THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No.: 2012-213509

Jacqueline Smith.....Appellant

v.

Horry County Schools.....Respondent.

APPELLANT'S REPLY BRIEF

W. Allen Nickles, III, SC Bar No. 4266
Susan M. Fittipaldi, SC Bar No. 14225
NICKLES LAW FIRM, LLC
1519 Richland Street
Columbia, South Carolina 29201
(803)779-8080

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

PROCEDURAL HISTORY

This appeal is governed by the Teacher Employment and Dismissal Act ("TEDA" or "Act"), S.C. Code Ann. § 59-25-410 through § 59-25-530. Appellant Jacqueline Smith ("Ms. Smith") is a continuing contract teacher formerly employed with Respondent Horry County School District ("District"). By virtue of her continuing contract, Ms. Smith possessed a property interest in employment with the District, subject to termination only upon satisfaction of the substantive and procedural requirements set forth in TEDA.

By letter dated January 5, 2011, the District notified Ms. Smith of the intent to terminate her employment. (District Ex. 1) Ms. Smith preserved her right to a hearing and participated in the hearing process. The District's Board voted to uphold her termination, affirming the Superintendent's recommendation contained in the January 5, 2011 letter. Ms. Smith appealed this decision to the Horry County Circuit Court. Following a hearing on September 13, 2012, the Honorable Benjamin Culbertson issued a form judgment affirming the Board's decision. (R. p. ___) Ms. Smith filed and served a timely notice of appeal to this Court, specifically preserving objections presented to the District's Board and Circuit Court regarding the submission of hearsay statements in support of the Superintendent's recommendation. By law, the Circuit Court participated as an appellate tribunal only. Its action affirming Ms. Smith's termination necessarily encompassed rejection of her challenge to the admission of hearsay testimony and her argument that the Board violated due process rights established in TEDA and the South Carolina constitution.[1]

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[1] The District asserts that because the Circuit Court did not issue an order specifically rejecting Ms. Smith's hearsay and due process argument, the issue is not preserved for appeal. (Resp. Brief p. 19, fn. 1) This

LEGAL ARGUMENT ON REPLY

I. The District is bound by the mandatory provisions of TEDA.

In adopting TEDA, the General Assembly specified that in teacher termination proceedings "all testimony at any hearing shall be taken under oath." S.C. Code Ann. § 59-25-460. The Act further states that the "teacher has the privilege of being present at the hearing with counsel and of cross-examining witnesses and may offer evidence and witnesses and present any and all defenses to the charges." S.C. Code Ann. § 59-25-470. Accordingly, the plain language of TEDA requires that any charges against Ms. Smith be presented "under oath" and subject to cross-examination.

II. Hearsay was relied upon in terminating Ms. Smith's employment.

Throughout its brief, the District makes reference to "concerns" about Ms. Smith expressed by parents and students. Examples are offered from as long ago as 2006 during which Ms. Smith's former Principal stated that she "had received in excess of ten complaints." (Resp. Brief pp. 3-4) The District argues that during 2008-2009, concerns were "brought to the administration from parents of students" and that Ms. Smith's Principal told the Human Resources Director that she was "receiving numerous complaints from parents." The District indicates that the "children felt uncomfortable in the classroom, they were confused on assignments and the classroom atmosphere was harsh." (Resp. Brief p. 7) The District ignores 2009-2010, but describes the complaints received by Ms. Smith's Principal in the early weeks of the 2010-2011 school year in

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argument ignores the role of the Circuit Court in this proceeding. As addressed below, objection to hearsay was presented and ruled upon by the Board acting as the "trial court." The District concedes that the Board "upheld" the Superintendent's recommendation of termination and that the Circuit Court "affirmed" the Board's decision. In this context, there can be no question that Ms. Smith's objections to hearsay presented to and rejected by the Board and Circuit Court are preserved for review.

detail. (Resp. Brief pp. 10-12) The Principal testified at length about these "concerns" even though she had not personally witnessed improper classroom conduct by Ms. Smith. Without any supporting first-hand knowledge, the Principal testified that she "felt like a good number of Ms. Smith's students were afraid of her, fearful of asking questions in her class for fear of embarrassment or humiliation and many, many times very unclear of what to do with their assignments." (Resp. Brief p. 10)

The Superintendent relied upon the second and third-hand reports in making her recommendation to terminate Ms. Smith's employment. For example, the letter recommending termination states that during the 2010-2011 school year alone "out of the 86 students you taught, the parents of 25 students made 161 complaints about you to your principal." The letter concludes by stating "the parental complaints raised against you are excessive in number, and cannot legitimately be blamed on the administration, since you received similar parental complaints at three different schools where you have been assigned." (Respondent's Ex. 1)

The Superintendent chose to accept the truthfulness of alleged parent and student complaints in making her recommendation to terminate Ms. Smith's employment. Despite timely objections, the Board heard and considered the hearsay relied upon by the Superintendent. (Bd. T. pp. 13-45; pp. 54-59; pp. 513-516) To explain the absence of factual findings, the District represents that the Board's vote "approved" and "affirmed" the Superintendent's recommendation. (Resp. Brief pp.17, 29) On appeal to the Circuit Court, Ms. Smith preserved and argued the objections raised during the Board hearing. (Cir. Ct. T. p. 3, line 21-p. 19, line 13; p. 38, line 15-p. 39, line 15)

There can be no question that hearsay played a dominant role in Ms. Smith's termination. Unlike Barber v Greenville County, 327 S.C. 31, 448 S.E.2d 314 (1997) offered by the District, the issue on appeal is not "notice" of alleged deficiencies , but the truthfulness of the underlying allegations. (Resp. Brief p. 21) To support Ms. Smith's termination, the District was obligated to establish that the concerns derived from parents and students who did not testify were true and substantial. The District did not and cannot do this because it elected not to call any student and offered only two parents who had never visited Ms. Smith in her classroom.

III. Children's out of court statements cannot be accepted on faith alone.

The hearsay in the record before the Court is not only abundant, it is multi-layered. The Superintendent, who did not visit Ms. Smith in the classroom and who did not speak with any student, received her information from the Human Resources Director and the Principal. Neither the Human Resources Director nor the Principal had first-hand information concerning Ms. Smith's conduct in the classroom. The parents who spoke with the Principal likewise did not observe Ms. Smith's alleged conduct. Instead, the parents relied upon the unsworn statements of their middle school children. Accordingly, the recommendation made by the Superintendent, as affirmed by the Board and Circuit Court, is removed from testimony "under oath" by more than three generations.

In hearing Ms. Smith's appeal, the Circuit Court Judge asked whether it would be appropriate to call students to testify in such a proceeding. The answer is obviously yes. If the cause of the termination is alleged mistreatment of students, there can be no doubt that the Board is obligated to hear the testimony offered in support of this charge. (Cir. Ct. T. p 7, line 22-p. 10, line 5) In this State, perhaps unlike others, the Supreme Court

has determined that when important issues of fact are at stake, first-hand information is required to be submitted. See, Brown v. S.C. Board of Education, 301 S.C. 326, 391 S.E.2d. 866 (1990) Notably, the General Assembly has addressed the procedure for offering out-of-court statements by children in abuse and neglect cases. There, the child must be available to testify at the proceeding or by videotape, unless unavailable, incompetent, or a "substantial likelihood" of severe emotional trauma is shown. S.C. Code Ann. § 19-1-180.

The District was not obligated to rely upon student complaints. It had the option to install an adult observer in Ms. Smith's classroom. The District elected not to take this measure and cannot use this decision as a basis to rely upon hearsay complaints by students.

The District argues that Ms. Smith could have called the students as hostile witnesses. (Resp. Brief pp. 19-20, *citing* Hinkle v. Garrett-Keyser-Butler Sch. Dist., 567 N.E.2d. 1173 (Ind. Ct. App. 1991)) This argument ignores several important points. First, apart from the two parents offered, the District did not disclose the names of the parents and students who allegedly complained. Second, Ms.Smith was limited by law to ten subpoenas. S.C. Code Ann. § 59-25-460. The Superintendent claimed that the parents of more than 25 students complained about her in the fall of 2010 alone, not to mention multiple parents in preceding years (Dist. Ex. 1). Finally, the Hinkle opinion notes that hearsay would have been inadmissible prior to the adoption of a law allowing its introduction. 567 N.E.2d. at 1177-1178. Unlike the Indiana legislature, our General Assembly has determined that testimony presented at teacher hearings must be "under oath" and there must be the opportunity for "cross-examining witnesses." S.C. Code Ann.

§ 59-25-460 and 470. The District's reliance upon Hinkle is obviously misplaced, as is its contention that general administrative procedures diminish rights provided by specific provisions of TEDA. Spectre, LLC v. South Carolina Dept. of Health and Environmental Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010) (a more specific statute is considered an exception to or qualifier of a general statute and must afforded its intended effect) See also, Mims v. Alston, 312 S.C. 311, 440 S.E.2d 357 (1994) (a specific statute prevails over a more general one)

IV. Controlling law requires reversal of Ms. Smith's termination.

This Court and the Supreme Court have determined that the provisions of TEDA are substantive and mandatory. (App. Brief p. 10) Controlling principles of statutory construction dictate that words employed by the General Assembly are to be afforded their common, plain meaning. Additionally, when the General Assembly imposes an obligation, it is presumed to know what it is doing. See, Spectre, 386 S.C. at 373, 688 S.E.2d at 852.

Unlike the cases relied upon by the District, this appeal presents squarely the question of due process. Hearsay is not a minor, cumulative or harmless aspect of the recommendation to terminate Ms. Smith's employment. Despite the District's best efforts to cherry pick the record, hearsay is front and center in the Superintendent's decision to recommend termination and necessary to the decisions by the Board and Circuit Court affirming that termination.

The District would invite this Court to join a minority of misguided jurisdictions that accept a watered down version of due process for the sake of expediency. This is not the law of our State and this is not justice. Reduced to its basics, the District's argument

will make all teachers beholden to their students, timid and uncertain of their futures when imposing discipline or awarding deservedly low grades. The "complaints" in this case may have been substantial. Because no first-hand testimony was offered, however, neither the Board nor the Circuit Court nor this Court can make that judgment.

Our courts have adhered to the principles of due process even in unpopular and controversial proceedings. See, for example, Shell v. Richland School Dist. One, 262 S.C. 408, 608 S.E.2d 428 (2005) (reinstating teacher following arrest for drug offense) A hearing to terminate a teacher's employment cannot be reduced to a popularity contest. If the District truly had concerns about Ms. Smith dating more than five years from her suspension in the fall of 2011, it had the opportunity and the obligation to follow the procedures set forth in TEDA, including written notice, assistance and an opportunity to improve. Instead, the District chose to placate parents by removing their children from Ms. Smith's classes and did not follow its obligations under law. In this context there can be only one result, reversal of Ms. Smith's termination and remand for a hearing in keeping with law. See, Creola Young v. Charleston County School District, 397 S.C. 303, 725 S.E.2d 107 (2012)

CONCLUSION

For the reasons set forth herein and in Appellant's brief, the controlling law of this State and the guarantees contained in our constitution require reversal of Ms. Smith's termination from employment and remand for proceedings consistent with law as enacted by the General Assembly and interpreted by our Supreme Court.

*****SIGNATURE PAGE FOLLOWS*****

NICKLES LAW FIRM, LLC

By: _____

W. Allen Nickles, III, SC Bar No. 4226
Susan M. Fittipaldi, SC Bar No. 14225
1519 Richland Street
Columbia, South Carolina 29201
(803) 779-8080

Attorney for Petitioners

Columbia, South Carolina
May 30, 2013

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APPELLANT'S DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the materials listed in the Designation of Matter filed on March 19, 2013, Appellant proposes the following be included in the Record on Appeal:

1. Transcript of Board Hearing pages 13-45;

2. Transcript of Circuit Court hearing pages 3-19; 38-39

I certify that this designation contains no matter which is irrelevant to this appeal.

NICKLES LAW FIRM, LLC

BY: _____

W. Allen Nickles, III, SC Bar No. 4266
Susan M. Fittipaldi, SC Bar No. 14225
1519 Richland Street
Columbia, South Carolina 29201
(803)779-8080

Attorneys for Appellant

May 30, 2013

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served Appellant's Reply Brief and Designation of Matter to be Included in the Record on Appeal by depositing a copy of same in the United States Mail, postage prepaid and addressed as follows:

Kenneth L. Childs, Esquire
Vernie L. Williams, Esquire
Kathy Mahoney, Esquire
Childs & Halligan, P. A.
Post Office Box 11367
Columbia, South Carolina 29211

This 30 day of May, 2013.

NICKLES LAW FIRM, LLC

By: _____

W. Allen Nickles, III, SC Bar No. 4266
Susan M. Fittipaldi, SC Bar No. 14225
1519 Richland Street
Columbia, South Carolina 29201
(803) 779-8080

Attorneys for Appellant