

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks-Durden, Administrative Law Judge

Appellate Case No. 2016-000285
Administrative Law Court Docket No. 12-ALJ-04-00145-AP

RECEIVED

FEB 08 2019

SC Court of Appeals

Thomas J. Torrence, #094651 RESPONDENT,

v.

South Carolina Department of Corrections APPELLANT.

**RESPONDENT'S RETURN TO
APPELLANT'S PETITION FOR REHEARING**

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

Respondent, *Pro se*

TABLE OF CONTENTS

Table of Authorities	ii
I. SCDC’S PETITION FOR REHEARING	1
II. THE SCOPE OF SCDC’S PETITION FOR REHEARING	1
III. TORRENCE’S RETURN TO SCDC’S PETITION FOR REHEARING	1
IV. THE JANUARY 20, 2016 ALC RULING CORRECTLY ALLOWS TORRENCE IMMEDIATE ACCESS TO HIS ESCROWED WAGES	2
V. THE ALC DID NOT HOLD TORRENCE WAS AN EMPLOYEE OF THE STATE OR PRIVATE SECTOR SPONSOR. THE STATUS/LABEL OF TORRENCE’S LABOR HAS NEVER BEEN RAISED AS AN ISSUE OR DEFENSE IN THE AGENCY GRIEVANCE OR BEFORE THE ALC	2
VI. THE ALC CORRECTLY REMANDED THE MATTER TO SCDC WITH INSTRUCTIONS TO CALCULATE THE PREVAILING WAGE OWED TORRENCE	4
VII. SCDC URGES THE COURT TO WITHDRAW IT’S NOVEMBER 28, 2018 UNPUBLISHED OPINION AND ISSUE A NEW OPINION WITH INSTRUCTIONS TO SUPPLEMENT THE RECORD	5
VIII. CONCLUSION	7

TABLE OF AUTHORITIES

<i>Arnold v. Carolina Power & Light Co.</i> , 167 S.E.2d 234 (1933)	2
<i>Ackerman et al.</i> , v. <i>S.C. Dep't of Corr.</i> , 782 S.E.2d 757 (S.C. App. Ct. 2016) cert denied (May 30, 2017)	1
<i>Charlotte-Mecklenburg Hosp. Auth.</i> , v. <i>S.C. Dep't of Health & Env't Control</i> 692 S.E.2d 894 (S.C. 2010)	1
<i>Hunter v. Staples.</i> , 515 S.E.2d 261 (Ct. App. 1999)	2
<i>Williams et al. v. S.C. Dep't of Corr.</i> , 641 S.E.2d 855 (S.C. 2007)	3

STATUTES

18 USC §1761(c)	3
S.C. Code Ann. §1-23-380(5)	2
S.C. Code Ann. §1-23-610(A)(1)	2
S.C. Code Ann. §24-3-315	3
S.C. Code Ann. §24-3-430(F)	3
S.C. Code Ann. §24-3-430(G)	3

OTHER AUTHORITIES

64 FR 17000, et seq	3
South Carolina Appellate Court Rule 221	2
South Carolina Appellate Court Rule 240(e)	1
South Carolina Administrative Law Court Rule 65	3

I. SCDC'S PETITION FOR REHEARING

On January 10, 2019, Appellant South Carolina Department of Corrections ["SCDC"] petitioned the court, under South Carolina Appellate Court Rule 221(a), to rehear its November 28, 2018 Unpublished Opinion in the instant matter. *See -- S.E.2d --, 2018W1 6199185 (S.C. Ct. App., Nov. 28, 2018).*

II. SCOPE OF SCDC'S PETITION FOR REHEARING

SCDC set forth the entirety of this Court's November 28, 2018 unpublished opinion by which it dismissed the entirety of SCDC's appeal.

SCDC argues that the January 30, 2014 and January 20, 2016 orders in the instant matter constitute a final decision where such orders are a final judgment which disposes of the whole subject matter of the action, leaving nothing to be done but to enforce by execution what has been determined, citing *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health and Env'l Control*, 692 S.E.2d 894 (S.C. 2010).

SCDC also correctly argues that this Court's decision in *Ackerman, et al. v. S.C. Dep't of Corr.*, 782 S.E.2d 757 (S.C. Ct. App. 2016), cert. denied (May 30, 2017) rendered moot the issues identified by SCDC in its instant appeal of the ALC's January 30, 2014 order, which addressed the timeliness of Torrence's administrative grievance "by which he challenged various aspects of his prison industries pay."

III. TORRENCE'S RETURN TO SCDC'S PETITION FOR REHEARING

Torrence enters this Return pursuant to Rule 240(e), SCACR. Torrence does not request a petition for rehearing but seeks to address or call this Court's attention to SCDC's attempt to (a) raise or re-characterize issues not before the ALC; (b) introduce evidence not contained in the instant Record; and (c) delay relief from this litigation further by asking the Court to order

additional procedures which are identical to those ordered by the ALC on remand to calculate the wages owed Torrence for his prison industries labor.

IV. THE JANUARY 20, 2016 ALC RULING CORRECTLY ALLOWS TORRENCE IMMEDIATE ACCESS TO HIS ESCROWED WAGES.

Torrence agrees with SCDC's January 10, 2019 Petition, pp. 4-5 that, solely for purposes of S.C. Code Ann. § 1-23-610(A)(1) (Supp. 2018), the January 30, 2016 ALC order concerning escrowed wages is a final order and SCDC should allow Torrence immediate access to these wages.

Torrence's position is the ALC order on this issue, including the analysis used to reach this holding, is correct. Any error on the part of the ALC in its analysis and holding would be harmless and completely within the parameters and requirements of S.C. Code Ann, § 1-23-380(5). Thus, if this Court decides to grant the rehearing; Respondent respectfully requests this Court affirm the ALC's January 20, 2016 Order on this issue.

V. THE ALC DID NOT HOLD THAT TORRENCE WAS AN EMPLOYEE OF THE STATE OR PRIVATE SECTOR SPONSOR. THE STATUS/LABEL OF TORRENCE'S LABOR HAS NEVER BEEN RAISED AS AN ISSUE OR DEFENSE IN THE GRIEVANCE OR ALC.

SCDC, for the first time in this litigation, has made the status/label of Torrence's labor in the private sector prison industries an issue or defense in this appeal. Torrence, as a *pro se* litigant, believes a petition for rehearing, pursuant to Rule 221(a), SCACR, must state with particularity the points supposed to have been overlooked or misapprehended by the Court; not the opportunity to raise issues additional to its Initial and Reply Briefs here.¹

Torrence enters this Return pursuant to Rule 240(e), SCACR as a matter of caution.

¹ The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, not is the purpose of a petition for rehearing to have the case tried in the appellate court a second time. *Arnold v. Carolina Power & Light Co.*, 167 S.E.2d 234 (1933). See, e.g., *Hunter v. Staples*, 515 S.E.2d 261 (Ct. App. 1999)

The status of Torrence's labor has never been raised as an issue or defense by any party other than footnotes in Torrence's Original ALC Brief and SCDC's Brief, p. 2, n. 3. It has nowhere been presented by number or letter designating an issue or sub-issue. Torrence's Brief, anticipating SCDC to argue Torrence did not "work" for wages, wrestled to provide a description of performing labor for the prevailing wage in the Private Sector Prison Industries Program operated at Evans under S.C. Code Ann §24-3-315; 18 USC § 1761(c); and Federal Regulations 64 FR 17000. Torrence, himself, other than describing his labor, his wages, and the entities involved, never claimed or asserts now to be a direct employee of the State² or the Private Sector Sponsor.³ Despite eligibility for every benefit of an employee, with the exception of unemployment benefits,⁴ Torrence simply demonstrated that one who labors for wages and pays taxes is *labeled* an employee. SCDC engages in technical hair-splitting of a nonissue to further delay litigation.

In contravention of SCDC attempting to raise this as an issue now, the ALC specifically held in footnote 3 of its January 20, 2016 Order (R. p. 1035):

"The Court declines to address in detail the parties arguments concerning [Torrence's] status as an 'employee,' *since they are not necessary for the disposition of this case.*"⁵

In fact, the ALC order specifically held contrary to that which SCDC begs a rehearing upon:

It is true that [Torrence] is not classified as an "employee" of the State [§24-3-430(F)]. Torrence is not an "employee" of either the state or the private industry sponsor for purposes of the Payment of Wages Act. [*Williams v. SC Dep't of Corr.*, 641 S.E.2d885 (2007)] Nor is [Torrence] an "employee" for the purposes of unemployment benefits. [§24-3-430(G)].

² S.C. Code Ann. § 24-3-430(F)

³ ESCOD Industries / Insilco Global Technologies

⁴ S.C. Code Ann. § 24-3-430(G)

⁵ Rule 65, South Carolina Administrative Law Court Rules states: The Administrative Law Court may affirm any ruling, order or judgment upon any ground(s) appearing in the Record and need not address a point which is manifestly without merit.

Based upon the ALC order specifically holding what SCDC is requesting in rehearing and remand, and the issue not properly before this Court, Torrence respectfully requests this Court deny rehearing concerning this issue.

VI. THE ALC CORRECTLY REMANDED THE MATTER TO THE DOC WITH INSTRUCTIONS TO CALCULATE THE PREVAILING WAGE.

Torrence agrees with SCDC's January 10, 2019 Petition for Rehearing, p.14, **solely** on the ground that the ALC's January 20, 2016 order constitutes a final judgment:

Torrence must be paid the mean average wage for an electronic assembler, including overtime, for the years he worked as a harness assembler for ESCOD. [SCDC] must obtain the data to determine this wage from the Department of Employment and Workforce. Specifically, [SCDC] must pay [Torrence] the mean average wage reflected by the 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.

Torrence suggests that the ALC merely ordered SCDC, on remand, to perform the duty required by law and regulation, utilizing the correct wage codes; codes that Appellant SCDC itself sought annual verification upon, as demonstrated in the Record (R. pp. 640-655). The record upon which the ALC relied is firm with no doubt as, upon a remand, the Codes and Wages involved here.

SCDC asserts that introducing the entirety of the deposition of Rebecca Eleazor will somehow cast doubt upon portions of the deposition currently part of the Record. SCDC cannot argue that Rebecca Eleazor, while harmonizing South Carolina language in ESC Codes with the term "prevailing wage." averred that for "prevailing wage" she would provide "our [ESC] average wage." This is supported by SCDC's own "Agreement" with the private sector sponsor

which specifically states, “The prevailing wage rate for the inmate labor is to be established annually *by the South Carolina Employment Security Commission.*” R. p. 1033 [Emphasis supplied].

Torrence suggests that these requirements are all contained in the Record and support the analysis and the holding of the ALC to reverse and remand with instructions. The ALC merely ensured SCDC utilized the proper OEC/OCC Codes in their calculation of the wages owed Torrence for his labor.

This is a final decision by the ALC. Torrence respectfully requests that if this Court grants a rehearing, that this issue be affirmed.

VII. SCDC URGES THIS COURT TO WITHDRAW ITS NOVEMBER 28, 2018 UNPUBLISHED OPINION AND ISSUE A NEW OPINION WITH INSTRUCTIONS TO SUPPLEMENT THE RECORD.

SCDC urged this Court, in the alternative, Petition for Rehearing, p.15; to withdraw its November 28, 2018 unpublished opinion and issue a new opinion, by which it sought to:

1. Permit SCDC to secure evidence from the ESCOD regarding the hourly rate of pay earned by those of its employees that performed the same or similar job tasks as Torrence; and
2. Permit SCDC to introduce into the record, the entirety of the transcript from the deposition of the ESC representative Rebecca Eleazor.

1. The ALC was extremely liberal and fair to both parties in supplementing the record. SCDC had every opportunity to request a schedule of pay rates of ESCOD employees. This would comply with the language of §24-3-315. The OEC/OCC Codes were obviously designed to provide just such insurance of an average/prevaling wage to ensure fair pay scales.

In the alternative, if this Court allows SCDC to harvest and introduce hourly pay earned by employees at other production facilities who performed the same as Torrence; Torrence

would request SCDC be required to introduce *all* Torrence's ESCOD/Insilco training records for a "perform[ed] the same or similar job tasks as Torrence" analysis/comparison. As outlined in Torrence's Briefs, Torrence labored in several positions in his tenure in the program and comparable OEC/OCC Codes should be provided for each position in which he labored. SCDC should also obtain from the Marlboro County Branch of the ESC/DEW information as to those ESCOD employees who were released from employment during Torrence's tenure and any complaints lodged by said employees that [they] were replaced by inmate labor.

2. Torrence has offered to provide the complete deposition of Rebecca Eleazor.

Alternatively, if the Court remands to the ALC and orders the record supplemented, Torrence requests that the Court receive into evidence the February 6, 2014 Declaration of Records Custodian Jessica Chesley, Records Custodian for the South Carolina Department of Employment and Workforce and attached Occupational Employment and Wage Estimates for OEC Code 93114 in which [she] phrases the OEC/OCC 'average' wage as the "prevailing" wage for wire harness assembly. This information supports the Record here provided by Rebecca Eleazor (R. pp. 640-655).

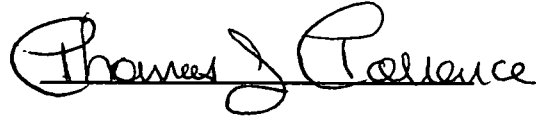
VIII.

CONCLUSION

Torrence respectfully suggests that the January 20, 2016 Order of the ALC is a final order. Torrence suggests that alternatives posed by SCDC are matters settled by the ALC order and provide no further guidance.

If this Court elects to rehear this matter, Torrence respectfully requests this Court affirm the January 20, 2016 Order of the ALC.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink that reads "Thomas J. Torrence". The signature is written in a cursive style with a large, looped initial "T".

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

RESPONDENT, *Pro se*

February 4, 2019
Pelzer, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks-Durden, Administrative Law Judge

RECEIVED

FEB 08 2019

SC Court of Appeals

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

Thomas J. Torrence, #094651 RESPONDENT,

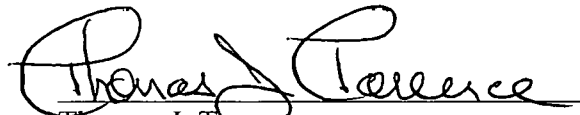
v.

South Carolina Department of Corrections APPELLANT.

PROOF OF SERVICE

I certify that I have served Respondent's **Return to Appellant's Petition for Rehearing** on counsel for the above-named Appellant by depositing a copy in the US Mail, first-class postage affixed that on this 6th day of February, 2019, addressed as follows:

Lake E. Summers, Esq.
Malone, Thompson, Summers, & Ott, LLC
339 Hayward Street, Suite 200
Columbia, South Carolina 29201



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

Respondent, Pro se

Thomas J. Torrence
#094651
Perry Correctional Inst. Q3B-102
430 Oaklawn Road
Pelzer, South Carolina 29669

February 5, 2019

Honorable Jenny Abbott-Kitchings
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
FEB 08 2019
SC Court of Appeals

Re: *Thomas J. Torrence, #094651 v. S.C. Dep't of Corr.*
2018WL6199185 (S.C. Ct. App., Nov. 28, 2018)
Appellate Case No. 16-000285

Dear Clerk:

Please find enclosed for filing I the above-referenced petition for rehearing the original and six (6) copies of **Respondent's Return to Appellant's Petition for Rehearing**. Also enclosed is a Proof of Service on counsel for Appellant.

With kindest regards, I remain,

Sincerely,



Thomas J. Torrence