct. App. 2010); *Williams v. S.C. Dep't. of Corr.*, 641 S.E.2d 885, 887 (S.C. 2007); and *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005). Hatton participated in the same project as Torrence and Ward. See note 1 above.

Hatton did not claim or assert in his Step 1 that SCDC failed to pay him the "prevailing wage" under S.C. Code Ann. § 24-3-430(D). Instead, he only referenced § 24-3-430(D) in his Step 1 in associated with his "training wages" claim.

SCDC denied Hatton's Step 1, and Hatton submitted a Step 2 appeal form dated June 22, 2012 by which he challenged SCDC's denial of the three (3) claims he articulated in his Step 1.

II. HATTON'S NOTICE OF APPEAL

SCDC denied Hatton's Step 2, and he filed a Notice of Appeal dated April 8, 2016 with the Court in which he stated the grounds for his appeal of SCDC's final decision:

I appeal for the fact SCDC is in violation of wages earned by me, and withheld illegally by SCDC. I grieved all wages owed to me by SCDC. Under [*Torrence* and § 24-3-40(A)]. SCDC owes me back wages of \$1.92 for every hour I worked for Insilco at [Evans] or Perry. Along with proper interest on all monies owed to me by SCDC. ...

In his Notice of Appeal, Hatton only preserved one (1) of the three (3) claims he articulated in his Step 1, namely that SCDC owed him back pay consisting of \$1.92 for every hour he participated in the federally certified PIECP project SCDC operated at Evans.

Hatton failed to preserve in his Notice of Appeal a claim for back pay associated with the "training wages" he received for the first 320 hours of his labor.

Likewise, Hatton did not preserve his claim for immediate access, under § 24-3-40(B)(2), to the monies SCDC deducted from his gross industries pay and held in an interest-bearing escrow account for his benefit under § 24-3-40(A)(5).

Finally, just as in his Step 1 and Step 2, Hatton did not assert in his Notice of Appeal that SCDC failed to pay him the "prevailing wage" under § 24-3-430(D).

III. HATTON'S BRIEF

In his brief dated July 15, 2016, Hatton identified the following issues on appeal (July 15, 2016 Brief, p. 2):

Whether SCDC erred in denying [my] grievance for back wages owed to owed to [me] for his work in the Prison Industries Project at the [Evans].

Hatton later asserted as follows (July 15, 2016 Brief, p. 3):

SCDC paid less than the prevailing wage during the training period. Moreover, SCDC withheld \$1.92 per hour for the entirety of his work with the Project. SCDC denied Step 1 and Step 2 of my grievance.

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

Hatton identified as an issue on appeal in his July 15, 2016 brief his claim that, under *Torrence*, SCDC owes him \$1.92 per hour for every hour of his prison industries labor. Hatton also identified as an issue on appeal in his July 15, 2016 brief his claim that SCDC paid him "training wages" rather than the "prevailing wage" for the first 320 hours of his labor.

Hatton further identified as an issue on appeal in his July 15, 2016 brief his claim that SCDC failed to pay him the "prevailing wage" during the entirety of the time he participated in

³ While he did not cite any authority for this declaration, Hatton undoubtedly quoted our Supreme Court's decision in *Wicker*, 602 S.E.2d at 58: "Finally, we concur with the [ALC] and the circuit court that there is simply nothing in the statutory scheme authorizing [SCDC] to pay Wicker a training wage less than the prevailing wage." [emphasis supplied]. Significantly, our Supreme Court, in affirming the ALC's decision which reversed SCDC's denial of the inmate's grievance, also acknowledged in *Wicker*, 602 S.E.2d at 56, that the ALC held the inmate "was entitled to be compensated the prevailing wage of \$5.25 per hour for the time he was in training for his [participation in the project SCDC operated at Evans]." [emphasis supplied]. The inmate in *Wicker* participated in the same PIECP project at Evans as *Torrence*, *Ward*, and *Hatton*.

the project. However, as illustrated above, Hatton never articulated such a claim in his Step 1, Step 2, or Notice of Appeal.

Hatton did not assert or mention in his July 15, 2016 brief that he was entitled, under § 24-3-40(B)(2), to immediate access to the monies SCDC deducted from his gross industries pay and held in an interest-bearing escrow account for his benefit by operation of § 24-3-40(A)(5).

IV. APPEAL HELD IN ABEYANCE

After Hatton submitted his brief dated July 15, 2016, SCDC moved the Court on July 28, 2016 to hold the instant matter in abeyance pending the resolution of two (2) cases that were pending before our Court of Appeals (i.e. *Ackerman, et al. v. S.C. Dep't of Corr.* and *Gatewood v. S.C. Dep't of Corr.*), and the Court issued an order on August 11, 2016 by which it granted SCDC's motion and held further proceedings in the instant matter in abeyance.

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

V. HATTON'S SUPPLEMENTAL BRIEF

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

Hatton filed a supplemental brief dated June 27, 2017 in which he identified the following issue(s) on appeal (June 27, 2017 Brief, p. 1):

Whether SCDC erred in denying [my] grievance for back wages owed to [me] for [my] work in [the] prison industries project at [Evans].

Hatton later asserted as follows (June 27, 2017 Brief, p. 2):

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

Hatton then asserted as follows (June 27, 2017 Brief, p. 3):

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

While he asserted the doctrine of equitable tolling in his supplemental brief as a response to SCDC finding that he did not timely file his Step 1, Hatton did not assert the doctrine in his Step 2, his Notice of Appeal, or his July 15, 2016 brief.

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

Like his July 15, 2016 brief, Hatton did not argue or even mention in his supplemental brief that he was entitled, under § 24-3-40(B)(2), to immediate access to the monies SCDC deducted from his gross industries pay and held in an interest-bearing escrow account for his benefit by operation of § 24-3-40(A)(5).

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

Finally, just as he did in his July 6, 2016 brief, Allen identified as an issue on appeal in his supplemental brief his claim that, under *Torrence*, SCDC owes him \$1.92 per hour for every hour of his prison industries labor.

STATEMENT OF ISSUES ON APPEAL

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

Although he did not identify it in his Notice of Appeal, SCDC, out of an abundance of caution, also addresses Hatton's "training wages" claim in its instant brief.

ARGUMENT

I. CLAIMS ABANDONED BY HATTON

SCDC respectfully asserts that Hatton failed to raise a claim for the "prevailing wage" under § 24-3-430(D) in his Step 1, Step 2, or Notice of Appeal and he failed to assert the doctrine of equitable tolling in his Step 2 or Notice of Appeal. Accordingly, Hatton's "prevailing wage" claim and invocation of equitable tolling are not preserved for review by the Court under *Gatewood*, 785 S.E.2d at 611 – 12:

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

Likewise, Hatton failed to argue or even mention in either of his briefs that he was entitled, under § 24-3-40(B)(2), to immediate access to the monies SCDC deducted from his

gross industries pay and held in an interest-bearing escrow account for his benefit by operation of § 24-3-40(A)(5). Consequentially, SCDC's denial of Hatton's claim for immediate access to these monies constitutes the law of the case. See *Burton v. County of Abbeville*, 440 S.E.2d 396, 398 (S.C. Ct. App. 1994) ("Burton never mentions or challenges this ruling in her brief, and, therefore, it is the law of this case.") [citations omitted]. See also *State v. Fripp*, 721 S.E.2d 465, 468 (S.C. Ct. App. 2012) (citing *Burton*).

II. TIMELINESS OF HATTON'S STEP 1

In the light most favorable to him, Hatton may have obliquely referenced *Ackerman* when he asserted in his supplemental brief, without any supporting argument, that he "filed a timely grievance under the doctrine of equitable tolling." (June 27, 2017 Brief, p. 3).

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

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

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

If he may not avail himself of *Ackerman*, SCDC respectfully asserts that Hatton's "training wages" claim, to the extent it's viable, and his claim for \$1.92 per hour for every hour of his labor under *Torrence* are time-barred.

Should the Court not recognize the above-noted distinction, SCDC respectfully addresses the merits of both claims below.

III. HATTON'S "TRAINING WAGES" CLAIM

As discussed above, Hatton asserted in his first brief that "SCDC paid [him] less than the prevailing wage during the training period." (July 15, 2016 Brief, p. 3). Hatton subsequently argued in his first brief that the Court "should resolve the Appeal in [his] favor and award [him] back wages owed from his participation in the project, more importantly, § 24-3-430(D) requires SCDC to pay the prevailing wage, not the federal minimum wage; 'there is simply nothing in the statutory scheme authorizing [SCDC] to pay [an inmate] a training wage less than the prevailing wage.'⁴" [emphasis supplied]. (July 15, 2016 Brief, p. 3).

On page 1 of its May 14, 2012 response to Hatton's Step 1, SCDC explained as follows:

Your prison industries participation and pay records were reviewed by the responsible officials at SCDC Headquarters in Columbia. These records confirm that you voluntarily participated in the prison industries project operated by SCDC at Evans in which ESCOD, and later INSILCO, participated as the private industry sponsor before SCDC ended its policy of paying inmates a "training wage" for their initial 320 hours of labor. SCDC ended its policy of paying a "training wage" on July 1, 1999.⁵

On pages 4 and 5 of its response to Hatton's Step 1, SCDC further explained as follows:

Again, your prison industries pay records reflect that, after you completed the first 320 hours of your prison industries labor for which SCDC paid you "training wages," SCDC paid you an hourly rate of at least \$5.15 beginning on or about December 16, 1999. These same records also reflect that SCDC continued to pay you at least \$5.15 per hour for the

⁴ See note 3 above.

⁵ See note 12 below.

[remainder] of the time you participated in the prison industries program until on or about March 31, 2006.

The federal minimum wage was \$5.15 per hour effective September 1, 1997, and it remained at that rate until July 23, 2007. Thus, SCDC paid you at least the federal minimum wage for the labor you voluntarily provided to the prison industries project it operates at Evans [after you completed your first 320 hours of labor].

SCDC acknowledges that the “training wages” it paid Hatton during the first 320 hours of his labor did not conform to § 24-3-430(D) or, for that matter, § 24-3-410(B)(7).⁶

If it rejects the argument SCDC articulated above in Section II, SCDC asserts that the Court should remand back to SCDC the calculation of the back pay to which Hatton is entitled for the first 320 hours of his labor. Should he dispute any part of SCDC’s calculation of his back pay for the first 320 hours of his labor, Hatton may file an appeal with the Court.

⁶ On page 4 of its May 14, 2012 response to his Step 1, SCDC addressed Hatton’s flawed reliance on § 24-3-430(D):

Additionally, I deny your claim that you are entitled to any relief under [§] 24-3-430(D), the so-called “prevailing wage” provision. Specifically, as the prison industries project in which you participated at Evans was a project for which SCDC received certification under the federal government’s Prison Industries Enhancement Certification Program [“PIECP”], I conclude that the provisions of [§] 24-3-410(B)(7) – not [§] 24-3-430(D) – applied to the rate of pay SCDC was required to remit to you under [§] 24-3-40(A) for labor you voluntarily provided to this project. In making this conclusion, I rely upon the decision issued by the circuit court in *Adkins*, which concluded that inmates who participated in an identically certified SCDC prison industries project did not possess a viable claim for back wages or higher wages under the provisions of [§] 24-3-430(D).

Even if you have a viable claim for relief under [§] 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 prison industries project it operates at Evans. 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 applicable 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.

SCDC discusses the trial court’s order in *Adkins* in more detail below. See notes 28 and 29 below.

IV. SCDC DID NOT REMOVE \$1.92 PER HOUR FROM HATTON'S GROSS PAY

Hatton asserted in his first brief that "SCDC withheld \$1.92 per hour for the entirety of [my] work in the Project." (July 15, 2016 Brief, p. 3).

In his supplemental brief (June 27, 2017 Brief, p. 3), Hatton asserted as follows:

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

SCDC also withheld \$1.92 per hour from [my] compensation for 'overhead' cost. SCDC claims that South Carolina Laws compels [it to] collect an hourly overhead cost from private industry sponsors. However, the court in [*Torrence*], referencing the \$1.92 per hour deduction by SCDC, noted that if [SCDC] removes any money remitted by the private industry sponsor [and then] disburses the percentages listed in [§] 24-3-40 based on [a] lower rate, [SCDC] would be in violation of [the] plain language of [the] statute which directs it to disburse the money on the gross wages. [*Torrence*, 646 S.E.2d at 870, n. 4]. The only support SCDC provides [is the required] overhead cost for the program. However, there is no explanation or discussion that [breaks] down this cost or demonstrates that SCDC did in fact disburse the money based on gross wages. [W]ithout more, SCDC should compensate [me] for hourly deductions from [my] pay check.

In the above-quoted paragraph from his supplemental brief, Hatton invoked the following passage from our Supreme Court's 2007 decision in *Torrence*, 646 S.E.2d at 870, n. 4, which, in its entirety, reads as follows:

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

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

A. CONTRACTS BETWEEN SCDC AND ESCOD

1. The 1995 Contract between SCDC and ESCOD

On or about July 31, 1995, SCDC entered into its first contract with ESCOD to engage in a PIECP project at Evans.⁷ The contract between SCDC and ESCOD was for five (5) years.⁸ SCDC and ESCOD were the only parties to the contract, and its purpose was "to fulfill the intent of [§ 24-3-310]."⁹ ESCOD represented in the contract that it intended "to engage in the business of assembling electronic components at [Evans]."¹⁰

Section 3.3, entitled "Mutual Duties of the Parties," provided as follows:¹¹

1. Inmate Pay: [ESCOD] and SCDC agree to a "minimum inmate wage" determined as follows:

Minimum Wage (See Appendix D)	\$4.25
Prorata Social Security	.32
Prorata Workers' Compensation Premium	.15
<u>SCDC Surplus Fund Amount</u>	<u>1.32</u>
MINIMUM INMATE WAGE	\$6.04

At no time during this agreement will inmates be paid less than the prevailing "minimum wage" as set forth in Appendix D once they complete training.¹² In the event the "minimum wage," prorata social security withholding payments or prorata Workers' Compensation premium increase during the term of this agreement, [ESCOD] agrees to increase the "minimum inmate wage" on a dollar for dollar basis, immediately upon the effective date of such increase.

⁷ SCDC respectfully submits its 1995 contract with ESCOD as Exhibit A in support of its instant brief. See Exhibit A, p. 7, § 3.3.2. As reflected by the contract's first paragraph, ESCOD was a division of Insilco. *Id.*, p. 1.

⁸ *Id.*, p. 8, § 4.1.1.

⁹ *Id.*, p. 1. Section 24-3-310 is entitled "Declaration of Intent," and it's the first section that appears in Article 3 of Chapter 3 from Title 24 of the South Carolina Code of Laws.

¹⁰ *Id.*, p. 1.

¹¹ *Id.*, pp. 6-7.

¹² SCDC stopped paying "training wages" on or about July 1, 1999. See note 5 above.

SCDC agrees that [the] "SCDC Surplus Fund Amount" shall remain fixed at \$1.32 for the first two (2) years of this Agreement. Thirty days prior to the third year of this Agreement, and thirty days prior to annual renewal, SCDC and [ESCOD] through negotiations may increase [the] "SCDC Surplus Fund Amount" up to a maximum of ten (10) percent of the prior year's amount.

Apart from the lawful gross inmate wage of \$4.25,¹³ the parties lawfully and properly negotiated in 1995, as reflected by § 3.3, for ESCOD to pay SCDC for both SCDC's pro rata Social Security withholdings (\$0.32 per inmate labor hour) and its pro rata Workers' Compensation premiums (\$0.15 per inmate labor hour). Likewise, the parties lawfully negotiated for ESCOD to pay SCDC an additional \$1.32 per inmate labor hour towards the "SCDC Surplus Fund Amount."

2. The 2000 Contract between SCDC and ESCOD

On or about November 28, 2000, SCDC entered into another contract for the PIECP project at Evans.¹⁴ Again, the contract between SCDC and ESCOD covered five (5) years.¹⁵ SCDC and ESCOD were again the only parties to the contract, and, like the 1995 contract, its was "to fulfill the intent of [§ 24-3-310]."¹⁶ ESCOD represented in the contract that it intended "to engage in the business of assembling wire harnesses at [Evans]."¹⁷

Section 3.3, entitled "Mutual Duties of the Parties," provided as follows:¹⁸

¹³ In 1995, the federal minimum wage equaled \$4.25 per hour, and it remained \$4.25 per hour until October 1, 1996 when it climbed to \$4.75 per hour. On September 1, 1997, the federal minimum wage climbed to \$5.15 per hour. See <https://www.dol.gov/whd/minwage/chart.htm>.

¹⁴ SCDC respectfully submits its 2000 contract with ESCOD as Exhibit B in support of its instant brief. See Exhibit B, p. 8, § 3.3.2.

¹⁵ *Id.*, p. 8, § 4.1.1. However, as described below, SCDC and ESCOD entered into another contract in late 2001.

¹⁶ *Id.*, p. 1. See note 9 above.

¹⁷ *Id.*, p. 1.

¹⁸ *Id.*, p. 7.

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

Prevailing Wage (See Appendix D)	\$5.25
Prorata Social Security Withholding Payment	.40
Prorata Workers' Compensation Premium	.20
<u>SCDC Surplus Fund Amount</u>	<u>1.32</u>
Hourly Rate charged to Contract	\$7.17

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

SCDC and [ESCOD] will negotiate the "SCDC Surplus Fund Amount" annually.

Apart from the lawful gross inmate wage of \$5.25,¹⁹ SCDC and ESCOD lawfully and properly negotiated in 2000, as reflected by § 3.3, for ESCOD to pay SCDC for both SCDC's pro rata Social Security withholdings (\$0.40 per inmate labor hour) and its pro rata Workers' Compensation premiums (\$0.20 per inmate labor hour). Likewise, SCDC and ESCOD again lawfully negotiated for ESCOD to pay SCDC an additional \$1.32 per inmate labor hour towards the "SCDC Surplus Fund Amount."

¹⁹ As discussed in note 13 above, the federal minimum wage climbed to \$5.15 per hour on September 1, 1997, and it remained \$5.15 per hour until it climbed to \$5.85 per hour on July 24, 2007.

3. The 2001 Contract between SCDC and ESCOD

On or about March 3, 2001, SCDC entered into another contract with ESCOD for the PIECP project at Evans.²⁰ The 2001 contract between SCDC and ESCOD covered a total of five (5) years.²¹ SCDC and ESCOD were once again the only parties to the contract, and, like the 1995 and 2000 contracts, its purpose was "to fulfill the intent of [§ 24-3-310]."²² As in the 2000 contract, ESCOD represented that it intended "to engage in the business of assembling wire harnesses at [Evans]."²³

Section 3.3, entitled "Mutual Duties of the Parties," provided as follows:²⁴

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

Prevailing Wage (See Appendix D)	\$5.25
Prorata Social Security Withholding Payment	.40
Prorata Workers' Compensation Premium	.20
<u>SCDC Surplus Fund Amount</u>	<u>1.32</u>
Hourly Rate charged to Contract	\$7.17

At no time during this agreement will inmates be paid less than the prevailing wage as set forth in Appendix D. The prevailing wage rate is to be established annually by the S.C. Employment Security Commission. Upon receipt of the annual wage rate, SCDC will notify [ESCOD] in writing and adjust its charge accordingly. In the event the prevailing wage, prorata social security withholding payments, or prorata Workers' Compensation premium increase during the term of this agreement,

²⁰ SCDC respectfully submits its 2001 contract with ESCOD as Exhibit C in support of its instant brief. See Exhibit C, p. 7, § 3.3.2. The copy of the 2001 contract submitted as Exhibit C served as a deposition exhibit during the litigation of *Torrence* in circuit court.

²¹ *Id.*, p. 8, § 4.1.1.

²² *Id.*, p. 1. See notes 9 and 16 above.

²³ *Id.*, p. 1.

²⁴ *Id.*, p. 7.

[ESCOD] agrees to increase the prevailing inmate wage on a dollar for dollar basis, immediately upon the effective date of such increase

SCDC and [ESCOD] will negotiate the "SCDC Surplus Fund Amount" annually.

Apart from the lawful gross inmate wage of \$5.25,²⁵ the parties lawfully and properly negotiated as they did in 1995 and 2000, as reflected by § 3.3, for ESCOD to pay SCDC for both SCDC's pro rata Social Security withholdings (\$0.40 per inmate labor hour) and its pro rata Workers' Compensation premiums (\$0.20 per inmate labor hour). Likewise, the parties again lawfully negotiated for ESCOD to pay SCDC an additional \$1.32 per inmate labor hour towards the "SCDC Surplus Fund Amount."

B. HATTON'S \$1.92 FIGURE COMBINES THREE (3) OTHER FIGURES

The three (3) figures discussed above from the 2000 and 2001 contracts between SCDC and ESCOD total \$1.92 per hour (e.g. $\$1.32 + \$0.40 + \$0.20$), and they were lawfully not part of Hatton's gross hourly wage. The same three (3) figures from the 1995 contract between SCDC and ESCOD total \$1.79 per hour (e.g. $\$1.32 + \$0.32 + \$0.15$), and, likewise, they were lawfully not part of Hatton's gross hourly wage.

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

[Inmates] allege, however, that [the private industry sponsor] pays [SCDC] \$7.17 per hour for their labor. [Inmates'] main claim is that [SCDC] improperly diverts \$1.92 from the \$7.17 hourly wage received from [the private industry sponsor] and deposits this money into [an SCDC] Surplus Fund. As a result, members of all three subclasses allegedly lose money to which they are entitled under statute.²⁶

²⁵ See notes 13 and 19 above.

²⁶ Neither the \$1.92 per hour figure asserted by Hatton nor any other figure appears in footnote 4 from *Torrence*, which SCDC quoted above on page 11 of its instant brief.

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

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

Like Hatton, the inmates in *Adkins* participated in a federally certified PIECP project operated by SCDC under the identical statutes and federal regulations at Tyger River Correctional Institution.²⁷ The *Adkins* Court, 602 S.E.2d at n. 6, recognized this reality:

The trial court relied upon federal cases interpreting the Ashurst-Sumners Act, 18 U.S.C. § 1761, to support its findings that the prevailing wage statute does not give rise to a private cause of action in inmates. In light of our holding, we need not address federal case law. However, we note the trial court's ruling is supported by the caselaw. See *Harker v. State Use Industries*, 990 F.2d 131 (4th Cir.), cert. denied [510 U.S. 886, (1993)]; *McMaster v. Minnesota*, 819 F.Supp. 1429 (D.Minn. 1993).

Obviously, the *Adkins* Court considered not only the record generated during the trial, but the trial court's order.²⁸ The contract at issue in *Adkins* reflected that SCDC charged the private industry sponsor participating in the PIECP project at Tyger River \$1.32 per inmate labor hour in

²⁷ See notes 1 and 2 above.

²⁸ SCDC respectfully submits a copy of the trial court's order in *Adkins*, filed October 30, 2002, in Exhibit D in support of its instant brief ["*Adkins* Order"]. See also note 6 above.

addition to the inmates' gross hourly wage, and the trial court in *Adkins* addressed and endorsed the \$1.32 per hour charge as follows:²⁹

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

Like the inmates in *Adkins*, Hatton did not introduce any evidence, aside from his defective reliance upon a footnote from *Torrence*, that the \$1.32 per hour figure from the contract between SCDC and ESCOD, labeled as the "SCDC Surplus Fund Amount," violated any applicable state or federal law.

18 U.S.C. § 1761(c)(3) states that inmates may not be "deprived of the right to participate in benefits made available by the Federal or State Government to other individuals on the basis of their employment," and Hatton's participation in our nation's Social Security system qualifies as such a benefit.³⁰ By charging ESCOD the rates of \$0.32 and \$0.40 per hour for the pro rata "Social Security Withholding Payment," SCDC complied with the operative federal requirement.

Section 1761(c)(3) also explicitly mentions "workmen's compensation" as one of the benefits it contemplates, and, critically, S.C. Code Ann. § 42-1-480 articulates the workers' compensation provisions applicable to inmates in our state. By charging ESCOD the rates of \$0.15 and \$0.20 per hour for the pro rata "Workers' Compensation Premium," SCDC again complied with both the applicable federal and state laws.

²⁹ See Exhibit D (*Adkins* Order), p. 16.

³⁰ See also BJA Program Brief, <https://www.ncjrs.gov/html/bja/piccp/bja-prison-industr.html>.

**C. THE \$1.79 PER HOUR AND \$1.92 PER HOUR FIGURES WERE
LAWFUL**

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

Section 24-3-310 provides that SCDC must "utilize the labor of inmates for self-maintenance and for reimbursing this State for expenses incurred by reason of their crimes and imprisonment,"³¹ and it conforms to § 24-1-20, which establishes that SCDC must be managed in a "manner consistent with the operation of a modern prison system, and with a view of making the system self-sustaining."

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

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

Without charging ESCOD \$1.79 per hour and then \$1.92 per hour *in addition* to the inmates' lawful gross wages of \$4.25 per hour and then \$5.25 per hour, SCDC would have been unable to comply with the provisions of § 24-3-400, as § 24-3-40 sets aside no monies for SCDC

³¹ See notes 9, 16, and 22 above.

by which it may defray the expenses associated with the operation of its prison industries program.³²

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

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

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

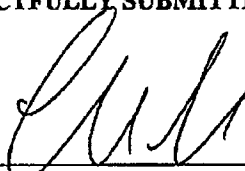
CONCLUSION

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

³² Section 24-3-40(A)(3) mandates that SCDC must withhold 25% of an inmate's gross wages only to “defray the cost of the prisoner's room and board” and only if the inmate possesses no child support obligations.

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

RESPECTFULLY SUBMITTED:



August 15, 2017

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THE STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

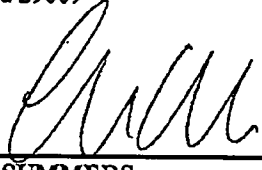
The Honorable H.W. Funderburk, Jr., Administrative Law Judge

Elliott Hatton, #158373,	)	Docket No. 16-ALJ-04-00296-AP
	)	Grievance No. ECI-1215-07
Appellant,	)	
	)	
vs.	)	RESPONDENT'S BRIEF
	)	
South Carolina Department of Corrections,	)	
	)	<u>CERTIFICATE OF SERVICE</u>
Respondent.	)	

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

Elliott Hatton, #158373
Perry Correctional Institution Q-2-A-124
430 Oaklawn Road
Pelzer, South Carolina 29669

August 15, 2017


LAKE E. SUMMERS

FILED

AUG 15 2017

SC ADMIN LAW COURT

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

AGREEMENT

THE AGREEMENT is entered in to this 31 day of July, 1995, by and between the South Carolina Department of Corrections (hereinafter called "SCDC") and its authorized agent Michael W. Moore, Director and Escod Industries, Inc., a Division of Insilco Corporation (hereafter referred to as "Contractor") by its duly authorized agent George J. Jadosh, V.P. Operations.

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

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

WHEREAS, the Contractor intends to engage in the business of assembling electronic components at the Evans Correctional Institution (hereinafter referred to as "ECI"); and,

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

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

ARTICLE 1 General:

SCDC shall provide an industry facility of approximately 25,000 square feet located at ECI and will refer necessary inmates to the Contractor for potential employment.

ARTICLE 2 Conditions of Occupancy of the Industry Facility:

2.0 General:

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

2.1 The Duties of the Contractor:

1. Maintenance: The Contractor shall keep the occupied area clean, neat and tidy, and shall report any damage to the building structure or material fixtures or unsafe conditions to the appropriate institutional authority. Further, the contractor shall be responsible for the routine maintenance except normal wear and tear of that equipment specified in Appendix A.

2. Insurance: The contractor shall maintain insurance coverage for its equipment, supplies and material located in the prison industries building against casualty occurrences. The contractor shall not be responsible for maintaining insurance on those items listed on Appendix A. Further the contractor shall maintain liability insurance coverage on itself, its agents, servants and employees in an amount no less than \$250,000 per person per claim, \$500,000 aggregate. The Contractor shall also maintain Workers Compensation insurance on its employees in accordance with the laws of the State of South Carolina. The contractor shall deliver to SCDC a duly authenticated certificate evidencing such insurance upon executing this agreement and upon each insurance renewal date.
3. Telephone Service: The Contractor may, with prior approval of SCDC, which will not be unreasonably withheld, install telephones and/or computer lines in the Prison Industries building, which must be secured at all times in accordance with SCDC guidelines. The cost of installation and maintenance of such telephones will be at the Contractor's sole expense. SCDC will provide contractor with guideline updates as changes are made.
4. Tools, Equipment and Supplies: The Contractor shall be responsible for providing all necessary tools, equipment, and/or supplies which may be necessary for the performance of the work herein contemplated; provided, however, SCDC will provide initial equipment as specified in Appendix A attached hereto and made part of this agreement. Such tools and equipment supplied by Contractor may be removed upon termination of the agreement.
5. Building Modification: The Contractor shall not make any alterations or improvements to the Prison Industry building other than those outlined herein above without prior written approval of SCDC which shall not be unreasonably withheld. Any such improvements or equipment permanently installed or affixed shall become the property of SCDC.
6. Waiver of Subrogation: SCDC shall not be liable for any damages to the contractor's equipment, supplies and material located in the prison industries building caused by casualty occurrence, it being understood that the Contractor shall look to its insurer for reimbursement and shall obtain from its insurer waiver of subrogation rights against SCDC.

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

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

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

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

2.2 The Duties of SCDC:

1. Premises to be Occupied: SCDC shall provide approximately 25,000 square feet in the industry building at ECI. The occupancy of this area should be consistent with the terms of this agreement regarding work authorized and hours. SCDC will maintain its facility and fixtures in good condition throughout term of contract.

2. Utilities: SCDC shall provide water, electricity, natural gas, and trash removal services and pass through actual cost to contractor for its proportional use of the building or allow contractor to install at its own cost separate meters for calculating payment.

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

4. Equipment: SCDC will provide equipment as specified in Appendix A. It is expressly agreed that SCDC shall retain such title to equipment and building. Should future modifications and equipment be required, these modifications and equipment changes and additions will be the sole and exclusive responsibility of the contractor. At the termination of this agreement and pursuant to applicable provisions of the State Consolidated Procurement Code, SCDC may permit the contractor to purchase equipment specified in Appendix A if an agreeable price can be negotiated between the parties.

ARTICLE 3 Conditions Related to Employment of Inmates:

3.0 General:

SCDC shall provide referrals and the Contractor shall employ a minimum of 60 inmates. Provided, however, that during the term of this agreement if inmate employment falls below the minimum number expressed above for more than fifteen (15) consecutive days, SCDC may terminate this agreement.

3.1 Duties of Contractor:

The Contractor shall provide to SCDC job descriptions and personnel procedures. From the pool of pre-screened potential inmate employees, the Contractor shall then select those inmates workers that they wish to work; provided that at all times herein, the contractor shall adhere to SCDC's nondiscrimination provisions as set forth in the general terms and conditions of this agreement above and within limits established by SCDC.

1. Training of Inmate Employees: The Contractor shall provide a maximum training period of 320 hours initial training after assuming work within the prison industries facility. The Contractor will assume all cost of its trainers and technical staff while SCDC shall pay inmates during the first 160 hours training status. During the second 160 hours training, the contractor shall pay \$.75 per hour, plus \$1.32 overhead for each inmate. After 320 hours training, the contractor will pay \$6.04 per hour, per inmate. During the course of this agreement, should there be a product change made by the Contractor, the expense of any additional training required will be borne solely by the Contractor.

2. Scope of Work: Prison Industry inmates under the direct and total supervision of SCDC will assemble electronic components according to engineering design and manufacturing specifications developed and provided by the Contractor. It will be the sole responsibility of

the Contractor to provide a quality control manual for these operations and to ensure compliance with the terms provided therein. The requirements contained within the quality control manual must be submitted in writing to Prison Industries for review for institutional safety and security prior to beginning of the assembly operations.

3. Raw Materials: The Contractor shall provide all raw materials and component parts for assembly. All raw materials, personal property, inventory, machinery, equipment and improvements and/or fixtures or other property of any kind or description whatsoever installed or brought into the prison buildings by the Contractor or its employees or agents, shall be at the sole risk of Contractor and neither the State of South Carolina or SCDC or its employees and agents thereof, shall be liable for any damage or loss suffered except as provided in Section 2.1.7 contained herein above. The Contractor will provide management and production supervision under total SCDC control for all phases of the assembly work. SCDC will allow Contractor's trucks, common carrier and others transporting raw materials, equipment and finished products to and from ECI reasonable access during normal business hours subject to the Department's security requirements in Section 3.1.4. SCDC shall provide updated copies of the requirements as changes are made.

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

5. Compliance With Rules and Regulations: The Contractor agrees that it and its employees must comply with all policies and procedures of SCDC and all applicable federal, state, and local laws, ordinances, regulations and accreditation standards. SCDC shall provide updated copies as changes are made.

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

7. Specifications: The Contractor will assume the responsibility to provide specifications for any modifications to the ECI Prison Industries building along with production equipment to be acquired.

8. Training of Contractor's Staff: The Contractor shall

make its civilian staff available for training in security concerns by SCDC's training staff. The SCDC request for training shall be conducted at a time and place so as not to interfere with contractors normal operations.

9. Supervisory Staff: The Contractor shall employ sufficient civilian supervisors to ensure that there is at least one (1) civilian supervisor on each production shift. Contractor's staff shall abide by all SCDC Policies and Procedures. Contractor understands and agrees that SCDC shall have the discretion to remove any agent or employee from the institution in the event of a violation of any of SCDC's policies and procedures with regard to the institution.

3.2 Duties of SCDC:

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

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

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

4. Inmate Workers Security: SCDC shall be responsible for the security of the inmate labor force.

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

3.3 Mutual Duties of the Parties:

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

Minimum Wage (See Appendix D)	\$ 4.25
+	
Prorata Social Security Withholding Payment	.32
+	
Prorata Workers' Compensation Premium	.15
+	
<u>SCDC Surplus Fund Amount</u>	<u>1.32</u>
MINIMUM INMATE WAGE	\$ 6.04

At no time during this agreement will inmates be paid less than the prevailing "minimum wage" as set forth in Appendix D once they complete training. In the event the

"minimum wage," prorata social security withholding payments, or prorata Workers' Compensation premium increase during the term of this agreement, Contractor agrees to increase the "minimum inmate wage" on a dollar for dollar basis, immediately upon the effective date of such increase.

SCDC agrees that "SCDC Surplus Fund Amount" shall remain fixed at \$1.32 for the first two (2) years of this Agreement. Thirty days prior to the third year of this Agreement, and thirty days prior to annual renewal, SCDC and the Contractor through negotiations may increase "SCDC Surplus Fund Amount" up to a maximum of ten (10) percent of the prior year's amount.

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

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

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

ARTICLE 4 General Terms and Conditions:

4.1 General:

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

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

1. Period of Performance: The term of this Agreement shall be for five (5) years commencing on the date of the execution of this Agreement.

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

SCDC represents and warrants to the Contractor that the terms and conditions of this agreement regarding the training, utilization, or employment of inmate labor, including but not limited to, hours of employment and rates of pay and benefits, are not in violation of the laws of the State of South Carolina, or of the United States, and SCDC agrees to protect, defend, and hold harmless the Contractor or any employees or agents thereof from any liability, loss, or claim for damage for any unfair or abusive labor practice, any violation of civil or human rights, or any unfair or anti-competitive trade practice relating to the training, utilization, or employment of inmate labor.

SCDC will be responsible for the payment of all required inmate restitution payments and federal, state, and local employment taxes, fees, and premiums, arising out of the inmates' employment in connection with this agreement, including, without limitation, federal, state, and local income tax withholdings, F.I.C.A. withholdings, workers' compensation insurance premiums, and state and federal unemployment compensation premiums, if applicable. SCDC represents and warrants that it has complied with applicable federal, state, and local laws with respect to the payment of such employment taxes, fees, and premiums, and will protect, defend and hold harmless the Contractor or any employees or agents thereof, from any liability, loss or claim for damage relating to the payment of any such employment taxes, fees, or premiums.

3. Assurance of Contractor: SCDC has agreed to waive the requirement for the contractor to obtain for the benefit of SCDC an irrevocable, standby letter of credit drawn on a bank acceptable to SCDC. Should SCDC determine that contractor's payment for invoices rendered by SCDC is consistently late, then SCDC will require by written notice contractor to post one month's inmate payroll in the form of an irrevocable, standby letter of credit specified above. Upon written notification by SCDC to contractor, contractor must produce such letter of credit within fifteen (15) days and shall remain in effect for duration of agreement.

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

Michael W. Moore, Director
South Carolina Department of Corrections
4444 Broad River Road
P. O. Box 21787
Columbia, South Carolina 29221-1787

to the Contractor as follows:

George J. Jadosh V.P. Operations Insilco Technologies Group 4709 Creekstone Drive Morrisville, N.C. 27560	Dave Schneider General Manager ESCOD Industries 1024 6th Avenue, South North Myrtle Beach, S.C. 29582
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5. Non-Discrimination in Employment: The Contractor shall not discriminate against any inmate worker or applicant for the program because of race, color, sex, religion, national origin, creed, marital status, age, or the presence of any sensory mental or physical handicap, which does not adversely affect such inmates ability to perform their normal job responsibilities.

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

7. Records, Documents and Reports: The Contractor shall maintain books, records, documents and other evidence of accounting procedures and practices which sufficiently and properly reflect all direct and indirect cost of any nature expended in the performance of this agreement. These records shall be subject at all reasonable times for inspection, review or audit by SCDC personnel or other personnel duly authorized by SCDC, the office of the State Auditor and Federal Officials so authorized by law, rules

regulations or contract such audit shall be at the expense of the auditing agency. The Contractor shall retain all books, records, documents and other materials relevant to this agreement for five (5) years after termination of the agreement and the authorities described herein above shall have full access to and the right to examine any of said materials during the extended period.

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

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

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

to carry on the purpose of program of SCDC, this sufficiency of funds to be solely determined by the State Budget and Control Board; and

- x. Immediately in the event that the safety or security of the institution, its personnel or inmates is jeopardized.

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

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

10. Governing Law: This contract shall be governed by the laws of the State of South Carolina.

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

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

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

Witness

Sandra S. Jeffcoat
Alvin Purnell

Michael W. Moore

Michael W. Moore, Director
S. C. Dept. of Corrections

Witness

Heather M. Hollis
[Signature]

APPROVED AS TO FORM
South Carolina Department of Corrections
OFFICE OF GENERAL COUNSEL

DATE: 11/14/93

George J. Vashosh
George J. Vashosh
V. P. Operations
ESCOD Industries, Inc.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND -)

AGREEMENT

THE AGREEMENT is entered into this 28 day of November, 2000, by and between the South Carolina Department of Corrections (hereinafter called "SCDC") by its duly authorized agent William D. Catoe, Director and Escod Industries, Inc. after referred to as "Contractor") by its duly authorize agent Phil Pitman, Vice President, Operations.

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

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

WHEREAS, the Contractor intends to engage in the business of assembling wire harnesses at the Evans Correctional Institution (hereinafter referred to as "ECI"); and,

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

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

ARTICLE 1 General:

SCDC shall provide a Prison Industries building located at Evans Correctional Institution of approximately 25,000 square feet and will refer necessary inmates to the Contractor for potential employment.

ARTICLE 2 Conditions of Occupancy of the Industry Facility:

2.0 General:

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

2.1 The Duties of the Contractor:

1. Maintenance: The Contractor shall keep the occupied area clean, neat and tidy, and shall report any damage to the building structure or material fixtures or unsafe conditions to the appropriate institutional authority. Further, the contractor shall be responsible for the routine maintenance of its equipment and that furnished by SCDC for contractor's production use.

2. Insurance: The contractor shall maintain insurance coverage for its equipment, supplies and material located in the prison industries building against casualty occurrences. Further the contractor shall maintain liability insurance coverage on itself, its agents, servants and employees in an amount no less than \$300,000 per person per claim, \$600,000 aggregate. The Contractor shall also maintain Workers Compensation insurance on its employees in accordance with the laws of the State of South Carolina. The contractor shall deliver to SCDC a duly authenticated certificate evidencing such insurance upon executing this agreement and upon each insurance renewal date.

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

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

5. Building Modification: The Contractor shall not make any alterations or improvements to the Prison Industry building without prior written approval of SCDC which shall not be unreasonably withheld. Any such improvements or equipment permanently installed or affixed shall become the property of SCDC. All equipment provided and installed by the contractor will remain the property of the Contractor and may be removed by the contractor at any time during the terms of this agreement or within ninety (90) days of termination.

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

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

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

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

10. Hazardous Waste: No hazardous waste shall be generated in the Prison Industries building by the Contractor. Contractor will be responsible for any other waste generated at anytime during this agreement.

2.2 The Duties of SCDC:

1. Premises to be Occupied: SCDC shall provide approximately 25,000 square feet in the industry building at ECI. The occupancy of this area should be consistent with the terms of this agreement regarding work authorized and hours. SCDC will maintain its facility

and fixtures in good condition throughout term of contract.

2. Utilities: SCDC shall provide water, electricity, natural or propane gas, and trash removal services and pass through actual cost to CONTRACTOR for its proportional use of the building or allow CONTRACTOR to install at its own cost separate meters for calculating payment.

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

Termination Remedy: If this contract is terminated by SCDC pursuant to Section 4.7 Termination subsections 7b, c, f, g, h, i or k, the Contractor shall be liable to SCDC for cost of inmate wages, civilian supervision and utilities incurred up to termination.

ARTICLE 3 Conditions Related to Employment of Inmates:

3.0 General:

SCDC shall provide referrals and the Contractor shall employ a minimum of 120 inmates full time (i.e., 7.5 hour work day). Provided however, if during the term of this agreement inmate employment falls below 100 inmates for more than thirty (30) consecutive days, SCDC can terminate this agreement.

3.1 Duties of Contractor:

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

1. Training of Inmate Employees: The Contractor will assume all cost of its trainers and technical staff. During the course of this agreement, should there be a product change made by the Contractor, the expense of any

additional training required will be borne solely by the Contractor.

2. Scope of Work: Prison Industry inmates under the direct and total supervision of SCDC will assemble wire harnesses according to engineering design and manufacturing specifications developed and provided by the Contractor. It will be the sole responsibility of the Contractor to provide a quality control manual for these operations and to ensure compliance with the terms provided therein. The requirements contained within the quality control manual must be submitted in writing to Prison Industries for review for institutional safety and security prior to beginning of operations.

3. Raw Materials: The Contractor shall provide all raw materials and component parts for assembly. All raw materials, personal property, inventory, machinery, equipment and improvements and/or fixtures or other property of any kind or description whatsoever installed or brought into the prison buildings by the Contractor or its employees or agents, shall be at the sole risk of Contractor and neither the State of South Carolina or SCDC or its employees and agents thereof, shall be liable for any damage or loss suffered except as provided in Section 2.1.7 contained herein above. The Contractor will provide management and production supervision for all phases of the assembly work. SCDC will allow Contractor's trucks, common carrier and others transporting raw materials, equipment and finished products to and from ECI reasonable access during normal business hours subject to the Department's security requirements in Section 3.1.4.

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

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

6. Payment for Inmate Services: SCDC will invoice the Contractor on a bimonthly basis for inmate labor. The Contractor will pay all sums due and owing within fifteen days of receipt of invoice. Payments shall be made to

S.C. Department of Corrections, Division of Industries account.

7. Specifications: The Contractor will assume the responsibility to provide specifications for any modification to the ECI Prison Industries building along with production equipment to be acquired.

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

9. Supervisory Staff: The Contractor shall employ sufficient civilian supervisors to ensure that there is at least one (1) civilian supervisor on each production shift. Contractor's staff shall abide by all SCDC Policies and Procedures. Contractor understands and agrees that SCDC shall have the discretion to remove any agent or employee from the institution in the event of a violation of any of SCDC's policies and procedures with regard to the institution. Upon agreement of both parties the civilian employees of SCDC may be used as supervisory staff and then cost invoiced to the Contractor according to an agreed upon formula.

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

3.2 Duties of SCDC:

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

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

3. Holidays: The inmates employed in the project will observe holidays as described in Appendix B attached hereto and incorporated herein. If the contractor works on a holiday, the inmate worker will have the option to either work or observe the holiday.

4. Inmate Workers Security: SCDC shall be responsible for the security of the inmate labor force. However, any overtime hours required by the contractor which results in security staff overtime will require that the cost be

charged to the contractor.

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

3.3 Mutual Duties of the Parties:

1. Hourly Rate: Contractor and SCDC agree to an hourly rate determined as follows:

	FOR INMATE WORKER
Prevailing Wage (See Appendix D)	\$5.25
+	
Prorata Social Security Withholding Payment	.40
Prorata Workers' Compensation Premium	.20
+	
<u>SCDC Surplus Fund Amount</u>	<u>1.32</u>
Hourly Rate charged to Contract	\$7.17

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

The prevailing wage rate for inmate labor is to be established annually by the S. C. Employment Security Commission. Upon receipt of the annual wage rate, SCDC will notify the Contractor in writing and adjust its charge accordingly. In the event the prevailing wage, prorata social security withholding payments, or prorata Workers' Compensation premium increase during the term of this agreement, Contractor agrees to increase the prevailing inmate wage on a dollar for dollar basis, immediately upon the effective date of such increase.

SCDC and the Contractor will negotiate the "SCDC Surplus Fund Amount" annually.

[Contractor agrees to list in Appendix C each production job under this Agreement with the base wage to be paid hereunder.]

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

Pursuant to Federal guidelines, inmates working in excess

of forty (40) hours per week shall be paid overtime at one and a half times the rate of the prevailing wage. The SCDC Surplus Fund amount will not be charged one and a half times on overtime hours.

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

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

ARTICLE 4 General Terms and Conditions:

4.1 General:

The Contractor, his/her employees or agents performing under the agreement are not to be deemed to be employees of SCDC nor as agents of SCDC in any manner whatsoever. The contractor will not hold himself/herself out nor claim to be an officer or employee of SCDC or of the State of South Carolina by reason hereof and will not make any claim, demand, or application to, or for any right or privilege applicable to an officer or employee of SCDC or the State of South Carolina, including, but not limited to, workers' compensation coverage, unemployment insurance benefits, social security benefits, or retirement membership or credit.

1. Period of Performance: The term of this Agreement shall be for five (5) years commencing on the date of the execution of this Agreement.

2. Hold Harmless: The Contractor agrees to protect, defend and hold harmless the State of South Carolina, SCDC or its

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

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

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

to the Contractor as follows:

Phil Pitman	Dave Schneider
Vice President Operations	General Manager
Insilco Technologies Group	Escod Industries, Inc.
2801 Slater Road, Suite 120	2801 Slater Road, Suite 120
Morrisville, N.C. 27560-8437	Morrisville, N.C. 27560-8437

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

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

6. Records, Documents and Reports: The Contractor shall maintain books, records, documents and other evidence of accounting procedures and practices which sufficiently and properly reflect all direct and indirect cost of any nature expended in the performance of this agreement. These records shall be subject at

all reasonable times for inspection, review or audit by SCDC personnel or other personnel duly authorized by SCDC, the office of the State Auditor and Federal Officials so authorized by law, rules regulations or contract such audit shall be at the expense of the auditing agency. The Contractor shall retain all books, records, documents and other materials relevant to this agreement for ten (10) years and the authorities described herein above shall have full access to and the right to examine any of said materials during the extended period.

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

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

- a. Upon the written, mutual, agreement of the parties;
- b. Upon the material breach or default of any provision of this Agreement by either party, provided thirty (30) days written notice of the breach is given to the breaching party by the non-breaching party and the breaching party fails to cure within the thirty (30) days;
- c. If Contractor fails to reimburse the State for a minimum number of inmates for a period of thirty (30) consecutive days subject of Article 3;
- d. If Section 24-3-310 of the Code of Laws of the State of South Carolina, 1976, as amended, is materially changed, altered, amended, or repealed so as to abrogate this legislation charged with establishing business relationships with private enterprise;
- e. If federal, state, or local laws change to prevent the shipment of goods produced under this Agreement;
- f. If Contractor becomes bankrupt and such is not cured within sixty (60) days, insolvent, or makes an assignment for the benefit of creditors, or becomes subject to the administration of its assets in any kind of voluntary or involuntary creditors proceedings;
- g. If Contractor performs any intentional act which damages the reputation or property of SCDC;
- h. If Contractor loses its corporate charter in its state of incorporation or loses the authority to transact business in the State of South Carolina pursuant to mandate by the Secretary of State of South Carolina, or if Contractor's corporation is dissolved voluntarily or involuntarily;

- i. Failure of Contractor to pay promptly any inmate wages due hereunder for a period of fifteen (15) days after written notice from SCDC to contractor of such default;
 - j. At the end of any fiscal year (June 30) after the commencement date of this Contract when sufficient appropriations, revenues, income, grants, or other funding from whatever source are not available to SCDC to carry on the purpose of program of SCDC, this sufficiency of funds to be solely determined by the State Budget and Control Board; and
 - k. Immediately in the event that the safety or security of the institution, its personnel or inmates is jeopardized.
- Upon termination of the contract the Contractor shall have ninety (90) days to vacate the facilities of SCDC.

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

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

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

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

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

Witness

Judy J. Deane
Dorothy D. Hawks

Witness

William D. Catoe
William D. Catoe, Director

APPROVED AS TO FORM
South Carolina Department of Corrections
OFFICE OF GENERAL COUNSEL

DATE: 11/24/00 PH

Phil Pitman
Vice President Operations
Escod Industries, Inc.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

AGREEMENT

THE AGREEMENT is entered into this 3rd day of MARCH, 2001, by and between the South Carolina Department of Corrections (hereinafter called "SCDC") by its duly authorized agent R. Dodge Frederick, Interim Director and Insilco Technologies, ITG Global Division, (hereinafter referred to as "Contractor") by its duly authorize agent Philip Pitman, Vice President, Operations.

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

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

WHEREAS, the Contractor intends to engage in the business of assembling wire harnesses at the Evans Correctional Institution (hereinafter referred to as "ECI"); and,

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

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

ARTICLE 1 General:

SCDC shall provide a Prison Industries building located at Evans Correctional Institution of approximately 25,000 square feet and will refer necessary inmates to the Contractor for potential employment.

ARTICLE 2 Conditions of Occupancy of the Industry Facility:

2.1 General:

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

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2.1 The Duties of the Contractor:

1. Maintenance: The Contractor shall keep the occupied area clean, neat and tidy, and shall report any damage to the building structure or material fixtures or unsafe conditions to the appropriate institutional authority. Further, the contractor shall be responsible for the routine maintenance of its equipment and that furnished by SCDC for contractor's production use.

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

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

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

5. Building Modification: The Contractor shall not make any alterations or improvements to the Prison Industry building without prior written approval of SCDC which shall not be unreasonably withheld. Any such improvements or equipment permanently installed or affixed shall become the property of SCDC. All equipment provided and installed by the contractor will remain the property of the Contractor and may be removed by the contractor at any time during the terms of this agreement or within ninety (90) days of termination.

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

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

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

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

10. Hazardous Waste: No hazardous waste shall be generated in the Prison Industries building by the Contractor. Contractor will be responsible for any other waste generated at anytime during this agreement.

2.2 The Duties of SCDC:

1. Premises to be Occupied: SCDC shall provide approximately 25,000 square feet in the industry building at ECI. The occupancy of this area should be consistent with the terms of this agreement regarding work authorized and hours. SCDC will maintain its facility

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and fixtures in good condition throughout term of contract.

2. Utilities: SCDC shall provide water, electricity, natural or propane gas, and trash removal services and pass through actual cost to CONTRACTOR for its proportional use of the building or allow CONTRACTOR to install at its own cost separate meters for calculating payment.

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

Termination Remedy: If this contract is terminated by SCDC pursuant to Section 4.7 Termination subsections 7b, c, f, g, h, i or k, the Contractor shall be liable to SCDC for cost of inmate wages, civilian supervision and utilities incurred up to termination.

ARTICLE 3 Conditions Related to Employment of Inmates:

3.0 General:

SCDC shall provide referrals and the Contractor shall employ a minimum of 60 inmates full time (i.e., 7.5 hour work day). Provided however, if during the term of this agreement inmate employment falls below 60 inmates for more than thirty (30) consecutive days, SCDC can terminate this agreement.

3.1 Duties of Contractor:

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

1. Training of Inmate Employees: The Contractor will assume all cost of its trainers and technical staff. During the course of this agreement, should there be a product change made by the Contractor, the expense of any

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additional training required will be borne solely by the Contractor.

2. Scope of Work: Prison Industry inmates under the direct and total supervision of SCDC will assemble wire harnesses according to engineering design and manufacturing specifications developed and provided by the Contractor. It will be the sole responsibility of the Contractor to provide a quality control manual for these operations and to ensure compliance with the terms provided therein. The requirements contained within the quality control manual must be submitted in writing to Prison Industries for review for institutional safety and security prior to beginning of operations.

3. Raw Materials: The Contractor shall provide all raw materials and component parts for assembly. All raw materials, personal property, inventory, machinery, equipment and improvements and/or fixtures or other property of any kind or description whatsoever installed or brought into the prison buildings by the Contractor or its employees or agents, shall be at the sole risk of Contractor and neither the State of South Carolina or SCDC or its employees and agents thereof, shall be liable for any damage or loss suffered except as provided in Section 2.1.7 contained herein above. The Contractor will provide management and production supervision for all phases of the assembly work. SCDC will allow Contractor's trucks, common carrier and others transporting raw materials, equipment and finished products to and from ECI reasonable access during normal business hours subject to the Department's security requirements in Section 3.1.4.

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

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

6. Payments for Inmate Services: SCDC will invoice the Contractor on a bi-monthly basis for inmate labor. The Contractor will pay all sums due and owing within fifteen days of receipt of invoice. Payments shall be made to

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S.C. Department of Corrections, Division of Industries account.

7. Specifications: The Contractor will assume the responsibility to provide specifications for any modification to the ECI Prison Industries building along with production equipment to be acquired.

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

9. Supervisory Staff: The Contractor shall employ sufficient civilian supervisors to ensure that there is at least one (1) civilian supervisor on each production shift. Contractor's staff shall abide by all SCDC Policies and Procedures. Contractor understands and agrees that SCDC shall have the discretion to remove any agent or employee from the institution in the event of a violation of any of SCDC's policies and procedures with regard to the institution. Upon agreement of both parties the civilian employees of SCDC may be used as supervisory staff and then cost invoiced to the Contractor according to an agreed upon formula.

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

3.2 Duties of SCDC:

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

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

3. Holidays: The inmates employed in the project will observe holidays as described in Appendix 3 attached hereto and incorporated herein. If the contractor works on a holiday, the inmate worker will have the option to either work or observe the holiday.

4. Inmate Workers Security: SCDC shall be responsible for the security of the inmate labor force. However, any overtime hours required by the contractor which results in security staff overtime will require that the cost be

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charged to the contractor.

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

3.3 Mutual Duties of the Parties:

1. Hourly Rate: Contractor and SCDC agree to an hourly rate determined as follows:

Prevailing Wage (See Appendix D)	\$5.25
+	
Prorata Social Security Withholding Payment	.40
+	
Prorata Workers' Compensation Premium	.20
+	
<u>SCDC Surplus Fund Amount</u>	<u>1.32</u>
Hourly Rate charged to Contract	\$7.17

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

SCDC and the Contractor will negotiate the "SCDC Surplus Fund Amount" annually.

[Contractor agrees to list in Appendix C each production job under this Agreement with the base wage to be paid hereunder.]

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

Pursuant to Federal guidelines, inmates working in excess of forty (40) hours per week shall be paid overtime at one and a half times the rate of the prevailing wage.

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The SCDC Surplus Fund amount will not be charged one and a half times on overtime hours.

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

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

ARTICLE 4 General Terms and Conditions:

4.1 General:

The Contractor, his/her employees or agents performing under the agreement are not to be deemed to be employees of SCDC nor as agents of SCDC in any manner whatsoever. The contractor will not hold himself/herself out nor claim to be an officer or employee of SCDC or of the State of South Carolina by reason hereof and will not make any claim, demand, or application to, or for any right or privilege applicable to an officer or employee of SCDC or the State of South Carolina, including, but not limited to, workers' compensation coverage, unemployment insurance benefits, social security benefits, or retirement membership or credit.

1. Period of Performance: The term of this Agreement shall be for five (5) years commencing on the date of the execution of this Agreement.

2. Hold Harmless: The Contractor agrees to protect, defend and hold harmless the State of South Carolina, SCDC or its employees or agents thereof, from any liability or claim for damage, including injury to the Contractor's employees or agents,

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

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

R. Dodge Frederick, Interim Director
South Carolina Department of Corrections
4444 Broad River Road
P. O. Box 21787
Columbia, South Carolina 29221-1787

to the Contractor as follows:

Philip Pitman
Vice President Operations
Insilco Technologies, ITG Global Div.
2801 Slater Road, Suite 120
Morrisville, N.C. 27560-3417

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

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

6. Records, Documents and Reports: The Contractor shall maintain books, records, documents and other evidence of accounting procedures and practices which sufficiently and properly reflect all direct and indirect cost of any nature expended in the performance of this agreement. These records shall be subject at all reasonable times for inspection, review or audit by SCDC personnel or other personnel duly authorized by SCDC, the office of

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the State Auditor and Federal Officials so authorized by law, rules regulations or contract such audit shall be at the expense of the auditing agency. The Contractor shall retain all books, records, documents and other materials relevant to this agreement for ten (10) years and the authorities described herein above shall have full access to and the right to examine any of said materials during the extended period.

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

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

- a. Upon the written, mutual, agreement of the parties;
- b. Upon the material breach or default of any provision of this Agreement by either party, provided thirty (30) days written notice of the breach is given to the breaching party by the non-breaching party and the breaching party fails to cure within the thirty (30) days;
- c. If Contractor fails to reimburse the State for a minimum number of inmates for a period of thirty (30) consecutive days subject of Article 3;
- d. If Section 24-3-310 of the Code of Laws of the State of South Carolina, 1975, as amended, is materially changed, altered, amended, or repealed so as to abrogate this legislation charged with establishing business relationships with private enterprise;
- e. If federal, state, or local laws change to prevent the shipment of goods produced under this Agreement;
- f. If Contractor becomes bankrupt and such is not cured within sixty (60) days, insolvent, or makes an assignment for the benefit of creditors, or becomes subject to the administration of its assets in any kind of voluntary or involuntary creditors proceedings;
- g. If Contractor performs any intentional act which damages the reputation or property of SCDC;
- h. If Contractor loses its corporate charter in its state of incorporation or loses the authority to transact business in the State of South Carolina pursuant to mandate by the Secretary of State of South Carolina, or if Contractor's corporation is dissolved voluntarily or involuntarily;
- i. Failure of Contractor to pay promptly any inmate wages due hereunder for a period of fifteen (15) days after

- j. written notice from SCDC to contractor of such default;
 - j. At the end of any fiscal year (June 30) after the commencement date of this Contract when sufficient appropriations, revenues, income, grants, or other funding from whatever source are not available to SCDC to carry on the purpose of program of SCDC, this sufficiency of funds to be solely determined by the State Budget and Control Board; and
 - k. Immediately in the event that the safety or security of the institution, its personnel or inmates is jeopardized.
- Upon termination of the contract the Contractor shall have ninety (90) days to vacate the facilities of SCDC.

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

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

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

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

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

Witness

Jeddy J. Dease
Miss Robertson

Witness

Juan P. Carr
D. Beale

R. Dodge Frederick
R. Dodge Frederick,
Interim Director
APPROVED AS TO FORM
South Carolina Department of Corrections

DATE: 11/14/16

Philip Pitman
Philip Pitman
Vice President Operations
Insilco Technologies,
ITG Global Div.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
Richard Adkins, et al.,	)	C/A No. 00-CP-40-4761
Plaintiffs,	)	
-versus-	)	JUDGMENT FOR THE
South Carolina Department	)	DEFENDANT
of Corrections,	)	
Defendant.	)	

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

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

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

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

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

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

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

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

Each of the 83 Plaintiffs are or were incarcerated within SCDC. The Plaintiffs currently participate or at one time participated in a SCDC Division of Industries (DOI) project established under the authority of South Carolina Code Section 24-3-310 (Lawyers Coop. 1976), *et seq.*

SCDC, in conjunction with a private industry, Standard Plywoods, Inc., of Clinton, South Carolina, operates the DOI project in which the Plaintiffs participate or at one time participated within the confinement facility now known as Tyger River Correctional Institution. The products manufactured inside Tyger River at the Standard Plywoods production facility carry the "Anderson Hardwood Floors" brand name.

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

³ Plaintiffs' Complaint, paragraph 1, page 1.

⁴ *Id.*, paragraph 8, page 4.

⁵ *Id.*

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

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

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

II. SUMMARY OF TRIAL PROCEEDINGS

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

⁶ Id., paragraph 6.

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

⁸ Id., paragraph 9, page 4.

⁹ Id., paragraph 13, page 6.

¹⁰ Id., paragraph 12, page 5.

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

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

Neither party offered any rebuttal witnesses.

III. FINDINGS OF FACT

Jan 12
Each of the Plaintiffs voluntarily executed participation agreements with SCDC under which the terms of their activities within this DOI project, including the withholding of certain percentages of their gross wages pursuant to Section 24-3-40, were precisely defined. Each of the Plaintiffs also completed SCDC DOI employment applications.

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

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

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

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

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

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

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

¹² See notes 6 and, *supra*.

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

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

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

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

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

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

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

¹⁶ See Defendant's Exhibits 1 and 2.

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

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

IV. THE COURT'S RULINGS

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

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

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

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

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

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

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

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

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

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

¹⁸ Plaintiffs' Complaint, paragraph 12.

¹⁹ *Id.*, paragraph 6.

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

SCDC clearly stated its training wage policy:

1. Training of Inmate Employees: The Contractor shall provide a maximum training period of 320 hours per inmate hired initial training after assuming work within the prison industries facility. ... *During the second 160 hours training, the contractor shall pay \$.75 per hour, plus \$1.32 per hour overhead for each inmate. ...*²⁰ (emphasis added)

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

1998, SCDC again clearly stated its training wage policy:

1. Training of Inmate Employees: The Contractor shall provide a maximum training period of 320 hours per inmate hired initial training after assuming work within the prison industries facility. ... *During the second 160 hours training, the contractor shall pay \$.75 per hour, plus \$1.32 per hour overhead for each inmate. After 320 hours training, the contractor will pay \$7.06 per hour, per inmate.*²¹ (emphasis added)

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

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

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

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

²² Id., paragraph 12.

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

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

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

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

BJA's position is that the Federal minimum wage must be a floor for all program wage payments, since the Fair Labor Standards Act sets the Federal minimum wage as a floor for any training which results in its products being sold. *The single exception to this rule, then, is pre-entry or vestibule training for new workers subject to the regulations and requirements set by State Fair Labor Standards, or Federal Fair Labor Standards legislation and procedures.*²³ (emphasis added)

²³ PIECP Guideline, Federal Register, Vol. 50, No. 61, March 29, 1985, p. 12662, "Section 3. Compensated Training, Response" (Plaintiffs' Exhibit 2).

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

This is to confirm our telephone conversation yesterday concerning the training period and wages for our PIE projects. As I related to you, P.I. factors in a 90 day training period for each inmate that allows them to reach the production standards specified by the contractor. ... As I related, P.I. pays inmate wages during the first month. *During the second month, P.I. charges the contractor \$1.32 per hour for overhead and pays the inmate \$.75 per hour.* During the final training month, P.I. charges \$1.32 per hour and \$.95 per hour. ... As we discussed, P.I. will continue this procedure.²⁴ (emphasis added)

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

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

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

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

²⁶ Plaintiffs' Exhibit 1.

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

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

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

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

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

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

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

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

²⁹ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Plaintiffs' inability under *Harker* to claim the federal minimum wage for their DOI labor completely and fatally undermines the Plaintiffs' second cause of action. This Court cannot sustain the Plaintiffs' allegation that "no statute in South Carolina Code of Laws provides that a person may be paid less than the minimum wage under the label or guise of a 'training wage'" under the holding and logic of *Harker*.¹² Thus, SCDC legitimately paid the Plaintiffs wages below the federal minimum wage under its training wage policy.

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

Jm/16 In the course of advising BJA of DOI's training wage policy and schedule, Director Ellis also advised BJA of DOI's \$1.32 per hour overhead charge.¹³ BJA did not object to this \$1.32 per hour overhead charge, and the Plaintiffs did not introduce any evidence indicating such a charge for overhead violated any applicable state or federal law.

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

¹² See note 17, *supra*. The South Carolina legislature has not enacted its own statute mandating the payment of a minimum wage to employees working in this state. Instead, the legislature enacted Section 41-3-80, which is entitled "Enforcement of the Fair Labor Standards Act of 1938." It provides that South Carolina's "Division of Labor may assist and cooperate ... in the enforcement within this State of the Fair Labor Standards Act of 1938 ..."

¹³ See note 22, *supra*.

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

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

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

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

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

The Plaintiffs alleged in their Complaint that, "[d]uring the course of [their] employment, Plaintiffs' wages were paid directly to Defendant SCDC as provided for by S.C. Code Ann.

Section 24-3-40 and 24-3-430.³⁴" The Plaintiffs then recite the following language from Section

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

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

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

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

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³⁵ Id., paragraph 6.

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

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

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

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

³⁷ Id., paragraph 8.

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

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

- (A) It is unlawful to sell or offer for sale on the open market of this State articles or products manufactured or produced wholly or in part by inmates in this or another state.
- (B) The provisions of this section do not apply to:
 - (7) products sold intrastate or interstate produced by inmates of the Department of Corrections employed in a *federally certified private sector/prison industries program* if the *inmate workers participate voluntarily, receive comparable wages, and the work does not displace employed workers.* ... The Department of Labor shall develop guidelines to determine if the work displaces employed workers. (emphasis added)

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

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

- (C) An inmate may participate in the program established pursuant to this section only on a voluntary basis and only after he has been informed of the conditions of his employment.
- (D) No inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector.
- (E) Inmate participation in the program may not result in the displacement of employed workers in the State of South Carolina and may not impair existing contracts for services.

Again, Section 24-3-430(D) uses the phrase "prevailing wage." Critically, however, nothing in Section 24-3-430 specifically connects the provisions of this section and its subsections to "a federally certified private sector/prison industries program."²⁸

Accordingly, this Court concludes, while Section 24-3-430 covers all prison industries activity (i.e. traditional projects, service projects, and PIECP certified projects), Section 24-3-410(B)(7) precisely addresses activity in the DOI project in which the Plaintiffs participate, which is "a federally certified private sector/prison industries program." "Sections which are part of the same general statutory law of the state should be construed together and each given effect if it can be done by any reasonable construction." *Father v. South Carolina Department of Social Services*, 345 S.C. 57, 545 S.E.2d 523, 527 (n. 13) (Cl. App. 2001), quoting *Glover v. Sultt Constr. Co.*, 318 S.C. 465, 458 S.E.2d 535, 537 (1995).

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

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

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

²⁸ Section 24-3-430(G) makes only an oblique reference to a federally certified PIECP project. This section provides "[n]o inmate who participates in a project designated by the Director of the Bureau of Justice Assistance (BJA) pursuant to Public Law 90-351 is eligible for unemployment compensation upon termination from the program."

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

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

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

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

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

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A person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not less than two hundred nor more than five thousand dollars or imprisoned for not less than three months nor more than one year, or both.

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

Any person who wilfully violates any of the provisions of this article *other than Section 24-3-410* shall be guilty of a misdemeanor and, upon conviction, shall be confined in jail not less than ten days nor more than one year, or fined not less than ten dollars nor more than five hundred dollars, or both, in the discretion of the court. (emphasis added)

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

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

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

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

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

³⁹ See note 5, *supra*.

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

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

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

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

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

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

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

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

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

In *Watson v. Sellers*, 299 S.C. 426, 385 S.E.2d 369 (Ct. App. 1989), our Court of Appeals harmonized *Cort v. Ash*, 422 U.S. 66 (1975), cited in *McMaster*, with *Rayfield v. S.C. Department of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988). The issue presented in *Watson*, which led to the Court of Appeals harmonizing *Cort* and *Rayfield*, was whether a statute that did not expressly provide a private right of action impliedly provided a private right of action to a complaining party. After reciting the test fashioned by the United States Supreme Court in *Cort*, the Court of Appeals recited South Carolina authority on this subject:

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

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

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

410(B)(7), the precisely applicable statute, expressly provides inmates a private right of action by which to demand either the prevailing wage or comparable wages for their DOI labor.⁴² Therefore, the Plaintiffs effectively seek this Court to find these statutes impliedly provide them a private right of action.

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

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

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⁴² By contrast, the Fair Labor Standards Act expressly provides for a private right of action. See 29 U.S.C. Section 216(b) which provides, in pertinent part, "[a]n action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

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

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

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

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

The evidence introduced by the parties at trial showed that the South Carolina

Employment Security Commission (ESC), the state agency responsible for collecting and publishing wage data for non-institutional businesses throughout South Carolina, reviewed and approved the permanent \$5.15 per hour wage SCDC pays the Plaintiffs for their DOI labor.

On July 27, 2000, Director Ellis wrote Mr. Ted Gladden, ESC's Assistant Director for Labor Market Information, and asked him to review the hourly wage rate for the DOI project in which the Plaintiffs participate.⁴³ Director Ellis clearly stated SCDC pays the Plaintiffs \$5.15 per hour. On August 4, 2000, Mr. Gladden responded to Director Ellis' inquiry by providing Director Ellis with a range of wages articulated as follows: "Low" = \$6.05, "Mean" = \$7.48, and "High" = \$8.29.⁴⁴

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

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

Ms. Rebecca Eleazer resolved any confusion surrounding the meaning of Mr. Gladden's August 4, 2000 response. The Plaintiffs called Ms. Eleazer, an ESC representative, during *their* case-in-chief, because she actually prepared Mr. Gladden's response. Ms. Eleazer clarified and explained Mr. Gladden's response.

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

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

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

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

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

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

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

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

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

⁴⁶ Plaintiffs' Exhibit 24.

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

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

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

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

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

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

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

⁵⁰ See note 7, supra.

⁵¹ See note 34, supra.

Director Ellis, as demonstrated above, submitted the \$5.15 per hour wage the Plaintiffs currently receive for review by both the South Carolina ESC and BJA. The \$5.15 hourly wage the Plaintiffs receive from SCDC falls within ESC's published range for similar work. As a result of the wage's conformity with ESC guidelines, BJA also approved the \$5.15 hourly wage SCDC pays the Plaintiffs for their DOI labor. Director Ellis' submission of the Plaintiffs' hourly wage for review by both ESC and BJA clearly demonstrates that Director Ellis afforded not just slight care but great care in determining the Plaintiffs' hourly wage. Accordingly, such great care means that Director Ellis did not act in a grossly negligent manner in determining the hourly wage the Plaintiffs currently receive. Thus, SCDC is immune from liability by operation of Section 15-78-60(5) even if the Plaintiffs had legitimately sustained losses as a result of receiving only the federal minimum wage of \$5.15 per hour for their DOI labor. See *Jackson v. SCDC*, 390 S.E.2d at 468 – 469.³²

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

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

³² Also see analysis on pages 12 and 13, *supra*.

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

V. CONCLUSION

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

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

J. W.
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JOSEPH M. STRICKLAND
Special Circuit Court Judge
Fifth Judicial Circuit

Columbia, South Carolina
October 30, 2002

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 00 -GP-40- 4761

Richard Adkins, et al.

S.C. Dept. of Corrections

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

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

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

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

PRESIDING JUDGE

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

Harry L. Dene, Jr.

Vinton Lide

Lake Summers

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRCP APP-24

Barbara C. Scott
CLERK OF COURT

SCRCP FORM 4 (Revised 3/00)

JUN 21 2018

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURTMALONE, THOMPSON
SUMMERS & OTT, LLC

Elliott Hatton, #158373,

Appellant,

vs.

South Carolina Department of Corrections,

Respondent

Docket No. 16-ALJ-04-0296-AP

Grievance No.: ECI 1215-07

FINAL ORDER

STATEMENT OF THE CASE

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

FACTS/PROCEDURAL BACKGROUND

Appellant participated in federally certified projects assembling electronic components and wire harnesses (altogether for approximately three (3) years and two (2) months) at Evans Correctional Institution (Projects). The Projects complied with federal guidelines and operated under state statutes codified at S.C. Code Ann. § 24-3-310 et seq. (1989, as amended). S.C. Code Ann. §§ 24-3-40 and 24-3-430 are directly at issue in this case.¹

Appellant filed a Step 1 Grievance on June 21, 2007, claiming that he was owed back wages of \$1.92 for each hour worked during his participation in the Projects, including 320 "training hours," when he was paid less than the prevailing wage for such work.² He also demanded access to wages

¹ These projects were not service projects exempted from the prevailing wage requirement by annual budget provisos and finally by S.C. Code Ann. § 24-1-295 (effective August 1, 2007). Also, S.C. Code Ann. § 24-3-40 was not substantially different when Appellant provided the labor involved in this case, and S.C. Code Ann. § 24-3-430 was the same.

² In its brief, Respondent also refers to training wages for the first 320 hours of Appellant's labor, but there is nothing in the record to establish what rate of pay was paid for training other than Appellant's claim that, based on Torrence a sum was improperly deducted from his gross wages.

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SC ADMIN. LAW COURT

held in escrow by SCDC. The grievance was denied on June 1, 2012, served June 21, 2012. Appellant filed a Step 2 Grievance on June 22, 2012, renewing the same claims. SCDC denied the Step 2 Grievance on March 28, 2016. Appellant filed his appeal to the ALC on April 8, 2016, in which he demanded the same rate of back pay for all wages illegally withheld or removed from his gross pay. On June 28, 2016, Respondent filed the Record on Appeal. Appellant filed his initial brief on July 15, 2016. On July 28, 2016, Respondent filed a Motion to Hold in Abeyance because two issues controlling in the instant case were also at issue in two cases pending on petitions for writs of certiorari to the South Carolina Court of Appeals: *Gatewood v. S.C. Dep't of Corr.*, 416 S.C. 304, 785 S.E. 2d 60 (2016), *cert. denied* (May 30, 2017) and *Ackerman, et al. v. S.C. Dep't of Corr.*, 415 S.C. 412, 782 S.E.2d 757 (Ct. App. 2016), *cert. denied* (May 30, 2017). This Court issued an Order of Abeyance on August 11, 2016. After the Supreme Court issued its orders denying certiorari in *Gatewood* and *Ackerman*, this Court issued an Order Lifting Abeyance on June 15, 2017, allowing the parties to file supplemental briefs. On June 27, 2017, Appellant filed a supplemental brief. On July 24, 2017, Respondent filed a Motion for Extension of Deadline to File Its Brief, which the Court granted. On August 8, 2017, Respondent filed a second Motion for Extension of the Deadline to File Its Brief. On August 15, 2017, Respondent filed its brief.

As appendices to its brief, Respondent presented itemized tables from portions of three contracts between SCDC and private contractors. In these contracts the parties agree "to follow the requirements" of the United States Department of Justice and federal statutes. These sections purport to define "Inmate Pay" as follows:

[For the Agreement first executed July 31, 1995, assembling electronic components ("1995 contract").]

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

Prevailing Wage Rate (See Appendix D [Not included])	\$ 4.25
+	
Prorata Social Security Withholding Payment	.32
+	
Prorata Workers' Compensation Premium	.15
+	
<u>SCDC Surplus Fund Amount</u>	<u>1.32</u>
MINIMUM INMATE WAGE	\$ 6.04

At no time during this agreement will inmates be paid less than the prevailing "minimum wage" as set forth in Appendix D once they complete training.

[For the Agreement first executed November 28, 2000, assembling wire harnesses ("2000 contract").]

Hourly Rate: Contractor and SCDC agree to an hourly rate determined as follows:

	<u>FOR INMATE WORKER</u>
Prevailing Wage Rate (See Appendix D [Not included])	\$ 5.25
+	
Prorata Social Security Withholding Payment	.40
+	
Prorata Workers' Compensation Premium	.20
+	
<u>SCDC Surplus Fund Amount</u>	<u>1.32</u>
Hourly Rate charged to Contract	\$ 7.17

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

[For the Agreement first executed March 3, 2001, assembling wire harnesses ("2001 contract").]

Hourly Rate: Contractor and SCDC agree to an hourly rate determined as follows:

Prevailing Wage Rate (See Appendix D [Not included])	\$ 5.25
+	
Prorata Social Security Withholding Payment	.40
+	
Prorata Workers' Compensation Premium	.20
+	
<u>SCDC Surplus Fund Amount</u>	<u>1.32</u>
Hourly Rate charged to Contract	\$ 7.17

At no time during this agreement will inmates be paid less than the prevailing wage as set forth in Appendix D.³

³ This information was not included in the Record on Appeal, nor was it provided to Appellant prior to service of the Respondent's brief. Furthermore, Appendix C referenced in the pay schedule (which presumably provides a basis for the prevailing wage) was neither included in the Record on Appeal nor in Respondent's brief.

The agreements were to be annually adjusted to conform to any changes in the “prevailing wage” as determined by the South Carolina Employment Security Commission.

ISSUES ON APPEAL

- I. Whether Appellant was entitled to the prevailing hourly wage rate for his labor during the Project.
- II. Whether Social Security withholding payments, SCDC Surplus Fund Amount, and Workers’ Compensation premiums, collectively, were required to be included in Appellant’s gross wages for purposes of the calculations mandated in S.C. Code Ann. § 24-3-40(A).

STANDARD OF REVIEW

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

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2017). *See also Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 337 S.C. 133, 137, 522 S.E.2d 605, 607 (Ct. App. 1999); *S.C. Dep't of Labor, Licensing and Regulation v. Girgis*, 332 S.C. 162, 166, 503 S.E.2d 490, 492 (Ct. App. 1998).

DISCUSSION

I. Whether Appellant was entitled to the prevailing hourly wage rate for his labor during the Project.

In his Step 1 Grievance, Appellant states that he is grieving “all wages owed ... under S.C. Code Ann. 24-3-40(A) ... [in the amount of] of \$1.92 for every hour [he] worked ... along with the training wages that [he] worked, 320 hours for less than the prevailing wages, under Statute 24-3-430(D).” He asserts that these claims are supported by *Torrence v. S.C. Dep't of Corr.*, 373 S.C. 586, 646 S.E.2d 866 (2007).⁴ Appellant also asks for immediate access to wages held in escrow. In his Step 2 Grievance, Appellant asserts that he is appealing the issues raised in his Step 1 Grievance. His appeal alleges SCDC “withheld illegally” wages earned by [him]” and restates that he is grieving “all wages owed to [him] by SCDC under case [of] ... *Torrence v. SCDC*.” Appellant also argues in his initial brief that “SCDC paid less than the prevailing wage during the training period.” In his briefs, Appellant claims that SCDC did not pay him the prevailing wage in accordance with S.C. Code § 24-3-430(D) and that he is entitled to back wages in the amount of the difference between the wages he received and the prevailing wage in effect at the time, ~~including the \$1.92 per hour in deductions, for every hour that he worked on the Projects.~~⁵ In support of his argument he quotes, without citation, from *Wicker*, 360 S.C. at 425, 602 S.E.2d at 58: “there is simply nothing in the statutory scheme authorizing the DOC to pay [an inmate] a training wage less than the prevailing wage.” In the supplemental brief, Appellant reasserts that the prevailing wage requirement of Section 24-3-430(D) applies to all his work for the Projects, and that his grievance was timely under the doctrine of equitable tolling.

Respondent contends that Appellant has not raised the prevailing wage issue and has not preserved

⁴ Appellant cites the case name for *Torrence*, as well as the correct opinion number (26328) and filing date, to support his position that Respondent had violated S.C. Code Ann. §§ 24-3-40 and 24-3-430(D). The Court will therefore consider this authority as support for Appellant’s appeal.

⁵ In its brief, Respondent refers to training wages for the first 320 hours of Appellant’s labor, but there is nothing in the record to establish what rate of pay was paid for the training period other than Appellant’s claim that, based on *Torrence*, an improper deduction was removed from his gross wages.

his claim for immediate access to wages held in an interest-bearing escrow account established by S.C. Code Ann. § 24-3-40(A)(5) and governed by § 24-3-40(B)(2). Respondent further argues Appellant failed to assert the doctrine of equitable tolling prior to his supplemental brief. Therefore, Respondent argues that Appellant's claims are time-barred.⁶

Issue Preservation

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

In this case, Respondent asserts that Appellant "failed to raise a claim for 'prevailing wage' under § 24-3-430(D) in his Step 1, Step 2, or Notice of Appeal and he failed to assert the doctrine of equitable tolling in his Step 2 or Notice of Appeal" and therefore did not preserve these claims for appeal. Respondent also argues that these claims, as well as Appellant's claim for prevailing wages for his training period (training wages), are time-barred for an untimely filing of his Step 1

⁶ Respondent concedes in its brief, however, that if the Court does not accept its argument regarding the timeliness issue, the Court should remand the calculation for back pay for the first 320 hours he worked, as the "training wages" he received during this time "did not conform to § 24-3-430(D) or, for that matter, § 24-3-410(B)(7)."

Grievance. I disagree.

First, Appellant cites specifically to Section 24-3-430(D) in his Step 1 Grievance (and all of his issues are incorporated by reference in his Step 2 Grievance) and his initial brief. Appellant also consistently argues that he was being paid a lower wage rate than he should have been paid while he worked for a private sector business at the prison. Appellant used the phrase “prevailing wages” and even cites to *Torrence* as his authority for this issue. *Torrence* dealt with prevailing wages and S.C. Code Ann. §§ 24-3-40, -430(D). Similarly, Appellant refers to “training wages” in his Step 1 Grievance and asserts in his Step 1 Grievance that he was underpaid for “every hour” that he worked for the private sector company while at the prison, including the 320 hours of his training, and that he is owed \$1.92 (which should be \$1.79 under the 1995 contract and \$1.92 under the 2000 and 2001 contracts) “for every hour” he worked. He also cites *Wicker, supra*. In his Step 2 Grievance, Appellant claims he is appealing all the issues in the Step 1 Grievance. His appeal alleges SCDC “withheld illegally” wages earned by [him]” and restates that he is grieving “all wages owed to [him] by SCDC under case [of] ... *Torrence v. SCDC*.” Appellant also argues in his initial brief that “SCDC paid less than the prevailing wage during the training period.” In the supplemental brief, Appellant reasserts that the prevailing wage requirement of § 24-3-430(D) applies to all his work during the Projects. Appellant thus consistently requests reimbursement for the difference in what was paid and the prevailing wage rate for all wages earned, which encompasses “training wages” where the contract applied the wage rate applied to training.⁷

Therefore, the Court finds the prevailing wage argument, which includes the training wages argument, to be preserved for review on appeal.

As to the equitable tolling/timeliness arguments, Respondent did not deny either the Step 1 Grievance or the Step 2 Grievance on the ground that either was time-barred.⁸ Moreover, in *Torrence*, the Supreme Court directed SCDC to provide “due process via the internal grievance system.” *Torrence*, 373 S.C. 586 at 595, 646 S.E.2d 866 at 870. To limit that remedy to the grievance system’s 15-day filing deadline at this stage would make the Court’s 2007 order a

⁷ The South Carolina Supreme Court in *Wicker* held that “there is simply nothing in the statutory scheme authorizing [SCDC] to pay [an inmate] a training wage less than the prevailing wage.” 360 S.C. at 425, 602 S.E.2d at 58. Accordingly, this Court finds that Appellant was entitled to the prevailing wage rate for his training wages, if the wage rate in the contract applied to training, too.

⁸ Significantly, Respondent took nearly four (4) years to issue a decision on Appellant’s timely-filed Step 2 Grievance.

nullity. Subsequently, in *Ackerman, supra*, the Court of Appeals held that the characterization of a wage grievance as an incident subject to the 15-day filing deadline “was arbitrary and capricious,” and that the wage challenges “logically [fall] within [challenges to] policies and procedures as contemplated in [the inmate grievance system].” *Id.* at 421, 782 S.E.2d at 761. This decision has the effect of identifying a wage complaint as not subject to a “time bar” for missing the 15-day deadline.⁹ Therefore, the Court finds that claims in Appellant’s Step 1 and Step 2 Grievances are not time-barred.¹⁰

Prevailing Wage Rate

Having addressed unpreserved, waived, and inapplicable issues, the Court now turns to one of the preserved issues on appeal: whether Appellant was entitled to the prevailing hourly wage rate for his labor during the Project.

Appellant argues that he should be reimbursed for the difference in what he was paid and the prevailing wage rate for all wages earned, including the “training wages” he received for the first 320 hours worked. Respondent argues that the prevailing wage rate issue was not preserved for review, but the Court has already addressed that argument, and found that it was.

The Prison Industries Program is authorized and operated pursuant to federal and state laws. Federal law, 18 U.S.C. § 1761(a) (2011), limits the transportation in interstate commerce of goods, wares, or merchandise manufactured or produced wholly or in part by convicts or prisoners.

Exceptions are established in 18 U.S.C. 1761(c) for projects designated by the Director of the Bureau of Justice Assistance. Those exceptions require “wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed” but allow deductions not to exceed eighty percent (80%) of the gross wages, to include federal and state taxes, reasonable charges for room and board, family support (according to court order or state statute), and contributions to a fund for victim compensation. Further, the federal law allows inmates to have benefits such as Workers’ Compensation but specifically disqualifies them from

⁹ Appellant made an additional argument concerning immediate access to wages escrowed pursuant to § 24-3-40(A)(5) and “returned” pursuant to § 24-3-40(B)(2), but it was only raised in his Step 1 Grievance and reiterated generally in his Step 2 Grievance but was not argued in his brief. Because this issue was not preserved on appeal, the Court will not consider this argument. *See Wright, supra*.

¹⁰ Respondent acknowledges in its brief that if the Court does not accept its argument regarding the timeliness issue, the Court should remand the calculation for back pay for the first 320 hours he worked, as the “training wages” he received during this time “did not conform to § 24-3-430(D) or, for that matter, § 24-3-410(B)(7).”

receiving unemployment compensation while incarcerated.

The Department of Justice issued a final Prison Industry Enhancement Certification Program Guideline in which it reiterates the statutory requirement that "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." 64 Fed. Reg. 17009 (April 7, 1999) (Guideline). After voicing its concern to protect "the private sector labor force and business from unfair competition that could otherwise stem from the flow of low-cost, prisoner-made goods into the marketplace, it states that "participants must, therefore, implement the prevailing wage requirements under like conditions experienced by private sector competition." *Id.* In determining the appropriate inmate wage, no "other cost variables [may] be taken into consideration [including any] ... unique expenses incurred as a result of undertaking production within the prison environment." *Id.* at 17010. This prevailing wage, as it is referred to here, must be verified by the appropriate state agency which determines wage rates using a "non-inmate wage scale which will not result in the displacement of non-inmate workers performing similar work in the relevant locality." *Id.* The "prevailing wage cannot be set below the Federal minimum wage"; however, [p]ayment of the Federal minimum wage ... does not automatically achieve compliance with the prevailing wage requirement unless the prevailing wage for the comparable private sector industries is, in fact, the Federal minimum wage." *Id.* The Guideline also requires the payment of overtime because that requirement would be imposed on private sector competition.

South Carolina enacted statutes to comply with federal law. For example, S.C. Code Ann. § 24-3-315 echoes the federal conditions:

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 added).

Likewise, S.C. Code Ann. § 24-3-430 (D) provides that "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." These state and federal requirements embrace both training and post-training wages.

In this case, remand is necessary for evidence to be entered by SCDC showing the gross wages paid to Appellant during his participation in the projects and what the prevailing wages were in

the area at the time of the project, as well as the calculation of any back wages to which Appellant is entitled for his labor, including his "training wages" for the first 320 hours he worked where the contract applied the wage rate to training.

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

Appellant contends that for every hour he worked his gross pay was reduced by an improper redirection of part of his pay to SCDC. Respondent argues that the items charged to the private company in addition to Appellant's gross hourly wages was lawful and that charging those items in addition to inmates' gross wages was necessary to defray the expenses associated with the operation of its prison industries program.

The federal rules require that inmates be paid a wage that cannot be set below the Federal minimum wage, and that the Federal minimum wage does not automatically achieve compliance with the prevailing wage requirement. Inmates must be paid wages not less than the Federal minimum and not less than wages paid for work of a similar nature in the locality in which the work was performed. See Guideline at 17010.

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

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

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

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

*

*

*

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

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

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

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

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

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

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

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

Based on the analysis in *Torrence* and the contract excerpts quoted above, these items comprise the inmate's gross hourly wages, which must be determined on remand and be recalculated and disbursed accordingly. The Court further notes that under Section 24-3-140 (A)(3) thirty-five

percent (35%) of the gross hourly wage would go to Appellant's child support obligation. If there is no child support obligation, ten percent (10%) would be added to Appellant's "incidentals" account as provided in subsection (A)(4). Once in that account, the funds could be "distributed to the person or persons of the inmate's choice." The remaining twenty-five percent (25%) would go to SCDC to defray the cost of the inmate's room and board.

The items set out in the contract as the hourly rate charged to the private sector business for the inmate labor furnished by SCDC are "the gross wages of the prisoner," as the South Carolina Supreme Court indicated in *Torrence*, These gross wages must be disbursed as provided in § 24-3-40(A). Not to do so is an error of law, a "violation of the plain language of the statute which directs [SCDC] to disburse the money based on the gross wages." See *Torrence*, 373 S.C. at 594 n.4, 646 S.E.2d at 870 n.4.

An Administrative Law Judge may reverse or modify an agency's decision if that decision is not supported by substantial evidence on the whole record or is affected by an error of law. In this case, much of the evidence relied on by Respondent (for example the contract and proof of the actual wages paid during Appellant's work for the project, as well as how much was deducted from Appellant's wages) was not in the record. Also, Respondent takes the position that the additional itemized expenses totaling \$1.79 under the 1995 contract and \$1.92 under the 2000 and 2001 contracts were not "lawfully" part of Appellant's gross wages, a position that is contrary to our Supreme Court's note in *Torrence* and is thus an error of law.¹¹ Thus, a remand is necessary for evidence to be entered by SCDC showing the proper deductions required by § 24-3-40(A).

Conclusion

SCDC's failures to demonstrate that it paid Appellant the prevailing wage rate and to include the

¹¹ In addition to addressing the issues raised by Appellant, Respondent contends that SCDC is required by law to make the prison system self-sustaining. See S.C. Code Ann. § 24-3-20. Specifically, Respondent cites S.C. Code Ann. § 24-3-190, which provides among other things that "amounts received or to be received from the hire of convicts or from any other source during the current fiscal year [must be] appropriated for the support of the penitentiary." (Respondent also cites S.C. Code Ann. § 24-3-400, but this section deals with proceeds from the sale of articles and products manufactured or produced by convict labor, not payments for the labor itself.). Respondent concludes that recalculating the wage structure as argued by Appellant would create a deficiency in the prison industries program. This argument is outside of the scope of this appeal. The Court notes, however, that if creating a program that would make prisons self-sustaining, while not favoring prison industries over non-inmate labor furnished by law-abiding citizens, were the goal, then the token \$1.00 a month for occupancy of public property for private use could have been increased to rent at market value.

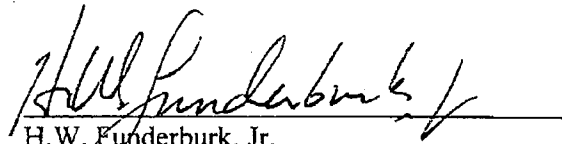
Social Security withholding, Workers' Compensation premium, and SCDC Surplus Fund Amount in the gross wages prior to making deductions thereto were errors of law. Accordingly, the parts of Respondent's decision dealing with the prevailing wage rate and gross wages are **REVERSED** and **REMANDED**. Respondent must demonstrate that Appellant was paid prevailing wage rate for the type of labor he provided at the time and in the area that he provided it, pursuant to Section 24-3-430(D). SCDC must also classify the entire contract amount as the hourly gross wages and calculate deductions and distributions from Appellant's pay as set forth in Section 24-3-40(A). If the contractual wage rate was also used to pay the inmate while training for the work, then this amount must also be included in the recalculation.

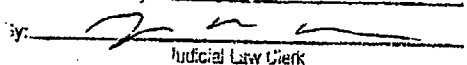
ORDER

IT IS THEREFORE ORDERED that those parts of SCDC's decision dealing with Appellant's prison industry wages, including training wages if covered by the wage rate in the contract, and their disposition are **REVERSED AND REMANDED** for proceedings consistent with this Order.

AND IT IS SO ORDERED.

June 20, 2018
Columbia, South Carolina


H.W. Funderburk, Jr.
Administrative Law Judge

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date
served this order in the above entitled action upon all
parties to this cause by depositing a copy hereof,
in the United States mail, postage paid, or in the Interagency
Mail Service addressed to the party(ies) or their attorney(s).
this 20th day of June 2018
by: 
Judicial Law Clerk

FILED
JUN 20 2018
SC ADMIN. LAW COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

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

Administrative Law Court Docket No. 16-ALJ-04-0296-AP

RECEIVED
JUL 18 2018
SC Court of Appeals

Elliott Hatton, #158373 Respondent,

v.

South Carolina Department of Corrections Appellant.

NOTICE OF APPEAL

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

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

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

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

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

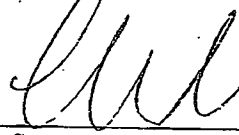
The items set out in the contract as the hourly rate charged to the private sector business for the inmate labor furnished by SCDC are 'the gross wages of the prisoner,' as indicated in [*Torrence v. S.C. Dep't of Corr.*, 646 S.E.2d 866, 870, n. 4 (S.C. 2007)]. These gross wages must be disbursed as provided in [S.C. Code Ann. § 24-3-40(A)]. Not to do so in an error of law, a "violation of the plain language of the statute which directs [the Department] to disburse the money based on the gross wages. [*Torrence*, 646 S.E.2d at 870, n. 4]."

...
[The Department's] failures to demonstrate that it paid [Hatton] the prevailing wage rate and to include the Social Security withholding, Workers' Compensation premium, and SCDC Surplus Fund Amount in the gross wages prior to making deductions thereto were errors of law. Accordingly, the parts of [the Department's] decision dealing with the prevailing wage rate and gross wages are **REVERSED** and **REMANDED**. [The Department] must demonstrate that [Hatton] was paid prevailing wage rate for the type of labor he provided at the time and in the area that he provided it, pursuant to [S.C. Code Ann. § 24-3-430(D)]. [The Department] must also classify the entire contract amount as the hourly gross wages and calculate deductions and distributions from [Hatton's] pay as set forth in [§ 24-3-40(A)]. If the contractual wage rate was also used to pay the inmate while training for the work, then this amount must also be included in the recalculation.

...
IT IS THEREFORE ORDERED that those parts of [the Department's] decision dealing with [Hatton's] prison industry wages, including training wages if covered by the wage rate in the contract, and their disposition are **REVERSED AND REMANDED** for proceedings consistent with this Order.

See Order, pp. 12 – 13. [emphasis supplied by ALJ].

RESPECTFULLY SUBMITTED:



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Outside Counsel for Appellant

South Carolina Department of Corrections

July 18, 2018

Pro Se Respondent:

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

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

Appellate Case No. 2018-001322

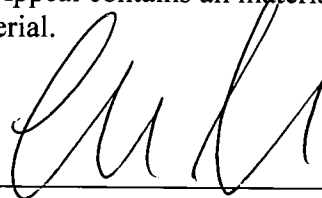
Elliott Hatton, #158373 Respondent,

v.

South Carolina Department of Corrections Appellant.

CERTIFICATE OF COUNSEL

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



May 13, 2019

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