THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Chief Administrative Law Judge

Docket No. 07-ALJ-04-00444, etc.

Francis Ackerman, #266928, et al .....Appellants,

v.

South Carolina Department of Corrections.....Respondent.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This case involves 197 inmate grievances for prevailing wages under S. C. Code §24-3-430(D). Appellants are inmates and former inmates who worked in the Lieber/Williams Technologies (WTI) work program at various times between 1998 and present.*

Section 24-3-430 (D) required the Department of Corrections (SCDC) to pay inmates at least "the prevailing wage for work of similar nature in the private sector". As of July 2001, Statutes at Large, No. 66, §37.31 amended §24-3-430 (D) to allow SCDC to pay inmates a "negotiated wage".

On January 29, 2002, inmate Darrell Williams filed a civil action for back wages earned in the program (1-29-02 Sum/Comp.). On July 1, 2002 and February 12, 2003, amended class action complaints were filed (7-1-02 & 2-12-03 Sum/Comp.).

On August 23, 2004, decisions were issued in Adkins, et al. v. SCDC 360 S.C. 413, 602 S.E. 2d 56 (S.C., 2004) and Wicker v. SCDC 360 S.C. 421, 602 S.E. 2d 51 (S.C., 2004), holding inmates could file a prevailing wage grievance and appeal to the Administrative Law Court (ALC). On September 9, 2004, the Court's remittiturs were

*Work and grievance file dates are in inmates' Appendix 1 and SCDC's spreadsheet in the record (Appendix 1; SCDC spreadsheet).

filed in Circuit Court (Adkins/Wicker remittiturs).

Beginning on September 22, 2004, 200 inmates retained undersigned counsel to file grievance, and many filed step 1 grievances that day. An April 2005 Circuit Court order found, "(O)n September 22, 2004, plaintiffs' counsel submitted nearly 200 grievances to SCDC's Inmate Grievance Coordinator at Lieber Correctional Institution" (Cir. Ct. Order, 8-9). Certificates of Service document 94 filings on September 22, and 84 (plus 7 repeat filers) on September 30 (9-22 & 9-30-04 Cert. of Ser.). An additional 3 filed on September 22 and 23, and 17 at other times. Two (McNeill, Perez) apparently did not file grievances.

All grievances were denied by SCDC. On November 3, 2004, the Circuit Court stayed the grievance process. Also in early November, inmates filed step 2 appeals.

The 2005 order dismissed the class action and decertified the class (Cir. Ct.. Order,8). In May 2005, inmates appealed the order and SCDC invoked the automatic stay in SCACR 225 (May 2005 Notice of App., 6-7-05 SCDC letter). In February 2007, the Supreme Court affirmed the dismissal and the Court's remittitur was filed March 22, 2007 (Williams remittitur).

On April 19, 2007, inmates filed 188 Amendments/Exhibits to their grievances pursuant to SCDC's in court agreement to accept them for filing and consider them on the merits (4-19-07 Trans, pp. 19-20, 22, 26, 4-20-07 Judg., 4-25 & 6-4-07 Westbrook letters). A few inmates filed Amendments on their own as evidenced by certificates proposed for record inclusion (Amend. Cert. of Serv.).

On or about May 21, 2007, the stay was lifted and the grievance process then resumed (e.g., Ackerman step 2 dec.)**. SCDC then issued final decisions to many step 2 appeals. Again, all grievances were denied. SCDC invoked the 15 day rule for "incident" grievances in §13.1 of Grievance Policy GA-01.12 (Griev. Pol., 6), contending inmates filed more than 15 days after initial employment and Adkins/Wicker (e.g., Ackerman step 2 dec.).

The 2005 Circuit Court order directed SCDC to post notice that inmates who had not filed grievances had until 45 days after notice posting to do so (Cir. Ct. order 12-13). This notice was posted from October 20 to December 6, 2008 (e-mail, not. post.).

From June 2007 to February 2008, counsel filed 116 appeals in the ALC. On November 7, 2008 and April 10, 2009, counsel filed 81 automatic appeals in the ALC pursuant to §13.5 of grievance policy (Griev. Pol.,7).

In an April 14, 2010 order, the ALC instructed the parties to brief this appeal in three levels. Level one consisted of two issues, whether Adkins and Wicker created a new remedy and/or substantive right, and whether those decisions apply prospectively or retrospectively. After the parties briefed these issues, the ALC in a March 10, 2011 order held that Adkins and Wicker did not create new substantive rights, new grievance remedies, or new appeal remedies. And further, these decisions apply retrospectively. The ALC also ordered the parties to proceed to Level two and brief the timeliness of each inmate's grievance filing under Grievance Policy GA-01.12 (3-10-11 order, 9-10).

** In this brief, individual inmate grievance documents are cited as typical of most or all such documents in the manner indicated.

Following receipt of the parties' briefs, the ALC in its orders of March 2 and 16, 2012 held that all grievances but one were untimely as not being filed within 15 days of inmates' initial pay date. The ALC held that inmate Fred Gatewood had timely filed his grievance, and ordered the parties to brief his grievance on the merits (3-2-12 order, 27; 3-16-12 order, 23).

The amount involved on appeal has not been determined. The amount of back wages owed per inmate varies depending on how long they worked and other factors. At the appropriate time, inmates may request appointment of a special master to make this determination.

On March 29, 2012, inmates filed their Notice of Appeal in the Court of Appeals, and at the same time served the notice on the ALC and counsel for SCDC (3-29-12 Notice of App.).

ARGUMENT

1. The Adkins and Wicker decisions created new grievance and appeal remedies for inmates' pre-existing right to prevailing wages.

The standard of review is as follows. Review must be confined to the record. The appellate court may not substitute its judgment for that of the ALC as to weight of the evidence on questions of fact. The appellate court may reverse or modify the decision if the substantive rights of the appellants have been prejudiced because the ALC's finding, conclusion, or decision is (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 substantive evidence on the whole record; or (f) arbitrary or capricious or

characterized by abuse of discretion or clearly unwarranted exercise of discretion (S.C. Code §1-23-610 (B)).

In its March 10, 2011 order, the ALC held that, prior to Adkins/Wicker, inmates "could have submitted" a prevailing wage grievance because SCDC grievance policy included, as grievable issues, SCDC policies/procedures, directives, or conditions which directly affected inmates. And, inmates were directly affected by "SCDC policies" that caused inmates to be paid less than prevailing wages. (3-10-11 order, 6-7). The ALC also held that Wicker did not create new appeal remedies, but merely re-affirmed Al Shabazz v. State 338 S.C. 354, 527 S.E. 2d 742 (S.C., 2000), which held due process applied to protection of 14th Amendment liberty and property interests (Id., 8).

Inmates contend the conclusion that inmates "could have submitted" a wage grievance disregards due process requirements, is clearly erroneous in view of the substantial evidence of record, and is arbitrary and an abuse of discretion. And further, the conclusion that Wicker did not create new appeal remedies is affected by error of law.

Before Adkins/Wicker, SCDC contended in court that wage grievances were not grievable under its grievance policy (Bennie Wicker, #122304 v. SCDC Dock No. 00-ALJ-04-00781-AP, Aug. 13, 2001, Op.1). The ALC conceded this point (3-10-11 order, 6). Thus, while inmates "could have submitted" such a grievance, SCDC would have summarily dismissed it as non-grievable (e.g., Darrell Williams step 1) (grievance dismissed for "want of jurisdiction"). In other words, SCDC's grievance remedy did not exist for these claims.

Due process requires an opportunity granted at a meaningful time and in a **meaningful manner** for an appropriate hearing (Logan v. Zimmerman Brush Co. 102

S.Ct. 1148, 1159 (1982). Inmates contend that summary dismissal of grievances for non-grievability would not provide a meaningful and appropriate hearing under due process.

Furthermore, inmates contend the ALC did not have jurisdiction to review these cases before Adkins/Wicker (Wicker v. SCDC 360 S.C. 421, 424, n.1, 425, 602 S.E. 2d 56,58, n. 1) ("expanding the jurisdiction" of the ALC to cover prevailing wage grievance appeals); James E. McNeil, #147700 v. SCDC Dock. No. 00-ALJ-04-00336-AP, Sept. 5, 2001, en banc opinion, 4-5) (limiting ALC appeal jurisdiction to sentence/credits/custody matters and "liberty" interests).

McNeil involved an inmate ALC appeal for SCDC administering chemical munition spray to McNeil and placing him in a restraint chair for unruly conduct. In an en banc opinion denying jurisdiction to hear the appeal, the ALC held:

> The Administrative Law Judge Division's appellate jurisdiction in inmate appeals is **limited** to either:
> 1. Cases in which an inmate contends that prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; or
> 2. Cases in which the Department has taken an inmate's created liberty interest as punishment in a major disciplinary hearing.

On October 23, 2001, the ALC cited McNeil in dismissing an inmate's wage appeal for lack of subject matter jurisdiction (Willie Ingram, # 83404 v. SCDC Dock. No. 01-ALJ-04-00190-AP, 1-2). Thus, while Ingram had "appealed" his wage dispute, the Court held it had no jurisdiction "to decide this matter".

Dismissal in Ingram was apparently required by ALC Rule 70F. This rule states that issues addressed in an en banc decision, such as McNeil, are "binding" upon individual administrative law judges in subsequent cases unless a majority of judges determines otherwise. Rule 70F was effective on May 1, 2001, before McNeil was

decided. After the McNeil en banc opinion was issued, the ALC dismissed McNeil's appeal stating the en banc opinion was 'binding", citing Rule 70F (James E. McNeil, #147700 v. SCDC Dock. No. 00-ALJ-04-00336-AP, October 1 , 2001 Order of Dismissal). Inmates contend that McNeil and Rule 70F prevented wage appeals from receiving a hearing and decision on the merits before Adkins/Wicker.

Significantly, in Wicker itself SCDC argued, citing McNeil, that the ALC lacked subject matter jurisdiction to review Wicker's wage appeal (Wicker v. SCDC 360 S.C. 421, 424, 602 S.E. 2nd 56, 57). In sum, before Adkins/Wicker inmates had no meaningful right to grieve wage disputes and could not enforce their right to prevailing wages in court.

Inmates contend the Adkins and Wicker decisions corrected this situation by creating new grievance and appeal remedies to vindicate inmates' right to prevailing wages under §24-3-430 (D). In Adkins, the Court considered the issue of whether §24-3-430 (D) created a private right of action in inmates. The Court held at 360 S.C. 413, 419, 602 S.E. 51, 55:

> However, notwithstanding our holding that inmates have no private civil cause of action, they are **not without a remedy.** In accordance with the companion case of Wicker v. South Carolina Dept. of Corrections 360 S.C. 421, 602 S.E. 2nd 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.

In Wicker, the issue was whether the Circuit Court erred in holding Wicker was entitled to a $5.25 per hour training wage pursuant to his prevailing wage grievance. The Court held that although Wicker had no claim for civil damages, he properly filed a grievance with SCDC (360 S.C. 421, 424, 602 S.E. 2nd 56, 57). The second part of the

Court's holding is stated at 360 S.C. 421, 424-425, 602 S.E. 56, 58, note 1:

> ..The Al-Shabazz Court 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. 338 S.C. at 369, 527 S.E. 2d at 750.
>
> We find that the state's statutory mandate that inmates be paid the prevailing wage creates such an interest, which may not be denied without due process. Piatt v. McDougall, supra. Accordingly, in this very limited circumstance,[1] we hold the DOC's failure to pay in accordance with the statutes is reviewable by the ALJ.
>
> [1] We note that our holding today is extremely limited and is not to be viewed as **expanding the jurisdiction of the ALJD** in any other circumstance.

Inmates respectfully submit the only logical interpretation of the Court's "holding today" is the Court was "expanding", or enlarging the ALC's jurisdiction to include matters, i.e., prevailing wage grievance appeals, not within the ALC's jurisdiction before that holding.

Inmates further contend that the remedies created in Adkins and Wicker were intended to vindicate their existing right to prevailing wages under §24-3-430 (D). This statute states that "(N)o inmate participating in the program may earn less than the prevailing wage for work of similar mature in the private sector". It was held to be "mandatory" in Adkins (360 S.C. 413, 419, 602 S.E. 2nd 51; 55). In Wicker, the Court found that in §24-3-430 (D), the state "has created a statutory right to the payment of a prevailing wage" (360 S.C. 421, 424, 602 S.E. 2nd 56, 57).

The statutory right to prevailing wages is the right violated by SCDC's underpayment of wages. Together with Adkins and Wicker, it is also the legal basis for inmates' grievances (e.g., Ackerman and Austin step 1's). Finally, it was the reason for

the Court's decisions, as evidenced by the holding in Adkins that inmates could file a grievance to protest SCDC's failure to pay wages "in accordance with the mandatory statutory provisions" (360 S.C. 413, 419, 602 S.E. 2nd 51, 55). In sum, inmates' rights and SCDC's liability are based on §24-3-430 (D) which pre-existed Adkins and Wicker by nine (9) years.

Inmates submit that Adkins and Wicker created new grievance and appeal remedies to enforce inmates' pre-existing right to prevailing wages under §24-3-430 (D).

2. Inmates' grievances concern policies/procedures under §13.9 of SCDC Grievance Policy because of their express language and substance, Adkins/Wicker, and notices of appeal, and there was no time limit to file under §13.9.

The ALC held that inmates' grievances do not concern policies/procedures under §13.9, but are "incident" grievances subject to the 15 day filing limitation of §13.1 (3-16-12 order, 9). Inmates contend the ALC's conclusion is affected by error of law in its interpretation of these provisions and is clearly erroneous in view of the substantial evidence on the whole record.

Inmates' primary contention is these were not "incident" grievances under §13.1, but grievances "concerning policies/procedures" under §13.9 with no time limit to file. Section 13.9 states, "(E)xceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures" (Griev. Pol., 8).

The term "policies/procedures" appears in several provisions of SCDC's grievance policy, most notably §§7.1 and 13.9 (Griev. Pol., 4, 8). However, the term is not defined in that policy (Id., 10). "Policy" is defined elsewhere as "the general

principles by which a government is guided in its management of public affairs" (Black's Law Dictionary, 5th ed., 104). The term "procedure" is defined as "the act or method of proceeding in an action" (Webster's New World Dictionary, 1989 ed., 341). SCDC defines "policies" and "procedures" as the approved guidelines for handling the agency's day-to-day operations as well as statements expressing the basic expectations of conduct for agency staff and inmates (3-16-12 order, 7).

Several conclusions can be drawn from these definitions. First, SCDC is an agency of "government". Second, SCDC operates the work program in question under S.C. Code §24-3-310 (1998 contract, 1) as one of its "public affairs" and "day-to-day operations". And third, SCDC operates the program pursuant to certain "principles", "methods", and "guidelines", primarily these in its 1998 contract with Williams Technologies, Inc. (WTI).

Among other things, this contract sets forth the $4/hour pay rate for inmate workers (1998 contract, 6); the invoicing and payment procedure between SCDC and WTI (Id., 5); WTI's agreement to pay SCDC $4 per hour per inmate and SCDC's agreement to pay inmates and PI overhead (Id., 6). The contract also sets these guidelines for inmates: status as SCDC "employees" (Id., 7); job duties (Id, 4); and grounds for dismissal (Id,). As for SCDC, it selects inmates to work (Id., 5); manages and supervises inmates (Id,); pays for inmate health and safety (Id., 6); agrees not to discriminate against inmates (Id., 8); and SCDC's Director and General Counsel signed the contract (Id., 11).

Inmates contend that this contract, along with other memos in the record (Exh. B-E to D. Williams' griev.), form the basis of SCDC wage policy which caused them to be

paid less than prevailing wages. The contract also contains, as summarized above, general principles, guidelines and methods for handling SCDC's day-to-day operations, as well as expectations of conduct, for the work program.

Section 7 of grievance policy describes the kinds of issues which are grievable. Among these are "policies/procedures" which directly affect an inmate (§7.1) (Griev. Pol.,4). Section 13.9 states, "(E)xceptions to the 15 day time limit requirement will be made for grievances concerning policies/procedures" (Id., 8). Thus, §§7.1 and 13.9 both use the term, "policies/procedures" to describe a kind of grievable issue or grievance. No other type of grievance in §7 contains the term "policies/procedures". Therefore, any §13.9 grievance "concerning policies/procedures" must also be a §7.1 "Department policies/procedures" grievable issue. Obviously, that issue is the only grievable issue within §7 it could possibly be.

From the above, it seems apparent that "policies/procedures" in §13.9 carries the same meaning as "policies/procedures" in §7.1. If so, any interpretation of the term in one should be authoritative for the other (Spartanburg County v. Arthur 180 S.C. 81, 85, 185 S.E. 2nd 486, 488) (S.C., 1936) (To aid in the construction of the language of a statute, the Court should look to the construction placed upon similar language in other statutes dealing with the same or a cognate subject matter); Busby v. State Farm Mut. Auto Ins. Co. 280 S.C. 330, 312 S.E. 2nd 716 (S.C. App., 1984) (The same word is presumptively intended to have the same meaning throughout a statute).

The meaning of "policies/procedures" in §13.9 has apparently not been directly addressed. However, "policies/procedures" in §7.1 has been discussed in at least two ALC rulings: Bennie Wicker, #122304 v. SCDC Dock. No. 00-ALJ-04-00781-AP,

August 13, 2001, Op. 2; and the ALC's March 10, 2011 order (3-10-11-order, 6-7). These rulings held that "DOC's **arrangement** with private industry **to pay** inmates" (Wicker), and "DOC **policies** that cause them **to be paid** less than that required by law" (March 10, 2011 order) directly affected inmates under §7.1. If SCDC had an "arrangement" to pay inmates, or "policies" causing them to be paid, it seems reasonable to infer that such arrangement or policies were SCDC's **wage** policy. This conclusion is supported by language from Adkins, et al. v. SCDC 602 S.E. 2nd 51 , 53, n. 1, where, after describing inmates' training wage, the Supreme Court stated: "The **policy of paying a training wage** ended July 1, 1999".

If SCDC's wage policy is the kind of grievable issue presented in §7.1 by a prevailing wage grievance, the same grievance should also concern wage policy, and thus "policies/procedures", under §13.9. If so, it seems to follow that "policies/procedures" within §7.1, and by extension in §13.9, means SCDC wage policy. Thus, inmates contend that the term "policies/procedures" in §13.9 means SCDC wage policy, without excluding other possible meanings depending on the policy involved.

Inmates point to several reasons why their grievances concerned policies/procedures. First, inmates note the express language of their grievances concerns policies/procedures. At least 92 step 1's state the following (e.g., Austin step 1):

> STATE GRIEVANCE (including documentation, and date of incident; if SCDC **policy**, indicate which **policy**.
>
> ..From 1999 to July 2001, WTI/Lieber were required by S.C. Code 24-3-430 to pay IE's the "prevailing wage" .. Since July 2001, WTI/Lieber were required to pay IE's the negotiated wage of $4.00 per hour (Statutes at Large, No. 66, §37.31., Exh. B, C). In fact, WTI/Lieber's **policy** was to pay IE's, in most cases, under $1.00 per hour.

Moreover, all 188 Amendments to grievances have similar language (e.g., Ackerman Amendment):

> ..From 1999 to July 2001, §24-3-430 required WTI/Lieber to pay Grievant the prevailing wage..Since July 2001, WTI/Lieber were required to pay Grievant the negotiated wage of $4.00/hour (Stat. At Large, No. 66, §37.31; Exh. B, C). In fact, SCDC **policy** was to pay a maximum of about $1/hour, and usually less.

Second, the grievances concern policies/procedures in substance. SCDC wage policy is found in the 1998 contract with WTI (1998 contract) and in various memos. These documents are attached as Exhibits B-E to Darrell Williams' grievance; incorporated by reference in the step 1's and Amendments quoted above; and Exhibit C, the 1998 contract, is attached in part to the Amendments (Exh, B-E; e.g., Austin step 1; Ackerman Amend.). The contract has two unlawful provisions, the $4/hour wage and a provision to pay "PI overhead" (1998 contract, 6). The $.35/hour base rate (Exh. B), plus unauthorized (§24-3-40) overhead deductions, reduced inmates' pay to under $1/hour. This wage policy violated §24-3-430 (D) from 1998 to 2001,and the $4/hour negotiated wage from 2001 to present. Inmates' grievances seek to set aside this illegal policy and enforce the public policy in §24-3-430 (D) and Adkins/Wicker. Thus, these grievances "concern" and are based on policy entirely.

Third, Adkins/Wicker support inmates' position. In Bennie Wicker, #122304 v. SCDC Dock. No. 00-ALJ-04-00781-AP, Aug. 13, 2001,SCDC argued that Wicker's grievance was not grievable. The ALC disagreed, stating at page 2 of its opinion:

> Moreover, 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"..

In its March 10, 2011 order, the ALC reached the same conclusion, stating at page 6 of its opinion (3-10-11 order, 6):

> 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 DOC. 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 (emphasis in original) Unquestionably, inmates are "directly affected" by DOC **policies** that cause them to be paid less than that required by law. Thus, this provision, which is very broad in scope, encompasses prevailing wage claims.

In its March 16, 2012 order, the ALC explained its use of the term "policies" in the March 10, 2011 order (3-16-12 order, 8-9):

> Although the Court used the term "policies" in the passage cited above, its use of that term was used in the context of **determining** whether the appellants' claims were **grievable** under Paragraph 7.1 of GA-01.12. The Court was simply describing appellants' claims; it was not ruling on whether the Department did in fact have policies to underpay inmates. Moreover, in employing the term "policies", the Court was referring to its broad meaning as "course(s) of action", not to the meaning ascribed to the term in Paragraph 13.9. The sentence highlighted above was meant to convey the Court's conclusion that the Department's alleged action in the case (i.e., deciding to pay appellants less than the prevailing wage) would have, if true, created a **"condition"** that "directly affected" appellants.

Inmates respectfully make the following observations concerning the ALC's explanation. Section 7.1 of grievance policy contains three categories of grievable issues: Department policies/procedures, directives, or conditions which directly affect an inmate (Griev. Pol., 4). Because the ALC stated in its March 10, 2011 order that "DOC policies"directly affected inmates, the ALC necessarily **excluded** "directives, or conditions".

Moreover, the ALC candidly explains in the March 16 order that it used the term "policies" in context of determining if inmates' claims were grievable under §7.1. The March 10, 2011 order did not say that "directives" or "conditions" directly affected inmates, but "DOC policies" did, and "unquestionably" so. Inmates submit the only logical conclusion is the ALC determined, in the March 10, 2011 order, that prevailing wage grievances were a §7.1 "Department policies and procedures" type grievable issue. And, because §13.9 is the only grievance provision pertaining to grievances concerning policies/procedures, it seems to follow that a §7.1 "Department policies/procedures" grievable issue would necessarily concern policies/procedures under §13.9.

Finally, if the March 10, 2011 order was "meant to convey" the conclusion that underpayment of wages would create a "condition" that directly affected inmates, that is not what the ALC said. The ALC said that ,"unquestionably" inmates were directly affected by "DOC policies" that cause them to be paid less than prevailing wages.

Inmates contend that the March 10, 2011 order was correct in using the term DOC "policies" rather than "conditions". This view appears to be in line with Adkins 602 S.E. 2d at 53, n. 1, where, after describing inmates' training wage, the Court stated, "(T)he **policy** of paying a training wage ended July 1, 1999." Adkins held that inmates could grieve their illegal wages (602 S.E. 2d at 55).

However, inmates also contend that this Court need not decide which ALC order is correct. The issue is not whether these are "policy" or "condition" grievances, but whether the grievances are **"concerning policies/procedures"** under §13.9. Grievances need not be, but only "concern" policies/procedures (Griev. Pol., 8).

Inmates' pay rate is set at $4 per hour in the 1998 contract (1998 contract, 6). If a

pay rate "condition" caused the illegal wages, that "condition" is still a fundamental provision of the contract. The contract, in turn, is the basis for SCDC wage policy for this work program.

Because inmates have protested the pay rate in their grievances (e.g., Ackerman & Austin step 1's), a successful challenge to that pay rate would effect a change in the contract rate and thus in wage policy itself. Indeed, a successful challenge could cause a termination of the contract altogether (1998 contract, 8-9). For these reasons, inmates contend that, whether a pay rate "policy" or "condition" caused illegal wages, their grievances are probably "concerning policies/procedures" under §13.9.

Inmates contend that several conclusions can be made from Adkins/Wicker: First, SCDC wage policy, or the pay rate condition in that policy, is the cause of illegal wages. Second, inmates may file a grievance to protest these wages. Third, such a grievance falls under §7.1 of SCDC grievance policy. And finally, if grievances protest illegal wages, which are caused by SCDC wage "policy" or the pay rate condition in that policy, the grievances are probably "concerning policies/procedures" under §§7.1, 13.9 of grievance policy.

Fourth, the notices of appeal expressly challenge wage policy by "contesting SCDC policy/procedure of paying below prevailing/negotiated wages" (e.g., Ackerman Not. Of App.).

In conclusion, there should be no time limit to file. First, §13.9 has no limit. It excepts policy/procedure grievances from the 15 day rule, and provides no time limit in its place. As an exception to §13.1, §13.9 is removed "absolutely" from §13.1's operation (73 Am. Jur. 2nd (2001), Statutes, §212). Also, §13.9 is plain and unambiguous, and the

courts should not change its terms (Wiggins v. Edwards 442 S.E. 2nd 169, 171 (S.C., 1994). Finally, SCDC's own application of §13.9 supports inmates' position. In its step 1 instructions (e.g., Ackerman step 1), SCDC directs inmates to :

> Submit the completed form to the Institutional Grievance Coordinator within fifteen (15) days of an alleged incident; **policy grievances at any time.**

The ALC states that some inmates filed years after they started work (3-16-12 order, 7). Again, Adkins/Wicker are helpful. In Wicker, the courts upheld Wicker's grievance filed on April 19, 2000, over six months after his work (February 18 to October 8, 1999) had ended (Bennie Wicker, #122304 v. SCDC Dock. No. 00-ALJ 04-00781-AP, Aug. 13, 2001, Op. p. 4; Wicker's ALC Brief, filed Nov. 22, 2000, p. 1). In addition, the Adkins Court approved grievances to protest an SCDC wage "policy" of 1999, over five years in the past (602 S.E. 2nd at 53, note 1; 55). Although the timeliness issue was not presented in Adkins/Wicker, these rulings are entirely consistent with the view that grievances concerning policies/procedures have no time limit to file.

The ALC believed §13.1 to be a "statute of creation" (3-16-12 order, 5-6). A statute of creation creates a **new liability**, and affixes the time within which an action may be commenced (Knight Pub. Co. v U.S.C. 367 S.E. 2d 20, 22 (S.C. 2007); 54 C.J.S. (2010), Limitations, §5).

Inmates contend §13.1 is not a statute of creation. First, §13.1 is not a statute at all, but an SCDC grievance regulation fixing a filing time limit for "incident" grievances (Griev. Pol., 6). Second, §13.1 creates no new liability. As the ALC correctly noted in its March 10, 2011 order, inmates' substantive right to prevailing wages was created in the 1995 statute, §24-3-430 (3-10-11 order, 5).

Finally, the ALC held the "alleged incident" in this case was SCDC's **decision** to pay inmates less than prevailing wages as required by §24-3-430 (D) (3-16-12 order, 21). Inmates contend that "decision" was made in its 1998 contract with WTI establishing the pay rate at $4 per hour (1998 contract, 6). This wage rate provision is a fundamental guideline by which SCDC manages the work program and thus an essential component of SCDC wage policy. If the "alleged incident" was this decision, or contract provision, which is SCDC policy, it seems to follow that inmates' grievances protesting the wage rate are "concerning polices/procedures" under §13.9.

Inmates submit that their grievances were "concerning policies/procedures" under §13.9, and there was no time limit to file. This rule applies to all inmate grievances. Inmates contend they had to file only once to cover all work in the past, present and future. This is because grievances concerning policies/procedures can be filed at any time. Also, inmates are prohibited from filing repeated grievances on the same matter or for an issue previously addressed (Griev. Pol., 4, 10). For inmates still working, the back pay period should include the time this case is on appeal until the Court's order is fully complied with by SCDC (45 C Am. Jur. 2nd (2002), Job Discrim., §§2596-2597).

3. There was reasonable cause under §13.9 not to file within the original time frame because inmates had no wage grievance and appeal rights before Adkins/Wicker, and even if inmates had such rights, they were effectively barred from exercising those rights, and there was no time limit to file under §13.9 after Adkins/Wicker.

The ALC held that this issue was not presented to SCDC for consideration, and thus not preserved for judicial review (3-16-12 order, 10). On the merits, the ALC held inmates could have filed grievances and appealed to the ALC, and were not effectively

barred from pursuing grievances before Adkins/Wicker (Id., 11). Inmates contend that these holdings are affected by error of law, and are clearly erroneous in view of the substantial evidence on the whole record.

If the Court believes these were "incident" grievances, inmates contend there was reasonable cause under §13.9 not to file until Adkins/Wicker were decided, and also the 15 day rule in §13.1did not apply. Section 13.9 (Griev. Pol., 8) provides:

> Exceptions may also be made for incident grievances..provided that documented reasonable cause can be demonstrated as to why the original time frame was not met..The waiver must be requested by the grievant.

Inmates' first position is they had no wage grievance and appeal rights before Adkins/Wicker. See issue 1, pp.6-9.

Assuming inmates had grievance and appeal rights before Adkins/Wicker, they contend that SCDC's practice of denying grievability, as in Wicker, and McNeil's limitation of ALC jurisdiction to cases other than prevailing wage disputes, effectively barred them from exercising those rights before Adkins/Wicker. (Yoder v. Nu-Enamel Corp.145 F 2nd 420, 427 (CA 8, 1944) (limitations period could not run against a right while court decisions prevented enforcement of right); 51 Am. Jur. 2nd (2000), Limit., §§170, 210 (courts recognize limitations exception for inability to sue or exercise one's remedy).

In Al-Shabazz v. State 527 S.E. 2nd 742, 750 (S.C., 2000), the Court stated that due process "consists of notice, a hearing, and judicial review". For special appeals, the rules require compiling a record, briefing, and a "decision" rendered by the ALC (ALC Rules 58, 60-61, 65). Furthermore, a merits decision seems to be required by statute

(S.C. Code §§1-23-600 (E), 1-23-380 (5)). Inmates refer the Court to issue 1, pp. 7-8, discussing the effect of McNeil and ALC Rule 70 F on ALC jurisdiction in prevailing wage appeals before Adkins/Wicker.

In sum, even if grievance and appeal rights pre-dated Adkins/Wicker, inmates contend they could not **exercise** those rights in any meaningful way or **enforce** wage claims in court to successful conclusion. For that reason, their claims should be held unaccrued and any limitations period tolled before that time (Bergstrom v. Palmetto Health Alliance 596 S.E. 2nd 42, 46 (S.C., 2004) (cause of action accrues when plaintiff has legal right to sue on it); Wooten v. Standard Life 122 S.E. 2nd 637, 640 (S.C., 1961) (cause of action accrues so as to start limitations period as soon as right to sue arises); King v. James 694 S.E. 2nd 35, 40 (S.C. App., 2010) (In analyzing a limitations defense, the fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it); 51 Am. Jur. 2nd (2011), Limitations, §127 (accrual occurs when claimant first may maintain an action to successful conclusion and is remediable in court).

Inmates contend that their inability to enforce any rights they had or grieve and appeal to successful conclusion before Adkins/Wicker should be considered reasonable cause for delayed filing under §13.9 of SCDC grievance policy.

The ALC held this issue was not preserved for review because inmates failed to raise it with SCDC (3-16-12 order, 10). Section 13.9 gives as examples of reasonable cause, hospitalization and court appearances (Griev. Pol., 8). Normally, these events will be appropriate for documented excuses and requests for waiver.

Here, inmates contend that their grievances contain adequate notification of

reasonable cause. Inmate drafted grievances allege, "(L)awsuit was filed, ordered to file grievance by court Wicker v. SCDC, Adkins v. SCDC" (e.g., Ackerman step 1). Grievances drafted by counsel allege Darrell Williams' 2001 grievance and dismissal for want of jurisdiction; Williams' 2002 filing of a lawsuit for wages; and reference Adkins and Wicker holding that §24-3-430 was mandatory and inmates could file grievances for their wages (e.g., Austin step 1).

From the above, it seems apparent that the reason for filing in September 2004, and not earlier, was Adkins/Wicker's grant of grievance and appeal rights for these cases. Moreover, in contrast to the examples of reasonable cause in §13.9, the reasons here were SCDC's treating grievances as non-grievable and the ALC's lacking merits jurisdiction to review. Inmates contend that these circumstances were not caused by inmates, do not call for waiver request, and none should be required.

The ALC refers to the 2001 ALC decision in Bennie Wicker, #122304 v. SCDC Dock. No. 00-ALJ 04-00781-AP, August 13, 2001, holding these grievances to be grievable (3-16-12 order, 11). Inmates contend that the September 5, 2001 McNeil en banc. opinion effectively overruled the Wicker ALC opinion until ALC jurisdiction was expanded to cover these cases in Wicker. Thus, until Wicker these grievances were unenforceable in court and of no practical effect.

In its March 2, 2012 order, the ALC cited Sullivan v. SCDC 355 S.C. 437, 586 S.E. 2d 124 (S.C., 2003) in support of its ruling (3-2-12 order, 12). In Sullivan, the inmate sought admission to a sex offender treatment program. After receiving no response, inmate filed a grievance, which SCDC denied, and inmate appealed to the ALC. The ALC found no jurisdiction to decide the matter, citing McNeil.

The Supreme Court held that SCDC's denial of enrollment in the program did not implicate a **liberty** interest and therefore the ALC had no jurisdiction to review (586 S.E. 2d at 128). In footnote 5, page 128, the Court stated:

> The en banc decision of the ALJD in McNeil formed the basis for the ALJD's and the Circuit Court's dismissal of Sullivan's claim. For this reason, and because we know McNeil has been relied upon by the ALJ in other cases to deny jurisdiction, the ALJD and the Circuit Court are instructed to look to this opinion, not McNeil, for guidance in future cases. Although much of McNeil's analysis is accurate, we believe Wolff requires minimal due process when for state created liberty interests, which are not necessarily limited to sentence credit issues and major disciplinary decisions. We recognize that a condition of confinement could implicate a state created liberty interest under Wolff. However, we adhere to Sandin's pronouncement that "these interests will generally be limited to freedom from restraint which ..imposes atypical or significant hardship on the inmate in relation to the ordinary incidents of prison life Sandin at 484, 115 S. Ct. at 2300, 132 L. Ed. at 430.

From the above, it seems clear that courts were directed to look to Sullivan instead of McNeil because a condition of confinement could implicate a liberty interest other than the two bases for jurisdiction specified in McNeil. However, the fact that Sullivan recognized the possibility of other **liberty** interests being implicated did not change the then existing absence of ALC jurisdiction over inmates' **property** interests implicated by prevailing wage claims. Sullivan said nothing about these claims or any kind of property interests. These interests were only recognized, and ALC jurisdiction expanded, in Wicker a year later.

In conclusion, there should also be no time limit to file after Adkins/Wicker. Again, §13.9 has no time limit. As with policy grievances, the reasonable cause provision in §13.9 is an exception to §13.1 and thus "absolutely" removed from §13.1's

operation (73 Am. Jur. 2nd (2001), Statutes , §212). Section 13.9 is also plain and unambiguous, and the courts should not change its terms (Wiggins v. Edwards 442 S.E. 2nd 169, 171 (S.C., 1994). In addition, a time limit is contrary to SCDC's own application of §13.9, at least for policy grievances. Finally, as a limitations period §13.1 should be strictly limited in application to its express terms (S.C. Juris., vol. 26, Limit., §9). Reasonable cause is not a term in §13.1, so the 15 day rule should be limited to incident grievances without reasonable cause.

Inmates submit that their grievances were timely as there was reasonable cause under §13.9 and no time limit to file. This rule applies to all inmates' grievances. Inmates contend they had to file only once to cover all work in the past, present and future, as non-accrual of their claim excused pre-Adkins/Wicker compliance with §13.1 and there was no time limit to file after. Also, repeated grievances are prohibited, and back pay periods extend to the date of SCDC's compliance, for the reasons stated in issue 2, last paragraph.

4. SCDC's application of §13.1 violated due process because it cut off inmates' claims before they accrued and denied inmates a meaningful opportunity to file grievances and obtain judicial review before the bar took effect.

The ALC held that SCDC did not violate due process (3-16-12 order, 12). Inmates contend that this holding was affected by error of law and was clearly erroneous in view of the substantial evidence on the whole record.

If the Court believes these were "incident" grievances and §13.1 applied, inmates contend it violated due process. Due process requires that a limitations period afford a party reasonable time to file suit considering the situation at hand. A limitation is not

reasonable which does not afford full opportunity to sue before the bar takes effect (Hite v. West Columbia 66 S.E. 2nd 427, 429 (S.C., 1951); S.C. Juris., vol. 26, Limitations, §7; 51 Am. Jur. 2nd (2000), Limitations, §40). Due process requires an opportunity granted at a meaningful time and in a meaningful manner for an appropriate hearing (Logan v. Zimmerman Brush Co. 102 S. Ct. 1148, 1159 (1982).

Inmates contend their claims did not accrue until Adkins/Wicker and could not have been enforced or filed successfully at an earlier time. See issue 3. However, SCDC applied §13.1 to pre-Adkins/Wicker claims. These applications denied inmates a meaningful opportunity to file and obtain judicial review before the bar took effect. It cannot be said that reasonable and meaningful opportunity to file and appeal is granted where claims, such as these, are cut off before they ever accrue.

The ALC held that its March 10, 2011 order has disposed of inmates' contention by finding inmates did have grievance and appeal rights prior to Adkins/Wicker (3-16-11 order, 11-12). Inmates refer the Court to their discussion in issue 1, pp. 6-9.

The ALC also noted that Al Shabazz v. State 338 S.C. at 374-375, 527 S.E. 2d at 753, held that SCDC disciplinary and grievance procedures comply with minimal due process "in such proceedings" (3-16-12 order, 12). The proceedings in Al Shabazz were disciplinary proceedings which inmates could appeal by initiating a grievance (527 S.E. 2d at 752). The Supreme Court was making an observation about SCDC grievance procedures in general. It was not addressing the due process issue presented in this case.

Inmates submit that application of §13.1 denied them due process. This rule applies to all inmates who worked on or before September 9, 2004, the Adkins/Wicker remittitur date (Adkins/Wicker remittiturs). Inmates contend they had to file only once to

cover all work in the past, present and future. This is because application of §13.1 to pre-Adkins/Wicker work violated due process and was thus ineffective. Also, repeated grievances are prohibited, and back pay periods extend to date of SCDC's compliance, for the reasons stated in issue 2, last paragraph.

5. SCDC waived §13.1 because §13.9 and step 1 instructions were inconsistent with an intention to rely on §13.1, SCDC did not raise §13.1 until step 2 appeals, and SCDC considered these grievances on the merits before invoking §13.1.

The ALC held SCDC did not waive §13.1 (3-16-12 order, 13). Inmates contend the court's ruling was affected by error of law, was clearly erroneous in view of the substantial evidence on the whole record, and was arbitrary and characterized by abuse of discretion.

If the Court believes these were "incident" grievances and §13.1 applied, inmates contend SCDC waived the right to raise it. In Anonymous Taxpayer v. Dept. of Revenue 377 S.C. 425, 661 S.E. 2nd 73, 80 (S.C., 2008), the Supreme Court stated how a party can waive the statute of limitations:

> A party can waive a statute of limitations defense, but the waiver must be shown by words or conduct, including an express agreement, failure to claim the defense, or any action or inaction inconsistent with an intention to use the statute of limitations defense.

First, inmates contend that §13.9 and step 1 instructions were words and actions which were inconsistent with an intent to raise §13.1. At least 92 step 1's filed in September 2004, plus all 188 amendments to grievances, expressly protested SCDC "policy" of paying below prevailing wages (e.g., Austin step 1 & Ackerman Amendment). In addition, all inmates' grievances "concern" policy in substance, as

discussed in issue 2.

When these grievances were filed, §13.9 provided that "(E)xceptions to the 15 day time limit requirement **will** be made for grievances concerning policies/procedures" (Griev. Pol., 8). And, §13.9 provided no alternative time limit for such grievances. Moreover, SCDC step 1 instructions directed inmates to file "policy grievances at **any time**" (e.g., Ackerman step 1). As of 2004, this step 1 form had been in use and was last revised in November 1997 (Aljalil step 1). Thus, the form was in effect the entire time the work program existed until grievances were filed.

The ALC states that nothing in SCDC's grievance policy or the step 1 instructions suggested that prevailing wage claims "constituted" policies/procedures grievances under §13.9 (3-16-12 order, 14). However, the issue is whether §13.9 and step 1 instructions were inconsistent with an intent to raise §13.1 for grievances which were in form and substance "concerning polices/procedures".

Inmates contend §13.9 and the step 1 instructions were words, conduct and actions which were inconsistent with an intent to raise §13.1 for grievances such as these and waiver should apply.

Second, for some 153 inmates SCDC failed to plead §13.1 in step 1 responses, and did so only on appeal in step 2 decisions (e.g., Ackerman step 1 response & step 2 decision). A statute of limitations must be pleaded as an affirmative defense or it is waived (Glen v. School District 366 S.E. 2d 47, 49 (S.C. App. 1988)). Generally, the statute cannot be raised for the first time on appeal (Verizon Maryland, Inc. v. Global Naps, Inc. 377 F 3rd 355, 369 (CA 4, 2004)).

Here, SCDC's step 1, 2, and responses all refer to step 2 as an "appeal" (e.g.,

Ackerman step 1 & response; step 2 & decision). Moreover, step 2 instructions prohibited inmates from raising new issues on appeal (e.g., Ackerman step 2), as SCDC did by invoking §13.1. Inmates contend the same rule should apply to both parties. Otherwise, SCDC gets to raise new issues without giving inmates a chance to respond.

The ALC held that waiver did not apply because step 1 responses which failed to raise §13.1 were not final decisions, citing Friends of Potter Marsh v. Peters 371 F. Supp. 2d 1115 (D. Alaska, 2005) (3-16-12 order, 14-15). That case is distinguishable in that the Secretary apparently took affirmative action at the first level by waiving a statutory requirement that projects not be located on local roads. Here, SCDC did nothing concerning §13.1 in the 153 step 1 responses in question, but invoked §13.1 only on appeal in step 2.

The ALC states inmates' reliance on Ross v. County of Bernalillo 365 F 3d 1181, 1186 (CA 10, 2004) is misplaced because Ross stated that nothing in the record suggested the prison treated Ross' complaint as untimely (3-16-12 order, 16). However, inmates cited Ross, not on this issue, but on the third basis of SCDC merits consideration of grievances. See below, page 28-29. Also, the 153 step 1's at issue did **not** raise §13.1 or timeliness, and like Ross, did not suggest that timeliness was a problem.

Inmates contend that SCDC failed to plead §13.1 in the 153 step 1 responses, and should be held to have waived it on appeal (Glen; Verizon Maryland, Inc.).

Third, SCDC considered grievances on the merits before invoking §13.1. If a prison accepts and considers on the merits a late filing, it is considered timely (Ross v. County of Bernalillo 365 F 3d 1181, 1186 (CA 10, 2004). Initially, the 153 step 1 responses which failed to plead §13.1 were merit decisions because they disputed

inmates' claims for "employee" status, class grievance recognition, prevailing wage rates, overtime pay, interest, costs and attorney fees (e.g., Ackerman step 1 response). Thus, having accepted and considered on the merits these step 1's, SCDC should be held to have waived §13.1 even if they were filed late (Ross).

In addition, SCDC considered inmates' Amendments/Exhibits to grievances on the merits before invoking §13.1. The Amendments allege each inmate's work hours, but otherwise paraphrase much of the language in the 92 step 1's filed in September 2004 which protested SCDC "policy" (e.g., Ackerman Amendment; Austin step 1).

At an April 19, 2007 Circuit Court hearing on inmate's motion to allow filing of Amendments, SCDC agreed to file all Amendment/Exhibits and consider them on the merits (4-19-07 Trans., 19-20, 22, 26). This became an order of the Circuit Court (4-20-07 Judg't). The in court agreement is summarized in the following colloquy between Judge Williams and counsel at pages 20, 22 of the April 19, 2007 transcript:

> The Court: He's telling me now that he will physically accept whatever it is that you want to submit, and he's telling me now that they will consider whatever you submit **on the merits** but they will not go back and change any deadlines. And I don't —
>
> . .
>
> The Court: Will you accept service of filings on behalf of Department of Corrections?
> Mr. Summers: Yes, sir, I will.

After the hearing, undersigned counsel tendered to SCDC's counsel the original Amendments with Exhibits for Lieber inmate-clients, and copies of Amendments without Exhibits for non-Lieber inmate-clients. On April 25, 2007, undersigned mailed to SCDC's counsel the Exhibits for non-Lieber inmate clients to pair up with Amendment copies hand-delivered on April 19. The Amendments/Exhibits tendered to SCDC April

19 and 25 pertained to 188 inmates now on appeal. Confirming letters were sent on April 25, 2007 to SCDC's counsel, and on June 4, 2007 to counsel with a copy to Judge Williams (4-25 & 6-4-07 Westbrook letters). Inmates request that the Amendments and Exhibits be deemed filed on April 19, 2007 and considered on the merits by SCDC pursuant to the Circuit Court order of April 20, 2007.

Finally, there are some 32 step 1 responses, and 136 step 2 final decisions, which raised §13.1 **and** considered the merits by disputing the same claims discussed on page 28-29 above (32 step 1's: e.g., Choice step 1 resp.; 136 step 2's: e.g., Aljalil step 2 decision). Some 30 step 2 final decisions do not expressly dispute claims, but they "completely adopt and endorse" step 1 responses which do (e.g., Beach step 1 resp. & step 2 decision).

In analogous circumstances, cases apparently go both ways on the issue of whether a document that is rejected as both late and unmeritorious counts as properly filed (Pozo v. McCaughtry 286 F 3rd 1022, 1025 (CA 7, 2002). Inmates urge the Court to conclude that it does count as properly filed because SCDC's merits consideration of their grievances should trump its simultaneous assertion of §13.1.

The ALC briefly discussed inmates' third basis for merits consideration waiver (3-16-12 order, 16-17), but did not address the two primary bases discussed at pp. 28-30 above.

Inmates contend that SCDC's merits consideration of their grievances in the above ways was inconsistent with an intent to rely on §13.1, and waiver should apply.

Inmates submit that SCDC waived §13.1 for all of the reasons stated herein. This rule should apply to all grievances because §13.9 and step 1 instructions were not

consistent with an intent to rely on §13.1 for grievances such as these. Waiver should also apply to all step 1 responses where SCDC failed to plead §13.1. Finally, waiver should apply to all grievances considered on the merits by SCDC in the above ways.

Inmates contend that they had to file only once to cover all work in the past, present and future. This is because SCDC's waiver excuses compliance with §13.1 for pre-waiver work. For post-waiver work, repeated grievances are prohibited, and back pay periods extend to date of SCDC's compliance, for the reasons stated in issue 2, last paragraph.

6. SCDC was estopped from raising §13.1 by equitable estoppel.

The ALC held that SCDC was not equitably estopped from raising §13.1 (3-16-12 order, 19). Inmates contend this ruling was affected by error of law and was clearly erroneous in view of the substantial evidence on the whole record.

If the Court believes these were "incident" grievances and §13.1 applied, inmates contend SCDC was equitably estopped from raising it. In RWE Nukem Corp. v. ENSR Corp. 373 S.C. 190, 644 S.E. 2nd 730 , 734 (S.C., 2007), the Supreme Court stated how a defendant can be estopped from raising the statute of limitations:

> A defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct (cite.).

Earlier, the Court in Kleckley v. Northwestern Nat. Cas. Co. 338 S.C. 131, 526 S.E. 2nd 218, 220 (S.C., 2000) described the conduct which can create an estoppel:

> The defendant's conduct may also involve inducing the plaintiff either to believe that an amicable adjustment of the claim will be made without suit or to **forbear exercising the right to sue.**

An intentional misrepresentation is not required. It is sufficient if claimant reasonably relied on defendant's words or conduct in allowing the limitations period to expire (Hedgepath v. A.T.T. 348 S.C. 340, 559 S.E. 2nd 327, 338 (S.C. App., 2001)).

Here, inmates and counsel reasonably believed these were grievances "concerning policies/procedures" under §13.9 and/or step 1 instructions, and could be filed "at any time". Inmate-drafted grievances allege that SCDC paid them only $.35 per hour instead of prevailing wages under §24-3-430 (e.g., Ackerman step 1). Counsel-drafted grievances expressly state §24-3-430's requirement of prevailing wages, and "WTI/Lieber's **policy**" of paying usually under $1 per hour (e.g., Austin step 1). Thus, all grievances, including Amendments to grievances, invoke SCDC wage policy and the public policy in the statute as a basis for their claims (e.g., Ackerman Amendment). It follows that inmates and counsel reasonably believed these were grievances concerning policies/procedures.

As to such a grievance being exempt from deadlines, step 1 instructions allowing filing of "policy grievances at any time" do suggest that pay claims concerning policy would be exempt from the deadline (e.g., Ackerman step 1).

In Dillon County School v. Lewis Metal Works. 332 S.E. 2nd 555, 561-562 (S.C. App., 1985), a school had sued to recover for the defective design and construction of a roof. Defendant raised the statute of limitations. School contended defendant's investigation of the roof, meetings, repair attempts and correspondence had lulled the school into a false sense of security and induced it to delay filing suit before the statute ran. The Court held a jury question existed as to whether defendant invited the very

delay defendant now asserted as a defense.

In much the same way, inmates contend that §13.9 and/or step 1 instructions lulled them into a false sense of security that no limitations period applied to grievances such as these, and they could be filed "at any time".

The ALC relied on the test from Strickland v. Strickland 375 S.C. 76, 84, 650 S.E. 2d 465, 470 (2007) for the elements of equitable estoppel (3-16-12 order, 17-18). However, it appears the Supreme Court uses the test from RWE Nukem Corp. and Kleckley for estoppel to plead the statute of limitations.

The ALC states there is no evidence that SCDC induced inmates to believe their grievances "constituted" policies/procedures grievances or that filing a grievance was unnecessary (3-16-12 order, 18-19). Inmates contend that because their grievances expressly and substantively "concerned" SCDC wage policy and the public policy in §24-3-430, a reasonable person reading §13.1 and step 1 instructions would conclude that these grievances concerned policies and procedures and could be filed at any time.

Inmates submit that SCDC should be estopped from raising §13.1 in these cases. This rule applies to all grievances. Inmates contend they had to file only once to cover all work in the past, present and future. This is because SCDC's estoppel excuses compliance with §13.1 for pre-filing work. Post-filing work should also be covered because repeated grievances are prohibited, and back pay periods extend to date of SCDC's compliance, for the reasons stated in issue 2, last paragraph.

7. Inmates complied with §13.1 because it was tolled by their class action and they filed grievances no later than 15 days after the class action remittitur filing date or within 45 days of notice posting under the 2005 order.

The ALC held inmates' class action did not toll the filing deadline in §13.1 (3-2-12 order, 24). The ALC's 3-16-12 order, page 19, states class action tolling as issue 6, but discusses only "equitable" tolling. Because only the 3-2-12 order discusses class action tolling, that order will be referenced herein. Inmates contend that the Court's ruling is affected by error of law and is clearly erroneous in view of the substantial evidence on the whole record.

If the Court believes these were "incident" grievances and §13.1 applied, inmates contend it was tolled by their class action. In Crown, Cork & Seal Co. v. Parker 103 S. Ct. 2392, 2397-8 (1983), the Supreme Court held the filing of a class action tolls the statute of limitations as to all class members who timely file **individual actions** after class certification is denied. Since the plaintiff in that case did not receive a right to sue letter until after the class action was filed, he had the full 90 days to sue after class certification was denied (affirming, Parker v. Crown, Cork & Seal Co. 677 F 2nd 391, 394 (CA 4, 1982). See, also Hunter v. American Gen. Life & Acc. Ins. Co. 384 F. Supp. 2nd 888 (D.S.C., 2005) (doctrine recognized).

Here, inmates' class action was filed on July 1, 2002, which itself was an amended complaint relating back to the original complaint of January 29, 2002 (1-29 & 7-1-02 Sum/Comp.). See SCRCP 15. Thus, under the above cases if §13.1 applied, it should be considered tolled on January 29, 2002.

In August 2004, Adkins/Wicker first recognized inmates' right to grieve and appeal wage disputes, thus removing the bar to exercise of any rights inmates had. In April 2005, the Circuit Court decertified the class and gave inmates who had not filed a grievance 45 days after notice posting to do so (Cir. Ct. order, 8, 13). Inmates appealed

this order, and SCDC invoked the automatic stay rule in SCACR 225 (May 2005 Not. of App. & 6-7-05 SCDC letter). This stayed all matters decided and relief ordered, including decertification and the right to file grievances, for the "duration of the appeal" (SCACR 225). In February 2007, the Supreme Court affirmed the order, and the remittitur was filed on March 22, 2007 (Williams remittitur). From October 20 to December 6, 2008, SCDC posted the notice required by the order (e-mail, not. post.).

Most grievances were filed in 2004 when the limitations period was tolled and before the class action order in 2005. A few were filed during the class action appeal and a few after. Inmates contend that since the bar to exercise of any rights they had was not removed until after the class action was filed, they had until 15 days after the remittitur filing date of March 22, 2007, or until April 6, 2007,to file grievances (Crown, Cork & Seal Co. v. Parker). See issue 9. For inmates not filed by April 6, 2007, the Circuit Court's order gave them until 45 days after notice posting, or until December 4, 2008 to file.

The ALC held that Crown, Cork & Seal Co. is distinguishable because, unlike that case, inmates' class action did not fail because certification was denied, but because Adkins held that inmates had no private cause of action (3-2-12 order, 23). Inmates contend the more important point is that both class actions resulted in decertification, and tolling should apply in both to promote the Rule 23 goal of economy of litigation (American Pipe & Construction Co. v. Utah 94 S. Ct. 756, 766 (1974).

The ALC also stated that Crown, Cork & Seal Co. was based largely on FRCP 23 and there is no rule similar to FRCP 23 that allows inmates to file grievances as a class (3-2-12 order, 24). Inmates' class action was filed under SCRCP 23, a rule very similar

to FRCP 23 (2-12-03 Sum/Comp., 5). Inmates contend that their grievances need not be "class" grievances to come within the Crown, Cork & Seal Co. tolling rule. While grievances are technically not "lawsuits" in the traditional sense, they are the sole remedy provided to inmates in Adkins/Wicker. The grievances should be considered "individual actions" under the Crown, Cork & Seal Co. tolling rule. Inmates contend the purposes of Rule 23 are equally served by suspending §13.1 during pendency of their class action and 15 days thereafter for grievances, or "individual actions", to be filed.

Finally, the ALC stated there is a significant number of inmates who began work long before 2002 when their class action was filed, and thus even if the class action suspended §13.1 , these inmates' grievances were still untimely since they were required to be filed within 15 days of beginning work (3-2-12 order, 24). Inmates respectfully disagree that grievances had to be filed as the ALC ruled. Even if the ALC was correct, there are some 80 inmates* who started work within 15 days of January 29, 2002 (or after), the effective date of their class action. These grievances would all be timely under this rule.

Inmates submit they timely filed under these rules since all step 1's were filed before December 4, 2008. For those who filed by April 6, 2007, work should be covered

*T. Aiken, 244428, F. Anderson, S. Austin, Q. Baker, Beach, Beasely, Benninger, Bogan, Brewer, F. Brown, K. Brown, E. Bryant, Buchanon, Burke, Bush, Busques, T. Carter, Cassady, Cobbs, Corley, Denney, P. Durham, Eigner, Elder, Feggins, Flores, Garrett, Garriett, Gatewood, Gilbert, C. Graham, G. Grant, Grooms, J. Hayes, Hood, Inman, Jordan, Knight, Libby, Linen, Lyles, L. Mack, Martino, McAteer, McClam, H. McFadden, J. McFadden, McFarland, Mills, Morris, A. Murphy, A. Murray, Patterson, Pitts, Poston, Pringle, Richards, Rivera, Rivers, Rochester, V. Sanders, Sattler, R. Scott, Shine, K. Simmons, Samuel Simmons, Stephon Simmons, V. Simpson, Sims, Singleton, T. Smith, Spears, Tevis, Thomas, Tino, Trumper, Wheeling, B. Williams, J. Williams, Youmous

if performed within 15 days of filing date (not counting the period tolled from January 29, 2002 through March 22, 2007) and any term of employment existing during that period, or occurring thereafter, the latter since policy prohibits repeated grievances for the same matter (Calvin Byrd, #257319 v. SCDC Dock. No. 07-ALJ-04-00410-AP, Oct. 10, 2007, Op. 2; Griev. Pol., 4,10). For example, if an inmate filed on March 23, 2007, all work from January 15, 2002 to March 23, 2007, and any term of employment existing during that period, or occurring thereafter, should be covered.

For those who filed on or after April 7, 2007, work should be covered if performed within 15 days of filing date and any term of employment existing during that period or occurring thereafter. If the Court believes inmates were required to file within 15 days of their first pay date, the 80 inmates in the footnote on page 36 who started work within 15 days of January 29, 2002 or after should be considered to have timely filed under class action tolling. Finally, back pay periods extend to date of SCDC's compliance for the reasons stated in issue 2, last paragraph.

8. Section 13.1 did not require filing within 15 days after inmates' initial pay date, and they complied with §13.1 by filing during a term of employment or for the previous 15 days work.

The ALC held that inmates had to file grievances within 15 days after their initial pay date (3-16-12 order, 21, 23). Inmates contend the court's ruling was affected by error of law and was clearly erroneous in view of the substantial evidence on the whole record.

If this Court believes these were "incident" grievances and §13.1 applied, inmates contend they complied by filing during or within 15 days of a term of employment, or alternatively, by filing for the previous 15 days work. The ALC has previously stated in

a prevailing wage grievance appeal (Calvin Byrd, #257319 v. SCDC Dock. No. 07-ALJ-04-00410-AP, Oct. 10, 2007, Op. 2) involving §13.1:

> Applying this policy provision to the instant matter would lead to an absurd result for this tribunal to find that an inmate must file a separate grievance for each day of work performed or for each pay period. A more logical result would be to interpret the policy so as to find that an inmate had timely filed a prevailing wage grievance if he filed during the course or **term of employment, regardless of when he initially began employment** with the prison industries program.

Here, some inmates clearly worked one continuous term of employment, and the records so reflect (e.g., Ackerman, Appendix 1, 1). But for many, it is hard to determine if multiple terms were worked or when one term stops and the next begins. Often there is ambiguity or inconsistency on these issues. For example, some final decisions state "work assignments" in separate periods or with unexplained "interruptions" (e.g., K. Carter, Appendix 1, 6). Obviously, any number of issues can cause a disruption of work, e.g., illness, without terminating employment.

In addition, Exhibit F records may have occasional gaps, or apparent time lapses, between certain pay periods. These gaps appear to indicate separate periods of work in some cases. Obviously, this would not be true if the gaps were caused by computer error or some other reason. A comparison of Exhibit F with other SCDC records illustrates the discrepancy between them. As shown on Appendix 1, many inmates have multiple work periods for Exhibit F, while other SCDC document sources show single or fewer work periods for the same work (e.g., Bogan, Appendix 1, 3). Moreover, for many inmates Exhibit F last pay dates are also disputed by other SCDC records (e.g., Baylor, Appendix1, 2).

In sum, Appendix 1 shows some 24 instances where other SCDC records state fewer work periods than Exhibit F (e.g., Bogan, Burke, Choice, Linen, Pringle). There are also about 26 inmates whose other records state more recent "last pay dates" than Exhibit F (e.g., Benninger, Deveaux, A. Scott, R. Scott, Sellers).

For these reasons, inmates contend the record does not show multiple terms of work, or at best the evidence is ambiguous. "Ambiguity" is uncertainty of meaning (Black's Law Dictionary, 8th ed., p. 88). Ambiguity should be resolved against a discriminating employer, and when it is impossible to reconstruct a claimant's work, back pay equal to the maximum amount which could have been earned but for the employer's discrimination is proper (45C Am. Jur. 2nd (2002), Job Discrim., §2607).

On this record, inmates request the Court to construe alleged multiple work periods as one term of employment for filing timeliness purposes. So construed, an inmates' work should be considered continuous from his first work day to the last regardless of alleged gaps or work periods.

As reflected on Appendix 1, some 94 inmates filed step 1's **while working.*** Of these 94, 89 filed on September 22 or 30, 2004 as documented in Certificates of Service

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* Aljalil, Q. Baker, Beach, Beaseley, Bogan, F. Brown, K. Brown, T. Brown, E. Bryant, P. Bryant, Bude, Burke, Bush,, Busques, T. Butler, D. Carter, Cassady, Choice, Cobbs, Cooper, Corley, Daniels, Denney, Dewey, P. Durham, Edger, Elder, Feggins, Flores, Gamble, Garrett, Garriett, Gatewood, Goff, C. Graham, H. Grant, Greene, Grooms, Harrell, Hartman, Hickenbottom, Holden, Hood, House, Inman, J. Jackson, Jordan, Kelly, Kelsey, Key, Law, Lease, Leonard, Linen, Livingston, Lyles, L. Mack, Martin, McAteer, H. McFadden, J. McFadden, McFarland, D. Miller, Moultrie, Murphy, A. Murray, Orr, Pitts, Poston, Pringle, Prioleau, G. Richardson, I. Richardson, Rivera, Robinson, Rochester, V. Sanders, R. Scott, Shine, K. Simmons, Samuel Simmons, Stephon Simmons, V. Simpson, Sims, T. Smith, Spears, Stewart, Stinson, Tevis, Thompson, Wheeling, B. Williams, J. Williams, L. Wilson. Selections are based on Appendix 1, column 9 dates. See Appendix 1, note 9.

(9-22 & 9-30-04 Cert. of Ser.). Inmates contend these 94 inmates should be entitled to back pay for the entire term of employment in which (or within 15 days of which) they filed (Calvin Byrd, #257319 v. SCDC).

The ALC held that the "incident" was not the inmate's term of employment, but SCDC's decision to pay inmates less than the prevailing wage (3-16-12 order, 21). The Court stated inmates had to file grievances within 15 days of their initial pay date (Id., 21, 23) citing Wallace v. Burbury 305 F. Supp. 2d 801, 806 ((N. D. Ohio, 2003). In Wallace, the "incident" was when the inmate learned the prison would not honor his request to observe Passover (Id. 22).

If this Court does not adopt the "term of employment" rule in Calvin Byrd, inmates contend the "incident" here was each paycheck wrongfully paid below prevailing wages. For limitations purposes, a suit for employment compensation due and periodically payable is a continuing claim involving multiple causes of action, each arising when the employer fails to make the payment due. A claim based on a single distinct event, with continued ill effects later on, is not a continuous claim (51 Am. Jur 2d (2011), Limitations, §145).

Inmates contend that Wallace involved a claim based on a single distinct event with continued ill effects, whereas inmates' is a continuing claim involving multiple causes of action arising with each pay check. For example, the Supreme Court has held that an employer violates Title 7 and triggers a new EEOC charging period whenever the employer issues pay checks using a discriminatory pay structure. A new violation does not occur when an employer issues pay checks pursuant to a system that is facially nondiscriminatory or there is no evidence that the employer initially adopted its pay

system with a purpose to discriminate or the employer later applied this system within the limitations period with discriminatory animus (Ledbetter v. Goodyear Tire & Rubber Co. 127 S. Ct. 2162, 2174 (2007) & Bazemore v. Friday 106 S. Ct. 3000 (1986).

After Ledbetter, Congress passed the Ledbetter Fair Pay Act, Pub. Law No. 111-2, 123 Stat. 5 (2009), stating the statute of limitations on a pay discrimination charge begins anew each time claimant receives pay that is reduced by a discriminatory pay decision or practice.

Here, §24-3-430 was enacted in 1995 (3-10-11 order, 5). Thus, SCDC would have known of this law in 1998 when it contracted with WTI to receive only $4 per hour for inmate labor. At the time, the federal minimum wage was $5.15 per hour (29 U.S.C. §206). Inmates contend that a wage of $4 per hour was facially illegal and agreed to with knowledge and intent to violate §24-3-430's requirement to pay "prevailing wages".

In Maher v. Tietex Corp. 500 S.E. 2d 204, 210 (S.C. App., 1998), the Court held, where an employer wrongfully canceled an employee's bonus, the "wrong" was the employee's discovery of the initial cancellation, which had continuing effects on subsequent pay. The Court stated the discovery rule was sufficient to allow plaintiff the opportunity to discover **and act** upon the original breach without need for the "continuing wrong" doctrine.

Here, inmates contend there is a need for the continuing wrong rule because they could not have "acted" due to their grievances being treated as non-grievable by SCDC and non-appealable by the ALC. At a minimum, inmates contend they should receive back pay for the 15 days preceding their step 1 file date.

Finally, the ALC held that as long as an inmate timely files a grievance within 15 days of learning of SCDC's decision to pay him less than prevailing wages, he will not need to file additional grievances during the period of his employment affected by the decision (3-16-12 order 23). Inmates note that there is no apparent connection between the legal basis for a timely filing and the necessity for additional filings thereafter. If correct, the ALC's ruling on this point seems to mean that, once a grievance is timely filed, for whatever reason, all subsequent work during the period of employment affected by the decision, is covered.

Inmates submit they did not have to file within 15 days of initial pay date, but only during or within 15 days of a term of employment. Alternatively, they contend they timely filed for the previous 15 days' work. Inmates further contend that all work is covered from their first to last work day regardless of time gaps. Alternatively, all work should be covered for the term of employment during which or within 15 days of which they filed; or for the 15 days preceding the file date. Back pay periods extend to date of SCDC's compliance for the reasons stated in issue 2, last paragraph.

9. If §13.1 required filing within 15 days after initial pay date, inmates complied with §13.1 because it was tolled while inmates were barred, or effectively barred, from grieving and appealing prevailing wage claims before Adkins/Wicker, and after those decisions recognized such rights, inmates filed grievances within 15 days after the Adkins/Wicker remittitur filing date.

The ALC held that §13.1 was not equitably tolled (3-16-12 order, 20). Inmates contend that the Court's ruling was affected by error of law and was clearly erroneous in view of the substantial evidence on the whole record.

If the Court believes these were "incident" grievances and §13.1 required filing

within 15 days after initial pay date, inmates contend that they complied with §13.1 because it was tolled while inmates were barred, or effectively barred, from grieving and appealing prevailing wage claims before Adkins/Wicker, and inmates filed grievances within 15 days after the Adkins/Wicker remittitur filing date.

The legal obstacles to exercising any grievance and appeal remedies inmates may have had (See issue 3) ended upon final disposition of Adkins/Wicker. Inmates contend that occurred when the remittitur in those cases was filed in Circuit Court on September 9, 2004 (Adkins/Wicker remittiturs). Until then, these cases were still "pending" on appeal (J. Toal, Appellate Practice of South Carolina, p. 294, citing Christy v. Christy 452 S.E. 2nd 1, 4 (S.C. App., 1994); McDowell v. DSS 386 S.E. 2nd 280, 281 (S.C. App., 1989) (issue of timeliness of attorney fee petition within thirty days of case final disposition, held, final disposition occurred when remittitur was filed in Circuit Court, not on date of Court of Appeals' opinion); Brackenbrook v. County of Charleston 623 S.E. 2nd 91, 93 (S.C., 2005). SCDC acknowledged observing the remittitur rule in its final decisions (e.g., Ackerman step 2 decision).

Inmates contend that all grievances filed within 15 days of the remittitur, or by September 24, 2004, were timely. At worst, under SCACR 221 the remittitur could not have been sent earlier than 15 days after the Adkins/Wicker opinion date (August 23, 2004), or September 7, 2004. Allowing a day for mailing and filing on September 8 would make all grievances filed within 15 days, or by September 23, 2004, timely.

In denying equitable tolling, the ALC cited 54 C.J.S., Limitations of Actions §133 (2011) for the rule that the statute of limitations generally will not be tolled when plaintiff has slept on his rights, but only when he has been prevented from asserting them (3-16-12

order, 20). Here, inmates' effective class action file date was January 29, 2002, less than three years after most of the first workers started work (1-29-02 Sum/Comp., 1). Inmates contend this demonstrates they did not sleep on their rights.

Inmates contend also that they were prevented from asserting their rights by SCDC's treating prevailing wage grievances as non-grievable, and the ALC summarily dismissing wage appeals as outside its jurisdiction.

The ALC believed §13.1 is a "statute of creation" and not subject to being tolled (3-2-12 order, 21). Inmates respectfully disagree, and refer to their discussion at page 18 above.

The ALC states McNeil was not binding precedent; inmates could have filed grievances and appealed to the ALC and Court of Appeals, which had authority to reverse McNeil; pertinent portions of McNeil were superseded in Sullivan (omitted from 3-16-12 order, 20); and while McNeil "may have discouraged" inmates from filing grievances, it did not bar them from doing so (3-2-12 order, 22; 3-16-12 order, 20).

However, McNeil, as an en banc opinion, **was** binding on administrative law judges unless a majority determined otherwise (ALC Rule 70 F). Moreover, the Court in Sullivan recognized the ALC had relied on McNeil to deny jurisdiction in other cases (586 S.E. 2d 124, 128, n. 5). See, for example, Willie Ingram #83404 v. SCDC, discussed at page 7 herein.

While inmates could have filed a wage grievance, it would probably have been dismissed as non-grievable (3-10-11 order, 6), or for want of jurisdiction. For example, the step 1 grievance of Darrell Williams states his 2001 wage grievance had been "dismissed for want of jurisdiction" (D. Williams step 1).

In addition, an appeal to the Court of Appeals would have probably resulted in dismissal. While Al Shabazz had stated that procedural due process was guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment (527 S.E. 2d at 750), inmates' right to prevailing wages under §24-3-430 was not **held to be** a property interest protected by the Fourteenth Amendment until Wicker in 2004 (602 S.E. 2d at 58).

As to McNeil being superseded by Sullivan, inmates agree that is true with respect to liberty interests, but not property interests implicated by inmates' right to prevailing wages under §24-3-430. See discussion page 22-23.

Inmates contend that McNeil not only discouraged but prevented ALC appellate jurisdiction in prevailing wage cases. Sullivan did nothing to change that, and ALC jurisdiction continued to exclude these cases until it was expanded to cover them in Wicker.

The ALC notes that if equitable tolling is applied, SCDC would be forced to defend actions it took many years ago and evidence and witnesses may be lost (3-16-12 order, 20). However, the ALC record contains some 3911 pages of inmates' grievances and related documents, and SCDC has never claimed that loss of evidence would hamper its ability to defend, or it has been prejudiced in any way.

The ALC states the prevailing wage statute was enacted to prevent unfair competition and any unfair competition arising from SCDC's failure to pay prevailing wages will not be rectified now because the "damage has already been done", and harmed competitors will not receive any benefits from inmates' case (3-16-12 order, 21). However, if SCDC is ordered to pay inmates lawful wages due, SCDC could seek

contribution from WTI (now Caterpillar) under their mutual hold harmless provision in the 1998 contract for ". . .any liability or claim for damage . . . arising out of the performance of this Agreement" (1998 contract, p. 7). Such contribution would require WTI to pay its share of lawful wages it should have paid in the first place. In so doing, the unfair competition WTI enjoyed would be prevented and the prevailing wage statute's purpose fulfilled. The statute was enacted to prevent unfair competition, not pay those harmed by its violation.

In conclusion, inmates contend that if grievances had to be filed within 15 days of their pay date, they still timely filed for the reasons stated herein. These grievances should cover work performed within 15 days of the filing. They should also cover pre-remittitur work because §13.1 should not run against inmates' right to prevailing wages while legal obstacles barred the free exercise of any rights inmates had. See authorities discussed in issue 3. Post-filing work should also be covered since repeated grievances are prohibited, and back pay periods extend to the date of SCDC's compliance, for the reasons stated in issue 2, last paragraph.

CONCLUSION

In conclusion, inmates respectfully request this Court to reverse the ALC order, and hold as follows:

1. Adkins/Wicker created new grievance and appeal remedies to enforce inmates' right to prevailing wages.

2. All grievances concern policies/procedures under §13.9; there was no time limit to file; and all work before and after grievances is covered.

3. All inmates had reasonable cause under §13.9 for not filing within the original

time frame; there was no time limit to file; and all work before and after grievances is covered.

4. SCDC's application of §13.1 violated due process for all inmates who worked on or before September 9, 2004; grievances were timely if filed by September 24, 2004; and all work before and after grievances is covered.

5. SCDC waived §13.1 as to all grievances because §13.9 and step 1 instructions were inconsistent with intent to rely on §13.1, as to the 153 step1 responses where SCDC failed to raise §13.1, and as to all grievances considered on the merits by SCDC; there was no time limit to file; and all work before and after grievances is covered.

6. SCDC was estopped from raising §13.1; there was no time limit to file; and all work before and after grievances is covered.

7. Section 13.1 was tolled by inmates' class action; grievances were timely if filed by April 6, 2007 or December 4, 2008; for filings by April 6 2007, all work from January 29, 2002 through March 22, 2007, and any term of employment existing during that period or occurring thereafter, is covered; for filings between April 7, 2007 and December 4, 2008, all work within 15 days of file date, and any term of employment existing during that period or occurring thereafter, is covered.

8. Section 13.1 did not require filing within 15 days of inmates' initial pay date; grievances were timely if filed during or within 15 days of a term of employment (alternatively, by filing for the previous 15 days work); and all work from inmates' first work day to the last is covered regardless of time gaps or work periods (alternative #1, all work for the term of employment during which, or within 15 days of which, inmates filed, is covered; alternative #2, work for the 15 days preceding file date is covered).

9. If §13.1 did require filing within 15 days of initial pay date, §13.1 was tolled until September 9, 2004; grievances filed by September 24, 2004 were timely; and all work before and after grievances is covered.

10. Finally, inmates request remand to the ALC for briefing on the merits as to all grievances.

Respectfully submitted.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Chief Administrative Law Judge

Docket No. 07-ALJ-04-00444, etc.

Francis Ackerman, #266928, et al .....Appellants,

v.

South Carolina Department of Corrections.....Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants on the South Carolina Department of Corrections by depositing a copy of it in the United States Mail, postage prepaid, on April 27, 2012, addressed to its attorneys of record, Lake Summers and Katherine Phillips, Malone, Thompson, Summers, & Ott, LLC, 339 Heyward Street, Suite 200, Columbia, SC 29201.

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