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 FINAL BRIEF

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STATEMENT OF THE CASE

This is an appeal from the Horry County School Board ("Board") decision to terminate Appellant Jacqueline Smith ("Ms. Smith"), a veteran teacher.

By letter dated January 5, 2011, the Horry County School District ("District") notified Ms. Smith of its recommendation that she be terminated from employment as a continuing contract teacher. (R. pp. 231-234) Ms. Smith timely requested a hearing before the Board which was held on March 24 and 25, 2011. On March 25, 2011, the Board voted to uphold the District's recommendation that Ms. Smith be terminated. On April 25, 2011, Ms. Smith filed a Notice of Appeal with the Horry County Circuit Court requesting that it reverse the Board's decision. Respondent Horry County Schools filed an Answer and Return dated May 3, 2011.

After both parties submitted briefs, the Honorable Benjamin Culbertson held a hearing on September 13, 2012. Judge Culbertson issued a form Judgment on September 20, 2012, without an accompanying written order, affirming the Board's decision. (R. p. 1) The Judgment was filed with the Clerk of Court on October 26, 2012. Ms. Smith timely filed and served a Notice of Appeal to this Court. (R. pp. 5-9)

STATEMENT OF THE FACTS

Ms. Smith began teaching in the District in 1999, and in 2003, received the Teacher of the Year award for North Myrtle Beach Elementary School. Prior to her termination, the District issued Ms. Smith continuing contracts to teach for each year of her employment.[1]

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[1] Ms. Smith maintains a professional teaching certificate and has been employed under a continuing contract in Dillon County since the 2011-2012 school year.

During the 2007-2008 school year, Ms. Smith taught at North Myrtle Beach Intermediate School. Due to conflicts with her principal, in January 2008, Ms. Smith filed a grievance pursuant to Board policy. Ms. Smith was concerned that the principal was not including her in discussions with parents about her teaching. (R. p. 205)

Soon after filing her grievance, Ms. Smith was placed on administrative leave and reassigned to a new school, Carolina Forest Elementary School for the remainder of the school year. (R. pp. 175-178; pp. 205-209) The District's Human Resources Director testified that the administration was concerned about Ms. Smith's relationship with her principal and wanted to give her a "fresh start." Notably, the District did not issue an improvement plan or place Ms. Smith on a conditional contract, measures established by law and policy to provide formal notice of perceived substandard performance. (R. p. 172)

Ms. Smith was reassigned to Ocean Bay Middle School for the 2008-2009 school year. Because of a significant drop in student enrollment the following fall, Ms. Smith was transferred to Conway Middle School for 2009-2010 under the supervision of Principal Mary Clark. During 2008-2009 and 2009-2010, Ms. Smith was routinely reemployed under continuing contracts.

Beginning the 2010-2011 school year, Ms. Margaret Sordian was named principal of Conway Middle School. Ms. Sordian testified that she immediately began receiving a large number of parental complaints about Ms. Smith. (R. p. 158) District policy calls for the teacher to be advised and included in parental conferences. (R. pp. 447-448) Nevertheless, Ms. Smith was not offered an opportunity to meet with or participate in the majority of "complaints" identified by Ms. Sordian. (R. p. 219)

On October 28, 2010, fewer than nine weeks into the school year, Ms. Smith was placed on administrative leave with pay. Ms. Smith did not return to the classroom. Instead, by letter dated January 5, 2011, the District's Superintendent informed Ms. Smith that she was being recommended for termination from employment. State law requires that continuing contract teachers like Ms. Smith receive written notice of reasons for discharge and an opportunity to confront the District's witnesses. S.C. Code Ann. §§ 59-25-460 and 470.

The termination letter issued to Ms. Smith identified S.C. Code Ann. § 59-25-430, requiring proof of incompetence manifesting an unfitness to teach. The letter also identified § 59-25-440, requiring written notice of perceived deficiencies, assistance and a reasonable time for improvement. (R. pp. 231-234) Ms. Smith submitted a timely request for a hearing before the Board to challenge the recommended termination. By law, this required the District to present evidence establishing "good and just cause" for termination. S.C. Code Ann. § 59-25-470.

At the outset of the hearing, the District submitted numerous proposed exhibits, including documents containing hearsay statements by parents and students who were not identified as witnesses. (R. pp. 231-238; 240-241; 246-248; 250-269; 274-300; 303-320) Ms. Smith objected to the admission of any exhibits or testimony that contained hearsay statements unsupported by witnesses available for cross-examination. The Board did not rule on the objection when presented, but voted at the conclusion of the hearing to consider all of the exhibits and testimony presented, including all of the hearsay statements. R. pp. 98-103; pp. 224-227) After considering the disputed evidence, the Board voted 6 to 1 to uphold the recommendation to terminate Ms. Smith's employment.

The dissenting member commented that the Board could only terminate Ms. Smith under S.C. Code Ann. § 59-25-440, requiring written notice of her shortcomings and reasonable time for improvement, and that the District did not satisfy these requirements. (R. p. 229) By letter dated March 29, 2011, the Board Chair confirmed in writing the Board's decision to uphold the recommendation of the superintendent that Ms. Smith's employment with the District be terminated. (R. p. 2) The letter states only that the Board found "good and sufficient reasons to justify the termination of your employment" without providing any factual findings supporting its decision. Id.

STANDARD OF REVIEW

On appeal from termination of a continuing-contract to teach, the Court of Common Pleas has the authority and duty to correct errors of law. Lexington County School District one Board of Trustees v. Bost, 282 S.C. 32, 316 S.E.2d 677 (1984) Where, as here, the challenged action arises from immediate termination, the record must contain evidence of unfitness to teach that is "undeniably and abundantly present." Kizer v. Dorchester County Vocational Educ. Bd. of Trustees, 287 S.C. 545, 550, 340 S.E.2d 144, 147 (1986) The Court may reverse or modify a decision if it is affected by an error of law or is arbitrary or capricious. S.C. Code Ann. § 1-23-380(5)(d), (f) (Supp. 2010) Additionally, the Court has the authority to reverse any decision "made upon unlawful procedure" or in excess of "statutory authority." S.C. Code Ann. § 1-23-380(6) (Supp. 1997), cited in Adamson v. Richland County School District One, 332 S.C. 121, 128, 503 S.E.2d 752, 755-56 (Ct. App. 1998)

This appeal is governed by the Teacher Employment and Dismissal Act. ("TEDA") S.C. Code Ann. § 59-25-410 et seq. In Sections 59-25-460 and 470, TEDA

requires that a continuing contract teacher be provided substantive and procedural due process by the school district's board within the time frames specifically delineated by statute. The hearing process established by the General Assembly in TEDA compels school boards to provide teachers the opportunity to confront witnesses and to challenge the introduction of evidence offered to substantiate any charges presented. Appellate courts have the responsibility of enforcing TEDA and ensuring that teachers are afforded the full process required by law.

Because school boards are delegated the responsibility to see and hear witnesses called to testify, review of the factual issues on appeal from teacher dismissals is determined by substantial evidence. Barr v. Bd. of Trs. of Clarendon County Sch. Dist. No. 2, 319 S.C. 522, 462 S.E.2d 316 (Ct. App. 1995) Substantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. Laws v. Richland County School District 1, 270 S.C. 492, 243 S.E.2d 192 (1978) The court must reverse an adverse decision that is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(A)(6)(e)(Supp. 1997); Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981) Moreover, this deferential standard of review does not require a reviewing court to accept a decision at face value without an explanation for the reasoning exercised below. Porter v. South Carolina Public Service Commission, 333 S.C. 12, 21, 507 S.E.2d 328, 222 (1998)

LEGAL ARGUMENT

I. The Circuit Court erred in upholding a decision that was rendered in violation of due process.

The South Carolina Constitution guarantees all citizens the right to due process of law. S.C. Const. art. I, § 3. Additionally, the Constitution states that no person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency except on due process and an opportunity to be heard. S.C. Const. art. I, § 22. This same section provides that no person shall be deprived of liberty or property "unless by a mode of procedure prescribed by the General Assembly." Id.

The General Assembly established the mode of procedure to be used in the dismissal of public school teachers in Title 59, Chapter 25, Article 5 of the Code of Laws. See, S.C. Code Ann. §§ 59-25-410 et seq. These statutes provide continuing contract teachers specific rights, including:

1. Notice of reasons for potential separation (§59-25-440);
2. The right to a hearing (§59-25-460); and
3. Substantive and procedural due process including the opportunity to cross-examine witnesses (§ 59-25-470)

To support its recommendation to terminate Ms. Smith the District presented evidence, over the objection of counsel, consisting of hearsay statements of numerous students and parents. Although only two parents testified at the hearing, the hearsay statements of numerous others were accepted by the Board. The students and parents who made these statements were not present to testify.[2] Despite the clear language of the state

[2]For example, the letter recommending termination was presented as the administration's first exhibit to the Board. This letter alleges that "during the 2010-11 school year alone, out of the 86 students you taught, the

constitution and TEDA, the Board did not honor Ms. Smith's right to cross-examine the witnesses whose statements were used against her.

Because this appeal is governed by TEDA, due process requirements guaranteed in that Act control. The "primary rule of statutory construction is that the Court must ascertain the intention of the legislature." Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002) Where the terms of a statute are clear, the court must apply those terms according to their literal meaning without resort to subtle or forced construction to limit or expand the statute's operation. Moody v. Dairyland Ins. Co., 354 S.C. 28, 30-31, 579 S.E.2d 527, 529 (Ct. App. 2003) If a statute's language is plain, unambiguous, and conveys a clear meaning, "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 582 (2000) Further, it is manifest error to look beyond the literal wording of the statute itself when the language is clear and plain. Paschal v. State Election Commission, 317 S.C. 434, 454 S.E.2d. 890 (1995) This Court need look no further than the plain language of TEDA to determine that Ms. Smith was not provided the full due process to which she was entitled.

Our Supreme Court affirmed the right to be heard in a meaningful fashion in Brown v. S.C. Board of Education, 301 S.C. 326, 391 S.E. 2d 866 (1990) Citing Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972), the Court in Brown held "[t]he fourteenth amendment Due Process Clause requires procedural due process be afforded an individual deprived of a property or liberty interest by the State." In reversing the revocation of the teacher's certificate, the Court stated "the Board must comply with the

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parents of 25 students made 161 complaints about you to your principal." (R. p. 232) The District did not identify the parents or students and offered no admissible evidence to substantiate these alleged complaints.

statutes and regulations providing for the revocation of a teaching certificate *before* depriving [appellant] of her teaching certificate." Brown, 301 S.C. at 330, 391 S.E.2d at 868 (emphasis added) Twenty years later, in Brown v. James, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010), this Court held that the language of TEDA is unambiguous regarding procedure and that "the observance of the procedural requirements of the Employment and Dismissal Act is **mandatory and not a matter of discretion**." Id. at 53. (emphasis added) In that case, a teacher was not afforded the hearing required by § 59-25-470 prior to a vote upholding the recommendation of termination. In reversing summary judgment in favor of the district, this Court found that the "procedure is set in place to afford the teacher a meaningful review of the evidence prior to the Board making a final determination..." Id. at 55. Here, Ms. Smith was not afforded a meaningful review of the evidence because she was deprived the opportunity to fully challenge hearsay presented to support her termination.

In other jurisdictions, even where a statute did not specifically provide for cross-examination, courts have recognized the due process right of public employees to confront and cross-examine witnesses who provide evidence used against them in termination proceedings. For example, Case v. Shelby Civil Service Merit Board, 98 S.W.3d 167 (Tenn. App. 2002), holds that due process requires an opportunity to confront and cross-examine adverse witnesses where facts giving rise to the public employee's termination are in dispute. As noted in Case, other jurisdictions have reached the same conclusion. See, Bartlett v. Krause, 209 Conn. 352, 551 A.2d 710 (1988); Ohio Assoc. of Pub. Sch. Emp. v. Lockwood City Sch. Dist. Bd. of Educ., 68 Ohio St.3d 175, 624 N.E.2d 1043 (1994) See also, Winegar v. Des Moines Indep. Comm. Sch. Dist., 20

F.3d 895 (8th Cir.), cert. denied, 115 S. Ct. 426 (1994)(public school teacher was denied due process because he was not given the opportunity to confront and cross-examine witnesses against him); Garraghty v. Comm. of Va. Dept. of Corrections, 52 F.3d 1274, 1282-83 (4th Cir. 1995)(public employee who was fired based on allegations that he engaged in sexual harassment was denied due process because the employer failed to afford him the opportunity to confront and cross-examine the witnesses against him); Casada v. Booneville School Dist. No. 65, 686 F.Supp. 730 (W.D. Ark. 1988)(failure to allow teacher to cross-examine witnesses against him was a denial of due process and violated the state teacher dismissal act)

McClure v. Independent School Dist. No. 16, 228 F.3d 1205 (10th Cir. 2000) found that a school district violated due process when it failed to allow cross examination of adverse witnesses at a pre-termination hearing. The plaintiff, a school principal, brought suit in federal court alleging violation of her due process rights by introduction of affidavits from thirteen witnesses. Id. at 1211. Because no post-termination hearing was held, due process was governed by post-termination requirements. Finding "a 'full post-termination hearing' is understood to include the right to representation by an attorney and the right to cross-examine adverse witnesses, the court held that allowing the affidavits to be used against plaintiff violated her due process rights." Id., citing Workman v. Jordan, 32 F.3d 475, 480 (10th Cir. 1994)

As in McClure, Ms. Smith's due process right to confront and cross-examine adverse witnesses at her termination hearing was violated. The Board was provided numerous documents replete with statements of anonymous parents accusing Ms. Smith of wrongdoing to which she could not adequately respond. Some examples include:

- District Exhibit 19 contains 27 anonymous parental complaint and concerns, including one that a guidance counselor reported receiving complaints that Ms. Smith yelled at students, failed to provide clear expectations and that students were afraid to ask for clarification.

(R. pp. 274-278)

- District Exhibit 26 contains 19 anonymous complaints, including allegations that Ms. Smith would not return phone calls, that a child was "terrified" of her and that she had been "unprofessional" to a parent.

(R. pp. 314-318)

- District Exhibit 17 contains a list of complaints against Ms. Smith including that she made inappropriate comments in class, embarrassed students, failed to give clear instructions, released students late from class and played "RAP" music.

(R. pp. 267-269)

The District may argue that hearsay and improperly admitted documents were "cumulative" and "harmless." This argument, however, ignores the mandatory nature of TEDA acknowledged by the Supreme Court in Johnson v. Spartanburg Co. School Dist. No. 7, 314 S.C. 340, 444 S.E.2d 501 (1994) and by this Court in Brown. Because the process below was infected by the admission of anonymous and hearsay statements, the Board's decision to consider all information presented renders Ms. Smith's termination invalid *per se*.

II. The Circuit Court erred in upholding actions taken in violation of Board policies.

A public agency must follow its own rules. In Hogsed v. Lancaster Area Schools Board of Trustees, 283 S.C. 42, 320 S.E.2d 724, 727 (S.C. App. 1984), this Court held that policies adopted by a school board are contractual and binding upon the district administration as well as its employees. As our Supreme Court emphasized in Triska v. DHEC, 292 S.C. 190, 355 S.E.2d 531 (1987), [an agency] "must also follow its own regulations and the provisions of the Administrative Procedures Act ... in carrying out the legitimate purposes of the agency." Id. at 194, 533. When a government agency does not follow its regulations or procedures, due process is violated and its action cannot stand. See, United States v. Heffner, 420 F.2d 809, 811-12 (4th Cir. 1969), citing the rule established in United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954) that an agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.

In the instant case, the District violated a number of its own policies in actions leading up to Ms. Smith's termination. For example, when a recommendation for termination in based upon performance deficiencies, the District is required to provide a teacher with written notice of the perceived deficiencies and a reasonable time to for improvement. (R. pp. 361-362) This policy also requires that the administration make reasonable efforts to assist the teacher including formal evaluation and/or placement on an improvement plan. Prior to her termination, Ms Smith was not placed on an

improvement plan or formally evaluated. Instead, she was placed on leave with no assignment for almost six months.[3]

Despite claims at the hearing of long-standing concerns about her performance, the District issued Ms. Smith a continuing contract for every school year leading up to her termination. If her performance was a concern, Ms. Smith was entitled to assistance and evaluation through a formal process in keeping with her continuing contract. The District's policy on Evaluation of Instruction and Administrative Staff, which refers to the Personnel Handbook, states that a continuing contract teacher identified as having deficiencies may be placed on a "continuing with conditions" contract. (R. p. 172, lines 1-12) The District did not take this step, thereby depriving Ms. Smith the benefit of this policy. (R. pp. 361-362)

The District primarily relied upon parental complaints in making its recommendation to terminate. However, the District did not follow its own policies in dealing with parental complaints. Under the policy entitled Grievances Filed by Students (R. pp. 447-448), if a student or parent has a complaint about a teacher, the complaint should first be brought to the attention of the teacher. In most instances, however, complaints went directly to the principal without giving Ms. Smith an opportunity to address and possibly alleviate the concern. (R. pp. 220-223) If the principal reported a concern, Ms. Smith was often denied specifics or not told student or parent making the complaint so that she could not adequately explain or defend herself. Id. The District's policy is in place for a reason - so that matters can be handled quickly and with the most information available. When the policy is violated, as it was in this case, the teacher

[3] Ms. Smith's principal presented her with an assistance plan in the fall of 2010. When Ms. Smith disagreed with the need for improvement, the District withdrew assistance and removed her from the classroom rather than comply with its statutory duty.

cannot adequately defend herself against serious complaints. Because the District failed to follow its own polices, Ms. Smith's termination must be reversed.

III. The Circuit erred in upholding a termination not supported by substantial evidence.

The District argued to the Board that its witnesses and evidence reflected a "common theme...of numerous parental complaints." (R. p. 104, lines 10-14) The District's Director of Human Resources, responsible for overseeing the investigation of Ms. Smith's alleged deficiencies while she was on leave, conceded that he recommended termination because of a "pattern" of parental complaints. (R. pp. 173-174) Nevertheless, evidence offered to support parental complaints was overwhelmingly hearsay, including documents containing and referring to alleged statements of parents and students who were not called to testify. Although the District asserted that it had received complaints about Ms. Smith from the parents of 25 students, only **two** parents testified at the hearing. Both parents were allowed to testify for their children and neither had any first hand information about Ms. Smith's conduct in the classroom. (R. pp. 139-140; 148-149) The submission of absent parental and student complaints had the intended effect of prejudicing the Board against Ms. Smith, without affording her the opportunity to confront or examine her actual accusers.

In an attempt to bolster its termination recommendation, the District argued that its concerns about Ms. Smith at the start of the 2010-2011 school year were similar to concerns encountered in 2008. However, the Human Resources Director testified that in 2008 the District did not issue Ms. Smith a conditional contract (one that required improvement in performance) because there was no intent to express concerns about her

performance. (R. p. 172, lines 1-19) During the next two school years, Ms. Smith worked with different supervisors and had no notice of major issues with her performance. In fact, Ms. Smith was commended for her students' wonderful test scores. (R. pp. 211-213) Following her transfer to Conway Middle in 2009-2010, Ms. Smith's principal offered strategies for improvement and she complied. (R. pp. 181-183) Thereafter, District issued Ms. Smith a continuing contract for 2010- 2011 with no conditions or requirements to improve her performance.

In contrast to the District's reliance on hearsay, Ms. Smith presented witnesses at the hearing who testified to her strengths as a teacher and their first-hand knowledge of her teaching. Anita Chestnut, a teacher at Conway Middle taught on same team as Ms. Smith. (R. pp. 184-185) Ms. Chestnut testified that she worked well with Ms. Smith, and never heard her yelling. (R. p. 185) Gretta Gore, a school guidance counselor at North Myrtle Beach Intermediate, testified that her grandchild was a student in Ms. Smith's class. (R. pp. 190-191) Ms. Gore testified that Ms. Smith was very cooperative and, based upon personal observation of her in the classroom, commended her on the amount of work and effort she put into teaching. On one occasion, Ms. Gore dealt with a parent who was upset with what she perceived to be unfair treatment of her daughter by Ms. Smith. When Ms. Smith explained the assignment to the parent and the student admitted not having finished it, the parent apologized to Ms. Smith. (R. pp. 191-199) Ellen Gerard, a teacher at North Myrtle Beach Intermediate, testified that she was impressed with Ms. Smith's high test scores. (R. pp. 200-202) Ms. Gerard never observed Ms. Smith mistreat or yell at a child and characterized her as hardworking and dedicated. Id.

Ms. Smith began teaching in 1993 and became employed with Horry County in 1999. (R. p. 203) After Ms. Smith testified on behalf of another teacher at a hearing before the Board, she began to experience criticism of her teaching. (R. pp. 204-205) During the 2007-08 school year, Ms. Smith had problems with her principal because the principal failed to send parents to her when they expressed concerns about assignments or instruction. As a result, Ms. Smith filed a grievance in January 2008. Rather that address her grievance, the District placed Ms. Smith on administrative leave in February 2008 and transferred her to another school for the remainder of the school year. (R. pp. 205-211)

Ms. Smith taught for the next two years without incident, and had good relationships with both principals. (R. pp. 213-215) The 2010-2011 school year was much different. From the beginning Ms. Smith's new Principal, Ms. Sordian, was not supportive. (R. p. 215) For example, early in 2010, Ms. Smith met with the administration and was told that told she might need an improvement plan, but no plan was ever presented. (R. p. 218) When Ms. Sordian told M. Smith that parents had complained, she did not offer any specifics that Ms. Smith could address. (R. p. 219) Regarding Parent A who testified at the hearing, Ms. Smith testified that while she had received an e-mail that the student was having problems, the parents never indicated that she was the source of the problems. That student received an "A" in Ms. Smith's class. (R. pp. 216-217)

Considering the record as a whole, the decision to terminate Ms. Smith's employment is not supported by substantial evidence. As stated above, substantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one

side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the public body reached or must have reached in order to justify its action. Laws v. Richland County School District 1, 270 S.C. 492, 243 S.E.2d 192 (1978) A constitutional violation, including the right to process established by statute, as guaranteed in Article I, § 22 of the South Carolina Constitution, is a wrong that demands a remedy. See LaSalle, 386 S.C. at 281, 688 S.E.2d at 123 (due process requires a rehearing) The procedural requirements of TEDA are mandatory, thus the District does not have the discretion to ignore them. Brown v. James, *supra.* Removing improper hearsay from consideration renders the decision to terminate Ms. Smith's employment unsupported by substantial evidence in violation of S.C. Code Ann. § 59-25-470.

IV. The Circuit Court erred in upholding the Board's decision without identifying supporting facts and legal conclusions.

Our Supreme Court has held that administrative bodies, including school boards, must make sufficient findings of fact to enable a reviewing court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings. Lee County School District Board of Trustees v. MLD Charter School Academy Planning Committee, 371 S.C. 561, 567-568, 641 S.E.2d 24, 28-29 (2007), citing Porter v. South Carolina Public Service Commission, 333 S.C. at 21-22, 507 S.E.2d at 332, 333 (1998) "Where material facts are in dispute, the administrative body must make specific, express findings of fact. " Id. at 21. The Court went on to hold that the reviewing courts will not *sua sponte* search the record for substantial evidence supporting a decision when an administrative agency's order inadequately sets out the

agency's findings of fact and reasoning. Id. In Porter, the Supreme Court found the PSC's order deficient because it made no findings of fact and failed to provide any explanation of its conclusion, reciting instead the conflicting testimony and general legal principles. Id. at 21-22.

In this case, the Board voted at the conclusion of the fourteen hour hearing to uphold the recommendation of termination without providing any explanation for its decision. (R. pp. 228-229) The letter recording Board's action identifies no factual findings and does not identify the statutory basis for Ms. Smith's termination. (R. p. 2) Similarly, the Circuit Court offered no explanation for its judgment affirming the Board's action.

In argument to the Circuit Court, the District portrayed Ms. Smith as a cruel and unfeeling teacher who instilled fear in her students. For example, the District highlighted the following description of Ms. Smith offered by Ms. Sordian, her principal in the fall of 2010:

> I 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. There was no clear example or clarity of assignments and many were confused as to what they should do.

(R. p. 170, lines 10-17)

Like her principal, the District's superintendent had no first-hand knowledge about Ms. Smith's conduct or performance in the classroom. Nevertheless, the District relied upon the superintendent's testimony about "concerns that all of the schools [forming] the basis for her termination" to support Ms. Smith's termination. (R. pp. 55; 228-230) The District also presented the Circuit Court the superintendent's testimony

that she received "reports from the parents [that] were just reprehensible and something I didn't want to allow in our schools." (R. p. 53 *citing* pp. 179-180)

The arguments advanced by the District to the Circuit Court establish that hearsay testimony played a central role in the effort to terminate Ms. Smith's employment. The District attempted to minimize this reliance by arguing to the Circuit Court that a hearing under TEDA is "quasi-judicial" and "not governed by the . . . rules of evidence." (R. p. 62) The District further argued that the Board had the right to rely upon any direct testimony in reaching its decision. As stated above, however, this argument ignores the express guarantee of confrontation provided in TEDA and required for purposes of due process by Article I, § 22 of our constitution.

As a consequence of the District's reliance upon hearsay and attempts to justify termination on the basis of an alleged "pattern" of misconduct, Ms. Smith and this Court can only speculate as to the basis for the decisions reached by the Board and the Circuit Court. For example, although two different statutes were referenced in the letter recommending Ms. Smith's termination, there is no way to know under which statute the recommendation was upheld. The two statutory sections identified in the termination notice require different findings and involve different burdens of proof.

Specifically, S.C. Code Ann. § 59-25-430 provides that a teacher may be dismissed for "evident unfitness for teaching" at any time. An immediate termination can only be upheld where evidence of unfitness for teaching was "undeniably and abundantly present." Kizer v. Dorchester County Vocational Educ. Bd. of Trustees, 287 S.C. 545, 550, 344 S.E.2d 144, 147 (1986) As recognized by this Court, however, S.C. Code § 59-25-440 (1990) applies to "[o]ther deficiencies or shortcomings...[and] must be addressed

by giving the teacher notice and a reasonable time for improvement." Hall v. Board of Trustees of Sumter County Sch. Dist. No. 2, 330 S.C. 402, 406, 499 S.E.2d 216, 218 (Ct. App. 1998). When a teacher's conduct does not demonstrate evident unfitness for teaching, procedural safeguards must be followed to allow the teacher reasonable time to correct the problem. This delineation is an important one. As noted in Johnson v. Spartanburg County School District No. 7, "[t]here must be a distinction between the cases, or it renders the legislature's intent to create procedural safeguards for educators a nullity." Id.

A district is required to report to the State Department of Education when a teacher is terminated for misconduct reasonably believed to constitute grounds for revocation or suspension of the teacher's State Board of Education-issued certificate. S.C. Code of Regs. 43-58.1. Grounds for revocation or suspension of a teacher's license include "incompetence, willful neglect of duty. . .unprofessional conduct . . .cruelty . . . [and] evident unfitness for the position of employment. . ." S.C. Code of Regs. 43-58.1 These examples are echoed in S.C. Code Ann. § 59-25-430 which authorizes dismissal for teachers "incompetent to give instruction in accordance with the directions of the superintendent; persistent neglect of duty [and] willful violation of the rules and regulations of the district board of trustees . . ." The District did not make any report to the State Department of Education regarding Ms. Smith's termination, and she remains a teacher in good standing. These circumstances support the observation of the dissenting Board member that Ms. Smith could be terminated only under S.C. Code Ann. § 59-25-440, after written notice, assistance and reasonable time for improvement, and the District did not present substantial evidence meeting these requirements. (R. p. 229)

In view of the numerous, significant violations of Ms. Smith's right to confront her accusers, the differing burdens of proof under the two statues relied upon by the District, and the absence of specific findings by the Board or the Circuit Court, at a minimum justice requires remand for a new, fair hearing with the opportunity to examine all the persons whose "complaints" caused the District to recommend termination.

CONCLUSION

Ms. Smith has not received the fair hearing to which she was entitled. As a result, she was deprived the property interest provided by her continuing contract in violation of established state law and constitutional principles. Only the intervention of this Court can remedy the statutory and constitutional rights that have been violated. For these reasons, Ms. Smith respectfully requests that this Court reverse the Board's decision and order her reinstatement, subject to the institution of a lawful hearing. Young v. Charleston County School District, 397 S.C. 303, 725 S.E.2d 107 (2012) (reversing a board decision on due process grounds and remanding for a proper hearing); Stono River Environmental Protection Ass'n. v. S.C. DEHC, 305 S.C. 90, 406 S.E.2d 340 (1991) (holding that art. I, § 22 requires notice, opportunity to be heard and cross-examination regarding the merits of a contested case)

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July 10, 2013
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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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief complies with Rule 211(b).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served Appellant's Final Brief by depositing a copy of same in the United States Mail, postage prepaid and addressed as follows:

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