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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Opinion No. 5829
Appellate Case No. 2016-000285
Administrative Law Court Docket No. 12-ALJ-04-00143-AP

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

v.

South Carolina Department of Corrections ..... Appellant.

APPELLANT'S PETITION FOR REHEARING

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I. SCDC'S PETITION FOR REHEARING

Appellant South Carolina Department of Corrections ["SCDC"] respectfully petitions the Court, pursuant to South Carolina Appellant Court Rule ["SCACR"] 221(a), to rehear its recent decision in the instant matter. *See* -- S.E.2d --, 2021 WL 2678920 (S.C. Ct. App. Jun. 30, 2021).

II. SCOPE OF SCDC'S PETITION

At the outset of its June 30, 2021 decision, *Id.*, at *1, this Court recognized the following:

> On appeal, [SCDC] argues the [South Carolina Administrative Law Court] erred by: (1) finding Torrence timely filed the grievance at issue, (2) finding the doctrine of equitable tolling applied to Torrence's grievance, (3) **calculating the prevailing wage in its order**, and (4) finding [SCDC] erred by failing to allow Torrence to designate persons or authorities under [S.C. Code Ann. § 24-3-40]. [emphasis supplied].

A. SOLE RULING ADDRESSED BY SCDC'S PETITION

SCDC's instant petition addresses the Court's ruling regarding only the third of the four (4) issues identified above, namely its ruling affirming the ALC's calculation of the prevailing wage applicable to the labor Torrence performed while participating in the prison industries project in question. *Id.*, at **6 – 7. By doing so, the scope of SCDC's instant petition is limited to the order issued January 20, 2016 by the ALC (R. pp. 1029 – 43), the second of the two (2) orders issued by the ALC in the instant matter.

B. RULINGS NOT ADDRESSED BY SCDC'S PETITION

For clarity's sake, SCDC's instant petition does not address the Court's rulings on the first of the above-identified four (4) issues (i.e., the ALC correctly found Torrence timely filed the administrative grievance at issue, *Id.*, at **4 – 5); the second of these four (4) issues (i.e., the Court did not address whether the ALC erred in applying the doctrine of equitable tolling given its ruling as to the first issue, *Id.*, at *6); or the fourth of these four (4) issues (i.e., the ALC correctly found SCDC erred by failing to allow Torrence to designate persons or entities to

receive an immediate distribution of funds held in escrow under the provisions of S.C. Code Ann. § 24-3-40, 2021 WL 2678920, at *4 and **7 – 8).

III. FACTUAL ERRORS IN THE COURT'S JUNE 30, 2021 DECISION

A. TORRENCE DID NOT PARTICIPATE IN A "SERVICE WORK PROJECT" OPERATED BY SCDC AT EVANS

In the first paragraph of the section from its decision styled "FACTS/PROCEDURAL HISTORY," this Court declared as follows, 2021 WL 2678920, at *1:

> Torrence is currently serving a life sentence without the possibility of parole. Between June 1997 and November 2004, Torrence participated in the prison industries **service project** (PIP) operated at Evans Correctional Institution. During this time, Torrence performed work for Insilco Global Industries/ESCOD (ESCOD). [emphasis supplied].

As it explained in all or nearly all its filings to this Court in this matter, SCDC operates three (3) types of projects within its prison industries program: "traditional" projects (*see* S.C. Code Ann. §§ 24-3-320 and 330), **"service work" projects** (*see* §§ 24-1-290 and 295; *see also* § 24-3-310(3)), and projects certified by the federal government under its "Prison Industries Enhancement Certification Program" ["PIECP"].

SCDC must operate its PIECP projects, such as the one at Evans in which Torrence participated, in conformity with federal law (*see* 18 USC § 1761, the Ashurst-Sumners Act), federal regulations (*see* 64 FR 17000, *et seq.*), and state law (*see* §§ 24-3-40 and 24-3-310, *et seq.*). Indeed, the parties, the ALC, and this Court have devoted considerable effort in litigating this matter towards analyzing these statutory and regulatory provisions.

No evidence exists anywhere in the record to support the notion Torrence participated in a "service" or "service work" project at Evans operated by SCDC under the provisions of § 24-1-290, § 24-1-295, or § 24-3-310(3).

SCDC addresses the nomenclature used by this Court to describe the type of project in which Torrence participated out of an abundance of caution, as this Court may not have intended to create the perception that Torrence participated in a "service work" project at Evans.

B. TORRENCE DID NOT PERFORM WORK FOR OR OTHERWISE WORK FOR INSILCO/ESCOD

As shown above in Section II(A), this Court declared as follows in the first paragraph of the section styled "FACTS/PROCEDURAL HISTORY," 2021 WL 2678920, at *1:

> Torrence is currently serving a life sentence without the possibility of parole. Between June 1997 and November 2004, Torrence participated in the prison industries service project (PIP) operated at Evans Correctional Institution. During this time, **Torrence performed work for Insilco Global Industries/ESCOD (ESCOD)**. [emphasis supplied].

Later in the same section, *Id.*, this Court described the claims Torrence raised in his Step 1 grievance as follows:

> Specifically, Torrence argued [SCDC] violated state law by paying him an hourly wage below the prevailing wage in the industry. Torrence argued he was entitled to the difference between his wage and the prevailing wage for **his work performed for ESCOD** both during and after his training period as well as for any overtime hours. [emphasis supplied].

Respectfully stated, this Court erred by declaring Torrence "performed work for" or otherwise worked in any way for Insilco/ESCOD, the private industry sponsor in the PIECP project at Evans in which Torrence voluntarily participated, in the two (2) above-quoted passages from its June 30, 2021 decision.

Torrence fired the first volley in the parties' battle by asserting the following in his Step 1 grievance (R. p. 121):[1]

> **I was employed by [ESCOD]**, in the SCDC Private Sector Industries Program at [Evans] from June 1997 thru November, 2004. [footnote

[1] *See* SCDC's Brief filed January 3, 2017, p. 2.

> omitted]. **During the course of my employment,**[2] I learned that SCDC was withholding certain wages and monies from me in contravention of state law, to which I have a property interest. The S.C. Supreme Court recently ruled in [*Torrence, et al., v. S.C. Dep't of Corr.,* 640 S.E.2d 866 (S.C. 2007)] (filed May 7, 2007) (received by [me] on May 21, 2007), that I must file a Grievance under [SCDC Policy Number GA-01.12]. [footnote omitted]. [emphasis supplied].

In its response to his Step 1 grievance (R. pp. 131 – 32), SCDC rejected Torrence's above-quoted assertions. ("To the extent that you claim in your Step 1 that you worked for or were otherwise 'employed' by ESCOD, I conclude that you never 'worked' for nor were you ever 'employed' by ESCOD.")

The parties contested the issue of whether Torrence performed work for or otherwise worked in any way for Insilco/ESCOD before the ALC, and the ALC recognized as much in a footnote from its January 20, 2016 order (R. p. 1035):

> **The parties also argue vociferously about whether it is proper to use the terms "employee" or "hire" with respect to [Torrence's] labor and his relationship with the [Prison Industries Enhancement Certification Program].**[3] The Court declines to address in detail the parties' arguments concerning [Torrence's] status as an "employee," since they are not necessary for the disposition of this case. It is true that [Torrence] is not classified as an "employee" of the State. [§ 24-3-430(F)]. [Torrence] is not an "employee" of either the state or the private industry sponsor for purposes of the Payment of Wages Act. [*Williams v. S.C. Dep't. of Corr.*, 641 S.E.2d 885 (2007)]. Nor is [Torrence] an "employee" for purposes of unemployment benefits. [§ 24-3-430(G)]. Yet, it is also true that for some other purposes [Torrence] has the same rights and responsibilities afforded to employees. [Torrence] is required to pay state and federal income taxes and Social Security taxes. [§ 24-3-40(A)(6)]. [Torrence] is entitled to worker's compensation benefits for on-the-job injuries. [18 U.S.C. § 1761(e)(3)]. None of these rights and duties (or lack thereof) directly bear on the disposition of this case. [emphasis supplied].

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[2] In the footnote associated with this clause in its January 3, 2017 brief, SCDC contested the notion Torrence was "employed" by or otherwise worked for Insilco/ESCOD. *See* SCDC's Brief filed January 3, 2017, p. 2, n. 3.

[3] *See* note 7 below.

Regarding the above-quoted footnote from the ALC's January 20, 2016 order, SCDC argued as follows in the first petition for rehearing it filed in the instant matter: [4]

> Despite its "on the one hand/on the other" exploration of this issue and its statement that the issue did not "directly bear on the disposition of this case," the ALC, in its January 20, 2016 order, nevertheless sided with Torrence when, in the course of issuing its erroneous ruling quantifying the "prevailing wage" SCDC should have paid him, it erroneously ruled that Torrence "worked as a harness assembler for ESCOD."

The ruling in which the ALC declared Torrence "worked as a harness assembler for ESCOD" appeared in the following passage from its January 20, 2016 order (R. p. 1039):

> [Torrence] must be paid the mean average South Carolina wage of an electronic assembler, including overtime, *for the years he worked as a harness assembler for ESCOD.*[5] [SCDC] must obtain the data to determine this wage from the Department of Employment and Workforce. **Specifically, [SCDC] must pay [Torrence] the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999 and the mean average wage reflected by that code or its counterpart for the years data is not contained in the record.** [italicized emphasis supplied by SCDC; bold emphasis supplied by the ALC].

While it extensively included verbatim passages from the ALC's January 20, 2016 order in its June 30, 2021 decision, this Court did not include the above-quoted passage in its decision.

Just like the ALC, this Court, as reflected by the two (2) above-quoted paragraphs from the section of its June 30, 2021 decision styled as "FACTS/PROCEDURAL HISTORY," fully embraced Torrence's assertion that he performed work for or otherwise worked for Insilco/ESCOD.

This Court, however, offered no analysis on the issue, nor did it even acknowledge the parties' dispute over the issue before the ALC in its June 30, 2021 decision.

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[4] *See* SCDC's Petition for Rehearing filed January 10, 2019, pp. 6 – 7.

[5] *See* note 6 below.

This Court's June 30, 2021 decision represents its second review of SCDC's appeal from the ALC's January 20, 2016 order.

Regarding its first review of SCDC's appeal, this Court acknowledged the following procedural history, 2021 WL 2678920, at *1, n. 2:

> Upon our initial review, this court dismissed [SCDC's] appeal as interlocutory, but our supreme court reversed the dismissal and remanded to this court to address the merits of [SCDC's] appeal. *See* [*Torrence v. S.C. Dep't of Corr.*, 857 S.E.2d 549 (S.C. 2021)].

Unlike this Court in its June 30, 2021 decision, our Supreme Court, in determining whether SCDC's appeal to this Court of the ALC's January 20, 2016 order was interlocutory, acknowledged the dispute between Torrence and SCDC concerning Torrence's status as an employee of Insilco/ESCOD, and it declared as follows, 857 S.E.2d at 551:

> [Torrence] asserted, and SCDC disputed, he was an employee of ESCOD. **The ALC determined [Torrence] was an employee of ESCOD as a matter of law, finding he "performed [labor] for ESCOD."** The ALC further concluded that [Torrence] "must be paid the mean average South Carolina wage of an electronic assembler, including overtime, **for the years he worked as a harness assembler for ESCOD.**[6]" [emphasis supplied].

Our Supreme Court next acknowledged the following, 857 S.E.2d at 551:

> Additional findings from the ALC order further confirm SCDC's contention that the ALC order constitutes a final judgment, including:
>
> > Specifically, [SCDC] must pay [Torrence] the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999 and the mean average wage reflected by that code or its counterpart for the years data is not contained in the record [and] IT IS FURTHER ORDERED that [SCDC] disburse, in accordance with Section 24-3-40, the difference between the amounts previously disbursed and the prevailing wage. This disbursement should be done immediately upon determination of the prevailing wage, but not later than July 1, 2016.

[6] In the second sentence of this passage, our Supreme Court obviously referenced the ruling from the ALC's January 20, 2016 order in which the ALC declared Torrence "worked as a harness assembler for ESCOD." (R. p. 1039). *See* note 5 above.

In the footnote associated with the final sentence of the passage from the ALC's January 20, 2016 order quoted above by our Supreme Court in its March 24, 2021 published decision, our Supreme Court further declared as follows, 857 S.E.2d at 551, n. 3:

> The ALC order includes a footnote which purports to "decline[ ] to address" [Torrence's] status as an employee.[7] The presence of the confusing footnote does not alter the result on appealability, for **the unmistakable award to [Torrence] of a defined method for calculating the prevailing wage removes any question that the ALC ruled with finality in favor of [Torrence] on the employee question.** [emphasis supplied].

Our Supreme Court, in its March 24, 2021 published decision, definitively and explicitly ruled the ALC, in its January 20, 2016 order, sided with Torrence regarding his assertion that he was an employee of Insilco/ESCOD while he voluntarily participated in the PIECP project SCDC operated at Evans.[8]

This Court, by recognizing at the outset of its June 30, 2021 decision that Torrence "performed work for" Insilco/ESCOD, adopted both Torrence's assertion that he was employed by Insilco/ESCOD and the ALC's ruling with finality in favor Torrence on this issue. Respectfully but directly stated, this Court committed plain error by doing so.

This Court's adoption of the ALC's ruling that Torrence's was employed by Insilco/ESCOD runs afoul of the guidelines published by the United States Department of

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[7] Our Supreme Court obviously referenced the footnote from the ALC's January 20, 2016 order in which the ALC acknowledged that SCDC and Torrence argued "vociferously about whether it is proper to use the terms 'employee' or 'hire' with respect to [Torrence's] labor and his relationship with the [Prison Industries Enhancement Certification Program]." (R. p. 1035). *See* note 3 above.

[8] Our Supreme Court finished its assessment of SCDC's challenge to this Court's conclusion that its appeal of ALC order was interlocutory as follows, 857 S.E.2d at 551:

> SCDC asserts it has numerous factual and legal challenges to the decision of the ALC, and the remand mandates, with no agency discretion, the exact relief sought by [Torrence]. **SCDC specifically disputes (1) that [Torrence] was an employee for purposes of the applicable law, and (2) the method of computing [Torrence's] wages mandated by the ALC.** SCDC correctly views the ALC order as a final judgment and the remand to the agency as essentially ministerial to execute the judgment ordered by the ALC. [emphasis supplied].

Justice's Bureau of Justice Administrative ["BJA"], which apply to projects certified by the federal government under its PIECP, like the project SCDC operated at Evans in which Torrence participated. The operative guidelines, 64 FR 17007, clearly state that "[t]he requisite payment of at least a minimum wage, by a [project], **is in no way intended by BJA to imply that PIECP inmate workers are employees** for purposes of the PIECP statute or any other federal law." [emphasis supplied].

The Court's adoption of the ALC's ruling is flatly negated by federal precedent. *See Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) ("Both public agencies and private firms have employees. **But prisoners are not employees.**"). [emphasis supplied].

This Court's adoption of the ALC's ruling is also negated by its own decision in *S.C. Dep't of Corr. v. Cartrette*, 694 S.E.2d 18 (S.C. Ct. App. 2010). In *Cartrette*, 694 S.E.2d at 21, this Court relied upon our Supreme Court's decision in *Williams* when recognized the following:

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

In *Cartrette, Id.*, this Court then invoked on our Supreme Court's decision in *Adkins v. S.C. Dep't of Corr.*, 602 S.E.2d 51 (S.C. 2014), as it continued discussing the status of inmates, like Torrence, who participate in prison industries projects operated by SCDC:

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

This Court unequivocally ruled in *Cartrette*, *Id.* at 23, that the inmate in question was not an employee of the private industry sponsor:

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

In so ruling, this Court, unlike the ALC in its January 20, 2016 order, affirmed SCDC's determination that the inmate in *Cartrette* was not an employee of the private industry sponsor that participated in the prison industries project under review. *Id.*

In its June 30, 2021 decision, 2021 WL 2678920, at **6 – 7, this Court acknowledged its prior decision in *Cartrette*, but it overlooked its above-quoted adoption of our Supreme Court's decision in *Williams* which declared a private industry sponsor, like Insilco/ESCOD, "is not an employer of inmates."

This Court also overlooked its decision in *S.C. Dep't of Corr. v. Tomlin*, 694 S.E.2d 25, 29 (S.C. Ct. App. 2010) (overruled on other grounds by *Allison v. W.L. Gore & Assoc.*, 714 S.E.2d 547 (S.C. 2011)), the companion case to *Cartrette*, in which it issued the identical ruling on this issue.

C. OUR STATE'S EMPLOYMENT SECURITY COMISSION DID NOT USE OR QUANTIFY THE TERM "PREVAILING WAGE"

Later in the section of its decision styled "FACTS/PROCEDURAL HISTORY," 2021 WL 2678920, at *2, this Court chronicled the ALC's operative order as follows:

> On January 21, 2016, the ALC issued its order addressing the merits of Torrence's claims. In its order, the ALC found [SCDC] erred by failing to pay Torrence the prevailing wage for his labor pre- and post-training, stating "there is no construction of law under which [SCDC] could pay

[Torrence] less than the prevailing wage." The ALC further stated, "The question then becomes, what is the 'prevailing wage' that must be paid for all hours worked in both the training period and thereafter?" Addressing this question, the ALC stated,

> **The [PIP] Guideline ... states that the prevailing wage must be obtained from the state agency that determines wage rates .... In South Carolina, this agency would have been the Employment Security Commission (ESC) at the times relevant to this case, but would now be the Department of Employment and Workforce (DEW).**

[emphasis supplied].

This Court continued chronicling the ALC's order, 2021 WL 2678920, at **2 – 3:

> The ALC continued,
>
> > [SCDC] cites a [c]ircuit [c]ourt order in another case as support for the theory that [§ 24-3-410], and not [§ 24-3-430], governs the wage standard applicable in this case.[9] Not only is this [c]ircuit [c]ourt order not binding, the argument for which it is cited contradicts the statements of the higher courts in this state. This [c]ourt declines to further address the argument that only [§ 24-3-410] applies,[10] noting that the South Carolina Supreme Court has already stated that the program at issue in this case operated under [§] 24-3-430.
>
> The ALC continued, "**While the [c]ourt agrees that verification of wage rates by the ESC is the method for determining the prevailing wage that the federal [g]uideline and state statutes contemplate**, the [c]ourt does not agree that the $5.25 regular hourly rate conforms to the ESC data in the record." The ALC stated,
>
> > **[Torrence] has asked this [c]ourt to determine the prevailing wage based on the record in this case.** In so doing, the [c]ourt reaches an issue not yet addressed by South Carolina courts. While it has been decided that the Department may not pay less than the prevailing wage during training, no inmate has successfully raised the issue of how the prevailing wage is calculated.

[emphasis supplied].

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[9] *See Adkins, et al., v. S.C. Dep't of Corr.*, Case No. 2000-CP-40-4761 (S.C. Cir. Ct. Oct. 30, 2002), discussed below in Section IV.

[10] Unlike the ALC, this Court addressed § 24-3-410(B)(7) in its June 30, 2021 decision.

This Court finished chronicling the ALC's operative order, 2021 WL 2678920, at *3:

> In calculating the prevailing wage, the ALC interpreted [§ 24-3-430]. The court stated,
>
> > The Merriam-Webster Dictionary defines "prevail" as "to be frequent: predominate." ... Predominate is defined as "to hold advantage in numbers or quantity." ... **The affidavit in the record of Rebecca Eleazor of the ESC supports the conclusion that the "average" wage in South Carolina for a given occupational category would be the ordinary interpretation of the statutory phrase prevailing wage.** The [c]ourt therefore concludes that the "prevailing wage" *equals the mean average wage* for an occupation.
> >
> > **The [PIP] Guideline requires that the prevailing wage must be obtained from the state agency that determines wage rates ....** Further, the Guideline states that the prevailing wage must be set exclusively in relation to the amount of pay received by similarly situated non-inmate workers and that no other cost variables may be taken into consideration.... In referring to the ESC data in the record, the [c]ourt concludes that "locality" means the state of South Carolina. Further, the [c]ourt concludes that the data necessary to determine the mean average wage for "work of a similar nature" as contemplated by the state statutes and federal guidelines **may be found by referring to the appropriate Occupational Employment Statistics (OES) or OCC code used by ESC/DEW.**
>
> (emphasis added). Based on the aforementioned analysis, the ALC found, "The record simply d[id] not support a finding that the mean average wage for an assembler [was] as low as the $5.25 paid [to Torrence]"; rather, the record showed the mean average wage for an electronic assembler was $8.82 in 1997 and $9.92 for 1998 and 1999. The ALC additionally found "the evidence in the record [was] insufficient to calculate the wage for all of the relevant years," specifically the years 2000 through 2004. It therefore ordered Torrence's claim be remanded to [SCDC] to determine the prevailing wage for the remaining years of Torrence's labor.

[emphasis supplied].

By adopting the ALC's analysis wholesale, this Court, in the words of our Supreme Court in its March 24, 2021 decision, 857 S.E.2d at 551, n. 3, awarded Torrence "a defined method for calculating the prevailing wage."

By doing so, however, this Court erroneously embraced a result which runs contrary to the reality that our state's ESC, the predecessor agency to our state's DEW, did not define or even use the term "prevailing wage."

As reflected above, this Court adopted in its June 30, 2021 decision the following factual conclusion articulated by the ALC in its January 20, 2016 order (R. p. 1038): "**[t]he affidavit in the record of Rebecca Eleazor** of the ESC supports the conclusion that the 'average' wage in South Carolina for a given occupational category would be the ordinary interpretation of the statutory phrase prevailing wage." [emphasis supplied].

Contrary to the ALC's above-quoted representation, which this Court adopted, no affidavit from Ms. Eleazor appears in the record. Instead, only deposition testimony from Ms. Eleazor appears in the record, which she provided August 10, 2004 during the litigation of the declaratory judgment action filed in circuit court in which Torrence initially pressed his prison industries pay claims. (R. pp. 533 and 604 – 39). *See Torrence, et al., v. S.C. Dep't of Corr.*, Case No. 2001-CP-40-3409 (S.C. Cir. Ct. May 31, 2005).[11]

Not only did it mischaracterize the method by which she offered her testimony, the ALC misapprehended the substance of Ms. Eleazor's testimony. By adopting the ALC's analysis wholesale, this Court has likewise misapprehended the substance of Ms. Eleazor's testimony.

At her deposition, Ms. Eleazor testified that she worked "with the [ESC's Occupation Employment Statistics Program] where we survey employers to collect occupation, employment, and wage data." (R. p. 605).

Ms. Eleazor further testified **the ESC**, the agency *exclusively* tasked under BJA guidelines (i.e., 64 FR 170009 – 10(B)) to verify the "prevailing wage," **does "not provide or**

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

publish a wage that's called prevailing wage," nor does it "have a wage classification called prevailing wage." (R. p. 617). [emphasis supplied].

By its January 20, 2016 order, the ALC erroneously did something the ESC itself did not do and, presumably, the DEW doesn't currently do, namely declare a precise hourly rate of pay for a specified job as "the prevailing wage."

By its wholesale adoption of the ALC's analysis, this Court has now erroneously declared a precise hourly rate of pay for a specified job as "the prevailing wage," which the ESC itself did not do.

IV. THIS COURT'S RULING AFFIRMING THE ALC'S DECISIONS TO BOTH DEFINE AND CALCULATE THE "PREVAILING WAGE" SCDC SHOULD HAVE PAID TORRENCE FOR HIS PRISON INDUSTRIES LABOR IS THE FLAWED PRODUCT OF ADOPTING THE ALC'S FACTUAL ERRORS AND DEFECTIVE LOGIC

At the outset of its analysis concerning the ALC's decision to calculate the prevailing wage, the Court stated the following, 2021 WL 2678920, at *6:

> [SCDC] argues the ALC erred by calculating the prevailing wage for Torrence's labor performed through PIP because it "misapprehended the applicable state law, federal law, and federal regulations." Specifically, [SCDC] asserts [§] 24-3-410(B)(7) is the controlling authority over inmate wages received through PIP, rather than [§] 24-3-430(D). Arguing the ALC erroneously ignored the analysis of the circuit court in [*Adkins, et al., v. S.C. Dep't of Corr.*, Case No. 2000-CP-40-4761 (S.C. Cir. Ct. Oct. 30, 2002)], [SCDC] urges this court to adopt the circuit court's holding, which found pursuant to [§] 24-3-410(B)(7), inmates were only entitled to a comparable wage in the industry and not the prevailing wage. [SCDC] therefore asserts the wage Torrence received complied with South Carolina law because it was ten cents over the federal minimum wage for similar labor. **[SCDC] further argues the ALC erred in its calculation of the prevailing wage because the record did not contain sufficient evidence to support the calculation.** We disagree. [emphasis supplied].

Before embarking upon an analysis of the various statutes applicable to prison industries projects operated by SCDC, this Court observed as follows, 2021 WL 2678920, at *6:

> Preliminarily, we find [SCDC's] assertion that [§] 24-3-410(B)(7) preemptively governs inmate wages earned through PIP is a misinterpretation of the law.

After comparing the provisions of § 24-3-410, specifically §§ 24-3-410(A) and (B)(7), and 24-3-430(D), this Court determined as follows, 2021 WL 2678920, at *6:

> Although both statutes refer to inmate wages earned through PIP, we find [§] 24-3-430(D) is the controlling authority, as it directly addresses the rate of inmate wages. [*See Bruning v. S.C. Dep't of Health and Env't Control*, 795 S.E.2d 290, 294 (S.C. Ct. App. 2016)] ("Generally, '[a] specific statutory provision prevails over a more general one.'" (quoting [*Wooten ex rel. Wooten v. S.C. Dep't of Transp.*, 511 S.E.2d 355, 357 (S.C. 1999)])).

This Court continued its analysis as follows, 2021 WL 2678920, at *7:

> However, we find [§] 24-3-410 and other sections within Article 3 still bear importance in determining the legislative intent behind the statutes governing PIP. [*See Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 670 S.E.2d 674, 678 (S.C. Ct. App. 2008)] ("When statutes address the same subject matter, they are *in pari materia[ ]* and must be construed together, if possible, to produce a single, harmonious result."). In comparing these sections with our precedent, it is clear the legislature intended to provide inmates with employment opportunities that would not displace workers in the private sector. *See* [§ 24-3-315] ("The director must determine prior to using inmate labor in a [PIP] project that it will not displace employed workers, ... and that the rates of pay and other conditions of employment are not less than those paid and provided for work of [a] similar nature in the locality in which the work is performed."); [§ 24-3-430(E)] ("Inmate participation in [PIP] may not result in the displacement of employed workers in the State of South Carolina and may not impair existing contracts for services."); *see also* [*Cartrette*, 694 S.E.2d at 22] (holding "[f]ailure of [SCDC's] contracts with PIP sponsors to provide inmate workers with time-and-a-half pay for overtime hours when their non-inmate counterparts receive it would create an impermissible and unfair advantage for inmate labor over private labor"). Therefore, we find the legislature created [§] 24-3-430(D) as a safeguard to prevent inmates from becoming a cheaper alternative to their counterparts in the private realm. Accordingly, we find the pivotal inquiry in the instant case becomes how the prevailing wage for a particular industry is calculated.

While acknowledging existence of § 24-3-410, this Court did not cite or examine any provision thereof in the above-quoted paragraph or, for that matter, the remainder of its decision.

This Court, 2021 WL 2678920, at *7, after acknowledging the frustrating reality that "Article 3 fails to define the term 'prevailing wage,'" then circled back to adopt the methodology used by the ALC in its January 20, 2016 order (R. p. 1038):

> According to the *Merriam-Webster Dictionary*, "prevailing" means to be frequent or predominant. It further defines "predominant" as being most frequent or common. Therefore, based on a plain reading of [§] 24-3-430(D) and its legislative intent, we agree with the ALC's interpretation that to determine the prevailing wage for an industry, [SCDC] must determine the mean average wage for the occupation at issue using records and data from DEW. *See Average*, *Black's Law Dictionary* (11th ed. 2019) (defining "average" as "[t]he ordinary or typical level; the norm"); *Average*, *Merriam-Webster Dictionary* (defining "average" as a level typical of a group, class, or series). Accordingly, we affirm the ALC's calculation of the prevailing wage for the years 1997 to 1999 and its decision to remand Torrence's grievance to [SCDC] for the calculation of the prevailing wage for the years 2000 to 2004.

The ALC, however, anchored the rulings by which it both defined and calculated the "prevailing wage" SCDC should have paid Torrence for the labor he provided to the prison industries PIECP project at Evans to erroneous factual determinations.

This Court not only embraced but adopted the ALC's erroneous factual determinations and then affirmed the rulings by which ALC both defined and calculated the "prevailing wage" purportedly owed to Torrence.

As demonstrated above in Section III(B), both the ALC and this Court misapprehended Torrence's status by finding that Torrence "performed work for" or otherwise worked for Insilco/ESCOD.

As demonstrated above in Section III(C), both the ALC and this Court misapprehended the substance of the evidence attributable to Rebecca Eleazor, an ESC representative who

worked in the agency's Employment Statistics Program. Moreover, both the ALC and this Court misapprehended the method by which the evidence attributable to Ms. Eleazor appeared in the record (i.e., deposition testimony rather than affidavit).

Therefore, the foundation of this Court's ruling(s) affirming the ALC's decisions to both define and calculate the "prevailing wage" SCDC should have paid Torrence for his prison industries labor is, like the foundation of the ALC's decisions themselves, imbued with evidentiary error.

This Court's June 30, 2021 decision sounds one loud discordant note: no evidence exists in the record to reflect what Insilco/ESCOD actually paid their employees during the same period in which Torrence participated in the PIECP project SCDC operated at Torrence. SCDC sounded the alarm about such a reality in its reply brief to this Court:[12]

> In further rationalizing the ALC's erroneous factual determinations (i.e., calculations) of the "prevailing wage," Torrence offered the following argument in his [brief] to this Court, which reflects the ultimate folly inherent with the ALC's factual determination of the "prevailing wage" SCDC purportedly should have paid him:[13]
>
> > SCDC suggests, as compliance with 18 USC § 1761(c)(2), § 24-3-315, and [§ 24-3-430(D)], that Torrence was paid ten cents above the federal minimum wage, [SCDC's Brief, p. 41]. This application contradicts the substantial evidence in the record **does not contain the hourly wage ESCOD actually paid its employees for work similar to Torrence. Torrence suggests that neither party to this action has access to those records, but common sense dictates it was within the average/mean wage range.**
>
> ...

[12] *See* SCDC's Reply Brief filed January 3, 2017, pp. 10 – 11.

[13] *See* Torrence's Brief filed January 5, 2017, p. 44.

> As SCDC accurately observed in the brief it filed with this Court, "no evidence exists in the record to confirm the hourly wage ESCOD *actually paid* its employees who performed job tasks identical or similar to those performed by Torrence.[14]" As SCDC also accurately observed in its brief, "[t]he ALC could have directed the parties to introduce such evidence into the record when it ultimately remanded the matter back to SCDC for further proceedings, but it elected not to do so.[15]"
>
> Thus, the ALC's calculation of the "prevailing wage" SCDC should have paid Torrence during 1997, 1998, and 1999 raises the very real possibility that the ALC fashioned a "prevailing wage" for Torrence that exceeded the actual hourly wage [Insilco/ESCOD] paid their non-inmate workers. No state statute, federal statute or federal regulation even contemplates such an absurd result.

[italicized and bold emphasis in original].

This Court's June 30, 2021 decision sounds out yet another loud discordant: this Court has affirmed the ALC's decision to both define and quantify a "prevailing wage" when the ESC, the agency tasked with doing so, does neither.

As discussed above at the beginning of Section IV, the circuit court's order in *Adkins* (R. pp. 860 – 91), which the ALC purposefully overlooked, avoided this fate as acknowledged by this Court in its June 30, 2021 decision, 2021 WL 2678920, at *6:

> Arguing the ALC erroneously ignored the analysis of the circuit court in *Adkins*, [SCDC] urges this court to adopt the circuit court's holding, which found pursuant to [§] 24-3-410(B)(7), inmates were only entitled to a comparable wage in the industry and not the prevailing wage.

V. CONCLUSION

SCDC, based upon the preceding analysis, hereby respectfully petitions the Court to rehear – and reconsider – the ruling by which it affirmed the decisions by the ALC in its January 20, 2016 order to both define and calculate the "prevailing wage" SCDC should have Torrence for his prison industries labor.

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[14] *See* SCDC's Brief filed January 3, 2017, p. 41.

[15] *Id.*, p. 43.

RESPECTFULLY SUBMITTED,

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July 30, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Opinion No. 5829
Appellate Case No. 2016-000285
Administrative Law Court Docket No. 12-ALJ-04-00143-AP

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

v.

South Carolina Department of Corrections ..... Appellant.

PROOF OF SERVICE

I certify that I have served the **APPELLANT'S PETITION FOR REHEARING** on the above-named self-represented Respondent by mailing a copy of it to him, first class postage pre-paid, at the following address:

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

July 30, 2021

LAKE E. SUMMERS