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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2016-000285  
Trial Court Case No. 2012ALJ040143AP

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

v.

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

RECORD ON APPEAL

VOLUME 3 OF 3

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**THE STATE OF SOUTH CAROLINA  
In The Administrative Law Court**

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**APPEAL FROM FINAL AGENCY DECISION  
South Carolina Department of Corrections**

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**Case No. 12-ALJ-04-0143-AP  
Grievance No. ECI-980-10**

**Honorable Deborah Brooks Durden, Administrative Law Judge**

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Thomas J. Torrence, #094651 ..... **APPELLANT**

**v.**

S.C. Department of Corrections ..... **RESPONDENTS**

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**APPELLANT'S ORIGINAL BRIEF**

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## ISSUE(S) ON APPEAL

- I. THE DEPARTMENT OF CORRECTIONS IMPROPERLY WITHHELD THE PREVAILING WAGES FOR APPELLANT'S LABOR DURING A 320 HOUR "TRAINING PERIOD" (JUNE 1997 - AUGUST 1997) AGAINST THE STATUTORY AUTHORITY OF S.C. CODE §§ 24-3-40, 24-3-315, 24-3-430(D) AND 18 USC §1761(c) (2) & (4).
- II. THE DEPARTMENT OF CORRECTIONS IMPROPERLY DIVERTED A PORTION OF WAGES FOR APPELLANT'S LABOR AND FAILED TO PAY THE PREVAILING WAGE FROM AUGUST 1, 1997 TO NOVEMBER 14, 2004 AGAINST THE STATUTORY AUTHORITY OF S.C. CODE §§ 24-3-40, 24-3-315, 24-3-430(D) AND 18 USC §1761(c) (2) & (4).
- III. THE DEPARTMENT OF CORRECTIONS IMPROPERLY REMOVES AND DENIES APPELLANT ACCESS TO 10% OF GROSS WAGES ESCROWED FOR HIS BENEFIT PRIOR TO HIS DEATH AGAINST THE STATUTORY AUTHORITY OF S.C. CODE §§ 24-3-40(A) (5), 24-3-40(B) (2), 24-3-315 AND 18 USC §1761(c) (2) & (4).
- IV. THE DEPARTMENT OF CORRECTIONS IMPROPERLY DENIES APPELLANT HIS PROPERTY INTEREST IN A FAIR INTEREST RATE ON WAGES ESCROWED FOR HIS BENEFIT UNDER S.C. CODE ANN. § 24-3-40(A) (5).
- V. APPELLANT IS ENTITLED TO INTEREST ON ALL WAGES WITHHELD WITHOUT STATUTORY AUTHORITY.

i.

## TABLE OF CONTENTS

|                                                                                                                                                                                                                                     |    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Statement of Issue(s) on Appeal . . . . .                                                                                                                                                                                           | i  |
| Table of Contents . . . . .                                                                                                                                                                                                         | ii |
| Table of Authorities . . . . .                                                                                                                                                                                                      | iv |
| Procedural History of the Case . . . . .                                                                                                                                                                                            | 2  |
| Factual History of the Case . . . . .                                                                                                                                                                                               | 3  |
| <br><b>Argument:</b>                                                                                                                                                                                                                |    |
| I.    The Department of Corrections withheld prevailing wages for Appellant's labor during a 320 hour "training period" without statutory authority . . . . .                                                                       | 8  |
| A.    No part of South Carolina or Federal statutory law prescribed less than the prevailing wage for Appellant's labor during his initial 320 hours defined a "Training Period." . . . .                                           | 8  |
| B.    Appellant is entitled to the prevailing wage for his labor during the 320 hour "Training Period" for work of a similar nature as established by statutory law and the South Carolina Employment Security Commission . . . . . | 10 |
| C.    Appellant was not informed of the lawful conditions of his employment in regards to prevailing wage and authorized deductions during the "training period" . . . . .                                                          | 11 |
| II.    The Department of Corrections diverted a portion of wages from and failed to pay the prevailing wage for Appellant's labor from August 1, 1997 - November 14, 2004 without statutory authority . . . .                       | 13 |
| A.    Appellant was entitled to the prevailing wage for regular and overtime labor hours performed between August 1, 1997 and November 14, 2004 . . . . .                                                                           | 13 |
| B.    The DOC improperly diverted a portion of Appellant's prevailing wages against state and federal statutory authority . . . . .                                                                                                 | 16 |



|       |                                                                                                                                                                                                                                                                |    |
|-------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| B. 1. | The DOC practice of the "SCDC Surplus Fund" contravenes state and federal authority . . . . .                                                                                                                                                                  | 19 |
| B. 2. | The DOC paying the employer's portion of Social Security Tax out of Appellant's wages improperly diverts a portion of Appellant's wages and violates federal law . . . . .                                                                                     | 22 |
| B. 3. | The DOC paying the employer's portion of Workmen's Compensation Insurance Premiums out of Appellant's wages improperly diverts a portions of Appellant's wages and violates statutory authority . . . . .                                                      | 24 |
| C.    | The DOC breached a fiduciary duty to pay Appellant the prevailing wage for his labor mandated by state and federal statutory authority . . . . .                                                                                                               | 26 |
| III.  | The Department of Corrections improperly removes and denies Appellant access to 10% OF his gross wages held in escrow for his benefit under S.C. Code Ann. §§ 24-3-40 (A) (5) and (B) (2) in contravention of constitutional and statutory authority . . . . . | 29 |
| A.    | The DOC improperly deducts 10% from Appellant's wages for placement in an interest bearing escrow account in accordance with §24-3-40(A) (5) . . . . .                                                                                                         | 32 |
| A. 1. | The DOC's Long Term Savings Account is not an interest bearing escrowed account "for the benefit of the prisoner within the meaning of §24-3-40(A)(5) . . . . .                                                                                                | 33 |
| B.    | The DOC improperly denies Appellant access to his wages escrowed pursuant to §24-3-40(A)(5) based upon §24-3-40(B)(2) . . . . .                                                                                                                                | 35 |
| B. 1. | The DOC misapplies the term "estate" in §24-3-40(B) (2) in denying Appellant [serving life] access to his Long Term Savings Account Fund . . . . .                                                                                                             | 35 |
| B. 2. | Section 24-3-40(B) (2) is applied as a bill of attainder . . . . .                                                                                                                                                                                             | 37 |
| B. 3. | Section 24-3-40(B) (2) is a law in violation of the prohibition against ex post facto laws . . . . .                                                                                                                                                           | 37 |

|            |                                                                                                                                                                                                                                                                                               |    |
|------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| B. 4.      | Section 24-3-40(B) (2) operates as a violation of the equal protection clauses in denying Appellant's class of prisoner [serving Life Sentences] equal personal access to his Long Term Savings Account Funds in his life time as provided for prisoners not serving life sentences . . . . . | 38 |
| IV.        | The Department of Corrections denies Appellant a fair interest rate on monies escrowed under § 24-3-40(A)(5) . . . . .                                                                                                                                                                        | 40 |
| V.         | Appellant is entitled to interest on all wages withheld without statutory authority . . . . .                                                                                                                                                                                                 | 43 |
| Conclusion | . . . . .                                                                                                                                                                                                                                                                                     | 44 |

## TABLE OF AUTHORITIES

### Cases

|                                                                                                                                                               |       |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| <i>Al-Shabazz v. State</i> , 338 S.C. 354, 527 S.E.2d 742 (2000) . . . . .                                                                                    | 1     |
| <i>Bouie v. Columbia</i> , 378 U.S. 347 (1964) . . . . .                                                                                                      | 38    |
| <i>Brown v. Bi-Lo, Inc.</i> , 354 S.C. 436, 581 S.E.2d 836 (2003) . . . . .                                                                                   | 30    |
| <i>Cabiness v. Town of James Island</i> , 393 S.C. 176, 712 S.E.2d 416 (2011) . . . . .                                                                       | 39    |
| <i>Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.</i> ,<br>467 U.S. 837 (1984) . . . . .                                                    | 30    |
| <i>City of Beaufort v. Holcombe</i> , 369 S.C. 643, 632 S.E.2d 894 (Ct. App. 2006) . . . . .                                                                  | 39    |
| <i>Davis v. Greenwood School Dist. 50</i> , 365 S.C. 629, 620 S.E.2d 65 (2003) . . . . .                                                                      | 27    |
| <i>Hinton v. S.C. Dep't of Prob., Parole &amp; Pardon Servs.</i> , 357 S.C. 327,<br>592 S.E.2d 335 (Ct. App. 2004) . . . . .                                  | 32    |
| <i>Jersey Shore State Bank v. United States</i> , 479 U.S. 442 (1987) . . . . .                                                                               | 23    |
| <i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525 (2001) . . . . .                                                                                        | 9     |
| <i>Mason v. Mason</i> , 2015 WL 895388 (SC App. March 4, 2015) . . . . .                                                                                      | 27    |
| <i>Medtronic Inc. v. Lohr</i> , 518 U.S. 470 (1996) . . . . .                                                                                                 | 30    |
| <i>Prather v. Clover Spinning Mills, Inc.</i> , 215 S.C. 103, 54 S.E.2d 529 (1949) . . . . .                                                                  | 9     |
| <i>S.C. Dep't of Corrections v. Cartrette</i> , 387 S.C. 640, 694 S.E.2d 18<br>(S.C. App. 2010) cert. dismissed 396 S.C. 523, 722 S.E.2d 8.5 (2012) . . . . . | 17-18 |
| <i>S.C. Dep't of Corrections v. James</i> , 2010 WL 10079906 (2010) . . . . .                                                                                 | 18    |
| <i>Smith v. Doe</i> , 123 S.Ct. 1140 (2003) . . . . .                                                                                                         | 38    |
| <i>South Carolina v. Kaatzenbach</i> , 383 S.Ct. 301 (1966) . . . . .                                                                                         | 37    |
| <i>State ex rel. McCleod v. Nessler</i> , 273 S.C. 371, 256 S.E.2d 419, 420 (1979) . . . . .                                                                  | 32    |
| <i>State v. Walls</i> , 348 S.C. 26, 558 S.E.2d 524 (2002) . . . . .                                                                                          | 34    |

v.

|                                                                                                                                        |                  |
|----------------------------------------------------------------------------------------------------------------------------------------|------------------|
| <i>Torrence v. S.C. Dep't of Corrections</i> , 373 S.C. 586,<br>646 S.E.2d 866 (2007) rehearing denied (C/A 2001-CP-40-3409) . . . . . | 6, 7, 12, 17, 43 |
| <i>Vortex Sports &amp; Entertainment, Inc. v. Ware</i> , 328 S.C. 197, 662 S.E.2d 444 (2008). . . . .                                  | 26               |
| <i>Wicker v. S.C. Dep't of Corrections</i> , 360 S.C. 421, 602 S.E.2d 56 (2004) . . . . .                                              | passim           |
| <i>Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.</i> ,<br>371 S.C. 365, 638 S.E.2d 109 (S.C. App. 2006) . . . . .          | 25               |
| <i>Williams v. S.C. Dep't of Corrections</i> , 372 S.C. 255, 641 S.E.2d 885 (2007) . . . . .                                           | 3                |

### Statutes

|                                                          |        |
|----------------------------------------------------------|--------|
| S.C. Code Ann. § 1-23-380(5) (2010) . . . . .            | 2      |
| S.C. Code Ann. § 12-2-40 (2010) . . . . .                | 23     |
| S.C. Code Ann. § 12-8-10(2) (Supp. 2011) . . . . .       | 23     |
| S.C. Code Ann. § 12-8-10(3) (Supp. 2011) . . . . .       | 3, 23  |
| S.C. Code Ann. § 12-8-1010(A) (1) (Supp. 2011) . . . . . | 5      |
| S.C. Code Ann. § 16-3-20(A) (1986) . . . . .             | 37     |
| S.C. Code Ann. § 16-3-910 (1991) . . . . .               | 37     |
| S.C. Code Ann. § 16-11-311 (2008) . . . . .              | 37     |
| S.C. Code Ann. § 17-25-45 (2014) . . . . .               | 37     |
| S.C. Code Ann. § 24-1-170 (2007) . . . . .               | 30     |
| S.C. Code Ann. § 24-3-40 (A) (1999) . . . . .            | passim |
| S.C. Code Ann. § 24-3-40(A) (1) (1999) . . . . .         | 20     |
| S.C. Code Ann. § 24-3-40(A) (2) (1999) . . . . .         | 19     |
| S.C. Code Ann. § 24-3-40(A) (3) (1999) . . . . .         | 19     |
| S.C. Code Ann. § 24-3-40(A) (5) (1999) . . . . .         | passim |
| S.C. Code Ann. § 24-3-40(A) (6) (1999) . . . . .         | 19     |

|                                                  |           |
|--------------------------------------------------|-----------|
| S.C. Code Ann. § 24-3-40(B) (2) (1999) . . . . . | passim    |
| S.C. Code Ann. § 24-3-315 (1999) . . . . .       | passim    |
| S.C. Code Ann. § 24-3-430 (1999) . . . . .       | 6, 21     |
| S.C. Code Ann. § 24-3-430(C) (1999) . . . . .    | 4, 11, 13 |
| S.C. Code Ann. § 24-3-430(D) (1999) . . . . .    | passim    |
| S.C. Code Ann. § 24-3-430(F) (1999) . . . . .    | 3         |
| S.C. Code Ann. § 24-3-430(H) (1999) . . . . .    | 4, 16, 43 |
| S.C. Code Ann. § 42-1-130 (Supp. 2011) . . . . . | 3         |
| S.C. Code Ann. § 42-1-610 (1976) . . . . .       | 26        |
| S.C. Code Ann. § 42-5-10 (1976) . . . . .        | 25        |
| S.C. Code Ann. § 42-5-200 (1976) . . . . .       | 25        |
| S.C. Code Ann. § 42-7-10 (1976) . . . . .        | 25        |
| S.C. Code Ann. § 42-7-65 (1976) . . . . .        | 25        |
| S.C. Code Ann. § 42-7-75 (Supp. 2010) . . . . .  | 25        |
| 18 U.S.C. § 1761(a) . . . . .                    | 9         |
| 18 U.S.C. § 1761(c) . . . . .                    | passim    |
| 18 U.S.C. § 1761(c) (2) . . . . .                | passim    |
| 18 U.S.C. § 1761(c) (4) . . . . .                | passim    |
| 26 U.S.C. § 3101 et seq. . . . .                 | 23        |

## Other Authorities

|                                                                                   |               |
|-----------------------------------------------------------------------------------|---------------|
| United States Constitution, Amendment XIV, §1 . . . . .                           | 39            |
| United States Constitution, Article I, §9, Clause 3 . . . . .                     | 37            |
| United States Constitution, Article I, §10, Clause 1 . . . . .                    | 37, 38        |
| United States Constitution, Article VI, Clause 2 . . . . .                        | 27, 32, 35    |
| South Carolina Constitution, Article I, §3 . . . . .                              | 39            |
| South Carolina Constitution, Article I, §4 . . . . .                              | 37            |
| South Carolina 1987 Acts No. 177, §2 . . . . .                                    | 4, 9          |
| South Carolina 1993 Acts No. 181, §409 . . . . .                                  | 9, 11         |
| South Carolina 1994 Acts No. 500, §2 . . . . .                                    | 11            |
| South Carolina 1995 Acts No. 7, Part II, §43 . . . . .                            | 9             |
| South Carolina 1998 Acts No. 355, §1 . . . . .                                    | 9             |
| South Carolina 1999 Acts No. 68, §2 . . . . .                                     | 6, 11, 14, 29 |
| South Carolina 2000 Acts No. 387, Part II, §83 A . . . . .                        | 11            |
| Federal Register, Volume 64, Issue 66 (April 7, 1999) pp. 17000 - 17014 . . . . . | passim        |
| Black's Law Dictionary (8 <sup>th</sup> Ed.) (2004) . . . . .                     | 36            |
| Justice Improvement Act of 1979, Pub.L. 96-157 (12/27/79) . . . . .               | 9, 33         |
| The American Heritage College Dictionary (3rd Ed.) . . . . .                      | 36            |
| The Crime Control Act of 1990, Pub.L. 101-647 . . . . .                           | 33            |
| 16 A C.J.S. Constitutional Law §429 (1984) . . . . .                              | 37            |

**THE STATE OF SOUTH CAROLINA  
In The Administrative Law Court**

|                                           |   |                                   |
|-------------------------------------------|---|-----------------------------------|
| Thomas J. Torrence, # 094651,             | ) | Docket No. 12-ALJ-04-00143-AP     |
|                                           | ) | Grievance No. ECI 0980-10         |
| Appellant,                                | ) |                                   |
|                                           | ) | Honorable Deborah Brooks Durden   |
| vs.                                       | ) |                                   |
|                                           | ) | <b>APPELLANT'S ORIGINAL BRIEF</b> |
| South Carolina Department of Corrections, | ) |                                   |
|                                           | ) |                                   |
| Respondent.                               | ) |                                   |
|                                           |   |                                   |

This matter is before the Administrative Law Court (ALC or Court) pursuant to the Notice of Appeal filed on March 12, 2012 by Thomas J. Torrence ("Appellant"), of a final agency decision of the South Carolina Department of Corrections ("DOC" or "Department" or "Respondent"). Appellant's appeal concerns the Department's failure to pay the prevailing wage for Appellant's work while participating in the private sector prison industry program; the Department's removal of a portion of Appellant's wages without statutory authority; Appellant's access to his long term savings account; and the interest paid on the monies alleged as improperly removed or denied access thereto. By order of this Honorable Court, dated January 30, 2014, this Court will address the merits of the issues presented in the instant appeal.

**JURISDICTION**

This Court's jurisdiction to hear this matter is derived from the South Carolina Supreme Court decision in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). The Supreme Court limited the ALC's jurisdiction in inmate appeals to state-created liberty interests typically involving: (1) cases in which an inmate contends that prison officials erroneously calculated his sentence or sentence related credits, or custody status; and (2) cases in which an inmate has

received punishment in a major disciplinary hearing as a result of a serious rule violation, *Id.* In August 2004, the Court clarified that the ALC must provide minimal due process for state-created liberty or property interests in cases involving prevailing wage claims, *Wicker v. S.C. Dep't. of Corrections*, 360 S.C. 421, 602 S.E.2d 56 (filed August 23, 2004).

### APPLICABLE STANDARD OF REVIEW

Pursuant to S.C. Code Ann. § 1-23-380(5), the standard of review applicable to Appellant's instant appeal is as follows:

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.

### PROCEDURAL HISTORY<sup>1</sup>

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<sup>1</sup> This matter involves four distinct parts of the Record:

**First:** Abbreviated Record on Appeal, filed July 9, 2012 ("AROA"), pages 2 - 75.

**Second:** Record on Appeal Addendum, filed December 15, 2014 ("ROAA")

Note to ROAA: The ROAA is out of order. Pgs. 146 - 147 are pgs. 1 - 2 of the Agreement between Insilco Technologies and Department; pgs. 3 - 12 of the Agreement are contained at pgs. 174 - 183 of the ROAA. Pages were out of order in the original deposition exhibit.

**Third:** Record on Appeal Addendum, filed February 9, 2015 ("ROAA") which continued page numbers 184 - 206.

**Fourth:** Information To Be Included In The Record On Appeal and Responsive To The Court's December 3, 2014 Order, filed February 9, 2015 ("ITBI"), pages 1 - 5.

Page 2 of 45



Appellant filed a Step One agency grievance on May 21, 2007 at Broad River Correctional Institution and served a copy, via U.S. Mail, on the Grievance Coordinator at Evans Correctional Institution.<sup>2</sup> The DOC, through outside counsel appearing here [Lake E. Summers, Esq.] denied the Step One in its entirety on December 1, 2011.<sup>3</sup>

Appellant filed a timely Step Two Appeal<sup>4</sup> with Appendices A - L in support thereof<sup>5</sup> on December 5, 2011. The DOC denied the Step Two in its entirety on February 9, 2012,<sup>6</sup> which was received by Appellant on February 15, 2012. The Notice of Appeal in this matter was filed March 2, 2012. Pursuant to the June 7, 2012 order of this Court, the parties submitted briefs to resolve the issue of timeliness of the grievance. This Court issued an order on January 30, 2014 holding that the grievance was equitably tolled and the matter would proceed on the merits. Between January 30, 2014 and February 9, 2015 the parties settled the contents of the Record(s) on Appeal.

### FACTUAL BACKGROUND

Appellant was hired<sup>7</sup> in the Private Sector Prison Industries (Insilco Global Technologies / Escod) ("PIP"), a federally certified program (18 USC §1761(c) (Prison Industries

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<sup>2</sup> Grievance No. ECI-980-10, ROAA pp. 1 - 4

<sup>3</sup> ROAA pp. 8 - 13

<sup>4</sup> ROAA pp. 14 - 24

<sup>5</sup> ROAA pp. 33 - 183

<sup>6</sup> ROAA pp. 25 - 32

<sup>7</sup> Respondents will argue Appellant is not an "employee" based on PIECP participants not being "employees of the state" under S.C. Code §24-3-430(F) (2007) and that the Fair Labor Standards Act does not extend to inmate workers for the purpose of payment of wages because inmates are not employees of the PIP sponsor, see *Williams v. S.C. Dep't. of Corr.*, 372 S.C. 255, 260, 641 S.E.2d 885, 888 (2007). However, Appellant meets the definition of "employee" as defined in S.C. Code §12-8-10(3) for the purpose of Income Tax Withheld. For the purpose of South Carolina Workmen's Compensation laws, Appellant is an "employee" as defined by the employer-employee test in S.C. Code §42-1-130 (Supp. 2011) and is a South Carolina Taxpayer.

Enhancement Certification Program ("PIECP")), at the Evans Correctional Institution in June 1997.

South Carolina is authorized to operate the umbrella PIECP project by the federal government under 18 U.S.C. §1761(c) [64 FR 17000]. To participate in the PIECP the United States Department of Justice ("DOJ") required the DOC to submit an application. One requisite was the Applicant [DOC] was required to submit certified proof the state legislature had authorized participation. The South Carolina Legislature enacted S.C. Code §24-3-315 (1987)<sup>8</sup> *specifically* for this purpose. A certified copy of §24-3-315 (1987) was attached to the DOC application submitted to the DOJ's Bureau of Justice Assistance ("BJA") who manages compliance. An umbrella certification was issued to the DOC based on the submitted application and §24-3-315.

The DOC applied for a PIECP certificate to operate Employer Model<sup>9</sup> projects that did not include management structure comparable to a temporary workforce structure where employees are informed of all deductions and clearly understand the employer pays one hourly rate and the temporary workforce entity pays a lower hourly rate to the employee, deducting an operating expense independent of government wage deductions.

Appellant was *never informed* of "conditions of employment"<sup>10</sup> and that he was entitled to receive the "prevailing wage" for his labor. Instead, and incorrectly, Appellant was informed

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<sup>8</sup> 1987 Act No. 177, §2

<sup>9</sup> In an Employer Model [the DOJ BJA only authorize[d] either a Custom or Employer Model - 64 FR 17007-17008], the private sector (Insilco/Escod) owns and operates the Cost Accounting Center ("CAC") "by controlling the hiring, firing, training, supervision," (see March 3, 2001 AGREEMENT between DOC and Escod, §§3.1 and 3.2, ROAA pp. 175, 177) and payment of the inmate work force (see S.C. Code Ann. §§24-3-40(A) (Supp. 1999) and 24-3-430(H) (Supp. 1999)). *The DOC assumes no major role in industry operations, does not direct production, and exercises minimum control over inmate labor performance. These functions are performed rather, by the private sector (Insilco/Escod).*

<sup>10</sup> As mandated by S.C. Code Ann. §§24-3-315 and 24-3-430(C) and 18 U.S.C. §1761(c) (4)

that he would be required to work a "Training Period" of 320 hours prior to working for "minimum wage."<sup>11</sup> During the training period Appellant performed labor side-by-side with non-inmate individuals employed from the local community who earned between \$8.00 and \$14.00 per hour. During the training period Appellant performed labor for Escod at a rate of .25¢ per hour for the initial 160 hours; and .75¢ per hour for the following 160 hours. Many of those hours were over-time labor. Upon completion of the 320 hour training period Appellant was paid the rate of \$5.25 per hour. Appellant continued to labor side-by-side with private sector employees as a Quality Control Inspector and Section Lead Person; and in a corporate buy-out, assumed many of the functions of the non-inmate employees (Maintenance Supervisor, Document Control, Training Coordinator and Quality Control Supervisor). Appellant labored in these positions from June 1997 thru November 2004. Throughout this period Escod paid \$7.17 per each regular hour of Appellant's labor (ROAA p. 178) and \$10.76 per each overtime hour. The "*prisoner's [Appellant's] wages*" were remitted to DOC pursuant to § 24-3-40. During this period the South Carolina Employment Security Commission designated rates above what Appellant received as the "prevailing wage" for the job code(s) classified by the Employment Security Commission and DOC, ROAA pp. 141<sup>12</sup>, 148 - 150<sup>13</sup>, 152<sup>14</sup>, 155<sup>15</sup> and 156.

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<sup>11</sup> All employment / dependent deduction / Comptroller General reporting forms (SCDC Form 16-63 Payroll Authorization, a 3-part form, controlled by the SCDC Division of Human Resources and Employee Dependent Deductions, pursuant to S.C. Code Ann. §12-8-1010(A)(1) (see Appellant's Payroll Example Exhibit ("APEE")); and PIP Agreement executed with Eugene Baker, DOC Prisoner Industries Business Manager (See Appellant's 1997 "Agreement" retained in Respondent's Prison Industries Inmate Employee File which varies distinctly from Appellant's 2000 "Agreement" which indicates conditions under which Appellant was informed new Agreement must be executed or be terminated from employment).

<sup>12</sup> OES Code 93956 - Assemblers and Fabricators (1993 - 1998); revised to OCC Code 51-2092 - Team Assemblers (1998 - 2000)

<sup>13</sup> Elect / Electr. Assemblers (Code 93114) - 1999 (\$8.82 per hr.)

<sup>14</sup> Assemblers / Fabricators ex. Machine / Electronic / Precision (93956) - 2000 (\$9.69 per hr.)

When the South Carolina Legislature amended S.C. Code §§ 24-3-40 and 24-3-430 by 1999 Act No. 68, § 2, Appellant and other prisoners complained to DOC Division of Industries personnel. In 2000, Appellant and Inmate William Ray Ward petitioned the DOC to change the wage payment practice then in effect. That petition went unanswered.

Appellant and Inmate Henry Hubbard filed suit in 2001 in the Richland County Court of Common Pleas.<sup>16</sup> Appellant and Ward obtained counsel who amended the declaratory judgment action and added Susan Smith as representative of the beneficiary class and Kimberly DuBose as representative of the victim class.<sup>17</sup>

On July 25, 2002 the DOC filed a motion for summary judgment, which was denied by the Honorable J. Ernest Kinard on November 25, 2002, *Id.*

On August 23, 2004 our Supreme Court decided *Wicker v. S.C. Dept. of Corrections*, 360 S.C. 421, 602 S.E.2d 56 (2004) and held that an inmate is entitled to file a grievance when not being paid the prevailing wage in a private sector prison industries employment, and that this Court (ALC) had jurisdiction to review such claims.

Appellant was transferred to a different institution on November 14, 2004. The DOC renewed their motion for summary judgment on February 14, 2005, based predominantly on the Supreme Court's holding in *Wicker*, establishing the right to file a grievance for failure to pay the prevailing wage, *Id.* The Honorable D. Garrison Hill issued an order granting DOC summary judgment, dated May 24, 2005, *Id.* Appellant's motion for reconsideration was denied by Judge

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<sup>15</sup> Elect / Electr. Assemblers (Code 93114) - 2000: Low / Mean / High (\$8.36 / \$9.92 / \$11.49)

<sup>16</sup> *Thomas Torrence and Henry Hubbard, Jr. v. South Carolina Department of Corrections and South Carolina Budget and Control Board*, C/A No. 2001-CP-40-3409 [Original Complaint]

<sup>17</sup> *Thomas J. Torrence and William Ray Ward, on behalf of themselves and all Others similarly situated; Kimberly Dubose, on behalf of herself and all Others similarly situated, and Susan Smith, on behalf of herself and all Others similarly situated, Plaintiffs, vs. South Carolina Department of Corrections and The State of South Carolina, Defendants*, C/A No. 2001-CP-40-3409 [Second Amended Complaint]

Hill on July 8, 2005, *Id.* Appellant filed a timely Notice of Appeal in the South Carolina Court of Appeals. The South Carolina Supreme Court assumed jurisdiction of the case.

In an opinion dated May 7, 2007, and received by Appellant on May 21, 2007, via correspondence from counsel dated May 17, 2007, the Supreme Court held that Appellant and Ward must file a grievance to initiate prevailing wage and Long Term Savings Account ("LTSA") claims, (*Thomas J. Torrence et al. v. S.C. Dept. of Corrections*, 373 S.C. 586, 594-95, 646 S.E.2d 866 (2007) rehearing denied).

Appellant filed a Step One Grievance (No. ECI-980-10) on May 21, 2007<sup>18</sup> within five (5) days of receipt of the Court's decision, while DOC filed a petition for rehearing based solely on footnote 4 of the *Torrence* opinion. Respondent DOC answered Appellant's Step 1 grievance on December 5, 2011<sup>19</sup> and answered the Step Two appeal<sup>20</sup> on February 9, 2012 (final agency decision).<sup>21</sup> This appeal of the DOC's final agency decision follows.

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<sup>18</sup> ROAA pp. 1 - 4 and 7

<sup>19</sup> ROAA pp. 8 - 13

<sup>20</sup> ROAA pp. 14 - 22, including Appellant's Affidavit, ROAA pp. 23 & 24, and Appendices A thru L, ROAA pp. 33 - 183.

<sup>21</sup> ROAA pp. 25 - 32

## ARGUMENT

I. THE DOC IMPROPERLY WITHHELD "PREVAILING WAGES" FOR APPELLANT'S LABOR DURING A 320 HOUR "TRAINING PERIOD" (JUNE 1997 THROUGH AUGUST 1997) AGAINST THE STATUTORY AUTHORITY OF S.C. CODE §§ 24-3-40, 24-3-315, 24-3-430(D) AND 18 USC 1761(c) (2) & (4).

Appellant performed labor in a PIECP certified program which was originally authorized in South Carolina pursuant to S.C. Code §24-3-315 (1987), which began with a "Training Period" of 320 hours. The DOC was *not* authorized by statute to divert "*prisoner wages*" during the training period. During the training period Appellant performed labor for Escod at a rate of .25¢ per hour for the first 160 hours; and .75¢ per hour for the following 160 hours. Many of the hours were over-time labor. Appellant asserts he is entitled to the prevailing wage,<sup>22</sup> or in the alternative, the rate remitted by Escod for his labor for that 320-hour training period (\$7.17 per regular hour and \$10.75 per overtime hour) that DOC diverted away from Appellant.

A. **NO PART OF SOUTH CAROLINA OR FEDERAL STATUTORY LAW PRESCRIBED LESS THAN THE PREVAILING WAGE FOR APPELLANT'S LABOR DURING HIS INITIAL 320 HOURS DEFINED AS "TRAINING PERIOD."**

The South Carolina law governing prisoners earning a prevailing wage for [their] labor in a private sector prison industries program in South Carolina has been clear since enactment. Section 24-3-315 provides:

**§24-3-315. Determinations prerequisite to selecting prison industry project.**

The Department of Corrections shall ensure that inmates participating in any prison industry program pursuant to the Justice Assistance Act of 1984 is on a voluntary basis. The director must determine prior to using inmate labor in a prison industry project that it will not displace employed workers, 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*

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<sup>22</sup> As defined by §§ 24-3-315, 24-3-430(D) and 18 U.S.C. §1761(c) (2)

*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.*

1987 Act No. 177 § 2; 1993 Act No. 181, § 409. (Emphasis added)

Section 24-3-430(D) provides:

**§24-3-430. Inmate labor in private industry authorized; requirements and conditions.**

(D) *No inmate participating in the program may earn less than the prevailing wage for work of a similar nature in the private sector.*

1995 Act No. 7, Part II, § 43; 1998 Act No. 355, § 1. (Emphasis added)

Appellant submits that although the Ashurst-Sumners Act [18 USC §1761(a)] was enacted in 1935 to protect private businesses from competition from goods produced with convict labor and not to protect the inmate worker,<sup>23</sup> the PIECP *requires* the State [Department] participants to *abide by the Act* in the wages and benefits provided to the inmate workers.<sup>24</sup> As a guide, Appellant suggests that 18 USC §1761(c) be read *in pari materia* with South Carolina Code Title 24, Chapter 3, Subsections 40, 315 and 430. Where subsection 315 is directly predicated upon §1761(c) in compliance and subsection 430 was created to expound upon PIPs authorized by subsection 315; both Title 24, Chapter 3 subsections may exist and operate *only* as authorized by 18 USC §1761(c). Title 18 USC §1761(c) reads in pertinent part:

**§ 1761. Transportation or importation.**<sup>25</sup>

...

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<sup>23</sup> The Prison Industries Enhancement Certification Program ("PIECP") was first authorized by the Justice Improvement Act of 1979 and codified at 18 U.S.C. §1761(a)

<sup>24</sup> The 1998 Guideline, published at 64 Federal Register 17000 - 17014, became effective April 7, 1999 and gave existing participants [Department] until April 7, 2000 "*to achieve compliance with all of the new requirements set forth in this guideline.*" (Emphasis supplied).

<sup>25</sup> See 64 FR 17000-17028; see also the Supremacy Clause, U.S. Const., Art. 6, Cl. 2; *Prather v. Clover Spinning Mills, Inc.*, 215 S.C. 103, 54 S.E.2d 529 (1949); and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)

(c) In addition to the exceptions set forth in subsection (b) of this section, this chapter [18 USC §§ 1761 et seq.] shall not apply to goods, wares or merchandise manufactured, produced, or mined by convicts or prisoners who -

(1) are participating in - one of not more than 50 non-Federal prison work pilot projects designated by the Director of the Bureau of Justice Assistance;

(2) have, *in connection with such work, received 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, except that such wages may be subject to deductions, which shall not, in the aggregate, exceed 80 per centum of gross wages*, and shall be limited as follows:

...  
(4) have participated in such employment voluntarily *and have agreed in advance to the specific deductions made from gross wages pursuant to this section, and all other financial arrangements as a result of participation in such employment.*

(Emphasis supplied)

Our Supreme Court held in *Wicker* that where “the state has created a statutory right [§24-3-430(D)] to the payment of a prevailing wage, it cannot thereafter deny that right without affording due process,” and that *nothing in the statutory scheme* [creating the PIECP or the PIP] *authorizes the DOC to pay a training wage less than the prevailing wage*, *Wicker*, 360 S.C. at 58, 602 S.E.2d at 424.

**B. APPELLANT IS ENTITLED TO THE “PREVAILING WAGE” FOR HIS LABOR DURING THE 320 HOUR “TRAINING PERIOD” FOR WORK OF A SIMILAR NATURE AS ESTABLISHED BY STATUTORY LAW AND THE SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION.**

Appellant asserts that the prevailing wage for the job code assigned to the labor performed by inmates at the Escod project (ROAA pp. 110 & 112)<sup>26</sup> and (ROAA pp. 141)<sup>27</sup> was annually proposed by the DOC (ROAA pp. 149 - 150, 154) and *verified as noncompliant* by the South Carolina Employment Security Commission (“ESC”) (ROAA pp. 148, 155.)<sup>28</sup> The

<sup>26</sup> August 10, 2004 Deposition of Rebecca Eleazor, [Job Code: 93956; Job Title: Assemblers & Fabricators; wage rate: \$9.04 per hr]

<sup>27</sup> Occupational Employment Wage Survey Wage Request, Assemblers and Fabricators: 1993 - 2000 (State Wide Wage Survey 2002)

<sup>28</sup> Employment Security Commission response to DOC wage requests for years 1999 and 2000.



prescribed wage the ESC set for a "minimum, "mean" and "maximum" is other than the wages paid to Appellant for his labor during the period of employment (See ROAA pp. 151-52).<sup>29</sup>

**C. APPELLANT WAS NOT INFORMED OF THE LAWFUL CONDITIONS OF HIS EMPLOYMENT IN REGARDS TO PREVAILING WAGE AND AUTHORIZED DEDUCTIONS DURING THE "TRAINING PERIOD."**

Appellant submits that the DOC did not inform Appellant of the diverting of wages during the training period in the "Agreement" executed by Appellant upon being hired (June 1997), as is required by §24-3-430(C)<sup>30</sup> and 18 U.S.C. §1761(c) (4), *infra*.

Appellant asserts that §24-3-40<sup>31</sup> (Disposition of wages of prisoner allowed to work at paid employment) authorizes the *only statutory deductions* the DOC is allowed to make from Appellant's wages.

The wages mandated to be paid PIECP inmates by 18 U.S.C. §1761(c)(2) and S.C. Code Ann. §§24-3-315 and 430(D), and authorized deductions pursuant to 18 U.S.C. §1761(c)(4) and S.C. Code Ann. §§24-3-40(A) and remitted to the DOC pursuant to §24-3-40(A), do not contemplate or leave any inference of an authority to pay a "training wage" less than the "prevailing wage."

The inmate worker must indicate in writing that he agrees voluntarily, and in advance, the specific deductions made from gross wages, as well as all other financial arrangements made as to earned PIECP wages, *see* 64 FR 17006. Although DOC may inform inmates they must work

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<sup>29</sup> Correspondence of Ted Gladden, Employment Security Commission, to Appellant establishing wage code rates for labor at the Escod facility.

<sup>30</sup> "(C) An inmate may participate in the program established pursuant to this section only on a voluntary basis and only on a voluntary basis *and only after he has been informed of the conditions of his employment.*" (Emphasis added).

<sup>31</sup> 1993 Act No. 181, § 393; 1994 Act No. 500, § 2; 1995 Act No. 7, Part II, § 54; 1999 Act. No. 68, § 2; 2000 Act No. 387, Part II, § 83A.

an initial training period, the inmate were not informed that the prevailing wage must be paid at that time.

The holding in *Wicker* was continued in Appellant's case before our Supreme Court in *Torrence v. S.C. Dept. of Corrections* (Inmates working in the prison industries program have a cognizable, state-created interest in having the DOC pay them according to the statutory scheme governing the program.) Indeed, the Court specifically held that:

"We recognize that the DOC will need to implement new regulations to allow these claimants access to the agency's internal grievance system. Furthermore, if appellants prove their allegation that the DOC 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, the DOC 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). (Emphasis in original).

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

Appellant suggests this Court make a determination independent of the DOC of the prevailing wage for work of a similar nature during the "training period." Appellant is entitled to the *prevailing wage* Escod paid for his labor, and diverted without statutory authority by the DOC, for the 320 labor hour "training period" between June 1997 and August 1, 1997. Respondent is not entitled to divert prevailing wages during training hours or pay a substandard wage below statutory guidelines.

This Court may reverse or modify the DOC's final agency decision here where the substantial rights of Appellant have been prejudiced by the DOC's decision as it was in violation of statutory law, in excess of the DOC's statutory authority, is clearly erroneous based on the substantial evidence on the whole record, and was characterized by an unwarranted exercise of discretion.

II. THE DOC IMPROPERLY DIVERTED A PORTION OF WAGES AND FAILED TO PAY THE PREVAILING WAGE FOR APPELLANT'S LABOR FROM AUGUST 1, 1997 THROUGH NOVEMBER 14, 2004 AGAINST THE STATUTORY AUTHORITY OF S.C. CODE §§ 24-3-40, 24-3-315, 24-3-430(D) AND 18 USC 1761(c) (2) & (4).

Appellant performed labor in the Evans PIP project, many of which were overtime hours, *side-by-side with private sector employees*, from August 1, 1997 through November 14, 2004. He initially served as a Quality Control Auditor *partnered* each day with private sector employees. He also performed in a number of supervisory and highly trusted positions, even in the capacity as Training Coordinator for *all* other plant employees<sup>32</sup> on corporate, industry and military standards and specifications, and ISO 9002 standards. This is contrary to Mr. Ellis' deposition regarding private sector employees not working side-by-side with inmates (ROAA pp. 66). Appellant submits his hourly wage was insufficient compared to the prevailing wage for similar work performed in the private sector and that non-inmate peers working side-by-side with Appellant, performing similar work, earned \$9.00 to \$14.00 per hour for that work.

A. **APPELLANT WAS ENTITLED TO THE "PREVAILING WAGE" FOR REGULAR AND OVERTIME LABOR HOURS PERFORMED BETWEEN AUGUST 1, 1997 AND NOVEMBER 14, 2004.**

Appellant received \$5.25 per regular hour and \$7.86 per overtime hour for that labor. Appellant was never informed that Escod actually paid \$7.17 per regular hour and \$10.75 per overtime hour.<sup>33</sup> Appellant asserts he had a state-created property interest, under §§ 24-3-40, 24-3-315 and 24-3-430(D) in the prevailing wage and the \$1.92 per regular hour and \$2.79 per overtime hour difference in the wage Escod paid for his labor and that the DOC diverted without

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<sup>32</sup> Private Sector Escod employees, Escod supervisory employees, and inmate employees. This assertion may be verified by Respondent auditing the Training records of all employees at the Escod/Evans plant where Appellant signed all training documentation as the Training Coordinator between 2001- 2004.

<sup>33</sup> As required by §24-3-430(C) and 18 U.S.C. §1761(c)(4)

statutory authority.<sup>34</sup> Appellant further asserts that he had a state-created property interest in the difference of the prevailing wage, as set by the Employment Security Commission and the rate the DOC paid Appellant for his labor.

The term "*prevailing wage*" is defined in the relevant statutes in question in the instant case.

Section 24-3-315 states in part:

*"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."*

To re-affirm this proposition, §24-3-430(D), enacted by 1999 Act No. 68, §2, shares similar language to §24-3-315 and is read *in pari materia* therewith, stating in part, "**(D)** *No inmate participating in the program may earn less than the prevailing wage for work of a similar nature in the private sector.*" This language is identical to that in the mandatory criteria of 18 U.S.C. §1761(c) (2) *in connection with such work, received 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.*

The applicable statutes read individually or *in pari materia* with one another, require a "prevailing wage" be paid in the PIECP programs in South Carolina PIPs. The statutes themselves define prevailing wage as 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."<sup>35</sup>

However, Respondents will argue and insist upon another interpretation of the term "prevailing wage," that relieves them of the fiduciary duty of the statutory language.

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<sup>34</sup> Per contract with Insilco/Escod, Respondents removed the diverted funds as "SCDC Surplus Fund." See ROAA p. 178; Deposition of Tony Ellis, Director of Prison Industries for Department, ROAA p. 75.

<sup>35</sup> §§24-3-315; 24-3-430(D) and 18 USC §1761(c)(2)

The South Carolina General Assembly requires "The *director* [Department] *must determine prior to using inmate labor in a prison industry project* that it will not displace employed workers, 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 a similar nature in the locality in which the work is performed.*"<sup>36</sup>

Compliance with the statutory requirement is met by the Department verifying the wage rates with the Employment Security Commission.<sup>37</sup> Rebecca W. Eleazor, with ESC's Occupation Employment Statistics Program, stated that the Occupational Employment Survey Wage Request for Assemblers and Fabricators, Job Code 93956 for the years 1993 - 2000,<sup>38</sup> was published by the ESC and was true and 95% accurate.<sup>39</sup> Ms. Eleazor further established the prevailing wage in her deposition and documents provided, *see* ROAA pp. 133 (\$8.36 - \$11.44) and pp. 134 - 136, corresponding with the Team Assemblers Code 51-2092 Chart on p. 156.

Ms. Eleazor stated the DOC [Mr. Ellis] "comes to us and asks for wage information for the occupations that are in the Prison Industries program," ROAA p. 113, and that the DOC wage requests "were understood [(by the ESC)] to set up salaries or whatever for the prisoners," ROAA p. 116. Ms. Eleazor stated the ESC considers a "comparable wage" the same as the "average wage," ROAA pp. 117 - 118; and the average wage "would be the middle number," ROAA p. 141. Ms. Eleazor also stated the ESC did "not have a wage classification called

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<sup>36</sup> §24-3-315; 18 USC §1761(c)(2); 64 FR 17008, which is mandatory; 64 FR 17009 - 17010.

<sup>37</sup> Section 1761(c) requires that the PIECP wage must be set exclusively in relation to the amount of pay received by similarly situated non-inmate workers, (64 FR 17009 - 17010), and the prevailing wage must be obtained by the appropriate state agency which determines wage rates, (64 FR 17010).

<sup>38</sup> ROAA p. 141

<sup>39</sup> ROAA p. 109

prevailing wage," ROAA p. 118. She also stated that if she had to define "prevailing wage or provide a prevailing wage," ROAA pp. 119 - 120, that she "would provide the average wage or mean wage," ROAA pp. 120, 125.

Appellant submits that the government agency [Department] is required to make annual wage verifications<sup>40</sup> with the Employment Security Commission, which has defined the prevailing wage as the average or mean wage as set forth at ROAA pp. 120, 127 and 141. This definition is harmonious with the applicable statutes instructing "*paid for work of a similar nature.*"

**B. THE DOC IMPROPERLY DIVERTED A PORTION OF APPELLANT'S PREVAILING WAGES AGAINST STATE AND FEDERAL STATUTORY AUTHORITY.**

The prisoner's [Appellant's] property interest in the full amount the private employer [Escod] paid for his Appellant's labor is created and mandated by §24-3-40, which states in part, "*shall pay the prisoner's wages directly to the Department of Corrections.*"

Section 24-3-40 is reflected by and read *in pari materia* with §24-3-430(H), which directs "the *earnings of an inmate* authorized to work at paid employment pursuant to this section must be paid directly to the DOC and applied as provided under Section 24-3-40." (Emphasis supplied).

The DOC had knowledge of and admitted that [they] were without statutory authority to divert such portions of Appellant's wages, See ROAA pp. 68 - 70, 75 - 76, 80 (Deposition of Tony Ellis, Director of Prison Industries) and ROAA pp. 148 - 155.

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<sup>40</sup> Annually, after initial prevailing wage verification, the PIECP participant [DOC] must reverify the adopted wage to ensure it continues to be comparable to wage paid for work of a similar nature, 64 FR 17010.

The rates of pay Escod paid for Appellant's labor and the DOC paid Appellant are established in ROAA, pp. 40 - 41 (Deposition of Thomas McQueen, DOC Financial Accounting); ROAA, p. 50 (Deposition of Phillip Pittman, Insilco VP); ROAA, p. 58 (Deposition of Steven Kuznik, Insilco Plant Manager) and ROAA, pp. 45, 67, 69

Respondents submit a schedule of Appellant's rates of pay and hours worked; AROA pp. 44 to 75. Appellant submits that the AROA, *Id.*, and the ROAA are proof certain that DOC violated each South Carolina and federal statutory section regarding the rates of pay and the deductions authorized to be made in this matter.

DOC representatives candidly *admit acting without authority*, with intent to remove a portion of the prisoner's wages; ROAA, pp. 41 - 42, 45, 73 -75 and ROAA p. 75 ("*no state authority*," "*we have done it since day one*," and "*we just did it*"); ROAA pp. 79 - 80 and 83.

Appellant asserts that he is entitled to the wage paid by Escod for his labor; however, Appellant submits that the prevailing wage for that labor is established by ROAA, pp. 141, 148 - 150, 152, 155 - 156; the Deposition of Rebecca Eleazor, S.C. Employment Security Commission, ROAA pp. 105 - 140; and Appellant suggests this Court determine what the prevailing wage, pursuant to S.C. Code Ann. §§24-3-40; 24-3-315; 24-3-430(D) and 18 U.S.C. §1761(c)(2) for such labor actually was during that period. See "Prevailing Wage Verification," 64 FR 17010.

Appellant suggests that the law regarding the statutory schemes in this matter was settled and set forth in *Torrence, supra*. This holding regarding the state-created statutory prevailing wage right was followed by our Court of Appeals in *S.C. Dept. of Corrections v. Billy Joe*

*Cartrette*.<sup>41</sup> The DOC filed a petition for certiorari, which was subsequently dismissed as improvidently granted in 2012, *Id.* The Court of Appeals found in *Cartrette* that §24-3-315 *resolved the prevailing wage dispute.*

Appellant suggests that the Administrative Law Court has remanded other cases emanating from PIP projects, based on *Wicker, supra, see, e.g., Cartrette, supra*; and *S.C. Dept. of Corrections v. James*, 2010 WL 10079906 (April 26, 2010).

In a recent report<sup>42</sup> discussing the need for an increased federal minimum wage, the Manhattan Institute for Policy Research stated only 3% of working Americans earn the “minimum wage” with 97% of Americans earning more than the federal minimum wage. That statement supports Appellant’s argument against DOC’s reliance on the wage of \$5.25 [10¢ above the federal minimum wage] as the prevailing wage at that time.

Pursuant to §24-3-315, the Department must receive from the ESC written assurance that wages paid to inmates are similar in the locality to other workers or Federal minimum wage whichever is higher.

In the matter of the wage difference between that the ESC provides and the wage Department pays, the Legislative Audit Council made an official inquiry in 2003. In responding to the Audit Council’s “Review of the Department of Corrections’ Prison Industries Program” in October 20, 2003 correspondence from Roosevelt T. Halley, Executive Director of the South Carolina Employment Security Commission to George L. Schroeder, Director of the Legislative Audit Council, Mr. Halley informed Mr. Schroeder:

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<sup>41</sup> 387 S.C. 640, 694 S.E.2d 18 (S.C. App. 2010) cert. dismissed as improvidently granted 396 S.C. 523, 722 S.E.2d 805 (2012)

<sup>42</sup> PBS Newshour, January 1, 2015.



"[I]n the case of the Prison Industries program, SCDC identified a need to us for wage and local job market information, and we provided that information to SCDC. When SCDC judged that information inadequate, we worked with them to arrive at a solution satisfactory to SCDC. We have not been advised by SCDC as to specific legal or regulatory guidelines governing the wage and displacement information SCDC has provided."

Appellant submits Department has been informed by the governing agency of the prevailing wage and has chosen to ignore the verification required by statute and mandate to pay those rates. This contradicts Agreement §3.3 (ROAA p. 178) which references an "Appendix D" and the requirement for a written assurance from the ESC of Respondent's wage compliance.

**B. 1. THE DOC PRACTICE OF THE "SCDC SURPLUS FUND" CONTRAVENES STATE AND FEDERAL AUTHORITY.**

Appellant submits that authorized deductions from the "prisoner's [prevailing] wage" paid to the DOC pursuant to §24-3-40(A) do not contemplate or authorize the "SCDC Surplus Fund"<sup>43</sup> deductions and is a benefit upon DOC not legally justifiable.

Federal guidelines authorizing operation of a PIECP program in South Carolina are crystal clear as to the *only* deductions authorized:

If a CAC elects to take deductions from a PIECP inmates' gross wages, such deductions can be taken *only* under the following conditions:

(A) Deductions from gross wages, if made, may be withheld *only* for the following authorized purposes:

- (1) taxes (Federal, state, local);<sup>44</sup>
- (2) in the case of a state prisoner, reasonable charges for room and board<sup>45</sup> as determined by regulations issued by the Chief State Correctional Officer;
- (3) allocations for support of family pursuant to state statute, court order, or agreement by the offender;<sup>46</sup> and

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<sup>43</sup> Agreement, §3.3, ROAA p. 178

<sup>44</sup> S.C. Code §24-3-40 (A) (6)

<sup>45</sup> S.C. Code §24-3-40 (A) (2)

<sup>46</sup> S.C. Code §24-3-40 (A) (3)

- (4) contributions of not more than 20%, but not less than 5% of gross wages to any fund established by law to compensate the victims of crime.<sup>47</sup>

*Such deductions, in aggregate, cannot exceed 80 percent of gross wages.*

- (B) PIECP Inmate workers must be paid, credited with or otherwise benefit legally from, the 20% gross remainder.

§III. Program Guidelines, d. Mandatory Program Criteria, 5. Deductions, 64 FR 17010-11 (Emphasis supplied)

Appellant suggests that \$7.17 per hour is the gross wage here and that the \$1.92 comprised of the Surplus Fund Amount and pro-rata withholdings for Social Security and Workmen's Compensation (ROAA p. 178), which is removed from Appellant's wages, equals 25% of the statutorily required prevailing wage and statutory deductions are made from the lower, remaining rate of \$5.25 per hour.

The DOC "must comply with specified statutory requirements." It "must pay participating prisoners 'wages not less than that paid for work of a similar nature in the locality in which the work was performed' and 'cannot take more than 80 percent in deductions from gross wages for specified purposes including taxes, reasonable charges for room and board, family support and victim's compensation.'" See 18 USC §1761(c) (2); 64 FR 17002.

Respondent's March 3, 2001 "Agreement" with Escod specifically states "At no time during this agreement will inmates be paid less than the prevailing wage."<sup>48</sup>

The PIP sponsor has stated "\$7.17 is the hourly rate that we pay the prison for the number of hours that they bill for the prisoners we employ."<sup>49</sup>

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<sup>47</sup> S.C. Code §24-3-40 (A) (1)

<sup>48</sup> March 3, 2001, Agreement, Article 3, Conditions Related to Employment of Inmates, §3.3, Mutual Duties of Parties, ROAA p. 178.

<sup>49</sup> ROAA pp. 50 - 51 (Deposition of Phillip Pittman, Insilco VP); and ROAA pp. 58 - 60 (Deposition of Steven Kuznik, current Escod President)

The former Director of DOC Prison Industries, Tony Ellis, stated the DOC takes \$1.32 per hour "overhead" [Surplus Fund] out of the amount received from the employer, ROAA p. 67. Mr. Ellis admits the statute and "Agreement" says "minimum inmate wage," ROAA p. 69, that "it will say that, but I can tell you how we practice it and what we're doing," *Id.* Mr. Ellis was adamant that "\$1.32 is my overhead cost to run the program," *Id.* Mr. Ellis clearly stated the SCDC Surplus Fund "would pay for the operation and the salaries of the C/O etcetera, to run that plant," ROAA p. 83.

During the deposition, when confronted with DOC taking the Surplus Fund Amount for overhead, Mr. Ellis responded, "we administratively allow that," ROAA p. 70. When asked if the statute allowed the overhead, Mr. Ellis responded, "I can't say that I have seen it anywhere," *Id.*

When asked for documentation authorizing or outlining the deductions of the Surplus Fund, Social Security Withholding and Workmen's Compensation Premiums out of the *prisoner's* wages paid by the employer to DOC, Mr. Ellis stated, "we sat down with staff at the inception of the program when we first started with our accounting staff," ROAA p. 80. Admitting there was no "writing" about it, Mr. Ellis stated "we decided to do it that way, that's correct," *Id.* and Mr. Ellis was "not aware of" any writings about the practice, *Id.*

In deriving the appropriate PIECP wage, 18 USC §1761(c)(2) *does not allow* other cost variables [SCDC Surplus Fund] to be taken into consideration, such as unique expenses incurred as a result of undertaking production within the prison environment.

Quite simply, no authority exists to allow wage deductions in addition to those set forth in 18 USC §1761(c) (2), §24-3-40(A) or §24-3-430 for the purpose of addressing the unusual costs [overhead] of doing business in a prison environment, however meritorious such proposed

adjustments might be. Thus, the practice of deductions from the difference Escod pays for Appellant's labor and the wage Appellant receives from Respondents not authorized by federal or state statutory law is illegal, deprived Appellant of the prevailing wage for his labor, and diverted a portion of Appellant's wages without authority.

**B. 2. THE DOC PAYING THE EMPLOYER'S PORTION OF SOCIAL SECURITY TAX OUT OF APPELLANT'S WAGES IMPROPERLY DIVERTS A PORTION OF APPELLANT'S WAGES AND VIOLATES FEDERAL LAW.**

Appellant submits that authorized deductions from the "prisoner's [prevailing] wage" paid to the DOC pursuant to §24-3-40(A) do not contemplate or authorize the employer's portion of the Social Security withholding out of those wages.

The employer's portion of the Social Security withholding (.40¢) is deducted via the "Agreement" between Escod and DOC, ROAA p. 178, which is *a portion of the wage paid for Appellant's labor*.

DOC admits making a Social Security deduction from Appellant's wages<sup>50</sup> and a "pro rata Social Security withholding," *Id*, from the same hourly wage received from Escod for Appellant's labor.

Essentially, Appellant had the *employee and employer portions* of Social Security deducted from his hourly wage, *see* ROAA p. 178. Indeed the federal law requires PIECP inmates must also "participate on a voluntary basis" and "*must have agreed to the specific deductions made from gross wages pursuant to 18 USC §1761(c)(2), and all other financial arrangements resulting from participation* in such employment, *see* 18 USC §1761(c)(4), 64 FR 17002.

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<sup>50</sup> ROAA pp. 41 - 42 (Deposition of Thomas McQueen, Prison Industries Accounting); ROAA pp. 67, 72 - 73 (Deposition of Tony Ellis, Director of Prison Industries)

Respondents improperly deducted its portion of Appellant's Social Security withholding from wages earned by Appellant's labor. An employee should not be liable for an employer's portion of the Social Security tax.

Subtitle C of the Internal Revenue 'Code of 1954, 26 USC § 3101 *et seq.*, imposes a number of employment taxes, among which are the income tax withheld from an employee's wages and the Social Security tax. The Code divides the burden of the Social Security tax between the employer and the employee, but imposes the income tax on the employee alone. The *employer has responsibility*, however, for both paying *its share* of the Social Security tax and withholding from the employee's wages the income tax and the employee's share of the social Security tax, *see Jersey Shore State Bank v. United States*, 479 U.S. 442, 443 - 44 (1987).

Appellant submits that the employer's portion of Social Security tax may not come from the "prisoner's [Appellant's] wages" remitted to the DOC pursuant to §24-3-40(A). Appellant suggests that the "Agreement" between DOC and Escod [and all PIP sponsors] is a contract designed to work a fraud on the State and Appellant.

Appellant suggests that the Agreement to remove the portion of Social Security tax withholding and Workmen's Compensation insurance premiums from Appellant's wages (ROAA p. 178) is a contract intended to evade payment of an employer's portion of tax in fraud of tax laws against the public policy of South Carolina pursuant to S.C. Code §12-2-40.

Under our South Carolina Tax Code (Income Tax Withholding), Respondent qualifies as a "Withholding Agent,"<sup>51</sup> and Appellant qualifies as an "employee."<sup>52</sup>

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<sup>51</sup> S.C. Code Ann. §12-8-10(2) "A person required to withhold income taxes under the provisions of this Chapter."

<sup>52</sup> S.C. Code Ann. §12-8-10(3) "[a] resident individual receiving wages, as defined in Section 12-8-520(D)."

Our statute clearly indicates the wages paid to DOC are Appellant's ["prisoner's wages"] property pursuant to §24-3-40(A) and mandate that Appellant's wages be paid to the DOC *for distribution*, with the only deductions authorized as those enumerated in §24-3-40.

**B. 3. THE DOC PAYING THE EMPLOYER'S PORTION OF WORKMEN'S COMPENSATION INSURANCE PREMIUMS OUT OF APPELLANT'S WAGES IMPROPERLY DIVERTS A PORTION OF APPELLANT'S WAGES AND VIOLATES STATUTORY AUTHORITY.**

Appellant submits that authorized deductions from the "prisoner's [prevailing] wage" paid to the DOC pursuant to §24-3-40(A) do not contemplate or authorize the employer's portion of the Workmen's Compensation Premium withholding out of those wages.

The employer's portion of the Workmen's Compensation Premium withholding (.20¢) is deducted via the "Agreement" between Escod and DOC, ROAA p. 178, which is a portion of the wage paid for Appellant's labor.

DOC admits making a Workmen's Compensation Premium deduction from Appellant's wages<sup>53</sup> and a "pro rata Workmen's Compensation withholding," *Id*, from the same hourly wage received from Escod for Appellant's labor.

Appellant had both employee and employer portions of Workmen's Compensation deducted from his hourly wage, see ROAA p. 178. As set forth in the arguments concerning the prorated Social Security Withholding, federal law requires PIECP inmates must also "participate on a voluntary basis" and "must have agreed to the specific deductions made from gross wages pursuant to 18 USC §1761(c)(4), 64 FR 17002.

Respondents improperly deducted its portion of Appellant's Workmen's Compensation Premiums from wages earned by Appellant's labor.

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<sup>53</sup> ROAA pp. 41 - 42, 67, 72 - 73

For the DOC to be required to pay the portion of Workmen's Compensation Premium of the employers, then DOC is technically the statutory employer under the Workmen's Compensation Act of S.C. Title 42.

Pursuant to S.C. Code Ann. §42-5-10, an "Employer shall secure payment of compensation." Under the provisions of the Workmen's Compensation Act, the employer [DOC] shall secure the payment of compensation to his employees in the manner provided by Title 42, Chapter 5 of the S.C. Code of Laws.

Section 42-7-10 established a State Worker's Compensation Fund. Appellant suggests that he falls into such category as it specifically addresses inmates who work in a federally approved PIECP under a 2010 Amendment to the last undesignated paragraph of §42-7-65. Appellant suggests that an employee<sup>54</sup> *shall not* pay any portion of the premium in the State Worker's Compensation Fund where §42-7-75 requires State agencies [DOC] to pay worker's compensation premiums.

Section 42-5-200 (1976) specifically states an "*Employee shall not pay any portion of insurance, self-insurance fund or other things required by Title.*"

Our Court of Appeals has held that an agreement<sup>55</sup> between an employee and employer to pay any portion of premiums for benefits required by the Workmen's Compensation Act is invalid. *See Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 371 S.C. 365, 638 S.E.2d 109 (S.C. App. 2006), rehearing denied, cert. granted, reversed 382 S.C. 295, 676 S.E.2d 700, cert. denied, cert. denied, 130 S.Ct. 741.

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<sup>54</sup> Appellant contemplates Respondent's forthcoming arguments against the term "employee" encompass Unemployment Compensation and the Payment of Wages Act, specifically. For all other purposes, Appellant pays into Social Security, workmen's Compensation, and is a South Carolina taxpayer.

<sup>55</sup> ROAA p. 178

Additionally, no contract between an employee and employer or an employee and a third party can operate to relieve the obligations created under the Worker's Compensation Act, *see* S.C. Code 42-1-610 (1976).

Appellant submits that if no agreement between an employer and employee for an employee to pay any portion of workmen's compensation benefits is valid by law, that Respondent deducting that portion from Appellant's wages without Appellant's knowledge is similarly invalid and must be returned to Appellant.

**C. THE DOC BREACHED A FIDUCIARY DUTY TO PAY APPELLANT THE PREVAILING WAGE FOR HIS LABOR MANDATED BY STATE AND FEDERAL STATUTORY AUTHORITY.**

Appellant suggests that the duty to pay Appellant the prevailing wage, pursuant to 18 USC §1761(c) (2), S.C. Code §§24-3-315 and 24-3-430(D), and to make only specific deductions, pursuant to 18 USC §1761(c) (4) and S.C. Code §24-3-40(A) creates a fiduciary relationship between Appellant and Respondents and places a duty upon Respondents to pay the specific statutory wage and make only those statutory specific deductions upon that wage, and to fully inform Appellant in advance of all conditions of said employment. Essentially, Respondents breach their fiduciary duty to Appellant and converted a portion of Appellant's wages through an illegal contract and statutory noncompliance.

Appellant submits that fiduciary of relations and trust, and a duty is imposed upon Respondents created by state and federal statutory law to perform certain obligations and that failure to meet those obligations converted Appellant's property, *see, e.g., Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (2008).

A confidential or fiduciary relationship exists where one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with



due regard to the interests of the one imposing the confidence, *see, Davis v. Greenwood School Dist.* 50, 365 S.C. 629, 630 S.E.2d 65 (2005); *Mason v. Mason*, ---S.E.2d---, 2015 WL 895388 (S.C. App. Mar. 4, 2015).

### Summation of Issue II

Appellant was never notified of or agreed to the SCDC Surplus Fund, Pro-rata Social Security Withholding Payment or Pro-rata Workmen's Compensation Premiums (ROAA p. 178) as deductions from his wages. Appellant asserts that his original agreement from June 1997 does not demonstrate notice of a prevailing wage in lieu of the "minimum wage," or any of the deductions named immediately above and that Respondents will not demonstrate notice or agreement.

The wages mandated to be paid a PIECP inmate [Appellant] by 18 USC §1761(c)(2) [64 FR 17000-17014], §24-3-315 and §24-3-430(D); and the deductions from those wages specifically authorized by 18 USC §1761(c)(4) and §24-3-40(A), and remitted to the DOC for distribution to Appellant, pursuant to §24-3-40(A), do not contemplate or create any inference of authority to misdirect a portion of or make deductions for the SCDC Surplus Fund (\$1.32 per hour); pro rata Social Security Withholding Payment (.40¢ per hour); or pro rata Workmen's Compensation Premium Withholding (.20¢ per hour).

The United States Constitution, along with the laws and treaties made pursuant thereto, constitutes the supreme law of the land. All state and federal officers, whether legislators or executive officers, are bound to enforce all federal laws, *see* U.S. Const. art. VI, cl. 2, *Prather v. Clover Spinning Mills, Inc.*, 215 S.C. 103, 54 S.E.2d 529 (1949).

Under the Supremacy Clause, state action may be foreclosed by express language in congressional enactment, *see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

Respondents refused to pay the prevailing wage and deductions beyond authorized amounts violates state and federal statutory authority and wrongfully diverts a portion of Appellant's wages to which he has a property interest.

Appellant is entitled to the prevailing wage or the difference between the amounts paid for his labor and diverted without statutory authority by the DOC, from August 1, 1997 through November 14, 2004.

This Court may reverse or modify the DOC's final agency decision here where the substantial rights of Appellant have been prejudiced by the DOC's decision as it was in violation of statutory law, in excess of the DOC's statutory authority, is clearly erroneous based on the substantial evidence on the whole record, and was characterized by an unwarranted exercise of discretion.

III. THE DOC IMPROPERLY REMOVES AND DENIES APPELLANT IMMEDIATE ACCESS TO 10% OF GROSS WAGES ESCROWED FOR HIS BENEFIT AGAINST THE STATUTORY AUTHORITY OF S.C. CODE §§ 24-3-40(A) (5); 24-3-40(B) (2), 24-3-315 AND 18 USC §1761(c) (2) & (4).

Appellant asserts the 10% of *his* wages deducted pursuant to §24-3-40(A)(5) is to be for the “*benefit of the prisoner.*” If the prisoner cannot access the principal or interest, then the prisoner is systematically deprived, via the unconstitutional interpretation of his property interest therein.

Section 24-3-40(B)(2) states in pertinent part:

“A prisoner serving life in prison or sentenced to death *shall be given the option of having his escrowed wages included in his estate or distributed to the persons or entities of his choice.*” (Emphasis supplied).

The DOC denies Appellant access to the wages escrowed under (A)(5) in their interpretation of (B)(2), which is that, inmates serving a life sentence receive their escrowed wages “only upon the inmate’s death.” Appellant asserts this is an unconstitutional interpretation.

The original Bills in 1999 Act No. 68, §2 were one (1) each from the House and Senate H.3216 and S.384, respectively (113<sup>th</sup> Session, 1999-2000). The House Bill version proposing subsection (B)(2) stated “upon death of the inmate.” That Bill did not make second reading. The Senate Bill, minus the language “upon death,” was the subject of 1999 Act No. 68, §2 and became the law §24-3-40(B)(2)). However, DOC chooses to employ an interpretation of legislation that did not become law, was not the legislative intent, and deprives Appellant of any benefit, for whom it was enacted; and earned through his labor.

Appellant asserts the DOC may not interpret §24-3-40(B)(2) in the manner currently employed. Our Supreme Court has held the Court “generally gives deference to an administrative agency’s interpretation of an applicable statute or its own regulation.”

Nonetheless, where, as here, "the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation," *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 581 S.E.2d 836, 838 (2003) (internal citations omitted). This very proposition is mirrored by the U.S. Supreme Court in *Medtronic Inc. v. Lohr*, 518 U.S. 470 (1996) (Where the language of the statute is clear, resort to the agency's interpretation is improper.) However, if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute, *see Chevron U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

Appellant, serving a life sentence without parole, asserts Respondent's incorrectly deducted and refuse to return his escrowed wages and is entitled to immediate, equal and personal access to funds escrowed for his benefit §24-3-40(A)(5) under §24-3-40(B)(2).

Respondents will argue that Appellant may not receive LTSA funds until his death based upon the agency interpretation of subsection (B)(2).<sup>56</sup> However, a review of Respondent's financial records<sup>57</sup> will demonstrate that the DOC has allowed at least two known inmate(s) to access their escrowed funds (§24-3-40(A)(5)) while incarcerated: 1) Arthur Manning Kirby, Jr., SCDC# 301664 [SCDC# different than on his previous sentence] to satisfy his DNA restitution in one lump sum instead of 5% of gross bi-monthly deductions, allowing Mr. Kirby more funds for inmate use in his E. H. Cooper Trust Fund Account on a bi-monthly basis; and 2) Thomas "Junior" Hinson, SCDC# 192170 [serving a life sentence] to satisfy his Internal Revenue Service restitution. Respondent's argument that the LTSA may not be accessed except by the strict

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<sup>56</sup> Deposition of Susanne Reich, ROAA p. 100

<sup>57</sup> S.C. Code §24-1-170 Financial Records states the [DOC] director shall keep, or cause to be kept, correct and accurate accounts of each and every financial transaction... including all receipts and disbursements of every character. He shall keep full and correct accounts... and with all persons having financial transactions with the prison system.

interpretation of §24-3-40(B) is without merit where Respondents allowed access for certain prisoner(s) to satisfy government restitution payments resulting from conviction - where the government(s) benefitted.

Appellant suggests an analysis and contrast of the statute in question [§24-3-40(B)(2)] with the South Carolina House and Senate Bills [H.3216 and S.384] to ascertain the true legislative intent in regards to if "*the interest bearing account*"<sup>58</sup> in question is "*for the benefit of the prisoner*"<sup>59</sup> and how a prisoner sentenced to life may actually "benefit" from the escrowed account if, according to the agency interpretation by the DOC, the prisoner serving life may not have access to the funds in that account until *after* his death.

Appellant submits that the language of the statute [§24-3-40(B)(2)] does not indicate, imply or infer in any language that Appellant must wait until after his [ ] death to have any control or benefit. Appellant suggests that the language used is the intended purpose of the statute and this purpose is demonstrated clearly in the South Carolina Legislature declining to utilize the "upon death" language of H.3216 [intending to create §24-3-40(B)(2)].

Appellant submits that Respondent's interpretation of the term(s) "escrow[ed]," "prisoner's benefit," and "estate" in §§24-3-40(A)(5) and 24-3-40(B)(2) are overly expansive. Respondents will also argue that the term(s) "escrow[ed]," "prisoner's benefit," and "estate" not being defined in subsections (A) and (B) imply Appellant is not entitled to any particular benefit or interest rate and "estate" means upon the death of the inmate. However, if the terms were construed that broadly, subsection (B)(2) would effectively swallow subsection (A)(5)'s intent of benefit to the prisoner himself. Because such a construction would fail to give proper effect to

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<sup>58</sup> S.C. Code Ann. §24-3-40(A)(5) (Supp. 1999)

<sup>59</sup> *Id.*

(A)(5)'s language "interest bearing" and "for the benefit of the prisoner," then the construing of "estate" as "upon death" must be rejected. *Cf. State ex rel. McCleod v. Nessler*, 273 S.C. 371, 256 S.E.2d 419, 420 (1979) ("In determining the meaning of a statute, it is the duty of this Court to give force and effect to all parts of the statute, if possible."); *Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct. App. 2004) ("Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together *and each given effect...*") [Original emphasis].

Appellant submits that Respondent's proposed interpretation of the terms "escrow[ed]," "prisoner's benefit," and "estate" are broad and do not comport with public policy concerns over fiduciaries where our State is the responsible fiduciary.

**A. THE DOC IMPROPERLY DEDUCTS 10% FROM APPELLANT'S WAGES FOR PLACEMENT IN AN INTEREST BEARING ESCROW ACCOUNT IN ACCORDANCE WITH §24-3-40(A) (5).**

South Carolina Code Ann. §24-3-40(A)(5) reads in pertinent part: "(5) Ten percent must be held in an interest bearing escrow account for the benefit of the prisoner."

Appellant submits that the deduction of 10% of gross wages as set out in subsection (A)(5) where subsection (B)(2), as applied to "lifers," denies access to that 10% of gross wages in his lifetime [life without parole] is not authorized as a deduction by 18 USC §1761(c)(4), and no state law, or application of state law may subvert federal law under the Supremacy Clause.<sup>60</sup>

Where subsection (A)(5) may promote the public policy of savings for when the prisoner returns to family and community as a contributor, and thus is not styled as a "deduction" in the true sense of the term. In the case of a prisoner serving life or life without parole, the application of subsection (B)(2) renders subsection (A)(5) a deduction in the true sense where the prisoner

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<sup>60</sup> See footnote 25, *supra*

never has personal access to the principal or interest on the escrowed wages and thus, is not authorized as a deduction in the sense authorized by 18 USC §1761(c)(4) and 64 FR 17006.

Appellant submits that the operation of §24-3-40(A)(5) acts to create a fiduciary duty upon Respondents to place the 10% of gross wages in an account for the benefit of the prisoner. For these reasons the Respondents improperly deduct 10% of gross wages from Appellant [lifer] where Appellant loses all access or control of those funds for his lifetime.

**A. 1. THE DOC'S LONG TERM SAVINGS ACCOUNT IS NOT AN INTEREST BEARING ESCROW ACCOUNT FOR THE BENEFIT OF THE PRISONER WITHIN THE MEANING OF §24-3-40(A)(5).**

The Long Term Savings Account ("LTSA") is not an "*interest bearing escrow account*" "*for the benefit of the prisoner*" contemplated by §24-3-40(A)(5). The operation of subsection (A)(5) created a fiduciary relationship between Respondents and Appellant and placed a duty upon Respondents to maintain the 10% of gross wages in an interest bearing escrow account for the benefit of the prisoner [Appellant].

The Justice System Improvement Act of 1979, Pub. L. 96-157 requires Respondents to "provide certain safeguards" "to prisoners themselves," see also The Crime Control Act of 1996, Pub. L. 101-647; 64 FR 17001-02. At the Congressional address, former Senator Charles Percy state the PIECP projects should "enable an inmate to become more self-sufficient to the benefit of himself," the prison system, and the taxpayer, *Id.* at 17002.

In his Deposition, Thomas McQueen, Respondent's Administrative Financial Manager stated the money [10%] is held in an "interest bearing escrow account for the benefit of the prisoner," which is "retained at SCDC individually by inmate," see ROAA p. 82. Mr. McQueen also stated "all deductions are made through that account [LTSA] maintained at the State

Treasurer's Office to which DOC can write checks to pay PI Inmates," *Id.* at 41 - 43, 82; *see* APEE, Earnings and Deductions Statement for 12/16/02.

Appellant submits that the LTSA is not an interest bearing account for the benefit of the prisoner. The Record indicates that Respondents maintain the LTSA as a Commercial Checking Account.<sup>61</sup>

Mr. McQueen also stated "if [an] Inmate works one hour and is paid \$7.17, the entire amount goes into the account, ROAA pp. 40 - 41. Appellant submits that the diverted \$1.92 per hour never shows up on any accounting sheet provided Appellant, *see* APEE, Earnings and Deductions Statement for 12/16/02. Mr. McQueen stated all monies collected are deposited in that fund, compliant with §24-3-40(A), ROAA p. 43.

Thus, the LTSA is used as an accounting tool (see APEE) for the justification of deductions with the remaining balance being the 10% of the current payroll check added to the beginning balance of the LTSA amount, *Id.*

With the LTSA being a commercial checking account, the 10% of Appellant's gross wages are not "escrowed" in an "interest bearing" account in the sense of a benefit where Appellant only earned minute amounts of interest on approximately \$5,900.00<sup>62</sup> between 2009 and 2014.<sup>63</sup>

Appellant suggests that the LTSA operates as an accounting tool for Respondents to divert the \$1.92 per regular hour and \$2.79 per overtime hour from "prisoner's wages" and is not an interest bearing escrow account for Appellant's benefit as contemplated by §24-3-40(A)(5).

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<sup>61</sup> ITBI, pg. 2, Response No. 1.

<sup>62</sup> AROA p. 44

<sup>63</sup> ROAA pp. 186 - 191, 204 - 206



**B. THE DOC IMPROPERLY DENIES APPELLANT ACCESS TO HIS WAGES ESCROWED PURSUANT TO §24-3-40(A)(5) BASED UPON §24-3-40(B)(2).**

Appellant is incorrectly denied immediate personal access to his escrowed wages where §24-3-40(B)(2) operates to create a permanent deduction of the funds supposedly escrowed in an interest bearing account for Appellant's benefit as set forth in subsection (A)(5).

Appellant submits that 18 USC §1761(c)(4) does not authorize a "deduction" created by the operation of §24-3-40(B)(2) in returning Appellant's escrowed wages. Appellant has a property interest in those wages as demonstrated in *Wicker, supra*, and the language of §24-3-40(A) "shall pay the *prisoner's wages* directly to the Department of Corrections," (emphasis supplied).

Not only is subsection (B)(2) in conflict with the authorized deductions of 18 USC §1761(c)(4), and thus, the Supremacy Clause, it is a taking in violation of the Takings Clause where no deduction is authorized.

Appellant suggests that Respondent's interpretation and application of §24-3-40(B)(2) improperly denies his [lifer] personal access to his escrowed wages in his own lifetime.

**B. 1. THE DOC MISAPPLIES THE TERM "ESTATE" IN § 24-3-40(B) (2) IN DENYING APPELLANT [SERVING LIFE] ACCESS TO HIS LONG TERM SAVINGS ACCOUNT FUNDS.**

Appellant contemplates that Respondent's definition of the term "estate" reinforces §24-3-40(B)(2) and will rely on the South Carolina Probate Code definition to include "the property of the decedent, trust, or other person whose affairs are subject to this Code..." Respondents will assert that subsection (B)(2) anticipates that the distribution of these monies will occur upon the death of the inmate, not prior to that event.

Appellant contends that nowhere in the statutory scheme of §24-3-40(A) is the South Carolina Probate Code invoked or referenced and that this was not the intent of the Legislature. The South Carolina Legislature specifically removed the language "upon death" from subsection (B)(2), which, Appellant submits, directly nullifies Respondent's suggested interpretation. Indeed, Respondent may not provide any support, statutory or precedent, to suggest the term "estate" utilized in (B)(2) means "upon death."

The American Heritage College Dictionary (3rd ed.) defines "estate" as "3. *Law*. The nature and extent of an owner's rights to land or other property," pp. 469 - 470. Black's Law Dictionary (8<sup>th</sup> ed) (2004) defines "estate" as "1. The amount, degree, nature, and quality of a person's interest in land or other property," p. 586.

The term "estate" in reference to the property of a person does not require that person to be dead. Such an interpretation, without statutory guidance and in reading the statute as a whole where the funds escrowed by (A)(5) are for "the benefit of the prisoner," is incorrect. Appellant submits Respondent's definition and application of that particular construction of the term is inapplicable here and must cease where it is contrary to the original legislative intent, *see* S.384.

If Appellant is required to bequeath his LTSA account to a beneficiary, as Respondent suggests, taxes will be paid on the escrowed wages a second time at the increased Estate Tax rate. The dual taxation of the same wages earned offends the legislative intent and public policy of escrowing wages for the wage earner's benefit and is similarly outside the federal statutory scheme of 18 USC §1761(c)(4) as an authorized deduction.

**B. 2. SECTION 24-3-40(B) (2) IS APPLIED AS A BILL OF ATTAINDER.**

Appellant suggests that Respondent's interpretation and application of §24-3-40(B)(2) operates as a bill of attainder.<sup>64</sup>

Respondent's incorrect application of (B)(2) inflicts an additional punishment upon the PIP inmates sentenced to life<sup>65</sup> where such application imposes a fine of 10% of gross wages earned in a PIP if the prisoner received a life sentence for his offense committed.

A bill of attainder is a legislative act [or application], regardless of form, that applies either to named individuals or to easily ascertainable members of a group [lifers] in such a way as to inflict punishment on them without a judicial trial.<sup>66</sup>

A bill of attainder clause in our State Constitution is intended to protect individuals and private groups who are vulnerable to nonjudicial determinations of guilt, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

Appellant submits Respondents must cease operating §24-3-40(B)(2) as a bill of attainder against Appellant sentenced to life.

**B. 3. SECTION 24-3-40(B)(2) IS A LAW IN VIOLATION OF THE PROHIBITION AGAINST EX POST FACTO LAWS.**

Appellant suggests Respondent's interpretation and application of §24-3-40(B)(2) operates as an *ex post facto* law in violation of the state and federal constitutions.<sup>67</sup>

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<sup>64</sup> United States Constitution, art. I, §9, cl. 3; art. I, §10, cl. 1.

<sup>65</sup> S.C. Code §16-3-20(A) (1986) (Murder); §16-11-311 (2008) (1<sup>st</sup> Degree Burglary); §17-25-45 (2014) (Life sentence for person convicted for certain crimes) [as well as those serving "common law" life sentences for kidnapping (§16-3-910 (1991) prior to elimination of a life sentence as a possible sentence.

<sup>66</sup> 16 A C.J.S. Constitutional Law §429 (1984)

<sup>67</sup> United States Constitution, art. I, §10, cl. 1; South Carolina Constitution Art. I, §4.

Respondent's incorrect application of subsection (B)(2) inflicts an additional punishment [10% of gross wages] upon those PIP inmates sentenced to life (*see* footnote 55, *supra*).

An *ex post facto* law makes an act criminal that was not criminal when the act was passed, *increases the punishment for the act*, or *alters the situation of a party with regards to the offense or its consequences to the party's disadvantage*, *see Bouie v. Columbia*, 378 U.S. 347 (1964); and *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002).

In considering whether §24-3-40(B)(2) constitutes retroactive punishment forbidden by the Ex Post Facto Clauses, Appellant suggests this Court ascertain whether the legislature meant the statute to establish civil proceedings; if the intent was to impose punishment, that ends the inquiry, but if the intent was to enact a regulatory scheme that is civil and nonpunitive, this Court should further examine whether the statutory scheme is so punitive either in purpose or effect [as applied by Respondents] as to negate the State's intention to deem it civil, *see U.S.C.A. Const. Art. 1, §10, cl. 1*, and *Smith v. Doe*, 123 S.Ct. 1140 (2003).

The §24-3-40(B)(2) classification targeting "lifers" is not a reasonable categorical judgment that conviction of crimes punishable by a life sentence should entail particular regulatory consequences contemplated by the Court in *Smith v. Doe* in an *ex post facto* clause violation. Appellant asserts Respondent's application of §24-3-40(B)(2) operates as an *ex post facto* law and such practice must cease.

- B. 4. SECTION 24-3-40(B) (2) OPERATES AS A VIOLATION OF THE EQUAL PROTECTION CLAUSES IN DENYING APPELLANT'S CLASS OF PRISONER [SERVING LIFE SENTENCES] EQUAL PERSONAL ACCESS TO HIS LONG TERM SAVINGS ACCOUNT FUNDS IN HIS LIFE TIME AS PROVIDED FOR PRISONERS NOT SERVING A LIFE SENTENCE.**

Appellant contends that §24-3-40(B)(2), as applied, operates as a violation of the equal protection clauses<sup>68</sup> where it denies Appellant, serving a life sentence, access to his LTSA funds in his lifetime when other PIP prisoners may gain access to their LTSA funds in their lifetime.

Both state and federal Constitutions prohibit any State from denying any person within its jurisdiction the equal protection of the laws. This means that no person, or class of persons, shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances, *see, City of Beaufort v. Holcombe*, 369 S.C. 643, 632 S.E.2d 894 (Ct. App. 2006).

Appellant suggests that §24-3-40 applies to the class of persons known as "prisoners" working in a PIECP certified project. Appellant further suggests that Respondent's application of §24-3-40(B)(2) creates a subclass of prisoners known as "lifers," to which are similarly situated in incarceration and wage earners under state and federal statutory schemes, but who are treated differently in the access of LTSA funds escrowed pursuant to §24-3-40(A)(5) "*for the benefit of the prisoner.*"

Respondents operate §24-3-40(B)(2) as "special legislation," without determining a basis for the unequal treatment, thus, as an arbitrary classification with no reasonable hypothesis to support the operation, *see, e.g., Cabiness v. Town of James Island*, 393 S.C. 176, 712 S.E.2d 416 (2011).

Appellant suggests that the operation of §24-3-40(B)(2) in the current manner denies Appellant equal protection of the law.

This Court may reverse or modify the DOC's final agency decision here where the substantial rights of Appellant have been prejudiced by the DOC's decision as it was in violation

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<sup>68</sup> U.S. Const. Amend XIV, §1; S.C. Const., Art. I, §3.

of statutory law, in excess of the DOC's statutory authority, is clearly erroneous based on the substantial evidence on the whole record, and was characterized by an unwarranted exercise of discretion.

**IV. THE DOC IMPROPERLY DENIES APPELLANT A FAIR INTEREST RATE ON WAGES ESCROWED FOR HIS BENEFIT UNDER §24-3-40(A) (5) TO WHICH HE ENJOYS A PROPERTY INTEREST.**

Appellant's wages were escrowed, pursuant to §24-3-40(A)(5) (1999) from late 1999 to November 2004. Upon Appellant receiving an institutional transfer in November 2004, he had \$5,358.00 escrowed in the DOC "Long Term Savings Account." On February 8, 2011, Appellant requested information from the DOC on interest earned for the year 2010, ROAA, pp. 168 - 169. Respondents answered that on the amount of \$5,997.44, Appellant earned .26¢ interest for the year. Appellant submitted a request to DOC Financial Accounting Branch, dated March 5, 2012, inquiring into interest earned for 2011.<sup>69</sup> The DOC responded that for 2011 Appellant earned .27¢ interest on \$5,997.71, *Id.*

Appellant made specific inquiry of DOC regarding his Long Term Savings Account on April 16, 2012, *Id.* The DOC response dated March 9, 2012 specifically states "Interest will be paid to all inmates with monthly average balances of *greater* than \$10.00", *id.* (Emphasis supplied).

Appellant is entitled to a fair interest rate on his escrowed wages for his benefit under §24-3-40(A)(5) and this amount should be fairly Applied for *each* year. The DOC acts in a fiduciary capacity in the administration of this trust in management of the Long Term Savings

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<sup>69</sup> Submitted with Appellant's November 3, 2014 Motion to Compel Discovery of Financial Records to this Court, but omitted by Respondent in the ROAA; *but see* AROA p. 44 (.27¢ interest on \$5,997.44 for year 2011).

Account and thus has a duty to Appellant to pay a comparable interest rate on Appellant's funds held in escrow. In South Carolina Courts the theory that interest follows principal applies.

Appellant contemplates Respondent will argue the plain meaning of §24-3-40(A)(5) merely requires Respondent to hold 10% of Appellant's monies in an "interest bearing escrow account," that subsection (A)(5) does not specify the rate of interest that must be applied to the monies held in the Appellant's interest bearing escrow account.

Appellant submits that the escrow account is "for the *benefit of the prisoner [Appellant]*."<sup>70</sup> A benefit is construed as an advantage, privilege, profit or gain. The escrow account is a pecuniary benefit as it is capable of monetary valuation. Appellant is entitled to income from his property, to receive the trust income; essentially, Appellant should be an income beneficiary in this respect.

"Escrow" is property or an account held in trust. In this instance, subsection (A)(5) has placed a fiduciary duty upon Respondent to maintain the LTSA in a manner that benefits the Appellant.

Respondent breaches its fiduciary duty to escrow 10% of gross wages in an interest bearing account when it fails to maintain a "Savings Account" or "Trust Fund" for Appellant to which Appellant would "benefit," as compared to the commercial checking account Respondent maintains, *see* footnote 61, *supra*. Respondent's breach of its fiduciary duty to maintain an interest bearing account for Appellant is demonstrated by comparing Appellant's E. H. Cooper Trust Fund and his LTSA.

---

<sup>70</sup> S.C. Code Ann. §24-3-40(A)(5) (1999) (emphasis supplied)

On February 13, 2015, in response to RTSM<sup>71</sup> #15-401073, on the amount of \$15.00 in Appellant's E. H. Cooper Trust Fund, Appellant earned .11¢ for the year 2014. In response to RTSM #15-401078, on the amount of approximately \$5,998.00 in Appellant's LTSA, Appellant earned .63¢ for the year 2014.

Appellant submits that the LTSA management is a breach of fiduciary duty in denying Appellant a fair interest rate where the statute implies a trust or savings account.

Respondent will also argue that there is no evidence, applicable statute or precedent that Appellant must earn a specified interest rate. Appellant will contend this is a novel issue not yet addressed by South Carolina courts, and that regardless of specific language directing a specific rate, our Legislature contemplated that Respondents, a State Agency, will support the public policy of the South Carolina government dealing fairly with citizens of the State with whom they are in a fiduciary relationship. Absent any other language, §24-3-40(A)(5) creates a fiduciary duty upon Respondents to ensure Appellant receives the fair interest rate available on his escrowed funds. The very language of subsection (A)(5) implies that promise.

This Court may reverse or modify the DOC's final agency decision here where the substantial rights of Appellant have been prejudiced by the DOC's decision as it was in violation of statutory law, in excess of the DOC's statutory authority, is clearly erroneous based on the substantial evidence on the whole record, and was characterized by an unwarranted exercise of discretion.

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<sup>71</sup> DOC Request To Staff Member on Automated Kiosk System  
Page 42 of 45



V. **APPELLANT IS ENTITLED TO INTEREST ON ALL WAGES WITHHELD WITHOUT STATUTORY AUTHORITY.**

The DOC withheld a portion of Appellant's wages without statutory authority between June 1997 and November 14, 2004. Appellant suggests that upon a determination by this Court that Appellant is entitled to the difference between the prevailing wage and wage paid for his labor by Escod and the amount paid Appellant by DOC; that this Court order that Appellant be awarded pre- and post-judgment statutory interest for those wages for the period between June 1997 and November 2004.

**SUMMARY OF THIS COURT'S STANDARD OF REVIEW APPLIED**

The DOC final agency decision is in violation of constitutional and statutory provisions; in excess of South Carolina and United States statutory authority of the agency;<sup>72</sup> is affected by errors of law in light of the decisions of *Wicker*, *Torrence*, and *Cartrette*; and are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Pursuant to S.C. Code Ann. § 1-23-380(5), this Court may reverse the DOC decision where the substantial rights of the Appellant have been prejudiced by the DOC conclusions.

---

<sup>72</sup> S.C. Code Ann. §§24-3-40(A)(5) & (B)(2); 24-3-315; 24-3-430 (D) & (H); and 18 USC §1761(c)

## CONCLUSION

Appellant respectfully prays that this Honorable Court reverse and remand the February 9, 2012 final agency decision of the Department of Corrections with an appropriate order to structure the proposed relief:

- 1) Reverse the Department's February 5, 2012 decision to deny Appellant's grievance;
- 2) The Department shall determine the dates the inmate in the instant matter started and completed his participation in the prison industries program operated by the Department;
- 3) The Department shall determine from this Court the prevailing wage in the private sector for the work the inmate performed during his participation in the prison industries program and any change in the rate during his participation until the completion of the project or employment at issue;
- 4) The Department shall determine the total hours worked by the Appellant in the prison on the project at issue and the prevailing wage for each hour of work completed by Appellant;
- 5) The Department shall pay the Appellant the difference in the wages actually paid and the prevailing wages that should have been paid for each hour, or fraction of an hour, regular and over-time, worked by the Appellant during "Training Hours," subject to any statutorily allowed deductions;
- 6) The Department shall pay the Appellant the difference in the wages actually paid and the prevailing wages that should have been paid for each hour, or fraction of an hour, regular and over-time, worked by the Appellant between August 1997 and November 2004, subject to any statutorily allowed deductions;

- 7) The Department shall determine the correct rate of interest on the Appellant's Long Term Savings Account for each year the inmate had a portion of his wages deducted pursuant to Section 24-3-40(A)(5) and every subsequent year those funds remained in that account;
- 8) The Department shall grant the Appellant, serving a life sentence with no parole, immediate access to the option of having his escrowed wages distributed to the persons or entities of his choice, pursuant to Section 24-3-40(B)(2); and
- 9) The Department shall determine and pay pre-and post-judgment interest on:
  - a. The difference in the wages actually paid and the prevailing wage that should have been paid for each hour, or fraction of an hour for the "Training Period" (June - August 1997);
  - b. The difference in the wages actually paid and the prevailing wage that should have been paid for each hour, or fraction of an hour for the period August 1997 thru November 2004);
  - c. The funds held in Appellant's Long-Term Savings Account.

Respectfully submitted,



Thomas J. Torrence  
#094651  
Lieber Correctional Institution SB-23  
P.O. Box 205  
Ridgeville, SC 29472-0205

APPELLANT, *Pro se*

LAW OFFICES

APR 02 2016

MALONE, THOMPSON  
SUMMERS & OTT, LLC

March 26, 2015

Thomas J. Torrence, # 094651,  
Appellant,  
vs.  
South Carolina Department of Corrections,  
Respondent.

**APPELLANT'S PAYROLL EXAMPLE EXHIBIT**

MALONE, THOMPSON  
SUMMERS & OTT, LLC

## INDEX

- 1) Statement of Gross Earnings (Pay Period: 11/17/02 to 12/01/02; Pay Date 12/16/02)  
(Double Sided)  
Issued by Division of Human Services, South Carolina Department of Corrections
- 2) Payroll Authorization, SCDC Form 16-63 (Pay Period: 11/17/02 to 12/01/02)  
(Double Sided)  
Issued by Division of Human Services, South Carolina Department of Corrections
- 3) Earnings and Deductions Statement (Payroll Date 12/16/02)  
(Single Sided)  
Issued by Prison Industries Accounting, South Carolina Department of Corrections

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS  
STATEMENT OF INMATE GROSS EARNINGS  
PAY PERIOD: 11/17/02 TO 12/01/02 PAY DATE: 12/16/02

12/06/02  
PAGE: 144

|                                            |        |        |
|--------------------------------------------|--------|--------|
| EMPLOYEE STATUS:                           | ACTIVE |        |
| OVER PAYMENT INSTALLMENT:                  | -      | .00    |
| BACK PAY DUE:                              | +      | .00    |
| REGULAR HOURS WORKED:                      |        |        |
| 63.25 REGULAR HOURS @ 5.25 /HOUR =         |        | 332.06 |
| OVERTIME:                                  |        |        |
| 11.50 PREM RATE HOURS @ 7.86 /HOUR = 90.50 |        |        |
| TOTAL OVERTIME COMPENSATION:               | +      | 422.56 |
| GROSS PAYMENT:                             | \$     | 422.56 |

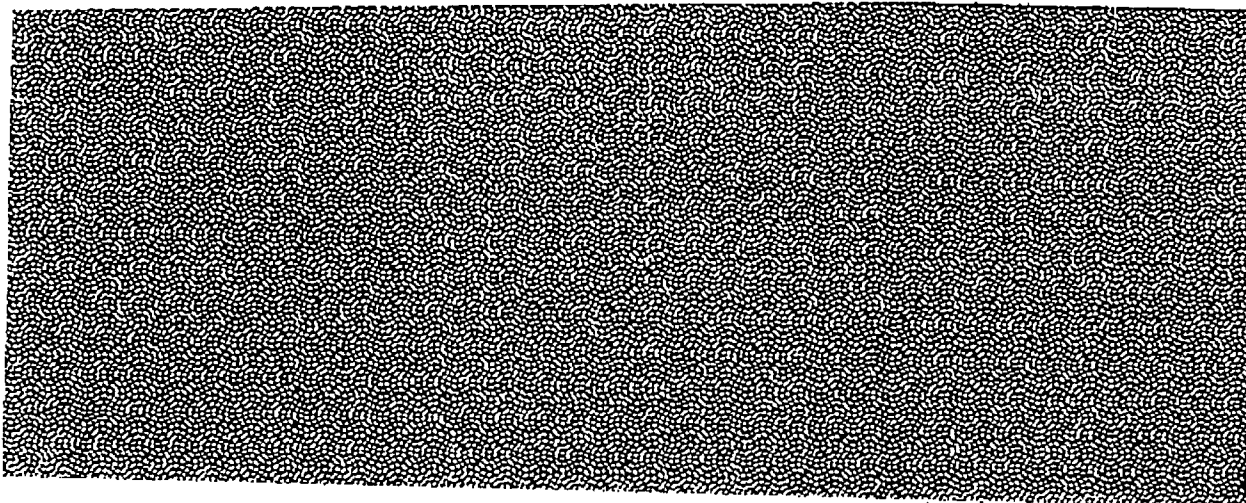
SSN: 249-11-7678

ANY QUESTIONS REGARDING YOUR STATEMENT OF EARNINGS  
SHOULD BE DIRECTED TO YOUR CONTACT PERSON AT YOUR  
WORK LOCATION.

DIVISION OF HUMAN RESOURCES  
SOUTH CAROLINA DEPARTMENT OF CORRECTIONS  
P.O. BOX 21787  
4444 BROAD RIVER ROAD  
COLUMBIA, SC 29221

ONE TIME PAY NOTICE

TORRENCE, THOMAS J  
INMATES  
ECI WIRE HARNESS ASSEMBLY



## Payroll Authorization

**PART I:**  
**TYPE OF EMPLOYEE: PLEASE CHECK ONE**

|                 |    |    |    |    |    |    |    |    |    |    |      |    |    |    |    |   |
|-----------------|----|----|----|----|----|----|----|----|----|----|------|----|----|----|----|---|
| Hours<br>Worked | 2  | 3  | 4  | 5  | 6  | 7  | 8  | 9  | 10 | 11 | 12   | 13 | 14 | 15 | 16 |   |
|                 |    |    |    |    |    |    |    |    |    |    |      |    |    |    |    |   |
|                 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27   | 28 | 29 | 30 | 31 | 1 |
|                 | 0  | 80 | 80 | 80 | 80 | 45 | 70 | 80 | 80 | 80 | 72.5 | 0  | 0  | 0  | 0  | 0 |

[illegible][illegible]

0779



## **INSTRUCTIONS**

### **PART I: TEMPORARY (PINK SLIP), INTERNS, DUAL EMPLOYMENT (TO INCLUDE LUMP SUM PAYMENT)**

1. Type of employee **MUST** be checked.
2. The employee must record the exact number of hours worked each day for the reporting pay period. If payment is a Lump Sum Dual Employment, the total gross sum payment should be recorded.
3. 12 Noon each payday is the deadline (unless otherwise directed by the Division of Human Resources) for an employee to turn in **ONLY ONE** signed report to the immediate supervisor for approval and turned into the designated authority at their work location **OR** to the Payroll Branch, Division of Human Resources. Paydays are the 1st and 16th of each month.
4. The designated individual entering and verifying the information keyed into the positive pay system **MUST** record their initials & identify the date the information was entered and verified.
5. Paydays falling on Saturday & Sunday, will have a deadline of 12 Noon the preceding Friday.
6. Temporary employees are eligible for payment for hours worked **ONLY**.
7. Non-submission or late submission of this form **WILL** result in an employee not being paid timely.

### **PART II: REGULAR SHIFT DIFFERENTIAL (HEALTH SERVICES ONLY)**

Medical employees assigned to a position approved for shift differential payment are eligible for payment if they are assigned to an evening, night, rotating, or split schedule (shift) and the majority of the hours worked are between 3 p.m. and 7 a.m. seven (7) days a week. Direct any questions to the Facility Human Resource Manager or the Payroll Branch, Division of Human Resources.

### **PART III: WEEKEND SHIFT DIFFERENTIAL (HEALTH SERVICES ONLY)**

In addition to regular shift differential, medical employees assigned to a schedule (shift) beginning at 11 p.m. Friday through 12 Midnight Sunday **AND** the majority of the hours worked are between 11 p.m. to 12 Midnight Sunday are eligible for weekend shift differential.

**TERMINATING EMPLOYEES: ALL HOURS WORKED AND ANY SHIFT DIFFERENTIAL (REGULAR OR WEEKEND) TO BE PAID FOR A TERMINATING EMPLOYEE MUST BE SUBMITTED WITH THE PERSONNEL ADVICE FORM (SCDC 16-5) TO THE DIVISION OF HUMAN RESOURCES IN ACCORDANCE TO PUBLISHED DEADLINES.**



**SOUTH CAROLINA DEPARTMENT OF CORRECTIONS  
PRISON INDUSTRIES ACCOUNTING  
EARNINGS AND DEDUCTIONS STATEMENT**

PAYROLL DATES 12/18/02

PLANT CODE 372 EVANS WIRE HARNESS ASSEMB

HOURS WORKED 74.75      HOURLY RATE \$ 25

| TRANSACTION DESCRIPTION | PAYEE                          | MEMO AMOUNT | DEPOSIT AMOUNT | WITHDRAWAL AMOUNT | BALANCE  |
|-------------------------|--------------------------------|-------------|----------------|-------------------|----------|
| BEGINNING BALANCE       |                                |             |                |                   | 3,532.04 |
| GROSS PAY               |                                | 422.56      |                |                   |          |
| FEDERAL TAX             |                                | 34.54       |                |                   |          |
| FICA                    |                                | 32.33       |                |                   |          |
| STATE TAX               |                                | 17.08       |                |                   |          |
| OTHER CG DEDUCTIONS     |                                | .00         |                |                   |          |
| NET PAY                 |                                |             | 338.57         |                   | 3,870.61 |
| PGM FEE: VICTM COMP     | GOV OFFICE - VICTIM ASSISTANCE |             |                | 84.51             | 3,786.10 |
| PGM FEE: ROOM/BOARD     | SC DEPT. OF CORRECTIONS (RM/B  |             |                | 105.64            | 3,680.46 |
| CASH FOR INMATE         | E. H. COOPER TRUST FUND        |             |                | 106.16            | 3,574.30 |

## Team Assemblers

**51-2092 Team Assemblers:** Work as part of a team having responsibility for an entire product component or a product. Team assemblers can perform all tasks conducted by the team in the assembly process and rotate through all or most of them rather than being assigned to a specific task on a permanent basis. May participate in making management decisions affecting the work. Team leaders who work as part of the team should be included. Exclude assemblers who who continuously perform the same task.

| AREA           | 2000 Estimated Employment | Federal Minimum Wage | Variance | Step 2 Plus 20% | Step 3 Plus 48% | Step 4 Plus 60% | Step 5 Plus 80% | Upper Level Wage | Average Wage |
|----------------|---------------------------|----------------------|----------|-----------------|-----------------|-----------------|-----------------|------------------|--------------|
| United States  | 1,306,430                 | \$5.15               | \$1.90   | \$5.53          | \$5.91          | \$6.29          | \$6.67          | \$7.05           | 10.32        |
| South Carolina | 25,670                    | \$5.15               | \$2.60   | \$5.67          | \$5.19          | \$6.71          | \$7.23          | \$7.75           | 10.82        |
| Pee Dee WIA    | 3170                      | \$5.15               | \$2.02   | \$5.55          | \$5.96          | \$6.36          | \$6.77          | \$7.17           | 10.16        |

## Technical Notes:

Wage data released by the South Carolina Employment Security Commission includes wage for the non-institutional population only.

The Upper level wage for each occupation represents the 10% percentile wage resulting from the 2000 Occupational Employment Statistics Wage survey. This means that 10% of the workers in the occupation earn less than the published wage for that occupation.

LAW OFFICES

APR 02 2015

MALONE, THOMPSON  
SUMMERS & OTT, LLC



1437



www.scesc.org

COMMISSIONERS  
J. William McLeod  
McKinley Washington, Jr.  
Carole C. Wells

EXECUTIVE DIRECTOR  
Roosevelt T. Halley  
(803) 737-2617  
rhalley@scesc.org

Your  
**onestop**  
to a New Career!

South Carolina Employment  
Security Commission  
P. O. Box 995  
Columbia, SC 29202

October 20, 2003

Mr. George L. Schroeder  
Director, Legislative Audit Council  
1331 Elmwood Avenue, Suite 315  
Columbia, SC 29201

Dear Mr. Schroeder:

This letter is the Employment Security Commission's response to the summary of your audit A Review of the Department of Corrections' Prison Industries Program. Our response specifically addresses the excerpts "Inmate Competition with Private Sector Workers" and "Inmate Training Wage and Training Period" that pertain to ESC.

SCESC has been working for some time with SCDC for its Prison Industries program. ESC's approach with SCDC has been the same as with our other customers. That is, the customer identifies its need, we work with that customer to meet its needs, and we work further with that customer to better meet its needs when asked. In the case of the Prison Industries program, SCDC identified a need to us for wage and local job market information, and we provided that information to SCDC. When SCDC judged that information inadequate, we worked with them to arrive at a solution satisfactory to SCDC. We have not been advised by SCDC as to specific legal or regulatory guidelines governing the wage and displacement information SCESC has provided.

Thank you for the opportunity to respond to your findings. If you have any questions, please contact Bob Branham, director of our Labor Market Information Department, at 737-2660.

Sincerely,

*Roosevelt Halley*

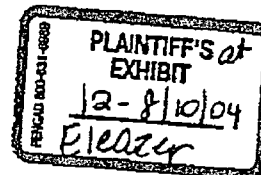
Roosevelt T. Halley  
Executive Director

ES-8

LAW OFFICES

APR 02 2015

MALONE, THOMPSON  
SUMMERS & OTT, LLC



THE STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Thomas J. Torrence, # 94561,

Appellant,

vs.

South Carolina Department of Corrections,

Respondent.

Docket No. 12-ALJ-04-00143-AP  
Grievance No. ECI-0980-10

**THE RESPONDENT'S MOTION FOR  
AN EXTENSION OF TIME TO FILE  
ITS BRIEF AND TO ADJUST THE  
PATRIES' BRIEFING SCHEDULE**

By the order it issued February 4, 2015 in response to a motion filed by the Appellant, this Court established the following briefing schedule for the above-captioned matter: the Appellant would file his original brief no later than March 30, 2015; the Respondent would file its brief no later than May 29, 2015; and the Appellant would file any reply brief no later than July 30, 2015.

The Appellant, by materials dated March 26, 2015, filed his original brief and other allied materials with the Court, and the Respondent's undersigned counsel received the Appellant's original brief and other allied materials via United States Mail on April 2, 2015.

For the reasons set forth below, the Respondent's undersigned counsel now respectfully moves the Court for an extension of time until Monday, June 15, 2015 by which to file the Respondent's brief.

The Respondent's undersigned counsel so moves in light of deadlines he recently confronted in matters pending in both federal and state court, as well as a medical procedure he recently underwent.

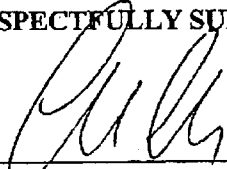
**FILED**

MAY 27 2015

Thus, in light of these reasons, the Respondent's undersigned counsel respectfully moves this Court to grant his instant motion and allow him until Monday, June 15, 2015 by which to file the Respondent's brief.

In light of the instant motion, the Respondent's undersigned counsel also respectfully moves this Court to permit the Appellant to file any reply brief no later than Monday, August 17, 2015.

RESPECTFULLY SUBMITTED,



Lake E. Summers

**Malone, Thompson, Summers & Ott LLC**

339 Heyward Street, Suite 200

Columbia, South Carolina 29201

Office: (803) 254-3300

Fax: (803) 254-0309

E-mail: [summers@mtsolvlawfirm.com](mailto:summers@mtsolvlawfirm.com)

[phillips@mtsolvlawfirm.com](mailto:phillips@mtsolvlawfirm.com)

Outside Counsel for the Respondent

Columbia, South Carolina  
May 27, 2015

THE STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Thomas J. Torrence, # 94561,

Appellant,

vs.

South Carolina Department of Corrections,

Respondent.

Docket No. 12-ALJ-04-00143-AP

Grievance No. ECI-0980-10

THE RESPONDENT'S MOTION FOR  
AN EXTENSION OF TIME TO FILE  
ITS BRIEF AND TO ADJUST THE  
PATRIES' BRIEFING SCHEDULE

CERTIFICATE OF SERVICE

This is to certify that I have, on May 27, 2015, caused to be served a copy of the Respondent's above-styled motion upon the *pro se* Appellant, via the United States Mail, to the following address:

Thomas J. Torrence, # 94651  
Lieber Correctional Institution [SA-43]  
Post Office Box 205  
Ridgeville, South Carolina 29472-0205

BY:



Lake E. Summers

Malone, Thompson, Summers & Ott LLC  
339 Heyward Street, Suite 200  
Columbia, South Carolina 29201  
Office: (803) 254-3300

Outside Counsel for the Respondent

**FILED**

MAY 27 2015

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Thomas J. Torrence, #094651,

Appellant,

vs.

South Carolina Department of Corrections,

Respondent.

Docket No. 12-ALJ-04-0143-AP

Grievance No.: ECI 0980-10

**ORDER GRANTING RESPONDENT'S  
MOTION FOR AN EXTENSION OF TIME  
TO FILE ITS BRIEF AND TO ADJUST  
THE PARTIES' BRIEFING SCHEDULE**

This matter is before the Administrative Law Court (ALC or Court) pursuant to the appeal of Thomas J. Torrence (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (Department or Respondent). Appellant filed a grievance with the Department objecting to the Department's decision concerning prevailing wages. On March 7, 2012, the Appellant filed this appeal with the Court.

On May 27, 2015, the Respondent filed a Motion for Extension of Time to File Its Brief and to Adjust the Parties' Briefing Schedule. This Court did not receive any opposition to the motion. The Court will grant Respondent until June 15, 2015 to file its brief in this matter.

**IT IS THEREFORE ORDERED** that Respondent shall file its brief no later than June 15, 2015. Appellant shall file any reply brief no later than August 17, 2015.

**AND IT IS SO ORDERED.**

  
Deborah Brooks Durden, Judge  
S.C. Administrative Law Court

May 29, 2015  
Columbia, South Carolina

**FILED**

MAY 29 2015

SC ADMIN. LAW COURT



**CERTIFICATE OF SERVICE**

I, A. Taylor Rollins, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



A. Taylor Rollins  
Staff Attorney for Deborah Brooks Durden

May 29, 2015  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Thomas J. Torrence, # 94561,

Appellant,

vs.

South Carolina Department of Corrections,

Respondent.

) Docket No. 12-ALJ-04-00143-AP

) Grievance No. ECI-0980-10

)  
) **THE RESPONDENT'S SECOND**  
) **MOTION FOR AN EXTENSION**  
) **OF TIME TO FILE ITS BRIEF**  
) **AND TO ADJUST THE PARTIES'**  
) **BRIEFING SCHEDULE**  
)  
)  
)  
)

By the order it issued May 29, 2015 in response to a motion filed by the Respondent's undersigned counsel, this Court granted the Respondent's first Motion for an Extension of Time to File Its Brief and to Adjust the Parties' Briefing Schedule.

By doing so, the Court allowed the Respondent's undersigned counsel until June 15, 2015 to file the Respondent's brief, and the Court also further modified the briefing schedule it established in early 2015 by allowing the Appellant to file any reply brief no later than August 17, 2015.

For the reasons set forth below, the Respondent's undersigned counsel now respectfully moves the Court for a second extension of time until Monday, June 29, 2015 by which to file the Respondent's brief. The Respondent's undersigned counsel so moves in light of deadlines he recently confronted in matters pending in both federal and state court.

On June 9, 2015, the presiding federal magistrate judge in the litigation styled as *Nance v. University of South Carolina*, C/A No. 3:13-cv-01803-CMC-JDA, issued a 42-page report and

**FILED**

JUN 10 2015

SC ADMIN. LAW COURT

recommendation concerning the defendant's summary judgment motion. The federal court issued a modified version of the report and recommendation on June 10, 2015.

The Respondent's undersigned counsel represents the defendant in *Nance*, and the defendant's summary judgment motion had been ripe for consideration since early December 2014. As a consequence of this development, the Respondent's undersigned counsel has unexpectedly found himself conducting a preliminary assessment of the report and recommendation and advising his client of various courses of action. Additionally, the parties in *Nance* now confront a June 26, 2015 deadline by which they must file any objections to the report and recommendation.

The Respondent's undersigned counsel has also, as of e-mail communication he received June 9, 2015, unexpectedly been offered an opportunity to resolve some if not all of claims pending against his client in a relatively recently filed matter pending in circuit court in Lancaster County styled as *Lewis v. Neal, The Home Depot, The City of Lancaster, and the S.C. Dep't of Transportation*, C/A No. 2015-CP-46-00479. The Respondent's counsel is currently engaging in efforts to respond to an overture from the Plaintiff's concerning the potential resolution of at least some of the claims against his client.

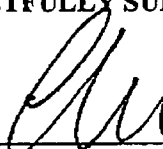
Additionally, the Respondent's undersigned counsel is currently scheduled to attend a status conference in circuit court in Spartanburg on Friday morning, June 12, 2015 concerning in a long-pending matter styled as *Temple v. S.C. Dep't of Corr.*, C/A No. 2007-CP-42-4042.

Finally, to compound matters, the law office of the Respondent's undersigned counsel has been short on staff and one (1) attorney since Monday, June 8, 2015 due to vacations scheduled to coincide with the end of the school year.

Thus, for the foregoing reasons, the Respondent's undersigned counsel respectfully moves this Court to grant his instant motion and allow him until Monday, June 29, 2015 by which to file the Respondent's brief.

In light of the instant motion, the Respondent's undersigned counsel also respectfully moves this Court to permit the Appellant to file any reply brief no later than Monday, August 31, 2015.

RESPECTFULLY SUBMITTED,



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Outside Counsel for the Respondent

Columbia, South Carolina  
June 10, 2015

## 0792



## TABLE OF CONTENTS

|                                                                                                                                                                        |    |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Table of Authorities .....                                                                                                                                             | iv |
| Statement of Issues on Appeal .....                                                                                                                                    | 1  |
| Standard of Review .....                                                                                                                                               | 1  |
| Statement of the Case .....                                                                                                                                            | 2  |
| Background .....                                                                                                                                                       | 3  |
| I.    THE APPELLANT'S DEFECTIVE FACTUAL ASSERTIONS .....                                                                                                               | 3  |
| II.   ESCOD DID NOT "HIRE" THE APPELLANT AS ANY KIND OF<br>"EMPLOYEE" .....                                                                                            | 6  |
| A.    REALITIES OF BEING AN INMATE .....                                                                                                                               | 6  |
| B.    INTENT OF PRISON INDUSTRIES .....                                                                                                                                | 7  |
| C.    THE SEVENTH CIRCUIT COURT OF APPEALS .....                                                                                                                       | 8  |
| D.    RULINGS BY OUR STATE'S COURTS NEGATE THE APPELLANT'S<br>ASSERTION THAT ESCOD "HIRED" HIM AS ANY KIND OF<br>"EMPLOYEE" .....                                      | 9  |
| 1.    Rulings by our Court of Appeals in <u>Cartrette</u> and <u>Tomlin</u> .....                                                                                      | 9  |
| 2.    Rulings by our Supreme Court in <u>Williams</u> .....                                                                                                            | 10 |
| 3.    Rulings by our Supreme Court in <u>Adkins</u> .....                                                                                                              | 12 |
| 4.    Rulings by the Circuit Court in <u>Adkins</u> .....                                                                                                              | 12 |
| Argument .....                                                                                                                                                         | 14 |
| I.    THE HOURLY RATE OF PAY APPLICABLE TO THE APPELLANT'S 320<br>HOUR "TRAINING PERIOD" DID NOT CONSIST OF THE VARIOUS<br>HOURLY RATES HE ASSERTED IN HIS BRIEF ..... | 14 |
| A.    NOTHING IN §§ 24-3-315, 24-3-430(D) OR § 18 U.S.C. § 1761(c)(2)<br>ESTABLISHES A SPECIFIC RATE AS THE "PREVAILING WAGE" ...                                      | 15 |

|     |                                                                                                                                                                                                                      |    |
|-----|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| B.  | THE APPELLANT WAS NOT ENTITLED TO THE HOURLY RATE HE CLAIMED AS THE "PREVAILING WAGE" FOR THE FIRST 320 HOURS OF HIS VOLUNTARY LABOR .....                                                                           | 15 |
| C.  | WITH THE POSSIBLE EXCEPTION OF WHEN IT PAID HIM A "TRAINING WAGE," THE DEPARTMENT PAID THE APPELLANT A LAWFUL RATE FOR HIS VOLUNTARY LABOR .....                                                                     | 18 |
| II. | THE DEPARTMENT DID NOT DIVERT ANY PORTION OF THE APPELLANT'S PRISON INDUSTRIES PAY, NOR DID IT FAIL TO PAY HIM A LAWFUL WAGE FOR HIS VOLUNTARY LABOR .....                                                           | 20 |
| A.  | THE DEPARTMENT PAID THE APPELLANT A LAWFUL WAGE .....                                                                                                                                                                | 21 |
| 1.  | Section 24-3-430 .....                                                                                                                                                                                               | 21 |
| 2.  | The Ashurst-Sumners Act, 18 U.S.C. § 1761 .....                                                                                                                                                                      | 22 |
| 3.  | 64 FR 17000 .....                                                                                                                                                                                                    | 23 |
| 4.  | Section 24-3-410(B)(7) .....                                                                                                                                                                                         | 26 |
| B.  | THE DEPARTMENT DID NOT DIVERT ANY PORTION OF THE APPELLANT'S PRISON INDUSTRIES PAY .....                                                                                                                             | 27 |
| 1.  | The Department lawfully charged ESCOD the rate of \$1.32 per inmate labor hour (the "SCDC Surplus Fund Amount") in addition to charging ESCOD the lawful hourly rate at which it paid the inmates .....              | 28 |
| a.  | The circuit court in <u>Adkins</u> reviewed and endorsed the same \$1.32 per inmate labor hour charge .....                                                                                                          | 29 |
| b.  | The 2001 contract's parties and purpose .....                                                                                                                                                                        | 30 |
| c.  | Section 3.3 of the 2001 contract .....                                                                                                                                                                               | 30 |
| d.  | Legal standards applicable to contract interpretation .....                                                                                                                                                          | 31 |
| e.  | Application of the legal standards to the 2001 contract .....                                                                                                                                                        | 32 |
| f.  | Common sense negates the Appellant's arguments .....                                                                                                                                                                 | 33 |
| g.  | Various statutes compelled the Department to charge ESCOD \$1.32 per inmate labor hour (i.e. the "SCDC Surplus Fund Amount") .....                                                                                   | 34 |
| 2.  | The Department lawfully charged ESCOD the rate of \$0.40 per inmate labor hour for the "Social Security Withholding Payment" in addition to charging ESCOD the lawful hourly rate at which it paid the inmates ..... | 36 |



|      |                                                                                                                                                                                                                |    |
|------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| 3.   | The Department lawfully charged ESCOD the rate of \$0.20 per inmate labor hour for the "Workers' Compensation Premium" in addition to charging ESCOD the lawful hourly rate at which it paid the inmates ..... | 38 |
| C.   | THE DEPARTMENT DID NOT BREACH ANY PURPORTED "FIDUCIARY DUTY" .....                                                                                                                                             | 39 |
| III. | THE DEPARTMENT DOES NOT UNLAWFULLY DEPRIVE THE APPELLANT ACCESS TO MONIES IT HOLDS IN ESCROW BY OPERATION OF §§ 24-3-40(A)(5) AND (B)(2) .....                                                                 | 41 |
| A.   | THE DEPARTMENT LAWFULLY DEDUCTED 10% FROM THE APPELLANT'S GROSS PAY IN CONFORMITY WITH § 24-3-40(A)(5) .....                                                                                                   | 42 |
| B.   | THE DEPARTMENT DOES NOT UNLAWFULLY DEPRIVE THE APPELLANT ACCESS TO MONIES ESCROWED PER § 24-3-40(A)(5) .....                                                                                                   | 43 |
| 1.   | The Department does not misapply the term "estate" from § 24-3-40(B)(2) .....                                                                                                                                  | 44 |
| 2.   | The Department does not apply § 24-3-40(B)(2) in any manner which violates the probation against ex post facto laws .....                                                                                      | 47 |
| 3.   | The Department does not apply § 24-3-40(B)(2) in any manner that constitutes a bill of attainder .....                                                                                                         | 48 |
| 4.   | The manner in which the Department applies § 24-3-40(B)(2) does not violate Equal Protection .....                                                                                                             | 49 |
| IV.  | THE DEPARTMENT DOES NOT IMPROPERLY DENY THE APPELLANT OF A "FAIR INTEREST RATE" ON THE MONIES ESCROWED BY OPERATION OF § 24-3-40(A)(5) .....                                                                   | 50 |
| V.   | THE APPELLANT IS NOT ENTITLED TO EITHER PRE-JUDGMENT OR POST-JUDGMENT INTEREST .....                                                                                                                           | 52 |
|      | Conclusion .....                                                                                                                                                                                               | 53 |

## TABLE OF AUTHORITIES

### CASES

|                                                                                                                                                   |                                        |
|---------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------|
| <u>Adkins v. S.C. Dep't of Corr.</u> , 602 S.E.2d 51 (S.C. 2004) .....                                                                            | 1, 10 – 12, 31, 42                     |
| <u>Adkins, et al. v. S.C. Dep't of Corr.</u> , Case No. 2000-CP-40-4761<br>(S.C. Cir. Ct. Oct. 30, 2002) .....                                    | 13 – 14, 16 – 19, 23, 25 – 27, 29 – 30 |
| <u>Al-Shabazz v. State</u> , 354 S.E.2d 742 (S.C. 2000) .....                                                                                     | 1, 19                                  |
| <u>Bennett v. Frank</u> , 395 F.3d 409 (7th Cir. 2005) .....                                                                                      | 8 – 10                                 |
| <u>Cain v. Nationwide Property &amp; Casualty Ins. Co.</u> , 661 S.E.2d 349 (S.C. 2008) .....                                                     | 43                                     |
| <u>Campbell v. Guignard</u> , Unpub. Opinion No. 2015-UP-293 (S.C. Ct. App. June 17, 2015) .....                                                  | 19                                     |
| <u>C.A.N. Enterps., Inc. v. S.C. Health &amp; Human Servs. Fin. Comm'n.</u><br>373 S.E.2d 584 (S.C. 1988) .....                                   | 31 – 33                                |
| <u>Carter v. Dutchess Community College</u> , 735 F.2d 8 (2d Cir. 1984) .....                                                                     | 9                                      |
| <u>Collins v. Youngblood</u> , 497 U.S. 37 (1990) .....                                                                                           | 47 – 48                                |
| <u>Farr v. Duke Power Co.</u> , 218 S.E.2d 431 (S.C. 1975) .....                                                                                  | 32                                     |
| <u>Felts v. Richland County</u> , 400 S.E.2d 781 (S.C. 1991) .....                                                                                | 11                                     |
| <u>Future Grp., II v. Nationsbank</u> , 478 S.E.2d 45 (S.C. 1996) .....                                                                           | 52                                     |
| <u>Gordon v. S.C. Dep't of Corr., et al.</u> , Case No. 1999-CP-40-3675,<br>(S.C. Cir. Ct. Sept. 7, 2001) .....                                   | 14                                     |
| <u>Harker v. State Use Industries</u> , 990 F.2d 131 (4th Cir.),<br><i>cert. denied</i> 510 U.S. 886, 114 S.Ct. 238, 126 L.Ed.2d 192 (1993) ..... | 13                                     |
| <u>Johnson v. Ozmint</u> , 2006 WL 2475344 (D.S.C. 2006) .....                                                                                    | 48 – 50                                |
| <u>Judy v. Martin</u> , 674 S.E.2d 151 (S.C. 2009) .....                                                                                          | 16                                     |
| <u>Kelly v. Logan, Jolley, &amp; Smith, L.L.P.</u> , 682 S.E.2d 1 (S.C. Ct. App. 2009) .....                                                      | 19                                     |
| <u>Kiawah Resort Assoc. v. S.C. Tax Com'n.</u> , 458 S.E.2d 542 (S.C. 1995) .....                                                                 | 44                                     |
| <u>Layman v. State</u> , 658 S.E.2d 320 (S.C. 2008) .....                                                                                         | 53                                     |

|                                                                                                                           |                    |
|---------------------------------------------------------------------------------------------------------------------------|--------------------|
| <u>Lynn v. West</u> , 134 F.3d 582 (4th Cir. 1998) .....                                                                  | 49                 |
| <u>Madden v. Bent Palm Investments, LLC</u> , 688 S.E.2d 597 (S.C. Ct. App. 2010) .....                                   | 31                 |
| <u>McGill v. Moore</u> , 672 S.E.2d 571 (S.C. 2009) .....                                                                 | 31                 |
| <u>McLamore v. State</u> , 186 S.E.2d 250 (S.C. 1972) .....                                                               | 50                 |
| <u>McMaster v. Minnesota</u> , 819 F.Supp. 1429 (D. Minn. 1993) .....                                                     | 12                 |
| <u>Medical Univ. of S.C. v. Arnaud</u> , 602 S.E.2d 747 (S.C. 2004) .....                                                 | 37, 39, 51         |
| <u>Muir v. C.R. Bard, Inc.</u> , 519 S.E.2d 583 (S.C. Ct. App. 1999) .....                                                | 37, 39, 51         |
| <u>Okera v. S.C. Dep't of Corr.</u> , Memo. Opinion No. 2012-MO-042 (S.C. Oct. 24, 2012) .....                            | 19                 |
| <u>S.C. Dep't of Corr. v. Cartrette</u> , 694 S.E.2d 18 (S.C. Ct. App. 2010) .....                                        | 10, 27 – 28        |
| <u>S.C. Dep't of Corr. v. Tomlin</u> , 694 S.E.2d 25 (S.C. Ct. App. 2010) .....                                           | 10, 28             |
| <u>S.C. Dep't of Natural Res. v. Town of McClellanville</u> , 550 S.E.2d 299 (S.C. 2001) .....                            | 32                 |
| <u>Skipper v. S.C. Dep't of Corr.</u> , 633 S.E.2d 910 (S.C. Ct. App. 2006) .....                                         | 7, 50              |
| <u>Touchberry v. City of Florence</u> , 367 S.E.2d 149 (S.C. 1988) .....                                                  | 31                 |
| <u>Torrence v. S.C. Dept. of Corr.</u> , 646 S.E.2d 866 (S.C. 2007) .....                                                 | 2 – 3, 27, 42      |
| <u>United States v. O'Neal</u> , 180 F.3d 115 (4th Cir. 1999) .....                                                       | 48 – 49            |
| <u>Wallace v. Day</u> , 700 S.E.2d 446 (S.C. Ct. App. 2010) .....                                                         | 32                 |
| <u>Watson v. Graves</u> , 909 F.2d 1549 (5th Cir. 1990) .....                                                             | 6 – 7, 9           |
| <u>Wicker v. S.C. Dep't of Corr.</u> , 602 S.E.2d 56 (S.C. 2004) .....                                                    | 1 – 2, 42          |
| <u>Williams v. S.C. Dept. of Corrections and</u><br><u>Williams Technologies, Inc.</u> , 641 S.E.2d 885 (S.C. 2007) ..... | 3, 10 – 11, 31, 42 |

#### STATUTES

|                           |                    |
|---------------------------|--------------------|
| 18 U.S.C. § 1761 .....    | 1, 12, 21 – 22     |
| 18 U.S.C. § 1761(a) ..... | 15, 22             |
| 18 U.S.C. § 1761(c) ..... | 3, 13, 15, 20 – 25 |

|                                      |                                    |
|--------------------------------------|------------------------------------|
| 18 U.S.C. § 1761(c)(1) .....         | 23                                 |
| 18 U.S.C. § 1761(c)(2) .....         | 14 – 15, 20 – 21, 23 – 24, 39 – 40 |
| 18 U.S.C. § 1761(c)(3) .....         | 37, 39                             |
| 18 U.S.C. § 1761(c)(4) .....         | 20 – 21, 23, 39, 42 – 44           |
| 29 U.S.C. § 206 .....                | 24 – 25                            |
| 29 U.S.C. § 207(a) .....             | 25                                 |
| S.C. Code Ann. § 1-23-380(5) .....   | 1                                  |
| S.C. Code Ann. § 1-23-600(D) .....   | 1                                  |
| S.C. Code Ann. § 11-9-220 .....      | 36                                 |
| S.C. Code Ann. § 24-1-20 .....       | 34                                 |
| S.C. Code Ann. § 24-1-290 .....      | 2, 24                              |
| S.C. Code Ann. § 24-1-295 .....      | 2, 24                              |
| S.C. Code Ann. § 24-3-27(B) .....    | 6                                  |
| S.C. Code Ann. § 24-3-40 .....       | 9, 15, 27 – 28, 40, 42, 48 – 50    |
| S.C. Code Ann. § 24-3-40(A) .....    | 28, 36 – 37, 39                    |
| S.C. Code Ann. § 24-3-40(A)(3) ..... | 36, 46 – 47                        |
| S.C. Code Ann. § 24-3-40(A)(4) ..... | 46 – 47                            |
| S.C. Code Ann. § 24-3-40(A)(5) ..... | 41 – 46, 50 – 51                   |
| S.C. Code Ann. § 24-3-40(A)(6) ..... | 47                                 |
| S.C. Code Ann. § 24-3-40(B) .....    | 43, 45                             |
| S.C. Code Ann. § 24-3-40(B)(2) ..... | 41 – 47, 49 – 50                   |
| S.C. Code Ann. § 24-3-190 .....      | 34                                 |
| S.C. Code Ann. § 24-3-310 .....      | 7 – 8, 30, 34                      |

|                                       |                                       |
|---------------------------------------|---------------------------------------|
| S.C. Code Ann. § 24-3-310(3) .....    | 2                                     |
| S.C. Code Ann. § 24-3-315 .....       | 2, 14 – 15, 21, 24 – 25, 27, 39       |
| S.C. Code Ann. § 24-3-320 .....       | 2, 34                                 |
| S.C. Code Ann. § 24-3-330 .....       | 2                                     |
| S.C. Code Ann. § 24-3-400 .....       | 35 – 36                               |
| S.C. Code Ann. § 24-3-410 .....       | 2, 26                                 |
| S.C. Code Ann. § 24-3-410(A) .....    | 22, 26                                |
| S.C. Code Ann. § 24-3-410(B)(7) ..... | 26 – 27, 40                           |
| S.C. Code Ann. § 24-3-430 .....       | 20 – 21, 23, 26                       |
| S.C. Code Ann. § 24-3-430(A) .....    | 21                                    |
| S.C. Code Ann. § 24-3-430(C) .....    | 20, 23                                |
| S.C. Code Ann. § 24-3-430(D) .....    | 10, 14 – 15, 21, 23, 26 – 27, 39 – 40 |
| S.C. Code Ann. § 24-3-430(F) .....    | 11, 38                                |
| S.C. Code Ann. § 24-3-430(G) .....    | 21                                    |
| S.C. Code Ann. § 24-3-430(H) .....    | 9, 27                                 |
| S.C. Code Ann. § 41-10-30 .....       | 11                                    |
| S.C. Code Ann. § 41-10-40(D) .....    | 11                                    |
| S.C. Code Ann. § 42-1-470 .....       | 39                                    |
| S.C. Code Ann. § 42-1-490 .....       | 39                                    |
| S.C. Code Ann. § 62-1-201(11) .....   | 44                                    |

#### OTHER AUTHORITIES

|                                     |        |
|-------------------------------------|--------|
| U.S. Const. Art I § 10, cl. 1. .... | 47, 49 |
| S.C. Const., Art. XII, § 2 .....    | 6      |

|                                                                    |                        |
|--------------------------------------------------------------------|------------------------|
| 64 FR 17000 .....                                                  | 2, 23 – 26, 28, 40, 43 |
| Rules of Procedure for the Administrative Law Court, Rule 60 ..... | 1                      |
| Black's Law Dictionary (5th ed. 1979) .....                        | 45                     |
| Black's Law Dictionary (8th ed. 2004) .....                        | 45                     |

In accordance with Administrative Law Court ["ALC"] Rule of Procedure 60, the Respondent, the South Carolina Department of Corrections ["the Department," "DOC," or "SCDC"], by and through its undersigned counsel, hereby addresses the issues on appeal presented by the Appellant in his brief dated March 26, 2015.

#### STATEMENT OF ISSUES ON APPEAL

Without conceding their merits or whether he preserved them for review, the Department acknowledges, for the sake of expediency, that the issues on appeal are as the Appellant presented them in his brief.

#### STANDARD OF REVIEW

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),<sup>1</sup> and Wicker v. S.C. Dep't of Corr., 602 S.E.2d 56 (S.C. 2004).

The instant matter is before the Court on appeal from a final decision issued by the Department pursuant to S.C. Code Ann. § 1-23-600(D) (Supp. 2010) of the Administrative Procedures Act ["APA"]. The Department's final decision denied various prison industries pay claims presented by the Appellant in an administrative grievance. By its final decision, the Department determined both that these claims were time barred and that they were without merit under the applicable state laws, federal laws, and federal regulations.

In South Carolina, the provisions of the APA, specifically § 1-23-380(A)(5), govern the circumstances in which an appellate body may reverse or modify an agency decision. Under the APA, this Court sits in an appellate capacity rather than as an independent finder of fact. See also Al-Shabazz, 527 S.E.2d at 754. The Department acknowledges that the Appellant accurately quoted § 1-23-380(A)(5) in his brief.

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<sup>1</sup> The Appellant did not discuss, reference, or cite Adkins anywhere in his brief.

## STATEMENT OF THE CASE

In its January 30, 2014 order,<sup>2</sup> the Court provided the following statement of the case:

This matter is before [the Court] pursuant to the appeal of [Appellant], an inmate incarcerated with [the Department]. Appellant filed a grievance with the Department objecting to the Department's alleged failure to pay the prevailing wage for Appellant's work while participating in the prison industry program. Appellant also asserted that the Department removed portions of his private sector prison industry wages without statutory authority. Appellant received the Department's final decision on or about February 15, 2012. On March 7, 2012, the Appellant filed this appeal with the Court.

In the same order, the Court presented the following background:<sup>3</sup>

The Appellant participated in the Private Sector Prison Industry Program (Program), in which [ESCOD] participated as the private industry sponsor at [Evans Correctional Institution] from June 1997 until November 2004.<sup>4</sup> During the first 320 hours of his employment, Appellant was paid a "training wage" of \$0.25 - \$0.75 per hour. Upon completion of the 320 "training hours," Appellant was paid \$5.25 per hour. Throughout Appellant's participation in the Program, ESCOD remitted the Appellant's wages to the Department pursuant to S.C. Code Ann. § 24-3-40. The Department distributed Appellant's wages to his Prison Industry Account.

...

<sup>2</sup> See the Court's Order issued January 30, 2014, p. 1. In footnote 2 of its January 30, 2014 order, the Court acknowledged that "the Appellant raised multiple issues related to the payment of wages," but, by its June 2, 2012 order, the Court determined that the only issue it would address was "the timeliness of Appellant's Step 1 grievance." The Court considered only these issues in its January 30, 2014 order: (1) whether our Supreme Court's decisions in Adkins and Wicker created new substantive or grievance rights; (2) whether the Appellant timely filed his Step 1 grievance alleging a prevailing wage issue with the Department; and (3) whether the time to file an inmate grievance with the Department was equitably tolled when the Appellant filed a claim in the Richland County Court of Common Pleas. Id., pp. 2 – 3. The Court ruled that Adkins and Wicker did not create new substantive rights or new grievance rights. Id., pp. 4 – 5. The Court next ruled that the prison industries pay claims articulated by the Plaintiff concerned "policies/procedures" as defined under ¶13.9 of Policy Number GA-01.12, and, therefore, the 15-day filing deadline from ¶13.1 of the same policy did not apply to the filing of the Appellant's Step 1 grievance. Id., p. 6. Finally, the Court ruled that, by filing his Step 1 grievance "within days" of receiving the Supreme Court's opinion in Torrence v. S.C. Dep't of Corr., 646 S.E.2d 866 (S.C. 2007) (i.e. the class action originally filed by the Appellant and other inmates in circuit court), the doctrine of equitable tolling applied. Id., p. 8.

<sup>3</sup> Id., pp. 1 – 2.

<sup>4</sup> The Department operates three (3) types of projects within its prison industries program: "traditional" projects (see S.C. Code Ann. § 24-3-320 and 330), "service" projects (see S.C. Code Ann. §§ 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"]. The Department must operate its PIECP projects, such as the project at Evans, in conformity with federal law (see 18 USC § 1761, the Ashurst-Sumners Act), federal regulations (see 64 FR 17000), and state law (see S.C. Code Ann. §§ 24-3-40, 24-3-310, 24-3-315, 24-3-410, and 24-3-430).



Upon the issuance of [*Torrence v. S.C. Dep't of Corr.*, 646 S.E.2d 866 (S.C. 2007)], Appellant filed a Step 1 grievance with the Department on May 21, 2007. ... the Department answered Appellant's Step 1 grievance, indicating the Step 1 grievance was denied because the grievance was untimely filed with the Department.<sup>5</sup> The Appellant filed his Step 2 grievance on December 5, 2011, appealing the denial of his Step 1 grievance. The Department denied the Step 2 grievance and this appeal followed. (footnotes omitted).

## BACKGROUND

### I. THE APPELLANT'S DEFECTIVE FACTUAL ASSERTIONS

In the first sentence his "Factual Background,"<sup>6</sup> the Appellant asserted as follows:

Appellant was hired in the [prison industries project in which ESCOD participated as the private industry sponsor], a federally certified [project] (18 USC §1761(c) (Prison Industries Enhancement Certification Program ("PIECP")), at [Evans] in June 1997. [emphasis supplied].

In the footnote immediately after the word "hired,"<sup>7</sup> the Appellant argued as follows:

[The Department] will argue [that the] Appellant is not an "employee" based on PIECP participants not being "employees of the state" under S.C. Code §24-3-430(F) (2007) and that the Fair Labor Standards Act does not extend to inmate workers for the purpose of payment of wages because inmates are not employees of the [private industry] sponsor, see [*Williams v S.C. Dep't. of Corr.*, 641 S.E.2d 885, 888 (S.C. 2007)]. However, Appellant meets the definition of "employee" as defined in S.C. Code §12-8-10(3) for the purpose of Income Tax Withheld. For the purpose of South Carolina Workmen's Compensation laws, Appellant is an "employee" as defined by the employer-employee test in S.C. Code §42-1-130 (Supp. 2011) and is a South Carolina Taxpayer. [emphasis supplied].

The Appellant did not assert in the above-quoted passages precisely which entity "hired" him as an "employee."

<sup>5</sup> The Department also denied the pay claims articulated by the Appellant in his grievance on their merits. (Abbrev. R. pp. 9 – 16 and 26 – 33).

<sup>6</sup> See the Appellant's Brief, pp. 3 – 4.

<sup>7</sup> *Id.*, p. 3, n. 7.

However, the Appellant did so later in the same section of his brief:<sup>8</sup>

During the training period Appellant performed labor side-by-side with non-inmate individuals employed from the local community who earned between \$8.00 and \$14.00 per hour. During the training period Appellant performed labor for [ESCOD] at a rate of [\$0.25] per hour for the initial 160 hours; and [\$0.75] per hour for the following 160 hours. [emphasis supplied].

The Appellant consciously made the effort to assert a fundamentally defective fact in the above quoted paragraphs, namely that ESCOD "hired" him as an "employee" during the time he participated in the prison industries project operated by the Department at Evans,<sup>9</sup> and he weaved this fundamentally defective assertion into his factual narrative:<sup>10</sup>

Appellant continued to labor side-by-side with private sector employees as a Quality Control Inspector and Section Lead Person; and in a corporate buy-out, assumed many of the functions of the non-inmate employees (Maintenance Supervisor, Document Control, Training Coordinator and Quality Control Supervisor). Appellant labored in these positions from June 1997 thru November 2004. Throughout this period [ESCOD] paid \$7.17 per each regular hour of Appellant's labor [ROAA p. 178] and \$10.76 per each overtime hour. The "*prisoner's [Appellant's] wages*" were remitted to [the Department] pursuant to § 24-3-40. During this period the South Carolina Employment Security Commission designated rates above what Appellant received as the "prevailing wage" for the job code(s) classified by the Employment Security Commission and [the Department] [ROAA pp. 141, 148 – 150, 152, 155 and 156].<sup>11</sup> [footnotes omitted and italicized emphasis supplied by the Appellant].

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<sup>8</sup> Id., p. 5.

<sup>9</sup> Neither ESCOD nor, for that matter, the Department "hired" the Appellant as an "employee." As shown below, the Appellant voluntarily participated in a work assignment offered by the Department in a prison industries project it operated at Evans.

<sup>10</sup> See the Appellant's Brief, p. 5.

<sup>11</sup> In the final three (3) footnotes associated with the above-quoted passage, the Appellant referenced the following purported "prevailing wages" associated with ESC codes corresponding to the job duties he claims to have performed while voluntarily participating in the prison industries project operated by the Department at Evans: \$8.82 per hour for "Code 93114;" \$9.69 per hour for "Code 93956;" and \$8.36 per hour ("Low")/\$9.92 per hour ("Mean")/\$11.49 per hour ("High") for "Code 93114." See the Appellant's Brief, pp. 5 – 6, n. 13 – 15. See also pp. 16 – 17 below.

In this passage, the Appellant further refines his fundamentally defective factual assertion that ESCOD "hired" him as one of its "employees" by carving out what perhaps is best described as a novel employment category, that of an "inmate employee." In his factual scenario, ESCOD "hired" the Appellant as an "inmate employee" as distinguished from the "non-inmate employees" next to whom the Appellant claims to have worked side-by-side.

Thus, the Appellant argued that he, as an "inmate employee," was entitled to hourly rates of pay identical to the rates of pay ESCOD remitted to its "non-inmate employees" whose job duties involved them working at Evans. The Appellant confirmed this fundamentally defective syllogism later in his brief:<sup>12</sup>

Appellant performed labor in the [project operated at Evans], many of which were overtime hours, *side-by-side with private sector employees*, from August 1, 1997 through November 14, 2004. He initially served as a Quality Control Auditor *partnered* each day with private sector employees. He also performed in a number of supervisory and highly trusted positions, even in the capacity as Training Coordinator for *all other plant employees* on corporate, industry and military standards and specifications, and ISO 9002 standards. ... Appellant submits his hourly wage was insufficient compared to the prevailing wage for similar work performed in the private sector and that non-inmate peers working side-by-side with [him], performing similar work, earned \$9.00 to \$14.00 per hour for that work.<sup>13</sup> [emphasis supplied].

The sole footnote provided by the Appellant with the above-quoted passage is associated with the phrase "all other plant employees," and the first part of the footnote stated the following:<sup>14</sup> "Private Sector [ESCOD] employees, [ESCOD] supervisory employees, and

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<sup>12</sup> See the Appellant's Brief, p. 13.

<sup>13</sup> While he asserted throughout his brief that ESCOD paid its true employees at an hourly rate of greater than \$5.25, no evidence exists in the Record which confirms the Appellant's assertion. Moreover, no evidence exists in the Record which confirms that the Appellant conducted work of a similar nature to any true employee of ESCOD. Instead, as discussed further below, the contract between the Department and ESCOD, a portion of which appears in the Record (R. Addm. pp. 174 – 83), expressly required ESCOD to provide trainers, technical staff, and at least one civilian supervisor on each production shift. (R. Addm. pp. 175 and 177).

<sup>14</sup> See the Appellant's Brief, p. 13, n. 32.

inmate employees.” [emphasis supplied]. As far as the Appellant is concerned, the distinction amongst the three (3) categories of ESCOD employees he created makes no difference when it comes to their respective hourly rates of pay, because the Appellant urges this Court to declare that he was entitled to the identical hourly rate of pay as his so-called “non-inmate peers.”

However, the declaration sought by the Appellant requires the Court to rule in a manner that would starkly depart from earlier decisions issued by our state’s appellate courts. Moreover, such a declaration is, as persuasively demonstrated below, simply not sustainable.

## **II. ESCOD DID NOT “HIRE” THE APPELLANT AS ANY KIND OF “EMPLOYEE”**

### **A. REALITIES OF BEING AN INMATE**

S.C. Const. Art. XII, § 2 provides as follows: “[t]he General Assembly shall establish institutions for the confinement of all persons convicted of such crimes as may be designated by law, and shall provide for the custody, maintenance, health, welfare, education, and rehabilitation of the inmates.” [emphasis supplied].

Under S.C. Code Ann. § 24-3-27(B), the Appellant, while committed to and confined in the Department’s custody, must perform labor as part of his sentence:

Every sentenced person committed to a local regional correctional facility constructed or operated pursuant to this section unless disqualified by sickness or otherwise, must be kept at some useful employment suited to his age and capacity and which may tend to promote the best interest of the citizens of this State. [emphasis supplied].

The Appellant voluntarily participated in the prison industries project operated by the Department at Evans, because he was required to keep “at some useful employment” as part of his sentence. Irrespective of his voluntarily participation in the work assignment at Evans made available to him by the Department, the Appellant’s labor simply did not belong to him in the manner that labor belongs to a “true” employee. In Watson v. Graves, 909 F.2d 1549, n. 7 (5th Cir. 1990), the Fifth Circuit Court of Appeals recognized that “when a prisoner is sentenced to

labor as part of his sentence, his labor belongs to the prison and is at the disposal of the prison officials." [emphasis supplied].

Thus, the Appellant must confront the reality that he did not stand, contrary to the myriad of his conclusory and unsupported arguments, in an equivalent status as any kind of ESCOD "employee" during the time he participated in the project at Evans. The Appellant simply did not enjoy any kind of true "employee-employer" relationship with ESCOD, because he was, at all times, an inmate committed to, confined by, and in the custody and control of the Department.

The Appellant ultimately had no control over whether he could even continue to participate in the project at Evans, because the Department could have reassigned him to another institution at any time. In Skipper v. S.C. Dep't of Corr., 633 S.E.2d 910, 913 (S.C. Ct. App. 2006), the Court of Appeals ruled as follows:

During the course of his appeal, Skipper was transferred to the Lee Correctional Institution, a facility which does not provide the privilege of employment with Prison Industries Enterprises. **Given the authority to determine an inmate's location rests with [the Department], this court may not order his return to [Evans] or to another correctional facility which offers Skipper's desired employment.**<sup>15</sup> Consequently, as will be discussed, we find any issue regarding potential employment relief for Skipper is moot. [emphasis supplied].

#### **B. INTENT OF PRISON INDUSTRIES**

Our General Assembly clearly expressed its intent regarding the Department's operation of its various prison industries projects by its enactment of § 24-3-310. This statute, which is entitled "Declaration of Intent," provides as follows:

Since the means now provided for the employment of **convict labor** is inadequate to furnish a sufficient number of convicts with employment it is the intent of this article to:

- (1) further provide more adequate, regular, and suitable employment for the convicts of this State, consistent with proper penal purposes;

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<sup>15</sup> The Appellant and Skipper participated in the same project at Evans. Id., 633 S.E.2d at 911, 913, and 915.

(2) further utilize the labor of convicts for self-maintenance and for reimbursing this State for expenses incurred by reason of their crimes and imprisonment;

(4) provide prison industry projects designed to place inmates in a realistic working and training environment in which they are able to acquire marketable skills and to make financial payments for restitution to their victims, for support of their families, and for the support of themselves in the institution. [emphasis supplied].

No component of § 24-3-310 declares that our state's prison industries program is intended to transform an inmate who participates in the program, like the Appellant, into any kind of an "employee" of the private industry sponsor, like ESCOD.

No support whatsoever exists for the Appellant's assertion that he benefited from his participation in the prison industries project at Evans by transforming into an "inmate employee" of ESCOD, and, thereby, is entitled to the identical rates of pay and/or benefits paid by ESCOD to those true ESCOD employees designated by the Appellant as "Private Sector [ESCOD] employees" and "[ESCOD] supervisory employees."

### C. THE SEVENTH CIRCUIT COURT OF APPEALS

In Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005), the Seventh Circuit Court of Appeals expressed the following realities confronting inmates who claimed entitlement to the provisions of the Fair Labor Standards Act ["FLSA"]:

**People are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep. If it puts them to work, it is to offset some of the cost of keeping them, or to keep them out of mischief, or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside. None of these goals is compatible with federal regulation of their wages and hours. The reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to occur to anyone when the legislation was under consideration by Congress.**

We cannot see what difference it makes if the prison is private. ... But a simpler and more fundamental point is that employment status doesn't depend on whether the alleged employer is a public or a private body. Both public agencies and private firms have employees. But prisoners are not employees.

...  
We have no quarrel with *Watson v. Graves*, 909 F.2d 1549 (5th Cir.1990), or *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir.1984), which hold that the FLSA applies to prisoners working for private companies under work-release programs. Those prisoners weren't working as prison labor, but as free laborers in transition to their expected discharge from the prison. Unlike our plaintiffs. [emphasis supplied].

**D. RULINGS BY OUR STATE'S COURTS NEGATE THE APPELLANT'S ASSERTION THAT ESCOD "HIRED" HIM AS ANY KIND OF "EMPLOYEE"**

**1. Rulings by Our Court of Appeals in Cartrette and Tomlin.**

Under two (2) decisions by our Court of Appeals, the Appellant's assertion that he was an ESCOD "inmate employee" or any kind of ESCOD employee actually conflicts with the following sentence from the Court's January 30, 2014 order:<sup>16</sup>

Throughout Appellant's participation in the Program, ESCOD remitted [his] wages to the Department pursuant to [§ 24-3-40]. The Department distributed Appellant's wages to his Prison Industry Account.

The Appellant embraced this reality in his brief by admitting that his wages "were remitted to [the Department] pursuant to § 24-3-40."<sup>17</sup> As provided by § 24-3-430(H), "[t]he earnings of an inmate authorized to work at paid employment pursuant to this section must be paid directly to [the Department] and applied as provided under [§ 24-3-40]." As shown below, the provisions of § 24-3-40(A) are the statutory mechanisms by which ESCOD was required to remit the Appellant's prison industries wages to the Department and by which the Department distributed the Appellant's prison industries wages to him.

<sup>16</sup> See the Court's January 30, 2014 Order, p. 1.

<sup>17</sup> See the Appellant's Brief, p. 5.

In S.C. Dep't of Corr. v. Cartrette, 694 S.E.2d 18, 23 (S.C. Ct. App. 2010), our Court of Appeals relied upon § 24-3-40(A), as well as rulings in Williams, 641 S.E.2d at 887, when it affirmed the circuit court's ruling that the inmate was *not* an employee of the private industry sponsor.<sup>18</sup> See also S.C. Dep't of Corr. v. Tomlin, 694 S.E.2d 25, 29 (S.C. Ct. App. 2010).

## 2. Rulings by our Supreme Court in Williams.

The following procedural history existed in Williams, one of the decisions from our Supreme Court regarding prison industries pay after Adkins:

This class action was commenced on behalf of inmates in custody of respondent [DOC]. These inmates participated in a prison industries program operated pursuant to [DOC's] contract with respondent Williams Technologies, Inc. (WTI). Appellants (Inmates) claim they were underpaid for their labor and seek "lost wages." The trial judge dismissed Inmates' complaint with prejudice based on our decision in [Adkins].<sup>19</sup> We affirm. 641 S.E.2d at 886.

The Williams Court then discussed its earlier decision in Adkins:

In Adkins, we considered a suit by inmates against DOC as the sole defendant. The suit alleged a violation of [§ 24-3-430(D)] which provides that "no inmate participating in [a prison industries] program may earn less than the prevailing wage for work of similar nature in the private sector." We held there is no private cause of action for a violation of this statute. Id. [emphasis supplied].

Next, the Williams Court explained the issues it confronted:

Inmates here alleged a cause of action under [the Payment of Wages Act] claiming lost wages because they were not paid the "prevailing wage" as specified in § 24-3-430(D). [footnote omitted]. They claim the trial judge should not have dismissed this cause of action against [Williams Technologies, Inc., the private industry sponsor]. Id. [emphasis supplied].

<sup>18</sup> The dissents in both Cartrette, 694 S.E.2d at 24, and Tomlin, 694 S.E.2d at 30, quoted the first of the three (3) paragraphs from Bennett v. Frank provided above by the Department.

<sup>19</sup> Like the action filed in circuit court by the inmates in Williams, the circuit court dismissed the action filed by the Appellant and his cohorts at summary judgment after our Supreme Court issued Adkins. Just as it did in Williams, our Supreme Court affirmed the circuit court's dismissal of the Appellant's action by its opinion in Torrence.



In the footnote associated with this paragraph, our Supreme Court in Williams observed that in Adkins it had “noted that § 24-3-430(F) provides that an inmate is not considered an ‘employee’ of the State and therefore no cause of action could be maintained against DOC under the Payment of Wages Act.”<sup>20</sup> Id., n. 3. [emphasis supplied].

After examining the provisions of §§ 41-10-30 and 40(D), the Williams Court considered the novel issue of “[w]hether a private industry sponsor and the inmates in a prison industries program have an employer-employee relationship for purposes of the Payment of Wages Act.” 641 S.E.2d at 886. [emphasis supplied].

In its analysis, the Williams Court considered whether, as advocated by the inmates, such an employer-employee relationship existed between the inmates and a private industry sponsor under the four factor test articulated in Felts v. Richland County, 400 S.E.2d 781 (S.C. 1991).

The Williams Court, 641 S.E.2d at 887, found that the four-part test from Felts was “not determinative of employer status in the context of the Payment of Wages Act.” [emphasis supplied]. The Williams Court also observed, before rendering its conclusion that the inmates did not possess a viable cause of action against the private industry sponsor under the Payment of Wages Act, that for purposes of wage statutes appellate courts in other states have held that “inmates compensated by the prison are not the employees of prison industries sponsors.” Id. [emphasis supplied].

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<sup>20</sup> The Williams Court cited Adkins, n. 7, at the end of its footnote. The Adkins footnote reads as follows:

The concurrence would hold inmates have a private right of action under [Payment of Wages Act]. However, [§] 41-10-80(C) provides that “[i]n case of any failure to pay wages due to an employee ... the employee may recover in a civil action.” Notably, [§ 24-3-430(F)] of the Prevailing Wage statute specifically states that “[n]o inmate compensated for participation in the program is considered an employee of the State.” (emphasis added). In my view, this further evinces a legislative intent not to create a private right of action. [emphasis supplied by the Court].

### 3. Rulings by Our Supreme Court in Adkins.

Like the Appellant, the inmates in Adkins participated in a federal certified PIECP project operated by the Department under the identical prison industries statutes, albeit at another institution. In Adkins, 602 S.E.2d at n. 6, our Supreme Court recognized the federal component to the Department's PIECP projects by observing as follows:

**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, 114 S.Ct. 238, 126 L.Ed.2d 192 (1993);<sup>21</sup> *McMaster v. Minnesota*, 819 F.Supp. 1429 (D.Minn.1993).<sup>22</sup> [emphasis supplied].**

In affirming in result the circuit court's decision in Adkins, our Supreme Court ruled 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 statutes in question were enacted for the special benefit of Inmates." 602 S.E.2d at 54. Our Supreme Court then ruled in Adkins that the inmates did not possess a private right of action under the prison industries statutes against the Department or, for that matter, the private industry sponsor.

### 4. Rulings by the Circuit Court in Adkins.

Obviously, our Supreme Court in Adkins considered not only the record generated during the trial conducted by the circuit court, but the circuit court's order.

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<sup>21</sup> In Harker, 990 F.2d at 135 - 36, the Fourth Circuit held that the FLSA, including the federal minimum wage and its overtime provisions, simply does not apply to "work done by inmates behind prison walls for any type of prison-operated industry or for the prison itself." [emphasis supplied and other citations omitted].

<sup>22</sup> In McMaster, the plaintiffs, inmates who participated in a Minnesota 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." 819 F.Supp. at 1433. The McMaster Court rejected the inmates' demand for minimum wage for their prison industries labor by ruling that "the relationship between the [inmates] and the state is not an employment relationship, but a custodial relationship to which the FLSA does not apply." [emphasis supplied]. *Id.*, 819 F.Supp. at 1438 (citing Harker, 990 F.2d at 132 - 33).

A review of order in Adkins,<sup>23</sup> in which the circuit court ruled in the Department's favor on every one of the inmates' claims, reveals that the inmates articulated many of the same claims in their original lawsuit that the Appellant articulated in his grievance. (R. Addm. pp. 1 – 183).

The inmates in Adkins, like the Appellant, asserted that they became "employees" by virtue of participating in a PIECP project operated by the Department. The circuit court in Adkins found that the project operated by the Department in which the inmates participated "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 the BJA's Prison Industry Enhancement Certification Program (PIECP)," and it also found that "[t]he PIECP is codified at 18 U.S.C. Section 1761(c)."<sup>24</sup>

However, it specifically found that the inmates "have not been and are not currently employees of Standard Plywoods," the private industry sponsor. It also found that they had not been "transformed from inmates into Standard Plywoods employees simply because they participate in [a prison industries project operated by the Department] in which Standard Plywoods also participates," and that the inmates "do not enjoy the same benefits and protections as non-inmate employees enjoy in the regular, non-institutional workforce."<sup>25</sup> The circuit court's order in Adkins also included the following ruling derived from Harker:<sup>26</sup>

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.** [emphasis supplied].

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<sup>23</sup> In satisfaction of the Court's July 25, 2012 order, the Department respectfully submits a copy of the circuit court's order in Adkins, filed October 30, 2002, in the appendix accompanying its instant brief ["Adkins Order"].

<sup>24</sup> See the Adkins Order, p. 5 and p. 5, n. 13 – 14.

<sup>25</sup> Id., pp. 5 – 7.

<sup>26</sup> Id., p. 15.

In the footnote associated with the final sentence of the above-quoted passage, the circuit court in Adkins also stated the following:<sup>27</sup>

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.'") [emphasis supplied].

#### ARGUMENT

I. **THE HOURLY RATE OF PAY APPLICABLE TO THE APPELLANT'S 320 HOUR "TRAINING PERIOD" DID NOT CONSIST OF THE VARIOUS HOURLY RATES HE ASSERTED IN HIS BRIEF.**

At the outset of his first argument, the Appellant stated and asserted as follows:<sup>28</sup>

Appellant performed labor in a PIECP certified program which was originally authorized in South Carolina pursuant to [§ 24-3-315], which began with a "Training Period" of 320 hours. The [Department] was *not* authorized by statute to divert "*prisoner wages*" during the training period. During the training period Appellant performed labor for [ESCOD] at a rate of [\$0.25] per hour for the first 160 hours; and [\$0.75] per hour for the following 160 hours. Many of the hours were over-time labor. Appellant asserts he is entitled to the prevailing wage, or in the alternative, the rate remitted by [ESCOD] for his labor for that 320-hour training period (\$7.17 per regular hour and \$10.75 per overtime hour) [the Department] diverted away from Appellant. [italicized and bold emphasis supplied by the Appellant; remaining emphasis supplied by the Department].

In the footnote from the above-quoted paragraph, the Appellant asserted that the term "prevailing wage" is "defined by §§ 24-3-315, 24-3-430(D) and 18 U.S.C. § 1761(c)(2)."<sup>29</sup>

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<sup>27</sup> Id., p. 15, n. 31.

<sup>28</sup> See the Appellant's Brief, p. 8.

<sup>29</sup> Id., p. 8, n. 22. The term "prevailing wage" does not appear in § 24-3-315 or § 1761(c)(2).

**A. NOTHING IN §§ 24-3-315, 24-3-430(D), OR 18 U.S.C. § 1761(c)(2) ESTABLISHES A SPECIFIC RATE AS THE "PREVAILING WAGE"**

The Appellant next quoted the entirety of § 24-3-315, as well as § 24-3-430(D). Before he quoted § 1761(c)(2), the Appellant argued as follows:<sup>30</sup>

Appellant submits that although [18 U.S.C. 1761(a)] was enacted in 1935 to protect private businesses from competition from goods produced with convict labor and not to protect the inmate worker, the PIECP *requires* the [Department] participants to *abide by the Act* in the wages and benefits provided to the inmate workers. As a guide, Appellant suggests that 18 USC §1761(c) be read *in pari materia* with [§§ 24-3-40, 315 and 430]. Where [§ 24-3-315] is directly predicated upon §1761(c) in compliance and [§ 24-3-430] was created to expound upon [prison industries projects] authorized by [§ 24-3-315]; both Title 24, Chapter 3 subsections may exist and operate *only* as authorized by 18 USC § 1761(c). (some footnotes omitted) [*italicized and bold emphasis supplied by the Appellant*].

However, a plain reading of these statutes reveals that they do not establish, specify or otherwise declare a particular hourly pay rate or range of hourly pay rates which constitute the "prevailing wage" applicable to the Appellant's labor.

**B. THE APPELLANT WAS NOT ENTITLED TO THE HOURLY RATE HE CLAIMED AS THE "PREVAILING WAGE" FOR THE FIRST 320 HOURS OF HIS VOLUNTARY LABOR.**

The Appellant asserted that "[t]he prescribed wage the ESC set for a 'minimum,' 'mean' and 'maximum' is other than the wages paid to Appellant for his labor during the period of employment (See ROAA pp. 151 – 52)."<sup>31</sup> (footnote omitted).

<sup>30</sup> *Id.*, p. 9.

<sup>31</sup> *Id.*, pp. 10 – 11. The pages of the Record referenced by the Appellant consist of his April 17, 2000 letter to the ESC's General Counsel, and a response to the Appellant dated April 24, 2000 by Mr. Kenneth T. "Ted" Gladden, the ESC's Director for Labor Market Information. In his April 17, 2000 letter, the Appellant enquired "as to the prevailing wage for wire harness assembly here in Marlboro County." In his response, Mr. Gladden responded by stating only that "[t]he statewide mean hourly wage for Assemblers/Fabricators ex. Machine/Electronic/Precision (93956) is \$9.69." Mr. Gladden also stated that the hourly wage he provided "is based on our most recent South Carolina Occupational Employment Statistics Wage Survey." Contrary to the Appellant's assertion, the terms "minimum" and "maximum" do not appear anywhere in Mr. Gladden's letter. As shown within the passage from its order provided below, the circuit court in *Adkins* provided a full and accurate explanation of the term "mean hourly wage" and the "wage survey" described by Mr. Gladden in his April 24, 2000 response to the Appellant's April 17, 2000 letter. See also note 11 above.

As his voluntary participation in the project at Evans did not transform him from an inmate into an "inmate employee" of ESCOD, the Appellant never experienced a "period of employment" with ESCOD. Moreover, the Appellant fundamentally misunderstands the wage data collected and published by the ESC, and the following ruling by the circuit court in Adkins clearly reveals as much.<sup>32</sup>

The evidence introduced by the parties at trial showed that 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 [prison industries] labor.

On July 27, 2000, Director [Tony Ellis] wrote Mr. Ted Gladden,<sup>33</sup> 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. Director Ellis clearly stated that 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.

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.<sup>34</sup>

According to Ms. Eleazer, the designations "Low, Mean, and High" simply reflect percentile designations. The designation "Low" corresponds to the 25<sup>th</sup> percentile, the designation "Mean" corresponds to the 50<sup>th</sup> percentile, and the designation "High" corresponds to the 75<sup>th</sup> percentile. In other words, 25% of the non-institutional businesses

<sup>32</sup> See the Adkins Order, pp. 26 – 27. Our Supreme Court could have addressed this holding in its decision in Adkins, but it instead chose to find that no private cause of action existed at all under the provisions of the prison industries statutes. Thus, the Department respectfully argues that this holding by the circuit court remains viable and constitutes the law of the case in Adkins. See Judy v. Martin, 674 S.E.2d 151, 153 (S.C. 2009).

<sup>33</sup> "Mr. Ted Gladden," as referenced in this passage from the circuit court's order in Adkins, is the same person as "Kenneth T. Gladden," the author of ESC's response to the Appellant's April 17, 2000 letter.

<sup>34</sup> "Ms. Rebecca Eleazer," as described in the instant passage from the circuit court's order in Adkins, is the same person as "Rebecca W. Eleazor," as referenced by the Appellant in his brief. See the Appellant's Brief, p. 10, n. 26 and pp. 15 – 17. Likewise, selected excerpts from a deposition provided by Ms. Eleazer during the litigation of Torrence before the circuit court appears in the Record, because the Appellant included these excerpts as "Appendix F" in support of his Step 2 appeal. (R. Addm. pp. 33 – 34 and 104 – 140).

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.

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 [prison industries] labor at Tyger River falls within ESC’s wage range as recited by Mr. Gladden in his August 4, 2000 letter to Director Ellis.<sup>35</sup> [emphasis supplied].

Thus, as established by the above-quoted passage from the circuit court’s decision in Adkins, the Department conformed to the wage data collected and published by the ESC when it paid the Appellant a regular hourly rate of \$5.25 for his prison industries labor after he completed the first 320 hours of his labor, a rate which was \$0.10 above the federal minimum wage applicable during the entirety of the time the Appellant participated in the project at Evans.

In its order in Adkins, the circuit court also rendered the following findings and conclusions in light of Ms. Eleazer’s testimony:

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<sup>35</sup> The Appellant also included selected excerpts from a deposition provided by Mr. Tony Ellis, the former Director of the Department’s Division of Industries [“DOI”], during the litigation of Torrence before the circuit court as “Appendix D” in support of his Step 2 appeal, and, consequentially, these materials appear in the Record. (R. Addm. pp. 33 – 34 and 61 – 84). The Appellant provided his interpretation of Mr. Ellis’ deposition testimony in his brief. See the Appellant’s Brief, p. 13; p. 14, n. 34; pp. 15 – 16; p. 21; and p. 22, n. 50. Importantly, the circuit court in Adkins heard sworn testimony from Mr. Ellis during the bench trial it conducted on August 8 and 9, 2002, and it relied upon evidence generated by Mr. Ellis in rendering its rulings. See the Adkins Order, pp. 4 – 5, 10 – 13, 16 – 17, and 26 – 30.

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 [that] the prevailing wage for work performed by the Plaintiffs in the [prison industries project] with Standard Plywoods ranges between \$9 and \$14 per hour.<sup>36</sup> [emphasis supplied].

The Department respectfully submits that, since the prison industries project at issue in Adkins was also a federally certified PIECP project,<sup>37</sup> the Appellant's claim that the hourly rate of pay for his prison industries labor should have been identical to the hourly rate at which ESCOD paid its true employees is wholly without merit, and, as illustrated throughout its instant brief, that the Department, with the possible exception of when it paid him a "training wage," paid the Appellant a lawful hourly rate for his labor.

**C. WITH THE POSSIBLE EXCEPTION OF WHEN IT PAID HIM A "TRAINING WAGE," THE DEPARTMENT PAID THE APPELLANT A LAWFUL HOURLY RATE FOR HIS VOLUNTARY LABOR<sup>38</sup>**

No dispute exists concerning whether the Department paid the Appellant lower hourly rates for the first 320 hours of the labor he voluntarily performed in the project at Evans than the \$5.25 per hour rate it paid the Appellant after he completed his first 320 hours of labor.

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<sup>36</sup> See the Adkins Order, pp. 26 – 28. Unlike Adkins, the circuit court in Torrence never conducted a trial in the class action brought by counsel representing the inmate plaintiffs, the lead plaintiff being the Appellant. Instead, the circuit court in Torrence, after the Supreme Court affirmed in result the rulings rendered by the circuit court in Adkins after it tried the case to conclusion, granted the Department's motion for summary judgment and dismissed the entirety of the inmates' claims. Any and all of the arguments and representations offered by the Appellant regarding Ms. Eleazer's testimony, wage survey data generated by the ESC, and related subjects are completely the result of his own defective interpretations and conclusory arguments. They are not grounded in any way from any verdict or order, because the circuit court in Torrence dismissed the entire case at summary judgment. The inmates in Adkins participated in a PIECP project operated by the Department, and they raised many claims regarding their status as "employees" and the rate at which the Department paid them for their labor that were identical or nearly identical to the claims raised by the Appellant in his grievance. Therefore, the circuit court's order in Adkins represents the only instance in which evidence purportedly supporting such claims has actually been heard, considered, and adjudicated. The Department respectfully submits that while the circuit court's order in Adkins is not binding authority, it is nonetheless enlightening if not overwhelmingly persuasive.

<sup>37</sup> See the Adkins Order, p. 5.

<sup>38</sup> See the Appellant's Brief, pp. 11 – 12.



In its order, the circuit court in Adkins recognized that the Department's "training wage" policy, which applied to the first 320 hours of the Appellant's labor in the project at Evans, actually conformed to a specific provision of the Federal Register applicable to PIECP projects. It further recognized that BJA officials advised the former official in charge of the Department's prison industries projects that "he could continue his training wage policy." The circuit court in Adkins also recognized that the Department ended its training wage policy effective July 1, 1999,<sup>39</sup> and it ultimately ruled in the Department's favor on all of the inmates' claims and causes of action regarding the "training wage."<sup>40</sup>

Moreover, the Appellant's ability to recover any back pay attributable to his first 320 hours of labor is contingent, like all other pay claims, on whether he timely filed his Step 1 grievance.<sup>41</sup> To the extent that any review of the Court's prior ruling on this issue is necessary and any such review operates adversely to him, then the entirety of the Appellant's pay claims, including those focused on the first 320 hours of his labor, would be moot.

To the extent that it owes any back pay to the Appellant for his first 320 hours of labor, the Department respectfully submits that the hourly rate at which he should have been paid for

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<sup>39</sup> See the Adkins Order, pp. 10 – 12.

<sup>40</sup> Id., pp. 12 – 13 and 15 – 17.

<sup>41</sup> See note 2 above. See also Campbell v. Guignard, Unpub. Opinion No. 2015-UP-293, pp. 2 – 3 (S.C. Ct. App. June 17, 2015) (quoting Kelly v. Logan, Jolley, & Smith, L.L.P., 682 S.E.2d 1, 8 (S.C. Ct. App. 2009) ("[F]or equitable estoppel to apply, a plaintiff must be aware that a claim might exist prior to the expiration of the statute of limitations, but due to some conduct or representation by the defendant, the plaintiff is induced ... to delay in filing suit." (alteration in original) (internal quotation marks omitted))).) and Okera v. S.C. Dep't of Corr., Memo. Opinion No. 2012-MO-042 (S.C. Oct. 24, 2012) ("This is a direct appeal from an order of the [ALC] dismissing the appeal from [the Department's] denial of Appellant's inmate grievance based on his failure to comply with the relevant statute of limitations set forth in the Department's internal policy. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: [Al-Shabazz] (approving [the Department's] internal procedures for discipline and grievances, which specify a fifteen-day time limit for filing for grievances)."). Okera participated in the same project at Evans as the Appellant, and, like the Appellant, he was a plaintiff in the original class action in Torrence. Okera presented prison industries pay claims in a grievance he filed with the Department, but Okera filed his grievance only after the circuit court dismissed Torrence at summary judgment. As discussed in note 19 above, the Department respectfully submits copies of both opinions in the appendix accompanying its instant brief.

these initial hours equaled no more than \$5.25, the regular hourly rate at which the Department paid him once he completed these initial hours, or, at the absolute most, \$7.86, the time-and-a-half overtime hourly rate at which the Department paid him once he completed these hours.

**II. THE DEPARTMENT DID NOT DIVERT ANY PORTION OF THE APPELLANT'S PRISON INDUSTRIES PAY, NOR DID IT FAIL TO PAY HIM A LAWFUL WAGE FOR HIS VOLUNTARY LABOR.**

At the outset of his second argument, the Appellant asserted that "his hourly wage was insufficient compared to the prevailing wage for similar work performed in the private sector and that non-inmate peers working side-by-side with Appellant, performing similar work, earned \$9.00 to \$14.00 per hour for that work."<sup>42</sup> [emphasis supplied].

**A. THE DEPARTMENT PAID THE APPELLANT A LAWFUL WAGE**

The Appellant next argued that he "received \$5.25 per regular hour and \$7.86 per overtime hour for that labor" and that he "was never informed that [ESCOD] actually paid \$7.17 per regular hour and \$10.75 per overtime hour."<sup>43</sup> In the footnote accompanying this passage, the Appellant asserted that § 24-3-430(C) and 18 U.S.C. § 1761(c)(4) required the Department to inform him of the hourly rates at which it leased the inmates' labor to ESCOD.<sup>44</sup>

However, the Appellant misapplied these two (2) statutes, because no authority supports his assertion that the rates at which the Department leased the inmates' labor to ESCOD constituted a "condition of his employment" under 24-3-430(C) or any kind of "financial arrangement" resulting from his "participation in such employment" under § 1761(c)(4).

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<sup>42</sup> See the Appellant's Brief, p. 13.

<sup>43</sup> *Id.*, p. 13

<sup>44</sup> *Id.*, p. 13, n. 33.

The Appellant then reiterated the provisions of § 24-3-315, § 24-3-430(D), and § 1761(c)(2), and he asserted that these statutes define “prevailing wage.”<sup>45</sup> The term “prevailing wage” does not appear in § 24-3-315,<sup>46</sup> and an analysis of § 24-3-430 and § 1761, as well as the relevant federal regulations, further reveals the profound errors in the Appellant’s argument.

1. Section 24-3-430.

By its enactment of § 24-3-430, our General Assembly enabled the Department to establish and operate such a “federal certified private sector/prison industries program.” Echoing the Ashurst-Sumners Act (18 U.S.C. § 1761), § 24-3-430(A) allows the Department to “establish a program involving the use of inmate labor ... in private industry for **the manufacturing and processing of goods, wares, or merchandise** ... or another business or commercial enterprise considered by the director to enhance the general welfare of South Carolina.” [emphasis supplied]. Section 24-3-430(G) specifically references federally certified projects administered by BJA by declaring that “[n]o inmate who participates in a **project designated by the Director of [BJA]** pursuant to Public Law 90-351 is eligible for unemployment compensation upon termination from the program.” [emphasis supplied].

Our General Assembly assimilated the key provisions of Ashurst-Sumners, specifically 18 U.S.C.A. § 1761(c)(2) and (c)(4), by enacting the following subsections to § 24-3-430, which are the head waters of our state’s “prevailing wage” statutes:

(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.**

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<sup>45</sup> Id., p. 14.

<sup>46</sup> See note 29 above.

- (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. [emphasis supplied].

**2. The Ashurst-Sumners Act, 18 U.S.C. § 1761.**

The first component of Ashurst-Sumners, 18 U.S.C.A. § 1761(a), criminalized the transportation in interstate commerce of "any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners," and, again, our General Assembly assimilated this standard in § 24-3-410(A). Another component of Ashurst-Sumners, 18 U.S.C. § 1761(c), provided an exception to the criminal penalties established by subsection (a) for such items that are "manufactured, produced, or mined by convicts or prisoners" who:

- (1) are participating in--one of not more than 50 non-Federal prison work pilot projects designated by the Director of the **Bureau of Justice Assistance**;
- (2) have, in connection with such work, received 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**, except that such wages may be subject to deductions which shall not, in the aggregate, exceed 80 per centum of gross wages, and shall be limited as follows:
  - (A) **taxes** (Federal, State, local);
  - (B) **reasonable charges for room and board**, as determined by regulations issued by the chief State correctional officer, in the case of a State prisoner;
  - (C) **allocations for support of family pursuant to State statute, court order, or agreement by the offender**;
  - (D) **contributions to any fund established by law to compensate the victims of crime** of not more than 20 per centum but not less than 5 per centum of gross wages;
- (4) **have participated in such employment voluntarily** and have agreed in advance to the specific deductions made from gross wages pursuant to this section, and all other financial arrangements as a result of participation in such employment. [emphasis supplied].

Again, our General Assembly assimilated the standards of 18 U.S.C.A. §1761(c)(2) and (c)(4) into § 24-3-430, and, specifically, § 24-3-430(C) and (D). However, §1761(c)(2) does not include the term "prevailing wage."

3. 64 FR 17000.

The BJA, as acknowledged by the circuit court in Adkins and as recognized by 18 U.S.C. § 1761(c)(1), is the arm of the federal government which coordinates with state correctional authorities, such as the Department, to establish, certify, and monitor PIECP projects, such as the project in which the Appellant participated at Evans. BJA acts, under the authority of Ashurst-Sumners, through federal regulation, specifically 64 FR 17000.

The effective date of the current version of 64 FR 17000 is April 7, 1999, and existing participants, including the Department, had until April 7, 2000 by which to achieve compliance with this edition of the regulation. As BJA recognized within the regulation, South Carolina's PIECP projects were first certified in 1984 under the Justice Assistance Act enacted that same year. BJA specifically recognized that the intent of Congress behind allowing the establishment of such PIECP projects was two-fold:

First, it would authorize the [BJA] to encourage development of pilot demonstration projects for prison industry at the State level, involving private sector industry \* \* \*. Under this approach, prison programs benefit from the private business, develop access to new markets, and attract needed capital. The goal of these pilot projects would be to create as realistic a working environment as possible within the prison walls, while enabling an inmate to become more self-sufficient to the benefit of himself, the prison system, and the taxpayer. See 64 FR 17001 - 02.

As stated by BJA, 64 FR 17007, the PIECP serves the following four (4) purposes:

- To provide a cost-efficient means to address inmate idleness and to provide inmates with work experience and training in marketable job skills. BJA encourages private sector PIECP partners to consider post-incarceration employment to PIECP inmate workers.

- Through inmate wage deductions, to increase advantages to the public by providing departments of correction with a means for collecting taxes and partially recovering inmate room and board costs, by providing crime victims with a greater opportunity to obtain compensation, as well as by promoting inmate family support.
- Through PIECP participation conditions, to prevent unfair competition between prisoner-made goods and private sector goods.
- To prevent the exploitation of prisoner labor. [emphasis supplied].

Nothing in these regulations transforms the Appellant from an inmate into an "inmate employee" of ESCOD, and the Appellant does not and, for that matter, could not legitimately argue that the Department exploited his labor since it paid him a lawful hourly rate for his labor.

To affect these purposes, BJA, 64 FR 17007, articulated the following definitions applicable to the PIECP projects it certifies and monitors:

Minimum wage refers to the Federal minimum wage which is the lowest possible wage that can be paid to private sector employees under the Fair Labor Standards Act, 29 U.S.C. 206. ... The 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.<sup>47</sup> [emphasis supplied].

BJA, 64 FR 17007, articulated the following additional applicable definitions:

*Prevailing wage is a wage 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, 18 U.S.C. 1761(c)(2).*<sup>48</sup>

Production is the forming anew or transforming of marketable goods. The term includes mining and manufacture and excludes services.<sup>49</sup> [emphasis supplied].

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<sup>47</sup> This definition flatly defeats the Appellant's assertion that, by virtue of his participation in the project at Evans, he became an "inmate employee" of ESCOD under federal law. As explained above, the Appellant confronts the same reality under state law.

<sup>48</sup> See § 24-3-315.

<sup>49</sup> See note 4 above regarding prison industries service projects operated under § 24-1-290 and 295.

BJA, 64 FR 170009 – 10, also specifically addressed wages for inmates who participate in PIECP projects in the following manner:

PIECP inmate workers must receive wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work is to be performed.<sup>50</sup> This requirement benefits society by allowing for the development of prison industries while protecting 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. PIECP participants must, therefore, implement the prevailing wage requirements under like conditions experienced by private sector competition. Toward this end, the following requirements are applicable:

...  
(B) Prevailing wage verification must be obtained by the appropriate state agency which determines wage rates (usually the Department of Economic Security).<sup>51</sup>

...  
(D) The PIECP prevailing wage must be received by those inmate workers performing notable tasks necessary to produce and/or transport goods in interstate commerce.

...  
(G) The PIECP prevailing wage [cannot] be set below the Federal minimum wage, as defined in the [FLSA]. Payment of the Federal minimum wage, however, 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.

(H) Overtime, at one and a half times the rate of regular or prevailing wage, must be paid for prisoner hours worked in excess of 40 hours per week. See 29 U.S.C. 207(a) (a payment standard imposed on private sector competition). [emphasis supplied].

The logic and analysis reflected by the circuit court's ruling in Adkins, namely that the Department conformed to the wage data collected and published by the ESC when it paid the inmates an hourly rate equal to the federal minimum wage, tracks with paragraph (G).<sup>52</sup>

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<sup>50</sup> See § 24-3-315.

<sup>51</sup> See pp. 16–17 above.

<sup>52</sup> See p. 18 above.

4. Section 24-3-410(B)(7).

The circuit court in Adkins rejected the inmates' contention that § 24-3-430(D) even applied to their demand for the "prevailing wage." Instead, it ruled that the provisions of § 24-3-410 and, specifically, § 24-3-410(B)(7) governed the inmates hourly wage "in the federally certified PIECP project operated by [the Department], in conjunction with Standard Plywoods, at Tyger River." As if recognized, § 24-3-410(B)(7) must be read in conjunction with the rest of § 24-3-410, and, specifically, § 24-3-410(A):<sup>53</sup>

- (A) It is unlawful to sell or offer for sale on the open market of this State articles or projects 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] 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. [italicized and underlined emphasis supplied by the circuit court].

The circuit court in Adkins concluded that while § 24-3-430 "covers all prison industries activity (i.e. traditional projects, service projects and PIECP certified projects)," § 24-3-410(B)(7) "precisely addresses activity in the [Department's] project in which the [inmates] participate, which is a 'federal certified private sector/prison industries program.'" It then ruled that the inmates' "demand for the 'prevailing wage' is unsupported by the precisely applicable statutory authority," as § 24-3-410(B)(7) only provides that they "should receive comparable wages and not the 'prevailing wage' for their [prison industries] labor." Finally, it ruled that the permanent hourly wage that the Department paid the inmates after the inmates completed the

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<sup>53</sup> See the Adkins Order, pp. 18 – 19. The term "inmate employees," as coined by the Appellant, does not appear in § 24-3-410(B)(7) or, for that matter, in any of the applicable state statutes, federal statutes, or federal regulations. Instead, § 24-3-410(B)(7) uses the term "inmate workers."



first 320 hours of their labor, "i.e. the federal minimum wage of \$5.15 per hour, conforms to both the 'comparable wage' standard from [§ 24-3-410(B)(7)] and the 'prevailing wage' standard from [§ 24-3-430(D)] under the guidelines published by the [ESC].<sup>54</sup>

Thus, as shown in Adkins, the Department, by paying the Appellant a regular hourly rate of \$5.25 (ten cents above the federal minimum wage applicable during the entirety of his participation) and an overtime hourly rate of \$7.86 once he completed the first 320 hours of his labor, satisfied the requirements imposed by state law, federal law, and federal regulations.

**B. THE DEPARTMENT DID NOT DIVERT ANY PORTION OF THE APPELLANT'S PRISON INDUSTRIES PAY.**

After invoking § 24-3-40 and § 24-3-430(H), the Appellant asserted the following:<sup>55</sup>

The [Department] had knowledge of and admitted that [they] were without statutory authority to divert such portions of Appellant's [prevailing wages]. (references to Record omitted).

After reiterating arguments rebutted by the Department above, the Appellant next invoked Torrence, as well as Cartrette.<sup>56</sup>

Regarding Cartrette, the Appellant asserted that our Court of Appeals found "that § 24-3-315 resolved the prevailing wage dispute."<sup>57</sup> However, the Appellant's assertion is flatly contradicted by a review of the opinion, which reveals that the Court of Appeals remanded "the question of the prevailing wage to which [the inmate] is entitled" back to the ALC for further proceedings Id., 694 S.E.2d at 22. See also Tomlin, 694 S.E.2d at 29 (S.C. Ct. App. 2010).

The Appellant next asserted as follows:

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<sup>54</sup> See the Adkins Order, pp. 20 – 21.

<sup>55</sup> See the Appellant's Brief, p. 16.

<sup>56</sup> Id., p. 17.

<sup>57</sup> Id., pp. 17 – 18.

In a recent report discussing the need for an increased federal minimum wage, the Manhattan Institute for Policy Research stated only 3% of working Americans earn the "minimum wage" with 97% of Americans earning more than the federal minimum wage. That statement supports Appellant's argument against DOC's reliance on the wage of \$5.25 [\$0.10 above the federal minimum wage] as the prevailing wage at that time. (footnote omitted).

The Appellant's comparison of himself to other "working Americans" again reveals the folly of his entire argument, because the Appellant continually ignores the reality that he is an inmate and was not an "employee" or "inmate employee" of ESCOD.

1. The Department lawfully charged ESCOD the rate of \$1.32 per inmate labor hour (the "SCDC Surplus Fund Amount") in addition to charging ESCOD the lawful hourly rate at which it paid the inmates.

The Appellant specified the first method by which the Department purportedly diverted his wages as follows:<sup>58</sup>

Appellant submits that authorized deductions from the "prisoner's [prevailing] wage" paid to the [Department] pursuant to § 24-3-40(A) do not contemplate or authorize the ["SCDC Surplus Fund Amount"] deductions and is a benefit upon [the Department] not legally justifiable.

In the course of mixing provisions of § 24-3-40 and 64 FR 17010 – 11, the Appellant asserted that the deductions assessed by the Department cannot, in aggregate, exceed 80% of his gross prison industries pay.<sup>59</sup> The Appellant next asserted as follows:<sup>60</sup>

Appellant suggests that \$7.17 per hour is the gross wage here and that the \$1.92 comprised of the Surplus Fund Amount and pro-rata withholdings for Social Security and Workmen's Compensation (ROAA p. 178), which is removed from Appellant's wages, equals 25% of the statutorily required prevailing wage and statutory deductions are made from the lower, remaining rate of \$5.25 per hour.

<sup>58</sup> See the Appellant's Brief, p. 19. In the footnote associated with this passage, the Appellant referenced § 3.3 of the contract between the Department and ESCOD, a contract to which the Appellant was not a party. *Id.*, n. 43.

<sup>59</sup> *Id.*, pp. 19 – 20. As demonstrated further below, the total deductions assessed by the Department against the Appellant's gross prison industries pay by operation of § 24-3-40, and specifically § 24-3-40(A), never exceeded 80% of the lawful hourly rate at which it paid the Appellant.

<sup>60</sup> *Id.*, p. 20.

The Appellant argued that from the inception of his participation in the project at Evans, the Department should have paid him \$7.17 per hour, which is the hourly rate of pay for inmate labor that ESCOD remitted to the Department pursuant to their 2001 contract.

As shown below, the following four (4) distinct and separate figures comprised the \$7.17 hourly rate: (1) the lawful hourly rate at which the Department paid the inmates (\$5.25); (2) the Department's pro rata Workers' Compensation Premiums (\$0.20); (3) its pro rata Social Security withholding payment (\$0.40); and (4) its "Surplus Fund Amount" (\$1.32). (R. Addm. p. 178).

- a. **The circuit court in Adkins reviewed and endorsed the same \$1.32 per inmate labor hour charge.**

The hourly rate of pay due the inmates under the applicable provision in Adkins, designated as the "minimum wage," equaled \$5.15, an amount ten cents less than the Department paid the Appellant and the other inmates who participated in the project at Evans. Just as in the contract under examination here, the contract at issue in Adkins reflected that the Department also charged the private industry sponsor \$1.32 per inmate labor hour in addition to the \$5.15 per inmate labor hour attributed to the inmates' rate of pay. The circuit court in Adkins addressed the \$1.32 per inmate labor hour charge as follows:<sup>61</sup>

In the course of advising BJA of [the Department's] training wage policy and schedule, [former Division of Industries Director Tony Ellis] also advised BJA of [the Department'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].

The circuit court in Adkins ruled in the Department's favor concerning all of the inmates' claims which targeted this identical \$1.32 per inmate labor hour charge.

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<sup>61</sup> Id., p. 16. See also pp. 9 - 10.

**b. The 2001 contract's parties and purpose.**

On or about March 3, 2001, the Department entered into a 5-year contract with ESCOD to engage in PIECP project at Evans (R. Addm. pp. 146 – 47 and 174 – 83) and the contract's first paragraph read as follows (R. Addm. pp. 146):

THE AGREEMENT is entered into this 3<sup>rd</sup> day of March, 2001, by and between the [Department] by its duly authorized agent R. Dodge Frederick, Interim, Director and [ESCOD], (hereinafter referred to as "Contractor") by its duly authorized agent Philip Pitman, Vice President, Operations.

The Department and ESCOD were the only parties to the contract, and its expressly stated purpose was "to fulfill the intent of [§ 24-3-310]." (R. Addm. p. 146).

**c. Section 3.3 of the 2001 contract.**

Section 3.3, entitled "Mutual Duties of the Parties," provided as follows (R. Addm. p. 178 – 79):

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

|                                                |             |
|------------------------------------------------|-------------|
| Prevailing Wage (See Appendix D) <sup>62</sup> | \$5.25      |
| Prorata Social Security                        | .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 the Contractor in writing and adjust its charge accordingly. In the event the prevailing wage, prorata social security withholding payments, or prorata Workers'

<sup>62</sup> It does not appear that "Appendix D" or, for that matter, "Appendix C," as referenced in § 3.3 of the contract appear in the Record. To the extent this Court determines that such materials are necessary to its consideration and adjudication of the issues presently before it, the Department respectfully urges this Court to allow the parties to supplement the Record accordingly.

Compensation premium increases 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.]

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.

**d. Legal standards applicable to contract interpretation.**

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Madden v. Bent Palm Investments, LLC, 688 S.E.2d 597, 600 (S.C. Ct. App. 2010) (quoting McGill v. Moore, 672 S.E.2d 571, 574 (S.C. 2009)). The court "must first look at the language of the contract to determine the intentions of the parties." C.A.N. Enterps., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 373 S.E.2d 584, 586 (S.C. 1988). The contract must be construed as a whole. Madden, 688 S.E.2d at 600. If the contract's language is unambiguous, the language alone will determine the terms of the contract. If, however, the contract's language is ambiguous, the court must determine the intention of the parties based on the evidence presented.<sup>63</sup>

"A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." *Id.* "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties." Wallace v. Day, 700 S.E.2d 446, 449 (S.C.

<sup>63</sup> As he was not a party to the contract, the Appellant cannot produce any evidence of the intent of the "parties." Compare Touchberry v. City of Florence, 367 S.E.2d 149, 150 (S.C. 1988) ("A third-party beneficiary is a party that the contracting parties intend to directly benefit.") with Adkins, 602 S.E.2d at 54 (holding that the prevailing wage statutes were not enacted for the special benefits of inmates) and Williams, 641 S.E.2d at 888 (citing Adkins).

Ct. App. 2010) (quoting S.C. Dep't of Natural Res. v. Town of McClellanville, 550 S.E.2d 299, 303 (S.C. 2001)).

“Common sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail.” C.A.N. Enterps., 373 S.E.2d at 586 (citing Farr v. Duke Power Co., 218 S.E.2d 431, 434 (S.C. 1975)).

**e. Application of the legal standards to the 2001 contract.**

The entirety of § 3.3 is clear and unambiguous. It expressly and unambiguously identified the “prevailing wage” for the labor voluntarily provided by the inmates as \$5.25 per hour, a rate that exceeded the then applicable federal minimum wage by \$0.10 per hour.

Apart from establishing a lawful hourly inmate labor rate of \$5.25, the parties lawfully and properly negotiated, as expressly and unambiguously reflected in § 3.3, that ESCOD pay the Department for both the Department’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 lawfully negotiated that ESCOD pay the Department an additional \$1.32 per inmate labor hour towards the “SCDC Surplus Fund Amount.”

The Appellant correctly observes that, as clearly and unambiguously reflected by § 3.3 (ROA Addm. p. 178), the amount at which the Department leased the inmates’ labor totaled \$7.17 per labor hour. However, the line item payment by ESCOD attributed to the “SCDC Surplus Fund,” like the line item payments attributed to the Department’s pro rata Social Security withholdings and its pro rata Workers’ Compensation premium, did not in any way impact the reality that the Department leased the inmates’ labor to ESCOD for \$5.25 per hour

and that the Department paid the inmates, like the Appellant, who voluntarily participated in the PIECP project at Evans a lawful regular hourly rate of \$5.25.

The contract is clear that ESCOD paid the Department \$7.17 per inmate labor hour to cover *all* expenses associated with operating the service project at Evans, including the inmates' \$5.25 hourly rate of pay. No provision of the contract states, implies, or suggests that ESCOD and the Department agreed that the Department would pay inmates at the rate of \$7.17 per hour. Thus, neither the express language of the contract nor any other evidence in the Record supports the Appellant's assertion that he was entitled to the \$7.17 "[h]ourly [r]ate charged to Contract."

**f. Common sense negates the Appellant's arguments.**

Common sense dictates that the Department would not have, in light of the overhead expenses identified in § 3.3, entered into a contract with ESCOD by which it would charge ESCOD a flat rate of \$7.17 per inmate labor hour and then pay the inmates who voluntarily participated in the project at the same hourly rate of \$7.17. By doing so, the Department would have violated the express terms of the contract and sacrificed the means by which it would be able to cover the various costs associated with operating the project at Evans identified in § 3.3.

Likewise, common sense dictates that the Department would not have entered into a contract with ESCOD without an expectation that it would receive reimbursement for its overhead expenses. See C.A.N. Enterps., 373 S.E.2d at 586. Section 3.3 clearly explains that the Department is required to pay inmates at the lawful hourly rate of \$5.25 out of the \$7.17 hourly rate ESCOD pays to the Department. Section 3.3 further clearly explains that the Department charged ESCOD and ESCOD paid the Department an additional \$1.92 per inmate labor hour for the Department's pro rata social security withholding payment, its Workers Compensation Premium, and the "SCDC Surplus Fund Amount."

- g. Various statutes compelled the Department to charge ESCOD \$1.32 per inmate labor hour charge (i.e. the "SCDC Surplus Fund Amount.")**

Section 24-3-310 reflects our General Assembly's intent regarding prison industries projects operated by the Department, and it provides that the Department must "utilize the labor of inmates for self-maintenance and for reimbursing this State for expenses incurred by reason of their crimes and imprisonment." Section 24-3-310 conforms to the provisions of § 24-1-20, which is entitled "Declaration of policy" and which establishes that the Department 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." [emphasis supplied].

Additionally, § 24-3-190, which is entitled "Appropriation of balances for Penitentiary," states that the "balance in the hands of [the Department] 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." [emphasis supplied]. Thus, it is evident that our legislature certainly envisioned if not authorized the Department to receive monies "from the hire of convicts" in order to support its operations.

Regarding the Department's operation of its prison industries projects, the prison industries statutes under § 24-3-310, *et seq.*, prescribe various expenses that it is required to pay in association with the projects it operates. Specifically, pursuant to § 24-3-320, the Department may purchase "equipment, raw materials, supplies and engage the supervisory personnel necessary to establish and maintain for this State ... industries for the utilization of services of convicts" in prison industries programs.

Ultimately, § 24-3-400 explicitly contemplates the manner in which the Department must cover the expenses it incurs in the course of operating its prison industries program:



All monies collected by the [Department] 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 and to discharge any existing obligation to the Sinking Funds and Property Division of the State Budget and Control Board, all of which must be under the direction and subject to the approval of the Director of the [Department]. ... The Prison Industries Account must never be maintained in excess of the amount necessary to efficiently and properly carry out the intentions of this article. When, in the opinion of the Director of [the Department], the Prison Industries Account has reached a sum in excess of the requirements of this article, the excess must be used by [the Department] for operating expenses and permanent improvements to the state prison system, subject to the approval of the State Budget and Control Board. [emphasis supplied].

Thus, our General Assembly clearly manifested its intent that the Department must cover the expenses it incurs as a consequence of operating its prison industries program in the manner prescribed by the provisions of § 24-3-400. Accordingly, the Department respectfully argues that the result urged by the Appellant would undoubtedly result in it operating the project in which the Appellant participated, as well as all of its other projects, at a perpetual deficit.

Without charging ESCOD \$1.92 per inmate labor hour as well as the lawful hourly rate of \$5.25 per hour at which it paid the inmates as set forth in § 3.3 of the contract, the Department would have no monies by which to comply with the provisions of § 24-3-400.

If it paid the inmates at the rate of \$7.17 per hour (\$1.32 per hour for the "SCDC Surplus Amount" plus the \$0.40 per hour for the pro rata Social Security charge plus the \$0.20 for the pro rate "Workers' Compensation Premium plus the \$5.25 per hour) and then assessed the deductions mandated by § 24-3-40 based upon this hourly rate as demanded by the Appellant,

the Department would not collect any monies from the operation of its prison industries program as mandated by § 24-3-400 to defray the expenses associated with the operation of its prison industries program. No provision of § 24-3-40 sets aside any monies for the Department by which it may defray the expenses associated with the operation of its prison industries program.<sup>64</sup>

If it recalculated the inmate wage structure in the manner advocated by the Appellant, then the Department would undoubtedly incur a deficiency by continuing to operate its prison industries program, which includes the project in which the Appellant participated at Evans. Such a contingency would animate the following provisions from § 11-9-220:

It shall be 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. [emphasis added].

The Department respectfully submits that this Court should reject the Appellant's argument, the practical outcome of which would produce an absurd result.

2. The Department lawfully charged ESCOD the rate of \$0.40 per inmate labor hour for the "Social Security Withholding Payment" in addition to charging ESCOD the lawful hourly rate at which it paid the inmates.

The Appellant next focused on a charge of \$0.40 per inmate labor hour assessed by the Department upon ESCOD in their agreement:<sup>65</sup>

Appellant submits that authorized deductions from the "prisoner's [prevailing] wage" paid to the [Department] pursuant to § 24-3-40(A) do not contemplate or authorize the employer's portion of the Social Security withholding out of those wages.

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<sup>64</sup> The version of § 24-3-40(A)(3) enacted in 2000 mandates that the Department must withhold 25% of an inmate's gross prison industries wages only to "defray the cost of the prisoner's room and board" and *only if* the inmate possesses no child support obligations. No part of § 24-3-40 provides that the Department is entitled to withhold any percentage of an inmate's gross prison industries wages to defray the expenses associated with the operation of its prison industries project.

<sup>65</sup> See the Appellant's Brief, p. 22.

The employer's portion of the Social Security withholding [\$0.40] is deducted via the "Agreement" between [ESCOD] and [the Department], ROAA p. 178, which is *a portion of the wage paid for [the] Appellant's labor.* [emphasis provided by the Appellant].

The Appellant buttressed his argument on this point by, yet again, erroneously asserting his status as an ESCOD employee (i.e. an "inmate employee").<sup>66</sup>

[The] Department improperly deducted its portion of Appellant's Social Security withholding from wages earned by [his] labor. An employee should not be liable for an employer's portion of the Social Security tax.

Appellant suggests that the Agreement to remove the portion of Social Security tax withholding and Workmen's Compensation insurance premiums from [his] wages (ROAA p. 178) is a contract intended to evade payment of an employer's portion of tax in fraud of tax laws against the public policy of South Carolina pursuant to S.C. Code §12-2-40.

Under our South Carolina Tax Code (Income Tax Withholding), [the Department] qualifies as a "Withholding Agent" and [the] Appellant qualifies as an "employee."<sup>67</sup> [emphasis supplied].

Other than conclusory arguments, the Appellant offered no legitimate rationale to support his contention that he somehow "qualified" as any kind of ESCOD employee under our state's tax code. See Medical Univ. of S.C. v. Arnaud, 602 S.E.2d 747, 750 (S.C. 2004) (failure to provide arguments or supporting authority for an issue renders it abandoned); see also Muir v. C.R. Bard, Inc., 519 S.E.2d 583, 600 (S.C. Ct. App. 1999) (conclusory arguments may be treated as abandoned).

Critically, 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 an inmate's 42 participation in our nation's Social Security

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<sup>66</sup> Id., pp. 23.

<sup>67</sup> The Appellant cited §§ 12-8-10(2) and (3) in support of his argument. Id., p. 23, n. 51 and n. 52.

system qualifies as such a benefit.<sup>68</sup> Thus, the Department, by charging ESCOD the rate of \$0.40 per inmate labor hour for an inmate's pro rata "Social Security Withholding Payment" is complying with the operative provisions of the applicable federal law.

3. The Department lawfully charged ESCOD the rate of \$0.20 per inmate labor hour for the "Workers' Compensation Premium" in addition to charging ESCOD the lawful hourly rate at which it paid the inmates.

The Appellant next focused on a charge of \$0.20 per inmate labor hour assessed by the Department upon ESCOD in their agreement.<sup>69</sup>

Appellant submits that authorized deductions from the "prisoner's [prevailing] wage" paid to the [Department] pursuant to §24-3-40(A) do not contemplate or authorize the employer's portion of the Workmen's Compensation Premium withholding out of those wages.

The employer's portion of the Workmen's Compensation Premium withholding [\$0.20] is deducted via the "Agreement" between [ESCOD] and [the Department], ROAA p. 178, which is a portion of the wage paid for Appellant's labor.

In this instance, however, the Appellant asserted that the Department was his employer.<sup>70</sup>

For the [Department] to be required to pay the portion of Workmen's Compensation Premium of the employers, then [it] is technically the statutory employer under the Workmen's Compensation Act of S.C. Title 42. [emphasis supplied].

As clearly and repeatedly established above, the Appellant, under § 24-3-430(F) and the rulings interpreting and applying § 24-3-430(F) from our Supreme Court in Adkins and Williams, is not an "employee" of the Department. Thus, the Appellant again offered only conclusory arguments in support of this issue on appeal, and, likewise, he offered absolutely no

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<sup>68</sup> See also BJA Program Brief, <https://www.ncjrs.gov/html/bja/piecp/bja-prison-industr.html>.

<sup>69</sup> See the Appellant's Brief, p. 24.

<sup>70</sup> Id., p. 25.

supporting authority for his above-quoted argument. See Muir v. C.R. Bard, Inc. and Medical Univ. of S.C. v. Arnaud above.

Again, 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 it explicitly mentions “workmen’s compensation” as the type of benefit contemplated. S.C. Code Ann. § 42-1-480 articulates the workers’ compensation provisions applicable to inmates in our state.

Thus, the Department, by charging ESCOD the rate of \$0.20 per inmate labor hour for an inmate’s pro rata “Workers’ Compensation Premium” is again complying with the operative provisions of both the applicable federal and state laws.

**C. THE DEPARTMENT DID NOT BREACH ANY PURPORTED “FIDUCIARY DUTY.”**

The Appellant concluded his argument in support of his second issue on appeal by invoking the provisions of § 24-3-40(A), § 24-3-315, and § 24-3-430(D), as well as 18 U.S.C. § 1761(c)(2) and (c)(4), and then asserting that these statutes “create[d] a fiduciary duty between [him] and [the Department] and places a duty upon [the Department] to pay the specific statutory wage and make only those specific deductions upon that wage, and to fully inform [him] in advance of all conditions of said employment.”<sup>71</sup> The Appellant then argued that the Department breached its purported fiduciary duty to him and “converted a portion of [his] wages through an illegal contract and statutory noncompliance.”

Inasmuch as it, with the possible exception of the period of time in which it paid the Appellant a “training wage,” complied with all applicable state law, federal law, and federal

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<sup>71</sup> See the Appellant’s Brief, p. 26.

regulations regarding the operation of its PIECP project at Evans, the Department did not breach any purported fiduciary duty it held toward the Appellant or his prison industries pay.

The Appellant furthered his argument that the Department breached its purported fiduciary duty to him in the section of his brief entitled "Summation of Issue II" by contending that the Department "refused to pay the prevailing wage and deductions beyond authorized amounts violates state and federal statutory authority and wrongfully diverts a portion of [his] wages to which he has a property interest."<sup>72</sup> [emphasis supplied].

18 U.S.C. § 1761(c)(2) prohibits the Department from deducting more than 80% of an inmate's gross prison industries wages. However, the Appellant's assertion that the Department assessed deductions totaling over 80% of his gross prison industries wages is completely unsupported by the Record.<sup>73</sup>

Therefore, the evidence simply does not support the Appellant's arguments that the Department exceeded the authorized limit of deductions applicable to his gross prison industries pay, and, consequentially, the evidence simply does not support the Appellant's arguments that the Department breached any fiduciary duties it purportedly owed him or otherwise failed to comply with the provisions of the applicable state laws, federal laws, or federal regulations.

Finally, the Department paid the Appellant, contrary to his oft-repeated assertion, ten cents more than the federal minimum wage for every hour of his labor after he completed the first 320 hours, and, by doing so, the Department satisfied the "prevailing wage" provision from § 24-3-430(D), the "comparable wage" provision from § 24-3-410(B)(7), and the applicable

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<sup>72</sup> *Id.*, p. 28. Our General Assembly enacted the version of § 24-3-40 under analysis in 1995. The Department respectfully provides a table comparing the version of § 24-3-40 enacted in 1995 with the version of § 24-3-40, specifically § 24-3-40(A), enacted in 2000 as Exhibit A in support of its instant brief. Our General Assembly did not enact another version of § 24-3-40 until 2010, several years after the Appellant ceased participating in the project at Evans.

<sup>73</sup> The Department illustrates its assertion by providing an analysis of extracts from the Appellant's prison industries pay data from the Record, and it respectfully provides its analysis as Exhibit B in support of its instant brief.

provisions of 64 FR 17000. Therefore, absolutely no evidence exists to support the Appellant's assertion that the Department unlawfully paid inmates, such as him, a regular hourly rate of \$5.25 and an overtime hourly rate of \$7.86 rather than the \$7.17 per inmate labor hour rate at which the Department lawfully leased the inmates' labor to ESCOD.

**III. THE DEPARTMENT DOES NOT UNLAWFULLY DEPRIVE THE APPELLANT ACCESS TO MONIES IT HOLDS IN ESCROW BY OPERATION OF §§ 24-3-40(A)(5) AND (B)(2)**

At the outset of the argument he offered in support of his third issue on appeal, the Appellant contended as follows:<sup>74</sup>

[The] Appellant asserts the 10% of *his* wages deducted pursuant to § 24-3-40(A)(5) is to be for the "*benefit of the prisoner.*" If the prisoner cannot access the principal or interest, then the prisoner is systematically deprived, via the **unconstitutional interpretation** of his property interest therein. [emphasis supplied].

The Appellant next quoted § 24-3-40(B)(2) in its entirety, and then argued as follows:<sup>75</sup>

The [Department] denies [the] Appellant access to the wages escrowed under (A)(5) in their interpretation of (B)(2), which is that, **inmates serving a life sentence receive their escrowed wages "only upon the inmate's death."** [The] Appellant asserts this is an **unconstitutional interpretation.** [emphasis supplied].

As discussed above,<sup>76</sup> the version of 24-3-40(A)(5) enacted in 2000 provided that the Department shall deduct 10% from an inmate's gross prison industries pay, and this section further mandates that these monies "must be held in an interest bearing escrow account for the benefit of the" inmate. The version of § 24-3-40(B)(2) enacted in 2000 then provided that, for an inmate "serving life in prison or sentenced to death," the Department shall give the inmate the

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<sup>74</sup> See the Appellant's Brief, p. 29.

<sup>75</sup> *Id.*

<sup>76</sup> See note 72 above.

option of having his escrowed wages deducted by operation of § 24-3-40(A)(5) “included in his estate or distributed to the persons or entities of his choice.”<sup>77</sup> [emphasis supplied].

It must be noted at the outset of any analysis of the Appellant’s arguments on this point that our state’s appellate courts have tacitly if not expressly determined that § 24-3-40’s deductions are constitutional. See Adkins, Cartrette, Tomlin, Torrence, and Williams.

The Appellant argued that the Department’s “proposed interpretation of the terms “escrow[ed],” “prisoner’s benefit,” and “estate” are broad and do not comport with public policy concerns over fiduciaries where our State is the responsible fiduciary.”<sup>78</sup>

**A. THE DEPARTMENT LAWFULLY DEDUCTED 10% FROM THE APPELLANT’S GROSS PAY IN CONFORMITY WITH § 24-3-40(A)(5)**

The Appellant further refined his argument on this issue as follows:<sup>79</sup>

... the deduction of 10% of gross wages as set out in subsection (A)(5) where subsection (B)(2), as applied to “lifers,” denies access to that 10% of gross wages in his lifetime [life without parole] is not authorized as a deduction by 18 USC §1761(c)(4), and no state law, or application of state law may subvert federal law under the Supremacy Clause.

Contrary to the Appellant’s argument, however, § 1761(c)(4), and, for that matter, 64 FR 17006 are completely silent about the monies withheld and escrowed by operation of § 24-3-40(A)(5), and, likewise, they are completely silent about the conditions under which the Appellant, an inmate serving a life sentence, may access such monies under § 24-3-40(B)(2).

The Appellant next argued as follows:<sup>80</sup>

Where subsection (A)(5) may promote the public policy of savings for when the prisoner returns to family and community as a contributor, and

<sup>77</sup> The Department respectfully provides a table comparing the 1995 version of § 24-3-40 with the version of § 24-3-40, specifically § 24-3-40(B), enacted in 2000 as Exhibit C in support of its instant brief.

<sup>78</sup> See the Appellant’s Brief, p. 32.

<sup>79</sup> Id.

<sup>80</sup> Id., pp. 32–33.



thus is not styled as a "deduction" in the true sense of the term. In the case of a prisoner serving life or life without parole, the application of subsection (B)(2) renders subsection (A)(5) a deduction in the true sense where the prisoner never has personal access to the principal or interest on the escrowed wages and thus, is not authorized as a deduction in the sense authorized by 18 USC § 1761(c)(4) and 64 FR 17006.

Once again, § 1761(c)(4) and 64 FR 17006 do not support the Appellant's argument. Moreover, the Appellant's interpretation of § 24-3-40(A)(5) and (B)(2) is contrary to the plain and ordinary meaning of these statutes.

According to our Supreme Court in Cain v. Nationwide Property & Casualty Ins. Co., 661 S.E.2d 349, 351 – 52 (S.C. 2008), a court must interpret a statute according to its plain meaning when possible, as evidenced by the following:

The primary purpose in interpreting statutes is to ascertain the intent of the Legislature. [The Court] cannot construe a statute without regard to its plain and ordinary meaning, and [the] Court may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. [citations omitted].

Applying this rule, no provision of § 24-3-40(B), including § 24-3-40(B)(2), authorizes any inmate to have "complete and immediate access" to monies held in escrow pursuant to § 24-3-40(A)(5) while still lawfully held in the Department's custody. Rather, each component of § 24-3-40(B) provides that the Department is not authorized to distribute the monies held in escrow pursuant to § 24-3-40(A)(5) to any inmate until he is either released from the Department's custody or upon his death.

**B. THE DEPARTMENT DOES NOT UNLAWFULLY DENY THE APPELLANT ACCESS TO MONIES ESCROWED PER § 24-3-40(A)(5)**

Again invoking 18 U.S.C. § 1761(c)(4), the Appellant contended that the Department "incorrectly denied immediate personal access to his escrowed wages where § 24-3-40(B)(2)

operates to create a permanent deduction of the funds supposedly escrowed in an interest bearing account for [his] benefit as set forth in [§ 24-3-40(A)(5)].<sup>81</sup>”

1. The Department does not misapply the term “estate” from § 24-3-40(B)(2).

The Appellant further advanced his argument by contending that the manner in which the Department defines and/or interprets the term “estate” as it appears in § 24-3-40(B)(2) does not comport with his recounting of the legislative history associated with its enactment or dictionary entries for the term. The Appellant continued this thread of his argument by once again invoking 18 U.S.C. § 1761(c)(4) and by asserting that the manner in which the Department defines or interprets the term “estate” animated an outcome by which the monies held in escrow for him by the Department would eventually and unavoidably be subject to double taxation.<sup>82</sup>

Once again, § 1761(c)(4) does not support the Appellant’s argument in any way. Moreover, the Appellant’s interpretation of § 24-3-40(B)(2) is defective. The plain meaning of the phrase “included in his estate or distributed to the persons or entities of his choice” anticipates that the distribution of these monies will occur upon the death of the inmate, and not prior to that event. Contrary to the Appellant’s argument, the definition of the term “estate” actually reinforces the reality presented by § 24-3-40(B)(2).

The South Carolina Probate Code defines “estate” to include “the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration.” See S.C. Code Ann. § 62-1-201(11).

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<sup>81</sup> Id., p. 35.

<sup>82</sup> As he did not present or otherwise raise his double taxation claim in his grievance (R. Addm. pp. 1 – 183) or in his notice of appeal dated March 2, 2012, the Appellant did not preserve this issue for review. See Kiawah Resort Assoc. v. S.C. Tax Com’n, 458 S.E.2d 542 (S.C. 1995) (In reviewing a final decision of an administrative agency, the ALC “has a limited scope of review, and cannot ordinarily consider issues that were not raised to and ruled on by the administrative agency.”). The Department provides its rebuttal out of an abundance of caution.

Additionally, Black's Law Dictionary defines the term "estate" as "[t]he total property of whatever kind that is owned by a decedent prior to the distribution of that property in accordance with the terms of a will or when there is no will, by the laws of inheritance in the state of domicile of the decedent." Black's Law Dictionary, pp. 490 – 91 (5th ed. 1979). [emphasis supplied]. Black's Law Dictionary also defines the term "escrow account" as "[a] bank account, generally held in the name of the depositor and an escrow agent, that is returnable to the depositor or paid to a third person on the fulfillment of specified conditions." Black's Law Dictionary (8th ed. 2004). [emphasis supplied].

Thus, the General Assembly, through § 24-3-40(B), set the specified condition, upon which the monies held in the escrow account for all inmates may be distributed, as the inmate's release from the Department's custody. The fact that an inmate serving a life sentence will only be released from the Department's custody upon his death does not change the clear and plain meaning of the statute.

Section 24-3-40(B)(2) must be read and understood in accordance with the above-provided definitions of the term "estate" and "escrow account." Thus, these definitions and the architecture of § 24-3-40(B)(2), as well as § 24-3-40(B) in its entirety, lead to the conclusion that the Department should distribute the monies held in escrow pursuant to § 24-3-40(A)(5) only upon the occurrence of a specified event, namely at the time of the inmate's death, and either to his estate or to a person or entity of his choosing.

Any other interpretation of § 24-3-40(B)(2) would conflict with § 24-3-40(B)(1) and (B)(3). Both § 24-3-40(B)(1) and (B)(3) envision that the Department will hold monies escrowed pursuant to § 24-3-40(A)(5) until the inmate is released from its custody or the custody of the Department of Probation, Parole and Pardon Services, and not before these events. The

Appellant has not identified any statute or precedent which authorizes or suggests that an inmate serving a life sentence should be treated differently, or preferentially, from other inmates by operation of § 24-3-40(B)(2).

Even if § 24-3-40(B)(2) treats inmates serving a life sentence differently from inmates who may be released from the Department's custody before death, such minor differences in treatment are consistent with § 24-3-40(A)(3). Specifically, under the 2000 version of § 24-3-40(A)(3), 35% of an inmate's wages are applied to an inmate's child support obligations. If an inmate did not have child support obligations, then 25% of the inmate's wages were applied to room and board, and the other 10% "must be made available to the inmate during his incarceration for the purchase of incidents pursuant to [and in addition to § 24-3-40(A)(4)]." Inmates without child support obligations had immediate access, under § 24-3-40(A)(3), to an additional 10% of their wages while inmates with child support obligations do not.

Section 24-3-40(A)(4), in its entirety, provided that "[10%] must be available to the inmate during his incarceration for the purchase of incidentals," and, critically, it provided that "[a]ny 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." [emphasis supplied].

Succinctly stated, if our General Assembly had intended for inmates serving a life sentence to have immediate access to their escrowed wages under § 24-3-40(B)(2), then it would have enacted § 24-3-40(B)(2) with language identical to § 24-3-40(A)(3), (A)(4), and, for that matter, (A)(6). Accordingly, the plain and ordinary meaning of § 24-3-40(B)(2) requires the Department to distribute monies escrowed pursuant to § 24-3-40(A)(5) only upon the inmate's death to either his estate or to a person or entity of his choosing, and not while he remains lawfully incarcerated within its custody.

2. The Department does not apply § 24-3-40(B)(2) in a manner which violates the prohibition against ex post facto laws.

The Appellant next argued that the Department's "interpretation and application of § 24-3-40(B)(2) operates as an ex post facto law in violation of the state and federal constitutions,"<sup>83</sup> in that the Department's purportedly "incorrect application" of § 24-3-40(B)(2) "inflicts an additional punishment [10% of gross wages] upon those" inmates who participate or participated in prison industries projects and who are subject to life sentences.<sup>84</sup>

The Ex Post Facto Clause from the United States Constitution simply provides that "[n]o state shall ... pass any ... ex post facto Law." U.S. Const. Art I § 10, cl. 1. This prohibition against ex post facto laws applies only to "penal statutes which disadvantage the offender affected by them." Collins v. Youngblood, 497 U.S. 37, 41 (1990). A law may not make a previously committed act criminal or increase the punishment for a crime after it was committed. 497 U.S. at 43. The United States Supreme Court further explained in Collins as follows:

It is settled ... that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its conclusion; or which deprives one charged with crime of any defense available according to law at the time that the act was committed, is prohibited as ex post facto. 497 U.S. at 42.

In United States v. O'Neal, 180 F.3d 115, 121 (4th Cir. 1999), the Fourth Circuit explained that "[p]unishment and penalty are constitutional terms of art, defined in contra distinction to law that are civil." (citation and quotation marks omitted). The Fourth Circuit in O'Neal continued by stating that "[w]hile laws that retroactively increase punishment or impose a penalty violate the Ex Post Facto Clause, retroactive civil or regulatory ones do not." Id.

<sup>83</sup> See the Appellant's Brief, p. 37. As he did not present or otherwise raise this claim in his grievance (R. Addm. pp. 1 – 183) or in his notice of appeal dated March 2, 2012, the Appellant did not preserve this issue for review. See note 82 above. Again, the Department provides its rebuttal out of an abundance of caution.

<sup>84</sup> See the Appellant's Brief, p. 38.

180 F.3d at 122. (emphasis supplied and quotation marks omitted). The Court expanded its analysis as follows:

In determining whether a law imposes punishment, the Supreme Court has ... applied a two-part test. The Court first asks whether the legislature's intent, as discerned from the structure and design of the statute along with any declared legislative intent, was to impose a punishment or merely to enact a civil or regulatory law. ...

Second, even if the legislature did not intend to impose a punishment, a law may still be said to do so if the sanction or disability that it imposes is so punitive in fact that the law may not legitimately be viewed as civil in nature. A defendant faces a heavy burden in making a showing of such a punitive effect and can succeed only on the clearest proof. *Id.* (quotation marks omitted)

In Johnson v. Ozmint, 2006 WL 2475344, \*4 – 5 (D.S.C. 2006), the federal district court ruled as follows regarding a similar claim advanced by another inmate concerning deductions assessed by the Department against his gross prison industries pay by operation of § 24-3-40:

The charges for medical services (and for room and board and victim's assistance programs, for that matter) are clearly not punitive in nature.

...  
The statute and regulations in question here are clearly civil or regulatory in nature and cannot be considered punitive so as to invoke the ex post facto prohibition. [emphasis supplied].

Thus, the Appellant's argument on this point fails, and this Court should deny any relief demanded by the Appellant in reliance upon this argument.

3. **The Department does not apply § 24-3-40(B)(2) in a manner that constitutes a bill of attainder.**

The Appellant also argued that the Department's "interpretation and application of § 24-3-40(B)(2) operates as a bill of attainder."<sup>85</sup>

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<sup>85</sup> *Id.*, p. 37. As he did not present or otherwise raise this claim in his grievance (R. Addm. pp. 1 – 183) or in his notice of appeal dated March 2, 2012, the Appellant did not preserve this issue for review. See notes 82 and 83 above. Again, the Department provides its rebuttal out of an abundance of caution.

The Bill of Attainder Clause from the United States Constitution simply provides that “[n]o state shall ... pass any bill of attainder.” U.S. Const. Art I § 10, cl. 1. As stated by the Fourth Circuit in Lynn v. West, 134 F.3d 582, 594, n. 11 (4th Cir. 1998), “[a] legislative act is an unconstitutional bill of attainder if it singles out an individual or narrow class of persons for punishment without a judicial proceeding.” In United States v. O’Neal, discussed immediately above, the Fourth Circuit explained that the same analysis of “punishment” applies to challenges made under the Bill of Attainder Clause as challenges made under the Ex Post Facto Clause.

As discussed above, the federal district court in Johnson v. Ozmint, 2006 WL 2475344 (D.S.C. 2006), \*5, ruled as follows:

As discussed above, the provisions of [§ 24-3-40] and the policy providing for deductions that inmates for medical co-payments do not constitute “punishment” in a constitutional sense. Accordingly, the plaintiff’s Bill of Attainder claim is without merit. [emphasis supplied].

Thus, the Appellant’s argument on this point fails, and this Court should deny any relief demanded by the Appellant in reliance upon this argument.

**4. The manner in which the Department applies § 24-3-40(B)(2) does not violate Equal Protection.**

The Appellant then argued that “§ 24-3-40(B)(2), as applied, operates as a violation of the equal protection clauses where it denies [him], serving a life sentence, access to his [Long Term Savings Account] funds in his lifetime when other” inmates who participated or participate in prison industries projects “may gain access to their LTSA funds in their lifetime.”<sup>86</sup>

The federal district court in Johnson, 2006 WL 2475344 at \*5, n. 2, ruled as follows regarding a similar claim advanced by another inmate concerning deductions assessed by the Department against his gross prison industries pay by operation of § 24-3-40:

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<sup>86</sup> Id., p. 39.

To the extent that the plaintiff is asserting an equal protection claim, this claim is also without merit. The plaintiff has made no showing that he has been treated differently from others similarly situated, that he is a member of a "suspect" class for equal protection purposes or that there is a "fundamental interest" involved. (citation omitted).

Likewise, in Skipper, 633 S.E.2d at 915, our Supreme Court observed as follows:

Moreover, it is not a requirement of the due process and equal protection clauses of either the State or the United States Constitutions that if the State undertakes to provide rehabilitative facilities, it must provide such facilities to all prisoners or to none. *See McLamore v. State*, 257 S.C. 413, 424, 186 S.E.2d 250, 256 (1972) (finding that inmate was not denied constitutional rights under the Due Process or Equal Protection clauses of the State and United States Constitutions where certain educational and rehabilitative services available to some inmates at the SCDC were not available to him). (footnote omitted).

Like the inmates in Johnson and Skipper, the Appellant's argument on this point fails, and this Court deny any relief demanded by the Appellant in reliance upon this argument.

**IV. THE DEPARTMENT DOES NOT IMPROPERLY DENY THE APPELLANT OF A "FAIR INTEREST RATE" ON MONIES ESCROWED BY OPERATION OF § 24-3-40(A)(5)**

The Appellant asserted that the interest rate applied to monies held in in his LTSA by the Department by operation of § 24-3-40(A)(5) is deficient.<sup>87</sup> However, the Appellant acknowledged that § 24-3-40(A)(5) does not specific a particular rate or rates of interest applicable to any monies so held.<sup>88</sup> That said, the Appellant again argued that the Department purportedly owes him a "fiduciary duty" under § 24-3-40(A)(5) to ensure that he "receives the fair interest rate available on his escrowed funds."<sup>89</sup>

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<sup>87</sup> See the Appellant's Brief, p. 40. The Appellant presented an identical or nearly identical argument earlier in his brief. *Id.*, pp. 33 – 34. In his earlier argument, The Appellant contends that interest earned by the escrow account into which the Department places the monies it deducts by operation of § 24-3-40(A)(5) is calculated at an unlawfully low rate or otherwise does not include all of the monies the Appellant has argued the Department owes him under his various purported definitions of the "prevailing wage" for his labor.

<sup>88</sup> *Id.*, p. 41.

<sup>89</sup> *Id.*



The Appellant again offered only conclusory arguments in support of this issue on appeal, and, likewise, he offered absolutely no supporting authority for his above-quoted argument. See Muir v. C.R. Bard, Inc. and Medical Univ. of S.C. v. Arnaud above.

Moreover, as the Department stated in a February 9, 2015 filing with the Court in satisfaction of its December 3, 2014 order, the Office of the State Treasurer for South Carolina is “the entity which derives the interest rate applicable to the LTSA” and the same office “is the governmental entity which determines and disperses the interest associated with [its] LTSA.” The Department further stated that it “does not take or receive any portion of interest earned by the LTSA.” Thus, the Department respectfully submits that, contrary to the Appellant’s arguments on this point, it conforms and complies with all applicable state laws.

Finally, the Department respectfully observes that the national and state economies experienced a severe recession in late 2007,<sup>90</sup> and, as a result, interest rates applicable to a myriad of financial accounts dramatically declined.<sup>91</sup> The fluctuation in the amount of interest earned by monies held in the LTSA reflects this reality. (Abbrev. R. pp. 44 – 75 and R. Addm. pp. 187 – 206). The Appellant’s incarceration does not protect him from the fluctuations experienced by the national and local economies, nor does it entitle him to higher interest rates than are otherwise available to the public at large.

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<sup>90</sup> [http://www.bls.gov/spotlight/2012/recession/pdf/recession\\_bls\\_spotlight.pdf](http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf)

<sup>91</sup> See generally [http://usatoday30.usatoday.com/money/economy/2008-12-16-fed-cuts-rates\\_N.htm](http://usatoday30.usatoday.com/money/economy/2008-12-16-fed-cuts-rates_N.htm). See also <http://www.bankrate.com/finance/cd-rates-history-0112.aspx>.

**V. THE APPELLANT IS NOT ENTITLED TO EITHER PRE-JUDGMENT OR POST-JUDGMENT INTEREST**

The Appellant argued he is entitled to pre-judgment and post-judgment interest on the difference between the inmate labor hour rate at which the Department lawfully charged ESCOD and the hourly rate at which the Department lawfully paid the inmate for the labor he voluntarily provided to the project at Evans during the entirety of the time he participated in the project (from June 1997 to November 2004).<sup>92</sup>

As explained above, the Department paid the Appellant at lawful hourly rates of pay during the entirety of the time he voluntarily participated in the project at Evans, and, in particular, once he completed the first 320 hours of his labor. Should the Court affirm the Department's denial of the prison industries pay claims the Appellant presented in his grievance, then he is not entitled to any award of back pay, and consequentially, the Court should conclude that the Appellant is not entitled to pre-judgment and post-judgment interest.

Alternatively, any determination by this Court as to whether the Appellant is entitled to pre-judgment and/or and post-judgment interest on any back pay is not yet ripe for adjudication and, as respectfully submitted by the Department, it will not be ripe for adjudication *unless and until* this Court resolves the Appellant's prison industries pay claims in his favor.

To the extent necessary, the Department respectfully submits, in order to preserve its position regarding this issue, that the Appellant is not entitled, under any applicable statute, precedent, or theory, to any pre-judgment and/or and post-judgment interest on any back pay that he may receive as a result of his instant appeal. See Future Grp., II v. Nationsbank, 478 S.E.2d 45, 51 (S.C. 1996). Furthermore, to the extent applicable, the Department respectfully submits, in order to preserve its position regarding this issue, that the Appellant is not entitled, under any

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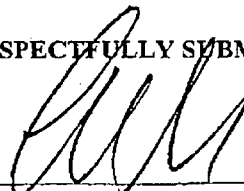
<sup>92</sup> See the Appellant's Brief, p. 43.

applicable statute, precedent, or theory, to any costs and attorneys' fees attributable to his prosecution of his instant appeal. See Layman v. State, 658 S.E.2d 320, 331 (S.C. 2008).

### CONCLUSION

For all of the foregoing reasons, the Department respectfully urges the Court to reject all of the arguments presented by the Appellant in his brief, deny all of the relief proposed by the Appellant in the final section of his brief entitled "Conclusion,"<sup>93</sup> and, consequentially, affirm the entirety of the final decision by which it denied the prison industries pay claims articulated by the Appellant in his administrative grievance.

RESPECTFULLY SUBMITTED,



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Counsel for the South Carolina  
Department of Corrections

Columbia, South Carolina  
June 29, 2015

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<sup>93</sup> Id., pp. 44 – 45.

Torrence v. S.C. Dep't of Corr., ALC Docket No. 12-ALJ-04-00143-AP  
Comparison of S.C. Code Ann. § 24-3-40 Enacted in 1995 and  
S.C. Code Ann. § 24-3-40(A) Enacted in 2000

| <i>Description of Deductions from § 24-3-40(A) in 2000 Version</i>                                                            | <i>Subsection of § 24-3-40(A) in 2000 Version</i> | <i>% Deducted under § 24-3-40(A) in 2000 Version</i>                                                                                                                          | <i>Withholdings Mandated by 1995 Version of § 24-3-40</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|-------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| If restitution to victim ordered by Court                                                                                     | § 24-3-40(A)(1)                                   | 20% to Satisfy Court Ordered Restitution                                                                                                                                      | The Director of the Department of Corrections shall withhold five percent of the gross wages and promptly place these funds on deposit with the State Treasurer for credit to a special account to support victim assistance programs established pursuant to the 'Victims of Crime Act of 1984, Public Law 98-473, Title II, Chapter XIV, Section 1404'. The director may withhold from the wages costs incident to the prisoner's confinement as the Department of Corrections considers appropriate and reasonable. These withholdings must be deposited to the maintenance account of the Department of Corrections. The balance of the wages, in the discretion of the director and in proportions determined by the director, may be disbursed to the prisoner, the prisoner's dependents, and the victim of the crime or deposited to the credit of the prisoner. [emphasis supplied]. |
| If restitution to victim <b>not</b> ordered by Court or if court ordered restitution has been satisfied                       | § 24-3-40(A)(2)                                   | 20% to SC Victims Compensation Fund                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| If inmate has child support obligation                                                                                        | § 24-3-40(A)(3)                                   | 35% for satisfaction of child support obligation                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| If inmate has <b>no</b> child support obligation                                                                              | § 24-3-40(A)(3)                                   | 25% used by the Department to defray cost of room & board                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|                                                                                                                               |                                                   | 10% to inmate for purchase of incidentals [in addition to 10% deducted and made available to inmate for purchase of incidentals by § 24-4-30(A)(4)]                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| Available to inmate for purchase of incidentals <b>and</b> may be distributed to the person or persons of the inmate's choice | § 24-3-40(A)(4)                                   | 10% to inmate for purchase of incidentals                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| Interest bearing escrow account for the benefit of the prisoner                                                               | § 24-3-40(A)(5)                                   | 10%                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| Federal and state taxes required by law                                                                                       | § 24-3-40(A)(6)                                   | Remaining Balance, <u>but</u> any monies not used to satisfy federal and state taxes must be made available to the inmate for the purchase of incidentals per § 24-3-40(A)(4) |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |

Torrence v. S.C. Dep't of Corr., ALC Docket No. 12-ALJ-04-00143-AP  
Impact upon the Appellant's Gross Prison Industries Pay between  
S.C. Code Ann. § 24-3-40 Enacted in 1995 and  
S.C. Code Ann. § 24-3-40(A) Enacted in 2000

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The version of § 24-3-40, enacted in 1995, in effect when it paid the inmate for his voluntary prison industries labor on August 15, 1997 authorized the Department to assess the following deductions from the Appellant's gross prison industries pay (Abbrev. R. p. 75):

| \$5.25 per hour for 4.75 hours = \$24.93 ("GROSS") |                                                   |         |                 |
|----------------------------------------------------|---------------------------------------------------|---------|-----------------|
| Deductions per § 24-3-40<br>(1995 Version)         | Description of Deduction                          | Amount  | % of<br>"GROSS" |
| The Prisoner                                       | "CASH FOR INMATE"                                 | \$12.55 | 50.33%          |
| Costs Incident to<br>the Inmate's Confinement      | "PGM FEE: ROOM/BOARD"                             | \$3.74  | 15%             |
| Victim Assistance Programs                         | "PGM FEE: VICTIM/COMP"                            | \$3.74  | 15%             |
| Taxes                                              | Taxes<br>("GROSS" - "NET")<br>(\$24.93 - \$22.52) | \$2.41  | 9.67%           |
| Balance added to<br>"Private Sector Account"       | "BALANCE"<br>(\$2.49 - \$0)                       | \$2.49  | 10%             |
|                                                    | "GROSS" =                                         | \$24.93 | 100%            |

The Appellant's gross pay for the applicable time period totaled only \$24.93.

The Department deducted a total of \$9.89 or 39.67% from the Appellant's gross pay for room and board (\$3.74 or 15%), victim's assistance (\$3.74 or 15%), and taxes (\$2.49 or 9.67%).

The Appellant received \$12.55 or 50.33% of his gross pay as "CASH."

The remaining balance of \$2.49 or 10% of the Appellant's gross pay remained in his "Private Sector Account" and carried forward.

Thus, the Appellant retained a total of \$15.04 or 60.33% of his gross pay, far above the 20% mandated by the applicable federal law and regulations.

Torrence v. S.C. Dep't of Corr., ALC Docket No. 12-ALJ-04-00143-AP  
Impact upon the Appellant's Gross Prison Industries Pay between  
S.C. Code Ann. § 24-3-40 Enacted in 1995 and  
S.C. Code Ann. § 24-3-40(A) Enacted in 2000

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The same version of § 24-3-40 in effect when it paid the inmate for his voluntary prison industries labor on September 16, 1997 authorized the Department to assess the following deductions from the Appellant's gross prison industries pay (Abbrev. R. p. 75):

| \$5.25 per hour for 69.75 hours = \$366.18 ("Gross") |                                                     |          |                 |
|------------------------------------------------------|-----------------------------------------------------|----------|-----------------|
| Deductions per § 24-3-40<br>(1995 Version)           | Description of Deduction                            | Amount   | % of<br>"GROSS" |
| The Prisoner                                         | "CASH FOR INMATE"                                   | \$139.61 | 38.13%          |
| Costs Incident to<br>the Inmate's Confinement        | "PGM FEE: ROOM/BOARD"                               | \$54.93  | 15%             |
| Victim Assistance Programs                           | "PGM FEE: VICTIM/COMP"                              | \$54.93  | 15%             |
| Taxes                                                | Taxes<br>("GROSS" - "NET")<br>(\$366.18 - \$310.90) | \$80.09  | 21.87%          |
| Balance added to<br>"Private Sector Account"         | "BALANCE"<br>(\$79.20 - \$42.58)                    | \$36.62  | 10%             |
|                                                      | "GROSS" =                                           | \$366.18 | 100%            |

The Appellant's gross pay for the applicable time period totaled a more representative figure of \$366.18.

The Department deducted a total of \$189.95 or 51.87% from the Appellant's gross pay for room and board (\$54.93 or 15%), victim's assistance (\$54.93 or 15%), and taxes (\$80.09 or 21.87%).

The Appellant received \$139.61 or 38.13% of his gross pay as "CASH."

The remaining balance of \$36.62 or 10% of the Appellant's gross pay remained in his "Private Sector Account" and carried forward.

Thus, the Appellant retained a total of \$176.23 or 48.13% of his gross pay, still far above the 20% mandated by the applicable federal law and regulations.

Torrence v. S.C. Dep't of Corr., ALC Docket No. 12-ALJ-04-00143-AP  
Impact upon the Appellant's Gross Prison Industries Pay between  
S.C. Code Ann. § 24-3-40 Enacted in 1995 and  
S.C. Code Ann. § 24-3-40(A) Enacted in 2000

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A new version of § 24-3-40, enacted in 2000, in effect when it paid the inmate for his voluntary prison industries labor on November 16, 2014 authorized the Department to assess the following deductions from the Appellant's gross prison industries pay (Abbrev. R. p. 46):

| \$5.25 per hour for 47.75 hours = \$250.68 ("GROSS")                  |                                                     |          |                 |
|-----------------------------------------------------------------------|-----------------------------------------------------|----------|-----------------|
| Deductions per § 24-3-40<br>(2000 Version)                            | Description of Deduction                            | Amount   | % of<br>"GROSS" |
| Victim Assistance Programs<br>§ 24-3-40(A)(2)                         | "PGM FEE: VICTIM/COMP"                              | \$50.14  | 20%             |
| Room and Board<br>§ 24-3-40(A)(3)                                     | "PGM FEE: ROOM/BOARD"                               | \$62.67  | 25%             |
| The Prisoner<br>§ 24-3-40(A)(3)<br>§ 24-3-40(A)(4)<br>§ 24-3-40(A)(6) | "CASH FOR INMATE"                                   | \$72.01  | 28.73%          |
| Escrow Wages<br>§ 24-3-40(A)(5)                                       | Escrow Account                                      | \$25.07  | 10%             |
| Taxes<br>§ 24-3-40(A)(6)                                              | Taxes<br>("GROSS" - "NET")<br>(\$250.68 - \$209.89) | \$40.79  | 16.27%          |
|                                                                       | "GROSS" =                                           | \$250.68 | 100%            |

The Appellant's gross pay for the applicable time period totaled \$250.68.

The Department deducted a total of \$178.67 or 71.27% from the Appellant's gross pay for victim's assistance (\$50.14 or 20%), room and board (\$62.67 or 25%), an escrow account for his benefit (\$25.07 or 10%), and taxes (\$40.79 or 16.27%).

The Appellant received \$72.01 or 28.73% of his gross pay as "CASH," an amount that was lower than he received under the 1995 version of § 24-3-40 but an amount that still exceeded the 20% mandated by the applicable federal law and regulations.

Torrence v. S.C. Dep't of Corr., ALC Docket No. 12-ALJ-04-00143-AP  
Comparison of S.C. Code Ann. § 24-3-40 Enacted in 1995 and  
S.C. Code Ann. § 24-3-40(B) Enacted in 2000

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| <i>Entirety of § 24-3-40(B) in<br/>2000 Version</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <i>Withholdings Mandated by<br/>1995 Version of § 24-3-40</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>(B) The Department of Corrections shall return a prisoner's wages held in escrow pursuant to subsection (A) as follows:</p> <p>(1) A prisoner released without community supervision must be given his escrowed wages upon his release.</p> <p>(2) A prisoner serving life in prison or sentenced to death shall be given the option of having his escrowed wages included in his estate or distributed to the persons or entities of his choice.</p> <p>(3) A prisoner released to community supervision shall receive two hundred dollars or the escrow balance, whichever is less, upon his release. Any remaining balance must be disbursed to the Department of Probation, Parole and Pardon Services. The prisoner's supervising agent shall apply this balance toward payment of the prisoner's housing and basic needs and dispense any balance to the prisoner at the end of the supervision period.</p> | <p>The Director of the Department of Corrections shall withhold five percent of the gross wages and promptly place these funds on deposit with the State Treasurer for credit to a special account to support victim assistance programs established pursuant to the 'Victims of Crime Act of 1984, Public Law 98-473, Title II, Chapter XIV, Section 1404'. The director may withhold from the wages costs incident to the prisoner's confinement as the Department of Corrections considers appropriate and reasonable. These withholdings must be deposited to the maintenance account of the Department of Corrections. The balance of the wages, in the discretion of the director and in proportions determined by the director, may be disbursed to the prisoner, the prisoner's dependents, and the victim of the crime or deposited to the credit of the prisoner. [emphasis supplied].</p> |



## FORM 4

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

## JUDGMENT IN A CIVIL CASE

CASE NO. 00 -CP-40- 4761Richard 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)

Barbara C. Scott  
CLERK OF COURT

SCRCP APP-24

SCRCP FORM 4 (Revised 5/00)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Richard Adkins, et al.,

Plaintiffs,

-versus-

South Carolina Department  
of Corrections,

Defendant.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C/A No. 00-CP-40-4761

JUDGMENT FOR THE  
DEFENDANT

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

FILED

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.<sup>1</sup> 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.<sup>2</sup>

*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.

<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup>

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"<sup>4</sup> 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."<sup>5</sup> The Plaintiffs specifically alleged SCDC's former policy

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<sup>3</sup> Plaintiffs' Complaint, paragraph 1, page 1.

<sup>4</sup> *Id.*, paragraph 8, page 4.

<sup>5</sup> *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).<sup>6</sup>

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."<sup>7</sup> 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.<sup>8</sup>

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The Plaintiffs' *second* cause of action alleged SCDC was "unjustly enriched"<sup>9</sup> 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.<sup>10</sup>

## 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

<sup>6</sup> Id., paragraph 6.

<sup>7</sup> Id., paragraphs 6 and 7, pages 3 and 4.

<sup>8</sup> Id., paragraph 9, page 4.

<sup>9</sup> Id., paragraph 13, page 6.

<sup>10</sup> Id., paragraph 12, page 5.

Heatherly, Andrew Kelly, Christopher Smith, Leroy Sullivan, Albert Todd, and Frank Weathers.<sup>11</sup>

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

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*04* 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

<sup>11</sup> 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.<sup>12</sup>

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.

*Am 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).<sup>13</sup> The PIECP is codified at 18 U.S.C. Section 1761(c).<sup>14</sup>

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.<sup>15</sup> None of the

<sup>12</sup> See notes 6 and, supra.

<sup>13</sup> 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).

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

<sup>15</sup> 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.<sup>16</sup>

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.

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*06* 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.

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<sup>16</sup> See Defendant's Exhibits 1 and 2.

Gary Wallace,<sup>17</sup> 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.

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**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**

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<sup>17</sup> 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' labors."<sup>18</sup> (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.'"<sup>19</sup>

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**

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<sup>18</sup> Plaintiffs' Complaint, paragraph 12.

<sup>19</sup> 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. ...*<sup>20</sup> (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.*<sup>21</sup> (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."<sup>22</sup>

<sup>20</sup> 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.

<sup>21</sup> 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.

<sup>22</sup> *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:

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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.*<sup>23</sup> (emphasis added)

<sup>23</sup> 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.<sup>24</sup> (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."<sup>25</sup> (emphasis added)

Eventually, BJA published a new program Guidelines in the Federal Register, Vol. 64, No. 66, effective April 7, 1999.<sup>26</sup> BJA's new program Guideline clearly addressed the question

<sup>24</sup> April 29, 1992 letter from Director Ellis to Ms. 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.

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

<sup>26</sup> 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."<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup>

**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).

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

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

<sup>29</sup> *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.

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),<sup>30</sup> 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

<sup>30</sup> 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.<sup>31</sup> 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

<sup>31</sup> 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*.<sup>32</sup> 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.

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*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.<sup>33</sup> 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,

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<sup>32</sup> 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 ..."

<sup>33</sup> 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.<sup>34</sup>" The Plaintiffs then recite the following language from Section

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<sup>34</sup> 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."<sup>35</sup>

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.<sup>36</sup> 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."<sup>37</sup>

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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<sup>35</sup> Id., paragraph 6.

<sup>36</sup> 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         |
| +                                               |             |
| <u>SCDC Surplus Fund Amount</u>                 | <u>1.32</u> |
| 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)

<sup>37</sup> 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."<sup>38</sup>

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) (Ct. App. 2001), quoting *Glover v. Sutt 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

<sup>38</sup> 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),<sup>39</sup> 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 (8<sup>th</sup> 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*.<sup>40</sup>

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

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<sup>39</sup> See note 5, *supra*.

<sup>40</sup> 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.L.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 *Cort 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.<sup>41</sup> 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:

Jan 24

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-

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<sup>41</sup> See *Smith v. Ewalt*, No. CA-95-317-6-OAK, p. 4 (D.S.C. 1996), affirmed 106 F.3d 392 (4<sup>th</sup> 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 8<sup>th</sup> 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.<sup>42</sup> 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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<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup>

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

<sup>44</sup> 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 25<sup>th</sup> percentile, the designation "Mean" corresponds to the 50<sup>th</sup> percentile, and the designation "High" corresponds to the 75<sup>th</sup> 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.<sup>45</sup>

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.<sup>46</sup>

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.<sup>47</sup> 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

<sup>45</sup> 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.

<sup>46</sup> Plaintiffs' Exhibit 24.

<sup>47</sup> 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.<sup>48</sup> ... BJA agrees that as long as the wage is at or above the "low" end of the scale, as determined by (the ESCI, it will be considered as having met PIECP compliance criteria. (emphasis added by Mr. Watkins).<sup>49</sup>

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)**

June 29

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.<sup>50</sup> 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."<sup>51</sup> Both allegations fail for the same reasons.

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

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

<sup>50</sup> See note 7, *supra*.

<sup>51</sup> 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.<sup>52</sup>

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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

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<sup>52</sup> 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.**

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*[Handwritten signature]*  
JOSEPH M. STRICKLAND  
Special Circuit Court Judge  
Fifth Judicial Circuit

Columbia, South Carolina  
October 30, 2002



**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

Linda Campbell, M.D., Appellant,

v.

Allen S. Guignard and Ashlin Potterfield, Respondents.

Appellate Case No. 2013-002272

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Appeal From Richland County  
G. Thomas Cooper, Jr., Circuit Court Judge

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Unpublished Opinion No. 2015-UP-293  
Submitted May 1, 2015 – Filed June 17, 2015

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**AFFIRMED**

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William Gary White, III, of Columbia, and Robert W.  
Rushing, Jr., of Robert W. Rushing, Jr., Attorney at Law,  
of Myrtle Beach, for Appellant.

Charles E. Hill, of Turner Padgett Graham & Laney, PA,  
of Columbia, and Virginia Watson Williams, of Williams  
& Williams, of Orangeburg, for Respondent Allen S.  
Guignard.

Charles E. Hill and Carmelo Barone Sammataro, both of  
Turner Padgett Graham & Laney, PA, of Columbia, and

Virginia Watson Williams, of Williams & Williams, of  
Orangeburg, for Respondent Ashlin Potterfield.

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**PER CURIAM:** Linda Campbell, M.D., appeals the trial court's grant of summary judgment in favor of her former attorney, Ashlin Potterfield. On appeal, Campbell argues the trial court erred in failing to find (1) Potterfield's actions tolled the statute of limitations and (2) Potterfield was estopped from asserting the statute of limitations as a defense.<sup>1</sup> We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438-39 (2003) ("In reviewing the grant of a summary judgment motion, the [appellate court] applies the same standard as the trial court under Rule 56(c), SCRCR . . ."); Rule 56(c), SCRCR (stating summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"); S.C. Code Ann. § 15-3-535 (2005) (stating except for medical malpractice actions initiated under section 15-3-545 of the South Carolina Code (2005), "all actions initiated under [s]ection 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action"); *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) ("Under [South Carolina's] discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." (emphasis omitted) (citations omitted)); *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009) ("[E]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use."); *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 639, 682 S.E.2d 1, 8 (Ct. App. 2009) ("[F]or equitable estoppel to apply, a plaintiff must be aware that a claim might exist prior to the expiration of the statute of limitations, but due to some conduct or representation by the defendant, the plaintiff is

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<sup>1</sup> Because the two issues are closely related, we address them together.

induced . . . to delay in filing suit." (alteration in original) (internal quotation marks omitted)).

**AFFIRMED.**<sup>2</sup>

**THOMAS, KONDUROS, and GEATHERS, JJ., concur.**

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<sup>2</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

Ja Ja D. B. Okera, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2009-135046

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Appeal from the Administrative Law Court  
Carolyn Matthews, Administrative Law Judge

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Memorandum Opinion No. 2012-MO-042  
Submitted October 15, 2012 – Filed October 24, 2012

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**AFFIRMED**

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Ja Ja D.B. Okera, of Ridgeland, *pro se*, Appellant.

Lake E. Summers and Katherine A. Phillips, both of  
Malone Thompson Summers & Ott, of Columbia, for the  
South Carolina Department of Corrections.

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**PER CURIAM:** This is a direct appeal from an order of the Administrative Law Court dismissing the appeal from the Department of Corrections' denial of Appellant's inmate grievance based on his failure to comply with the relevant statute of limitations set forth in the Department's internal policy. We affirm

pursuant to Rule 220(b)(1), SCACR, and the following authorities: *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (1999) (approving Department of Corrections' internal procedures for discipline and grievances, which specify a fifteen-day time limit for filing for grievances).

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ.,  
concur.**

THE STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

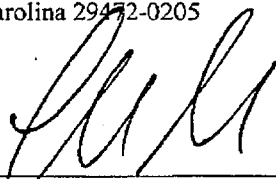
The Honorable Deborah Brooks Durden, Administrative Law Judge

|                                           |   |                               |
|-------------------------------------------|---|-------------------------------|
| Thomas J. Torrence, # 94561,              | ) | Docket No. 12-ALJ-04-00143-AP |
|                                           | ) | Grievance No. ECI-0980-10     |
| Appellant,                                | ) |                               |
|                                           | ) |                               |
| vs.                                       | ) | THE BRIEF OF THE              |
|                                           | ) | SOUTH CAROLINA                |
| South Carolina Department of Corrections, | ) | DEPARTMENT OF                 |
|                                           | ) | CORRECTIONS                   |
|                                           | ) |                               |
| Respondent.                               | ) | <u>CERTIFICATE OF SERVICE</u> |

This is to certify that I have, on June 29, 2015, caused to be served a copy of the Department's Brief, all supporting exhibits, and the allied appendix upon the *pro se* Appellant, via the United States Mail, to the following address:

Thomas J. Torrence, # 94651  
Lieber Correctional Institution [SA-43]  
Post Office Box 205  
Ridgeville, South Carolina 29472-0205

BY:

  
Lake E. Summers  
Malone, Thompson, Summers & Ott LLC  
339 Heyward Street, Suite 200  
Columbia, South Carolina 29201  
Office: (803) 254-3300

Counsel for the South Carolina  
Department of Corrections

|                                           |   |                                  |
|-------------------------------------------|---|----------------------------------|
| Thomas J. Torrence, # 094651,             | ) | Docket No. 12-ALJ-04-00143-AP    |
|                                           | ) | Grievance No. ECI 0980-10        |
| Appellant,                                | ) |                                  |
|                                           | ) | Honorable Deborah Brooks Durden  |
| vs.                                       | ) |                                  |
|                                           | ) | <b>APPELLANT'S MOTION FOR AN</b> |
| South Carolina Department of Corrections, | ) | <b>ORDER FOR RESPONDENTS TO</b>  |
|                                           | ) | <b>COMPLY WITH THIS COURT'S</b>  |
| Respondent.                               | ) | <b>JULY 10, 2014 ORDER FOR</b>   |
| <hr/>                                     | ) | <b>MATERIALS TO BE INCLUDED</b>  |
|                                           | ) | <b>WITH RESPONDENT'S BRIEF</b>   |

1. 1999 House and Senate Bills and amended versions of those bills dealing with the issue of prison industries pay;
2. Copies of specific versions of the South Carolina statutes related to the issues of prison industries pay: S.C. Ann. §24-3-40 (199); §24-3-315 (1999) and §24-3-430 (1999);
3. ALC cases cited in Respondent's briefs or a Westlaw citation to those cases;
4. Materials cited in Respondent's briefs from outside South Carolina, the Fourth Circuit Court of Appeals, or the United States Supreme Court.

*Bennett v. Frank*, 395 F.3d 409 (7<sup>th</sup> Cir. 2005) and *Gordon v. S.C. Dep't of Corrections, et al.*, Case No. 1999-CP-40-3675 (S.C. Cir.Ct., Sept. 7, 2001).

Respectfully submitted,

Thomas Lawrence

Lieber Corr. Inst. SB-23  
P.O. Box 205  
Ridgeville, SC 29472

JUL 16 2015

MALONE, THOMPSON  
SUMMERS & OTT, LLC

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

Thomas J. Torrence, # 094651, )  
 )  
Appellant, )  
 )  
vs. )  
 )  
South Carolina Department of Corrections, )  
 )  
Respondent. )  
\_\_\_\_\_ )

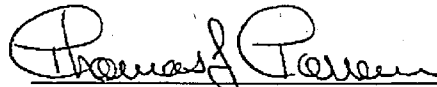
**Docket No. 12-ALJ-04-00143-AP**  
Grievance No. ECI 0980-10

Honorable Deborah Brooks Durden

**CERTIFICATE OF MAILING**

The undersigned *pro se* Appellant, Thomas J. Torrence, hereby certifies that he has served a true and correct copy of APPELLANT'S MOTION FOR AN ORDER FOR RESPONDENTS TO COMPLY WITH THIS COURT'S JULY 10, 2014 ORDER FOR MATERIALS TO BE INCLUDED WITH RESPONDENT'S BRIEF on counsel for Respondents, Lake E. Summers, Esquire, by placing a copy of same in the United States Mail, First-Class postage affixed thereto, this 14th day of July, 2015, addressed as follows:

Lake E. Summers, Esquire  
MALONE, THOMPSON, SUMMERS & OTT, LLC  
339 Heyward Street, Suite 200  
Columbia, South Carolina 29201



Thomas J. Torrence  
#094651  
Lieber Corr. Inst. SB-23  
P.O. Box 205  
Ridgeville, SC 29472

**APPELLANT, *Pro se***



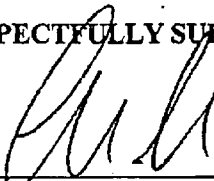
Thomas J. Torrence, # 94561,  
Appellant,  
vs.  
South Carolina Department of Corrections,  
Respondent.

**THE DEPARTMENT'S RESPONSE  
TO THE APPELLANT'S MOTION  
FOR AN ORDER FOR IT TO  
COMPLY WITH THE TERMS OF  
THE ORDER ISSUED BY THE  
COURT ON JULY 10, 2014**

Accordingly, the Department's undersigned counsel shall immediately begin efforts to fully comply with the terms of the Court's July 10, 2014 order. Toward that end, the Department's undersigned counsel includes a copy of the decision by the Seventh Circuit Court of Appeals in Bennett v. Frank, 395 F.3d 409 (7th Cir. 2005) with its instant filing, both of which are being served upon the Appellant.

The Department's undersigned counsel shall make every effort to ensure full compliance with the terms of the Court's July 10, 2014 order no later than Monday, July 27, 2015.

RESPECTFULLY SUBMITTED,



---

Lake E. Summers

**Malone, Thompson, Summers & Ott LLC**

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E-mail: [summers@mtsolvlawfirm.com](mailto:summers@mtsolvlawfirm.com)

Counsel for the South Carolina  
Department of Corrections

Columbia, South Carolina  
July 16, 2015

## 0902

395 F.3d 409  
United States Court of Appeals,  
Seventh Circuit.

Jay R. BENNETT and James W. Knipfer,  
Plaintiffs-Appellants,  
v.  
Matthew J. FRANK, et al., Defendants-Appellees.

No. 04-1959. | Submitted Dec. 10, 2004. | Decided  
Jan. 19, 2005.

**Synopsis**

**Background:** Inmates of private prison, which was under contract to the Wisconsin Department of Corrections, brought action claiming entitlement to the minimum wage provision of the Fair Labor Standards Act (FLSA). The United States District Court for the Western District of Wisconsin, John C. Shabaz, J., found that act did not apply to inmates, and appeal was taken.

**Holding:** The Court of Appeals, Posner, Circuit Judge, held that minimum wage provision of FLSA did not apply to inmates.

**Affirmed.**

**West Headnotes (1)**

**[1] Labor and Employment**  
    ↪ Inmates

Minimum wage provision of Fair Labor Standards Act (FLSA) did not apply to inmates of private prison that was under contract to state department of corrections. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

15 Cases that cite this headnote

**Attorneys and Law Firms**

\*409 Jay R. Bennett, Fox Lake, WI, pro se.

James W. Knipfer, Green Bay, WI, pro se.

Peggy A. Lautenschlager, Office of the Attorney General, Office of the Attorney General, Wisconsin Department of Justice, Michelle M. Affatati, Christopher T. Sundberg, Stafford Rosenbaum, Madison, WI, for Defendants-Appellees.

Before POSNER, KANNE, and SYKES, Circuit Judges.

**Opinion**

POSNER, Circuit Judge.

This appeal presents an issue of some novelty but little difficulty. The plaintiffs, inmates of Whiteville Correctional Facility, a private prison (owned by Corrections Corporation of America) that is under contract to the Wisconsin Department of Corrections, claim entitlement to the minimum wage provision of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. All their other claims have been waived.

The Fair Labor Standards Act is intended for the protection of employees, and prisoners are not employees of their prison, whether it is a public or a private one. So they are not protected by the Act. *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir.1992); *Tourscher v. McCullough*, 184 F.3d 236, 243 (3d Cir.1999); *Villarreal v. Woodham*, 113 F.3d 202, 206 (11th Cir.1997); *Nicastro v. Reno*, 84 F.3d 1446 (D.C.Cir.1996) (per curiam); *Danneskjold v. Hausrath*, 82 F.3d 37, 42 (2d Cir.1996); *Hale v. Arizona*, 993 F.2d 1387, 1395 (9th Cir.1993) (en banc). Oddly, this is so only because of presumed legislative intent and not because of anything in the actual text of the FLSA. The Act unhelpfully defines "employee" as "any individual employed by an employer" and defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency." 29 U.S.C. §§ 203(e)(1), (d). There are some excepted classes of employees, § 203(e)(2), (3), (4), but prisoners are not among them. Although the minimum wage provision of the Act applies only to employees engaged \*410 in, or producing goods for, commerce or employed in an enterprise engaged in or producing goods for commerce, § 206(a)(1), we do not know whether Bennett and Knipfer were engaged in any such activities.

But we have no doubt that the cases we have cited are correct. People are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep. If it puts them to work, it is to offset some of the cost of keeping them, or to keep them out of mischief, or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside. None of these goals is compatible with federal regulation of their wages and hours. The reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to occur to anyone when the legislation was under consideration by Congress.

We cannot see what difference it makes if the prison is private. Ideally, neither the rights nor the liabilities of a state agency should be affected by its decision to contract out a portion of the services that state law obligates it to provide. Otherwise the "make or buy" decision (the decision whether to furnish a service directly or obtain it in the market) would be distorted by considerations irrelevant to the only thing that should matter: the relative efficiency of internal versus contractual provision of services in particular circumstances. But a simpler and more fundamental point is that employment status doesn't depend on whether the alleged employer is a public or a private body. Both public agencies and private firms have employees. But prisoners are not employees.

Our conclusion that the FLSA does not apply to

End of Document

Whiteville's inmates is reinforced by decisions that hold that a state prison does not lose its immunity from liability under the FLSA merely because it has hired a private company to manage the prison labor. *Gambetta v. Prison Rehabilitative Industries & Diversified Enterprises, Inc.*, 112 F.3d 1119, 1124-25 (11th Cir.1997); *Danneskjold v. Hausrath, supra*, 82 F.3d at 43-44. A prison's decision to hire a catering firm to operate its cafeteria should not influence the entitlements of a prisoner who works in the cafeteria.

We have no quarrel with *Watson v. Graves*, 909 F.2d 1549 (5th Cir.1990), or *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir.1984), which hold that the FLSA applies to prisoners working for private companies under work-release programs. Those prisoners weren't working as prison labor, but as free laborers in transition to their expected discharge from the prison. Unlike our plaintiffs.

AFFIRMED.

#### All Citations

395 F.3d 409, 150 Lab.Cas. P 34,940, 10 Wage & Hour Cas.2d (BNA) 394

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

Thomas J. Torrence, # 94561,

Appellant,

vs.

South Carolina Department of Corrections,

Respondent.

Docket No. 12-ALJ-04-00143-AP

Grievance No. ECI-0980-10

**THE DEPARTMENT'S FILING  
IN COMPLIANCE WITH THE ORDER  
ISSUED BY THE COURT ON  
JULY 10, 2014 AND IN FURTHER  
RESPONSE TO THE APPELLANT'S  
MOTION DATED JULY 13, 2015**

By his motion dated July 13, 2015, the Appellant moved the Court to issue an order directing the Respondent, the South Carolina Department of Corrections ["the Department"], to comply with certain terms of an order issued by the Court on July 10, 2014.

The Department's undersigned counsel provided an initial response to the Appellant's July 13, 2015 motion by a July 16, 2015 filing with the Court, and, by his filing, the Department's undersigned counsel pledged to "make every effort to ensure full compliance with the terms of the Court's July 10, 2014 order no later than Monday, July 27, 2015."

As accurately stated by the Appellant in his July 13, 2015 motion, the Court's July 10, 2014 order (pp. 3 - 4) directed the Department, by and through its undersigned counsel, to provide the following materials to the Appellant along with the service of the Department's brief:

1. 1999 House and Senate bills and amended versions of those bills dealing with the issue of prison industries pay;
2. Copies of specific versions of the South Carolina statutes related to the issue of prison industries pay: S.C. Code Ann. § 24-3-40 (1999); § 24-3-315 (1999) and § 24-3-430 (1999);

**FILED**

JUL 27 2015

SC ADMIN. LAW COURT

3. ALC cases cited in [the Department's] briefs or a Westlaw citation to those cases;
4. Materials cited in [the Department's] briefs from outside South Carolina, the Fourth Circuit Court of Appeals, or the United States Supreme Court.

Accordingly, the Department's undersigned counsel respectfully submits the below-itemized materials with its instant filing as the 2<sup>nd</sup> Appendix to the Department's brief filed June 29, 2015 in compliance with the terms of the Court's July 10, 2014 order:

| Item # | Description                                                                                                                                                                        | Appendix      |
|--------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| 1      | 1999 House and Senate bills and amended versions of those bills dealing with the issue of prison industries pay                                                                    | pp. 1 – 34    |
| 2      | Copies of specific versions of the South Carolina statutes related to the issue of prison industries pay: S.C. Code Ann. § 24-3-40 (1999); § 24-3-315 (1999) and § 24-3-430 (1999) | pp. 35 – 39   |
| 3      | ALC cases cited in [the Department's] briefs or a Westlaw citation to those cases                                                                                                  | No such cases |
| 4      | Materials cited in [the Department's] briefs from outside South Carolina, the Fourth Circuit Court of Appeals, or the United States Supreme Court                                  | pp. 40 – 86   |

For the sake of clarity, the Department's undersigned counsel includes copies of the following five (5) decisions in satisfaction of item #4 in the 2<sup>nd</sup> Appendix to the Department's June 29, 2015 brief:

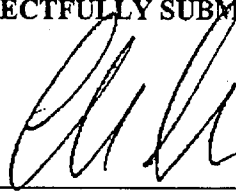
- 1) Bennett v. Frank, 395 F.3d 409 (7th Cir. 2005);
- 2) Carter v. Dutchess Community College, 735 F.2d 8 (2d Cir. 1984);
- 3) Gordon v. S.C. Dep't of Corr., et al., Case No. 1999-CP-40-3675 (S.C. Cir. Ct. Sept. 7, 2001);
- 4) McMaster v. Minnesota, 819 F.Supp. 1429 (D. Minn. 1993); and
- 5) Watson v. Graves, 909 F.2d 1549 (5th Cir. 1990).

The Department's undersigned counsel attached a copy of Bennett v. Frank to his July 16, 2015 filing in response to the Appellant's motion dated July 13, 2015, but, out of an abundance of caution, he includes another copy of the decision in the 2<sup>nd</sup> Appendix.

For the sake of further clarity, the Department's undersigned counsel included copies of the following decisions in satisfaction of item #4 within the 1<sup>st</sup> Appendix which accompanied the Department's June 29, 2015 brief:

- 1) Adkins, et al. v. S.C. Dep't of Corr., Case No. 2000-CP-40-4761 (S.C. Cir. Ct. Oct. 30, 2002);
- 2) Campbell v. Guignard, Unpub. Opinion No. 2015-UP-293 (S.C. Ct. App. June 17, 2015); and
- 3) Olera v. S.C. Dep't of Corr., Memo Opinion No. 2012-MO-042 (S.C. Oct. 24, 2012).

RESPECTFULLY SUBMITTED,



Lake E. Summers

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Counsel for the South Carolina  
Department of Corrections

Columbia, South Carolina  
July 27, 2015



**The Honorable Deborah Brooks Durden, Administrative Law Judge**

Respondent.

**2<sup>ND</sup> APPENDIX TO  
THE BRIEF OF THE  
SOUTH CAROLINA  
DEPARTMENT OF  
CORRECTIONS**

Counsel for the South Carolina  
Department of Corrections

SC ADMIN. LAW COURT

BIL: 384  
 RTN: 114  
 ACN: 68  
 TYP: General Bill GB  
 INB: Senate  
 IND: 19990121  
 PSP: Anderson  
 SPO: Anderson, Washington, Matthews, Patterson, Glover, Ford, Reese  
 DDN: 1:\council\billis\ggs\22116cm99.doc  
 DPB: 19990603  
 LAD: 19990601  
 GOV: S  
 DGA: 19990611  
 SUB: Prisoner confinement, Correction Department to consider proximity to  
 home of convicted person, inmate wages, disposition

HST:

| Body          | Date     | Action Description                                          | Com | Leg Involved |
|---------------|----------|-------------------------------------------------------------|-----|--------------|
|               | 19990702 | Act No. A68                                                 |     |              |
|               | 19990611 | Signed by Governor                                          |     |              |
|               | 19990609 | Ratified R114                                               |     |              |
| <u>Senate</u> | 19990603 | Concurred in House amendment,<br>enrolled for ratification. |     |              |
| <u>House</u>  | 19990602 | Read third time, returned to Senate<br>With amendment       |     |              |
| <u>House</u>  | 19990601 | Amended, read second time                                   |     |              |
| <u>House</u>  | 19990526 | Committee report: Favorable                                 | 27  | H3M          |
| <u>House</u>  | 19990427 | Introduced, read first time,<br>referred to Committee       | 27  | H3M          |
| <u>Senate</u> | 19990422 | Read third time, sent to House                              |     |              |
| <u>Senate</u> | 19990421 | Read second time                                            |     |              |
| <u>Senate</u> | 19990420 | Committee report: Favorable                                 | 03  | SCP          |
| <u>Senate</u> | 19990121 | Introduced, read first time,<br>referred to Committee       | 03  | SCP          |

Printed Versions of This Bill

Ordered Printed on 19990420  
 Ordered Printed on 19990526  
 Ordered Printed on 19990601

TXT:

(A68, R114, S384)

AN ACT TO AMEND SECTION 24-3-30, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE DESIGNATION OF PLACES OF CONFINEMENT FOR A PERSON CONVICTED OF AN OFFENSE AGAINST THE STATE, SO AS TO PROVIDE THAT THE DEPARTMENT OF CORRECTIONS SHALL CONSIDER PROXIMITY TO THE HOME OF THE CONVICTED PERSON IN DESIGNATING THE PLACE OF HIS CONFINEMENT UNDER CERTAIN CIRCUMSTANCES; AND TO AMEND SECTION 24-3-40, AS AMENDED, RELATING TO THE DISPOSITION OF WAGES OF A PRISONER ALLOWED TO WORK AT PAID EMPLOYMENT, SO AS TO REVISE THE AMOUNTS THAT THE DEPARTMENT OF CORRECTIONS DEDUCTS FROM A PRISONER'S GROSS WAGES TO SATISFY HIS RESTITUTION, CHILD SUPPORT, AND OTHER OBLIGATIONS.

Be it enacted by the General Assembly of the State of South Carolina:

**Place of confinement for a prisoner**

SECTION 1. Section 24-3-30 of the 1976 Code, as last amended by Act 7 of 1995, is further amended to read:

"Section 24-3-30. (A) Notwithstanding the provisions of Section 24-3-10 or another provision of law, a person convicted of an offense against the State must be in the custody of the Department of Corrections, and the department shall designate the place of confinement where the sentence must be served. The department may designate as a place of confinement an available, a suitable, and an appropriate institution or facility including, but not limited to, a county jail or work camp whether maintained by the Department of Corrections, or otherwise. However, the consent of the officials in charge of the county institutions so designated must be obtained first. If imprisonment for three months or less is ordered by the court as the punishment, all persons so convicted must be placed in the custody, supervision, and control of the appropriate officials of the county in which the sentence was pronounced, if the county has facilities suitable for confinement. A county or municipality, through mutual agreement or contract, may arrange with another county or municipality or a local regional correctional facility for the detention of its prisoners. The

Department of Corrections must be notified by the county officials concerned not less than six months before the closing of a county prison facility which would result in the transfer of the prisoners of the county facility to facilities of the department.

(B) The department shall consider proximity to the home of a person convicted of an offense against the State in designating the place of his confinement if this placement does not jeopardize security as determined by the department. Proximity to a convicted person's home must not have precedence over departmental criteria for institutional assignment.

(C) Each county administrator, or the equivalent, having charge of county prison facilities, upon the department's designating the county facilities as the place of confinement of a prisoner, may use the prisoner assigned to them for the purpose of working the roads of the county or other public work. A prisoner assigned to the county must be under the custody and control of the administrator or the equivalent during the period to be specified by the director at the time of the prisoner's assignment, but the assignment must be terminated at any time the director determines that the place of confinement is unsuitable or inappropriate, or that the prisoner is employed on other than public works. If, upon termination of the assignment, the prisoner is not returned, habeas corpus lies."

#### **Deductions from the gross wages of a prisoner**

SECTION 2. Section 24-3-40 of the 1976 Code, as last amended by Act 7 of 1995, is further amended to read:

"Section 24-3-40. (A) Unless otherwise provided by law, the employer of a prisoner authorized to work at paid employment in the community under Sections 24-3-20 to 24-3-50 or in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages directly to the Department of Corrections.

The Director of the Department of Corrections 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 the twenty percent referred to in subsection (1) must be placed on deposit with the State Treasurer for credit to a special account to support victim assistance programs established pursuant to the 'Victims of Crime Act of 1984', Public Law 98-473, Title II, Chapter XIV, Section 1404, if the prisoner is engaged in work at paid employment in the community. If the prisoner is employed in a prison industry program, then the twenty percent referred to in subsection (1) must be applied to the South Carolina Victims Compensation Fund.

(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 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).

(B) The Department of Corrections shall return a prisoner's wages held in escrow pursuant to subsection (A) as follows:

(1) A prisoner released without community supervision must be given his escrowed wages upon his release.

(2) A prisoner serving life in prison or sentenced to death shall be given the option of having his escrowed wages included in his estate or distributed to the persons or entities of his choice.

(3) A prisoner released to community supervision shall receive two hundred dollars or the escrow balance, whichever is less, upon his release. Any remaining balance must be disbursed to the Department of Probation, Parole and Pardon Services. The prisoner's supervising agent shall apply this balance toward payment of the prisoner's housing and basic needs and dispense any balance to the prisoner at the end of the supervision period."

**Time effective**

SECTION 3. This act takes effect upon approval by the Governor, and Section 2 applies to wages earned beginning with the first day of the second month after the signature of the Governor.

Ratified the 9<sup>th</sup> day of June, 1999.

Approved the 11<sup>th</sup> day of June, 1999.

**South Carolina General Assembly**  
113th Session, 1999-2000

Download [This Bill](#) in Microsoft Word format

**Bill 384**~~Indicates Matter Stricken~~Indicates New Matter**Current Status**

Bill Number: 384  
 Ratification Number: 114  
 Act Number: 68  
 Type of Legislation: General Bill GB  
 Introducing Body: Senate  
 Introduced Date: 19990121  
 Primary Sponsor: Anderson  
 All Sponsors: Anderson, Washington, Matthews, Patterson, Glover, Ford, Reese  
 Drafted Document Number: 1:\council\hills\ggs\22116cm99.doc  
 Date Bill Passed both Bodies: 19990603  
 Date of Last Amendment: 19990601  
 Governor's Action: S  
 Date of Governor's Action: 19990611  
 Subject: Prisoner confinement, Correction Department to consider proximity to home of convicted person, inmate wages, disposition

**History**

| Body          | Date     | Action Description                                      | Com    | Leg Involved |
|---------------|----------|---------------------------------------------------------|--------|--------------|
| -----         | 19990702 | Act No. A68                                             |        |              |
| -----         | 19990611 | Signed by Governor                                      |        |              |
| -----         | 19990609 | Ratified R114                                           |        |              |
| <u>Senate</u> | 19990603 | Concurred in House amendment, enrolled for ratification |        |              |
| <u>House</u>  | 19990602 | Read third time, returned to Senate With amendment      |        |              |
| <u>House</u>  | 19990601 | Amended, read second time                               |        |              |
| <u>House</u>  | 19990526 | Committee report: Favorable                             | 27 H3M |              |
| <u>House</u>  | 19990427 | Introduced, read first time, referred to Committee      | 27 H3M |              |
| <u>Senate</u> | 19990422 | Read third time, sent to House                          |        |              |
| <u>Senate</u> | 19990421 | Read second time                                        |        |              |
| <u>Senate</u> | 19990420 | Committee report: Favorable                             | 03 SCP |              |
| <u>Senate</u> | 19990121 | Introduced, read first time, referred to Committee      | 03 SCP |              |

**Versions of This Bill**

Revised on April 20, 1999 - Word format  
 Revised on May 26, 1999 - Word format  
 Revised on June 1, 1999 - Word format

View additional legislative information at the LPITS web site.

(Text matches printed bills. Document has been reformatted to meet World Wide Web specifications.)

(A68, R114, S384)

**AN ACT TO AMEND SECTION 24-3-30, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE DESIGNATION OF PLACES OF CONFINEMENT FOR A PERSON CONVICTED OF AN OFFENSE AGAINST THE STATE, SO AS TO PROVIDE THAT THE DEPARTMENT OF CORRECTIONS SHALL CONSIDER PROXIMITY TO THE HOME OF THE CONVICTED PERSON IN DESIGNATING THE PLACE OF HIS CONFINEMENT UNDER CERTAIN CIRCUMSTANCES; AND TO AMEND SECTION 24-3-40, AS AMENDED, RELATING TO THE DISPOSITION OF WAGES OF A PRISONER ALLOWED TO WORK AT PAID EMPLOYMENT, SO AS TO REVISE THE AMOUNTS THAT THE DEPARTMENT OF CORRECTIONS DEDUCTS FROM A PRISONER'S GROSS WAGES TO SATISFY HIS RESTITUTION, CHILD SUPPORT, AND OTHER OBLIGATIONS.**

Be it enacted by the General Assembly of the State of South Carolina:

**Place of confinement for a prisoner**

SECTION 1. Section 24-3-30 of the 1976 Code, as last amended by Act 7 of 1995, is further amended to read:

"Section 24-3-30. (A) Notwithstanding the provisions of Section 24-3-10 or another provision of law, a person convicted of an offense against the State must be in the custody of the Department of Corrections, and the department shall designate the place of confinement where the sentence must be served. The department may designate as a place of confinement an available, a suitable, and an appropriate institution or facility including, but not limited to, a county jail or work camp whether maintained by the Department of Corrections, or otherwise. However, the consent of the officials in charge of the county institutions so designated must be obtained first. If imprisonment for three months or less is ordered by the court as the punishment, all persons so convicted must be placed in the custody, supervision, and control of the appropriate officials of the county in which the sentence was pronounced, if the county has facilities suitable for confinement. A county or municipality, through mutual agreement or contract, may arrange with another county or municipality or a local regional correctional facility for the detention of its prisoners. The Department of Corrections must be notified by the county officials concerned not less than six months before the closing of a county prison facility which would result in the transfer of the prisoners of the county facility to facilities of the department.

(B) The department shall consider proximity to the home of a person convicted of an offense against the State in designating the place of his confinement if this placement does not jeopardize security as determined by the department. Proximity to a convicted person's home must not have precedence over departmental criteria for institutional assignment.

(C) Each county administrator, or the equivalent, having charge of county prison facilities, upon the department's designating the county facilities as the place of confinement of a prisoner, may use the prisoner assigned to them for the purpose of working the roads of the county or other public work. A prisoner assigned to the county must be under the custody and control of the administrator or the equivalent during the period to be specified by the director at the time of the prisoner's assignment, but the assignment must be terminated at any time the director determines that the place of confinement is unsuitable or inappropriate, or that the



prisoner is employed on other than public works. If, upon termination of the assignment, the prisoner is not returned, habeas corpus lies."

**Deductions from the gross wages of a prisoner**

SECTION 2. Section 24-3-40 of the 1976 Code, as last amended by Act 7 of 1995, is further amended to read:

"Section 24-3-40. (A) Unless otherwise provided by law, the employer of a prisoner authorized to work at paid employment in the community under Sections 24-3-20 to 24-3-50 or in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages directly to the Department of Corrections.

The Director of the Department of Corrections 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 the twenty percent referred to in subsection (1) must be placed on deposit with the State Treasurer for credit to a special account to support victim assistance programs established pursuant to the 'Victims of Crime Act of 1984', Public Law 98-473, Title II, Chapter XIV, Section 1404, if the prisoner is engaged in work at paid employment in the community. If the prisoner is employed in a prison industry program, then the twenty percent referred to in subsection (1) must be applied to the South Carolina Victims Compensation Fund.
  - (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 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).
- (B) The Department of Corrections shall return a prisoner's wages held in escrow pursuant to subsection (A)

as follows:

- (1) A prisoner released without community supervision must be given his escrowed wages upon his release.
- (2) A prisoner serving life in prison or sentenced to death shall be given the option of having his escrowed wages included in his estate or distributed to the persons or entities of his choice.
- (3) A prisoner released to community supervision shall receive two hundred dollars or the escrow balance, whichever is less, upon his release. Any remaining balance must be disbursed to the Department of Probation, Parole and Pardon Services. The prisoner's supervising agent shall apply this balance toward payment of the prisoner's housing and basic needs and disburse any balance to the prisoner at the end of the supervision period."

**Time effective**

SECTION 3. This act takes effect upon approval by the Governor, and Section 2 applies to wages earned beginning with the first day of the second month after the signature of the Governor.

Ratified the 9th day of June, 1999.

Approved the 11th day of June, 1999.

---

This web page was last updated on Wednesday, December 9, 2009 at 9:05 A.M.

## South Carolina Legislature

prison industry found 9 times. 0

**S\*384**

Session 113 (1999-2000)

**S\*0384(Rat #0114, Act #0068 of 1999) General Bill, By Anderson, Washington, Matthews, Patterson, Glover, Ford and Reese**

A BILL TO AMEND SECTION 24-3-30, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE DESIGNATION OF PLACES OF CONFINEMENT FOR A PERSON CONVICTED OF AN OFFENSE AGAINST THE STATE, SO AS TO PROVIDE THAT THE DEPARTMENT OF CORRECTIONS SHALL CONSIDER PROXIMITY TO THE HOME OF THE CONVICTED PERSON IN DESIGNATING THE PLACE OF HIS CONFINEMENT UNDER CERTAIN CIRCUMSTANCES; AND TO AMEND SECTION 24-3-40, AS AMENDED, RELATING TO THE DISPOSITION OF WAGES OF A PRISONER ALLOWED TO WORK AT PAID EMPLOYMENT, SO AS TO REVISE THE AMOUNTS THAT THE DEPARTMENT OF CORRECTIONS DEDUCTS FROM A PRISONER'S GROSS WAGES TO SATISFY HIS RESTITUTION, CHILD SUPPORT, AND OTHER OBLIGATIONS.-AMENDED TITLE

|          |        |                                                                                                                                                |
|----------|--------|------------------------------------------------------------------------------------------------------------------------------------------------|
| 01/21/99 | Senate | Introduced and read first time SJ-5                                                                                                            |
| 01/21/99 | Senate | Referred to Committee on Corrections and Penology SJ-5                                                                                         |
| 04/20/99 | Senate | Committee report: Favorable Corrections and Penology SJ-8                                                                                      |
| 04/21/99 | Senate | Read second time SJ-27                                                                                                                         |
| 04/22/99 | Senate | Read third time and sent to House SJ-26                                                                                                        |
| 04/27/99 | House  | Introduced and read first time HJ-11                                                                                                           |
| 04/27/99 | House  | Referred to Committee on Medical, Military, Public and Municipal Affairs HJ-11                                                                 |
| 05/26/99 | House  | Committee report: Favorable Medical, Military, Public and Municipal Affairs HJ-40                                                              |
| 06/01/99 | House  | Amended HJ-55                                                                                                                                  |
| 06/01/99 | House  | Read second time HJ-57                                                                                                                         |
| 06/02/99 | House  | Read third time and returned to Senate with amendments HJ-15                                                                                   |
| 06/03/99 | Senate | Concurred in House amendment and enrolled SJ-78                                                                                                |
| 06/09/99 |        | Ratified R 114                                                                                                                                 |
| 06/11/99 |        | Signed By Governor                                                                                                                             |
| 06/11/99 |        | Effective date 06/11/99 Section 2 applies to wages earned beginning with the first day of the second month after the signature of the Governor |
| 07/07/99 |        | Copies available                                                                                                                               |
| 07/07/99 |        | Act No. 68                                                                                                                                     |

(A58, R114, S384)

AN ACT TO AMEND SECTION 24-3-30, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE DESIGNATION OF PLACES OF CONFINEMENT FOR A PERSON CONVICTED OF AN OFFENSE AGAINST THE STATE, SO AS TO PROVIDE THAT THE DEPARTMENT OF CORRECTIONS SHALL CONSIDER PROXIMITY TO THE HOME OF THE CONVICTED PERSON IN DESIGNATING THE PLACE OF HIS CONFINEMENT UNDER CERTAIN CIRCUMSTANCES; AND TO AMEND SECTION 24-3-40, AS AMENDED, RELATING TO THE DISPOSITION OF WAGES OF A PRISONER ALLOWED TO WORK AT PAID EMPLOYMENT, SO AS TO REVISE THE AMOUNTS THAT THE DEPARTMENT OF CORRECTIONS DEDUCTS FROM A

**PRISONER'S GROSS WAGES TO SATISFY HIS RESTITUTION, CHILD SUPPORT, AND OTHER OBLIGATIONS.**

Be it enacted by the General Assembly of the State of South Carolina:

**Place of confinement for a prisoner**

**SECTION 1.** Section 24-3-30 of the 1976 Code, as last amended by Act 7 of 1995, is further amended to read:

"Section 24-3-30. (A) Notwithstanding the provisions of Section 24-3-10 or another provision of law, a person convicted of an offense against the State must be in the custody of the Department of Corrections, and the department shall designate the place of confinement where the sentence must be served. The department may designate as a place of confinement an available, a suitable, and an appropriate institution or facility including, but not limited to, a county jail or work camp whether maintained by the Department of Corrections, or otherwise. However, the consent of the officials in charge of the county institutions so designated must be obtained first. If imprisonment for three months or less is ordered by the court as the punishment, all persons so convicted must be placed in the custody, supervision, and control of the appropriate officials of the county in which the sentence was pronounced, if the county has facilities suitable for confinement. A county or municipality, through mutual agreement or contract, may arrange with another county or municipality or a local regional correctional facility for the detention of its prisoners. The Department of Corrections must be notified by the county officials concerned not less than six months before the closing of a county prison facility which would result in the transfer of the prisoners of the county facility to facilities of the department.

(B) The department shall consider proximity to the home of a person convicted of an offense against the State in designating the place of his confinement if this placement does not jeopardize security as determined by the department. Proximity to a convicted person's home must not have precedence over departmental criteria for institutional assignment.

(C) Each county administrator, or the equivalent, having charge of county prison facilities, upon the department's designating the county facilities as the place of confinement of a prisoner, may use the prisoner assigned to them for the purpose of working the roads of the county or other public work. A prisoner assigned to the county must be under the custody and control of the administrator or the equivalent during the period to be specified by the director at the time of the prisoner's assignment, but the assignment must be terminated at any time the director determines that the place of confinement is unsuitable or inappropriate, or that the prisoner is employed on other than public works. If, upon termination of the assignment, the prisoner is not returned, habeas corpus lies."

**Deductions from the gross wages of a prisoner**

**SECTION 2.** Section 24-3-40 of the 1976 Code, as last amended by Act 7 of 1995, is further amended to read:

"Section 24-3-40. (A) Unless otherwise provided by law, the employer of a prisoner authorized to work at paid employment in the community under Sections 24-3-20 to 24-3-50 or in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages directly to the Department of Corrections.

The Director of the Department of Corrections 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 the twenty percent referred to in subsection (1) must be placed on deposit with the State Treasurer for credit to a special account to support victim assistance programs established pursuant to the 'Victims of Crime Act of 1984', Public Law 98-473, Title II, Chapter XIV, Section 1404, if the prisoner is engaged in work at paid employment in the community. If the prisoner is employed in a prison industry program, then the twenty percent referred to in subsection (1) must be applied to the South Carolina Victims Compensation Fund.

(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 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).

(B) The Department of Corrections shall return a prisoner's wages held in escrow pursuant to subsection (A) as follows:

(1) A prisoner released without community supervision must be given his escrowed wages upon his release.

(2) A prisoner serving life in prison or sentenced to death shall be given the option of having his escrowed wages included in his estate or distributed to the persons or entities of his choice.

(3) A prisoner released to community supervision shall receive two hundred dollars or the escrow balance, whichever is less, upon his release. Any remaining balance must be disbursed to the Department of Probation, Parole and Pardon Services. The prisoner's supervising agent shall apply this balance toward payment of the prisoner's housing and basic needs and dispense any balance to the prisoner at the end of the supervision period."

**Time effective**

SECTION 3. This act takes effect upon approval by the Governor, and Section 2 applies to wages earned beginning with the first day of the second month after the signature of the Governor.

Ratified the 9th day of June, 1999.

Approved the 11th day of June, 1999.

## South Carolina Legislature

July 17, 2015, 04:21:36 pm

### Session 113 - (1999-2000)

**S\*0384 (Rat #0114, Act #0068 of 1999) General Bill, By Anderson, Washington, Matthews, Patterson, Glover, Ford and Reese**

**Summary:** Prisoner confinement, Correction Department to consider proximity to home of convicted person, inmate wages, disposition

A BILL TO AMEND SECTION 24-3-30, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE DESIGNATION OF PLACES OF CONFINEMENT FOR A PERSON CONVICTED OF AN OFFENSE AGAINST THE STATE, SO AS TO PROVIDE THAT THE DEPARTMENT OF CORRECTIONS SHALL CONSIDER PROXIMITY TO THE HOME OF THE CONVICTED PERSON IN DESIGNATING THE PLACE OF HIS CONFINEMENT UNDER CERTAIN CIRCUMSTANCES; AND TO AMEND SECTION 24-3-40, AS AMENDED, RELATING TO THE DISPOSITION OF WAGES OF A PRISONER ALLOWED TO WORK AT PAID EMPLOYMENT, SO AS TO REVISE THE AMOUNTS THAT THE DEPARTMENT OF CORRECTIONS DEDUCTS FROM A PRISONER'S GROSS WAGES TO SATISFY HIS RESTITUTION, CHILD SUPPORT, AND OTHER OBLIGATIONS.-AMENDED TITLE

|          |        |                                                                                                                                                |
|----------|--------|------------------------------------------------------------------------------------------------------------------------------------------------|
| 01/21/99 | Senate | Introduced and read first time SJ-5                                                                                                            |
| 01/21/99 | Senate | Referred to Committee on Corrections and Penology SJ-5                                                                                         |
| 04/20/99 | Senate | Committee report: Favorable Corrections and Penology SJ-8                                                                                      |
| 04/21/99 | Senate | Read second time SJ-27                                                                                                                         |
| 04/22/99 | Senate | Read third time and sent to House SJ-26                                                                                                        |
| 04/27/99 | House  | Introduced and read first time HJ-11                                                                                                           |
| 04/27/99 | House  | Referred to Committee on Medical, Military, Public and Municipal Affairs HJ-11                                                                 |
| 05/26/99 | House  | Committee report: Favorable Medical, Military, Public and Municipal Affairs HJ-40                                                              |
| 06/01/99 | House  | Amended HJ-55                                                                                                                                  |
| 06/01/99 | House  | Read second time HJ-57                                                                                                                         |
| 06/02/99 | House  | Read third time and returned to Senate with amendments HJ-15                                                                                   |
| 06/03/99 | Senate | Concurred in House amendment and enrolled SJ-78                                                                                                |
| 06/09/99 |        | Ratified R 114                                                                                                                                 |
| 06/11/99 |        | Signed By Governor                                                                                                                             |
| 06/11/99 |        | Effective date 06/11/99 Section 2 applies to wages earned beginning with the first day of the second month after the signature of the Governor |
| 07/07/99 |        | Copies available                                                                                                                               |
| 07/07/99 |        | Act No. 68                                                                                                                                     |

1 ~~Indicates Matter Stricken~~

2 Indicates New Matter

3

4 COMMITTEE REPORT

5 April 20, 1999

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7

**S. 384**

8

9 Introduced by Senators Anderson, Washington, Matthews,  
10 Patterson, Glover, Ford and Reese

11

12 S. Printed 4/20/99--S.

13 Read the first time January 21, 1999.

14

15

16 **THE COMMITTEE ON CORRECTIONS AND PENOLOGY**

17 To whom was referred a Bill (S. 384), to amend Section  
18 24-3-30, as amended, Code of Laws of South Carolina, 1976,  
19 relating to the designation of places of confinement for a person  
20 convicted of an offense against the State, etc., respectfully

21

**REPORT:**

22 That they have duly and carefully considered the same, and  
23 recommend that the same do pass:

24

25 DAVID L. THOMAS, for Committee.

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[384-1]

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9                   **A BILL**  
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11 TO AMEND SECTION 24-3-30, AS AMENDED, CODE OF  
12 LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE  
13 DESIGNATION OF PLACES OF CONFINEMENT FOR A  
14 PERSON CONVICTED OF AN OFFENSE AGAINST THE  
15 STATE, SO AS TO PROVIDE THAT THE DEPARTMENT OF  
16 CORRECTIONS SHALL CONSIDER PROXIMITY TO THE  
17 HOME OF THE CONVICTED PERSON IN DESIGNATING  
18 THE PLACE OF HIS CONFINEMENT UNDER CERTAIN  
19 CIRCUMSTANCES.  
20

21 Be it enacted by the General Assembly of the State of South  
22 Carolina:  
23

24 SECTION 1. Section 24-3-30 of the 1976 Code, as last amended  
25 by Act 7 of 1995, is further amended to read:  
26

27 "Section 24-3-30. (A) Notwithstanding the provisions of  
28 Section 24-3-10 or another provision of law, a person convicted of  
29 an offense against the State must be in the custody of the  
30 Department of Corrections ~~of the State~~, and the department shall  
31 designate the place of confinement where the sentence must be  
32 served. The department may designate as a place of confinement  
33 an available, a suitable, and an appropriate institution or facility  
34 including, but not limited to, a county jail or work camp whether  
35 maintained by the Department of Corrections or otherwise.  
36 However, the consent of the officials in charge of the county  
37 institutions so designated must be obtained first. If imprisonment  
38 for three months or less is ordered by the court as the punishment,  
39 all persons so convicted must be placed in the custody,  
40 supervision, and control of the appropriate officials of the county  
41 in which the sentence was pronounced, if the county has facilities  
42 suitable for confinement. A county or municipality, through

[384]

1



1 mutual agreement or contract, may arrange with another county or  
2 municipality or a local regional correctional facility for the  
3 detention of its prisoners. The Department of Corrections must be  
4 notified by the county officials concerned not less than six months  
5 before the closing of a county prison facility which would result in  
6 the transfer of the prisoners of the county facility to facilities of the  
7 department.

8 (B) The department shall consider proximity to the home of a  
9 person convicted of an offense against the State in designating the  
10 place of his confinement if this placement does not jeopardize  
11 security as determined by the department. Proximity to a  
12 convicted person's home must not have precedence over  
13 departmental criteria for institutional assignment.

14 (C) Each county administrator, or the equivalent, having charge  
15 of county prison facilities, upon the department's designating the  
16 county facilities as the place of confinement of a prisoner, may use  
17 the prisoner assigned to them for the purpose of working the roads  
18 of the county or other public work. A prisoner so assigned to the  
19 county must be under the custody and control of the administrator  
20 or the equivalent during the period to be specified by the director  
21 at the time of the prisoner's assignment, but the assignment must  
22 be terminated at any time the director determines that the place of  
23 confinement is unsuitable or inappropriate, or that the prisoner is  
24 employed on other than public works. If, upon termination of the  
25 assignment, the prisoner is not returned, habeas corpus lies."

26  
27 SECTION 2. This act takes effect upon approval by the Governor.

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1 ~~Indicates Matter Stricken~~

2 ~~Indicates New Matter~~

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4 COMMITTEE REPORT

5 May 26, 1999

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**S. 384**

8

9 Introduced by Senators Anderson, Washington, Matthews,  
10 Patterson, Glover, Ford and Reese

11

12 S. Printed 5/26/99--H.

13 Read the first time April 27, 1999.

14

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16 **THE COMMITTEE ON MEDICAL, MILITARY, PUBLIC,  
17 AND MUNICIPAL AFFAIRS**

18 To whom was referred a Bill (S. 384), to amend Section  
19 24-3-30, as amended, Code of Laws of South Carolina, 1976,  
20 relating to the designation of places of confinement for a person  
21 convicted of an offense against the State, etc., respectfully

22 **REPORT:**

23 That they have duly and carefully considered the same, and  
24 recommend that the same do pass:

25

26 JOE E. BROWN, for Committee.

27

28 **STATEMENT OF ESTIMATED FISCAL IMPACT**  
29 **ESTIMATED FISCAL IMPACT ON GENERAL FUND**  
30 **EXPENDITURES IS:**

31 \$0 (No additional expenditures or savings are expected)

32 **ESTIMATED FISCAL IMPACT ON FEDERAL & OTHER**  
33 **FUND EXPENDITURES IS:**

34 \$0 (No additional expenditures or savings are expected)

35 **EXPLANATION OF IMPACT:**

36 A review of this bill by the department indicates there will be no  
37 impact to the General Fund of the State nor on federal and/or other  
38 funds.

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Approved By:  
Don Addy  
Office of State Budget

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9 **A BILL**

10  
11 TO AMEND SECTION 24-3-30, AS AMENDED, CODE OF  
12 LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE  
13 DESIGNATION OF PLACES OF CONFINEMENT FOR A  
14 PERSON CONVICTED OF AN OFFENSE AGAINST THE  
15 STATE, SO AS TO PROVIDE THAT THE DEPARTMENT OF  
16 CORRECTIONS SHALL CONSIDER PROXIMITY TO THE  
17 HOME OF THE CONVICTED PERSON IN DESIGNATING  
18 THE PLACE OF HIS CONFINEMENT UNDER CERTAIN  
19 CIRCUMSTANCES.

20  
21 Be it enacted by the General Assembly of the State of South  
22 Carolina:

23  
24 SECTION 1. Section 24-3-30 of the 1976 Code, as last amended  
25 by Act 7 of 1995, is further amended to read:

26  
27 "Section 24-3-30. (A) Notwithstanding the provisions of  
28 Section 24-3-10 or another provision of law, a person convicted of  
29 an offense against the State must be in the custody of the  
30 Department of Corrections of the State, and the department shall  
31 designate the place of confinement where the sentence must be  
32 served. The department may designate as a place of confinement  
33 an available, a suitable, and an appropriate institution or facility  
34 including, but not limited to, a county jail or work camp whether  
35 maintained by the Department of Corrections, or otherwise.  
36 However, the consent of the officials in charge of the county  
37 institutions so designated must be obtained first. If imprisonment  
38 for three months or less is ordered by the court as the punishment,  
39 all persons so convicted must be placed in the custody,  
40 supervision, and control of the appropriate officials of the county  
41 in which the sentence was pronounced, if the county has facilities  
42 suitable for confinement. A county or municipality, through

[384]

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1 mutual agreement or contract, may arrange with another county or  
2 municipality or a local regional correctional facility for the  
3 detention of its prisoners. The Department of Corrections must be  
4 notified by the county officials concerned not less than six months  
5 before the closing of a county prison facility which would result in  
6 the transfer of the prisoners of the county facility to facilities of the  
7 department.

8 (B) The department shall consider proximity to the home of a  
9 person convicted of an offense against the State in designating the  
10 place of his confinement if this placement does not jeopardize  
11 security as determined by the department. Proximity to a  
12 convicted person's home must not have precedence over  
13 departmental criteria for institutional assignment.

14 (C) Each county administrator, or the equivalent, having charge  
15 of county prison facilities, upon the department's designating the  
16 county facilities as the place of confinement of a prisoner, may use  
17 the prisoner assigned to them for the purpose of working the roads  
18 of the county or other public work. A prisoner so assigned to the  
19 county must be under the custody and control of the administrator  
20 or the equivalent during the period to be specified by the director  
21 at the time of the prisoner's assignment, but the assignment must  
22 be terminated at any time the director determines that the place of  
23 confinement is unsuitable or inappropriate, or that the prisoner is  
24 employed on other than public works. If, upon termination of the  
25 assignment, the prisoner is not returned, habeas corpus lies."

26  
27 SECTION 2. This act takes effect upon approval by the Governor.  
28

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[384]

2

1 ~~Indicates Matter Stricken~~

2 Indicates New Matter

3

4 AMENDED

5 June 1, 1999

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**S. 384**

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9 Introduced by Senators Anderson, Washington, Matthews,  
10 Patterson, Glover, Ford and Reese

11

12 S. Printed 6/1/99--H.

13 Read the first time April 27, 1999.

14

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[384-1]

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9 **A BILL**

10  
11 TO AMEND SECTION 24-3-30, AS AMENDED, CODE OF  
12 LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE  
13 DESIGNATION OF PLACES OF CONFINEMENT FOR A  
14 PERSON CONVICTED OF AN OFFENSE AGAINST THE  
15 STATE, SO AS TO PROVIDE THAT THE DEPARTMENT OF  
16 CORRECTIONS SHALL CONSIDER PROXIMITY TO THE  
17 HOME OF THE CONVICTED PERSON IN DESIGNATING  
18 THE PLACE OF HIS CONFINEMENT UNDER CERTAIN  
19 CIRCUMSTANCES.

20 Amend Title To Conform

21  
22 Be it enacted by the General Assembly of the State of South  
23 Carolina:

24  
25 SECTION 1. Section 24-3-30 of the 1976 Code, as last amended  
26 by Act 7 of 1995, is further amended to read:

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29 Section 24-3-10 or another provision of law, a person convicted of  
30 an offense against the State must be in the custody of the  
31 Department of Corrections of the State, and the department shall  
32 designate the place of confinement where the sentence must be  
33 served. The department may designate as a place of confinement  
34 an available, a suitable, and an appropriate institution or facility  
35 including, but not limited to, a county jail or work camp whether  
36 maintained by the Department of Corrections, or otherwise.  
37 However, the consent of the officials in charge of the county  
38 institutions so designated must be obtained first. If imprisonment  
39 for three months or less is ordered by the court as the punishment,  
40 all persons so convicted must be placed in the custody,  
41 supervision, and control of the appropriate officials of the county  
42 in which the sentence was pronounced, if the county has facilities

[384]

1

1 suitable for confinement. A county or municipality, through  
2 mutual agreement or contract, may arrange with another county or  
3 municipality or a local regional correctional facility for the  
4 detention of its prisoners. The Department of Corrections must be  
5 notified by the county officials concerned not less than six months  
6 before the closing of a county prison facility which would result in  
7 the transfer of the prisoners of the county facility to facilities of the  
8 department.

9 (B) The department shall consider proximity to the home of a  
10 person convicted of an offense against the State in designating the  
11 place of his confinement if this placement does not jeopardize  
12 security as determined by the department. Proximity to a  
13 convicted person's home must not have precedence over  
14 departmental criteria for institutional assignment.

15 (C) Each county administrator, or the equivalent, having charge  
16 of county prison facilities, upon the department's designating the  
17 county facilities as the place of confinement of a prisoner, may use  
18 the prisoner assigned to them for the purpose of working the roads  
19 of the county or other public work. A prisoner so assigned to the  
20 county must be under the custody and control of the administrator  
21 or the equivalent during the period to be specified by the director  
22 at the time of the prisoner's assignment, but the assignment must  
23 be terminated at any time the director determines that the place of  
24 confinement is unsuitable or inappropriate, or that the prisoner is  
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31 "Section 24-3-40. (A) Unless otherwise provided by law, the  
32 employer of a prisoner authorized to work at paid employment in  
33 the community under Sections 24-3-20 to 24-3-50 or in a prison  
34 industry program provided under Article 3 of this chapter shall pay  
35 the prisoner's wages directly to the Department of Corrections.  
36 ~~The Director of the Department of Corrections shall withhold five~~  
37 ~~percent of the gross wages and promptly place these funds on~~  
38 ~~deposit with the State Treasurer for credit to a special account to~~  
39 ~~support victim assistance programs established pursuant to the~~  
40 ~~"Victims of Crime Act of 1984, Public Law 98-473, Title II,~~  
41 ~~Chapter XIV, Section 1404". The director may withhold from the~~  
42 ~~wages costs incident to the prisoner's confinement as the~~  
43 ~~Department of Corrections considers appropriate and reasonable.~~

[384]

2

1 These withholdings must be deposited to the maintenance account  
2 of the Department of Corrections. The balance of the wages, in the  
3 discretion of the director and in proportions determined by the  
4 director, may be disbursed to the prisoner, the prisoner's  
5 dependents, and the victim of the crime or deposited to the credit  
6 of the prisoner.

7 The director of the Department of Corrections shall deduct the  
8 following amounts from the gross wages of the prisoner:

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

18 (2) If restitution to a particular victim or victims has not  
19 been ordered by the court, or if court-ordered restitution to a  
20 particular victim or victims has been satisfied, then the twenty  
21 percent referred to in subsection (1) must be placed on deposit with  
22 the State Treasurer for credit to a special account to support victim  
23 assistance programs established pursuant to the 'Victims of Crime  
24 Act of 1984', Public Law 98-473, Title II, Chapter XIV, Section  
25 1404, if the prisoner is engaged in work at paid employment in the  
26 community. If the prisoner is employed in a prison industry  
27 program, then the twenty percent referred to in subsection (1) must  
28 be applied to the South Carolina Victims Compensation Fund.

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

[384]

3



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

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

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

11    (B) The Department of Corrections shall return a prisoner's  
12    wages held in escrow pursuant to subsection (A) as follows:

13    (1) A prisoner released without community supervision must  
14    be given his escrowed wages upon his release.

15    (2) A prisoner serving life in prison or sentenced to death  
16    shall be given the option of having his escrowed wages included in  
17    his estate or distributed to the persons or entities of his choice.

18    (3) A prisoner released to community supervision shall  
19    receive two hundred dollars or the escrow balance, whichever is  
20    less, upon his release. Any remaining balance must be dispersed to  
21    the Department of Probation, Parole, and Pardon Services. The  
22    prisoner's supervising agent shall apply this balance toward  
23    payment of the prisoner's housing and basic needs and disburse  
24    any balance to the prisoner at the end of the supervision period."

25  
26    SECTION 3. This act takes effect upon approval by the Governor  
27    and Section 2 applies to wages earned beginning with the first day  
28    of the second month after the signature of the Governor.  
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## South Carolina Legislature

### H 3216

Session 113 (1999-2000)

#### H 3216 General Bill, By Campsen and Rodgers

A BILL TO AMEND SECTION 24-3-40, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE DISPOSITION OF WAGES OF A PRISONER ALLOWED TO WORK AT PAID EMPLOYMENT SO AS TO PROVIDE A DISTRIBUTION PLAN FOR THE WAGES THAT INCLUDES PAYMENTS FOR VICTIM RESTITUTION, CHILD SUPPORT, PRISONER ROOM AND BOARD, PRISONER INCIDENTALS, AND PRISONER ESCROW ACCOUNT.

01/06/99 House Prefiled  
01/06/99 House Referred to Committee on Judiciary  
01/12/99 House Introduced and read first time HJ-80  
01/12/99 House Referred to Committee on Judiciary HJ-80  
04/27/99 House Committee report: Favorable with amendment  
Judiciary HJ-3  
04/28/99 House Debate interrupted HJ-37  
04/29/99 House Requests for debate-Rep(s). Scott, Pinckney,  
Lloyd, Parks, Clyburn, Howard, Jennings,  
Moody-Lawrence, Lee, Cobb-Hunter, Phillips,  
McMahand, D. Smith, Campsen, Fleming, Woodrum,  
Altman, Whipper and Kennedy HJ-20  
05/06/99 House Requests for debate removed-Rep(s). Jennings HJ-20  
05/26/99 House Amended HJ-116  
05/26/99 House Read second time HJ-124  
05/26/99 House Roll call Yeas-93 Nays-7 HJ-124  
05/27/99 House Read third time and sent to Senate HJ-132  
06/01/99 Senate Introduced and read first time SJ-15  
06/01/99 Senate Referred to Committee on Corrections and Penology SJ-15

Indicates Matter Stricken

Indicates New Matter

AMENDED

May 26, 1999

H. 3216

Introduced by Reps. Campsen and Rodgers

S. Printed 5/26/99-H.

Read the first time January 12, 1999.

## A BILL

TO AMEND SECTION 24-3-40, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE DISPOSITION OF WAGES OF A PRISONER ALLOWED TO WORK AT PAID EMPLOYMENT SO AS TO PROVIDE A DISTRIBUTION PLAN FOR THE WAGES THAT INCLUDES PAYMENTS FOR VICTIM RESTITUTION, CHILD SUPPORT, PRISONER ROOM AND BOARD, PRISONER INCIDENTALS, AND PRISONER ESCROW ACCOUNT.

Amend Title To Conform

Be It enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 24-3-40 of the 1976 Code, as last amended by Act 7 of 1995, is further amended to read:

"Section 24-3-40. (A) Unless otherwise provided by law, the employer of a prisoner authorized to work at paid employment in the community under Sections 24-3-20 to 24-3-50 or in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages directly to the Department of Corrections. The Director of the Department of Corrections shall withhold five percent of the gross wages and promptly place these funds on deposit with the State Treasurer for credit to a special account to support victim assistance programs established pursuant to the "Victims of Crime Act of 1984, Public Law 98-473, Title II, Chapter XIV, Section 1404". The director may withhold from the wages costs incident to the prisoner's confinement as the Department of Corrections considers appropriate and reasonable. These withholdings must be deposited to the maintenance account of the Department of Corrections. The balance of the wages, in the discretion of the director and in proportions determined by the director, may be disbursed to the prisoner, the prisoner's dependents, and the victim of the crime or deposited to the credit of the prisoner.

The Director of the Department of Corrections 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 the twenty percent referred to in subsection (1) must be placed on deposit with the State Treasurer for credit to a special account to support victim assistance programs established pursuant to the "Victims of Crime Act of 1984", Public Law 98-473, Title II, Chapter XIV, Section 1404, if the prisoner is engaged in work at paid employment in the community. If the prisoner is employed in a prison industry program, then the twenty percent referred to in subsection (1) must be applied to the South Carolina Victims Compensation Fund.

(3) Forty-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 appropriate clerks of court for application toward payment of child support obligations. If there are no child support obligations, then one-half of the forty-percent referred to in this subsection must be used by the Department of Corrections to defray the cost of the prisoner's room and board. This is in addition to the fifteen percent used for the same purpose in subsection (4). Furthermore, if there are no child support obligations, then the other half of the forty percent referred to in this subsection must be made available to the inmate during his incarceration for the purchase of incidentals. This is in addition to the fifteen-percent used for the same purpose in subsection (5).

(4) Fifteen percent must be used by the Department of Corrections to defray the cost of the prisoner's room and board.

(5) Fifteen 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.

(6) Ten percent must be held in an interest bearing escrow account for the benefit of the prisoner.

(7) 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.

(B) The Department of Corrections shall return a prisoner's wages held in escrow pursuant to subsection (A) as follows:

(1) A prisoner released without community supervision must be given his escrowed wages upon his release.

(2) A prisoner serving life in prison shall be given the option of having his escrowed wages included in his estate or distributed to the persons or entities of his choice.

(3) A prisoner released to community supervision shall receive two hundred dollars or the escrow balance, whichever is less, upon his release. Any remaining balance must be dispersed to the Department of Probation, Parole, and Pardon Services. The prisoner's supervising agent shall apply this balance toward payment of the prisoner's housing and basic needs and dispense any balance to the prisoner at the end of the supervision period."

SECTION 2. This act takes effect upon approval by the Governor and applies to wages earned beginning with the first day of the second month after the signature of the Governor.

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Legislative Services Agency  
<http://www.sccourts.gov>

## South Carolina Legislature

prison industry found 0 times.

**H 3562**

Session 113 (1989-2000)

**H 3562 General Bill, By Fleming, Vaughn, Knotts, Robinson, Walker, Edge, Kelley, Tripp, Hinson, Whatley, Limehouse, Young-Brickell, Law, Hayes, Witherspoon, Klauber, Riser, Altman, Hawkins, Leach, Mason, McCraw, McKay, Phillips, Rice, Simrill, Rodgers, Sandifer and Stille**

A BILL TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 24-13-70 SO AS TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS AND A PERSON CHARGED WITH THE OPERATION OF A DETENTION FACILITY SHALL REQUIRE CERTAIN INMATES TO WORK, RESTRICT THE TYPE OF TELEVISION SHOWS AN INMATE MAY VIEW, AND REQUIRE CERTAIN INMATES TO WORK ON CHAIN GANGS; TO AMEND SECTION 24-3-40, AS AMENDED, RELATING TO THE DISPOSITION OF WAGES OF PRISONERS ALLOWED TO WORK AT PAID EMPLOYMENT, SO AS TO REVISE THE DISPOSITION OF WAGES BY THE DEPARTMENT OF CORRECTIONS; AND TO AMEND SECTION 24-13-80, AS AMENDED, RELATING TO CERTAIN COSTS TO BE BORNE BY INMATES, SO AS TO PROVIDE A DEFINITION FOR "ASSETS", "COSTS OF CARE", AND "DEPARTMENT", TO REVISE THE PROCEDURE THAT INMATES MUST COMPLY WITH TO SATISFY THESE COSTS, AND TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS SHALL PERFORM A STUDY TO DETERMINE THE COSTS SAVINGS THE DEPARTMENT COULD REALIZE BY SERVING INMATES "MEALS READY TO EAT".

02/18/99 House Introduced and read first time HJ-3

02/18/99 House Referred to Committee on Judiciary HJ-3

### A BILL

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 24-13-70 SO AS TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS AND A PERSON CHARGED WITH THE OPERATION OF A DETENTION FACILITY SHALL REQUIRE CERTAIN INMATES TO WORK, RESTRICT THE TYPE OF TELEVISION SHOWS AN INMATE MAY VIEW, AND REQUIRE CERTAIN INMATES TO WORK ON CHAIN GANGS; TO AMEND SECTION 24-3-40, AS AMENDED, RELATING TO THE DISPOSITION OF WAGES OF PRISONERS ALLOWED TO WORK AT PAID EMPLOYMENT, SO AS TO REVISE THE DISPOSITION OF WAGES BY THE DEPARTMENT OF CORRECTIONS; AND TO AMEND SECTION 24-13-80, AS AMENDED, RELATING TO CERTAIN COSTS TO BE BORNE BY INMATES, SO AS TO PROVIDE A DEFINITION FOR "ASSETS", "COSTS OF CARE", AND "DEPARTMENT", TO REVISE THE PROCEDURE THAT INMATES MUST COMPLY WITH TO SATISFY THESE COSTS, AND TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS SHALL PERFORM A STUDY TO DETERMINE THE COSTS SAVINGS THE DEPARTMENT COULD REALIZE BY SERVING INMATES "MEALS READY TO EAT".

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. The 1976 Code is amended by adding:

"Section 24-13-70. The Director of the Department of Corrections and a person charged with the operation of a detention facility:

(1) shall require convicted inmates in an institution of the State Department of Corrections or a county jail to engage in a work program unless they are considered a security risk or physically or mentally incapacitated;

(2) shall require that no cable television is provided to inmates, that inmates are encouraged to view educational programs, and that programs of a violent nature are not allowed; and

(3) may assign inmates convicted of nonviolent offenses, or eligible for custody in minimum security institutions, to work on chain gangs, with or without shackles."

SECTION 2. Section 24-3-40 of the 1976 Code, as last amended by Section 54, Part II, Act 7 of 1995, is further amended to read:

"Section 24-3-40. (A) Unless otherwise provided by law, the employer of a prisoner authorized to work at paid employment in the community under Sections 24-3-20 to 24-3-50 or in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages directly to the Department of Corrections. The Director of the Department of Corrections shall withhold five percent of the gross wages and promptly place these funds on deposit with the State Treasurer for credit to a special account to support victim assistance programs established pursuant to the 'Victims of Crime Act of 1984', Public Law 98-473, Title II, Chapter XIV, Section 1404". The director may withhold from the wages costs incident to the prisoner's confinement as the Department of Corrections considers appropriate and reasonable. These withholdings must be deposited to the maintenance account of the Department of Corrections. The balance of the wages, in the discretion of the director and in proportions determined by the director, may be disbursed to the prisoner, the prisoner's dependents, and the victim of the crime or deposited to the credit of the prisoner.

The director of the Department of Corrections shall deduct those amounts, if any, required by law for federal and state tax withholdings and then shall distribute the balance as follows:

(1) If restitution to a particular victim or victims has been ordered by the court, then thirty-five 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 thirty-five 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 thirty-five percent to meet the payment schedule 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 the thirty-five percent referred to in subsection (A)(1) of this section must be placed on deposit with the State Treasurer for credit to a special account to support victim assistance programs established pursuant to the 'Victims of Crime Act of 1984', Public Law 98-473, Title II, Chapter XIV, Section 1404.

(3) In addition to the restitution payments of subsections (A)(1) and (A)(2) of this section, five percent must be deposited with the State Treasurer for credit to a special account to support victim assistance programs established pursuant to the 'Victims of Crime Act of 1984', Public Law 98-473, Title II, Chapter XIV, Section 1404.

(4) Twenty percent must be used to pay the prisoner's child support obligations pursuant to law, court order, or agreement by the prisoner. These child support monies must be disbursed to the appropriate clerks of court for application toward payment of child support obligations. If there are no child support obligations, then one-half of the twenty percent referred to in this subsection must be used by the Department of Corrections to defray the cost of the prisoner's room and board. This is in addition to the twenty percent used for the same purpose in subsection (A)(5) of this section. Furthermore, if there are no child support obligations, then the other half of the twenty percent referred to in this subsection must be held in an escrow account for the benefit of the prisoner. This is in addition to the ten percent used for the same

purpose in subsection (A)(7) of this section.

(5) Twenty percent must be used by the Department of Corrections to defray the cost of the prisoner's room and board.

(6) Ten percent must be available to the inmate during his incarceration for the purchase of incidentals.

(7) Ten percent must be held in an escrow account for the benefit of the prisoner.

(B) The Department of Corrections shall return a prisoner's wages held in escrow pursuant to subsections (A)(4) and (A)(7) of this section as follows:

(1) A prisoner released without community supervision must be given escrowed wages upon his release.

(2) A prisoner serving life in prison shall have his escrowed wages included in his estate upon death.

(3) A prisoner released to community supervision shall receive two hundred dollars or the escrow balance, whichever is less, upon his release. Any remaining balance must be dispersed to the Department of Probation, Parole, and Pardon Services. The prisoner's supervising agent shall apply this balance toward payment of the prisoner's housing and basic needs and disperse any balance to the prisoner at the end of the supervision period."

SECTION 3: Section 24-13-80 of the 1976 Code, as last amended by Section 44; Part II, Act 7 of 1995, is further amended to read:

"Section 24-13-80. (A) As used in this section:

(1) 'Detention facility' means a municipal or county jail or state correctional facility used for the detention of persons charged with or convicted of a felony, misdemeanor, municipal offense, or violation of a court order.

(2) 'Inmate' means a person who is detained in a detention facility by reason of being charged with or convicted of a felony, a misdemeanor, a municipal offense, or violation of a court order.

(3) 'Medical treatment' means each visit initiated by the inmate to an institutional physician, physician's extender including a physician's assistant or a nurse practitioner, dentist, optometrist, or psychiatrist for examination or treatment.

(4) 'Administrator' means the county administrator, city administrator, or the chief administrative officer of a county or municipality.

(5) 'Director' means the agency head of the Department of Corrections.

(6)(a) 'Assets' means property, tangible or intangible, real or personal, belonging to or due an inmate or a former inmate, including income or payments to the inmate from the Social Security Administration, Workers' Compensation Commission, Veterans' Administration, pension benefits, previously earned salary or wages, bonuses, annuities, retirement benefits, or from another source including the following:

(i) monies or other tangible assets received by the inmate as a result of a settlement of a claim against the State, a state agency, or a claim against an employee or independent contractor arising from and in the scope of the employee's or independent contractor's official duties to the State or a state agency;

(ii) a money judgment received by the inmate from the State as a result of a civil action in which the State, a state agency, or a state employee, or independent contractor where the judgment arose from a claim arising from the conduct of official duties on behalf of the State by the employee, a subcontractor, or for a state agency;

(iii) a current stream of income from any source including a salary, wage, disability, retirement, pension, insurance, or annuity benefit, or similar payments.

(b) 'Assets' shall not include:

(i) the homestead of the inmate up to fifty thousand dollars in value; or

(ii) monies saved by the inmate from wages and bonuses up to two thousand five hundred dollars paid the inmate while he is confined in a detention facility.

(7) 'Cost of care' means the cost to the department for providing transportation, room, board, clothing, security, medical, and other living expenses of inmates under the jurisdiction of the department, as determined by the director.

(8) 'Department' means the Department of Corrections.

(B) The administrator or director, whichever is appropriate, may establish, by rules, criteria for a reasonable deduction from money credited to the account of an inmate to:

(1) repay the costs of:

(a) public property wilfully damaged or destroyed by the inmate during his incarceration;

(b) medical treatment for injuries inflicted by the inmate upon himself or others;

(c) searching for and apprehending the inmate when he escapes or attempts to escape. The costs must be limited to those extraordinary costs incurred as a consequence of the escape; or

(d) quelling a riot or other disturbance in which the inmate is unlawfully involved;

(2) defray the costs paid by a municipality or county for elective medical treatment for an inmate, which has been requested by him, if the deduction does not exceed five dollars for each occurrence of treatment received by the inmate at the inmate's request. If the balance in an inmate's account is five dollars or less, the fee must not be charged. This item does not apply to medical costs incurred as a result of injuries sustained by an inmate or other medically necessary treatment for which that inmate is determined not to be responsible.

(C) All sums collected for medical treatment must be reimbursed to the inmate if the inmate is acquitted or otherwise exonerated of all charges for which the inmate was being held.

(D) The detention facility may initiate an action for collection of recovery of medical costs incurred pursuant to this section against an inmate upon his release or his estate if the inmate was executed or died while in the custody of the detention facility.

(E) The department shall develop a form which must be used by the department to obtain information from an inmate regarding his assets.

(F) The form must be submitted to each inmate sentenced to imprisonment under the jurisdiction of the department. The form may be resubmitted to an inmate by the department for purposes of obtaining current information regarding assets of the inmate.

(G) An inmate shall complete the form and shall swear or affirm under oath that to the best of his knowledge the information provided is complete and accurate. An inmate who knowingly provides false information on the form to the department is guilty of the crime of false swearing as contained in Section 16-9-30.

(H) Failure by an inmate to fully, adequately, and correctly complete the form may be considered by the



Department of Probation, Parole, and Pardon Services for purposes of a parole and in determining an inmate's parole eligibility, and constitutes sufficient grounds for denial of parole.

(I) Before the release of an inmate from imprisonment, and before his release from the jurisdiction of the department, the department shall request from the inmate an assignment of ten percent of his wages, salary, benefits, or payments from any source. The assignment is valid for the greater period of five years from the date of its execution, or five years from the date that the inmate is released from the jurisdiction of the department. The assignment shall secure payment of the total cost of care of the inmate executing the assignment.

(J) The director shall forward to the Attorney General a report on an inmate containing a completed form with all other information available on the assets of the inmate and an estimate of the total cost of care for the inmate.

(K) The Attorney General may investigate all reports furnished pursuant to the provisions of subsection (J) of this section. The investigation may include obtaining information from any source that may have relevant information concerning an inmate's assets. The director shall provide all information possessed by the department and its divisions and agencies, upon request of the Attorney General, in order to assist the Attorney General in completing his duties pursuant to this section.

(L) If the Attorney General, upon completing the investigation pursuant to subsection (K) of this section, has good cause to believe that an inmate or former inmate has sufficient assets to recover the lesser of not less than ten percent of the estimated cost of care of the inmate or ten percent of the estimated cost of care of the inmate for two years, or has a stream of income sufficient to pay these amounts within a five-year period, the Attorney General may seek to secure reimbursement for the expense of the State for the cost of care of the inmate or former inmate.

(M) The Attorney General, or his designee, shall not bring an action pursuant to this section against an inmate or former inmate after the expiration of five years after his release from the jurisdiction of the department.

(N) Not more than ninety percent of the value of the assets of an inmate may be used for purposes of securing costs and reimbursement pursuant to the provisions of this section.

(O) The amount of reimbursement sought from an inmate must not be in excess of the per capita cost for care for maintaining inmates in the detention facility in which the inmate is housed for the period the inmate is housed in a detention facility.

(P) The court of common pleas has exclusive jurisdiction over all proceedings seeking reimbursement from inmates pursuant to the provisions of this section. The Attorney General may file a complaint in the court of common pleas in the county from which an inmate was sentenced or in Richland County against any inmate under the jurisdiction of the department stating that:

(1) the inmate is or has been an inmate in a detention facility;

(2) there is good cause to believe that the inmate has assets; and

(3) the assets be used to reimburse the State for the expenses incurred or to be incurred, or both, by the State for the cost of care of the inmate.

(Q) Upon the filing of a complaint under subsection (P) of this section, the court shall issue an order to show cause why the prayer of the complainant should not be granted. The complaint and order must be served upon the inmate personally, or if the inmate is confined in a detention facility, by registered mail addressed to the inmate in care of the chief administrator of the detention facility where the inmate is housed at least thirty days before the date of hearing on the complaint and order.

(R) At the time of the hearing on the complaint and order, if it appears that the inmate has any assets which should be subjected to the claim of the State pursuant to the provisions of this section, the court shall issue an order requiring a person, corporation, or other legal entity possessing or having custody of the assets, to apply the assets or a portion of them to satisfy the claim.

(S) At the hearing on the complaint and order and before entering an order on behalf of the State against the defendant, the court shall take into consideration any legal obligation of the defendant to support a spouse, minor children, or other dependents and any moral obligation to support dependents to whom the defendant is providing or has provided support.

(T) If the person, corporation, or other legal entity neglects or refuses to comply with an order issued pursuant to subsection (R) of this section, the court shall order the person, corporation, or other legal entity to appear before the court to show cause why the person, corporation, or other legal entity should not be considered in contempt of court.

(U) If the court finds the assets of the inmate are sufficient to pay the cost of the proceedings under the provisions of this section, the inmate is liable for those costs upon order of the court.

(V) Except as provided in subsection (R) of this section, the Attorney General may use any remedy, interim order, or enforcement procedure under the law including an ex parte restraining order to restrain the inmate or another person or legal entity in possession or having custody of the estate of the inmate from disposing of property in avoidance of an order issued pursuant to the provisions of this section.

(W) The court, upon request, may appoint a receiver to protect and maintain assets pending resolution of proceedings initiated pursuant to the provisions of this section.

(X) The Attorney General, or his designee, shall not enforce a judgment obtained pursuant to the provisions of this section by means of execution against the homestead of the inmate.

(Y) The state's right to recover the cost of incarceration pursuant to an order issued pursuant to the provisions of this section shall have priority over all other liens, debts, or other encumbrances against real property or any other assets which are part of an inmate's estate, except for those items contained in Section 24-3-40.

(Z) The sentencing judge, the sheriff, the county or city, the chief administrator of the detention facility, and the State Treasurer shall furnish to the Attorney General, or his designee, all information and assistance possible to enable the Attorney General, or his designee, to secure reimbursement for the State pursuant to the provisions of this section.

(AA) Notwithstanding the provisions of another law protecting the confidentiality of information possessed by the State, the Secretary of State, the Director of the Department of Revenue, the Director of the Department of Social Services, the Director of the Department of Corrections, the Director of the Department of Labor, Licensing and Regulation, and the Director of the Department of Public Safety shall provide the Attorney General or prosecuting attorney with all information requested pursuant to the provisions of this section.

(BB) A county or municipal official having custody of records of the estate or real property of an inmate or former inmate shall surrender the records or certified copies of them without fee to the Attorney General, or his designee, upon request pursuant to the provisions of this section.

(CC) The cost of an investigation under this section must be paid from the reimbursements secured under this section. The investigative costs are presumed to be twenty percent of the reimbursement recovered, unless the Attorney General demonstrates to the court otherwise. All reimbursements collected must be paid to the 'Inmate Incarceration Reimbursement Act Revolving Fund', which is hereby established in the State Treasurer's Office. Monies in this fund must be appropriated to the Attorney General in order to defray the costs of the Attorney General, or his designee in connection with his duties under this section.

All remaining balances in the fund must be appropriated to the department for purposes of construction and operation of state correctional facilities. Monies in the fund shall not lapse, be transferred, or appropriated to or placed to the credit of the general revenue fund or any other fund of the State.

(DD) The Director of the Department of Corrections shall perform a study of potential cost savings and efficacy of implementing a policy of feeding 'meals ready to eat' (MRE's) to inmates in the state's correctional institutions and shall forward this report to the House of Representatives and the Senate by January 1, 2000."

SECTION 4. This act takes effect upon approval by the Governor.

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§ 24-3-40. Disposition of wages of prisoner allowed to work..., Code 1976 § 24-3-40

Code 1976 § 24-3-40  
CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED  
TITLE 24. CORRECTIONS, JAILS, PROBATIONS, PAROLES AND PARDONS  
CHAPTER 3. STATE PRISON SYSTEM  
ARTICLE 1. PERSONS CONFINED AND USE THEREOF GENERALLY

§ 24-3-40. Disposition of wages of prisoner allowed to work at paid employment.

(A) Unless otherwise provided by law, the employer of a prisoner authorized to work at paid employment in the community under Sections 24-3-20 to 24-3-50 or in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages directly to the Department of Corrections.

The Director of the Department of Corrections 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 the twenty percent referred to in subsection (1) must be placed on deposit with the State Treasurer for credit to a special account to support victim assistance programs established pursuant to the Victims of Crime Act of 1984", Public Law 98-473, Title II, Chapter XIV, Section 1404, if the prisoner is engaged in work at paid employment in the community. If the prisoner is employed in a prison industry program, then the twenty percent referred to in subsection (1) must be applied to the South Carolina Victims Compensation Fund.

(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 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).

(B) The Department of Corrections shall return a prisoner's wages held in escrow pursuant to subsection (A) as follows:

(1) A prisoner released without community supervision must be given his escrowed wages upon his release.

(2) A prisoner serving life in prison or sentenced to death shall be given the option of having his escrowed wages included in his estate or distributed to the persons or entities of his choice.

(3) A prisoner released to community supervision shall receive two hundred dollars or the escrow balance, whichever is less, upon his release. Any remaining balance must be disbursed to the Department of Probation, Parole and Pardon Services. The prisoner's supervising agent shall apply this balance toward payment of the prisoner's housing and basic needs and disburse any balance to the prisoner at the end of the supervision period.

HISTORY: 1962 Code § 55-321.2; 1966 (54) 2180; 1980 Act No. 431, § 2; 1986 Act No. 462, § 9.

HISTORY: 1993 Act No. 181, § 393, eff July 1, 1993; 1994 Act No. 500, § 2, eff August 25, 1994; 1995 Act No. 7, Part II, § 54, eff July 1, 1995 (became law without the Governor's signature January 12, 1995); 1999 Act No. 68, § 2, eff June 11, 1999.

§ 24-3-40. Disposition of wages of prisoner allowed to work..., Code 1976 § 24-3-40

FEDERAL ASPECTS—

Provisions of the Victims of Crime Act of 1984, P.L. 98-473, Title II, Chapter XIV, Section 1404, see 42 USCA § 10603. Public Law 90-351, see 42 USCA 3701 et seq.

EDITOR'S NOTE—

1999 Act No. 68, § 3, provides as follows:

"This act takes effect upon approval by the Governor, and Section 2 [§ 24-3-40] applies to wages earned beginning with the first day of the second month after the signature of the Governor."

EFFECT OF AMENDMENT—

The 1993 amendment substituted "director" for "Commissioner" and "Department" or "director" for "Board" throughout this section.

The 1994 amendment revised this section so as to further provide for those prisoners which qualify and added the last sentence to provide that no prisoner who participates in certain programs is eligible for unemployment compensation benefits.

The 1995 amendment revised this section, inserting "Unless otherwise provided by law," and "or in a prison industry program provided under Article 3 of this chapter."

The 1999 amendment designated the existing text as paragraph (A), deleted the second and subsequent sentences and added the second undesignated paragraph and items (1) through (6) to paragraph (A) and added paragraph (B).

CROSS REFERENCES—

Workers' compensation coverage for convicted persons under custody or supervision of the Department of Parole and Community Corrections, see § 42-1-505.

Earnings of inmate working in private industry must be paid directly to Department of Corrections and applied as provided under this section, see § 24-3-430.

CASE NOTES

.1. In General

Work release prisoner who entered into voluntary contract of employment with private employer and enjoyed same salary and working conditions as other employees is entitled to workmen's compensation benefits when injured on his job because it is prisoner's status visavis employer, not-visavis state, which is determinative of whether he is entitled to compensation. *Hamilton v. Daniel Intern. Corp.* (S.C. 1979) 273 S.C. 409, 257 S.E.2d 157.

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§ 24-3-315. Determinations required to be made prior to use..., Code 1976 § 24-3-316

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Code 1976 § 24-3-315  
CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED  
TITLE 24. CORRECTIONS, JAILS, PROBATIONS, PAROLES AND PARDONS  
CHAPTER 3. STATE PRISON SYSTEM  
ARTICLE 3. PRISON INDUSTRIES

§ 24-3-315. Determinations required to be made prior to use of inmate labor.

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

HISTORY: 1987 Act No. 177 § 2.

HISTORY: 1993 Act No. 181, § 409, eff July 1, 1993.

EFFECT OF AMENDMENT—

The 1993 amendment substituted "Department" or "director" for "Board".

CROSS REFERENCES—

Employer, of prisoner authorized to work at paid employment in a prison industry program provided under this Article, must pay prisoner's wages directly to the Department of Corrections, see § 24-3-40.

RESEARCH AND PRACTICE REFERENCES—

60 Am Jur 2d, Penal and Correctional Institutions §§ 163-173.

ANNOTATIONS

Sex discrimination in treatment of jail or prison inmates. 12 ALR 4th 1219 (§ 4, employment).

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§ 24-3-430. Inmate labor in private industry authorized;... Code 1976 § 24-3-430

Code 1976 § 24-3-430  
CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED  
TITLE 24. CORRECTIONS, JAILS, PROBATIONS, PAROLES AND PARDONS  
CHAPTER 3. STATE PRISON SYSTEM  
ARTICLE 3. PRISON INDUSTRIES

§ 24-3-430. Inmate labor in private industry authorized; requirements and conditions.

(A) The Director of the Department of Corrections may establish a program involving the use of inmate labor by a nonprofit organization or in private industry for the manufacturing and processing of goods, wares, or merchandise or the provision of services or another business or commercial enterprise considered by the director to enhance the general welfare of South Carolina. No violent offender shall be afforded the opportunity to perform labor for nonprofit organizations if such labor is outside the confines of a correctional institution. Inmates participating in such labor shall not benefit in any manner contradictory to existing statutes.

(B) The director may enter into contracts necessary to implement this program. The contractual agreements may include rental or lease agreements for state buildings or portions of them on the grounds of an institution or a facility of the Department of Corrections and provide for reasonable access to and egress from the building to establish and operate a facility.

(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.

(F) Nothing contained in this section restores, in whole or in part, the civil rights of an inmate. No inmate compensated for participation in the program is considered an employee of the State.

(G) No inmate who participates in a project designated by the Director of the Bureau of Justice Assistance pursuant to Public Law 90-351 is eligible for unemployment compensation upon termination from the program.

(H) The earnings of an inmate authorized to work at paid employment pursuant to this section must be paid directly to the Department of Corrections and applied as provided under Section 24-3-40.

HISTORY: 1995 Act No. 7, Part II, § 43, eff July 1, 1995 (became law without the Governor's signature January 12, 1995); 1998 Act No. 355, § 1, eff May 26, 1998.

FEDERAL ASPECTS—

Public Law 90-351 sec. 42 USCA 3711 et seq.

EFFECT OF AMENDMENT—

The 1998 amendment, in the first sentence of subsection (A), inserted "by a nonprofit organization or"; and added the second sentence requiring the promulgation of regulations.

RESEARCH AND PRACTICE REFERENCES—

60 Am Jur 2d, Penal and Correctional Institutions § 170.

ANNOTATIONS—

Validity, construction, and application of state statute requiring inmate to reimburse government for expense of incarceration. 13 ALR5th 872.

§ 24-3-430. Inmate labor in private industry authorized;... Code 1976 § 24-3-430

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Bennett v. Frank, 395 F.3d 409 (2005)

150 Lab.Cas. P 34,940, 10 Wage & Hour Cas.2d (BNA) 394

395 F.3d 409  
United States Court of Appeals,  
Seventh Circuit.

Jay R. BENNETT and James W. Knipfer,  
Plaintiffs-Appellants,

v.

Matthew J. FRANK, et al., Defendants-Appellees.

No. 04-1959. | Submitted Dec. 10, 2004. | Decided  
Jan. 19, 2005.

#### Synopsis

**Background:** Inmates of private prison, which was under contract to the Wisconsin Department of Corrections, brought action claiming entitlement to the minimum wage provision of the Fair Labor Standards Act (FLSA). The United States District Court for the Western District of Wisconsin, John C. Shabaz, J., found that act did not apply to inmates, and appeal was taken.

**Holding:** The Court of Appeals, Posner, Circuit Judge, held that minimum wage provision of FLSA did not apply to inmates.

**Affirmed.**

#### West Headnotes (1)

##### [1] Labor and Employment     Inmates

Minimum wage provision of Fair Labor Standards Act (FLSA) did not apply to inmates of private prison that was under contract to state department of corrections. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

15 Cases that cite this headnote

#### Attorneys and Law Firms

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James W. Knipfer, Green Bay, WI, pro se.

Peggy A. Lautenschlager, Office of the Attorney General, Office of the Attorney General, Wisconsin Department of Justice, Michelle M. Affatati, Christopher T. Sundberg, Stafford Rosenbaum, Madison, WI, for Defendants-Appellees.

Before POSNER, KANNE, and SYKES, Circuit Judges.

#### Opinion

POSNER, Circuit Judge.

This appeal presents an issue of some novelty but little difficulty. The plaintiffs, inmates of Whiteville Correctional Facility, a private prison (owned by Corrections Corporation of America) that is under contract to the Wisconsin Department of Corrections, claim entitlement to the minimum wage provision of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. All their other claims have been waived.

The Fair Labor Standards Act is intended for the protection of employees, and prisoners are not employees of their prison, whether it is a public or a private one. So they are not protected by the Act. *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir.1992); *Tourscher v. McCullough*, 184 F.3d 236, 243 (3d Cir.1999); *Villarreal v. Woodham*, 113 F.3d 202, 206 (11th Cir.1997); *Nicastro v. Reno*, 84 F.3d 1446 (D.C.Cir.1996) (per curiam); *Danneskjold v. Hausrath*, 82 F.3d 37, 42 (2d Cir.1996); *Hale v. Arizona*, 993 F.2d 1387, 1395 (9th Cir.1993) (en banc). Oddly, this is so only because of presumed legislative intent and not because of anything in the actual text of the FLSA. The Act unhelpfully defines "employee" as "any individual employed by an employer" and defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency." 29 U.S.C. §§ 203(e)(1), (d). There are some excepted classes of employees, § 203(e)(2), (3), (4), but prisoners are not among them. Although the minimum wage provision of the Act applies only to employees engaged "410 in, or producing goods for, commerce or employed in an enterprise engaged in or producing goods for commerce, § 206(a)(1), we do not know whether Bennett and Knipfer were engaged in any such activities.

Bennett v. Frank, 395 F.3d 409 (2005)

150 Lab.Cas. P 34,940, 10 Wage & Hour Cas.2d (BNA) 394

But we have no doubt that the cases we have cited are correct. People are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep. If it puts them to work, it is to offset some of the cost of keeping them, or to keep them out of mischief, or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside. None of these goals is compatible with federal regulation of their wages and hours. The reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to occur to anyone when the legislation was under consideration by Congress.

We cannot see what difference it makes if the prison is private. Ideally, neither the rights nor the liabilities of a state agency should be affected by its decision to contract out a portion of the services that state law obligates it to provide. Otherwise the "make or buy" decision (the decision whether to furnish a service directly or obtain it in the market) would be distorted by considerations irrelevant to the only thing that should matter: the relative efficiency of internal versus contractual provision of services in particular circumstances. But a simpler and more fundamental point is that employment status doesn't depend on whether the alleged employer is a public or a private body. Both public agencies and private firms have employees. But prisoners are not employees.

Our conclusion that the FLSA does not apply to

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Whiteville's inmates is reinforced by decisions that hold that a state prison does not lose its immunity from liability under the FLSA merely because it has hired a private company to manage the prison labor. *Gambetta v. Prison Rehabilitative Industries & Diversified Enterprises, Inc.*, 112 F.3d 1119, 1124-25 (11th Cir.1997); *Danneskjold v. Hausrath, supra*, 82 F.3d at 43-44. A prison's decision to hire a catering firm to operate its cafeteria should not influence the entitlements of a prisoner who works in the cafeteria.

We have no quarrel with *Watson v. Graves*, 909 F.2d 1549 (5th Cir.1990), or *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir.1984), which hold that the FLSA applies to prisoners working for private companies under work-release programs. Those prisoners weren't working as prison labor, but as free laborers in transition to their expected discharge from the prison. Unlike our plaintiffs.

AFFIRMED.

#### All Citations

395 F.3d 409, 150 Lab.Cas. P 34,940, 10 Wage & Hour Cas.2d (BNA) 394

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Carter v. Dutchess Community College, 735 F.2d 8 (1984)

26 Wage & Hour Cas. (BNA) 1239, 101 Lab. Cas. P 34,540, 17 Ed. Law Rep. 1031

735 F.2d 8  
United States Court of Appeals,  
Second Circuit.

Louis CARTER, Plaintiff-Appellant,  
v.  
DUTCHESS COMMUNITY COLLEGE, et al.,  
Defendants-Appellees.

No. 778, Docket 83-2053. | Argued Feb. 17, 1984. |  
Decided May 14, 1984.

On appeal from a judgment entered in the Southern District of New York, Robert L. Carter, District Judge, granting defendants' motions for summary judgment on ground that plaintiff, as a state prison inmate, was not entitled to the federal minimum wage as prescribed by the Fair Labor Standards Act, the Court of Appeals, Timbers, Circuit Judge, held: (1) that an inmate may be entitled under the law to receive the federal minimum wage from an outside employer depending on how many typical employer prerogatives are exercised over the inmate by the outside employer, and to what extent, and (2) that in a case involving an inmate conducting tutorial classes at prison in a program conducted by a community college in which, among other things, the college sent compensation directly to the inmate's prison account, inmate demonstrated genuine issues as to material facts regarding whether he was covered by the Fair Labor Standards Act, precluding summary judgment.

Reversed and remanded.

West Headnotes (5)

<sup>[1]</sup> Labor and Employment  
◆=Employment Relationship

In determining whether employment relationship exists for purposes of Fair Labor Standards Act, courts must evaluate the "economic reality" of the relationship, which includes inquiries into whether employer had the power to hire and fire employees, supervised and controlled employee work schedules or conditions of employment, determined rate and method of payment, and maintained employment records, and the power to control a

worker is a crucial factor in determining whether employment relationship exists. Fair Labor Standards Act of 1938, §§ 1 et seq., 3(d, e, g), 29 U.S.C.A. §§ 201 et seq., 203(d, e, g); 42 U.S.C.A. § 1983.

204 Cases that cite this headnote

<sup>[2]</sup> Labor and Employment  
◆=Employment Relationship

Entry's control over a worker need not be "ultimate" in order to justify a finding of an employer-employee relationship for purposes of the Fair Labor Standards Act; that is, fact that control over a worker may be qualified is not a sufficient factor, in and of itself, to place employment relationship beyond the scope of the Act. Fair Labor Standards Act of 1938, §§ 1 et seq., 3(d, e, g), 29 U.S.C.A. §§ 201 et seq., 203(d, e, g); 42 U.S.C.A. § 1983.

36 Cases that cite this headnote

<sup>[3]</sup> Labor and Employment  
◆=Employment Relationship

It would be contrary to congressional intent to permit an employer who exercises substantial control over a worker, but whose hiring decisions occasionally may be subjected to a third party's veto, to escape compliance with the Fair Labor Standards Act. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; 42 U.S.C.A. § 1983.

21 Cases that cite this headnote

<sup>[4]</sup> Labor and Employment  
◆=Inmates

Prison inmate may be entitled under the Fair

**Carter v. Dutchess Community College**, 735 F.2d 8 (1984)

26 Wage & Hour Cas. (BNA) 1239, 101 Lab.Cas. P 34,540, 17 Ed. Law Rep. 1031

Labor Standards Act to receive federal minimum wage from an outside employer, depending upon how many typical employer prerogatives are exercised over the inmate by the outside employer, and to what extent. Fair Labor Standards Act of 1938, §§ 1 et seq., 2, 3(d, e, g), 13, 29 U.S.C.A. §§ 201 et seq., 202, 203(d, e, g), 213; 42 U.S.C.A. § 1983.

14 Cases that cite this headnote

[5]

**Federal Civil Procedure**

—Employees and Employment Discrimination, Actions Involving

There were issues of fact, precluding summary judgment as to whether prison inmate employed as a tutor in community college's class program at prison was covered by the minimum wage requirements of the Fair Labor Standards Act, in light of facts that college made initial proposal to "employ" workers, suggested wage, developed eligibility criteria, recommended inmates for tutoring positions, was not required to take any inmate it did not want, decided how many sessions and for how long inmate would be permitted to tutor, and sent compensation directly to inmate's prison account. Fair Labor Standards Act of 1938, §§ 1 et seq., 3(d, e, g), 29 U.S.C.A. §§ 201 et seq., 203(d, e, g); 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

21 Cases that cite this headnote

**Attorneys and Law Firms**

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Nancy Miller Lerner, Asst. Atty. Gen., New York City (Robert Abrams, Atty. Gen. of State of N.Y., Melvyn R.

Leventhal, Deputy First Asst. Atty. Gen., Barbara Butler and Brenda S. Spears, Asst. Attys. Gen., New York City, on the brief), for defendants-appellees Walter Chattman and Patrick J. Fish.

Before TIMBERS, KEARSE and PIERCE, Circuit Judges.

**Opinion**

TIMBERS, Circuit Judge:

This is an appeal from a summary judgment entered January 11, 1983 on the motions of defendants in the Southern District of New York, Robert L. Carter, *District Judge*. The court granted the motions based on the report and recommendation of Magistrate Naomi Reice Buchwald, dated December 13, 1982. The magistrate recommended that, because plaintiff Louis Carter, as a state inmate, is under the "ultimate control" of the New York State Department of Correctional Services, he cannot be an employee of defendant Dutchess Community College within the meaning of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. (1982). We reverse and remand.

**I.**

At the time this § 1983 action was commenced on February 25, 1981, Carter was an inmate at the Fishkill Correctional Facility (FCF) in New York. He alleged that he was participating in a program at FCF conducted by Dutchess Community College (DCC), pursuant to which, in conjunction with the several college level courses offered by DCC to inmates at FCF, DCC "employ[ed]" several inmates in [the] institution (using only those who have actually graduated from a four-year college program) to act as teaching assistants to our regular staff." In his amended complaint filed December 5, 1981, Carter alleged that he was compensated at a level well below the federal minimum wage, in violation of the FLSA.

The origins of the inmate-teaching assistant program at FCF can be traced to a letter dated March 25, 1978 from defendant F. Kennon Moody, a former Coordinator of Inmate Education at DCC, to defendant Walter Chattman, who at the time was the Director of Educational Services for the New York State Department of Correctional Services (DCS). In that letter Moody first proposed the program. The duties of the inmate-teaching assistants would include meeting with DCC teachers, attending

**Carter v. Dutchess Community College, 735 F.2d 8 (1984)**

26 Wage & Hour Cas. (BNA) 1239, 101 Lab.Cas. P 34,540, 17 Ed. Law Rep. 1031

class meetings, and tutoring inmate-students outside of classroom hours. Moody requested the permission of DCS to supplement the inmates' prison wages so that a total day's salary would amount to between \$3 and \$4, five days a week. Moody also suggested that DCC send a check on a monthly basis to the prison's Office of Inmates Accounts to cover the supplementary wages.

The inquiry regarding the payment of supplementary wages to inmates was referred to defendant Patrick J. Fish, an attorney with DCS. According to Chattman's memorandum of April 20, 1978 to a deputy superintendent of programs, Fish advised that he saw "no legal impediment" to the supplementary compensation plan.

DCC then conducted a screening process to find inmates it considered to be qualified for the teaching assistant positions. Eligibility criteria were determined solely by DCC. DCC then submitted to DCS a list of inmates who it recommended be permitted by DCS to participate in the teaching assistant program. It is not clear from the record how many inmates were proposed by DCC, and consequently how many, if any, were rejected by DCS. What is clear is that Carter was among the eight inmates selected during the Fall of 1980. He was selected to conduct twenty tutorial classes in business math, all of which were held within the prison. Each session lasted 2½ hours. He was paid a total of \$60, which breaks down to \$3 per class, or \$1.20 per ½ hour. The federal minimum wage at the time was \$3.10 per hour.

At some point during or after his participation in the teaching assistant program, Carter learned that student tutors at the campus of DCC earned at least the federal minimum wage, which DCC was required to pay by law. On February 4, 1981, Carter wrote letters to the Director of Education at DCS and the Director of Financial Aid at DCC, inquiring about the disparate compensation scheme. He referred in both letters to the fact that the current Coordinator of Inmate Education at DCC had told Carter that DCS did not permit DCC to pay any more than \$3 per day.

Carter received a prompt response on February 10 from the DCC Director of Financial Aid, Daniel Sistarenik, who informed Carter that indeed DCS did restrict the maximum amount of compensation that could be paid to the inmate tutors. Sistarenik advised Carter to state his concerns to DCS. By the time Carter commenced his § 1983 pro se action on February 25, he had received no response from DCS. He attached the response he finally did receive, dated April 9, to his affidavit in opposition to defendants' motions to dismiss. This letter told Carter to

direct his concerns to DCC.

In his pro se complaint, Carter named DCS and DCC as defendants. He alleged that he had been denied the equal protection of the laws, in violation of the Fourteenth Amendment, and had been subjected to involuntary servitude in violation of the Thirteenth Amendment. He sought back wages in amount of \$107.50, plus interest, punitive damages in amount \$150,000, and an injunction requiring defendants to begin paying all tutors the same compensation.

After DCS was dismissed from the action by an order entered June 17, 1981, Carter filed an amended complaint on November 23, 1981. The amended complaint added the individual defendants Moody, Chattman and Fish and alleged that defendants' actions violated the labor laws by compensating him at a rate less than the minimum wage.

On July 20, 1982, defendants DCC and Moody filed a motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). On July 21, 1982, defendants Chattman and Fish filed a similar motion to dismiss. The motions were referred to the magistrate in accordance with a prior order referring the entire case to her.

In her well reasoned report and recommendation to Judge Carter, the magistrate rejected both constitutional arguments made by plaintiff. These arguments are not pressed on appeal.

In stating the alleged FLSA violation, the magistrate framed the issue as follows:

"In order to determine whether such an employment relationship exists the court must look to the 'economic reality' of the situation and determine whether DCC has 'ultimate control' over plaintiff."

The magistrate then applied the following standard to the facts before her:

"Although DCC does have discretion in the selection of inmates for positions in the teaching assistant program, these inmates nevertheless remain under the supervision and control of prison officials. It was the prison administrators that initially approved the program, and inevitably it is these same officials who retain the authority to disqualify an inmate or discontinue the program as they see fit. The fact that DCC was responsible for initiating the program and paying the inmates' wages does not compel a contrary

Carter v. Dutchess Community College, 735 F.2d 8 (1984)

26 Wage & Hour Cas. (BNA) 1239, 101 Lab. Cas. P 34,540, 17 Ed. Law Rep. 1031

result. Rather, the college's control over the inmates is 'qualified,' that is, 'subject to the ultimate control of prison administrators.' ... In short, inmates who participate in the teaching assistant program nevertheless retain their status as inmates under the control of New York State's correctional facilities, rather than becoming 'employees' of DCC."

In a footnote, the magistrate added that it was "unlikely that Congress intended that the FLSA's minimum wage protection be extended to prisoners." She recommended that defendants' motions, which \*12 she correctly treated as motions for summary judgment because the parties had conducted some discovery and relied on matters outside the pleadings, be granted.

The magistrate's report and recommendation was accepted and adopted by Judge Carter as the opinion of the court. From the judgment entered thereon, plaintiff has taken this appeal on which he has been represented by competent counsel. He argues (1) that the court applied an improper legal standard under the FLSA; (2) that defendants failed to sustain their burden under Rule 56; (3) that the court resolved factual disputes against him, the non-moving party; and (4) that the court did not allow sufficient discovery. For the reasons set forth below, we reverse the judgment of the district court and remand the case to that court for further proceedings.

## II.

In our view, the issues in this case really boil down to one question: whether prisoners ever may be considered employees for the purposes of the minimum wage provisions of the FLSA. We frame the question in this way because, upon close examination, the only issue of fact considered material by defendants in their moving papers was Carter's inmate status. Moreover, the practical effect of the district court's decision is an absolute preclusion of FLSA coverage for prisoners. The court acknowledged that DCC exercised some control over the inmate-teaching assistants, but held that, since prison officials "inevitably" had "ultimate control" over the inmates, DCC could not be considered to be the inmates' employer.

[1] It is common ground that courts, in determining whether an employment relationship exists for purposes of the FLSA, must evaluate the "economic reality" of the relationship.<sup>1</sup> Such an evaluation was first applied in the FLSA context in *Goldberg v. Whitaker House Cooperative, Inc.*, 356 U.S. 28 (1961). The "economic

reality" test since has been refined and now is understood to include inquiries into:

"whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."

*Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9 Cir.1983). The power to control a worker clearly is a crucial factor in determining whether an employment relationship exists. The district court here was correct in considering it.

The point at which we believe the court below erred was in giving undue weight to the control factor alone. More specifically, the court created a two-tiered analysis of control, recognizing that DCC had "qualified control" and that DCS had "ultimate control". Based on this distinction, as in *Alexander v. Sara, Inc.*, 559 F.Supp. 42 (M.D.La.), *aff'd per curiam*, 721 F.2d 149 (5 Cir.1983), the court here held that Carter was not an employee within the meaning of the FLSA.

[2] [3] We do not agree that an entity's control over a worker must be "ultimate" in order to justify a finding of an employer-employee relationship. The statute is a remedial one, written in the broadest possible terms so that the minimum wage provisions would have the widest possible impact in the national economy. It runs counter to the breadth of the statute and to the Congressional intent to impose a qualification which permits an employer who exercises substantial control over a worker, but whose hiring decisions occasionally may be subjected to a third party's veto, to escape compliance with the Act. Indeed, in *Falk v. Brennan*, 414 U.S. 190 (1973), the Supreme \*13 Court held that a real estate management partnership, for FLSA minimum wage purposes, was an employer of maintenance workers at various apartment complexes. The workers were hired and supervised by the partnership, but at all times were considered employees of the owners of the apartment buildings. The Court referred to the amount of control exercised by the partnership over the workers as "substantial". The fair inference is that ultimate control was exercised by the apartment owners. It follows that the fact that control over a worker may be qualified is not a sufficient factor, in and of itself, to place an employment relationship beyond the scope of the FLSA.

[4] Defendants argue, however, and the district court essentially agreed, that in the specific area of inmate labor, the ultimate control exercised by prison officials over inmates is a dispositive consideration that precludes a finding of an employee-employer relationship between

Carter v. Dutchess Community College, 735 F.2d 8 (1984)

26 Wage & Hour Cas. (BNA) 1239, 101 Lab.Cas. P 34,540, 17 Ed. Law Rep. 1031

an inmate and some outside entity. Aside from language in *Alexander v. Sara, Inc.*, *supra*, defendants claim support from the stated purposes behind the FLSA. The argument here begins by pointing out that the FLSA was enacted to improve the living conditions, bargaining strength vis-a-vis employers, and general well-being of the American worker. 29 U.S.C. § 202 (1982). In light of that, they contend that the FLSA has no application to imprisoned persons such as Carter, whose living conditions are determined as a matter of state policy, and who have no need for bargaining strength since their right to work in the first place is a matter of legislative grace.

Despite the surface appeal of this logic, we reject it for three reasons. First, there are purposes behind the FLSA other than those set forth above, among which is the establishment of minimum standards in the workplace. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). This results in the elimination of unfair competition, not only among employers, but also among workers looking for jobs. We believe that courts should refrain from exempting a whole class of workers, based on technical labels, from the coverage of the FLSA, because such action would have the potential for upsetting the desired equilibrium in the workplace.

Second, in § 13 of the FLSA, 29 U.S.C. § 213 (1982), Congress has set forth an extensive list of workers who are exempted expressly from FLSA coverage. The category of prisoners is not on that list. It would be an encroachment upon the legislative prerogative for a court to hold that a class of unlisted workers is excluded from the Act. Congress must be presumed to be aware of and to approve of the use by the courts of the economic reality test, which involves a case-by-case factual analysis. We decline defendants' invitation to depart from that analysis here.

Third, the cases relied upon by defendants—even those with language suggesting a bright-line rule of exemption for prisoners—in fact have undertaken a particularized inquiry into the facts of each case. In *Alexander v. Sara, Inc.*, *supra*, a district court in Louisiana described in detail the blood plasma program in the Louisiana State Penitentiary at Angola, at which the plaintiffs worked. In ruling that the inmates were not employees of the defendant (an outside company), the court acknowledged that the facts were nearly identical to those of another Louisiana district court case, *Hudgins v. Hari*, 323 F.Supp. 898 (E.D.La.1971). While the court in *Alexander* did state that FLSA coverage for prison inmates was not contemplated by Congress, that strikes us as dictum in view of the factual analysis of the case.

Similarly, in *Sims v. Parke Davis & Co.*, 334 F.Supp. 774 (E.D.Mich.), *aff'd per curiam*, 453 F.2d 1259 (6 Cir.1971), *cert. denied*, 405 U.S. 978 (1972), the court carefully analyzed all the facts of the case before concluding that the economic reality of the inmate-manufacturer relationship was that it was not employment, and not covered by the FLSA. *Accord, Huntley v. Gunn Furniture Co.*, 79 F.Supp. 11 (W.D.Mich.1948).

We hold that it was error to have granted defendants' motions on the basis of "ultimate \*14 control"—whether viewed as one factor of the economic reality test or as an independent ground. A full inquiry into the true economic reality is necessary. We hold only that an inmate may be entitled under the law to receive the federal minimum wage from an outside employer, depending on how many typical employer prerogatives are exercised over the inmate by the outside employer, and to what extent.

### III.

There remains to be determined whether, based on the record before us, we can affirm the summary judgment in favor of defendants on the ground that the economic reality test discloses no employment relationship between Carter and DCC. We can do so only if there is no genuine issue as to any material fact, the burden of establishing that being on defendants as the moving parties. *American International Group, Inc. v. London American International Corp.*, 664 F.2d 348, 351 (2 Cir.1981). Any ambiguities must be resolved in favor of the non-moving party. *Id.*

In applying the economic reality test, the material facts are whether the alleged employer could hire and fire the worker, control work schedules and conditions of employment, determine the rate and method of payment, and maintain employment records. Carter's amended complaint alleges that he was employed by DCC pursuant to a proposal made by Moody of DCC to Chatman of DCS. The complaint also alleges that DCC was to pay the inmate-tutors directly, and that the wages eventually paid to Carter were substantially below the minimum wage and the compensation paid to on-campus student tutors. Attached to the complaint were Moody's letter (which says, "We propose to employ several inmates"), a response from the deputy superintendent of program services at Green Haven, a letter from the same deputy superintendent to Chatman asking for advice on the legality of DCC's paying inmates, and Chatman's answering memorandum that, on the advice of counsel,

Carter v. Dutchess Community College, 735 F.2d 8 (1984)

26 Wage & Hour Cas. (BNA) 1239, 101 Lab.Cas. P 34,540, 17 Ed. Law Rep. 1031

there was no legal impediment to DCC's paying the inmates.

In support of the motion to dismiss by DCC and Moody, there was attached an affidavit by the Chief Assistant County Attorney for Dutchess County. His affidavit did not address any of the facts that are material under the economic reality test. His ground for urging dismissal was solely that Carter was an inmate at a state prison. We have held above that that is an insufficient reason to have granted summary judgment for defendants.

In support of the motion to dismiss by Chattman and Fish, there was attached an affidavit by an Assistant Attorney General. His affidavit likewise was devoid of any material facts and rested solely on the fact that Carter was an inmate. In paragraph 10, the affidavit stated as a conclusion that "[i]nmates in the New York State Correctional System are not entitled to receive minimum wage." Attached to the affidavit were the Moody letter, the letter to Chattman from the deputy superintendent of program services, and Chattman's memorandum relaying counsel's advice, all of which had been attached to the complaint. In addition, there was attached a certificate of approval from the office of the Commissioner of Correctional Services setting forth daily allowance rates paid by the prison system to the inmates. The certificate did not disclose that money paid to inmates by outside "employers" was subject to a DCS-imposed maximum.

In short, defendants' affidavits simply failed to demonstrate that all material facts under the economic reality test were undisputed.

Carter filed opposing papers, including an affidavit. He restated the facts as originally alleged in the complaint. He added, however, that he had received a letter from a Petrita Hernandez, dated April 9, 1981 (after the filing of Carter's original complaint). This letter was in response to Carter's letter to DCS of February 4, 1981 which had been attached to Carter's original \*15 complaint. In her letter, Ms. Hernandez, who was Director of Education at DCS, informed Carter that "this issue [regarding compensation for tutoring] should be addressed to Dutchess Community College for whom you tutor." This letter certainly suggests a genuine issue as to a very material fact, namely, who determines the rate of pay for inmate-tutors. While it is the position of defendants that DCS imposes a maximum on money payable to inmates, Ms. Hernandez' letter at least gives rise to a contrary inference.

<sup>[5]</sup> Despite the sparse record before us, this case strikes us as quite different from the typical case in which prisoners

seek FLSA coverage. *E.g., Wentworth v. Solem*, 548 F.2d 773 (8 Cir.1977) (per curiam) (inmate working in prison bookbinding not an employee of the state prison); *Alexander v. Sara, Inc.*, *supra* (no contractual relationship between inmates and outside company; "compensation" paid to State of Louisiana, not to inmates; no right on part of outside company to reject an inmate assigned to work in the plasma program); *Sims v. Parke Davis & Co.*, *supra* (no contractual relationship between inmates and outside company; outside company relinquished to prison officials the normal rights of an employer to determine whether more or less manpower was needed, who the workers would be, and to discharge those found unsatisfactory); *Hudgins v. Hart*, *supra* (no contractual relationship between outside company and inmates; prison officials assigned inmates to work for defendant; money was sent to prison, which decided how much to pay the inmates); *Huntley v. Gunn Furniture Co.*, *supra*, (same; sole control was with prison officials).

In the instant case, accepting the facts and all reasonable inferences favorable to Carter as the non-moving party, DCC made the initial proposal to "employ" workers; suggested a wage as to which there was "no legal impediment"; developed eligibility criteria; recommended several inmates for the tutoring positions; was not required to take any inmate it did not want; decided how many sessions, and for how long, an inmate would be permitted to tutor; and sent the compensation directly to the inmate's prison account.

While perhaps not the full panoply of an employer's prerogatives, this may be sufficient to warrant FLSA coverage. We do not hold one way or the other on that ultimate issue. We hold only that Carter has demonstrated genuine issues regarding material facts as to whether he is covered by the FLSA, and we emphatically hold that the fact that he is a prison inmate does not foreclose his being considered an employee for purposes of the minimum wage provisions of the FLSA.

The judgment of the district court is reversed, and the case is remanded to that court for further proceedings consistent with this opinion, including appropriate discovery proceedings.<sup>1</sup>

Costs to appellant on this appeal.

The mandate shall issue forthwith.

Reversed and remanded.

#### All Citations

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6



**Carter v. Dutchess Community College, 735 F.2d 8 (1984)**

26 Wage & Hour Cas. (BNA) 1239, 101 Lab.Cas. P 34,540, 17 Ed. Law Rep. 1031

735 F.2d 8, 26 Wage & Hour Cas. (BNA) 1239, 101  
Lab.Cas. P 34,540, 17 Ed. Law Rep. 1031

Footnotes

- <sup>1</sup> A case by case analysis is required because the statute's definitions are stated in only the broadest terms. Section 3(e) defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e) (1982). "Employ" is defined as "to suffer or permit to work." *Id.* § 203(g). An "employer" is one who acts "directly or indirectly in the interest of an employer in relation to an employee." *Id.* § 203(d).
- <sup>2</sup> After commencement of the action, Carter was transferred out of the Fishkill Correctional Facility.
- <sup>3</sup> Since the district court did not reach the issues, and because the record before us is inadequate, we do not pass on the merit of defendants' arguments regarding the Eleventh Amendment, qualified immunity or the exemption from FLSA coverage based upon *National League of Cities v. Usery*, 426 U.S. 833 (1976).

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 99-CP-40-3675

S.C. Dept. of Corrections,  
et al.

Freddie D. Gordon, et al

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 \_\_\_\_\_ day of Sept, 2001 to attorneys of record or to parties (when appearing pro se) as follows:

David C. Alford

Lake E. Summers

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

[Signature]  
CLERK OF COURT

SCRCP APP-24

SCRCP FORM 4 (Revised 5/00)

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

Freddie D. Gordon, SCDC #106707, et al. )

Plaintiffs, )

vs. )

South Carolina Department of  
Corrections, William D. Catoe, Director,  
Et al. )

Defendants. )

IN THE COURT OF COMMON PLEAS

C/A NO: 99-CP-40-3675

BOOK P. 270

ORDER GRANTING  
DEFENDANTS'  
MOTION FOR  
SUMMARY JUDGMENT

FILED  
01 SEP -1 PM 3:00  
BARBARA A. SCOTT  
C.C.C. & G.S.

On June 4, 2001, the Defendants moved this Court to grant their Motion for Summary Judgment regarding the Plaintiffs' four (4) causes of action challenging the constitutionality of South Carolina Code Section 24-3-40 (Law. Co-op. 1976). On July 24, 2001, the Plaintiffs submitted their own Motion for Summary Judgment.

This Court heard arguments on July 31, 2001. Lake E. Summers, Esquire, of Vinton D. Lide & Associates, LLC, appeared on behalf of the Defendants. David C. Alford, Esquire, appeared on behalf of the Plaintiffs. At argument, both sides agreed that there were no factual issues in dispute. The parties consented that this Court's decision regarding their respective motions for Summary Judgment would be dispositive and, therefore, the parties agreed that trial would not be necessary.

After reviewing both the Plaintiffs' and Defendants' Motions for Summary Judgment and considering the positions advocated by both sides at argument, this Court **GRANTS** the *Defendants'* June 4, 2001 Motion for Summary Judgment.

Page 1 of 11

62

## I. STANDARD OF REVIEW

Summary Judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether any triable issues of fact exist to preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Padgett v. South Carolina Insurance Reserve Fund*, 340 S.C. 250, 531 S.E.2d 305, 306 (Cl. App. 2000). If any triable factual issues exist, those issues must go to the jury. *Id.* Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Id.*

## II. PERTINENT FACTS

BOOK P. 271

Each of the ten (10) Plaintiffs are or were incarcerated within the South Carolina Department of Corrections (SCDC)<sup>1</sup>. All ten (10) of the Plaintiffs currently participate or at one time participated in the Prison Industries program established by SCDC under South Carolina Code Section 24-3-310 (Law. Co-op. 1976), *et seq.* Each of the Plaintiffs voluntarily executed agreements under which the terms of their activities within the Prison Industries program, including the withholding of percentages of their gross wages, were precisely defined. Nine (9) of the ten (10) Plaintiffs executed at least two (2) Prison Industries inmate participation agreements; one (1) inmate participation agreement in 1997 and one (1) in early 2000<sup>2</sup>.

<sup>1</sup> Plaintiffs Gordon, Gray, Kinard, Lewis, and Wright remain incarcerated within SCDC. Plaintiffs Grant, Griggs, Sessions, Wallace, and Williamson are no longer SCDC inmates.

<sup>2</sup> Plaintiff Gordon executed three (3) voluntary agreements; one (1) on December 9, 1997, one (1) on January 18, 2000, and one (1) on December 5, 2000. Plaintiff Grant executed only one (1) voluntary agreement on June 12, 1997. He was released from SCDC before he was offered the opportunity to execute a second inmate participation agreement in 2000. The

### III. SUMMARY OF THE PLAINTIFFS' CAUSES OF ACTION

Each of Plaintiffs' four (4) causes of action challenge the constitutionality of South Carolina Code Section 24-3-40.

Plaintiffs' first cause of action alleges that Section 24-3-40, after its amendment by 1999 Senate Act No. 68, impairs their ability to freely enter into contracts, and, therefore, its application constitutes a taking pursuant to Article I, Section 4 of the South Carolina Constitution.

Plaintiffs' second cause of action alleges that, by withholding the percentages mandated by Section 24-3-40 from their gross wages, the Defendants deprive the Plaintiffs of their property (i.e., their wages) without due process of law and without equal protection under the law pursuant to Article I, Section 3 of the South Carolina Constitution.

Plaintiffs' third cause of action alleges that the withholdings from their gross wages as mandated by Section 24-3-40, after its amendment by 1999 Senate Act No. 68, constitutes a taking of their private property (i.e., their wages) without just compensation pursuant to Article 1, Section 13 of the South Carolina Constitution.

The Plaintiffs' fourth and final cause of action alleges that Section 24-3-40 was unconstitutionally amended by 1999 Senate Act No. 68, because Article III, Section 15 of the South Carolina Constitution permits revenue raising legislation only by a bill originating in the South Carolina House of Representatives. The Plaintiffs allege, inferentially, that the withholdings from their gross wages mandated under Section 24-3-40 constitute "revenue." As

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remaining eight (8) plaintiff's each executed two (2) inmate participation agreements as described above.

Page 3 of 11

these withholdings were added to Section 24-3-40 through action of the South Carolina Senate (Senate Act No. 68), the Plaintiffs allege that the resulting version of the statute is unconstitutional.

**IV. SOUTH CAROLINA CODE SECTION 24-3-40 PERMITS THE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS TO WITHHOLD PERCENTAGES OF THE GROSS WAGES EARNED BY PRISONERS WHO PARTICIPATE IN THE DEPARTMENT'S PRISON INDUSTRIES PROGRAM**

BOOK ~~P-1~~ PAGE 273

Section 24-3-40 is entitled "[d]isposition of wages of prisoner allowed to work at paid employment." Paragraph (A) of this section provides the following:

Unless otherwise provided by law, the employer of a prisoner authorized to work at paid employment *in the community* under Sections 24-3-20 to 24-3-50 or *in a prison industry program* provided under Article 3 of this chapter<sup>3</sup> shall pay the prisoner's wages directly to the Department of Corrections (emphasis added).

The remainder of paragraph (A) requires the Director of the Department of Corrections to deduct various percentages from the gross wages of a prisoner authorized to work at paid employment in the community or in a prison industry program. These amounts are specified in subsections (1) through (6) of paragraph (A)<sup>4</sup>.

<sup>3</sup> Section 24-3-310, *et seq.*

<sup>4</sup> 24-3-40(A)(1) and (2) require that 20% of a prisoner's gross wages be directed to either satisfy court ordered restitution to a specific victim or victims or support state sponsored victim assistance programs. 24-3-40(A)(3) requires that 35% of a prisoner's gross wages be used to pay the prisoner's child support obligations. If the prisoner has no child support obligations, 24-3-40(A)(3) requires that 25% of the prisoner's gross wages be used by SCDC to defray the cost of the prisoner's room and board and 10% of the prisoner's gross wages must be made available during the prisoner's incarceration for his or her purchase of incidentals pursuant to subsection (4). 24-3-40(A)(4) requires that 10% of a prisoner's gross wages must be made available to the prisoner during the prisoner's incarceration for the purchase of incidentals. 24-3-40(A)(5) requires that 10% of a prisoner's gross wages must be held in an interest bearing escrow account for the prisoner's benefit. 24-3-40(A)(6) requires that the remaining balance of a prisoner's gross wages be used to pay required federal and state taxes. Subsection (A)(6) finally requires

Section 24-3-40 was amended in 1999 by Senate Act No. 68, Section 2. As a result of this amendment, Section 24-3-40 established the precise scale of withholdings from a prisoner's gross wages detailed above.

BOOK P. # PAGE 274

Contrary to the Plaintiffs' assertions articulated at argument and in their Memorandum of Law in support of their Motion for Summary Judgment, nothing within Section 24-3-40, as it was amended in 1999, transfers to the State's general fund the portions of a prisoner's gross wages withheld pursuant to its requirements. The monies withheld from a prisoner's gross wages under this section are specifically devoted to victim assistance programs, the prisoner's child support obligations, the prisoner's room and board (if the prisoner has no child support obligations), the prisoner's incidental expenses, an interest bearing escrow account for the prisoner's direct financial benefit, and applicable federal and state taxes.

**V. AS THE PLAINTIFFS EXECUTED PARTICIPATION AGREEMENTS WITH THE DEPARTMENT OF CORRECTIONS AND DID NOT INDIVIDUALLY NEGOTIATE OR EXECUTE PRIVATE EMPLOYMENT CONTRACTS, THEY NEVER ACQUIRED ALL OF THE RIGHTS AND LIABILITIES OF PRIVATE EMPLOYEES WHO EXECUTE VOLUNTARY EMPLOYMENT CONTRACTS.**

The Plaintiffs' first three (3) causes of action essentially allege that the Defendants unconstitutionally interfered with their respective rights as employees. The South Carolina Supreme Court addressed the rights and liabilities of prisoners as employees within the context of our state's workmen's compensation legislation in *Hamilton v. Daniel International Corp.*, 273 S.C. 409, 257 S.E.2d 157 (1979).

Hamilton was a SCDC prisoner who was injured on the job site of a private employer

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that the residue of the prisoner's gross wages, remaining after satisfying federal and state taxes and the other listed withholdings, be made available to the prisoner for the purchase of incidentals pursuant to subsection (4).

Page 5 of 11

while participating in a prison work release program under the authority of Section 24-3-20. The Court made the following findings of fact regarding the conditions and circumstances of Hamilton's employment:

He was permitted to enter into a voluntary contract of employment with Daniel, and enjoyed the same salary and working conditions as other Daniel employees. Hamilton lived at a minimum security facility and was transported to and from the job site by a Department of Corrections bus. [Hamilton] received his paycheck directly from Daniel and paid the Department of Corrections a maintenance fee which covered room, board, and transportation. *Id.*, 257 S.E.2d at 158.

In its analysis, the Court in *Hamilton* stated the following:

Until passage of the Work Release Statute in 1966, prisoners who worked did so in prison industries or in public works activities under the control of penal authorities. With the advent of the work release program, however, a prisoner was able to acquire all the rights and liabilities of a private employee. [Section 24-3-20] states that "the rates of pay and other conditions of employment will not be less than those paid and provided for work of similar nature in the locality in which the work is to be performed." *Id.* (Emphasis supplied by Court.)

Section 24-3-430(D) echoes Section 24-3-20 in requiring rates of pay and other conditions of employment for prisoners participating in the Prison Industries program will not be less than those paid and provided for work of similar nature in the locality in which the work is to be performed.

However, the distinction made by the Court between the property rights of prisoners participating in "prison industries" activities and the property rights of prisoners authorized to participate in work release programs is critical in the present case.

Unlike the plaintiff in *Hamilton*, each of the Plaintiffs in the present case earned their gross wages by virtue of their participation in the Prison Industries program under Section 24-3-310, *et. seq.*

Page 6 of 11



Hamilton was permitted by the rules of the work release program to negotiate and execute "a voluntary contract of employment" directly with a private sector employer; the Plaintiffs in the present case worked exclusively "under the control of penal authorities" as participants in the Prison Industries program. The Plaintiffs here did not individually negotiate and execute contracts with a private sector employer; they executed agreements with the South Carolina Department of Corrections 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." *Id.*

BOOK P-M PAGE 276

This conclusion is further supported by comparing the method by which Hamilton received his wages and the method by which the Plaintiffs in the present case received their wages. Hamilton received his pay check directly from his employer. None of the Plaintiffs in the present case received a paycheck directly from a single private employer. Pursuant to the provisions of Section 24-3-40, their gross wages were paid directly to the Department of Corrections.

Although *Hamilton* examined a prisoner's property rights as an employee within the context of our State's workmen's compensation laws, its analysis is nonetheless applicable in the present case. As all ten (10) Plaintiffs earned their gross wages as participants in the Prison Industries program under Section 24-3-310, *et seq.*, they performed their labor under the control of state penal authority. Consequentially, they never acquired private sector employee property rights to their gross wages.

If the Plaintiffs never acquired private sector employee property rights to their gross wages, the withholdings required by Section 24-3-40 do not impair their rights to freely enter into contracts, do not deprive them of their property without due process and equal protection

Page 7 of 11

under the law, and do not constitute the taking of their private property. Concisely stated, the State cannot impair, deprive or take from the Plaintiffs that which they did not possess in the first place.

As there is no genuine issue of material fact regarding the Plaintiffs' participation in the Prison Industries program, the withholdings mandated by Section 24-3-40 are clearly constitutional under *Hamilton*.

BOOK P. 277

**VI. THE PLAINTIFFS DO NOT HAVE A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT TO THEIR GROSS WAGES**

In *Washlefske v. Winston*, 234 F.3d 179, 185 (4<sup>th</sup> Cir. 2000), the Fourth Circuit Court of Appeals determined that, "under traditional rules of property law in Virginia, an inmate has no property interest in any 'wages' from his work in prison except insofar as the State might elect, through statute, to give him rights."

In the present case, the Plaintiffs earned their wages by participating in the Prison Industries program, a program which was originally established by the South Carolina legislature through its enactment of Section 24-3-310. The Plaintiffs' ability to even earn wages for their labor was established only by our legislature's enactment of Section 24-3-430. Our legislature then enacted, and later amended, Section 24-3-40 to establish the method by which the Plaintiffs received their wages and the precise allocation of their wages.

When the statutory basis for our state's Prison Industries program is analyzed in this logical sequence, *Washlefske* is more than illustrative. It is the logical extension of our Supreme Court's distinction between prison industry activity and work release employment in *Hamilton*. As such, there exists no genuine issue of material fact for trial with regards to the Plaintiffs' first three causes of action, all of which offer constitutional challenges to Section 24-3-40.

Page 8 of 11

**VII. ACCORDING TO SOUTH CAROLINA CODE SECTION 24-3-310, PARTICIPATION IN THE PRISON INDUSTRIES PROGRAM DOES NOT GRANT A PRISONER ANY VIABLE PROPERTY INTEREST IN HIS WAGES**

As expressed by Section 24-3-310(2), one intent of the Prison Industries program is to "further utilize the labor of convicts for self-maintenance and for reimbursing this State for expenses incurred by reason of their crimes and imprisonment." Therefore, the statute establishing the Prison Industry program (Section 24-3-310), within which each of the Plaintiffs was or is a participant, does not contemplate the recognition of a prisoner's employment rights, as the prisoner is performing labor which ultimately benefits the State and its citizens and not private employers.

BOOK ~~P-1~~ PAGE 278

The withholding schedule provided by the amended version of Section 24-3-40 provides the mechanism to implement the intent of the Prison Industries program stated above. The withholding of a percentage of a prisoner's gross wages for restitution purposes<sup>5</sup> reimburses the State for expenses incurred by reason of the prisoner's crime. The withholding of a percentage of a prisoner's gross wages for room and board<sup>6</sup> and for a prisoner's incidental expenses<sup>7</sup> certainly constitutes "self-maintenance" and also reimburses the State for the expenses incurred by reason of the prisoner's imprisonment. The withholding of a percentage of a prisoner's gross wages for child support obligations<sup>8</sup> indirectly reimburses the State for the expenses incurred by reason of the prisoner's imprisonment. A prisoner who must satisfy child support obligations could not do so if he were imprisoned and not permitted to receive wages for his labor. As a

<sup>5</sup> Section 24-3-40(A)(1) and (2).

<sup>6</sup> Section 24-3-40(A)(3).

<sup>7</sup> Section 24-3-40(A)(3), (A)(4), (A)(6).

<sup>8</sup> Section 24-3-40(A)(3).

result, the recipient of the prisoner's child support payments could well turn to other State agencies for financial assistance to fill the financial gap created if such a circumstance occurred.

As the Plaintiffs do not challenge the constitutionality of Section 24-3-310 in their complaint and the withholdings mandated by Section 24-3-40 clearly support an expressly defined intent of the Prison Industries program under Section 24-3-310(2), there is no genuine issue of material fact for trial regarding the Plaintiffs' first three causes of action.

**VIII. AS SOUTH CAROLINA CODE SECTION 24-3-40 IS NOT A REVENUE RAISING STATUTE, ITS AMENDMENT VIA AN ACT OF THE SOUTH CAROLINA SENATE IS NOT UNCONSTITUTIONAL**

BOOK PAGE 279

Plaintiffs' fourth and final cause of action alleges that Section 24-3-40 was unconstitutionally amended by 1999 Senate Act No. 68, because Article III, Section 15 of the South Carolina Constitution permits revenue raising legislation only by a bill originating in the South Carolina House of Representatives. The Plaintiffs allege, at least inferentially, that the withholdings from Section 24-3-40 constitute "revenue."

Article III, Section 15 of the South Carolina Constitution provides that "[b]ills for raising revenue shall originate in the House of Representatives but may be altered, amended or rejected in the Senate; all other Bills may originate in either House, and may be amended, altered or rejected by the other."

In *State v. Stanley*, 131 S.C. 513, 127 S.E. 574, 575 (1925), the South Carolina Supreme Court declared that this provision "only applies to bills to levy [t]axes, in the strict sense of the word, and not to bills for other purposes, which may incidentally raise revenue."

As detailed above, no part of Section 24-3-40, as amended by Senate Act No. 68 in 1999, transfers to the State's general fund the portions of a prisoner's gross wages withheld pursuant to its requirements. Therefore, no part of Section 24-3-40 either expressly or incidentally raises

Page 10 of 11

revenue under the standard articulated in *Stanley*.

Accordingly, there exists no material issue of genuine fact for trial regarding the Plaintiffs' fourth and final cause of action.

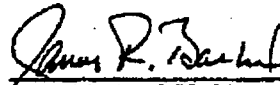
BOOK ~~P.M.~~ PAGE 280

**IX. ORDER OF THE COURT**

When viewed in the light most favorable to the Plaintiffs as the non-moving party, Plaintiffs' evidence, and all inferences which can reasonably be drawn therefrom, present no genuine issue of material fact for trial. The deductions from a prisoner's gross wages mandated by Section 24-3-40, as amended in 1999, are constitutional. Furthermore, Section 24-3-40 was constitutionally amended in 1999. As such, the Defendants are entitled to Summary Judgment as a matter of law regarding all of the Plaintiffs' causes of action.

Accordingly, this Court **GRANTS** the Defendants' Motion for Summary Judgment.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
**JAMES R. BARBER, III**  
Circuit Court Judge  
Fifth Judicial Circuit

Columbia, South Carolina  
September 7, 2001

Page 11 of 11

McMaster v. State of Minn., 819 F.Supp. 1429 (1993)  
RICO Bus.Disp.Guide 8317, 1 Wage & Hour Cas.2d (BNA) 616

819 F.Supp. 1429  
United States District Court,  
D. Minnesota,  
Fourth Division.

Gregory J. McMASTER, Elizabeth Krogstad,  
Harold Gustafson, Michael Giest, Guy Hathaway,  
John E. Liljedahl, Timothy S. Smith, Shawn  
Hubbard, James Scott, Rickey J. Sistad, and  
Gerald Norris, on behalf of themselves and all  
other persons similarly situated, Plaintiffs,

v.

STATE OF MINNESOTA; Orville Pung, Minnesota  
Commissioner of Corrections; Jean Whitney,  
Administrative Assistant to the Commissioner of  
Corrections; Donald G. Tomsche, Correctional  
Administrator to Minnesota Department of  
Corrections; Dennis Benson, Warden, Minnesota  
Correctional Facility—Oak Park Heights; Pat  
Adair, Superintendent, Minnesota Correctional  
Facility—Shakopee; Robert Erickson, Warden,  
Minnesota Correctional Facility—Stillwater; Fred  
Holbeck, Superintendent, Minnesota Correctional  
Facility—Faribault; G. Fred Lafleur,  
Superintendent, Minnesota Correctional  
Facility—Lino Lakes; Leroy Siegal,  
Superintendent, Minnesota Correctional  
Facility—St. Cloud; Thomas F. Grogan, Director,  
Minnesota Correctional Facility—Oak Park  
Heights Industries; Frank Wood, Minnesota  
Deputy Commissioner of Corrections; Guy Piras,  
Assistant Director, Minnesota Correctional  
Facility—Oak Park Heights Industries; Jim Rariak,  
Supervisor, Complex 4, Minnesota Correctional  
Facility—Oak Park Heights Industries; John Doe,  
Mary Roe, and Persons Unknown, Defendants.

Civ. 4-92-1058. | April 29, 1993.

Prison inmates brought suit against state and prison officials, challenging failure to pay minimum and prevailing wages for inmates working in prison industries. On defense motions for dismissal and partial summary judgment, the District Court, MacLaughlin, J., held that: (1) inmates were not "employees" governed by minimum wage provisions of the Fair Labor Standards Act (FLSA); (2) prevailing wage provision for transportation in interstate commerce of goods produced by prisoners, under the Ashurst-Sumners Act, had primary purpose of benefitting society in general, rather than being enacted for "especial benefit" of prison inmates, and thus, inmates could not enforce provision under § 1983; and (3) prison

officials established legitimate reasons for actions they took with regard to prison inmates, and thus, prison inmates failed to establish that actions were in retaliation for pursuing minimum wage and prevailing wage claims.

Motions granted.

#### West Headnotes (26)

- <sup>111</sup> Federal Courts  
◆ Agencies, officers, and public employees  
Federal Courts  
◆ Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Where plaintiffs seek injunctive or declaratory relief under federal law, they may overcome state's Eleventh Amendment immunity by naming state officials in their official capacity as defendants, but they may not obtain award of monetary damages against state officials in their official capacity, because such an award would be in effect an award against state. U.S.C.A. Const.Amend. 11.

Cases that cite this headnote

- <sup>112</sup> Federal Courts  
◆ Labor and employment  
Federal Courts  
◆ Agencies, officers, and public employees .

Prison inmates' FLSA claims against state and state officials in their official capacity were not barred by state's Eleventh Amendment immunity, because FLSA applies to states. Fair Labor Standards Act of 1938, §§ 1-19, 29 U.S.C.A. §§ 201-219; U.S.C.A. Const.Amend. 11.

Cases that cite this headnote

**McMaster v. State of Minn., 819 F.Supp. 1429 (1993)**

RICO Bus.Disp.Guide 8317, 1 Wage & Hour Cas.2d (BNA) 616

[3]

**Civil Rights**

•States and territories and their agencies and instrumentalities, in general

State itself is not subject to suit under § 1983, because state and state entities are not "persons" within meaning of that section. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[4]

**Racketeer Influenced and Corrupt Organizations**

•Persons liable

States are not subject to suit under Racketeer Influenced and Corrupt Organizations Act (RICO), absent state waiver of immunity. 18 U.S.C.A. §§ 1761, 1961-1968.

1 Cases that cite this headnote

[5]

**Federal Courts**

•Agencies, officers, and public employees  
Federal Courts

•Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Eleventh Amendment barred prison officials' non-FLSA claims against individual state officials in their official capacity only to extent that inmates, who sought both injunctive relief and monetary relief, sought monetary damages for those claims, in suit also brought under § 1983 and the Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. §§ 1761, 1961-1968; Fair Labor Standards Act of 1938, §§ 1-19, 29 U.S.C.A. §§ 201-219; 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 11.

Cases that cite this headnote

**Labor and Employment**

•Employees Included

Courts are to construe terms "employee" and "employer" expansively, under the FLSA, in order to further congressional goal of outlawing from interstate commerce goods produced in violation of the Act. Fair Labor Standards Act of 1938, §§ 3(d), (e)(1), (g), 6(a)(1), 29 U.S.C.A. §§ 203(d), (e)(1), (g), 206(a)(1).

2 Cases that cite this headnote

[7]

**Labor and Employment**

•Employment relationship

Where status of "employer" and "employee" is uncertain, under the FLSA, it is economic reality of relationship, and not technical concepts of employment, that control. Fair Labor Standards Act of 1938, §§ 3(d), (e)(1), (g), 6(a)(1), 29 U.S.C.A. §§ 203(d), (e)(1), (g), 206(a)(1).

2 Cases that cite this headnote

[8]

**Labor and Employment**

•Inmates

Prison inmates working in prison, for prison, pursuant to penological work assignment are not "employees" protected by minimum wage provisions of the FLSA; relationship is not "employment relationship," but "custodial relationship" to which FLSA does not apply. Fair Labor Standards Act of 1938, §§ 3(d), (e)(1), (g), 6(a)(1), 29 U.S.C.A. §§ 203(d), (e)(1), (g), 206(a)(1).

1 Cases that cite this headnote

[9]

**Prisons**

•Wages or earnings

Prisoners may be required to work and any

[6]

**Labor and Employment**

•Employers Included

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2

McMaster v. State of Minn., 819 F.Supp. 1429 (1993)

RICO Bus.Disp.Guide 8317, 1 Wage & Hour Cas.2d (BNA) 616

compensation for their labor exists by grace of the state.

2 Cases that cite this headnote

2 Cases that cite this headnote

<sup>[10]</sup> **Labor and Employment**  
• Fair Labor Standards Act

FLSA was intended both to provide minimum standard of living to American workers and to eliminate unfair competition resulting from use of underpaid labor. Fair Labor Standards Act of 1938, §§ 1-19, 29 U.S.C.A. §§ 201-219.

Cases that cite this headnote

<sup>[11]</sup> **Labor and Employment**  
• Inmates

Even if Minnesota prison industries operated as competitive industries, minimum wage requirements of the FLSA would not apply to prison inmates working for prison industries. Fair Labor Standards Act of 1938, §§ 3(d), (e)(1), (g), 6(a)(1), 29 U.S.C.A. §§ 203(d), (e)(1), (g), 206(a)(1).

1 Cases that cite this headnote

<sup>[12]</sup> **Labor and Employment**  
• Inmates

Because Congress dealt specifically with threat of unfair competition from prison inmates under the Ashurst-Sumners Act, which contains exemption allowing interstate transportation of goods produced under prison program providing that inmates who produced goods were paid prevailing local rates, it is that statute, and not FLSA, that controls wages to be paid to prison inmates. 18 U.S.C.A. § 1761; Fair Labor Standards Act of 1938, §§ 1-19, 29 U.S.C.A. §§ 201-219.

<sup>[13]</sup> **Action**  
• Statutory rights of action  
**Civil Rights**  
• Prisons  
Prisons  
• Right of action; restrictions

Prison inmates have no private right of action under statute prohibiting transportation in interstate commerce of goods manufactured by prisoners unless prisoners have been paid prevailing wages, but unavailability of such private right of action would not foreclose possibility of obtaining relief for violation of statute under § 1983. 18 U.S.C.A. §§ 1761, 1761(a-c); 42 U.S.C.A. § 1983.

Cases that cite this headnote

<sup>[14]</sup> **Civil Rights**  
• Rights Protected

Section 1983 can be used to enforce federal statute only if statute creates "federal right," and whether statute creates such right depends upon whether it was intended to benefit putative plaintiff. 42 U.S.C.A. § 1983.

Cases that cite this headnote

<sup>[15]</sup> **Civil Rights**  
• Prisons  
Prisons  
• Wages or earnings

Prevailing wage provision for transportation in interstate commerce of goods produced by prisoners, under the Ashurst-Sumners Act, had primary purpose of benefitting society in general by eliminating unfair competition, rather than being enacted for "especial benefit" of prison inmates, and thus, inmates may not enforce



McMaster v. State of Minn., 819 F.Supp. 1429 (1993)

RICO Bus.Disp.Guide 8317, 1 Wage & Hour Cas.2d (BNA) 616

provision under § 1983. 18 U.S.C.A. §§ 1761, 1761(a-c); 42 U.S.C.A. § 1983.

Cases that cite this headnote

3 Cases that cite this headnote

1164 Constitutional Law  
 ➤Prisoners; convicts  
 Prisons  
 ➤Labor and Employment

Thirteenth Amendment's prohibition on involuntary servitude does not extend to those who have been convicted of crimes, and compelling prison inmates to work thus does not violate the Amendment. U.S.C.A. Const.Amend. 13.

1 Cases that cite this headnote

119 Constitutional Law  
 ➤Eminent Domain  
 Constitutional Law  
 ➤Property and employment

Prison inmates had no protected property interest in receiving minimum or prevailing wages for work performed in prisons, and thus, failure to pay such wages to prison inmates for work was not taking without due process. U.S.C.A. Const.Amend. 5, 14; 18 U.S.C.A. § 1761; Fair Labor Standards Act of 1938, §§ 1-19, 29 U.S.C.A. §§ 201-219.

1 Cases that cite this headnote

117 Sentencing and Punishment  
 ➤Work and labor

Prison work requirements may be "cruel and unusual punishment" in violation of Eighth Amendment if prison officials knowingly compel inmates to perform labor that is beyond their strength, endangers their lives or health, or is unduly painful. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

120 Racketeer Influenced and Corrupt Organizations  
 ➤Pleading

Prison inmates asserting that state and prison officials violated Racketeer Influenced and Corrupt Organizations Act (RICO) based on violating criminal statutes regarding obstruction of criminal investigations and interference with commerce by threats of violence failed to meet minimum pleading requirements with regard to alleged statutory violations, thus warranting dismissal of RICO claims. Fed.Rules Civ.Proc.Rule 8, 28 U.S.C.A.; 18 U.S.C.A. §§ 1510, 1951, 1961-1968.

1181 Prisons  
 ➤Wages or earnings  
 Sentencing and Punishment  
 ➤Work and labor

Prison inmates, who alleged that prison officials force them to engage in work without paying them prevailing wages, did not state cause of action for infliction of "cruel and unusual punishment" in violation of the Eighth Amendment. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 1761.

121 Federal Civil Procedure  
 ➤Fraud, mistake and condition of mind

Conclusory allegations by prison inmates that prison officials used mails and wires to advance unlawful enterprise were too vague to meet particularity requirements for pleading fraud, and thus, inmates failed to state cause of action.

McMaster v. State of Minn., 819 F.Supp. 1429 (1993)

RICO Bus. Disp. Guide 8317, 1 Wage & Hour Cas.2d (BNA) 616

for violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), based on alleged fraud. 18 U.S.C.A. §§ 1961-1968; Fed. Rules Civ. Proc. Rule 9(b), 28 U.S.C.A.

Cases that cite this headnote

that were intended to dissuade them from exercising their right to seek a ruling on their wage claims. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[22] **Federal Civil Procedure**  
◊-Fraud, mistake and condition of mind

Litigants pleading Racketeer Influenced and Corrupt Organizations Act (RICO) violations must allege time, place, and content of all false representations to meet particularity requirement for pleading fraud. 18 U.S.C.A. §§ 1961-1968; Fed. Rules Civ. Proc. Rule 9(b), 28 U.S.C.A.

Cases that cite this headnote

[25] **Civil Rights**  
◊-Prisons  
Civil Rights  
◊-Access to courts

Claim by prison inmates that state officials have taken retaliatory action against them to punish them for having exercised constitutional right to seek judicial relief or to intimidate them from exercising their rights in future states claim upon which relief may be granted. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[23] **Racketeer Influenced and Corrupt Organizations**  
◊-Particular acts

Prison inmates could not premise Racketeer Influenced and Corrupt Organizations Act (RICO) claim against state and prison officials on failure of state and officials to pay them prevailing wages, as violation of statute regarding prevailing wages for prison inmates is not "racketeering activity." 18 U.S.C.A. §§ 1761, 1961(1).

Cases that cite this headnote

[26] **Civil Rights**  
◊-Prisons

Prison officials established legitimate reasons for action they took with regard to prison inmates, and thus, prison inmates failed to establish that actions were in retaliation for pursuing minimum wage and prevailing wage claims against prison officials; search of one inmate's cell was explained by entry for "computer selected random shakedown" of that cell, training replacement inmate for second inmate's work was explained as common practice, and laying off of third inmate was on same date prison industry lost customer, and was only temporary. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[24] **Civil Rights**  
◊-Prisons and jails; probation and parole

Claim by prison inmates that prison officials have retaliated against inmates for participation in lawsuit challenging wages paid them for prison work by interfering with their constitutional right of access to courts was sufficient to state cause of action; inmates alleged that officials had taken specific actions

Attorneys and Law Firms

\*1433 Richard G. Nadler, Thomas J. Lyons, St. Paul,

McMaster v. State of Minn., 819 F.Supp. 1429 (1993)

RICO Bus.Disp.Guide 8317, 1 Wage & Hour Cas.2d (BNA) 616

MN, Heidi H. Crissey, John R. Wylde, Jr., Minneapolis, MN, for plaintiffs.

Hubert H. Humphrey, III, Minnesota Atty. Gen., and Blair A. Rosenthal and Jocelyn F. Olson, Asst. Attys. Gen., St. Paul, MN, for defendants.

### MEMORANDUM AND ORDER

MacLAUGHLIN, District Judge.

This matter is before the Court on defendants' motion for dismissal and partial summary judgment. The motion will be granted.

### FACTS

This is a class action brought by current and former inmates of various Minnesota correctional facilities. Defendants include the state of Minnesota, the Commissioner of the Department of Corrections (DOC), and various state officials involved with prison industries operated by the DOC. The prison industries were established pursuant to Minn.Stat. § 241.27, which allows the DOC to establish industrial and commercial activities at correctional institutions to provide vocational training and employment to inmates. The industries produce items such as furniture, truck and auto body products, mattresses, textiles, and notebooks; they also provide services such as data entry, assembly, market research, and printing to private companies with whom the state has contracts. Plaintiffs allege that defendants sell prison industry products in interstate commerce to governmental entities and to the private sector. They further allege that in 1991, total sales for the prison industries exceeded \$11 million, and forty percent of the sales were in the private sector.

Compensation paid to inmates working in prison industries is determined by the commissioner of the DOC, pursuant to Minn.Stat. § 243.23, subd. 1, which allows the commissioner to pay inmates according to the quality and character of the work performed. Plaintiffs allege that they are paid between fifty and seventy-five cents per hour. Although Minnesota law allows many inmates to reduce their sentences by accruing good time, inmates who refuse available work assignments in the prison industries may not earn good time for any day on which they do not perform a work assignment. Minn.Stat. § 243.18.

Plaintiffs allege that defendants have violated their constitutional and statutory rights by failing to pay inmates minimum or prevailing wages for work performed in prison industries, and by punishing inmates who refuse to work by depriving them of good time. Plaintiffs seek relief on behalf of two classes of individuals. The first class includes individuals who have worked in prison industries and have not received lawful wages; the second class includes inmates who have lost good time as a result of refusing to work in the industries. Defendants move to dismiss Counts 1, 2, 4, 5, and 6 of the complaint, which raise claims under the Federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, various amendments to the United States Constitution, and 18 U.S.C. § 1761. Defendants also move for dismissal or summary judgment on Count 3, which alleges that defendants have retaliated against some of the named plaintiffs because of their participation in this lawsuit.

### DISCUSSION

In reviewing a motion to dismiss for failure to state a claim the Court presumes all factual allegations to be true and all reasonable inferences from those allegations are construed in favor of the non-moving party. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *Palmer v. Tracor, Inc.*, 856 F.2d 1131, 1132 (8th Cir.1988). The appropriate inquiry is not whether plaintiff will ultimately prevail but whether he will be allowed to introduce evidence to support his claims. *Scheuer*, 416 U.S. at 236, 94 S.Ct. at 1686. Because dismissal on the pleadings is an extreme remedy it is not favored by the courts and is employed only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957) (footnote omitted). *Robinson v. MFA Mutual Insurance Co.*, 629 F.2d 497, 500 (8th Cir.1980). See also *Palmer*, 856 F.2d at 1132.<sup>1</sup>

#### *I. Eleventh Amendment Immunity*

At the outset, defendants argue that the Eleventh Amendment shields the state of Minnesota and the individual defendants in their individual capacity from suit on all of plaintiffs' claims except the claims arising under the FLSA. Plaintiffs argue that neither the state nor the individual officials are immune from suit under the Eleventh Amendment.

McMaster v. State of Minn., 819 F.Supp. 1429 (1993)  
 RICO Bus. Disp. Guide 8317, 1 Wage & Hour Cas.2d (BNA) 618

<sup>14</sup> The Eleventh Amendment bars suits against states or state entities unless the state has waived its immunity or Congress has overridden it. *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 3106 n. 14, 87 L.Ed.2d 114 (1985). The Eleventh Amendment bar applies regardless of the relief sought. Thus, the general rule is that a state cannot be sued directly in its own name. *Id.* Where plaintiffs seek injunctive or declaratory relief under federal law, they may overcome the state's immunity by naming state officials in their official capacity as defendants; they may not, however, obtain an award of monetary damages against state officials in their official capacity because such an award would be in effect an award against the state. *Id.* at 169, 105 S.Ct. at 3107.

<sup>15</sup> <sup>16</sup> Defendants concede that the plaintiffs' FLSA claims are not barred by the Eleventh Amendment, because the United States Supreme Court has held that the FLSA applies to the states. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). Defendants assert, however, that neither the state as an entity nor the state officials in their official capacity are subject to suit on plaintiffs' remaining claims. Defendants correctly point out that the state itself is not subject to suit under section 1983 because states and state entities are not "persons" within the meaning of that section. *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Nor are states subject to suit under RICO, absent a state waiver of immunity. *See Bair v. Krug*, 853 F.2d 672 (9th Cir.1988). Therefore, defendants assert that with the exception of the FLSA claim, all claims against the state and the individual defendants in their official capacity must be dismissed.

In response, plaintiffs do not argue that the state of Minnesota has waived its sovereign immunity for plaintiffs' non-FLSA claims, or that Congress has abrogated the state's immunity on those claims. Instead, <sup>1435</sup> plaintiffs assert that where the commerce clause is involved, the state does not have complete immunity. In support of this assertion, plaintiffs rely on *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989). As defendants point out, however, *Union Gas* holds that Congress has authority under the commerce clause to abrogate sovereign immunity for claims arising under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). As this case involves no CERCLA claim, *Union Gas* is simply inapplicable. Because it is clear that the state of Minnesota is not subject to suit on plaintiffs' non-FLSA claims, those claims must be dismissed insofar as they seek to impose liability against the state itself.

<sup>15</sup> However, the claims against the individual defendants in their official capacity cannot be dismissed in their entirety on Eleventh Amendment grounds. Defendants rely on *Will* to support their argument that plaintiffs' non-FLSA claims against the individual defendants in their official capacity must be dismissed. This argument misstates the reach of *Will*. As noted above, the Eleventh Amendment does not bar suits for injunctive or declaratory relief against state officials. Consistent with this rule, *Will* holds that suits seeking prospective injunctive relief against state officials in their official capacity are permissible under section 1983 because they are not treated as actions against the state. *Will*, 491 U.S. at 71 n. 10, 109 S.Ct. at 2311 n. 10. Because plaintiffs seek both injunctive relief and monetary relief, the Eleventh Amendment bars their non-FLSA claims against the individual defendants in their official capacity only to the extent that plaintiffs seek monetary damages for those claims.

## II. The FLSA Claim

<sup>16</sup> <sup>17</sup> The FLSA requires covered employers to pay their employees a minimum hourly wage, which is currently \$4.25. 29 U.S.C. § 206(a)(1). The Act defines critical terms in circular fashion. "Employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee," while "employee" is defined as "any individual employed by an employer." 29 U.S.C. § 203(d), (e)(1). "Employ" is defined as "to suffer or permit to work." 29 U.S.C. § 203(g). Courts are to construe the terms "employee" and "employer" expansively in order to further the congressional goal of outlawing from interstate commerce goods produced in violation of the Act. *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 1350, 117 L.Ed.2d 581 (1992); *Tony & Susan Alamo Foundation v. Sec. of Labor*, 471 U.S. 290, 296, 105 S.Ct. 1953, 1959, 85 L.Ed.2d 278 (1985). Where the status of employer and employee is uncertain, it is the economic reality of the relationship, and not technical concepts of employment, that control. *Tony & Susan Alamo*, 471 U.S. at 301, 105 S.Ct. at 1961; *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33, 81 S.Ct. 933, 936, 6 L.Ed.2d 100 (1960).

<sup>18</sup> There are numerous reported decisions in which prisoners have raised FLSA wage claims against private companies with whom the state has contracted to provide inmate labor. In this situation, courts have generally held that the prisoners had no claim under the FLSA, either because prisoners are not employees within the meaning of the Act, or because the private companies were not the

McMastor v. State of Minn., 819 F.Supp. 1429 (1993)

RICO Bus.Disp.Guide 8317, 1 Wage &amp; Hour Cas.2d (BNA) 618

prisoners' employers under the economic reality test. *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320 (9th Cir.1991); *Alexander v. Sara, Inc.*, 721 F.2d 149 (5th Cir.1983); *Sims v. Parke Davis & Co.*, 334 F.Supp. 774 (E.D.Mich.), *aff'd*, 453 F.2d 1259 (6th Cir.1971), *cert. denied*, 405 U.S. 978, 92 S.Ct. 1196, 31 L.Ed.2d 254 (1972); *Hudgins v. Hart*, 323 F.Supp. 898 (E.D.La.1971); *Huntley v. Gunn Furniture Co.*, 79 F.Supp. 110 (W.D.Mich.1948); *Prieur v. D.C.I. Plasma Center*, 102 Nev. 472, 726 P.2d 1372 (1986); *Lavigne v. Sara, Inc.*, 424 So.2d 273 (La.Ct.App.1982); *Manville v. Board of Governors of Wayne State*, 85 Mich.App. 628, 272 N.W.2d 162 (1978); *but see Watson v. Graves*, 909 F.2d 1549 (5th Cir.1990) (inmates who worked for a construction company outside prison grounds were employees of the company); *Carier v. Duchess Community College*, 735 F.2d 8 (2d Cir.1984) (an inmate who worked as a teaching assistant for a \*1436 community college was an employee of the college).

This case presents a slightly different question than the cases cited above, because plaintiffs are pressing their FLSA claim not against the private companies with whom the state contracts, but against the state itself. As is the case for FLSA actions against private employers, most courts considering FLSA claims against states and state entities have held in favor of the state. *Harker v. State Use Industries*, 990 F.2d 131 (4th Cir.1993); *Vanskike v. Peters*, 974 F.2d 806 (7th Cir.1992), *cert. denied*, 507 U.S. 928, 113 S.Ct. 1303, 122 L.Ed.2d 692 (1993); *Gilbreath*, 931 F.2d 1320 (9th Cir.1991); *Miller v. Dukakis*, 961 F.2d 7 (1st Cir.), *cert. denied*, 506 U.S. 1024, 113 S.Ct. 666, 121 L.Ed.2d 590 (1992); *Worsley v. Lash*, 421 F.Supp. 556 (N.D.Ind.1976); *Quigg v. South*, 243 Mont. 218, 793 P.2d 831 (1990); *McGinnis v. Stevens*, 543 P.2d 1221 (Alaska 1975); *see also Alvarado Guevara v. Immigration & Naturalization Service*, 902 F.2d 394 (5th Cir.1990) (alien detainees not employees of INS); *Emory v. United States*, 2 Cl.Ct. 579 (Cl.Ct.), *aff'd*, 727 F.2d 1119 (Fed.Cir.1983) (prisoner working in federal prison industries not employee of federal government). Defendants rely on this line of cases in general, and on *Vanskike* in particular, to argue that plaintiffs' FLSA claims must fail because plaintiffs are not employees within the meaning of the Act, and because no employer/employee relationship exists between plaintiffs and the state.

Plaintiffs in turn rely on *Hale v. State of Arizona*, 967 F.2d 1356 (9th Cir.1992), in which the court held that inmates who worked for Arizona Correctional Industries were employees within the meaning of the FLSA. The Court declines to follow *Hale*, for several reasons. First, the Court notes that the precedential value of *Hale* is

uncertain. The *Hale* decision appears to conflict with *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320 (9th Cir.1991), in which a different panel of the Ninth Circuit held that the FLSA did not cover prisoners working within the prison for a private plasma center; perhaps because of this conflict, the Ninth Circuit has decided to reconsider *Hale* en banc.

Second, *Hale* is not factually analogous to the case at bar. In *Hale*, the prisoners worked for an entity that was deemed to be a private enterprise under state law and was intended by the state to operate as a profit-oriented commercial enterprise. Here, the industries in which plaintiffs work are not private entities. Rather, under Minnesota law, they are enterprises that are created, owned, and operated by the DOC. Minn.Stat. § 241.27.<sup>1</sup>

Third, the result reached in *Hale* is against the weight of authority. To the extent that *Hale* holds that inmates working on prison grounds and performing work for private entities are employees under the FLSA, the decision is something of an anomaly. As noted above, numerous reported decisions hold that private companies who use inmate labor pursuant to a contractual arrangement with the state are not employers within the meaning of the FLSA.<sup>2</sup> To the extent that *Hale* holds that a prisoner working within a prison and for the prison is an employee of the prison for FLSA purposes, the case is also an anomaly, because the vast majority of cases hold that in such a situation the prisoner is not a state employee. For these reasons, both the Seventh Circuit and the Fourth Circuit have expressly declined to follow *Hale*. *Vanskike v. Peters*, 974 F.2d 806 (7th Cir.1992), *cert. denied*, 507 U.S. 928, 113 S.Ct. 1303, 122 L.Ed.2d 692 (1993); *Harker v. State Use Industries Envelope Shop Inmates*, 990 F.2d 131 (4th Cir.1993).

\*1437 The Court concludes that Eighth Circuit, like the Seventh and Fourth Circuits, would decline to follow *Hale*. The Eighth Circuit considered a prisoner's claim for wages under the FLSA in *Wentworth v. Solem*, 548 F.2d 773 (8th Cir.1977). The plaintiff in *Wentworth* was an inmate in a state penitentiary who alleged, among other things, that state prison officials had violated the FLSA by failing to pay him the federal minimum wage for work he performed in the prison's bookbinding shop. The court held that the plaintiff had failed to state a claim under the FLSA, because the Act did not extend coverage to state employees under *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976).

The holding in *Wentworth* does not control this case because the United States Supreme Court reversed *Usery* and extended FLSA coverage to state employees in

McMaster v. State of Minn., 819 F.Supp. 1429 (1993)

RICO Bus. Disp. Guide 8317, 1 Wage &amp; Hour Cas.2d (BNA) 616

*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). However, in addition to holding that the FLSA did not extend to state employees, the *Wentworth* court stated, "we are doubtful that Congress ... intended to extend the coverage of the minimum wage law to convicts working in state prison industries." *Wentworth*, 548 F.2d at 775. This statement is a strong indication that the Eighth Circuit would reject a construction of the FLSA that would include within the definition of employee a prisoner performing work for the prison itself.

In arguing that prisoners are employees within the meaning of the FLSA, plaintiffs point out that Congress specifically exempted certain employees from FLSA coverage in 29 U.S.C. § 213. Because Congress did not include prisoners in the list of exempted employees, plaintiffs argue that it must be assumed that Congress intended them to be covered by the FLSA. However, as a matter of statutory interpretation, the Court agrees with the *Vanskike* court that "common linguistic intuitions ... are at least strained by the classification of prisoners as 'employees' of the [department of corrections] or of the State." *Vanskike*, 874 F.2d at 807. Moreover, if prisoners do not fall within the meaning of employee in the first place, their omission from section 213's list of exempted employees does not indicate a congressional intent to confer FLSA coverage upon them. *Vanskike*, 974 F.2d at 807 n. 2; *Harker*, 990 F.2d at 132-33.

In any event, the Court need not decide whether prisoners can ever be considered employees for purposes of the FLSA, because under the facts alleged here, it is clear that no employer/employee relationship exists between plaintiffs and the state. In support for their argument that such a relationship does exist, plaintiffs rely heavily on the fact that the state contracts directly with outside employers to produce products and perform services; for example, plaintiffs point out that the state contracts with private entities to provide data processing and telemarketing, which are performed by inmates. Because non-inmates performing this type of work would surely be protected by the FLSA, plaintiffs assert that they too must be covered by the Act.

Plaintiffs do not allege that any of the entities with whom the state contracts is an employer within the meaning of the FLSA. Instead, they apparently argue that the state's contracts with private companies somehow convert the relationship between plaintiffs and defendants into an employment relationship within the meaning of the Act. Plaintiffs cite no authority to support such a proposition. Moreover, plaintiffs' focus on the nature of the work they perform is misplaced. Coverage under the FLSA turns not

on the nature of the work performed, but on the economic reality of the relationship between the alleged employer and the alleged employee. See, e.g., *Vanskike*, 974 F.2d at 808.

Where, as here, inmates work in the prison and for the prison pursuant to penological work assignments, the economic reality is that they are not employees. *Vanskike*, 974 F.2d at 810.<sup>1</sup> Plaintiffs have neither contracted \*1438 with the government to become employees nor engaged in a bargained-for exchange of labor for consideration. Rather, they have been assigned work within prison industries for the purposes of training, rehabilitation, and reduction of idleness. Thus, the relationship between plaintiffs and the state is not an employment relationship, but a custodial relationship to which the FLSA does not apply. *Harker*, 990 F.2d at 132-33.

<sup>(9)</sup> Moreover, because plaintiffs are required to work as part of their sentences of incarceration, they are in fact engaged in involuntary servitude, not employment. The law is clear that prisoners may be required to work and that any compensation for their labor exists by grace of the state. *Vanskike*, 974 F.2d at 809 (citing *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir.), cert. denied, 375 U.S. 915, 84 S.Ct. 214, 11 L.Ed.2d 153 (1963); *Sigler v. Lowrie*, 404 F.2d 659 (8th Cir.1968), cert. denied, 395 U.S. 940, 89 S.Ct. 2010, 23 L.Ed.2d 456 (1969)). The mere fact that prisoners may be required to work without compensation does not foreclose the possibility that a right to compensation could be conferred upon them by statute. *Vanskike*, 974 F.2d at 809. But the Thirteenth Amendment's exclusion of prisoner labor from the prohibition on involuntary servitude is a strong indication that as a matter of economic reality, prisoners working for the prison itself are not employed by the prison within the meaning of the FLSA.

<sup>(10)</sup> <sup>(11)</sup> This conclusion is consistent with the purposes behind the FLSA. The FLSA was intended both to provide a minimum standard of living to American workers and to eliminate unfair competition resulting from the use of underpaid labor. *Vanskike*, 974 F.2d at 810. The first of these purposes has no application to prisoners, whose basic needs are met by the state. Nor does the second purpose of the FLSA require that coverage under the Act be extended to plaintiffs. It does not appear that the prison industries for which plaintiffs work present a substantial threat of unfair competition. By statute, the prison industries are to operate "for the primary purpose of providing vocational training, meaningful employment and the teaching of proper work habits to the inmates ... and not as competitive business ventures." Minn.Stat. § 241.27, subd. 1.<sup>2</sup> Plaintiffs assert

McMaster v. State of Minn., 819 F.Supp. 1429 (1993)

RICO Bus.Disp.Guide 8317, 1 Wage &amp; Hour Cas.2d (BNA) 616

that as a factual matter, Minnesota prison industries do operate as competitive business ventures, and that until factual questions regarding the competitive nature of the industries are resolved, summary judgment would be inappropriate. The Court concludes, however, that even if plaintiffs were able to establish that the prison industries in fact operate as competitive industries, their FLSA claim would fail. Although one of the purposes underlying the FLSA was to prevent unfair competition, application of the Act does not turn upon whether a particular entity operates as a competitive business.

In addition, as both the *Vanskike* court and the *Harker* court noted, Congress has chosen to deal with the problem of unfair competition from prison-made goods not through the FLSA, but through the Ashurst-Sumners Act, 18 U.S.C. §§ 1761-62, which criminalizes the transportation of prison-made goods in interstate commerce. *Vanskike*, 974 F.2d at 811-12; *Harker*, 990 F.2d at 134. The existence of the Ashurst-Sumners Act undermines plaintiffs' argument that the FLSA was intended to combat unfair competition resulting from the use of prison labor. Because the Ashurst-Sumners Act assumes that the use of prison labor will result in low-cost goods, it presupposes that the labor of prisoners belongs to the institution. *Vanskike*, 974 F.2d at 812. In recognition of this fact, Congress specifically exempted from the Ashurst-Sumners Act commodities manufactured by prisoners for use "1439 by federal, state or local governments." 18 U.S.C. § 1761(b). The governmental use exemption indicates both that Congress intended to let government reap the benefits of prison labor and that Congress has rejected the notion that all governmental uses of prison labor unduly obstruct fair competition. *Vanskike*, 974 at 811-12; *Harker*, 990 F.2d at 134. Applying the FLSA to plaintiffs would directly conflict with the governmental use exemption, because it would require the payment of the federal minimum wage in all instances.

<sup>[12]</sup> In addition to the governmental use exemption, 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 (Prison Industry Certification Program), provided that the inmates who produced the goods were paid the prevailing local rate for their work. 18 U.S.C. § 1761(c). The prevailing wage requirement insures that the availability of prison-made goods will not hamper fair competition. *Harker*, 990 F.2d at 133-34. The prevailing wage requirement was enacted in 1979, more than forty years after the FLSA was enacted. Pub.L.No. 96-157, 93 Stat. 1215 (1979). If Congress believed that the FLSA applied to prison labor,

it would have had no reason to amend the Ashurst-Sumners Act to exempt goods produced for prevailing wages under the Prison Industry Certification Program; thus, to adopt plaintiffs' reading of the FLSA would be to render the later enactment wholly superfluous. See *Vanskike*, 974 F.2d at 812; *Harker*, 990 F.2d at 134-35. Because Congress dealt specifically with the threat of unfair competition from prison-made goods in the Ashurst-Sumners Act, it is that statute, and not the FLSA, that controls.

In sum, the Court concludes that where, as here, inmates perform work for the prison and at the direction of the prison as part of their sentences, the relationship between the state and the inmates is not an employer/employee relationship that is governed by the FLSA. Accordingly, plaintiffs' claim for wages under the FLSA will be dismissed.

### III. The Section 1983 Claims

In Counts 2, 4, and 6 of the complaint, plaintiffs allege that defendants have violated 42 U.S.C. § 1983 by depriving them of their rights under color of state law. Section 1983 provides a cause of action for violations of both federal statutes and the United States Constitution. *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 508, 110 S.Ct. 2510, 2517, 110 L.Ed.2d 455 (1990). Plaintiffs assert that defendants have deprived them of their rights by violating the Ashurst-Sumners Act and the Fifth, Eighth, Thirteenth, and Fourteenth Amendments to the United States Constitution.

#### A. Ashurst-Sumners Act

Section 1761 of the Ashurst-Sumners Act provides:

Whoever knowingly transports in interstate commerce ... any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners ... shall be fined ... or imprisoned ... or both.

18 U.S.C. § 1761(a). As noted above, the prohibition on transporting convict-made goods does not apply to goods manufactured for governmental use or goods manufactured by prisoners participating in certain prison work pilot projects, if the prisoners have been paid wages comparable to those paid to non-inmate laborers for similar work. 18 U.S.C. § 1761(b), (c). Plaintiffs assert that defendants have violated section 1761 by transporting

McMaster v. State of Minn., 819 F.Supp. 1429 (1993)

RICO Bus.Disp.Guide 8317, 1 Wage & Hour Cas.2d (BNA) 616

In interstate commerce goods produced by inmates who were not paid prevailing wages. Defendants deny that they have transported prison-made goods in interstate commerce. They assert, however, that even if they had violated the statute, plaintiffs' section 1761 claim would fail because plaintiffs have no enforceable rights under the statute.

[10] [11] Defendants correctly point out that plaintiffs have no private right of action under section 1761. *Wentworth v. Solem*, 548 F.2d 773, 775 (8th Cir.1977).<sup>6</sup> The unavailability "1440 of a private right of action under a federal statute, however, does not foreclose the possibility of obtaining relief for violations of the statute under section 1983. *Wilder*, 496 U.S. at 508 n. 9, 110 S.Ct. at 2517 n. 9. In order to establish a private right of action under a federal statute, a plaintiff must establish both that he is "one of the class for whose *especial* benefit the statute was enacted" and that Congress intended to provide him a private remedy. *Cori v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26 (1975) (emphasis in original); *Touche Ross v. Redington*, 442 U.S. 560, 575, 99 S.Ct. 2479, 2488, 61 L.Ed.2d 82 (1979). Those seeking to enforce a federal statute through section 1983 are relieved of the burden of establishing that Congress intended to provide them with a private remedy, because section 1983 constitutes express congressional authorization for private suits. *Wilder*, 496 U.S. at 508 n. 9, 110 S.Ct. at 2517 n. 9. However, a mere violation of federal law will not support a section 1983 claim: section 1983 can be used to enforce a federal statute only if the statute creates a federal right. Whether the statute creates such a right depends upon whether it was intended to benefit the putative plaintiff. *Wilder*, 496 U.S. at 508, 110 S.Ct. at 2517 (citing *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 105, 110 S.Ct. 444, 448, 107 L.Ed.2d 420 (1989)). This inquiry is essentially the same as the first prong of the *Cori v. Ash* test. *New York Airlines v. Duker County*, 623 F.Supp. 1435 (D.Mass.1985). Thus, in order to prevail on a section 1983 claim based on section 1761 violations, plaintiffs must establish that the section was enacted for their *especial* benefit.

[12] In determining whether section 1761 creates rights in favor of plaintiffs, the Court must analyze the statute in detail, taking into account the entire legislative enactment. *Suter v. Artist M.*, 503 U.S. 347, 112 S.Ct. 1360, 1367, 118 L.Ed.2d 1 (1992). Section 1761 was originally enacted in 1935 as part of the Ashurst-Sumners Act. 49 Stat. 494 (1935). As originally enacted, the statute prohibited interstate transportation of all convict-made goods, except those manufactured in federal correctional institutions for use by the federal government. The

original purpose of the statute was to protect private business from unfair competition from low-cost, convict-made goods. *Kentucky Whip & Collar Co. v. Illinois Central Railroad Co.*, 299 U.S. 334, 351, 57 S.Ct. 277, 282, 81 L.Ed. 270 (1937); *Wentworth*, 548 F.2d at 775; *Vanskike*, 974 F.2d at 811.

Section 1761 was amended in 1948 to exempt from coverage agricultural commodities, parts for farm machinery, and commodities manufactured for use by state or local governments. Pub.L. No. 772, 62 Stat. 695 (1948). The statute was amended again by the Justice System Improvement Act of 1979. Pub.L. No. 96-157, 93 Stat. 1215 (1979). The 1979 amendments authorized the federal law enforcement assistance administration to designate seven pilot projects in which inmates would produce goods that would be exempt from the prohibition on the transportation of convict-made goods; the exemption was conditioned on inmates working voluntarily and being paid prevailing wages for their labor. Pub.L. No. 96-157 § 827(e) (codified at 18 U.S.C. § 1761(c)). Under the amended statute, wages earned by inmates in the pilot programs were subject to deductions for taxes, room and board charges, family support payments, and contributions to victim compensation funds. *Id.*

Pursuant to this statutory authority, the Prison Industry Certification Program was established. H.R.Rep. No. 101-681(I), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6608. The Prison Industry Certification Program was expanded by the Justice Assistance Act of 1984, which increased the number of authorized pilot projects from seven to twenty. Pub.L. No. 98-473, 98 Stat. 2077, 2102 (1984). The Senate Report accompanying the 1984 amendment indicates that the program was expanded because "the designated projects have been successful in teaching inmates marketable job skills, reducing the need for their families to receive public assistance, \*1441 decreasing the net cost of operating correctional facilities, and breaking the recidivist cycle." S.Rep. No. 98-225, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3463.

In 1990, Congress amended section 1761 once again to expand the Prison Industry Certification Program to fifty non-federal prison work pilot projects. Pub.L. No. 101-647 § 2906, 104 Stat. 4789, 4914 (1990). The House Report accompanying the amendment discusses the prevailing wage provision in detail:

Also of importance to the [Prison Industry Certification Program] is the payment of prevailing wages. With the earned wages, offenders can make a substantial contribution to society. Permissible deductions include room and board payments, Federal and state taxes,



McMaster v. State of Minn., 819 F.Supp. 1429 (1993)

RICO Bus.Disp.Guide 8317, 1 Wage & Hour Cas.2d (BNA) 616

Social Security and family support. Between five and 20 percent of the inmate's gross wages is mandatorily paid to victim's compensation programs....

....

The benefits of this program are numerous, with the reduction of the cost of incarceration being the most notable. It is also an effective way of occupying the growing prison population and reducing idleness, while at the same time expanding the available supply of goods and services. For the victims of crime, it is a means of partial reparation. For the inmates, the program provides them with a marketable skill, offering a chance of rehabilitation, as well as a way of meeting financial obligations while incarcerated.

H.R.Rep. No. 101-681(I), reprinted in 1990 U.S.C.C.A.N. 6472, 6608-09 (1990).

Plaintiffs rely upon the legislative history of the 1984 and 1990 amendments to argue that Congress specifically intended the prevailing wage provision of section 1761 to benefit them. The Court reads the legislative history differently. The enactment of the prevailing wage provision is consistent with the original goal of section 1761: it allowed states to develop meaningful prison industry programs, while continuing to protect private business from unfair competition resulting from low-cost, prison-made goods. The legislative history cited by plaintiffs does indicate that in enacting the prevailing wage provision, Congress had more in mind than merely safeguarding against unfair competition; Congress also intended the Prison Industry Certification Program and its prevailing wage requirement to help reduce inmate idleness, recidivism rates, and the costs of incarceration. Those benefits, however, accrue not specifically to inmates, but to prison administrators and to society in general. Moreover, although the prevailing wage provisions were intended to help inmates meet their financial obligations while incarcerated, it is again society in general that benefits from the inmates' ability to do so: society gains if prisoners pay taxes, support their families, and compensate their victims.

In short, the legislative history cited by plaintiffs indicates that the primary purpose of the prevailing wage provision 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. *Cort*, 422 U.S. at 80-81. Because plaintiffs have failed to

demonstrate that the prevailing wage provision was enacted for their especial benefit, the Court holds that they may not enforce the provision under section 1983.

#### B. The Constitutional Claims

<sup>(10)</sup> Plaintiffs allege that by requiring them to work in prison industries under threat of losing good time and by failing to pay them minimum or prevailing wages for their work, defendants have violated the Fifth, Eighth, Thirteenth and Fourteenth Amendments. Plaintiffs' Eighth and Thirteenth Amendment claims can be easily resolved. The Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction" (emphasis added). Because the prohibition on involuntary servitude does not extend to <sup>(11)</sup> those who have been convicted of crimes, compelling prison inmates to work does not violate the Thirteenth Amendment. *United States v. Reynolds*, 235 U.S. 133, 149, 35 S.Ct. 86, 90, 59 L.Ed. 162 (1914); *Mosby v. Mabry*, 697 F.2d 213 (8th Cir.1982). See also *Sigler v. Lowrie*, 404 F.2d 659, 661 (8th Cir.1968), *cert. denied*, 395 U.S. 940, 89 S.Ct. 2010, 23 L.Ed.2d 456 (1969) (there exists no constitutional right to be paid for work performed during imprisonment).

<sup>(12)</sup> <sup>(13)</sup> Prison work requirements may constitute cruel and unusual punishment in violation of the Eighth Amendment if prison officials knowingly compel convicts to perform labor that is beyond their strength, endangers their lives or health, or is unduly painful. *Roy v. Mabry*, 556 F.2d 881, 882 (8th Cir.1977); *Franklin v. Banks*, 979 F.2d 1330 (8th Cir.1992). However, plaintiffs have alleged no facts suggesting that any of these circumstances exist. Rather, they assert that it is cruel and unusual punishment for prison officials to force them to engage in work that violates section 1761. This argument merely repeats plaintiffs' section 1761 arguments, which the Court has already rejected. Moreover, plaintiffs have cited no authority to support such a reading of the Eighth Amendment. Because the Thirteenth Amendment specifically countenances forced labor during incarceration, and because plaintiffs have alleged no facts indicating that the circumstances under which they performed their labor constitute cruel and unusual punishment, the Court will dismiss the Eighth and Thirteenth Amendment claims.

<sup>(14)</sup> Although plaintiffs' due process claims have not been well-articulated, they appear to raise not a procedural due process claim, but a takings claim: they assert that defendants' failure to pay them the wages required by the

McMaster v. State of Minn., 819 F.Supp. 1429 (1993)

RICO Bus. Disp. Guide 8317, 1 Wage &amp; Hour Cas.2d (BNA) 616

FLSA and section 1761 is a taking for which they have not been compensated. In order to maintain either a procedural due process claim or a takings claim plaintiffs must first establish that they have a protected property interest. *Education Assistance Corp. v. Cavazos*, 902 F.2d 617, 626 (8th Cir.), cert. denied, 498 U.S. 896, 111 S.Ct. 246, 112 L.Ed.2d 205 (1990). Defendants contend that plaintiffs' due process claim must fail because neither state nor federal law gives plaintiffs a protected property interest in receiving minimum or prevailing wages for work performed in the prison industries. Plaintiffs apparently concede that they have no property interest in receiving a given wage under state law. They assert, however, that the FLSA and section 1761 give them a protected property interest in receiving minimum or prevailing wages. The Court has already concluded that plaintiffs have no enforceable right to receive minimum or prevailing wages under the FLSA or section 1761; therefore, plaintiffs may not rely on those provisions to establish a due process claim.

#### IV. The RICO Claim

<sup>[20]</sup> Count 5 of plaintiffs' complaint alleges that defendants have violated RICO because "through a pattern of deception and the use of the mails, the wires, and through interstate commerce, [they] have developed an enterprise for the purpose of selling goods in interstate commerce produced by persons who are paid unlawful wages." Compl. ¶ 55. Generally, RICO prohibits four types of activity: (1) investing income derived from a pattern of racketeering activity in an enterprise that affects interstate or foreign commerce, (2) acquiring an interest in such an enterprise through a pattern of racketeering activity, (3) conducting the affairs of such an enterprise through a pattern of racketeering activity, and (4) conspiring to engage in any of the first three activities. 18 U.S.C. § 1962. The statute defines "racketeering activity" as "any act or threat involving" specified state law crimes, any "act" indictable under various specified federal statutes, "1443 and certain federal 'offenses.'" *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 232, 109 S.Ct. 2893, 2897, 106 L.Ed.2d 195 (1989) (citing 18 U.S.C. § 1961(1)). Defendants assert that plaintiffs' RICO claim must be dismissed because plaintiffs have failed to adequately allege that defendants have engaged in any sort of racketeering activity within the meaning of RICO.

Defendants first point out that although plaintiffs state in the jurisdictional section of their complaint that their RICO claim is based on defendants' violations of criminal statutes regarding obstruction of criminal investigations (18 U.S.C. § 1510) and interference with commerce by threats of violence (18 U.S.C. § 1951), neither those

statutes nor any facts suggesting a violation of those statutes appear in the substantive allegations of the complaint. Thus, defendants argue that any RICO claim predicated on violations of sections 1510 and 1951 must be dismissed because plaintiffs have failed to make allegations that would give defendants fair notice of such a claim.

Federal Rule of Civil Procedure 8 requires plaintiffs to provide a statement of facts sufficient to give defendants notice of the plaintiffs' claim and the grounds upon which the claim rests. *Connelly v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *Baxley-DeLamar Monuments v. American Cemetery Ass'n*, 843 F.2d 1154, 1156 (8th Cir.1988). The Court finds that plaintiffs have failed to meet this minimal pleading requirement with regard to their section 1510 and section 1951 claims. Neither the complaint nor plaintiffs' memorandum provides any indication that defendants have interfered with commerce by threats or violence or have obstructed a criminal investigation. Therefore, the Court will dismiss plaintiffs' RICO claim insofar as plaintiffs base that claim on violations of sections 1510 and 1951.

<sup>[21]</sup> <sup>[22]</sup> Defendants next argue that plaintiffs' conclusory allegation that defendants have used the mails and wires to advance an unlawful enterprise is insufficient to sustain a RICO claim based on mail or wire fraud. Federal Rules of Civil Procedure 9(b) provides that where a plaintiff alleges fraud, the circumstances constituting that fraud must be pled with particularity. Thus, litigants pleading RICO violations must allege the time, place, and content of all false representations. *Lange v. Hocker*, 940 F.2d 359, 362 (8th Cir.1991) (quoting *Lally v. Crawford County Trust & Savings Bank*, 863 F.2d 612, 613 (8th Cir.1988)). In *Lange*, the plaintiffs alleged that the defendants had violated RICO by illegally obtaining control of a closely-held corporation engaged in equestrian training and equine research. The complaint alleged that the defendants had executed their scheme by contacting various horse owners through the use of interstate mail and telephone systems. The court held that this allegation was too vague and conclusory to be the basis of a RICO claim, and therefore affirmed the district court's dismissal of the complaint.

In this case, as in *Lange*, plaintiffs' allegations regarding mail and wire fraud are simply too vague to meet the particularity requirements of Rule 9(b). Plaintiffs have asserted that the defendants have used the mails and wires to further their allegedly fraudulent scheme, but have provided no details regarding the alleged violation. Because the plaintiffs have failed to plead their mail and wire fraud claim with the required specificity, it will be

McMaster v. State of Minn., 819 F.Supp. 1429 (1993)

RICO Bus.Disp.Guide 8317, 1 Wage &amp; Hour Cas.2d (BNA) 616

dismissed.

<sup>123</sup> Finally, defendants assert that plaintiffs cannot base their RICO claim on defendants' failure to pay them prevailing wages because even if defendants had violated 18 U.S.C. § 1761, such a violation would not constitute "racketeering activity" within the meaning of RICO. As noted above, RICO defines "racketeering activity" in terms of violations of certain specified state and federal laws. 18 U.S.C. § 1961(1). Section 1761 is not one of the specified federal laws. Therefore, plaintiffs may not premise their RICO claim upon a section 1761 violation. Because plaintiffs have failed to adequately allege a RICO claim, the claim will be dismissed.

#### V. The Retaliation Claim

Count 3 of the complaint alleges that defendants have retaliated against some inmates \*1444 for their participation in this lawsuit. The complaint alleges two types of retaliatory activity. First, the complaint alleges that the defendants laid off inmate workers and announced that the lay-offs were caused by plaintiffs' threatened challenge to defendants' failure to pay minimum or prevailing wages. This conduct, according to plaintiffs, put them in physical danger. Second, the complaint alleges that defendants have retaliated against some of the named plaintiffs by ransacking their cells while they were meeting with their attorneys regarding this lawsuit. The complaint alleges that defendants engaged in this conduct in order to dissuade plaintiffs from exercising their legal and constitutional rights.

<sup>124</sup> <sup>125</sup> Defendants first argue that these allegations are too conclusory to state a claim for retaliation. The Court is not persuaded by this argument. Although neither party has addressed the law on which plaintiffs' retaliation claim is based, it appears that plaintiffs are claiming that defendants have interfered with their constitutional right of access to the courts. A claim that state officials have taken retaliatory action against individuals to punish them for having exercised their constitutional right to seek judicial relief or to intimidate them from exercising their rights in the future clearly states a claim upon which relief may be granted. *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1427-28 (8th Cir.1986). In the instant case, plaintiffs have alleged that defendants have taken specific actions that were intended to dissuade them from exercising their right to seek a ruling on their wage claims. Those allegations are sufficient to withstand a motion to dismiss.

<sup>126</sup> Alternatively, defendants argue that they are entitled to summary judgment on the retaliation claim. A movant is

not entitled to summary judgment unless the movant can show that no genuine issue exists as to any material fact. Fed.R.Civ.P. 56(c). In considering a summary judgment motion, a court must determine whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The role of a court is not to weigh the evidence but instead to determine whether, as a matter of law, a genuine factual conflict exists. *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir.1987). "In making this determination, the court is required to view the evidence in the light most favorable to the nonmoving party and to give that party the benefit of all reasonable inferences to be drawn from the facts." *AgriStor Leasing*, 826 F.2d at 734. When a motion for summary judgment is properly made and supported with affidavits or other evidence as provided in Fed.R.Civ.P. 56(c), then the nonmoving party may not merely rest upon the allegations or denials of the party's pleading, but must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 585 (8th Cir.1987), cert. denied, 484 U.S. 1010, 108 S.Ct. 707, 98 L.Ed.2d 658 (1988). Moreover, summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324; 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

To support their retaliation claim, plaintiffs proffer affidavits of two of the named plaintiffs in this action. The first, Ricky J. Sistas, was incarcerated at the Minnesota Correctional Facility—Oak Park Heights (MCF-OPH) until October 1, 1992, when he was extradited to Wisconsin. He asserts that three weeks prior to his extradition, and before prison officials were aware that he was going to be transferred to Wisconsin, his supervisor informed him that another inmate was going to be trained for his job as a shop clerk. Sistas asserts that his supervisor "clearly intended to replace me because of [my] participation in the pending inmate litigation." Affidavit of Ricky J. Sistas ¶ 2. The affidavit does not provide the facts underlying this conclusion. Sistas further alleges that on September 23, 1992, approximately two hours after he met with his attorneys regarding this action, his cell was \*1445 searched. He states, "I was given the strong message by MCF-OPH staff that said action was the direct result of my participation in the then pending litigation." *Id.* at ¶ 3. Again, the affidavit does not provide the facts underlying this conclusion.

McMaster v. State of Minn., 819 F.Supp. 1429 (1993)

RICO Bus. Disp. Guide 8317, 1 Wage &amp; Hour Cas.2d (BNA) 616

The second inmate, James L. Scott, is currently incarcerated at MCF-OPH. He states that in July 1992 he and his fellow inmates Ron Moten and Juan Gatlin were informed that they were being laid off. According to Scott, Moten asked why he was being laid off and stated that he was not involved in any lawsuit involving inmate wages. Scott states that the MCF-OPH resident program manager replied that it was true that Moten was not involved in a lawsuit but that Scott was involved in such a suit. Scott asserts that the resident program manager's statement "placed me in the position of having other inmates apply pressure on me not to pursue this litigation and of having other inmates blame me for being laid-off from work." Affidavit of James L. Scott ¶ 5.

Defendants do not dispute that the acts Sistad and Scott complain of occurred; however, they contend that none of the actions were taken in retaliation for the inmates' participation in this lawsuit. Defendants assert that another inmate was trained for Sistad's position as a shop clerk not because Sistad was challenging the defendants' failure to pay minimum or prevailing wages, but because in August 1992 Sistad told his foreman that he might be extradited to Wisconsin and that he wanted a less demanding position than that of shop clerk. Affidavit of Richard E. Traynor ¶ 3. Defendants also assert that because of frequent turnover within the prison industries, it is common practice to train potential replacements for inmates and to maintain a reserve of at least two inmates who are qualified to assume any given position. *Id.* ¶ 5. Finally, defendants state that after the other inmate was trained to perform Sistad's former job, Sistad was given work as a slitter, and was told that when he returned from Wisconsin he would be restored to his former position as a shop clerk if he so chose. *Id.* ¶ 4. Given these facts, defendants argue, plaintiffs' allegation that the training of a replacement worker was a retaliatory act is simply unsupported.

Defendants maintain that Sistad's allegations that his cell was searched because he is involved in this litigation is similarly unsupported. They point out that MCF-OPH has a random "shakedown" policy, under which a computer randomly selects two rooms per week in each complex for a thorough search. Affidavit of Lynn Dingle ¶ 2 & Ex. A. The purpose of this policy is to purge the institution of weapons, drugs, and other contraband. *Id.* ¶ 2. Defendants assert that on September 23, 1992, Sistad's cell was randomly selected for a shakedown. *Id.* ¶ 3. As proof of this assertion, defendants submit the captain's report from September 23, 1992, which contains an entry for a "computer selected random shakedown" of Sistad's cell. *Id.* Ex. B.

Finally, defendants assert that the facts do not support plaintiffs' allegation that Scott was laid off in retaliation for his involvement in this lawsuit. Defendants assert that in the spring of 1992 two inmates who are not named plaintiffs in this action brought lawsuits in state court against nine private companies who are customers of Oak Park Heights Prison Industries. One of the companies named in the lawsuit was Argosy Electronics, Inc. (Argosy), which purchased hearing aid pouches from Oak Park Heights Prison Industries. Jan. 19, 1992 Affidavit of Guy Piras ¶ 2. On July 30, 1992, Argosy canceled its orders; the cancellation was confirmed in a letter from Argosy's attorney who stated that Argosy was "cancelling [sic] any further purchases of hearing aid pouches until the litigation regarding the sale of these items is resolved." *Id.* ¶ 3 & Ex. A. Because Oak Park Heights Prison Industries no longer had a customer to purchase its hearing aid pouches, it was forced to lay off inmates assigned to the Argosy production line. The inmates whose positions were made superfluous by the cancellation included Moten, Gatlin, and Scott, and those inmates were informed of the layoffs on the same day that Argosy canceled its orders. *Id.* ¶ 4-5. Shortly after informing the three inmates that they had been laid off, prison industry personnel determined that the layoffs "1446 should be accomplished in a more egalitarian manner, and therefore solicited volunteers to be laid off in place of Moten, Gatlin, and Scott. Three inmates volunteered, and Moten, Gatlin, and Scott returned to work the next morning. Moten, Gatlin, and Scott missed only one afternoon of work, and were paid for that afternoon. *Id.* ¶ 6.

Based upon this record, the Court finds that plaintiffs have failed to establish a genuine issue of material fact regarding their retaliation claim. Defendants' evidence establishes that defendants had legitimate reasons for the actions they took regarding Sistad and Scott. Plaintiffs have produced no evidence to rebut defendants' explanations for the challenged actions; instead, plaintiffs rely on conclusory allegations that the actions were motivated by defendants' desire to retaliate. However, "conclusive assertions of ultimate fact are entitled to little weight when determining whether a nonmovant has shown a genuine issue of fact sufficient to overcome a summary judgment motion." *Miller v. Solem*, 728 F.2d 1020, 1024 (8th Cir.), cert. denied, 469 U.S. 841, 105 S.Ct. 145, 83 L.Ed.2d 84 (1984). Moreover, in order to establish a claim for denial of access to the courts, plaintiffs must make some showing that they were in fact denied access to the courts or were otherwise prejudiced by defendants' actions. *McMaster v. Pung*, 984 F.2d 948, 953 (8th Cir.1993). Plaintiffs have failed to make such a

McMaster v. State of Minn., 819 F.Supp. 1429 (1993)

RICO Bus.Disp.Guide 8317, 1 Wage & Hour Cas.2d (BNA) 616

showing. Therefore, the Court will grant summary judgment for defendants on Count 3 of the complaint.

of the complaint is granted.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Accordingly, based on the foregoing, and upon all the files, records and proceedings herein,

**IT IS ORDERED that:**

All Citations

1. defendant's motion to dismiss Counts 1, 2, 4, 5, and 6 of the complaint is granted; and

819 F.Supp. 1429, RICO Bus.Disp.Guide 8317, 1 Wage & Hour Cas.2d (BNA) 616

2. defendants' motion for summary judgment on Count 3

**Footnotes**

<sup>1</sup> Plaintiffs have submitted numerous exhibits along with their memorandum in opposition to the motion to dismiss. Defendants object to the introduction of the exhibits except to the extent that they bear on defendants' motion for summary judgment on Count 3 of the complaint. Under Federal Rule of Civil Procedure 12(b), the Court may accept matters outside the pleadings and treat the motion as one for summary judgment where it would expedite resolution of the matter to do so. Plaintiffs' exhibits consist of documents that plaintiffs believe provide factual support for the allegations of the complaint. Because all allegations are taken as true in a motion to dismiss, and because defendants' motion to dismiss raises solely legal issues, the Court need not consider the material presented in plaintiffs' exhibits. Moreover, because defendants object to converting their motion to dismiss to a motion for summary judgment and have offered nothing beyond the pleadings to supplement the record, it would be inappropriate to convert the motion to one for summary judgment. Therefore, the Court will exclude all matters outside the pleadings, except to the extent that they bear on the summary judgment motion on Count 3.

<sup>2</sup> Plaintiffs' contention that the status of the prison industries involved in this case is a factual question is without merit. As defendants point out, plaintiffs' complaint does not allege that the industries are private enterprises. Even if it did, the legal characterization of a state-created entity is a question of law, not of fact.

<sup>3</sup> Those cases are, however, somewhat different from *Hale*, because while the earlier cases involved private industries that had contracted with the state, *Hale* involved a state-created entity within the department of corrections that was treated as a private enterprise under state law. *Hale*, 967 F.2d at 1360. Thus, the result in *Hale* may be explained by the unique status of the employing entity under state law.

<sup>4</sup> Plaintiffs attempt to distinguish *Vanskike* on the grounds that the inmate in that case merely performed janitorial and kitchen work within the prison. This assertion is simply incorrect. The inmate in *Vanskike* not only performed janitorial and kitchen work, but worked as a piece-line worker in the prison knit shop as well. *Vanskike*, 974 F.2d at 806. Moreover, the *Vanskike* court expressly rejected an interpretation of the FLSA under which coverage would turn upon whether inmates performed services for the prison itself or produced goods for distribution beyond prison walls. *Id.* at 811.

<sup>5</sup> Minnesota law does provide that private corporations may lease facilities on the grounds of state correctional institutions and employ selected inmates at those facilities; in such cases, however, state law requires the corporations to pay the inmates prevailing wages. Minn.Stat. § 243.88.

<sup>6</sup> As discussed above, the portion of *Wentworth* dealing with FLSA claims by prisoners has been overruled by a subsequent United States Supreme Court ruling. *Wentworth*'s holding regarding a private cause of action under section 1761, however, was not affected by the Supreme Court ruling, and remains good law.

<sup>7</sup> Any claim to a state-created property interest in a given wage would likely fail, because decisions regarding whether to pay inmates for their work in prison industries and what amount to pay them are committed to the discretion of the commissioner of the DOC. Minn.Stat. § 243.23, subd. 1. In a case involving similar statutes, the Eighth Circuit has held that inmates have no state-created property interest in receiving wages. *Hrbek v. Farmer*, 787 F.2d 414 (8th Cir.1986).

McMaster v. State of Minn., 819 F.Supp. 1429 (1993)

RICO Bus.Disp.Guide 8317, 1 Wage & Hour Cas.2d (BNA) 616

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Watson v. Graves, 909 F.2d 1549 (1990)

29 Wage & Hour Cas. (BNA) 1601, 110 A.L.R. Fed. 823, 59 USLW 2200...

909 F.2d 1549  
United States Court of Appeals,  
Fifth Circuit.

Kevin WATSON and Raymond Wayne Thrash,  
Plaintiffs-Appellants,

v.

Odom GRAVES, Darryl Jarreau, Marilyn Jarreau,  
and Abe Ross, Defendants-Appellees.

No. 89-3899. | Sept. 13, 1990.

Inmates who had participated in work release program brought suit against private employers and sheriff and warden, claiming violations of federal laws, including Fair Labor Standards Act and Thirteenth Amendment. The United States District Court for the Middle District of Louisiana, Frank J. Polozola, J., granted summary judgment in favor of all defendants, and inmates appealed. The Court of Appeals, Wiener, Circuit Judge, held that: (1) inmates were not subjected to involuntary servitude; (2) inmates were Fair Labor Standards Act (FLSA) "employees"; and (3) inmates abandoned their FLSA claim against sheriff and warden.

Affirmed in part, reversed and rendered in part, and remanded in part.

West Headnotes (9)

<sup>111</sup> Constitutional Law  
• Prisoners; convicts

Prisoner who is not sentenced to hard labor retains his Thirteenth Amendment rights, but to prove violation thereof, prisoner must show he was subjected to involuntary servitude or slavery. U.S.C.A. Const. Amend. 13.

28 Cases that cite this headnote

<sup>121</sup> Constitutional Law  
• Labor and employment

"Involuntary servitude," proscribed by Thirteenth Amendment, is defined as action by master causing servant to have, or to believe he has, no way to avoid continued service or confinement. U.S.C.A. Const. Amend. 13.

24 Cases that cite this headnote.

<sup>131</sup> Constitutional Law  
• Involuntary Servitude

Showing of compulsion is prerequisite to proof of involuntary servitude, in violation of Thirteenth Amendment; when employee has a choice, even though it is a painful one, there is no involuntary servitude. U.S.C.A. Const. Amend. 13.

27 Cases that cite this headnote

<sup>141</sup> Constitutional Law  
• Prisoners; convicts  
Prisons  
• Work release

Inmates who were not sentenced to hard labor were not subjected to involuntary servitude by virtue of their participation in work release program for \$20 a day, where inmates were not coerced to work or to continue to work against their will. U.S.C.A. Const. Amend. 13, § 1; LSA-R.S. 15:711.

14 Cases that cite this headnote

<sup>151</sup> Labor and Employment  
• Employment relationship

For purposes of Fair Labor Standards Act, determination of employee status focuses on economic reality and economic dependence. Fair Labor Standards Act of 1938, §§ 3(e)(1),

**Watson v. Graves, 909 F.2d 1549 (1990)**

29 Wage & Hour Cas. (BNA) 1601, 110 A.L.R. Fed. 823, 59 USLW 2200...

6(a)(1), as amended, 29 U.S.C.A. §§ 203(e)(1),  
206(a)(1).

LSA-R.S. 15:711.

14 Cases that cite this headnote

33 Cases that cite this headnote

<sup>[6]</sup> **Labor and Employment**  
• Employment relationship

Under "economic reality" test of determining employee status under Fair Labor Standards Act, court inquires whether alleged employer has power to hire and fire the employees, supervises and controls employee work schedules or conditions of employment, determines rate and method of payment, and maintains employment records. Fair Labor Standards Act of 1938, §§ 3(e)(1), 6(a)(1), as amended, 29 U.S.C.A. §§ 203(e)(1), 206(a)(1).

73 Cases that cite this headnote

<sup>[9]</sup> **Federal Courts**  
• Mode and sufficiency of presentation

Inmates abandoned their claims of employer-employee relationship with sheriff and warden, by failing to present facts that would substantiate such relationship. Fair Labor Standards Act of 1938, § 3(e)(1), as amended, 29 U.S.C.A. § 203(e)(1).

Cases that cite this headnote

<sup>[7]</sup> **Labor and Employment**  
• Inmates

Inmate status does not foreclose inquiry into Fair Labor Standards Act coverage. Fair Labor Standards Act of 1938, § 3(e)(1), as amended, 29 U.S.C.A. § 203(e)(1).

5 Cases that cite this headnote

**Attorneys and Law Firms**

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A.S. Easterly, III, Easterly & Pittman, Denham Springs, La., for defendants-appellees Jarreau.

John R. Burgess, Burgess & Lee, Livingston, La., for defendants-appellees Graves and Ross.

Appeal from the United States District Court for the Middle District of Louisiana.

Before REAVLEY, DUHÉ and WIENER, Circuit Judges.

**Opinion**

WIENER, Circuit Judge:

<sup>[8]</sup> **Labor and Employment**  
• Inmates

Inmates who were not sentenced to hard labor and chose to participate in work release program for flat rate of \$20 a day, were Fair Labor Standards Act "employees" of their private employers, who supervised inmates while they were away from jail and had de facto power to hire and fire by requesting or rejecting particular inmate. Fair Labor Standards Act of 1938, § 3(e)(1), as amended, 29 U.S.C.A. § 203(e)(1);

Kevin Watson (Watson) and Raymond Wayne Thrash (Thrash) (collectively, the Inmates), appeal the district court's grant of summary judgment in favor of all defendants based on that court's conclusion that as a matter of law, the Inmates are not employees of the private defendants under the Fair Labor Standards Act (FLSA or the Act), 29 U.S.C. §§ 201 *et seq.*, and are not entitled to relief under 42 U.S.C. § 1983 against the public defendants because their actions did not violate the thirteenth amendment or FLSA. We affirm the district



Watson v. Graves, 909 F.2d 1549 (1990)

29 Wage & Hour Cas. (BNA) 1601, 110 A.L.R. Fed. 823, 59 USLW 2200...

court's holding that none of the defendants violated the thirteenth amendment. We reverse the district court's grant of summary judgment to the private defendants based on its conclusion that the inmates were not employees of those defendants for purposes of FLSA coverage; we render judgment for the inmates on their FLSA claims against the private defendants; and we remand for the limited purpose of calculating the amount owed to the inmates by the private defendants under the Act. We affirm the grant of summary judgment in favor of the public defendants on the FLSA issue.

## I.

After serving their respective sentences in the Livingston Parish Jail, Watson and Thrash filed this action against the Sheriff of Livingston Parish, the Warden of the Livingston Parish Jail (the public defendants), and Darryl and Marilyn Jarreau, owners of Jarreau Builders (the private defendants), claiming violations of various federal laws,<sup>1</sup> including FLSA and the thirteenth amendment. The inmates filed a motion for summary judgment and the defendants filed a counter-motion for summary judgment. Following a hearing, the magistrate recommended that summary judgment be granted in favor of all defendants on all claims. The district court accepted the magistrate's recommendation. On appeal, the inmates dropped all claims other than those based on the Fair Labor Standards Act and on the thirteenth amendment and 42 U.S.C. § 1983 claims.

## II.

Up to now this court believed, apparently naively, that in the last decade of the twentieth century scenarios such as the one now before us no longer occurred in county or parish jails of the rural south except in the imaginations of movie or television script writers. The egregious nature of this misanthropic situation in the instant case, however, disabuses us of that innocent misconception.

\*1551 In 1987, Watson and Thrash were incarcerated in the Livingston Parish Jail to serve sentences resulting from convictions in Louisiana state courts for commission of non-violent crimes. Neither inmate had been sentenced to hard labor. At all pertinent times, Odorn Graves (the Sheriff) was the Sheriff of Livingston Parish and keeper of the parish jail. See La.Rev.Stat. Ann. § 15:704 (West 1981). Abe Ross (the Warden) was the warden of that jail.

During the time that Watson and Thrash were incarcerated, the Sheriff operated and the Warden administered a work release program for the Livingston Parish Jail. Under that program, prisoners who were granted trusty status were allowed to work outside the jail for private individuals or companies. When an outside party wanted trusty labor, such party would contact the Warden at the jail and he would assign the requested number of trusties to work for that party. Each trusty was paid \$20.00 per day regardless of the nature of the work he performed, the hours he worked or his particular level of skill. That amount had been set by the Sheriff during one of his prior administrations.<sup>2</sup>

In September 1987, both Thrash and Watson were granted trusty status, then assigned to work for the Sheriff's daughter and son-in-law, Marilyn and Darryl Jarreau (the Jarreaus or Jarreau).<sup>3</sup> The Jarreaus operate an unincorporated construction business called Darryl Jarreau Builders. It listed only two employees, Darryl and Marilyn Jarreau, and otherwise used trusty labor or subcontractors.

Jarreau signed a "Livingston Parish Trusty Work Detail Agreement" each day he picked up trusties for work. The relevant terms of the agreement were that (1) Jarreau was responsible for the trusty's actions while they were in his custody; (2) the trusties could not go beyond the Livingston Parish line; (3) the trusties were not allowed access to drugs or alcohol; (4) trusties were not allowed to operate motor vehicles, machinery, or heavy equipment; (5) Jarreau had to provide transportation to and from the prison; (6) the trusties assigned were selected by the prison officials;<sup>4</sup> and (7) the trusties had to remain on the job site.

At times Jarreau picked up the inmates as early as six in the morning and returned them as late as six to seven in the evening. No deputies or other law enforcement officers were present while the inmates or other trusties worked for Jarreau. Neither deputies nor other law enforcement officers made either routine or "spot" checks or patrols of the job sites. Neither the jail nor Jarreau kept work records on Watson or Thrash, each of whom was paid directly for his day's work.<sup>5</sup> On at least one occasion, Watson used his own transportation while working for Jarreau. It appears that on other occasions jail personnel delivered one or both of the inmates to the job site or picked them up from the job site as a favor to Jarreau.

## III.

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3

Watson v. Graves, 809 F.2d 1549 (1990)

29 Wage & Hour Cas. (BNA) 1601, 110 A.L.R. Fed. 823, 59 USLW 2200...

This court reviews the grant of summary judgment motion de novo, using the same "1552 criteria used by the district court in the first instance. *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir.1988). We "review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party." *Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc.*, 804 F.2d 879, 881 (5th Cir.1986) (per curiam) (citing *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 873 (5th Cir.1984)). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "Material facts" are "facts that might affect the outcome of the suit under the governing law." *Id.*

#### IV.

##### *Plaintiffs' Thirteenth Amendment Claims*

The thirteenth amendment states:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the States, or any place subject to their jurisdiction.

U.S. Const. Amend. XIII, § 1. This court has held that the requirement that incarcerated prisoners work without pay does not constitute involuntary servitude in violation of the thirteenth amendment. *Wendt v. Lynaugh*, 841 F.2d 619, 620 (5th Cir.1988).

The inmates argue that *Wendt* applies only to prisoners sentenced to hard labor, or those sentenced to work as part of their sentence. Watson and Thrash posit that, because they were not sentenced to hard labor, nor did the state demand work as part of their respective sentences, the holding in *Wendt* is inapplicable to them. Therefore, they argue, their case does not fall within the thirteenth amendment's exception for criminal punishment. They also argue that, because the work release program set up

by the Sheriff violated La.Rev.Stat. § 15:711(F),<sup>4</sup> the program was itself not authorized by law. Therefore, it was illegal for the inmates to be "put out to work."

<sup>[1]</sup> We agree that a prisoner who is not sentenced to hard labor retains his thirteenth amendment rights; however, in order to prove a violation of the thirteenth amendment the prisoner must show he was subjected to involuntary servitude or slavery.

<sup>[2]</sup> <sup>[3]</sup> Involuntary servitude is defined as "an action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement." *United States v. Shackney*, 333 F.2d 475, 486 (2d Cir.1964). When the employee has a choice, even though it is a painful one, there is no involuntary servitude. *Id.* at 487. "A showing of compulsion is thus a prerequisite to proof of involuntary servitude." *Flood v. Kuhn*, 316 F.Supp. 271, 281 (D.C.N.Y.1970), *aff'd*, 443 F.2d 264 (2d Cir.1971), *aff'd on other grounds*, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972).

<sup>[4]</sup> Watson and Thrash have proved no such compulsion. They argue that in a prison setting there are subtle and palpable tactics employed by jailors to intimidate the inmates and render seemingly voluntary conduct involuntary. None of the "facts" presented by Watson and Thrash show such intimidation. In fact, both testified that they requested work outside the jail and took work release whenever possible. The choice of whether to work outside of the jail for twenty dollars a day or remain inside the jail and earn nothing may have indeed been "painful" and quite possibly illegal under state law, but the evidence "1553 shows that neither Watson nor Thrash was forced to work or continued to work against his will. We conclude that, on the basis of their own testimony, neither Thrash nor Watson were subjected to involuntary servitude. Therefore, the district court correctly granted summary judgment to the defendants on the inmates' thirteenth amendment claims.

#### V.

##### *Fair Labor Standards Act Claim*

<sup>[5]</sup> <sup>[6]</sup> Under FLSA, an " 'employee' is defined as 'any individual employed by an employer.' " *Alexander v. SARA*, 721 F.2d 149, 150 (5th Cir.1983) (quoting 29 U.S.C. § 203(e)(1)(1982)). An employer is "one who acts 'directly or indirectly in the interest of an employer in

Watson v. Graves, 809 F.2d 1549 (1990)

29 Wage & Hour Cas. (BNA) 1601, 110 A.L.R. Fed. 823, 59 USLW 2200...

relation to an employee." *Young v. Cutter Biological*, 694 F.Supp. 651, 655 (D.Ariz.1988) (citing 29 U.S.C. § 203(d)). To "employ" is defined as including to "suffer or permit to work." *Id.* (citing 29 U.S.C. § 203(g)). For purposes of FLSA, determination of employee status focuses on economic reality and economic dependence. *Id.*; see *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308 (5th Cir.), cert. den., 429 U.S. 826, 97 S.Ct. 82, 50 L.Ed.2d 89 (1976); see also 29 U.S.C. § 206(a)(1). The "economic reality" test includes inquiries into:

whether the alleged employer (1) has the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.

*Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir.1984) (citing *Bonette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir.1983)).

There are two distinctly different "inmate" situations that engender prisoners' claims of FLSA coverage. The more common of the two involve outside, private, for-profit firms conducting operations within a prison (distinguished from a jail) and typically utilizing prisoners who have been sentenced to hard labor. In the majority of those situations, analysis under the economic reality test has led the courts to conclude that the inmates were not entitled to FLSA protection because primary control over the inmates, and determination of the hours to be worked and the nature of the work to be performed rested with the prison.<sup>7</sup> Under that analysis, the courts have found no employer-employee relationship existed. See, e.g., *Alexander*, 721 F.2d 149 (outside company had no contractual relationship with the inmates; compensation was paid to the State of Louisiana, not to inmates; no right on part of the company to select or reject an inmate assigned to work in the plasma program); *Hudgins v. Hart*, 323 F.Supp. 898 (E.D.La.1971) (outside company had no contractual relationship with the inmates; prison officials assigned inmates to work for the company; compensation was sent to the prison, which determined the rate of pay); *Sims v. Parke Davis & Co.*, 334 F.Supp. 774 (E.D.Mich.), aff'd, 453 F.2d 1259 (6th Cir.1971) (no contractual relationship between inmates and private contractor; outside company relinquished right to determine manpower required, who would work and who

would be discharged).

The second, less common inmate labor situation involves inmates working outside of the prison for and under the supervision of private contractors. In the leading case of *Carter v. Dutchess Comm. College*, 735 F.2d 8 (2d Cir.1984) the plaintiff was an inmate in the Fishkill Correctional Facility (FCF) and was employed outside of the prison as a teaching assistant at Dutchess Community College (DCC). After discovering that he was being paid at a rate lower than that of the "non-inmate" tutors, Carter sued DCC under section 1983 for violation of 1554 of FLSA. The district court held that Carter retained his inmate status under the control of prison officials and, therefore, did not become an "employee" of DCC. *Id.* at 11. The district court also noted that "it was unlikely that Congress intended that the FLSA's minimum wage protection be extended to prisoners." *Id.*

The second circuit reversed,<sup>8</sup> stating that "we emphatically hold that the fact that [Carter] is a prison inmate does not foreclose his being considered an employee for purposes of the minimum wage provisions of FLSA." *Id.* at 15. Rejecting the idea that prison labor could never be covered under FLSA, the second circuit stated that the degree of control exercised by the prison officials is only one factor in determining employee status under FLSA. *Id.* at 13. Other factors to consider include the extent to which an employer exercises typical employer prerogatives over the inmate. *Id.* at 14.

The *Carter* court stated that in order to analyze an inmate's employee status the court must also look to the purposes behind the Act. The Act was drafted not only to improve living conditions, bargaining strength vis-a-vis employers, and the general well-being of the American worker, but also to eliminate unfair competition among employers competing for business in the market and among workers looking for jobs. *Id.* Furthermore, the category of prison inmate is not one of the groups Congress expressly excluded from coverage by FLSA. See *Id.* at 13. For the court to exempt an entire class of workers on the basis of a technical label could upset the desired equilibrium in the work place. *Id.* Therefore, the policies behind FLSA factor into the true economic reality of inmate labor outside of the prison.

<sup>7</sup> We agree with the *Carter* court that status as an inmate does not foreclose inquiry into FLSA coverage. We also agree that in order to determine the true "economic reality" of the inmates' employee status, we must apply the four factors of the economic realities test to the facts in the instant case in light of the policies behind FLSA. We must also look to the substantive realities of the

Watson v. Graves, 909 F.2d 1549 (1990)

29 Wage & Hour Cas. (BNA) 1601, 110 A.L.R. Fed. 823, 59 USLW 2200...

relationship, not to mere forms or labels ascribed to the laborer by those who would avoid coverage.

A.

*Watson's and Thrash's employee status as to Jarreau*

<sup>(6)</sup> The district court found that under the economic realities test, Watson and Thrash were not employees of Jarreau. The magistrate found, and the district court agreed, that (1) the prison officials made the decisions whether an inmate could become a trusty and perform work outside the prison; (2) the Sheriff determined the rate of pay; and (3) no employment records were kept on any of the prisoners by the Sheriff or the Jarreaus. On the basis of those findings, and in light of this court's reasoning in *Alexander*,<sup>15</sup> the district court found no material issue of fact. It held as a matter of law that Watson and Thrash did not have FLSA claims against the Jarreaus. We disagree.

Not only Watson and Thrash, but the Sheriff, Darryl Jarreau and Marilyn Jarreau all testified that during the times that Watson and Thrash worked for Jarreau they were unsupervised by any prison official, no patrols or spot checks were made at the work sites, and the inmates were supervised by the Jarreaus and no one else during the entire time the inmates were away from the jail. Jarreau kept the inmates for as long as he needed them, sometimes in excess of twelve hours. It is thus clear <sup>\*1555</sup> that Jarreau "supervised and controlled the 'employee' work schedules or conditions" of employment." See, e.g., *Carter*, 735 F.2d at 12.

Jarreau also had the de facto power to hire and fire because he could request or reject particular inmates.<sup>16</sup> Technically, the Warden could overrule Jarreau and declare an inmate ineligible for work-release or proffer some inmate other than the one requested—we speculate that such rejection by the Warden would be quite unlikely considering that he worked for Jarreau's father-in-law. That technicality, however, does not change the realities of the situation; Jarreau not only determined which inmate would work for him, but also when, how frequently, how long, and on what projects the inmate would work, as well as what specific functions the inmate would perform. The facts at our disposal leave no doubt but that Jarreau had the de facto power to hire and fire. Therefore, two prongs of the economic reality test are satisfied. The third and fourth prongs require deeper analysis.

Technically, the Sheriff "set" the rate of pay for the inmates,<sup>17</sup> albeit illegally under section 15:711. And it is undisputed that neither the Jarreaus, nor the Sheriff or the Warden kept any employment records whatsoever. Alone however, those superficial facts do not preclude application of FLSA to Watson and Thrash when we analyze the economic realities of the inmate's employment in light of the policies behind FLSA.

Jarreau had at his disposal a "captive" pool of workers whom he had only to pay token wages. Those wages were well below the legal minimum, and, we speculate, even further below the "going rate" for workers with the inmates' skills and abilities. Unlike his competitors, Jarreau incurred no expense for overtime, unemployment insurance, social security, worker's compensation insurance, or other employee benefit plans because he had no "employees." Jarreau had no need to hire any non-inmate employees because his labor needs were in cheap and easy supply at his father-in-law's jail. Such a situation is fraught with the very problems that FLSA was drafted to prevent—grossly unfair competition among employers and employees alike.

Obviously, construction contractors in the area could not compete with Jarreau's prices because they had to pay at least minimum wage for even unskilled labor, not to mention all of the above listed overhead costs avoided by Jarreau. It takes little imagination to recognize that job opportunities for non-inmate workers in the area was severely distorted by the availability of twenty dollar per day workers from the parish jail.

This situation is unlike that in *Alexander*, *Hudgins*, and *Young* in which inmates who worked for private companies did so within the confines of the prison as a part of their sentence to hard labor. In those instances, the "hard time" inmates' labor did indeed "belong to the institution" and could be disposed of legitimately within the discretion of the correction facility or agency. See *Alexander*, 721 F.2d at 150; *Young*, 694 F.Supp. at 655; *Hudgins*, 323 F.Supp. at 899. In such situations, there is no need to "protect the standard of living and general well-being of the worker in American industry." *Alexander*, 721 F.2d at 150. Neither is there fear of "upsetting the desired equilibrium in the work place," because the "work place" was the prison itself. See *Carter*, 735 F.2d at 13. From that fact alone it is evident there was no unfair competition among workers in job markets outside the prison.

<sup>\*1556</sup> By stark contrast, Watson and Thrash were not required to work as a part of their respective sentences.<sup>18</sup>

Watson v. Graves, 909 F.2d 1549 (1990)

29 Wage & Hour Cas. (BNA) 1601, 110 ALR. Fed. 823, 59 USLW 2200...

Therefore, their labor did not "belong" to the Livingston Parish Jail and was not legitimately at the disposal of the Sheriff or the Warden. Consequently, the reasoning and the holdings in *Alexander, Young, Hudgins* and similar cases are inapposite.

Under a realistic analysis of the four prongs of the economic realities test, in light of the policies behind the Act, we find that when Watson and Thrash worked for the Jarreaus as part of the unauthorized Livingston Parish Jail work release program, they were "employees" of the Jarreaus for purposes of FLSA coverage. We therefore reverse the district court and render summary judgment for the inmates on this issue. We also remand that portion of this case to the district court for calculation of the amount owed by the Jarreaus to Watson and Thrash under FLSA.<sup>19</sup> The inmates are not entitled to punitive damages, but are entitled to any overtime pay due under FLSA, as well as any other payments applicable under the Act.<sup>20</sup> All costs of these proceedings and those in the district court are assessed against the appellees.

B.

*Watson's and Thrash's employment status as to Sheriff Graves and Warden Ross*

<sup>19</sup> The Sheriff and the Warden argue that the inmates have abandoned their claims of an employer-employee relationship with the Sheriff and the Warden. We agree.

The district court granted summary judgment in favor of the Sheriff and the Warden because the inmates failed to argue or present facts that would substantiate an employer-employee relationship between the inmates and the Sheriff and Warden. The magistrate stated that the inmates failed to present any evidence to show that there was a genuine issue of material fact as to the liability of the Sheriff or the Warden under FLSA. The district court adopted the magistrate's findings.

On appeal, Watson and Thrash continue to argue that the Sheriff and the Warden are liable to them under FLSA. But again, the record available to this court is devoid of any evidence, except a few conclusory statements, to support such claims. The inmates point to no specific facts, other than that the Sheriff set the wage for inmate labor at twenty dollars per day, to show that an employment relationship existed between the inmates and the Sheriff and Warden.

Watson and Thrash appear to argue that the Sheriff and Warden are somehow "joint employers" with the Jarreaus. Although the record is silent on the matter, it would follow logically that the Sheriff benefited vicariously in the knowledge of his daughter's and son-in-law's business advantages. For all we know he may have profited politically as well. But mere conclusory allegations and inferences are not sufficient to prove the required linkage. This court still must apply the economic realities test to each individual or entity alleged to be an employer and each must satisfy the four part test. See *Young*, 694 F.Supp. at 655 n. 4 (citing 29 C.F.R. § 791.2(a)(1981)).

The inmates had ample opportunity to supply this court with facts necessary to determine whether they were employees of the Sheriff or the Warden, but failed to do "1557 so." We can reach no other conclusion but that the appellants abandoned their FLSA claim against the Sheriff and the Warden. Therefore, the district court's grant of summary judgment on that point is affirmed.

VI.

The work release program authorized in La.Rev.Stat. Ann. § 15:711 was meant to benefit inmates in Louisiana jails by allowing them to work outside the institution and earn wages with which to help support their families and pay their fines. It was also meant to benefit the citizens of Louisiana by permitting a portion of the wages earned by a work release inmate to be applied to his room and board, thereby easing the burden on the taxpayer. It is understandable that Watson and Thrash chose to work for the Jarreaus, thereby pleasing their jailers, getting away from the prison environment, and picking up pocket change for doing so, meager as it was. It is also true that their families received a modicum of cash while the inmates were incarcerated. The inmates' paltry earnings, however, constituted a relatively minor contribution to support of family or payment of fines, and did absolutely nothing for the taxpayer. That the direct beneficiaries of the Sheriff's unauthorized work release program were his daughter and son-in-law and the indirect beneficiary was the Sheriff himself is nothing short of disgraceful. It is disappointing to realize that such a situation can exist in this day and time—a situation in which the chief law enforcement officer of a parish located virtually in the shadow of Louisiana's capitol consciously disregards the only work release program statutorily authorized for his jurisdiction and in lieu thereof confects his own plan under which his relatives reap the benefits of inmate toil

Watson v. Graves, 909 F.2d 1549 (1990)

29 Wage & Hour Cas. (BNA) 1601, 110 A.L.R. Fed. 823, 59 USLW 2200...

at a fraction of the minimum wage.

For the foregoing reasons, the judgment of the district court is affirmed in part, reversed and rendered in part, and remanded for proceedings in conformity with this decision.

AFFIRMED in part, REVERSED and RENDERED in part, and REMANDED in part.

All Citations

909 F.2d 1549, 29 Wage & Hour Cas. (BNA) 1601, 110 A.L.R. Fed. 823, 59 USLW 2200, 116 Lab.Cas. P 35,392

Footnotes

- <sup>1</sup> Appellants filed claims pursuant to (1) 42 U.S.C. §§ 1983, 1985, and 1986, based on violation of the fifth, eighth, thirteenth and fourteenth amendments, and 42 U.S.C. § 1994; (2) 18 U.S.C. § 1961, the civil RICO statute; and (3) 29 U.S.C. § 201 *et seq.*, for violation of the Fair Labor Standards Act.
- <sup>2</sup> La.Rev.Stat. Ann. § 15:711 (West 1981) specifies the only kind of work release program legally authorized for all parish prisons in the state (except those in Jefferson Davis Parish which has its own statutory work release program). The only inmates eligible for such a program are those convicted of non-violent crimes. *Id.* § 711(G). Section 15:711 mandates that wages of an inmate so employed "shall be not less than the customary wages for an employee performing similar services." *Id.* § 711(F). The Sheriff offered no justification for not following the wage mandate contained in section 711(F), but stated that he simply created his own program based in part on the one used in Jefferson Davis Parish, although that program is only authorized for that one parish.
- <sup>3</sup> The inmates were occasionally assigned to work for other individuals, but primarily were assigned to work for Jarreau.
- <sup>4</sup> Despite the provisions of the written agreement, there is evidence that trustees could be requested by name. Darryl Jarreau testified at deposition that after Watson asked to work for Jarreau, he placed Watson on the work crew for various projects.
- <sup>5</sup> Marilyn Jarreau testified by deposition that she paid cash to the trustees directly each day for the work they did for that day.
- <sup>6</sup> Appellants claim the Livingston Parish work release program is illegal because it violates subsection (F) which requires inmates to be paid wages similar to those paid to other workers doing similar work. See *supra* note 2.
- <sup>7</sup> We do not dispute that when a prisoner is sentenced to labor as part of his sentence, his labor belongs to the prison and is at the disposal of the prison officials. We draw a distinction however, between those prisoners who are sentenced to labor as part of their sentences and those who are not. In the latter case, there is no bar to a FLSA claim because the prisoner's work belongs to him and not to the prison.
- <sup>8</sup> The second circuit did not reach the ultimate issue of whether FLSA actually covered Carter, but remanded for further proceedings to determine if the facts of the case warranted FLSA coverage.
- <sup>9</sup> In *Alexander*, this court held that the relationship between SARA and the inmates had all of the characteristics of an employment relationship, even though the agency had ultimate control over the inmate, but concluded that there was no employment relationship because in hard labor situations, the inmate's labor belonged to the prison and Congress did not contemplate FLSA being extended to prison inmates. *Alexander*, 721 F.2d at 150.
- <sup>10</sup> See *supra* note 4.
- <sup>11</sup> It is difficult for us to identify any one party as the one who "set" the rate of pay in this particular situation. The \$20.00 a day amount was a flat rate for any inmate working at any job in the work release program. The "employer" of work release trustees did not have to negotiate the amount of pay because it was predetermined and indeed, it would have been foolish for him to haggle about paying such a de minimis amount. In addition, the Sheriff's "policy" is silent as to the method of payment; it seems that the method of pay was left to the discretion of the "employer." Therefore, no one really "set" a rate of pay as defined in the economic realities test.

Watson v. Graves, 909 F.2d 1549 (1990)

29 Wage & Hour Cas. (BNA) 1601, 110 A.L.R. Fed. 823, 59 USLW 2200.

- 12 An Inmate may be required to perform maintenance or upkeep work within the jail, but work-release is entirely voluntary. See generally La.Rev.Stat.Ann. § 15:708 and § 15:711.
- 13 This amount does not include the amounts already paid to the inmates as wages. The amount already earned will be subtracted from the amount owed by the Jarreaus to the inmates under FLSA.
- 14 We do not address Watson's and Thrash's claims for wages under La.Rev.Stat.Ann. § 15:711. Because the state cause of action was dismissed without prejudice by the district court, those claims are still viable and are not preempted by our holding in this case.
- 15 It is ironic that we are prohibited from applying FLSA standards to the Sheriff given that he may have profited as much or more than the Jarreaus in this situation; however, it is not our place to make the appellants' case for them. Without facts sufficient to satisfy at even one factor of the economic realities test, we are prohibited from applying FLSA to the Sheriff and the Warden.

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THE STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Thomas J. Torrence, # 94561,

Appellant,

vs.

South Carolina Department of Corrections,

Respondent.

) Docket No. 12-ALJ-04-00143-AP  
) Grievance No. ECI-0980-10  
)

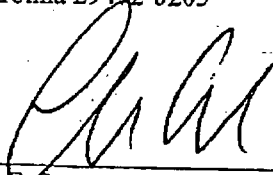
) THE DEPARTMENT'S FILING  
) IN COMPLIANCE WITH THE ORDER  
) ISSUED BY THE COURT ON  
) JULY 10, 2014 AND IN FURTHER  
) RESPONSE TO THE APPELLANT'S  
) MOTION DATED JULY 13, 2015

) CERTIFICATE OF SERVICE

This is to certify that I have, on July 27, 2015, caused to be served a copy of the Department's above-styled filing and 2<sup>nd</sup> Appendix to the Department's June 29, 2015 brief upon the *pro se* Appellant, via the United States Mail, to the following address:

Thomas J. Torrence, # 94651  
Lieber Correctional Institution [SB-23]  
Post Office Box 205  
Ridgeville, South Carolina 29472-0205

BY:

  
\_\_\_\_\_  
Lake E. Summers

Malone, Thompson, Summers & Ott LLC  
339 Heyward Street, Suite 200  
Columbia, South Carolina 29201  
Office: (803) 254-3300

Counsel for the South Carolina  
Department of Corrections



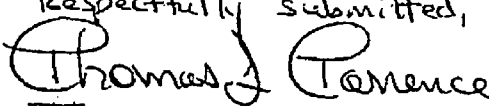
THE STATE OF SOUTH CAROLINA  
In The Administrative Law Court

|                              |   |                                 |
|------------------------------|---|---------------------------------|
| Thomas J. Torrence, #094651, | ) | Docket No. 12-ALJ-04-00143-AP   |
|                              | ) | Grievance No. ECI-0980-10       |
| Appellant,                   | ) | Honorable Deborah Brooks Darden |
| vs.                          | ) |                                 |
| South Carolina Department of | ) | Motion for Extension of Time    |
| Corrections,                 | ) |                                 |
| Respondent,                  | ) |                                 |

The undersigned pro se Appellant, Thomas J. Torrence, respectfully moves this Honorable Court for an extension of time of thirty (30) days, up to and including September 30, 2015, in which to file his Reply Brief.

Appellant submits this motion is for good cause where his word processor is inoperable and must seek other means of preparing his brief in presentable fashion. Appellant apologizes for any delay this has caused Respondent on this Court in the progress of this litigation.

August 20, 2015

Respectfully submitted,  
  
Thomas J. Torrence  
#094651  
P.O. Box 205  
Lieber Corr. Inst.  
Ridgville, SC 29472  
Appellant, pro se

LAW OFFICES

AUG 24 2015

MALONE, THOMPSON  
SUMMERS & OTT, LLC

## CERTIFICATE OF MAILING

The undersigned pro se Appellant, Thomas J. Torrence, hereby certifies that he has served a true and correct copy of Appellant's Motion for Extension of Time on counsel for Respondents by placing a copy of same in the United States Mail, first-class postage affixed thereto, this 20th day of August, 2015, addressed as follows:

Lake E. Summers, Esq.  
Malone, Thompson, Summers : OTH, LLC  
339 Heyward Street, Suite 200  
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Thomas J. Torrence

Thomas J. Torrence

#094651

Lieber Corr. Inst.

P.O. Box 205

Ridgeville, SC 29472

Appellant, Pro se

STATE OF SOUTH CAROLINA  
In the Administrative Law Court

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APPEAL FROM THE FINAL AGENCY DECISION  
South Carolina Department of Corrections

---

Case No. 12-ALJ-04-0143-AP  
Grievance No. ECI-980-10  
Honorable Deborah Brooks Durden, Administrative Law Judge

---

Thomas J. Torrence, #094651 ..... Appellant

v.

South Carolina Department of Corrections ..... Respondents

---

APPELLANT'S REPLY BRIEF

---

Thomas J. Torrence  
#094651  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina 29472

APPELLANT, *pro se*

**THE STATE OF SOUTH CAROLINA  
In The Administrative Law Court**

|                               |   |                                 |
|-------------------------------|---|---------------------------------|
| Thomas J. Torrence, # 094651, | ) | Docket No. 12-ALJ-04-00143-AP   |
|                               | ) | Grievance No. ECI-0980-10       |
| Appellant,                    | ) |                                 |
|                               | ) | Honorable Deborah Brooks Durden |
| vs.                           | ) |                                 |
|                               | ) |                                 |
| South Carolina Department of  | ) | <b>APPELLANT'S REPLY BRIEF</b>  |
| Corrections,                  | ) |                                 |
| Respondent.                   | ) |                                 |
| _____                         | ) |                                 |

This matter is before the Administrative Law Court ("ALC" or "Court") pursuant to the Notice of Appeal filed on March 12, 2012, by Thomas J. Torrence ("Appellant"), of a final agency decision of the South Carolina Department of Corrections ("DOC," "Department," or "Respondents").

Appellant filed his Original Brief dated March 26, 2015. Respondent filed The Brief of the South Carolina Department of Corrections dated June 29, 2015. ("Resp. Brf")

In addition to the Record(s) on Appeal as designated in Appellant's Original Brief, note 1, Appellant submitted the Payroll Example Exhibit ("APEE"). Following the filing of Resp. Brf.<sup>1</sup>, the Respondent entered *The Department's Filing In Compliance With The Order Issued By The Court On July 10, 2014 And In Response To The Appellant's Motion Dated July 13, 2015* dated July 27, 2015 ("2<sup>nd</sup> Appendix").

Appellant's Reply Brief follows:

**A. Respondent's Statement of the Case**

In the Statement of the Case presented by Respondents ( Resp. Br. Pg. 2 n. 4 ) the Department misrepresents the types of industry projects they were at the time authorized to

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<sup>1</sup> Containing Exhibits A - C and an Appendix

operate. Respondent suggests it operates its PIECP projects "in conformity with federal laws."

In fact, at the time of DOC's 1987 application (1987 Act. No. 177§ 2), only two (2) types of projects were authorized: (1) customer model and (2) employer model; to which the DOC applied for an umbrella to operate *employer* model projects. See AOB, p. 4 and note 9; Federal Register ("FR"), Volume 64, pages 17008 and 17012. South Carolina Code §24-3-315 was specifically enacted to authorize the requested umbrella operation, see FR Vol. 64, page 17012 (2. Application Content). Section 24-3-40 was amended to disperse funds paid to inmates authorized to participate in such labor. Section 24-3-430 later expanded the definitions of the criteria governing private sector prison industries. (1995 Act No. 7, Part II, § 43).

**B. Respondent's objection to Appellant's use of the terms "hired" and "employee" used to describe the labor performed, wages paid, and taxes withheld in the matter before this Court (Resp. Brf. Pgs. 3-14).**

Respondents seek to misdirect the Court's attention from the issues on appeal (AOB pg. ii - iv) where the Appellant has not raised the issue and does not argue his status as an employee of any specific entity to obtain benefits, but rather to demonstrate his taxpayer status. Respondent merely seeks to avoid the statutory questions that Appellant be compensated at a certain wage for [his] labor. However, so Respondent does not later plead Appellant conceded these assertions as not being traversed, Appellant will respond accordingly.

Appellant asserts that §24-3-40 governs the disposition of wages for a prisoner "authorized to work at paid employment... or in a prison industry program..." He also asserts that the word "hire" means "*to engage the labor or services of another for wages*"

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or other payment.”<sup>2</sup> Even under the theory implied by Respondents, to which no application has been made during Appellant’s period of employment, “hire” means “to grant the temporary use of services”.<sup>3</sup>

Our Supreme Court resolved the conundrum of the private sector prisoner employment label in *South Carolina Department of Corrections v. Cartrette*,<sup>4</sup> in stating the facts of the case that “as a participant in PIP [ ] provided on-site labor...”<sup>5</sup> Yet the Court in *Cartrette* made a clear distinction between the prisoner and the non-prisoner workers in holding. “South Carolina law requires that *inmate workers* in a PIP enjoy pay and working conditions *comparable* to those enjoyed by *non-inmate workers*.”<sup>6</sup>

Appellant asserts that he does not attempt to argue on appeal any “employee” status but again, merely seeks to demonstrate he paid wage withholding taxes under various South Carolina taxpayer laws that similarly label that status as an employee, but not of whom.

Respondent contends Appellant’s Factual Background (Resp.Brf. Pg. 4, referencing AOB, pg. 5) that “Appellant performed labor side-by-side with non-inmate individuals employed from the local community” and “... Appellant performed labor for ESCOD...” the Appellant asserts that as a Quality Control Inspector (assigned an Escod Inspector #), he was paired with a non-inmate worker each day. This fact is a matter of record which Respondent may produce from the ESCOD / Evans facility upon Respondent’s request. Training and Inspection records will demonstrate Appellant was specifically paired with

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<sup>2</sup> BLACK’S Law Dictionary, Seventh Ed. (1999) pg. 735

<sup>3</sup> *Id.*

<sup>4</sup> 387 S.C. 640, 694 SE2d 18 (S.C. App. 2010)

<sup>5</sup> *Id.* 387 S.C. at 642, 694 SE2d at 19-20

<sup>6</sup> *Id.* 387 S.C. at 645, 694 SE2d at 21 (emphasis supplied)

non-inmate ESCOD employees Patsy Driggers, Betty Graham, Sue Malachia, and at least four (4) others on a periodic basis as a Quality Control Inspector.

Additionally, though DOC screened inmates from which to choose, it was the PIP [ESCOD] that selected inmate workers and retained the authority to hire, fire, or promote.<sup>7</sup> Respondent's own Contract/Agreement periodically refers to inmate workers [Appellant] as "employees".

Respondent asserts in Resp. Brf. p. 4, n. 9 that neither ESCOD nor Department "hired" Appellant as an "employee". As previously set forth, Appellant does not seek to establish or argue his status as an employee, but does recognize that it is the PIP, per contract, who selects / hires "inmate employee workers".<sup>8</sup>

Respondent asserts that the term "inmate employee" is a novel category created by the Appellant. Appellant contends that very term is employed by the DOC in their March 3, 2001 Agreement to describe prisoner participants.<sup>9</sup>

Respondent's Brief, pg. 5, n. 13 suggests Appellant has produced no evidence in the Record that Escod employees were paid a rate greater than \$5.25 per hour or that Appellant conducted work of a similar nature. Appellant contends that he has no access to ESCOD Corporate Payroll records, but that DOC enjoys access to those records. As previously set forth, Escod records will demonstrate Appellant's duties at the Escod / Evans facility. Corporate records will indicate that at least from 2002-04 the Appellant signed all

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<sup>7</sup> March 3, 2001 Agreement, ROAA p. 175  
Article 3 Conditions Related to Employment of Inmates  
3.1 Duties of Contractor

"From the pool of pre-screened potential inmate employees, the Contractor shall then select those inmate workers that they wish to hire.... The Contractor shall have the same authority to hire, fire, promote or suspend as it would in the normal course of business practices..." (emphasis supplied)

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

documents related to the training of *all* Escod / Evans personnel on industry, corporate and military standards as the Training Coordinator. Corporate Internet e-mail will demonstrate that Appellant similarly performed in the Document Control position during this same period after the corporate buy-out by the current owners.

**C. Respondent's Argument of Appellant as an Employee.**

Appellant does not contest §24-3-27(B) as it applies to prisoners being required to work. However, Appellant's DOC file will demonstrate continuous employment during his incarceration. Also, Appellant left that employment to "voluntarily" participate in the PIECP program. It was Appellant's choice on which employment to pursue.

Respondent has incorrectly relied upon *Watson V. Graves*, 909 F2d 1549, n. 7 (5<sup>th</sup> Cir.1990) for the proposition that a prisoner's "*labor belongs to the prison and is at the disposal of the prison officials.*" (Respondent's emphasis). Respondent's analysis of *Watson* fails to emphasize the Fifth Circuit's analysis that an inmate's labor belongs to the prison was based on whether or not the Sentencing Judge made labor a part of the sentence, e.g., "I sentence you to XX years at hard labor," which, Appellant submits, has not been part of the South Carolina sentencing nomenclature for decades. Appellant further notes that *Watson* stated that it was in conflict with Sister Circuits regarding the status of inmate employees for FLSA purposes, which is not at issue here.

**D. Respondent's analysis of the Intent of Prison Industries.**

Appellant has no argument with §24-3-310, nor does he argue it was intended to "transform" an inmate into an employee. However, §24-3-310(4) states "... and for support of themselves in the institution," and "for support of their families," and clearly implies it is a benefit. Similarly, Appellant is accorded the privilege of paying state and federal taxes,



to include Social Security and Workmen's Compensation, which is clearly a benefit not only to Appellant, but to his family and society as a whole.

Respondent asserts §24-3-310 lends no support to entitlement to the "incidental rates of pay / or benefits paid by Escod to those true Escod employees..." Resp. Brf. at 8. Appellant contends that the rates of pay and other benefits for work of a similar nature is adequately supported by the correctly applicable subsections of Article 3, specifically §§ 24-3-315 and 24-3-430(D), as well as federal statute 18 USC §1761(c)(2). Respondent clearly chooses to ignore that its *sole* authorization from the federal government and our legislature derived from their own application to the Department of Justice with a certified copy of §24-3-315 to verify compliance with federal guidelines.

**E. Respondent's application of *Bennett v. Frank***

Respondent relied upon *Bennett v. Frank*, 395 F.3d 409 (7<sup>th</sup> Cir. 2005) to support the proposition inmates were not entitled to protection under the FLSA and to distinguish types of prison labor (inside vs. outside the walls).

Appellant submits that a close reading of *Bennett* shows those Plaintiffs worked prison jobs in the cafeteria of a private prison and claimed entitlement to the minimum wage under the FLSA. In its analysis, the Seventh Circuit noted the minimum wage provision of the Act [like the prevailing wage provision of 18 USC §1761(c)(2) and §§24-3-315 and 24-3-430 (D) here] applies only to employees engaged in producing goods for interstate commerce. It was uncertain whether *Bennett* and *Knipher* did so – that question is uncontested here.

**F. Respondent's State Court analysis that Appellant was not "hired" as an "employee."**

Respondent suggests Appellant embraced some reality of being a prisoner by admitting his wages were remitted to the DOC pursuant to §24-3-40 (Resp. Brf. p. 9). Appellant never objected to § 24-3-40 but instead asserts that very language cited at Resp. Brf. p. 9 creates the fiduciary duty to pay the prevailing wage, albeit via the DOC for *statutory* deductions.

Respondent based further argument on Appellant's status as an "employee" in presenting excerpts from *Williams v. S.C. Dept of Corr.*, 641 SE2d 885 (S.C. 2007) and *Adkins v. S.C. Dept. of Corr.*, 602 SE2d 51 (S.C. 2004).

Appellant will forego addressing Respondent's presentation at Resp. Brf. pp. 10-14 on the above-cited cases only insofar as that argument is addressed exclusively toward an "employee" status and Appellant has not sought to have his status declared as such. Appellant does submit these respective cases were dismissed predominantly as being raised as tort claims, FLSA claims, or as a private cause of action. He also notes *Adkins* was the companion case to *Wicker* and both cases held a prisoner may file a grievance to protest DOC's failure to pay wages in accordance with mandatory statutes.

**G. RESPONDENT'S ARGUMENT**

**I. Hourly rate of pay applicable to 320 hour "Training Period"**

Respondent argues (Resp. Brf. p. 14, n. 29) that the term "prevailing wage" does not appear in §24-3-315 or 18 USC §1761(c)(2).

Appellant contends that §24-3-315 states in part "... that the rates of pay and other employment are not less than those paid and provided for work of a *similar nature* in the

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locality in which the work is performed.” (Emphasis supplied). Appellant also contends 18 USC §1761(c)(2) tracks almost identical language.

Appellant submits that this language determines the rate of pay (“prevailing wage”) and that the Court in *Cartrette* not only utilized §§24-3-315 and 24-3-430(D) to define “prevailing wage”, but specifically stated §24-3-315 “resolves *Cartrette*’s dispute.”<sup>10</sup>

1. Respondent’s assertion nothing in §§24-3-315, 24-3-430(D), or 18 USC §1761(c)(2) establishes a specific rate as the prevailing wage.

Appellant asserts that each of the above-cited statutes clearly instructs that the rate of pay in a PIP “are not less than those paid and provided for work of a similar nature in the locality in which the work is performed,” or “the prevailing wage for work of a similar nature in the private sector.” More specifically, Section 1761(c) requires that the PIECP wage amount be set exclusively in relation to the amount of pay received by similarly situated non-inmate workers, *see* 64 FR 17009-10.

Appellant submits the rate of pay during the Training Period is mandated by statute and this Court should develop a method to determine the appropriate prevailing wage

2. Respondent’s assertion Appellant was not entitled to the hourly rate he claimed as the prevailing wage for the first 320 hours.

Respondent’s Brief, p. 15, n. 31 implies Appellant made incorrect assertions regarding wage rates as provided by the South Carolina Employment Security Commission (“ESC”). Appellant made an oversight in not including the response of Mr. Ted Gladden to Tony Ellis (August 4, 2000; ROAA, p. 155) in that citation. Appellant submits that the proposed, acceptable and stated wage rates are fully supported by the Record (ROAA, pp. 148-156).

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<sup>10</sup> 387 S.C. at 645, 694 SE2d at 21

Respondent seeks to rely upon a synopsis of Mr. Gladden's testimony in the *Adkins* circuit court proceeding as an explanation of "mean hourly wage." Appellant submits that portions of the deposition of Rebecca W. Eleazor (ROAA, pp. 105-140) and corresponding exhibits (ROAA, pp. 141-142, 148, 151-156) were prepared for the predecessor to this final agency decision in *Torrence*,<sup>11</sup> which are not altered by the *Adkins*<sup>12</sup> litigation. These materials thoroughly demonstrate the applicable wage rates and distinctions of any such levels utilized in those determinations.

Respondent next asserts the Appellant "fundamentally misunderstands the wage data collected and published by the ESC" (Resp. Brf. p. 16) and continues to attempt to employ the circuit court order from *Adkins* in an effort to distract the Court from the wage rate information specifically applicable to the case at hand in the instant record. Appellant relies on the Record in support of his claims. Appellant submits that the statute(s) are clear on the "work of a similar nature," which was Appellant's non-inmate peers, and that this Court should determine those rates.

It should be noted that despite the circuit court ruling in *Adkins*, Our Supreme Court ultimately held that "Nonetheless, South Carolina law requires that inmate workers in a PIP enjoy pay and working conditions *comparable* to those enjoyed by non-inmate workers." *Adkins*, 360 S.C. 413, 418, 602 SE2d 51, 54 (2004). No matter how a party analyzes the word meanings or numerical data, the statutes are clear on how to arrive at the prevailing wage.

**3. Respondent's assertions Appellant was paid a lawful hourly rate with the exception of the Training Wage.**

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<sup>11</sup> *Thomas J. Torrence, et al. v. S.C. Dept. of Corrections*, C/A No: 01-CP-40-3409

<sup>12</sup> Respondent correctly notes the Circuit Court Order in *Adkins* (Appendix) is not binding authority, Resp. Brf. p. 18, n. 36

Respondent concedes there is no dispute it paid Appellant a lower hourly rate for the first 320 hours, but asserts that rate should be \$5.25 per hour.<sup>13</sup>

Appellant contends that the "prevailing wage" and rate of pay "for work of a similar nature" language in the statutes at issue here are similarly applicable to the 320 Training Hour period Appellant worked for substandard wages.

Respondent continued to rely on the circuit court order <sup>14</sup> in *Adkins* that the "training wage" policy somehow "conformed" to the Federal Register and that BJA officials advised the DOC could "continue his training wage policy."

Appellant contends that Respondents have submitted no such "authorization" in the Record and, despite the opinion of an agency employee, such practice was repugnant to §§ 24-3-315, 24-3-430(D) and 18 USC §1761(c)(2) mandatory language, all of which was law *prior* to the July 1, 1999 training wage practice coming to a halt.

Appellant notes Respondent continues to argue these claims are based on whether [his] Step 1 grievance was timely filed.<sup>15</sup> Appellant submits, this Honorable Court made an Order resolving that matter dated January 20, 2014.

**II. Respondent's assertion it did not divert any portion of Appellant's wages nor did it fail to pay him a lawful wage for his labor.**

**1. The DOC did not pay Appellant a lawful wage.**

Respondent asserts that the Appellant misapplied §24-3-430(C) and 18 USC §1761(c)(4) in requiring the DOC to inform Appellant of his pay, financial arrangements and conditions of employment "at which it leased the inmate's labor to Escod."<sup>16</sup>

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<sup>13</sup> Resp. Brf. p. 18

<sup>14</sup> *Id.* at 19

<sup>15</sup> *Id.* and n. 41

<sup>16</sup> *Id.* at 20 and n. 44

First, this is an incorrect assertion of Appellant's Brief <sup>17</sup>where Appellant specifically asserted "*Appellant was never informed that Escod actually paid \$7.17 per regular hour and \$10.75 per overtime hour.*" Second, Respondent's assertion is absolutely ludicrous, when read in conjunction with the controlling statutes, to believe Appellant should *not* be informed of the rates of pay, other conditions of employment and the financial arrangements (deductions).

Respondents conveniently ignore that §24-3-40 instructs that the employer shall pay the "prisoner's wages" to the DOC. This ensures the statutory distribution of the wages, but emphasizes the property interest in question regarding the wages.

Respondent reiterated the argument of the lack of the term "prevailing wages" from the relevant statutes. Appellant addressed this argument, § G.I., *supra*, and asserts that the Federal Register specifically defined "prisoner's wages", FR Vol. 64, p. 17008, which is specifically applicable to 18 USC §1761(c)(2) and was the language upon which our legislature enacted §24-3-315.

**A. Respondent's §24-3-430 analysis**

Respondent's reliance on §24-3-430 as enabling the DOC to establish and operate a PIECP is misplaced.

First, §24-3-315 (1987 Act No. 177 § 2) was enacted to meet the federal criteria to operate the PIECP in South Carolina, not §24-3-430.

Second, §24-3-430 (1995 Act No. 7 Part II, §43) was enacted almost ten years later to more clearly define the guidelines for South Carolina participation in the federally certified program.

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<sup>17</sup> AOB at 13.

Appellant agrees that the subsections of §24-3-430 assimilate the components of USC 18 §1761(c)(2) and (c)(4) into state law.

**B. Respondent's analysis of 18 USC § 1761**

Appellant raises no objection to Respondent's presentation of 18 USC §1761.<sup>18</sup>

**C. Respondent's analysis of 64 FR 17000**

Respondent asserts that DOC had until April 7, 2000 to achieve compliance.<sup>19</sup> However, Appellant contends that even the previous version of the Federal Register did not conflict with the "*wages at a rate which is not less than that paid for work of a similar nature*" ("prevailing wages") requirement for an inmate participant; nor did it obviate the same requirement set forth in § 24-3-315.

Respondent asserts that these regulations do not transform Appellant into an inmate employee or was Appellant's labor exploited by paying him an hourly rate that was not lawful.<sup>20</sup> Respondent further asserted, by citing the federal regulation, that "the requisite payment of at least a minimum wage... .. 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."<sup>21</sup>

Appellant contends Respondent intentionally twists the federal regulation. Appellant submits 64 FR 17007 is the catalyst for § 24-3-430(F) and (G) in that, an inmate shall not be a government employee or be eligible for *unemployment insurance*, that alone

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<sup>18</sup> Resp. Brf. pp. 22-23

<sup>19</sup> *Id.* at 23

<sup>20</sup> *Id.* at 24

<sup>21</sup> *Id.* at n. 47

is the purpose for the “employee” designation barred by statute. Indeed, the DOC itself refers to “Inmate Employees.”<sup>22</sup>

Appellant duly notes that Respondent recognizes, and thus concedes, that 64 FR 17007 defined “prevailing wage” as a “rate which is not less than paid for work of a similar nature in the locality in which the work is to be performed,” citing 18 USC §1761(c)(2) and referencing §24-3-315.<sup>23</sup>

Appellant contends Respondent’s assertion and reliance on the circuit court order in *Adkins* as conformity with federal regulations<sup>24</sup> by placing a rate equal to the federal minimum wage. Appellant contends the federal regulations set the federal minimum wage as the base floor rate. This does not obviate the need to compare “work of a similar nature” or the wage verification. Appellant submits the work in *Adkins* and the labor performed by Appellant, as demonstrated by the ESC exhibits in the Record,<sup>25</sup> are not the same and must be distinguished.

**D. Respondent’s application of §24-3-410 (B)(7)**

Appellant submits the Respondent’s application of §24-3-410(B)(7) is incorrect. First, §24-3-410 is not one of the prisoner prevailing wage statutes. Second, §24-3-410(B) specifically states the prohibitions in §24-3-410(A) *do not apply* to the seven (7) enumerated subsections of (B). Section § 24-3-410(B)(7) is in no way intended by our Legislature to govern the prevailing wage statutes, but to create a Commerce Clause exemption in South Carolina law. Third, for the sake of argument, “comparable wage” could be assimilated into “work of a similar nature,” (*see* §G.I. 2, *supra*).

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<sup>22</sup> ROAA, pp. 175, 180

<sup>23</sup> Resp. Brf. p. 24 and n. 48

<sup>24</sup> *Id.* at 25

<sup>25</sup> ROAA, pp. 141-142, 148, 151-56



2. Respondent's assertion the DOC did not divert any portion of Appellant's Prison Industries pay.

Respondent begins by asserting Appellant's analysis of *Cartrette* at AOB, p. 17 is flatly contradicted by a review of the opinion<sup>26</sup> and in the same sentence correctly asserts the Court of Appeals remanded the question of the prevailing wage to which [the inmate] is entitled back to the ALC for further proceeding. Appellant submits that the Court of Appeals was in fact affirming the Circuit Court's Order that remanded the prevailing wage question with instructions back to the ALC. More precisely, the ALC found the prevailing wage was \$5.25. On appeal from the ALC, after a hearing, the circuit court found \$5.25 was not the prevailing wage and remanded the issue to the ALC with seven (7) questions for the ALC to consider in determining the correct prevailing wage. The issue which advanced to the Court of Appeals from the Circuit Court was the time-and-a-half rate for overtime hours. The Court of Appeals similarly held "we observe section §24-3-430(D) requires inmates receive the prevailing wage paid to their non-inmate peers for comparable work." The Court's conclusion was specific, "we find sections §24-3-315 and §24-3-430 (D) entitle inmate workers in a PIP to pay and working conditions *comparable* to those enjoyed by workers in private industry, including time-and-a-half pay for overtime hours worked." (Emphasis supplied)

Respondent asserts it is folly for Appellant to compare himself with "working Americans,"<sup>27</sup> in earning the minimum wage. Appellant submits that not only does the U.S. Census Bureau count prisoners as residents for demographic purposes, but statistics on

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<sup>26</sup> Resp. Brf. p. 27

<sup>27</sup> *Id.* at 28

working Americans contemplate taxpayer and unemployment records from state agencies. South Carolina PIP workers are certainly counted as taxpayers by state and federal laws.

**A. Respondent's assertion DOC "lawfully charged Escod" the rate of \$1.32 per inmate hour ("Surplus Fund Amount") in addition to the hourly rate it paid the inmates.**

Appellant contends that the issue on appeal is not whether Respondents "lawfully charged Escod the rate of \$1.32 per inmate labor hour," but was that the \$1.32 is not an authorized deduction under state or federal authority and that this point was clearly conceded by former Prison Industries Director Tony Ellis during deposition in the *Torrence* civil action.<sup>28</sup> Respondent attempts to justify the deductions from Appellant's prevailing wage<sup>29</sup> that are *not* authorized by law. Respondent's position (deductions) fail where no state or federal authority allows the challenged deductions from Appellant's wages.

**1. Respondent's assertion the *Adkins* Court "endorsed" the same \$1.32 charge.**

As conceded by Respondent the circuit court order in *Adkins* is not binding authority.<sup>30</sup> Respondent correctly asserted that the Supreme Court had the opportunity to review not only the circuit order, but the trial record.<sup>31</sup> The Supreme Court ultimately dismissed the action for the published reasons which did not take into consideration any endorsement of nonstatutory deductions.

First, neither 18 USC §1761(c)(2) nor §24-3-40(A) authorized the deductions employed by Respondents.

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<sup>28</sup> ROAA, pp. 70, 80

<sup>29</sup> Resp. Brf. p. 29

<sup>30</sup> *Id.* at 18, n. 36

<sup>31</sup> *Id.* at 12

Second, "the plain language of the PIECP exception statute provides BJA [nor DOC] with *no authority* to allow wage deductions in addition to those set forth in 18 USC §1761 (c)(2) and *for the purpose of addressing the unusual cost of doing business in prison environment, however meritorious such proposed adjustments might be.*"<sup>32</sup>

Respondent attempts to imply that where statutory law states a PIECP participant must benefit legally from 20% of [his] wages, that Respondents are authorized to remove the remaining 80% by any means necessary. Appellant contends that he is entitled to be paid the "*prisoner's wages*" from the PIP sponsor <sup>33</sup> and that the *only* authorized deductions are those set forth in statute or federal regulations. <sup>34</sup>

ii. Respondent's presentation of the 2001 contract with Escod. <sup>35</sup>

Appellant contends it is a violation of the Contract Clause for Respondent to enter into a contract to remove a portion of the "prisoner's wages" <sup>36</sup> without statutory authority, the Appellant's consent, or without informing Appellant of the financial arrangement concerning his wages in advance. Nor may Respondent contract to avoid mandatory statutory language for the benefit of another (prisoner).

In demonstrating the table of deductions in §3.3 of the 2001 Contract regarding the Prevailing Wage <sup>37</sup> footnote 62 urged the Court to allow the parties to supplement the Record accordingly. Appellant contends the Record clearly supports the wage verification,

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<sup>32</sup> 64 FR pp. 17004, 17010, 17011 (Emphasis supplied)

<sup>33</sup> § 24-3-40 (A)

<sup>34</sup> *Id.* to which Appellant takes exception to the permanent deprivation upon (A)(5) created by Respondent's application of (B)(2); 18 USC § 176 (c)(2) and 64 FR 17004, 170011

<sup>35</sup> Resp. Brf. p. 30

<sup>36</sup> § 24-3-40 (A)

<sup>37</sup> Resp. Brf. p. 30 and note 62

but if required, formally requests this Court construct a formula and structure any wage verification in fairness to both parties.

Appellant further contends that the prevailing wage is not established as \$5.25. That determination must be found by this Court's formula, thus §3.3 of the contract is not clear as Respondent asserts. The prevailing wage is demonstrated in the statutory language of this State. Appellant was not informed in advance of the "prevailing wage" or the deductions that were not authorized by statute as required by §§24-3-315, 24-3-430(C) and 18 USC §1761(c)(4).

Appellant also asserts that at the time of DOC's 1987 application to the DOJ BJA for authority to operate a PIECP, for which §24-3-315 was enacted, (1987 Act No. 177 §2) the BJA had only two (2) models: employer and customer. *DOC applied for an umbrella authority to operate employer model PIECPs.* This model does *not* contemplate or authorize the "leasing" of inmate labor as what now may be recognized as a "workforce" model. Again, Mr. Ellis' deposition indicated [they] knew [they] were without authority for the Surplus Fund and just did it (ROAA, pp. 41-42, 45 73-75, 79-80 and 83). As a note, the State General Fund receives all money from the Room & Board deduction in §24-3-40(A).

Simply, DOC was *not* authorized to "lease" inmate labor and divert a portion of PIP prisoner hourly wages.

Respondents assert that "common sense" dictates the DOC would not have entered into a contract with Escod without the overhead charge.<sup>38</sup>

Appellant contends that DOC would not enter a contract specifying deductions that were not authorized by statute unless it was the original intent to divert a portion of the wages from the onset. Additionally, as previously set forth, the DOC, the Governor's

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<sup>38</sup> *Id.* at 33.

Office (Victim's Compensation Fund) and families with children (society) *all* benefit from the statutory deductions. DOC attempts to double-dip without having to contribute to the State General Fund and help support the State as a whole.

**iii. Respondent's assertion that various statutes "compel" DOC to charge the Surplus Fund Amount.<sup>39</sup>**

Respondents assert that §§24-3-310, 24-1-20, 24-3-190, 24-3-320, 24-3-400, and 11-9-220 "compel" or mandate the DOC to charge Escod a "Surplus Fund Amount," which is deducted from Appellant's prevailing wage amount.

Respondent's argument, novel though it may be, is wholly ludicrous as it comes into conflict with the PIECP prevailing wages statutes governing rates of pay and authorized deductions. As previously set forth,<sup>40</sup> there is *no* authority for deductions associated with the unusual costs of doing business in a prison environment. Most of the statutes cited by Respondent are not applicable to the private sector prison industries programs and contemplate the non-PIP industries operations.

**B. Respondent's assertion DOC lawfully charged Escod \$0.40 per hour for the "Social Security withholding Payment."<sup>41</sup>**

Appellant contends that the issue is *not* whether DOC "lawfully charged Escod the rate of \$0.40 per inmate labor hour for the Social Security withholding," but was the DOC paying the employee's portion of Social Security out of Appellant's wages which improperly diverts a portion of [his] wages.

Appellant submits that Escod paid "*the prisoner's wages*" of \$7.17 per hour to the DOC as mandated by §24-3-40(A). The "employer," whether it be Escod, DOC, or

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<sup>39</sup> *Id.* at 34

<sup>40</sup> note 32, *supra*

<sup>41</sup> *Id.* at 36

whomever, is required to pay, by statute, a portion of Social Security for Appellant. By deducting that payment from the \$7.17 per hour, Appellant paid both the employee and employer portions of the Social Security withholding. Respondent may object to these labels but this is the reality of wages paid for employment in the United States and South Carolina – taxes, Social Security and Workmen's Compensation Premiums.

**C. Respondent's assertion DOC lawfully charge Escod \$0.20 per hour for the "Workmen's Compensation Premium."<sup>42</sup>**

Appellant contends that the issue is not whether DOC "lawfully charged Escod the rate of \$0.20 per inmate hour for the Workmen's Compensation Premium," but was the DOC paying the employer's portion of the Workmen's Compensation Premium out of Appellant's wages which improperly diverts a portion of [his] wages.

Appellant believed the \$7.17 per hour "*prisoner's wages*" was the prevailing wage and DOC, without statutory authorization, deducted that amount from Appellant's lawful wage to pay the employer's portion.

Respondent attempts to assert the "employee" label argument but this rationale fails. Some entity *must* pay the employer's portion. The DOC, in their prison industries, is required by law to post Workmen's Compensation Notices. Similarly, if an inmate employee is injured, the DOC must file the appropriate forms and the inmate *may* file a claim under the South Carolina Workmen's Compensation laws. Appellant submits that he was injured at the Escod / Evans facility and the DOC Business Manager, Eugene Baker, was required to document that accident. However, the claim remains that the \$0.20 deduction is *not* authorized by statute.

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<sup>42</sup> *Id.* at 38

3. Respondent's assertion the DOC did not breach any purported "fiduciary duty."<sup>43</sup>

Respondent admits that there was a possible breach of a fiduciary duty in paying, Appellant a "training wage."<sup>44</sup> Appellant asserts that based on the same statutory mandates<sup>45</sup> that a fiduciary duty exists to remit the rates of pay and other conditions for work of a similar nature in the locality and to make *only* those deductions authorized by § 24-3-40(A) and 18 USC §1761(c)(4). Failure to pay those rates or make deductions outside statutory guidelines is a *breach of fiduciary duties* to do same. Respondent attempts to side-step the claim concerning statutory deductions. Appellant clearly stated that the \$1.92 per hour *difference between* \$7.17 per hour paid for his labor and remitted to DOC pursuant to § 24-3-40 (A) and the \$5.25 per hour DOC claimed was the gross wage is the deduction not authorized by statute. Further, it is upon this lower gross wage that the statutory deductions were made. Respondents implied several times that since \$5.25 is \$0.10 above the Federal Minimum Wage, that particular rate satisfied the "prevailing wage" requirement and endorsed the practice of the \$1.92 diverted funds or any specific wage verification requirement.

Whether there is a fiduciary relationship between two people is an equitable issue.<sup>46</sup> "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence," *O'Shea v. Lesser*, 416 S.E.2d 629, 631 (S.C. 1992). Our Supreme Court has recognized certain relationships are

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<sup>43</sup> *Id.* at 39

<sup>44</sup> *Id.*

<sup>45</sup> §§24-3-40(A), 24-3-315, 24-3-430(D), and 18 USC §1761(c)(2) and (c)(4)

<sup>46</sup> *Island Car Wash, Inc. v. Norris*, 358 SE2d 150 (S.C. Ct. App. 1987)

fiduciary by nature. Historically, our Supreme Court has reserved imposition of a fiduciary duty *to legal or business settings*, often in which one person entrusts money to another, such as with lawyers ... corporate directors ..." *Hendricks v. Clemson University*, 578 S.E.2d 711, 713-14 (S.C. 2013).

Appellant submits that where his property interests herein are created solely by statutory law and it is incumbent upon Respondent to collect the "prisoner's wages" from the PIP sponsor (Escod); ensure the "prevailing wage" is paid; and ensure that the *only* deductions made are authorized by statute; that a fiduciary duty is created by state and federal statute here.

To establish a claim for breach of fiduciary duty, the Appellant must prove (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages proximately resulting from the wrongful conduct of Respondent, *see, e.g., Turpin v. Lowther*, 745 SE2d 397, 401-02 (S.C. App. 2013). Appellant submits the AOB, the Record, the federal and state statute, and the foregoing showing have satisfied this test.

In as much as Respondent continually asserted that Appellant's claims were "conclusory allegations," and in light of *In re McCracken*, 351 SE2d 235, 238 (S.C. 2001), Appellant submits that each argument presented in this appeal has been pled and supported by state or federal statute, precedent or the Record.

In summation of this issue, Appellant submits that *no* statutory authority exists for the deductions imposed by DOC from "prisoner wages," that deductions are made on the lower gross wage after the \$1.92 per hour is removed; and Appellant respectfully requests this Court construct a method and determine the prevailing wage for work of a similar in nature in the locality it was performed.



**III. Respondent's assertion it does not unlawfully deprive Appellant access to monies it holds in escrow by operation of §§24-3-40(A)(5) and (B)(2).**

Respondent asserts that our state appellate courts "have tacitly if not expressly determined that §24-3-40's deductions are constitutional,"<sup>47</sup> citing *Adkins*, *Cartrette*, *Tomlin*, *Torrence*, and *Williams*. None of the cited precedent supports Respondent's assertion.

Appellant contends that our state appellate courts have ruled upon §§24-3-40(A)(1) - (4), but that *no* state appellate court has ruled on the constitutionality of §§24-3-40(A)(5) and (B)(2). In fact, in *Torrence*,<sup>48</sup> our Supreme Court held that, "[c]learly, *Torrence* and *Ward* can present this claim [escrowed wages] via the inmate grievance procedure." It is indeed that question Appellant brings forward on appeal, the unconstitutional application of the above-cited subsections.

Respondent vaguely addressed Appellant's argument regarding DOC's proposed interpretation of the terms "escrowed," "prisoner's benefit," and "estate" were broad and do not comport with public policy. Appellant notes Respondent chooses only to argue the term "estate" and remains vaguely silent on the wages "escrowed" for the "prisoner's benefit." Where Respondent has failed to address or vaguely remains silent on the terms "escrow[ed]" and for the "prisoner's benefit," Appellant stands on his argument presented at AOB, pp. 29-34 on these matters.

**1. Respondent's assertion DOC "lawfully" deducted 10% from Appellant's gross pay under §24-3-40(A)(5).**

Respondent asserts that §1761(c)(4) and 64 FR 17006 are "completely silent about the monies withheld and escrowed by operation of §24-3-40(A)(5), and, likewise, they are

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<sup>47</sup> Resp. Brf., p. 42

<sup>48</sup> 373 S.C. at 594-95, 646 SE2d at 870

completely silent about the conditions under which the Appellant, an inmate serving a life sentence may access such monies under §24-3-40(B)(2).”<sup>49</sup>

Respondent’s assertion that the statute(s) and regulations are silent on the 10% deduction for the Long Term Savings Account (“LTSA”), [an “interest bearing escrow account for the benefit of the prisoner”] is absurd; conflicts with the intent of Congress and our Legislature; and such “silence” does not grant tacit authority to make deductions outside the scope of the very specific federal regulations.

Appellant contends that the Federal Regulations are not silent, but are in fact specific as to authorized deductions.

(A) Deductions from gross wages, if made may be withheld only for the following authorized purposes: (Emphasis supplied)

- (1) taxes (federal, state, local),<sup>50</sup>
- (2) in the case of a state prisoner, reasonable charges for room & board...<sup>51</sup>
- (3) allocations for support of family pursuant to state statute, court order, or agreement by the offender;<sup>52</sup> and
- (4) contributions of not more than 20 percent, but not less than 5 percent of gross wages to any fund established by law to compensate victims of crime.<sup>53</sup>

Such deductions, in aggregate, cannot exceed 80 percent of gross wages.<sup>54</sup>

Appellant simply contends that Respondent is not authorized to escrow any funds to which the Appellant in his person or life time will not receive as a benefit.

Respondent asserts that §24-3-40(B)(2) does not authorize any inmate to have “complete and immediate access” to the monies escrowed pursuant to §24-3-40(A)(5).

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<sup>49</sup> Resp. Brf. p. 42

<sup>50</sup> §24-3-40(A)(6)

<sup>51</sup> *Id.* at (A)(3)

<sup>52</sup> *Id.* at (A)(2)

<sup>53</sup> *Id.* at (A)(1) and (A)(2). Appellant notes this was the agreement he executed in June 1997.

<sup>54</sup> (A)(1) – (4) presented here are specific deductions enumerated in 64 FR 17012

Appellant contends that Respondent was not authorized by Federal Regulations to make any deductions not so specific and that all monies not utilized for statutory deductions must be credited to Appellant, not to some decedent beneficiary which Appellant does not have or will never obtain.

Appellant asserts that Respondent's interpretation and application of §24-3-40(B)(2) as it applies to the monies escrowed for *Appellant's benefit* is incorrect and has not been addressed by any Court of this State. This appeal seeks that step.

**2. Respondent's assertion DOC does not "unlawfully" deny the Appellant access to monies escrowed pursuant to §24-3-40(A)(5).**

Appellant reiterates that federal regulation does not authorize the 10% escrowed wage deduction; specifically where it operates as a forfeiture by operation of §24-3-40(B)(2).

First, subsection (A)(5) is predicated upon the language and intent "for the benefit of the prisoner." That contemplates a return of the property to the party with the property interest [Appellant].

Second, Respondent's interpretation and application of §24-3-40(B)(2) would rob subsection (A)(5) of any meaning and render it superfluous. When construing a statute, the court should presume the legislature did not intend a futile act. This is demonstrated in the comparison of the original Bill H3562<sup>55</sup> and to amended version H3562,<sup>56</sup> that became the final version to correct the futile conflict originally proposed between (A)(5) and (B)(2). However, it was S384<sup>57</sup> that was finally enacted bearing the amended language of H3562.

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<sup>55</sup> 2<sup>nd</sup> Appendix, p. 30 ("upon death of the inmate")

<sup>56</sup> 2<sup>nd</sup> Appendix, p. 35

<sup>57</sup> 2<sup>nd</sup> Appendix, pp. 9, 12, 24

Unfortunately, to Appellant's detriment, Respondent continues to apply §24-3-40(B)(2) in the manner of the original language of H3562<sup>58</sup> in lieu of Appellant having access to distribute his money during his lifetime ("for the benefit of the prisoner").

**A. Respondent's assertion DOC does not apply §24-3-40(B)(2) in a matter which violates the prohibition against ex post facto laws.**

Respondent relied upon *United States v. O'Neal*, 180 F.3d 115, 121 (4<sup>th</sup> Cir. 1999) that the ex post facto prohibition applies only to laws criminal in nature. Appellant submitted that §24-3-40(B)(2) is directed at imposing a permanent deprivation of prisoners with specific crimes.<sup>59</sup>

In the Supreme Court's analysis of *United States v. Ursery*,<sup>60</sup> the Court held that "even if the legislature did not intend to impose a punishment, a law still may be said to do so if the sanction or disability that it imposes is so punitive in fact that the law may not legitimately be viewed as civil in nature."

Analysis under this standard of the ex post facto violation test announced in *Ursery* focuses upon whether the sanction or disability that the law imposes "may rationally be connected" to the legislature's non-punitive intent or rather "appears excessive "in light of that intent."<sup>61</sup>

**B. Respondent's assertion DOC does not apply §24-3-40(B)(2) in a manner that constitutes a bill of attainder.**

Respondent relied upon *Johnson v. Ozmint*, 2006 WL2475344 (D.S.C. 2006).

Appellant asserts the federal court in *Johnson* did not rule on "general" deductions from gross wages, but instead (1) due process allegations regarding the statutory room &

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<sup>58</sup> 2<sup>nd</sup> Appendix, p. 30 (and note 55, *supra*)

<sup>59</sup> AOB, p. 37 and n. 65

<sup>60</sup> 578 U.S. 267, 288 (1996)

<sup>61</sup> See also *Flemming v. Nestor*, 363 U.S. 603, 614 617 (1960)

board and victim compensation funds; (2) the ex post facto application to medical copayments; and (3) the bill of attainder application to those same medical copayments.

Appellant contends that none of the *Johnson* claims relate to the case at hand where Appellant's brief addressed ex post facto and bill of attainder applications to a specific section (§§24-3-40(A)(5) and (B)(2)) where subclasses have been created for wage deductions based on criminal convictions a decade prior.

A legislative act is an unconstitutional bill of attainder if it singles out an individual or *narrow class of persons* for punishment without a judicial proceeding.<sup>62</sup>

**C. Respondent's assertion in which DOC applies §24-3-40(B)(2) does not violate Equal Protection guarantees.**

Appellant submits that §24-3-40(B)(2) would render subsection (A)(5) meaningless where the permanent deprivation of the 10% of gross for the LTSA does not provide the same "benefit for the prisoner" as subsection (B)(1) provides for prisoners not serving a life sentence.

It is thus absurd to return the 10% escrowed wages to one class of prisoner *based solely on the type of sentence*. It is further absurd to be categorized with a death sentence where no such prisoner in South Carolina is allowed to participate in any program under §§24-3-315 or 24-3-430.

**IV. Respondent's assertion DOC does not improperly deny Appellant a fair interest rate on monies escrowed by operation of §24-3-40(A)(5).**

Appellant submits that Respondent has a fiduciary duty to ensure a fair interest rate on monies escrowed "for the benefit of the prisoner" under §24-3-40(A)(5). Appellant

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<sup>62</sup> *Lynn v. West*, 134 F.3d 582, 594 n.11 (4<sup>th</sup> Cir. 1998); *United States v. Brown*, 381 U.S. 437, 449-56 (1965).

submits that the interest rate and period Appellant received<sup>63</sup> and then as compared to the data provided by Respondent<sup>64</sup> demonstrates that Respondent breached the fiduciary duty created by §24-3-40(A)(5). Appellant is entitled to an interest rate that would be deemed economically equitable where Respondent had a fiduciary duty to ensure the statutory mandate “interest bearing escrow account for the *benefit* of the prisoner” was exercised for the *intended benefit* of the prisoner [Appellant].

Appellant respectfully requests this Court to find Respondent has a fiduciary duty, created by §24-3-40(A)(5) in fairly maintaining “an interest bearing escrow account for the benefit of the prisoner [Appellant].”

**V. Respondent’s assertion Appellant is not entitled to any pre-judgment or post-judgment interest.**

Appellant submits that this issue on appeal was presented in the original grievance for issue preservation that Appellant is entitled to pre-judgment interest on any prison industries pay claims this Court may resolve in Appellant’s favor and that such interest should be contained in the requested structured relief.

Appellant further submits that pre-and post-judgment interest is applicable to the fair interest rate claim on wages escrowed for the benefit of the prisoner pursuant to §24-3-40(A)(5).

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<sup>63</sup> AROA, pp. 74-44 (on a bi-weekly and monthly basis from October 29, 1997 to April 14, 2009) and then less than \$0.30 *annually* on \$5,997.00 for years 2010-2011 (AROA, p. 44) and years 2012-2013 (submitted in motions or exhibits) and \$0.63 for 2014 (AOB, p. 42).

<sup>64</sup> ROAA, pp. 184-205

**CONCLUSION**

Appellant respectfully prays this Honorable Court grant the relief requested in Appellant's Original Brief, pages 44-45.

August 27, 2015.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Thomas J. Torrence".

Thomas J. Torrence  
#094651  
Lieber Corr. Inst.  
P.O. Box 205  
Ridgeville, S.C. 219472-0205

**APPELLANT, *Pro se***

Thomas J. Torrence, # 094651, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 South Carolina Department of )  
 Corrections, )  
 Respondent. )

**Honorable Deborah Brooks Durden**

## CERTIFICATE OF MAILING

Thomas J. Torrence  
Thomas J. Torrence  
#094651  
Lieber Correctional Institution  
P.O. Box 205  
Ridgeville, S.C. 29472

1027



STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Thomas J. Torrence, #094651,

Appellant,

vs.

South Carolina Department of Corrections,

Respondent.

Docket No. 12-ALJ-04-0143-AP  
Grievance No.: ECI 0980-10

**ORDER GRANTING APPELLANT'S  
MOTION TO EXTEND TIME  
TO FILE REPLY BRIEF**

This matter is before the Administrative Law Court (ALC or Court) pursuant to the appeal of Thomas J. Torrence (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (Department or Respondent). Appellant filed a grievance with the Department objecting to the Department's decision concerning prevailing wages. On March 7, 2012, the Appellant filed this appeal with the Court.

On August 20, 2015, the Appellant filed a Motion for an Extension of Time to File Reply Brief. This Court did not receive any opposition to the motion.

This Court will grant Appellant until September 30, 2015 to file his reply brief in this matter.

**IT IS THEREFORE ORDERED** that Appellant shall file his reply brief no later than September 30, 2015.

**AND IT IS SO ORDERED.**

  
Deborah Brooks Durden, Judge  
S.C. Administrative Law Court

August 31, 2015  
Columbia, South Carolina

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 31<sup>st</sup> day of August 2015  
By: Q E C  
Judicial Law Clerk

LAW OFFICES

SEP 03 2015

MALONE, THOMPSON  
SUMMERS & OTT, LLC

**FILED**

AUG 31 2015

SC ADMIN. LAW COURT

JAN 21 2016

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

Thomas J. Torrence, #094651,

Appellant,

vs.

South Carolina Department of Corrections,

Respondent.

Docket No. 12-ALJ-04-0143-AP  
Grievance No. ECI 0980-10

## ORDER

## STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or Court) pursuant to the appeal of Thomas J. Torrence (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (SCDC or Department). On May 21, 2007, Appellant entered a Step 1 Grievance with the Department objecting to the Department's payment, disbursement, and retention of wages for work done by the Appellant in the Department's Private Sector Prison Industries Program (Program or PSPIP). The Department responded on December 1, 2011, finding the grievance untimely filed and denying Appellant's claims in their entirety. On December 5, 2011, Appellant entered a Step 2 Grievance reiterating his arguments. In a final decision signed February 9, 2012, the Department again found the grievance untimely filed and denied Appellant's claims in their entirety. On March 7, 2012, the Appellant filed an appeal with this Court. Subsequently, the issues before the Court on appeal were bifurcated to allow the parties to address the issue of timeliness before reaching the substantive issues of the case. On January 30, 2014, the Court issued an order applying the doctrine of equitable tolling and ruling that Appellant's grievance was timely filed. The Court further ordered the parties to brief the merits of the case, upon which the Court now rules.

## BACKGROUND

From June 1997 to November 2004, the Appellant participated in PSPIP at Evans Correctional Institution. Appellant performed work for Insilco Global Technologies/ESCOD (ESCOD), which participated in the Program as a private industry sponsor. For the first 320 hours of his labor, the Department paid Appellant a "training wage" of \$0.25 per hour for the first 160 hours, and \$0.75 for the remaining 160 hours. Upon completion of the 320 "training hours," the

**FILED**

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SC ADMIN LAW COURT

Department paid Appellant \$5.25 per hour for regular hours and \$7.86 per hour for overtime. From the gross wages the Department paid Appellant, FICA and federal and state tax deductions were made, leaving Appellant's "net pay," which was deposited in the "PIE Trust Fund Account" from the "Prison Industries Operating Account." Subsequent to 1999,<sup>1</sup> once the net pay was in the PIE Trust Fund Account, the Department made the following additional deductions: 20% of gross pay for victims' compensation -- 25% of gross pay for SCDC room and board (to the State General Fund). Ten percent of gross pay stayed in the account, maintained by the State Treasurer's office, as "escrowed wages" for the benefit of Appellant. The remaining balance of Appellant's pay was placed in his "Cooper" account for his personal use. The Department invoiced ESCOD \$7.17 per regular hour and \$10.86 per overtime hour of inmate labor. For a regular hour, \$5.25 was defined in the contract between ESCOD and the Department as inmate wages, \$0.40 as Social Security, and \$0.20 as Workers' Compensation, while \$1.32 was placed in the Department's "Surplus Fund Account." The Department referred to this difference as "overhead." In addition to sourcing inmate labor for ESCOD, the Department provided 25,000 square feet of workspace in Evans' industry building. A charge of \$1.00 per month for occupying this space was specified in the contract.

In 2001, Appellant and two other inmates (Plaintiffs) filed a class action law suit in the Richland County Court of Common Pleas.<sup>2</sup> Plaintiffs alleged, among other things, that the Department violated South Carolina Code Sections 24-3-310 through -430 in failing to pay inmates a prevailing wage for work performed. The class action also alleged that the Department improperly diverted a portion of the inmates' wages to its Surplus Fund Account. In 2002, The Department filed a motion to dismiss pursuant to Rule 12, SCRCPP, which was denied.

In 2004, the South Carolina Supreme Court issued opinions in two cases dealing with similar issues of inmate wages. See Adkins v. S.C. Dept. of Corrs., 360 S.C. 413, 602 S.E.2d 51

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<sup>1</sup> The Record is not clear on the distribution of Appellant's wages prior to the 1999 amendment to Section 24-3-40, which governs wage distribution.

<sup>2</sup> In the class action, Appellant and the other Plaintiff were representatives of all prisoners who participated in the Program at Evans Correctional Institute. The suit also included a "Victim Beneficiary Subclass" which represented all crime victims awarded funds from the South Carolina Victims Compensation Fund and all victims receiving restitution paid by prisoners working in the Program. The suit included a "Dependent Beneficiary Subclass" which represented all dependents of prisoners entitled to support payments from funds received through the Program.

(2004); Wicker v. S.C. Dept. of Corrs., 360 S.C. 421, 602 S.E.2d 56 (2004). The Department renewed its motion for summary judgment based upon those decisions. The motion was granted, and Plaintiffs appealed. The South Carolina Supreme Court heard the appeal.

In Torrence v. South Carolina Department of Corrections, 373 S.C. 586, 646 S.E.2d 866 (2007), the South Carolina Supreme Court held that the Plaintiffs did not have a private right of action against the Department and thus could not bring suit before the Circuit Court. However, the Court held that all members of the class action could file internal grievances with the Department to seek any monies owed. Id. at 595. Following the Court's decision, Appellant began the grievance process, which led to this appeal.

#### ISSUES ON APPEAL

1. Did the Department improperly fail to pay Appellant the prevailing wage during training?
2. Did the Department improperly fail to pay Appellant the prevailing wage after training?
3. Did the Department improperly deny Appellant access to wages escrowed for his benefit?
4. Did the Department improperly deny Appellant a fair interest rate on escrowed wages?
5. Is Appellant entitled to interest on improperly withheld wages?

#### STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the South Carolina Supreme Court decisions in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). The Al-Shabazz decision explained that "procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property." Wicker, 360 S.C. at 424, 602 S.E.2d at 58 (citation omitted). The statutory mandate that inmates be paid the prevailing wage creates a property interest that may not be denied without due process of law. Id. (citation omitted). Thus, when the Department denies an inmate, dependent, victim, or other interested party property to which he or she is entitled by law, the matter is reviewable by the ALC via the Department's internal grievance procedure. See Torrence, 373 S.C. at 594, 646 S.E.2d at 869-70.

When reviewing the Department's decisions in inmate grievance matters, the ALC sits in an appellate capacity. Al-Shabazz, 338 S.C. at 377, 527 S.E.2d at 754. Under the appellate standard of the Administrative Procedures Act, the Court's review in appellate cases is limited to

the record, absent irregularities in the procedure of the agency. S.C. Code Ann. § 1-23-380(4) (Supp. 2015). Additionally, the Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5) (Supp. 2015). Substantial rights of the appellant are prejudiced when the agency's decision, including the agency's findings, inferences, and conclusions, are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Id.* Substantial evidence is not a mere scintilla, but evidence "which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency. Friends of Earth v. Pub. Serv. Commn. of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 911 (2010) (internal quotations and citation omitted). An agency's construction of a statute that it administers will be accorded the most respectful consideration and will not be overruled absent compelling reasons. S.C. Energy Users Comm. v. S.C. Elec. & Gas, 410 S.C. 348, 353-54, 764 S.E.2d 913, 915 (2014) (citations omitted); see also Kiawah Dev. Partners, II v. S.C. Dept. of Health & Envtl. Control, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014).

## DISCUSSION

### Applicable Law

State and federal laws are applicable to the Program operated by the Department. South Carolina's PSPIP is authorized by the federal Bureau of Justice Assistance (BJA) as part of the Prison Industries Enhancement Certification Program (PIECP), under Title 18, Section 1761(c) of the United States Code. Subsection (a) of Section 1761, sometimes referred to as the Ashurst-Sumners Act, enacted in 1935, governs the transportation and importation of items made by prisoners. See 18 U.S.C. § 1761(a) (2012). Such items may not be transported in interstate commerce unless an exception applies. *Id.* Subsection (c) creates an exception for BJA-administered programs. See 18 U.S.C. § 1761(c) (2012). The BJA issued its final PIECP guideline

for programs such as the Department's in 1999. 64 Fed. Reg. 17000-14 (Apr. 7, 1999) (hereinafter "Guideline").

The federal statute requires that inmates in BJA-administered programs "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] performed." 18 U.S.C. § 1761(c)(2) (2012). From these wages, deductions of up to 80% may be made for taxes, room and board, family support, and victim compensation. Id. The PIECP Guideline refers to this rate of pay as the "prevailing wage" and states that the prevailing wage must be obtained from the state agency that determines wage rates. Guideline at 17010. The Guideline states that this agency is usually the "Department of Economic Security." 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). 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. Id. at 17009-10. Additionally, the Guideline states that the prevailing wage cannot be less than the federal minimum wage, but that payment of the minimum wage does not achieve compliance with the law unless the comparable private sector industry wage is indeed the federal minimum wage. Id. at 17010.

The Department's BJA-authorized program operates under South Carolina statutes enacted to comply with the federal law. In Section 24-3-315 of the South Carolina Code, it is stated that the Director of the Department "must determine . . . that the rates of pay . . . are not less than those paid . . . for work of similar nature in the locality in which the work is performed." S.C. Code Ann. § 24-3-315 (2007). Further, Section 24-3-430 requires that "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." S.C. Code Ann. § 24-3-430 (2007). Although these statutes were amended during the time period at question in this case, the amendments do not affect the disposition of the case.

However, the state statute governing the distribution of inmate wages has been substantively changed. Prior to Act 68 of 1999, Section 24-3-40 required only that 5% of gross wages go to victim assistance programs, while the amount distributed for room and board to the Department and the amounts distributed to the inmate, the inmate's dependents, and victim(s) of

the crime was left in the discretion of the Department. S.C. Code Ann. § 24-3-40 (Westlaw through 1998). No mention was made of escrowing any portion of inmate wages. See id. Act 68 created a more specific distribution system that governed the remaining time at issue in this case. An additional amendment made in 2000 does not affect this case. In addition to provisions for restitution, victim compensation, room and board, family support, and personal use, the amended statute directs that the Department “shall deduct . . . from the gross wages of the prisoner: . . . [t]en percent must be held in an interest bearing escrow account for the benefit of the prisoner.” S.C. Code Ann. § 24-3-40(A)(5) (Westlaw through 2001). The statute further directed that “The Department of Corrections shall return a prisoner’s wages held in escrow pursuant to subsection (A) as follows: . . . A prisoner serving life in prison or sentenced to death shall be given the option of having his escrowed wages included in his estate or distributed to the person or entities of his choice.” S.C. Code Ann. § 24-3-40(B)(2) (Westlaw through 2001).

#### **Payment of Training Wages**

Appellant contends that he must be paid the prevailing wage required by law for his labor performed during the training period. The Court agrees.

The South Carolina Supreme Court has held “there is simply nothing in the statutory scheme authorizing the DOC to pay [Appellant] a training wage less than the prevailing wage.” Wicker, 360 S.C. at 425, 602 S.E.2d at 58. Thus, it is beyond argument that SCDC must pay Appellant the difference between the “training wages” and the prevailing wage. Furthermore, the statutory mandate of comparable pay and conditions means that inmates are entitled to time-and-a-half overtime pay in situations non-inmate workers would receive such overtime pay. S.C. Dept. of Corrs. v. Cartrette, 387 S.C. 640, 646, 694 S.E.2d 18, 21 (Ct. App. 2010); see also Guideline at 170000-01.

The Department’s decision to pay Appellant less than the prevailing wage for regular hours and time-and-a-half the prevailing wage for overtime hours during the first 320 hours of his labor is erroneous as a matter of law.

#### **Payment of Post-Training Wages**

Appellant also contends that he was not paid the prevailing wage required by law for each hour of labor after the training period. As stated above, there is no construction of the law under

which the Department could pay Appellant less than the prevailing wage. The question then becomes, what is the "prevailing wage" that must be paid for all hours worked in both the training period and thereafter? The Department makes a number of arguments regarding the definition of prevailing wage.<sup>3</sup>

### **Prevailing Wage**

First, the Department argues that "comparable wages" and "prevailing wage" are different concepts and that the requirement to pay a comparable wage does not require the Department to pay the prevailing wage. The term "comparable wages" is used in Section 24-3-410 of the South Carolina Code. This section is similar to the Ashurst-Sumners Act, in that it bans the sale of inmate-manufactured goods, with certain exceptions. The exception applicable to the PSPIP provides that the "inmate workers participate voluntarily, receive comparable wages, and the work does not displace employed workers." S.C. Code Ann. § 24-3-410(B)(7) (2007). The Department cites a Circuit Court order in another case as support for the theory that Section -410, and not Section -430, governs the wage standard applicable in this case. Not only is this Circuit Court order not binding, the argument for which it is cited contradicts the statements of the higher courts in this state. This Court declines to further address the argument that only Section -410 applies, noting that the South Carolina Supreme Court has already stated that the program at issue in this case operated under Section 24-3-430. See Torrence, 373 S.C. at 590, 646 S.E.2d at 867.

Second, the Department argues that the "prevailing wage" is defined by its contract with ESCOD. The fact that SCDC and ESCOD agreed between themselves in their contract that \$5.25 was the prevailing wage does nothing to establish that \$5.25 meets the requirements of Sections -315 and -430. Even the contract acknowledges the need to comply with state and federal law with

<sup>3</sup> The parties also argue vociferously about whether it is proper to use the terms "employee" or "hire" with respect to Appellant's labor and his relationship with the PIECP. The Court declines to address in detail the parties' arguments concerning Appellant's status as an "employee," since they are not necessary for the disposition of this case. It is true that Appellant is not classified as an "employee" of the State. S.C. Code Ann. § 24-3-430(F) (2007). He 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. Dept. of Corrs., 372 S.C. 255, 641 S.E.2d 885 (2007). Nor is he an "employee" for purposes of unemployment benefits. S.C. Code Ann. § 24-3-430(G) (2007). Yet, it is also true that for some other purposes Appellant has the same rights and responsibilities afforded to employees. He is required to pay state and federal income taxes and Social Security taxes. S.C. Code Ann. § 24-3-40(A)(6) (Supp. 2015). He is entitled to worker's compensation benefits for on-the-job injuries. 18 U.S.C. § 1761(c)(3) (2012). None of these rights and duties (or lack thereof) directly bear on the disposition of this case.



the statement, "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." The Department's many citations to contract construction principles are inapposite to the main issue in this case, which is not about the Department's interaction or agreement with ESCOD, but whether the Department's own actions complied with the law.

Third, the Department argues that so long as the wage paid exceeds the federal minimum wage it is a lawful wage. SCDC argues that nothing in the statutes establishes a specific rate as the prevailing wage with respect to the wages an inmate must be paid. The final agency decision states: "BJA declared that the rate at which inmates are paid for the labor they voluntarily provide to PIECP projects . . . cannot be set below the federal minimum wage. Except for the period of time it paid you a 'training wage,' SCDC paid you at least the federal minimum wage for your labor." However, the Department neglected to note in this statement that the Guideline's language in question also provides: "Payment of the Federal minimum wage, however, 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." Guideline at 170010. The federal minimum wage is the *lowest possible* acceptable wage to pay inmates, because it is legally impossible for the prevailing wage to be any lower. The minimum wage would only satisfy the prevailing wage standard in all instances if all non-inmate workers were paid only the minimum wage. However, workers in this state earn different rates of pay according to their skillset and the type job in which they work. The Guideline cited by the Department also states that the federal law "requires that the PIECP wage amount be set *exclusively* in relation to the amount of pay received by similarly situated non-inmate workers." Guideline at 17009-10 (emphasis added). The Department cites no evidence that the minimum wage was the prevailing wage for workers in jobs similar to the one performed by the Appellant. The law clearly states that "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." S.C. Code Ann. § 24-3-420 (2007).

Finally, the Department argues that the \$5.25 regular hourly rate conformed to the wage data collected and published by the ESC for the type of work in question. While the Court agrees

that verification of wage rates by the ESC is the method of determining the prevailing wage that the federal Guideline and state statutes contemplate, the Court does not agree that the \$5.25 regular hourly rate conforms to the ESC data in the record.

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

#### **Calculating the Prevailing Wage**

In its argument that \$5.25 constitutes a permissible wage, the Department seems to misapprehend the policy of the laws governing this private-sector program. The Department argues in its brief that “Appellant’s claim that the hourly rate of pay for his prison industries labor should have been identical to the hourly rate at which ESCOD paid its true employees is wholly without merit.” While, it is true that the law does not require “identical” rates of pay to those paid by the same employer for similar work, there are strong policy reasons why inmates working in the private sector must be paid the prevailing wage of that sector. The policy behind the passage of the Ashurst-Sumners Act was to prevent inmate labor from posing a threat to the employment of non-inmate workers. See Guideline at 17000–01. The PIECP is an *exception to a complete ban* on the commercial trade of products created with inmate labor. See 18 U.S.C. § 1761 (2012). As an exception, the criteria of the program are designed to achieve certain goals that maintain the overall policy of the Act—primarily, the protection of private sector jobs. Inmates must be paid the prevailing wage so that inmate labor does not create a cheaper alternative to non-inmate labor. See Cartrette, 387 S.C. at 647, 694 S.E.2d at 22 (Failure to pay inmates overtime “would create an impermissible and unfair advantage for inmate labor over private labor.”); Adkins, 360 S.C. at 418, 602 S.E.2d at 55 (“Given that the overall purpose of the prevailing wage statute is to prevent unfair competition, and to aid society and the public in general, we cannot conclude that the statutes in question were enacted for the special benefit of Inmates.”).

South Carolina law requires that an inmate’s wages cannot be less than those “for work of similar nature in the locality in which the work is performed.” S.C. Code Ann. § 24-3-315 (2007). Section 24-3-430 requires that “[n]o inmate participating in the program may earn less than the

prevailing wage for work of similar nature in the private sector.” S.C. Code Ann. § 24-3-430 (2007). In applying clear and unambiguous statutes, “there is no room for statutory construction and a court must apply the statute according to its literal meaning.” State v. Gordon, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015) (internal quotations and citation omitted). “Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” Id. The goal is “to ascertain and effectuate the intention of the legislature.” Id.

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

The PIECP Guideline requires that the prevailing wage must be obtained from the state agency that determines wage rates. Guideline at 17010. 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). 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. Id. at 17009–10. In referring to the ESC data in the record, the Court concludes that “locality” means the state of South Carolina. Further, the Court concludes that the data necessary to determine the mean average wage for “work of a similar nature” as contemplated by the state statutes and federal guidelines may be found by referring to the appropriate Occupational Employment Statistics (OES) or OCC code used by ESC/DEW. The record simply does not support a finding that the mean average wage for an assembler is as low as the \$5.25 paid Appellant. For example, in 1999, Ted Gladden of the Employment Security Commission informed the Department by letter that the mean average wage in 1997 for electronic assemblers was \$8.82. In 2000, Gladden informed the Department that the mean average wage in 1998–1999 for

electronic assemblers was \$9.92. While this evidence demonstrates that the data necessary to calculate the mean average wage is available from DEW, the evidence in the record is insufficient to calculate the wage for all of the relevant years.

There is no evidence whatsoever in the record to support the Department's argument that its wage payment was in conformity with ESC data. To pay Appellant less than the prevailing wage is an error of law.<sup>4</sup> By failing to pay the correct wage, the Department subverts the purpose of the laws enacted by Congress and the General Assembly and harms not only inmates, but the victims and family members who receive disbursements from the inmates' gross wages and the public at large.

Appellant 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. The Department must obtain the data to determine this wage from the Department of Employment and Workforce. Specifically, the Department must pay Appellant 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.

#### Access to Escrowed Wages

Appellant next contends that the Department incorrectly denies him access to the escrowed portion of his wages. The Court agrees in part.

The parties contest the meaning of Section 24-3-40(B)(2), which provides that, "A prisoner serving life in prison or sentenced to death shall be given the option of having his escrowed wages included in his estate or distributed to the persons or entities of his choice." S.C. Code Ann. § 24-3-40(B)(2) (Supp. 2015). The parties disagree on when Appellant's escrowed wages may be distributed to persons or entities of the inmate's choosing—i.e. whether they may be distributed only after the inmate's death. While there is nothing in the statute explicitly stating that the

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<sup>4</sup> The Court acknowledges the footnote statement of the South Carolina Supreme Court, that "if appellants prove true their allegation that the DOC 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, the DOC would be in violation of the plain language of the statute." *Torrence*, 373 S.C. at 594n.4, 646 S.E.2d at 870n.4 (citing S.C. Code § 24-3-40(A)) (emphasis in original)). Upon review, this Court concludes that Section 24-3-40 does not bar the Department from invoicing ESCOD for services provided in addition to inmate labor, such as the use of workspace. Here, the Department did not remove any of the money intended to constitute wages prior to disbursing the percentages. Only money intended for other purposes was separated from the wages.

distribution of the funds to persons or entities chosen by the inmate can occur only after the inmate's death, the Department's interpretation of an ambiguous statute that it administers is entitled to deference unless there is a compelling reason to differ. Kiawah, 411 S.C. at 34, 766 S.E.2d at 717. Therefore, the Court turns to the rules of statutory construction to determine the intent of the legislature.

In South Carolina, the cardinal rule of statutory interpretation requires a court to ascertain the intent of the legislature. Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (citing Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 423 S.E.2d 101 (1992)). The determination of legislative intent is a matter of law. Id. (citing CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). In so doing, the Court must give a reasonable and practical construction to the statute that is consistent with the purpose and policy expressed in the statute. Id. (citing Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011)). All other rules of statutory construction are subservient to the rule that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. S.C. Prop. & Cas. Ins. Guar. Assn. v. Brock, 410 S.C. 361, 367, 764 S.E.2d 920, 922 (2014) (citing McClanahan v. Richland Cnty. Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002)). If the statutory language gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the statute itself. State v. Hudson, 336 S.C. 237, 247, 519 S.E.2d 577, 582 (Ct. App. 1999) (citing State v. Baucom, 334 S.C. 371, 513 S.E.2d 112 (Ct. App. 1999), *rev'd*). Ambiguity should be resolved in favor of a just, equitable, and beneficial operation of the law. Id. (citing City of Sumter Police Dept. v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 498 S.E.2d 894 (Ct. App. 1998)).

Appellant argues that, as an inmate sentenced to life in prison, he should have immediate personal access to the escrowed funds. This argument is based upon his reading of Subsection (A)(5), which states that the funds are to be escrowed "for the benefit of the inmate." S.C. Code Ann. § 24-3-40(B) (Supp. 2015). Appellant argues that an inmate sentenced to life imprisonment will never receive any benefit from the escrowed funds unless he is allowed immediate personal access to those funds. On the other hand, the Department argues that an inmate sentenced to life

in prison cannot have the escrowed funds distributed on his behalf prior to the inmate's death. The Court must conclude that neither interpretation urged by the parties provides a full and fair reading of the statutory scheme, because either reading renders some language of the statute ineffectual. "In determining the meaning of a statute, it is the duty of this Court to give force and effect to all parts of the statute, if possible." State ex rel. McCleod v. Nessler, 273 S.C. 371, 373, 256 S.E.2d 419, 420 (1979) (citing Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952)). A statutory construction should seek to give effect to every word of a statute, rather than adopting an interpretation that renders a portion meaningless. Hinton v. S.C. Dept. of Prob., Parole & Pardon Servs., 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004) (citing McClenaghan v. McClenaghan, 20 S.C. Eq. (1 Strob. Eq.) 295 (1847)).

On the one hand, the meaning urged by Appellant ignores the language of Subsection (B)(2), which states, "A prisoner serving life in prison or sentenced to death shall be given the option of having his escrowed wages **included in his estate or distributed to the persons or entities of his choice.**" S.C. Code Ann. § 24-3-40(B)(2) (Supp. 2015) (emphasis added). This subsection specifically provides for the distribution of the escrowed wages of a prisoner serving a life sentence, and immediate personal access to the funds is not an allowed option. On the other hand, SCDC's interpretation ignores the language of Subsection (A)(5), which provides that "Ten percent must be held in an interest bearing escrow account **for the benefit of the prisoner.**" S.C. Code Ann. § 24-3-40(A)(5) (Supp. 2015) (emphasis added). The Department's interpretation that the escrowed funds may not be distributed to a person or entity of the inmate's choosing during the inmate's lifetime ignores the fact that the funds are to be for the benefit of the prisoner, not the benefit of the prisoner's heirs. Therefore, the Court concludes that a construction of the statute that gives full effect to both Subsections (B)(2) and (A)(5) requires reading Subsection (B)(2) to allow a prisoner serving a life sentence without opportunity for parole the option of having the escrowed funds distributed to the persons or entities of his choice during his lifetime.

The legislative history surrounding the enactment of the statute provides a compelling reason to reach this conclusion. The statute in question was enacted by Section 2 of 1999 Act Number 68. The changes to Section 25-3-40 were originally proposed in 1999 House Bill 3216, which included the language, "included in his estate upon death." After review by committee,

amended H3216 read, "included in his estate or distributed to the person or entities of his choice." This language was then included in 1999 Senate Bill 384, which became Act 68. Clearly, if the legislature had intended for the escrowed money to be distributed only "upon death," it would have enacted that proposed language rather than amending it. Therefore, Appellant must be allowed the opportunity to designate persons or entities to receive an immediate distribution of funds held in escrow pursuant to Section 24-3-40(A)(5).<sup>5</sup>

#### Interest on Escrowed Wages

Appellant next argues that SCDC has breached its fiduciary duty under the statute to hold the escrowed wages in an interest bearing account. See generally S.C. Code Ann. § 24-3-40(A)(5) (Supp. 2015). Appellant argues that because the funds are held in a commercial checking account and earn interest at a low rate of return, the Department has breached its fiduciary duty with respect to those funds by not paying a "fair interest rate." The undisputed evidence reflects that the escrowed funds are held in a commercial checking account with an accounting kept for the prisoner's escrowed funds and interest accrued on the account. The State Treasurer's Office determines the applicable interest rate and disperses the interest. While the interest rate in some years is low, there is no finding by SCDC as to what a proper, or fair, rate of interest should have been for the years in question, and nothing in the record from which such a finding could be made. An appellate court will not consider any fact which does not appear in the Record on Appeal. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 339, 611 S.E.2d 485, 488 (2005). The appealing party has the burden of providing a sufficient record. Here, Appellant has failed to provide a record upon which a finding that the interest rate was insufficient could be made by the Department or reviewed by this Court. Id. The Department's decision stating that the escrowed funds are held in an interest bearing account for the benefit of the inmate is supported by the substantial evidence in the record.

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<sup>5</sup> Appellant also argues that SCDC's application of Subsection (B)(2) operates as a bill of attainder, an *ex post facto* law, and violates his constitutional right to equal protection. None of these issues were raised in the grievance before the agency, and therefore they may not be taken up by this Court. See Home Med. Syss., Inc. v. S.C. Dept. of Revenue, 382 S.C. 556, 562-63, 677 S.E.2d 582, 586 (2009).

### Interest on Judgment

Lastly, Appellant has pleaded and argued for pre- and post-judgment interest. The Court has determined that such interest is not appropriate due to the nature of this case. As held by the South Carolina Supreme Court, the statutes governing this case do not give rise to a private cause of action or establish civil liability, because they were not enacted for the benefit of the inmates, but rather for the benefit of the public. Adkins, 360 S.C. at 417-119, 602 S.E.2d at 54-55. This reasoning was applied to the parties in this case by the South Carolina Supreme Court. See Torrence, 373 S.C. at 593, 646 S.E.2d at 869. Appellant is before the ALC to protest the failure of the Department to comply with the law, not to pursue a private right of action. Id. Thus, this Order does not constitute a civil judgment in Appellant's favor as contemplated by Section 34-31-20, but rather a directive to the Department to comply with the law. Therefore, Appellant is not entitled to interest.

### ORDER

**IT IS THEREFORE ORDERED** that the Department's Final Decision is **REVERSED**.

**IT IS FURTHER ORDERED** that this matter is **REMANDED** to the Department to determine the prevailing wage, as defined by the Court above, for all hours of regular and overtime labor performed by Appellant for ESCOD. The determination of the prevailing wage shall be made no later than **April 1, 2016**.

**IT IS FURTHER ORDERED** that the Department 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**.

**IT IS FURTHER ORDERED** that the Department allow Appellant to designate persons or entities to receive an immediate distribution of the escrowed wages in accordance with this Order.

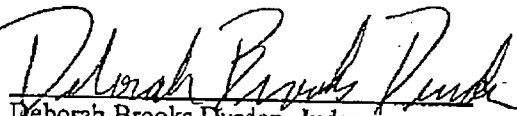
**AND IT IS SO ORDERED.**

January 20, 2016  
Columbia, South Carolina

#### CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the 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 20<sup>th</sup> day of January 2016  
By: R E L  
Judicial Law Clerk

  
Deborah Brooks Durden, Judge  
S.C. Administrative Law Court

15

LAW OFFICES

JAN 21 2016

MALONE, THOMPSON  
SUMMERS & OTT, LLC



THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Administrative Law Court Docket No. 12-ALJ-04-00143-AP

**RECEIVED**

FEB 17 2016

**SC Court of Appeals**

Thomas J. Torrence, #094651 ..... 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 both the January 30, 2014 and the January 20, 2016 decisions issued by the Honorable Deborah Brooks Durden, Administrative Law Judge.

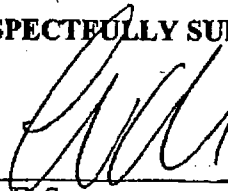
Judge Durden's final decision in this matter consists of her written orders filed January 30, 2014 and January 20, 2016. By her final decision, Judge Durden reversed the final decision issued by the Department in an administrative grievance filed by the Respondent.

The Department, by and through its undersigned counsel, appealed the written order from Judge Durden filed January 30, 2014 to this Court in 2014. By an order filed April 17, 2014, this Court dismissed the Department's appeal, as it determined that Judge Durden's January 30, 2014 order did not constitute a final decision.

The Department's undersigned counsel received written notice of the entry of Judge Durden's January 20, 2016 order on January 21, 2016.

For the sake of clarity, the Department appeals the entirety of Judge Durden's January 30, 2014 order. However, the Department appeals only the rulings issued by Judge Durden concerning the first three (3) issues she addressed in her January 20, 2016 order. See January 20, 2016 Order, pp. 3 and 6 – 14.

**RESPECTFULLY SUBMITTED:**



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Outside Counsel for Appellant South Carolina  
Department of Corrections

February 17, 2016

*Pro Se* Respondent:

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Lieber Correctional Institution  
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Ridgeville, South Carolina 29472

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Thomas J. Torrence, #094651,

Appellant,

vs.

South Carolina Department of Corrections,

Respondent.

Docket No. 12-ALJ-04-00143-AP

Grievance No. ECI 0980-10

**RECEIVED** **RECEIVED**  
ORDER

FEB 17 2016

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SC Court of Appeals

GENERAL COUNCIL

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or Court) pursuant to the appeal of Thomas J. Torrence (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (DOC or Department). Appellant filed a grievance with the Department objecting to the Department's alleged failure to pay the prevailing wage for Appellant's work while participating in the prison industry program. Appellant also asserted that the Department removed portions of his private sector prison industry wages without statutory authority. Appellant received the Department's final decision on or about February 15, 2012. On March 7, 2012, the Appellant filed this appeal with the Court.

BACKGROUND

The Appellant participated in the Private Sector Prison Industry Program (Program), in which Insilco Global Technologies/ESCOD (ESCOD) participated as the private industry sponsor at Evans Correctional Institute from June 1997 until November 2004. During the first 320 hours of his employment, Appellant was paid a "training wage" of \$0.25-\$0.75 per hour. Upon completion of the 320 "training hours," Appellant was paid \$5.25 per hour. Throughout Appellant's participation in the Program, ESCOD remitted Appellant's wages to the Department pursuant to S.C. Code Ann. § 24-3-40. The Department distributed Appellant's wages to his Prison Industry Account.

In 2001, Appellant and two other inmates filed a class action law suit in the Richland County Court of Common Pleas. Appellant alleged, among other things, that the Department violated S.C. Code Ann. §§ 24-3-310 through -430 (2007) in failing to pay inmates a prevailing wage for work

**FILED**

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SC ADMIN. LAW COURT

performed.<sup>1</sup> The class action also alleged that the Department improperly diverted a portion of the inmates' wages to the Department Surplus Fund. The Department filed a motion to dismiss pursuant to Rule 12, SCRPC in November 2002, however, that motion was denied. In 2004, the South Carolina Supreme Court issued its opinions in two cases dealing with similar issues of inmate wages, Adkins v. S.C. Dept. of Corrections, 360 S.C. 413, 602 S.E.2d 51 (2004) and Wicker v. S.C. Dept. of Corrections, 360 S.C. 421, 602 S.E.2d 56 (2004). The Department renewed its motion for summary judgment based upon those decisions. The motion was granted, and the Appellant appealed. The South Carolina Supreme Court heard the appeal.

In Torrence v. South Carolina Department of Corrections, 373 S.C. 586, 646 S.E.2d 866 (2007), the South Carolina Supreme Court held that the plaintiffs did not hold a private right of action against the Department. However, the court held that all members of the class action could file an internal grievance with the Department to seek any monies owed. Upon the issuance of the Supreme Court decision, Appellant filed a Step 1 grievance with the Department on May 21, 2007. The Department notified Appellant that his Step 1 grievance would not be answered until the Supreme Court decided on the Department's petition for rehearing. In December 2011, the petition for rehearing was denied by the court. At that time, the Department answered Appellant's Step 1 grievance, indicating the Step 1 grievance was denied because the grievance was untimely filed with the Department. Appellant filed his Step 2 grievance on December 5, 2011, appealing the denial of his Step 1 grievance. The Department denied the Step 2 grievance and this appeal followed.<sup>2</sup>

#### ISSUES ON APPEAL

1. Did the South Carolina Supreme Court decisions in the Adkins and Wicker cases create new substantive or grievance rights?
2. Did Appellant timely file his Step 1 grievance alleging a prevailing wage issue with the Department?

<sup>1</sup> In the class action, Appellant and the other Plaintiff were representatives of all prisoners who participated in the Program at Evans Correctional Institute. The suit also included a "Victim Beneficiary Subclass" which represented all crime victims awarded funds from the South Carolina Victims Compensation Fund and all victims receiving restitution paid by prisoners working in the Program. The suit included a "Dependent Beneficiary Subclass" which represented all dependents of prisoners entitled to support payments from funds received through the Program.

<sup>2</sup> In his appeal to this Court, the Appellant raised multiple issues related to the payment of wages. However, by an order dated June 7, 2012, the only issue addressed in this order is the timeliness of Appellant's Step 1 grievance.

3. Was the time to file an inmate grievance with the Department equitably tolled when the Appellant filed a claim in the Richland County Court of Common Pleas?

#### STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decision of the South Carolina Supreme Court in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). The Administrative Law Court's jurisdiction in inmate appeals is limited to state created liberty interests typically involving: (1) cases in which an inmate contends that prison officials have erroneously calculated his/her sentence, sentence-related credits, or custody status; and (2) cases in which an inmate has received punishment in a major disciplinary hearing as a result of a serious rule violation. *Id.* When reviewing the Department's decisions in inmate grievance matters, the ALC sits in an appellate capacity. *Id.* at 756. Consequently, the review in these inmate grievance cases is limited to the record presented. An Administrative Law Judge may not substitute his judgment for that of an agency "as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2013). Furthermore, an Administrative Law Judge may not reverse or modify an agency's decision unless substantial rights of the appellant have been prejudiced because the decision is clearly erroneous in view of the substantial evidence on the whole record, arbitrary or affected by an error of law. See S.C. Code Ann. § 1-23-380(A)(6); See also Marietta Garage, Inc. v. South Carolina Dept. of Public Safety, 337 S.C. 133, 522 S.E.2d 605 (1999); South Carolina Dept. of Labor, Licensing and Regulation v. Girgis, 332 S.C. 162, 503 S.E.2d 490 (1998).

#### DISCUSSION

##### Creation of Substantive Rights or Remedies by Adkins and Wicker

The Appellant contends that the Supreme Court's decisions in Adkins and Wicker created new substantive and grievance rights for inmates alleging the Department failed to pay a prevailing wage. Specifically, Appellant asserts that "a remedy for prevailing wage claims was not solidified until August 23, 2004 in Wicker." The Department argues, however, that the Supreme Court did not create a new substantive right, but simply clarified that inmates had a pre-existing right to pursue prevailing wage claims through the inmate grievance system.

A substantive right can be created by statute or by judicial decision. See, e.g., Lawson v. S.C. Dept. of Corrections, 340 S.C. 346, 532 S.E.2d 259, 261 (2000) (holding that the whistleblower

statute created new substantive rights); McCaskey v. Shaw, 295 S.C. 372, 375, 368 S.E.2d 672, 673 (Ct. App. 1988) (holding that a prior Supreme Court decision "created a new substantive right"). A statute presumptively creates substantive rights. A court creates a new substantive right when it recognizes a new cause of action that did not previously exist. Toth v. Square D Co., 377 S.E.2d 584 (S.C. 1989).

In Adkins, our Supreme Court held that Section 24-3-430 and accompanying prison industries statutes did not provide inmates with the right to bring a private cause of action against DOC. Adkins, 360 S.C. at 419, 602 S.E.2d at 55. More relevant to the case at hand, the court further held that:

[N]otwithstanding our holding that inmates have no private civil cause of action, they are not without remedy. In accordance with the companion case of Wicker v. South Carolina Dept. of Corrections, 360 S.C. 421, 602 S.E.2d 56, 2004 WL 1877947 (2004), we hold inmates may file an inmate grievance to protest DOC's failure to pay wages in accordance with the mandatory statutory provisions.

*Id.*

In Wicker, the Supreme Court fleshed out this latter holding. It explained that "where, as here, the state has created a statutory right to the payment of a prevailing wage, it cannot thereafter deny that right without affording due process of law." Wicker, 360 S.C. at 424, 602 S.E.2d at 57. The court thus held that inmates' prevailing wage claims were grievable through DOC's internal grievance processes and that DOC's denial of those claims could be appealed to the ALC. *Id.* at 25, 602 S.E.2d at 57-58.

Adkins and Wicker did not create new substantive rights. The substantive right at issue in Adkins and Wicker—i.e., the right to a prevailing wage—was granted to inmates in 1995 pursuant to S.C. Code Ann. § 24-3-430(D). Adkins and Wicker simply addressed the appropriate procedure for seeking redress for a denial of that existing right. More precisely, these decisions acknowledged Policy Number GA-01.12 as the proper procedural mechanism by which inmates may challenge the rate at which the Department paid for labor provided.

Adkins and Wicker also did not create new grievance rights. Paragraph 7 of DOC Policy Number GA-01.12, which has existed in some form since May 1, 1996, sets forth the issues that are

considered grievable by the Department.<sup>3</sup> Among other grievable issues, it includes the following: "Department policies/procedures, directives, or conditions which directly affect an inmate." DOC Policy Number GA-01.12, ¶ 7.1. Unquestionably, inmates are "directly affect[ed]" by DOC policies that cause them to be paid less than required by law. Thus, this provision, which is very broad in scope, encompasses prevailing wage claims.

The ALC reached that same conclusion in a 2001 decision that gave rise to, and was ultimately affirmed by, the Supreme Court's opinion in Wicker. See Wicker v. S.C. Dept. of Corrections, 00-ALJ-04-00781-AP, 2001 WL 1005574 (S.C. Admin. Law Ct. Aug. 13, 2001). In the case before the ALC, the Department contended that prevailing wage claims were "non-grievable." See *id.* at \*1. Upon reviewing the Department's grievance policies, the ALC disagreed, holding:

Wicker's wage dispute falls under the listed issues considered "grievable" under DOC policy at GA-01.12(OP), Specific Procedures, paragraph 7; the first issue listed is "Department policies/procedures, directives, or conditions which directly affect an inmate." Wicker is directly affected by DOC's arrangement with private industry to pay inmates less than the "prevailing wage for work of similar nature in the private sector" for the first 320 hours of work. Therefore, Wicker's wage dispute is grievable under the agency's grievance system.

*Id.* at \*1.

Furthermore, in affirming the ALC's decision in Wicker, the Supreme Court did not suggest that it was granting inmates new grievance rights. There was no indication by the court that the Department's grievance procedures were inadequate or that they should be enlarged. The court ruled that "[t]here are numerous issues relating to inmates which, although not giving rise to private, civil cause of action, are nonetheless grievable through DOC's internal grievance processes." Wicker, 360 S.C. at 423-24, 602 S.E.2d at 57.

Accordingly, I conclude that Adkins and Wicker did not create new substantive or grievance rights, but merely confirmed that prevailing wage claims were grievable under the Department's existing policies.

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<sup>3</sup> The existence of the Department's grievances policies was specifically recognized by the Supreme Court in its 2000 decision Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), where the court held that the Department's grievance procedures were consistent with the standard delineated by the U.S. Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974). See Al-Shabazz, 338 S.C. at 371-373, 527 S.E.2d 751-52.

### Timeliness of Filing Grievance

The Department denied Appellant's grievance as untimely because it was not brought within 15 days of the date the Department began paying Appellant for his labor. The Department argues that the Inmate Grievance policy has been the proper procedure for filing an internal grievance regarding a prevailing wage since its inception in May 1996, predating the decision issued by the Supreme Court in Wicker. The Department alleges that since the Appellant had a "pre-existing constitutionally protected property interest" in his prison industry pay, policy guidelines required that Appellant file a grievance within 15 days of the date the Department began paying Appellant for his labor.

Appellant points out that prior to the Wicker decision no such grievance was recognized by the Department, so any attempt to file an internal grievance would have been futile. Appellant also argues that, at that time, he had no judicially recognized constitutional right to file a grievance, so he "logically elected" to file a claim in Circuit Court. Appellant states that he timely filed his grievance with the Department within 15 days after the Supreme Court issued a final ruling which stated: "[c]learly, [Appellant] can present this claim via the inmate grievance procedure." Torrence v. S.C. Dept. of Corrections, 373 S.C. 586, 595, 646 S.E.2d 866, 870 (2007).

Paragraph 13.1 of GA-01.12 generally requires that Step 1 grievances be filed "within 15 days of the alleged incident." DOC Policy Number GA-01.12, ¶ 13.1. However, Paragraph 13.9 of GA-01.12 provides that "[e]xceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures." DOC Policy Number GA-01.12, ¶ 13.9. In the present case, Appellant contends that his grievance concerns "policies/procedures" and, therefore the 15 day time limit requirement does not apply to the filing of his grievance. I agree.

The courts have long held that "[w]hen interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand [its] operation." Murphy v. S.C. Dept. of Health and Envtl. Control, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012). While the policy at issue is not a regulation, the Court finds the rules of statutory and regulatory interpretation instructive. The Inmate Grievance System Policy fails to define either "incident" or "policies/procedures." The dictionary defines "Incident" as "an occurrence of an action or situation that is a separate unit of experience;" "policy" is defined as "a



definite course of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions." Meriam-Webster Dictionary, available at <http://www.meriam-webster.com>. Based on the "plain and ordinary meaning" of both of these words, it is clear that an incident would be a one-time, specific event, and a policy would be continuous course of action. In the present case, it was not a one-time event, in which Appellant was not paid a prevailing wage. The Department continuously failed to pay Appellant a prevailing wage. Therefore, the grievance involved is related to a policy or procedure.

In the absence of an express time limit for grievance of a policy or procedure this Court must determine a reasonable time limitation that gives effect to the statutory or regulatory scheme. McCummings v. S.C. Dept. of Corrections, 319 S.C. 440, 462 S.E.2d 271 (1995). The fact that other grievances must be filed within 15 days indicates a policy requiring the utmost promptness in raising a grievance. In the case of a challenge to the agency's policies and practices, such as the one raised here, it seems reasonable to require the grievance be raised within 15 days of the time some action has been taken under the policy relevant to the grievance.

Prior to the Wicker opinion issued by the Supreme Court, the Department maintained that wage issues were not grievable under the internal grievance system. In its brief in the current matter the Department acknowledges that in its appeal of Wicker before the ALC, the Department argued that "Wicker's complaint is non-grievable." In its decision, the ALC disagreed with the Department and found that Wicker's prison industries pay claim was grievable under ¶ 7 because Wicker's pay represented "conditions which directly affect an inmate." Wicker, 2001 WL 1005574, \*1. Clearly, the Department did not recognize a wage claim as grievable until the Supreme Court upheld the ALC's decision in August 2004. Thus, any attempt by Appellant to file a grievance prior to August 22, 2004 would have been futile. By that time, Appellant's lawsuit initiated as a class action in Circuit Court was pending before the courts, representing ongoing litigation between these same parties over the same issue. Appellant filed his grievance within fifteen days of the date the Supreme Court issued its decision in his case stating, "[c]learly, [Appellant] can present this claim via the inmate grievance procedure." Torrence v. S.C. Dept. of Corrections, 373 S.C. 586, 595, 646 S.E.2d 866, 870 (2007).

### Equitable Tolling

Appellant maintains that by filing his class action lawsuit in the Court of Common Pleas, he effectively tolled the filing requirement of his internal grievance. Appellant argues that a defective action, filed within the statute of limitations, maintained in a court of competent jurisdiction tolled the time to file an agency grievance. The Department maintains that the Appellant did not toll the time to file a grievance by filing a claim in the Court of Common Pleas.

Where a statute sets forth a limitation period for commencement of an action, courts have invoked the doctrine of equitable tolling to suspend the statutory period "to ensure fundamental practicality and fairness." Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (quoting Rodriguez v. Superior Court, 98 Cal. Rptr. 3d 728, 736 (Cal. Ct. App. 2009)). Equitable tolling is a judicially created doctrine, and it stems from the judiciary's inherent power to formulate rules of procedure "where justice demands it." Hooper, 386 S.C. at 115, 687 S.E.2d at 32. The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. *Id.*

Equitable tolling is reserved for extraordinary circumstances, and it is rarely applied in South Carolina. American Legion Post 15 v. Horry County, 381 S.C. 576, 582, 674 S.E.2d 181, 184 (Ct. App. 2009). The threshold necessary to trigger equitable tolling is very high, lest the exception swallow the rule. Ex parte Ward, 47 So. 3d 888, 897 (Ala. 2007). The S.C. Court of Appeals has explained:

[A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation.

Pelzer v. State, 378 S.C. 516, 522, 662 S.E.2d 618, 621 (Ct. App. 2008) (quoting Harris v. Hutchinson, 209 F.3d 325, 330 (4<sup>th</sup> Cir. 2000)).

Typically, equitable tolling applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control. Hooper, 386 S.C. at 116, 687 S.E.2d at 32; see also 54 C.J.S. Limitations of Actions § 133 (2013). However, as the South Carolina Supreme Court has noted, courts have flexibility in applying equitable remedies such as tolling:

The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.

Hooper, 386 S.C. at 116-17, 687 S.E.2d at 33 (citations omitted).

"Under the doctrine of equitable tolling, when a party has more than one legal remedy available, the statute of limitations is tolled while the party pursues one of the possible remedies." Abbott v. State, 979 P.2d 994, 998 (Alaska 1999).

In this case, Appellant did not have more than one legal remedy available, but no statute, regulation, or precedent established the proper procedure for bringing his claim. Because the Department refused to consider the issue under the grievance procedures, Appellant was effectively prevented from utilizing the procedure that the Supreme Court ultimately determined to be the appropriate method to raise prison industry pay claims. Appellant's case, originally filed as a class action in the Court of Common Pleas, was pending before the courts on August 23, 2004 when the Wicker and Adkins decisions were issued. This case presents the type of extraordinary circumstances in which fairness demands that the doctrine of equitable tolling be applied. Appellant's existing lawsuit, filed prior to the time the Department recognized grievances regarding pay claims, equitably tolled the time for filing a grievance during the period that lawsuit was pending. Appellant filed his Step 1 grievance within days of receiving the Supreme Court's final order and decision in that matter holding that he could present his claim via the inmate grievance procedure.

Given all of the above factors, the Appellant's grievance was timely filed.

#### **Motions to Expand Record/Provide Full Record**

On May 1, 2012, Appellant filed a Motion for an Order to Provide a Full Record and a Motion to Expand Record (Record Motions). In light of the decision in this order, it is appropriate to address those motions. Respondent has not filed a response related to the merits of the Record Motions, seeking instead to defer the issue until the timeliness of the grievance could be addressed.

Therefore, Respondent shall have thirty days to file any response to the Record Motions. Appellant shall then have thirty days to reply.

**ORDER**

**IT IS THEREFORE ORDERED** that in light of the determination, above, that Appellant's grievance was timely filed, this Court will address the merits of the issues presented in this appeal.

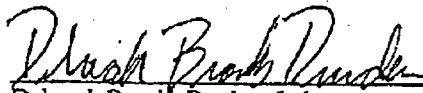
**IT IS ALSO ORDERED** that the Department of Corrections may file a response to the Record Motions by March 31, 2014. If such a response is filed, Appellant may file a reply, if any, by April 30, 2014.

**IT IS FURTHER ORDERED** that if no opposition to the Record Motions is filed, the Department of Corrections shall file an addendum to the Record on Appeal, including the items requested in the Record Motions and all relevant matter in the record not previously presented in the Abbreviated Record filed May 7, 2012. The Addendum to the Record on Appeal shall be filed with the Court by March 31, 2014, if no opposition to the Record Motions is timely filed.

**IT IS FURTHER ORDERED** that Appellant's brief shall be filed within sixty days of the date the Record is filed.

**IT IS FURTHER ORDERED** that the Respondent shall have sixty days from the date Appellant's Brief is filed to submit a brief. Any reply brief must be filed within twenty days from the date Respondent's brief is filed.

**AND IT IS SO ORDERED.**

  
Deborah Brooks Durden, Judge  
Administrative Law Court

January 30, 2014  
Columbia, South Carolina

**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 30<sup>th</sup> day of January, 2014  
By: R. E. C.  
Judicial Law Clerk

LAW OFFICES

JAN 21 2016

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

MALONE, THOMPSON  
SUMMERS & OTT, LLC

Thomas J. Torrence, #094651,

Appellant,

vs.

South Carolina Department of Corrections,

Respondent.

Docket No. 12-ALJ-04-0143-AP  
Grievance No. ECI 0980-10

ORDER

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or Court) pursuant to the appeal of Thomas J. Torrence (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (SCDC or Department). On May 21, 2007, Appellant entered a Step 1 Grievance with the Department objecting to the Department's payment, disbursement, and retention of wages for work done by the Appellant in the Department's Private Sector Prison Industries Program (Program or PSPIP). The Department responded on December 1, 2011, finding the grievance untimely filed and denying Appellant's claims in their entirety. On December 5, 2011, Appellant entered a Step 2 Grievance reiterating his arguments. In a final decision signed February 9, 2012, the Department again found the grievance untimely filed and denied Appellant's claims in their entirety. On March 7, 2012, the Appellant filed an appeal with this Court. Subsequently, the issues before the Court on appeal were bifurcated to allow the parties to address the issue of timeliness before reaching the substantive issues of the case. On January 30, 2014, the Court issued an order applying the doctrine of equitable tolling and ruling that Appellant's grievance was timely filed. The Court further ordered the parties to brief the merits of the case, upon which the Court now rules.

BACKGROUND

From June 1997 to November 2004, the Appellant participated in PSPIP at Evans Correctional Institution. Appellant performed work for Insilco Global Technologies/ESCOD (ESCOD), which participated in the Program as a private industry sponsor. For the first 320 hours of his labor, the Department paid Appellant a "training wage" of \$0.25 per hour for the first 160 hours, and \$0.75 for the remaining 160 hours. Upon completion of the 320 "training hours," the

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SC ADMIN LAW COURT

Department paid Appellant \$5.25 per hour for regular hours and \$7.86 per hour for overtime. From the gross wages the Department paid Appellant, FICA and federal and state tax deductions were made, leaving Appellant's "net pay," which was deposited in the "PIE Trust Fund Account" from the "Prison Industries Operating Account." Subsequent to 1999,<sup>1</sup> once the net pay was in the PIE Trust Fund Account, the Department made the following additional deductions: 20% of gross pay for victims' compensation -- 25% of gross pay for SCDC room and board (to the State General Fund). Ten percent of gross pay stayed in the account, maintained by the State Treasurer's office, as "escrowed wages" for the benefit of Appellant. The remaining balance of Appellant's pay was placed in his "Cooper" account for his personal use. The Department invoiced ESCOD \$7.17 per regular hour and \$10.86 per overtime hour of inmate labor. For a regular hour, \$5.25 was defined in the contract between ESCOD and the Department as inmate wages, \$0.40 as Social Security, and \$0.20 as Workers' Compensation, while \$1.32 was placed in the Department's "Surplus Fund Account." The Department referred to this difference as "overhead." In addition to sourcing inmate labor for ESCOD, the Department provided 25,000 square feet of workspace in Evans' industry building. A charge of \$1.00 per month for occupying this space was specified in the contract.

In 2001, Appellant and two other inmates (Plaintiffs) filed a class action law suit in the Richland County Court of Common Pleas.<sup>2</sup> Plaintiffs alleged, among other things, that the Department violated South Carolina Code Sections 24-3-310 through -430 in failing to pay inmates a prevailing wage for work performed. The class action also alleged that the Department improperly diverted a portion of the inmates' wages to its Surplus Fund Account. In 2002, The Department filed a motion to dismiss pursuant to Rule 12, SCRCP, which was denied.

In 2004, the South Carolina Supreme Court issued opinions in two cases dealing with similar issues of inmate wages. See Adkins v. S.C. Dept. of Corrs., 360 S.C. 413, 602 S.E.2d 51

<sup>1</sup> The Record is not clear on the distribution of Appellant's wages prior to the 1999 amendment to Section 24-3-40, which governs wage distribution.

<sup>2</sup> In the class action, Appellant and the other Plaintiff were representatives of all prisoners who participated in the Program at Evans Correctional Institute. The suit also included a "Victim Beneficiary Subclass" which represented all crime victims awarded funds from the South Carolina Victims Compensation Fund and all victims receiving restitution paid by prisoners working in the Program. The suit included a "Dependent Beneficiary Subclass" which represented all dependents of prisoners entitled to support payments from funds received through the Program.

(2004); Wicker v. S.C. Dept. of Corrs., 360 S.C. 421, 602 S.E.2d 56 (2004). The Department renewed its motion for summary judgment based upon those decisions. The motion was granted, and Plaintiffs appealed. The South Carolina Supreme Court heard the appeal.

In Torrence v. South Carolina Department of Corrections, 373 S.C. 586, 646 S.E.2d 866 (2007), the South Carolina Supreme Court held that the Plaintiffs did not have a private right of action against the Department and thus could not bring suit before the Circuit Court. However, the Court held that all members of the class action could file internal grievances with the Department to seek any monies owed. Id. at 595. Following the Court's decision, Appellant began the grievance process, which led to this appeal.

#### ISSUES ON APPEAL

1. Did the Department improperly fail to pay Appellant the prevailing wage during training?
2. Did the Department improperly fail to pay Appellant the prevailing wage after training?
3. Did the Department improperly deny Appellant access to wages escrowed for his benefit?
4. Did the Department improperly deny Appellant a fair interest rate on escrowed wages?
5. Is Appellant entitled to interest on improperly withheld wages?

#### STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the South Carolina Supreme Court decisions in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). The Al-Shabazz decision explained that "procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property." Wicker, 360 S.C. at 424, 602 S.E.2d at 58 (citation omitted). The statutory mandate that inmates be paid the prevailing wage creates a property interest that may not be denied without due process of law. Id. (citation omitted). Thus, when the Department denies an inmate, dependent, victim, or other interested party property to which he or she is entitled by law, the matter is reviewable by the ALC via the Department's internal grievance procedure. See Torrence, 373 S.C. at 594, 646 S.E.2d at 869-70.

When reviewing the Department's decisions in inmate grievance matters, the ALC sits in an appellate capacity. Al-Shabazz, 338 S.C. at 377, 527 S.E.2d at 754. Under the appellate standard of the Administrative Procedures Act, the Court's review in appellate cases is limited to

the record, absent irregularities in the procedure of the agency. S.C. Code Ann. § 1-23-380(4) (Supp. 2015). Additionally, the Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5) (Supp. 2015). Substantial rights of the appellant are prejudiced when the agency's decision, including the agency's findings, inferences, and conclusions, are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Id.* Substantial evidence is not a mere scintilla, but evidence "which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency." Friends of Earth v. Pub. Serv. Commn. of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 911 (2010) (internal quotations and citation omitted). An agency's construction of a statute that it administers will be accorded the most respectful consideration and will not be overruled absent compelling reasons. S.C. Energy Users Comm. v. S.C. Elec. & Gas, 410 S.C. 348, 353-54, 764 S.E.2d 913, 915 (2014) (citations omitted); see also Kiawah Dev. Partners, II v. S.C. Dept. of Health & Envtl. Control, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014).

## DISCUSSION

### Applicable Law

State and federal laws are applicable to the Program operated by the Department. South Carolina's PSPIP is authorized by the federal Bureau of Justice Assistance (BJA) as part of the Prison Industries Enhancement Certification Program (PIECP), under Title 18, Section 1761(c) of the United States Code. Subsection (a) of Section 1761, sometimes referred to as the Ashurst-Sumners Act, enacted in 1935, governs the transportation and importation of items made by prisoners. See 18 U.S.C. § 1761(a) (2012). Such items may not be transported in interstate commerce unless an exception applies. *Id.* Subsection (c) creates an exception for BJA-administered programs. See 18 U.S.C. § 1761(c) (2012). The BJA issued its final PIECP guideline



for programs such as the Department's in 1999. 64 Fed. Reg. 17000-14 (Apr. 7, 1999) (hereinafter "Guideline").

The federal statute requires that inmates in BJA-administered programs "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] performed." 18 U.S.C. § 1761(c)(2) (2012). From these wages, deductions of up to 80% may be made for taxes, room and board, family support, and victim compensation. Id. The PIECP Guideline refers to this rate of pay as the "prevailing wage" and states that the prevailing wage must be obtained from the state agency that determines wage rates. Guideline at 17010. The Guideline states that this agency is usually the "Department of Economic Security." 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). 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. Id. at 17009-10. Additionally, the Guideline states that the prevailing wage cannot be less than the federal minimum wage, but that payment of the minimum wage does not achieve compliance with the law unless the comparable private sector industry wage is indeed the federal minimum wage. Id. at 17010.

The Department's BJA-authorized program operates under South Carolina statutes enacted to comply with the federal law. In Section 24-3-315 of the South Carolina Code, it is stated that the Director of the Department "must determine . . . that the rates of pay . . . are not less than those paid . . . for work of similar nature in the locality in which the work is performed." S.C. Code Ann. § 24-3-315 (2007). Further, Section 24-3-430 requires that "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." S.C. Code Ann. § 24-3-430 (2007). Although these statutes were amended during the time period at question in this case, the amendments do not affect the disposition of the case.

However, the state statute governing the distribution of inmate wages has been substantively changed. Prior to Act 68 of 1999, Section 24-3-40 required only that 5% of gross wages go to victim assistance programs, while the amount distributed for room and board to the Department and the amounts distributed to the inmate, the inmate's dependents, and victim(s) of

the crime was left in the discretion of the Department. S.C. Code Ann. § 24-3-40 (Westlaw through 1998). No mention was made of escrowing any portion of inmate wages. See id. Act 68 created a more specific distribution system that governed the remaining time at issue in this case. An additional amendment made in 2000 does not affect this case. In addition to provisions for restitution, victim compensation, room and board, family support, and personal use, the amended statute directs that the Department "shall deduct . . . from the gross wages of the prisoner: . . . [t]en percent must be held in an interest bearing escrow account for the benefit of the prisoner." S.C. Code Ann. § 24-3-40(A)(5) (Westlaw through 2001). The statute further directed that "The Department of Corrections shall return a prisoner's wages held in escrow pursuant to subsection (A) as follows: . . . A prisoner serving life in prison or sentenced to death shall be given the option of having his escrowed wages included in his estate or distributed to the person or entities of his choice." S.C. Code Ann. § 24-3-40(B)(2) (Westlaw through 2001).

#### **Payment of Training Wages**

Appellant contends that he must be paid the prevailing wage required by law for his labor performed during the training period. The Court agrees.

The South Carolina Supreme Court has held "there is simply nothing in the statutory scheme authorizing the DOC to pay [Appellant] a training wage less than the prevailing wage." Wicker, 360 S.C. at 425, 602 S.E.2d at 58. Thus, it is beyond argument that SCDC must pay Appellant the difference between the "training wages" and the prevailing wage. Furthermore, the statutory mandate of comparable pay and conditions means that inmates are entitled to time-and-a-half overtime pay in situations non-inmate workers would receive such overtime pay. S.C. Dept. of Corrs. v. Cartrette, 387 S.C. 640, 646, 694 S.E.2d 18, 21 (Ct. App. 2010); see also Guideline at 170000-01.

The Department's decision to pay Appellant less than the prevailing wage for regular hours and time-and-a-half the prevailing wage for overtime hours during the first 320 hours of his labor is erroneous as a matter of law.

#### **Payment of Post-Training Wages**

Appellant also contends that he was not paid the prevailing wage required by law for each hour of labor after the training period. As stated above, there is no construction of the law under

which the Department could pay Appellant less than the prevailing wage. The question then becomes, what is the "prevailing wage" that must be paid for all hours worked in both the training period and thereafter? The Department makes a number of arguments regarding the definition of prevailing wage.<sup>3</sup>

#### Prevailing Wage

First, the Department argues that "comparable wages" and "prevailing wage" are different concepts and that the requirement to pay a comparable wage does not require the Department to pay the prevailing wage. The term "comparable wages" is used in Section 24-3-410 of the South Carolina Code. This section is similar to the Ashurst-Sumners Act, in that it bans the sale of inmate-manufactured goods, with certain exceptions. The exception applicable to the PSPIP provides that the "inmate workers participate voluntarily, receive comparable wages, and the work does not displace employed workers." S.C. Code Ann. § 24-3-410(B)(7) (2007). The Department cites a Circuit Court order in another case as support for the theory that Section -410, and not Section -430, governs the wage standard applicable in this case. Not only is this Circuit Court order not binding, the argument for which it is cited contradicts the statements of the higher courts in this state. This Court declines to further address the argument that only Section -410 applies, noting that the South Carolina Supreme Court has already stated that the program at issue in this case operated under Section 24-3-430. See Torrence, 373 S.C. at 590, 646 S.E.2d at 867.

Second, the Department argues that the "prevailing wage" is defined by its contract with ESCOD. The fact that SCDC and ESCOD agreed between themselves in their contract that \$5.25 was the prevailing wage does nothing to establish that \$5.25 meets the requirements of Sections -315 and -430. Even the contract acknowledges the need to comply with state and federal law with

<sup>3</sup> The parties also argue vociferously about whether it is proper to use the terms "employee" or "hire" with respect to Appellant's labor and his relationship with the PIECP. The Court declines to address in detail the parties' arguments concerning Appellant's status as an "employee," since they are not necessary for the disposition of this case. It is true that Appellant is not classified as an "employee" of the State, S.C. Code Ann. § 24-3-430(F) (2007). He 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. Dept. of Corrs., 372 S.C. 255, 641 S.E.2d 885 (2007). Nor is he an "employee" for purposes of unemployment benefits. S.C. Code Ann. § 24-3-430(G) (2007). Yet, it is also true that for some other purposes Appellant has the same rights and responsibilities afforded to employees. He is required to pay state and federal income taxes and Social Security taxes. S.C. Code Ann. § 24-3-40(A)(6) (Supp. 2015). He is entitled to worker's compensation benefits for on-the-job injuries. 18 U.S.C. § 1761(c)(3) (2012). None of these rights and duties (or lack thereof) directly bear on the disposition of this case.

the statement, "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." The Department's many citations to contract construction principles are inapposite to the main issue in this case, which is not about the Department's interaction or agreement with ESCOD, but whether the Department's own actions complied with the law.

Third, the Department argues that so long as the wage paid exceeds the federal minimum wage it is a lawful wage. SCDC argues that nothing in the statutes establishes a specific rate as the prevailing wage with respect to the wages an inmate must be paid. The final agency decision states: "BJA declared that the rate at which inmates are paid for the labor they voluntarily provide to PIECP projects . . . cannot be set below the federal minimum wage. Except for the period of time it paid you a 'training wage,' SCDC paid you at least the federal minimum wage for your labor." However, the Department neglected to note in this statement that the Guideline's language in question also provides: "Payment of the Federal minimum wage, however, 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." Guideline at 170010. The federal minimum wage is the *lowest possible* acceptable wage to pay inmates, because it is legally impossible for the prevailing wage to be any lower. The minimum wage would only satisfy the prevailing wage standard in all instances if all non-inmate workers were paid only the minimum wage. However, workers in this state earn different rates of pay according to their skillset and the type job in which they work. The Guideline cited by the Department also states that the federal law "requires that the PIECP wage amount be set *exclusively* in relation to the amount of pay received by similarly situated non-inmate workers." Guideline at 17009-10 (emphasis added). The Department cites no evidence that the minimum wage was the prevailing wage for workers in jobs similar to the one performed by the Appellant. The law clearly states that "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." S.C. Code Ann. § 24-3-420 (2007).

Finally, the Department argues that the \$5.25 regular hourly rate conformed to the wage data collected and published by the ESC for the type of work in question. While the Court agrees

that verification of wage rates by the ESC is the method of determining the prevailing wage that the federal Guideline and state statutes contemplate, the Court does not agree that the \$5.25 regular hourly rate conforms to the ESC data in the record.

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

#### **Calculating the Prevailing Wage**

In its argument that \$5.25 constitutes a permissible wage, the Department seems to misapprehend the policy of the laws governing this private-sector program. The Department argues in its brief that "Appellant's claim that the hourly rate of pay for his prison industries labor should have been identical to the hourly rate at which ESCOD paid its true employees is wholly without merit." While, it is true that the law does not require "identical" rates of pay to those paid by the same employer for similar work, there are strong policy reasons why inmates working in the private sector must be paid the prevailing wage of that sector. The policy behind the passage of the Ashurst-Sumners Act was to prevent inmate labor from posing a threat to the employment of non-inmate workers. See Guideline at 17000-01. The PIECP is an exception to a complete ban on the commercial trade of products created with inmate labor. See 18 U.S.C. § 1761 (2012). As an exception, the criteria of the program are designed to achieve certain goals that maintain the overall policy of the Act—primarily, the protection of private sector jobs. Inmates must be paid the prevailing wage so that inmate labor does not create a cheaper alternative to non-inmate labor. See Cartrette, 387 S.C. at 647, 694 S.E.2d at 22 (Failure to pay inmates overtime "would create an impermissible and unfair advantage for inmate labor over private labor."); Adkins, 360 S.C. at 418, 602 S.E.2d at 55 ("Given that the overall purpose of the prevailing wage statute is to prevent unfair competition, and to aid society and the public in general, we cannot conclude that the statutes in question were enacted for the special benefit of Inmates.").

South Carolina law requires that an inmate's wages cannot be less than those "for work of similar nature in the locality in which the work is performed." S.C. Code Ann. § 24-3-315 (2007). Section 24-3-430 requires that "[n]o inmate participating in the program may earn less than the

prevailing wage for work of similar nature in the private sector.” S.C. Code Ann. § 24-3-430 (2007). In applying clear and unambiguous statutes, “there is no room for statutory construction and a court must apply the statute according to its literal meaning.” State v. Gordon, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015) (internal quotations and citation omitted). “Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” Id. The goal is “to ascertain and effectuate the intention of the legislature.” Id.

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

The PIECP Guideline requires that the prevailing wage must be obtained from the state agency that determines wage rates. Guideline at 17010. 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). 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. Id. at 17009–10. In referring to the ESC data in the record, the Court concludes that “locality” means the state of South Carolina. Further, the Court concludes that the data necessary to determine the mean average wage for “work of a similar nature” as contemplated by the state statutes and federal guidelines may be found by referring to the appropriate Occupational Employment Statistics (OES) or OCC code used by ESC/DEW. The record simply does not support a finding that the mean average wage for an assembler is as low as the \$5.25 paid Appellant. For example, in 1999, Ted Gladden of the Employment Security Commission informed the Department by letter that the mean average wage in 1997 for electronic assemblers was \$8.82. In 2000, Gladden informed the Department that the mean average wage in 1998–1999 for

electronic assemblers was \$9.92. While this evidence demonstrates that the data necessary to calculate the mean average wage is available from DEW, the evidence in the record is insufficient to calculate the wage for all of the relevant years.

There is no evidence whatsoever in the record to support the Department's argument that its wage payment was in conformity with ESC data. To pay Appellant less than the prevailing wage is an error of law.<sup>4</sup> By failing to pay the correct wage, the Department subverts the purpose of the laws enacted by Congress and the General Assembly and harms not only inmates, but the victims and family members who receive disbursements from the inmates' gross wages and the public at large.

Appellant 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. The Department must obtain the data to determine this wage from the Department of Employment and Workforce. Specifically, the Department must pay Appellant 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.

#### Access to Escrowed Wages

Appellant next contends that the Department incorrectly denies him access to the escrowed portion of his wages. The Court agrees in part.

The parties contest the meaning of Section 24-3-40(B)(2), which provides that, "A prisoner serving life in prison or sentenced to death shall be given the option of having his escrowed wages included in his estate or distributed to the persons or entities of his choice." S.C. Code Ann. § 24-3-40(B)(2) (Supp. 2015). The parties disagree on when Appellant's escrowed wages may be distributed to persons or entities of the inmate's choosing—i.e. whether they may be distributed only after the inmate's death. While there is nothing in the statute explicitly stating that the

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<sup>4</sup> The Court acknowledges the footnote statement of the South Carolina Supreme Court, that "if appellants prove true their allegation that the DOC 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, the DOC would be in violation of the plain language of the statute." *Torrence*, 373 S.C. at 594n.4, 646 S.E.2d at 870n.4 (citing S.C. Code § 24-3-40(A)) (emphasis in original)). Upon review, this Court concludes that Section 24-3-40 does not bar the Department from invoicing ESCOD for services provided in addition to inmate labor, such as the use of workspace. Here, the Department did not remove any of the money intended to constitute wages prior to disbursing the percentages. Only money intended for other purposes was separated from the wages.

distribution of the funds to persons or entities chosen by the inmate can occur only after the inmate's death, the Department's interpretation of an ambiguous statute that it administers is entitled to deference unless there is a compelling reason to differ. Kiawah, 411 S.C. at 34, 766 S.E.2d at 717. Therefore, the Court turns to the rules of statutory construction to determine the intent of the legislature.

In South Carolina, the cardinal rule of statutory interpretation requires a court to ascertain the intent of the legislature. Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (citing Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 423 S.E.2d 101 (1992)). The determination of legislative intent is a matter of law. Id. (citing CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). In so doing, the Court must give a reasonable and practical construction to the statute that is consistent with the purpose and policy expressed in the statute. Id. (citing Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011)). All other rules of statutory construction are subservient to the rule that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. S.C. Prop. & Cas. Ins. Guar. Assn. v. Brock, 410 S.C. 361, 367, 764 S.E.2d 920, 922 (2014) (citing McClanahan v. Richland Cnty. Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002)). If the statutory language gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the statute itself. State v. Hudson, 336 S.C. 237, 247, 519 S.E.2d 577, 582 (Ct. App. 1999) (citing State v. Baucom, 334 S.C. 371, 513 S.E.2d 112 (Ct. App. 1999), *rev'd*). Ambiguity should be resolved in favor of a just, equitable, and beneficial operation of the law. Id. (citing City of Sumter Police Dept. v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 498 S.E.2d 894 (Ct. App. 1998)).

Appellant argues that, as an inmate sentenced to life in prison, he should have immediate personal access to the escrowed funds. This argument is based upon his reading of Subsection (A)(5), which states that the funds are to be escrowed "for the benefit of the inmate." S.C. Code Ann. § 24-3-40(B) (Supp. 2015). Appellant argues that an inmate sentenced to life imprisonment will never receive any benefit from the escrowed funds unless he is allowed immediate personal access to those funds. On the other hand, the Department argues that an inmate sentenced to life



in prison cannot have the escrowed funds distributed on his behalf prior to the inmate's death. The Court must conclude that neither interpretation urged by the parties provides a full and fair reading of the statutory scheme, because either reading renders some language of the statute ineffectual. "In determining the meaning of a statute, it is the duty of this Court to give force and effect to all parts of the statute, if possible." State ex rel. McCleod v. Nessler, 273 S.C. 371, 373, 256 S.E.2d 419, 420 (1979) (citing Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952)). A statutory construction should seek to give effect to every word of a statute, rather than adopting an interpretation that renders a portion meaningless. Hinton v. S.C. Dept. of Prob., Parole & Pardon Servs., 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004) (citing McClenaghan v. McClenaghan, 20 S.C. Eq. (1 Strob. Eq.) 295 (1847)).

On the one hand, the meaning urged by Appellant ignores the language of Subsection (B)(2), which states, "A prisoner serving life in prison or sentenced to death shall be given the option of having his escrowed wages **included in his estate or distributed to the persons or entities of his choice.**" S.C. Code Ann. § 24-3-40(B)(2) (Supp. 2015) (emphasis added). This subsection specifically provides for the distribution of the escrowed wages of a prisoner serving a life sentence, and immediate personal access to the funds is not an allowed option. On the other hand, SCDC's interpretation ignores the language of Subsection (A)(5), which provides that "Ten percent must be held in an interest bearing escrow account **for the benefit of the prisoner.**" S.C. Code Ann. § 24-3-40(A)(5) (Supp. 2015) (emphasis added). The Department's interpretation that the escrowed funds may not be distributed to a person or entity of the inmate's choosing during the inmate's lifetime ignores the fact that the funds are to be for the benefit of the prisoner, not the benefit of the prisoner's heirs. Therefore, the Court concludes that a construction of the statute that gives full effect to both Subsections (B)(2) and (A)(5) requires reading Subsection (B)(2) to allow a prisoner serving a life sentence without opportunity for parole the option of having the escrowed funds distributed to the persons or entities of his choice during his lifetime.

The legislative history surrounding the enactment of the statute provides a compelling reason to reach this conclusion. The statute in question was enacted by Section 2 of 1999 Act Number 68. The changes to Section 25-3-40 were originally proposed in 1999 House Bill 3216, which included the language, "included in his estate upon death." After review by committee,

amended H3216 read, "included in his estate or distributed to the person or entities of his choice." This language was then included in 1999 Senate Bill 384, which became Act 68. Clearly, if the legislature had intended for the escrowed money to be distributed only "upon death," it would have enacted that proposed language rather than amending it. Therefore, Appellant must be allowed the opportunity to designate persons or entities to receive an immediate distribution of funds held in escrow pursuant to Section 24-3-40(A)(5).<sup>5</sup>

#### Interest on Escrowed Wages

Appellant next argues that SCDC has breached its fiduciary duty under the statute to hold the escrowed wages in an interest bearing account. See generally S.C. Code Ann. § 24-3-40(A)(5) (Supp. 2015). Appellant argues that because the funds are held in a commercial checking account and earn interest at a low rate of return, the Department has breached its fiduciary duty with respect to those funds by not paying a "fair interest rate." The undisputed evidence reflects that the escrowed funds are held in a commercial checking account with an accounting kept for the prisoner's escrowed funds and interest accrued on the account. The State Treasurer's Office determines the applicable interest rate and disperses the interest. While the interest rate in some years is low, there is no finding by SCDC as to what a proper, or fair, rate of interest should have been for the years in question, and nothing in the record from which such a finding could be made. An appellate court will not consider any fact which does not appear in the Record on Appeal. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 339, 611 S.E.2d 485, 488 (2005). The appealing party has the burden of providing a sufficient record. Here, Appellant has failed to provide a record upon which a finding that the interest rate was insufficient could be made by the Department or reviewed by this Court. Id. The Department's decision stating that the escrowed funds are held in an interest bearing account for the benefit of the inmate is supported by the substantial evidence in the record.

---

<sup>5</sup> Appellant also argues that SCDC's application of Subsection (B)(2) operates as a bill of attainder, an *ex post facto* law, and violates his constitutional right to equal protection. None of these issues were raised in the grievance before the agency, and therefore they may not be taken up by this Court. See Home Med. Sys., Inc. v. S.C. Dept. of Revenue, 382 S.C. 556, 562-63, 677 S.E.2d 582, 586 (2009).

### Interest on Judgment

Lastly, Appellant has pleaded and argued for pre- and post-judgment interest. The Court has determined that such interest is not appropriate due to the nature of this case. As held by the South Carolina Supreme Court, the statutes governing this case do not give rise to a private cause of action or establish civil liability, because they were not enacted for the benefit of the inmates, but rather for the benefit of the public. Adkins, 360 S.C. at 417-119, 602 S.E.2d at 54-55. This reasoning was applied to the parties in this case by the South Carolina Supreme Court. See Torrence, 373 S.C. at 593, 646 S.E.2d at 869. Appellant is before the ALC to protest the failure of the Department to comply with the law, not to pursue a private right of action. Id. Thus, this Order does not constitute a civil judgment in Appellant's favor as contemplated by Section 34-31-20, but rather a directive to the Department to comply with the law. Therefore, Appellant is not entitled to interest.

### ORDER

**IT IS THEREFORE ORDERED** that the Department's Final Decision is **REVERSED**.

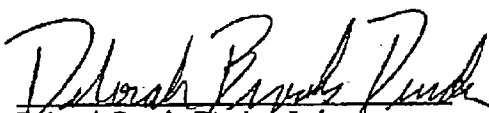
**IT IS FURTHER ORDERED** that this matter is **REMANDED** to the Department to determine the prevailing wage, as defined by the Court above, for all hours of regular and overtime labor performed by Appellant for ESCOD. The determination of the prevailing wage shall be made no later than April 1, 2016.

**IT IS FURTHER ORDERED** that the Department 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.

**IT IS FURTHER ORDERED** that the Department allow Appellant to designate persons or entities to receive an immediate distribution of the escrowed wages in accordance with this Order.

**AND IT IS SO ORDERED.**

January 20, 2016  
Columbia, South Carolina

  
Deborah Brooks Durden, Judge  
S.C. Administrative Law Court

**CERTIFICATE OF SERVICE**  
This is to certify that the undersigned has this date served the 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 20<sup>th</sup> day of January 2016  
By: R. S. L.  
Judicial Law Clerk

15

**LAW OFFICES**

**JAN 21 2016**

**MALONE, THOMPSON  
SUMMERS & OTT, LLC**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Administrative Law Court Docket No. 12-ALJ-04-00143-AP

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

v.

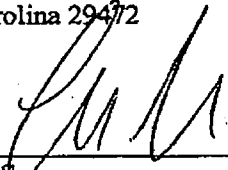
South Carolina Department of Corrections ..... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Notice of Appeal on the above-named *pro se* Respondent by depositing a copy of it in the United States Mail, First Class Postage Pre-Paid, to the Respondent addressed as follows:

Thomas J. Torrence  
#094651  
Lieber Correctional Institution  
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February 17, 2016

  
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February 17, 2016

VIA HAND DELIVERY

The Honorable Jana-E. Shealy  
Clerk of Court, South Carolina Administrative Law Court  
Edgar A. Brown Building, Suite 224  
1205 Pendleton Street  
Columbia, South Carolina 29211

Re: Notice of Appeal of the Administrative Law Court's Final Decision in *S.C. Dep't of Corrections, Appellant, v. Thomas J. Torrence, #094651, Respondent*, ALC Docket No. 12-ALJ-04-00143-AP

Dear Ms. Shealy:

Enclosed for filing is the Notice of Appeal submitted by the South Carolina Department of Corrections to the Court of Appeals in the above-captioned case.

I include with the Notice of Appeal a copy of its allied proof of service. I also include copies of the two (2) orders issued by this Court which are to be challenged on appeal with the Court of Appeals.

Finally, I enclose a second copy of each of these documents. Please return the file stamped copy to our representative who delivered them to your office.

Thank you for your consideration of this matter.

As always, I remain

**FILED**

FEB 17 2016

SC ADMIN. LAW COURT

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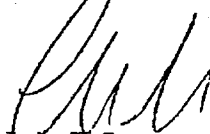
Page 2 of 2

February 17, 2016

Re: Notice of Appeal of the Administrative Law Court's Final Decision Order in *S.C. Dep't of Corrections, Appellant, v. Thomas J. Torrence, #094651, Respondent*, ALC Docket No. 12-ALJ-04-00143-AP

---

Very respectfully yours,



Lake E. Summers  
Counsel for Appellant South Carolina  
Department of Corrections

Cc:

Thomas J. Torrence, *Pro Se* Respondent

The Honorable Jenny Abbott Kitchings, Clerk of Court for the South Carolina Court of Appeals

Stephen Lunsford, Esquire, Ass't General Counsel for the S.C. Dep't of Corrections

LAW OFFICES

**MALONE, THOMPSON, SUMMERS & OTT LLC**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

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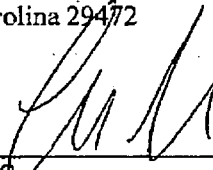
South Carolina Department of Corrections ..... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's **Notice of Appeal** on the above-named *pro se* Respondent by depositing a copy of it in the United States Mail, First Class Postage Pre-Paid, to the Respondent addressed as follows:

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#094651  
Lieber Correctional Institution  
Post Office Box 205  
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February 17, 2016

  
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**FILED**

FEB 17 2016

SC ADMIN. LAW COURT

Outside Counsel for Appellant South Carolina  
Department of Corrections

DEC 16 2016

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**SC Court of Appeals**

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2016-000285  
Trial Court Case No. 2012ALJ040143AP

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

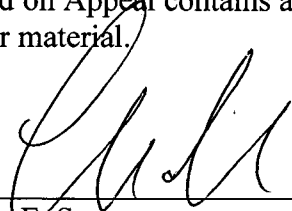
v.

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.

December 16, 2016

  
Lake E. Summers

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Counsel for the Appellant