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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2023-001841
Ct. App. Opinion No. 2023-UP-301 (Aug. 30, 2023)
Court of Common Pleas No. 2020-CP-10-02726

Olivia M. Thompson, Ph.D., M.P.H. ..... Petitioner,

v.

College of Charleston; College of Charleston Foundation, Inc.; Frances C. Welch, Ph.D., M.A.; Godfrey A Gibbison, Ph.D., M.S.; and Christopher R. Tobin ..... Defendants

Of whom College of Charleston and Frances C. Welch, Ph.D., M.A. are the ..... Respondents

RETURN TO PETITION FOR WRIT OF *CERTIORARI*

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INTRODUCTION

A. Factual Background Relevant to This Petition

Petitioner Olivia M. Thompson, Ph.D., M.P.H. ("Petitioner") alleges that Respondent College of Charleston ("CofC") employed her, initially as an untenured Assistant Professor and then as a tenured Associate Professor. (*See* R. p. 27 ¶ 11). She alleges that, prior to August 16, 2014, her faculty appointment was in CofC's School of Education, Health, and Human Performance ("EHHP"), under the supervision of Respondent Dean Dr. Frances C. Welch, Ph.D., M.A. ("Dr. Welch"). (*See* R. p. 28 ¶ 14). She claims that Dr. Welch engaged in misconduct toward her, including efforts to terminate her and reassign grants that she had obtained. (*See* R. p. 28 ¶¶ 15-16). CofC and Dr. Welch are sometimes referred to herein as the "Respondents."

Petitioner asserts that, as a result of Dr. Welch's actions, she and CofC executed a July 14, 2017 Memorandum of Understanding ("MOU"), which she contends is an enforceable contract. (*See* R. pp. 71-72). Petitioner alleges that, under the MOU, CofC transferred her from EHHP to the School of Humanities and Social Sciences ("HSS") effective August 16, 2014. (*See* R. p. 30 ¶ 26). Consistent with the MOU, she reported to Dr. Stewart, her Department Chair, and had her offices moved from EHHP to the Riley Center. (*See* R. p. 30 ¶ 27).

Petitioner alleges that on May 14, 2018, she applied to Boeing for a grant of $250,000.00 to fund a project entitled "Veterans Fellowship Program in Sustainable Food Systems" ("SFS Program"). (*See* R. p. 31 ¶ 28). Petitioner alleges that CofC agreed to develop and implement a professional development certificate program and academic credit certificate program in Sustainable Food Systems to be administratively housed within the CofC's School of Professional Studies ("SPS"), even though her academic home would remain in the HSS. (*See* R. p. 32 ¶ 32). The Boeing grant requires that monies that the operation of the SFS Program generates must go back to program expenses. (*See* R. p. 32 ¶ 33).

On July 1, 2019, Dr. Welch became CofC's Interim Provost and Executive Vice President for Academic Affairs. (*See* R. p. 33 ¶ 38). Petitioner avers that — contrary to the MOU —

Dr. Welch moved her back to the EHHP and into its Department of Health and Human Performance ("Department of HHP" or "HEHP"). (*See* R. p. 33 ¶ 39). She asserts that CofC removed her from Dr. Stewart 's supervision and that Dr. Welch returned to the EHHP to be her supervisor. (*See id.*). Petitioner claims she did not agree or consent to this action or to her placement at EHHP. (*See* R. p. 34 ¶ 40). Dr. Welch allegedly did not consult with the Dean of EHHP or the Chair of the Department of HHP. (*See* R. p. 34 ¶ 41). Petitioner claims that CofC refused her demand that it confirm her continued assignment to HSS. (*See* R. p. 34 ¶ 42).

B. Procedural History

Petitioner alleged causes of action for: (1) declaratory judgment against CofC; (2) breach of contract/covenant of good faith and fair dealing against CofC; (3) S.C. Payment of Wages Act against CofC and Dr. Welch; (4) intentional interference with contract; (5) intentional interference with prospective business relations; (6) defamation; (7) civil conspiracy; (8) injunctive relief against CofC and Dr. Welch; (9) conversion against Defendants Foundation and Dr. Tobin (who are not involved in this appeal); and (10) attorneys' fees against CofC under S.C. Code § 15-77-300. (*See generally* R. pp. 24-73). Petitioner's Complaint focused on her claim that Defendants breached the MOU, which she contends is an enforceable contract.

After Petitioner filed her Complaint, she filed a Motion for a Preliminary Injunction ("First Motion"), mirroring the Complaint. (*See* R. pp. 74-75). Petitioner's First Motion sought "a preliminary injunction maintaining the status quo that existed before Defendants CofC and Welch engaged in the contested matters involving Plaintiff's MOU dated July 17, 2014 and her faculty appointment." (*See* R. pp. 93-94). The First Motion claimed that the MOU was intended to "relieve Plaintiff of any further accountability to Defendant Welch, to remove Defendant Welch from having any supervisory role over Plaintiff or her tenure-track, and to preclude Defendant Welch from retaliating against Plaintiff and further adversely interfering with and affecting Plaintiff's Boeing-funded work." (*See* R. p. 77). Petitioner asserted that Respondents violated the MOU in various ways. (*See* R. pp. 81-89). On August 13, 2020, Judge Daniel D. Hall denied the

preliminary injunction requested in Petitioner's First Motion "[a]fter careful consideration" (the "First Order"). (*See* R. pp. 1-3). Petitioner did *not* file a Rule 59(e) Motion to Alter or Amend.

On April 2, 2021, Petitioner filed a second Motion for Preliminary Injunction ("Second Motion"), which relied on the MOU and sought an injunction for reasons similar to the First Motion. (*See* R. pp. 110-197). On July 9, 2021, Petitioner filed her Supplemental Motion for Temporary Restraining Order and Preliminary Injunction ("Supplement"). (*See* R. pp. 218-19). Petitioner's Supplement "incorporates by reference and reasserts all the facts stated in" Dr. Thomspon's Second Motion "as if reiterated herein verbatim." (*See* R. p. 223). The Supplement focused on incidents that allegedly occurred on June 29, 2021, when Public Safety allowed Petitioner to enter the Riley Center.

After a hearing on the Second Motion and Supplement, Judge Roger L. Young, Sr. entered an Order Denying Plaintiff's Motion for Preliminary Injunction ("Second Order") dated November 12, 2021. (*See generally* R. pp. 4-15). This appeal followed. On August 30, 2023, the Court of Appeals filed its Unpublished Opinion No. 2023-UP-301, affirming Judge Young's denial of the Second Motion and Supplement. (*See* App. pp. 1-4) On September 14, 2023, Petitioner filed a Petition for Rehearing. (*See* App. pp. 5-28). The Court of Appeals denied Petition for Rehearing on November 2, 2023. (*See* App. pp. 56-57). On November 28, 2023, Petitioner filed the instant Petition for Writ of *Certiorari*.

ARGUMENTS

A. This Is Not an Appropriate Case for the Court to Grant *Certiorari* Under Rule 242.

The rules governing the grant of petitions for writs of *certiorari* are well-settled in South Carolina and require that *certiorari* be granted only in rare cases, such as:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

See S.C.R. App. P. 242(b).

Petitioner contends that her "Petition raises novel issues under our state law." (*See* Pet. for *Certiorari*, at 1). Her first alleged "novel issue" is "whether the employee must show she is at risk of completely losing her job or professional livelihood" to obtain a preliminary injunction against her employer prohibiting it from breaching a claimed employment agreement. (*See id.*). The second question that Petitioner characterizes as "novel" is "whether a money judgment in favor of an employee is an adequate legal remedy when the injury involves the loss of intangible job benefits that are difficult to quantify or ascertain." (*See id.*). She posits that "[o]ur state courts have yet to resolve these important questions." (*See id.*).

As discussed below, this case does not present novel, disputed legal questions that warrant the Court's clarification. This appeal relates to a request for a preliminary injunction that was denied more than two years ago and relief that could not even be granted at this time. The case has been ruled upon and reviewed. There is no reason to further extend the life of this appeal of an interlocutory order. This appeal does not present novel issues mandating this Court's involvement in an appeal from an interlocutory, ruling regarding interim relief. Plaintiff may attempt to prove at trial that she is entitled to some final relief. There is no reason to further extend this unnecessarily expensive appeal concerning Petitioner's claims for interim relief that have been considered and rejected by two courts.

1. <u>This Case Does Not Present a Novel Question of Law Regarding an Employee's Proof of Irreparable Harm.</u>

The Opinion affirmed Judge Young, in part, because "Thompson failed to demonstrate irreparable harm and an inadequate remedy at law because she is not at risk of a complete loss of her professional practice, and the injuries she alleged can be remedied by monetary damages or an order of the circuit court." (*See* Opinion ¶ 2). Petitioner responds that it "was unnecessary for [her] to prove she was at risk of completely losing her faculty appointment or professional livelihood to establish irreparable harm or inadequacy of a legal remedy" and that "[n]umerous

other courts" had found irreparable harm based on the loss of employment opportunities short of the complete loss of livelihood or profession. (*See* Pet. for *Certiorari*, at 4).

In support of her contention that "numerous other courts" have ruled in her favor on this question, Petitioner cites to various federal court decisions. Her reliance is misplaced for several reasons. First, these cases were never cited before the trial judge, and he never had the opportunity to consider them. In fact, Petitioner did not cite these cases until her Reply Brief of Appellant (App. pp. 186-87), which meant that CofC never had a proper opportunity to brief them. As a result, Petitioner did not properly preserve this claimed "novel issue" for appellate review. *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.").

Even if Petitioner did properly raise the issue, the cases she cites do not support her contention. None of those cases conclude that a breach of an employment contract resulting in a failure to promote constitutes irreparable harm. To the contrary, most of those cases involve discrimination or other civil rights claims — primarily in the law enforcement context where missed promotions can dramatically impact future advancement — accompanied by evidence of actual harm to future career opportunities:

- *Hispanic Nat'l Law Enf't Ass'n NCR v. Prince George's Cty.*, 535 F. Supp. 3d 393, 427 (D. Md. 2021) → This case involved a constitutional challenge to a county's entire promotions system in its police department. The court found irreparable harm because a constitutional violation is, on its face, an irreparable harm. In addition, the court held that the unconstitutional system threatened to impact the future career courses of many officers because of prerequisites for future promotions.

- *Brinkley v. Bd. of Comm'rs*, No. 2:12-CV-00469, 2013 U.S. Dist. LEXIS 11887 (S.D. Ohio Jan. 29, 2013) → This concerned a police officer's Title VII discrimination and retaliation claims. It was "uncontested that Plaintiff has lost employment opportunities including chances for promotion, open assignments, and training." In finding irreparable harm, where, "*because of the nature of her profession*, she is continually losing seniority, on-duty experience, training, and opportunity for advancement."

- *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) → This was an equal protection claim against state officials regarding their treatment of "Deferred Action

for Childhood Arrivals" recipients disparately from other noncitizens who were permitted to use their employment authorization documents as proof of their authorized presence in the United States when applying for driver's licenses. The court found irreparable harm from the inability to obtain a driver's license because of its impact on the ability to earn a living: "Plaintiffs' ability to drive is integral to their ability to work — after all, eighty-seven percent of Arizona workers commute to work by car. It is unsurprising, then, that Plaintiffs' inability to obtain driver's licenses has hurt their ability to advance their careers."

- *Manlove v. Volkswagen Aktiengesellschaft*, No. 1:18-cv-145, 2019 U.S. Dist. LEXIS 93634 (E.D. Tenn. May 17, 2019) → This case involved individual and collectively claims under, *inter alia*, the Age Discrimination in Employment Act. Plaintiff argued that "absent preliminary-injunctive relief, he will be hampered in his career advancement and lose his management skills." The court found that he had *not proven* irreparable harm because, for example, he had not shown that the loss of one promotion would prevent him from obtaining work experience that would allow him to reach a higher position. He also failed to produce any evidence showing that his loss of work opportunities would impact his professional opportunities outside of Volkswagen.

- *Tanner v. Federal Bureau of Prisons*, 433 F. Supp. 2d 117 (D.D.C. 2006) → This was an inmate's claim that a transfer from a federal correctional institution (FCI) to a penitentiary would deprive him of the chance to participate in vocational activities. He request an injunction returning him to the FCI. The court noted that, while the loss of job opportunities or training might be irreparable harm, "[t]o justify preliminary relief, however, the plaintiff must also demonstrate that the injury is certain, great, actual and not theoretical." The court found irreparable harm as to training in the aquaculture program at FCI, since he could not possibly participate while incarcerated at Leavenworth. With regard to the loss of potential future work opportunities, however, the court held that "the loss of prospective job opportunities and success is too speculative to factor in the court's reasoning."

- *Allied Constr. Indus. v. City of Cincinnati*, No. 1-14-CV-450, 2014 U.S. Dist. LEXIS 88695 (S.D. Ohio June 30, 2014) → In this case, the plaintiff was a not-for-profit trade association comprised of approximately 580 member companies. This lawsuit involved Responsible Bidder Ordinances applied to three specific water works projects. The court held that irreparable harm existed because its members could lose work and "the pending contracts already would be awarded and the preparations and work already will have commenced" by the time a permanent injunction could issue.

- *Matter of 35 N.Y.C. Police Officers v. City of N.Y.*, 819 N.Y.S.2d 852 (Sup. Ct.), *reversed*, 2006 NY Slip Op 8889, 34 A.D.3d 392, 826 N.Y.S.2d 22 (App. Div. 1st Dept.) → This case involved claims by NYC police officers who were applying for Port Authority positions and needed to access their personnel files in connection with that process. The City refused. In the case Petitioner cites, the trial court granted injunctive relief to the officers. However, the appellate court ***reversed***, holding that trial court ***abused its discretion*** in granting the officers' requested injunction, in part because they "failed to establish imminent and irreparable harm because none of the

petitioners was guaranteed employment with the Port Authority and all were subject to additional screening." The case cited in Petitioner's Petition for *Certiorari* is not good law and does not support her argument. If anything, this case confirms that Plaintiff has not shown irreparable harm.

- *EEOC v. Tufts Inst. of Learning*, 421 F. Supp. 152 (D. Mass. 1975) → In this case, professors were allegedly terminated because of sex. The court found irreparable harm because the plaintiff's "ability to secure a faculty position has been and will be harmed because of the decision denying her tenure" and "[a]ny prospect for a position at the administrative level in a university seems foreclosed to her where she is not presently employed."

- *Johnson v. City of Memphis*, 444 F. App'x 856 (6th Cir. 2011) → This case involved police officers' claims that the defendant city's promotion processes violated Title VII. The court held that "[w]ithout the preliminary injunction, lost work experience and the opportunity to compete for promotions would be actual and imminent for these twenty-eight Plaintiffs."

These cases do not support Petitioner's argument that the claimed breaches of the MOU threaten to cause irreparable harm. She has not presented the type of evidence that existed in some of these cited cases supporting that a missed opportunity would dramatically harm an employee's career and future opportunities due to the prerequisites for future advancement. To the contrary, the only apparent claimed injury is the loss of this particular opportunity. In other words, unlike the cited cases, there is no evidence here that the denial of this opportunity will forestall future advancement (because of prerequisites to future promotions, etc.).

2. <u>This Case Does Not Present a Novel Question of Law Regarding Whether Difficult to Quantify Losses Do Not Have an Inadequate Legal Remedy.</u>

Petitioner also argues that this case involves the "novel" question of whether "irreparable injury is present and the legal remedy is inadequate in this case because monetary damages would be difficult to determine or ascertain given the intangible nature of the losses to be sustained by Petitioner." (*See* Pet. for *Certiorari*, at 4 (citations omitted)). For the reasons that follow, the Court should deny *certiorari* because there is no novel legal issue requiring this Court's decision or other reason for this court to accept this appeal for review.

The cases that Petitioner cites for her contention that damages that are hard to ascertain cannot be remedied at law are inapposite. In each of those cases, for some special reason (the

novelty of a business service, the unknown harms caused by retention of trade secrets, ...) money damages were not simply hard to ascertain; there was no reasonable way to ascertain them:

- *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994): "Contrary to Appellants' assertion, the historical average of Adelphia's revenue does not provide an adequate basis for measuring the potential loss of revenue because Adelphia only began providing a la carte service in the summer of 1993. The relative novelty of such service clearly makes any calculation of Adelphia's damages 'difficult to ascertain' and, therefore, supports a finding that Adelphia would suffer irreparable harm."

- *Danielson v. Local 275, Laborers Int'l Union*, 479 F.2d 1033, 1037 (2d Cir. 1973) → "[T]he amount of damage attributable specifically to union activity is clearly difficult to assess and measure."

- *Baker v. Boeing Co.*, Civil Action No. 2:18-02574-RMG-MGB, 2021 U.S. Dist. LEXIS 107077 (D.S.C. May 19, 2021) → This case involved the impermissible retention of over 450 pages of documents, along with a company laptop. The court found that the misappropriation of company secrets is irreparable and cannot be quantified in money damages.

In this case, Petitioner has not shown how her claimed injuries are incapable of being quantified in a damage award. She merely speculates that they are because they are intangible. However, juries constantly quantify such intangible harms — often with the aid of expert witnesses. It would not be impossible for Plaintiff to give the jury a reasonable basis for calculating damages. There is no basis for Petitioner's reliance on these case, which involve unique challenges to the ability to prove damages by evidence.

Additionally, she has not shown an unsettled question of law on this topic. To the contrary, her argument is that, under existing South Carolina law, the trial judge erred factually in concluding that injunctive relief is improper. This is not a reason for the Supreme Court to exercise its jurisdiction.

B. <u>The Court Should Deny *Certiorari* Because the Court of Appeals' Opinion is Correct.</u>

As discussed above, this is not an appropriate or desirable case for the Court to take up on *certiorari*. This is particularly so since the Court of Appeals' Opinion is simply correct. For the following reasons (and those set forth in the Final Brief of Respondents, which is incorporated

herein by reference as if set forth at length), the Opinion correctly affirmed Judge Young's denial of Petitioner's Second Motion and Supplement.

1. Petitioner Did Not Carry Her Heavy Burden for Entitlement to Preliminary Injunctive Relief.

The requirements for preliminary injunctive relief are well-settled:

> An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App.2002). Accordingly, the applicant must establish three elements to receive this relief: (1) he will suffer immediate, irreparable harm without the injunction; (2) he has a likelihood of success on the merits; and (3) he has no adequate remedy at law. *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004).

Compton v. South Carolina Dep't of Corr., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). "A preliminary injunction should issue only if necessary to preserve the *status quo ante*, and only upon a showing by the moving party" of these requirements. *See Poynter Invs. v. Century Bldrs. of Piedmont*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010).

a. Petitioner Has Not Shown Irreparable Harm.

Whether "a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules." *See Kirk v. Clark*, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939). Petitioner argued to the Court of Appeals that she will suffer irreparable harm in that she will be subjected to retaliation and deprivation of her rights under the MOU:

> If Respondents are not enjoined, Appellant will suffer interference with her ability to perform her responsibilities as a tenured Associate Professor at the CofC, including the inability to conduct in-person meetings with students and others in her faculty office in the Riley Center and her inability to access and use the equipment and facilities that come with this office location. She will be relocated from the Riley Center to an inferior office location at the Silcox Building despite the deplorable, unhealthy, unsafe, and unworkable conditions that exist there. . . .
>
> Appellant will also be denied the opportunity to apply for and obtain the merit pay increase awarded to other faculty members. Because . . . the increases range from

> 4% to 15% of the faculty member's annual salary — it will not be easy to calculate the financial loss to Appellant after the fact if she is not considered for the merit increase.
>
> Finally, . . . Appellant will be deprived of the opportunity to be considered for the HEHP Chairperson position. Appellant will be deprived of the opportunity for realizing an increase in standing, professional reputation, notoriety, prestige, experience, and good will accompanying the performance of the duties connected with the position of HEHP Chairperson. The value of this increase in professional standing is difficult to measure in monetary terms, thus its loss is irreparable.

(*See* App. 96-97).

However, Petitioner has not cited any authority supporting that any of those alleged harms are "irreparable." She has made no showing with specific evidence to support that she cannot be made whole with money damages granted at the conclusion of this case, if appropriate. The trial court and Court of Appeals properly concluded that Petitioner did not carry her heavy burden of showing that her injuries are so severe that they call for the extraordinarily rare relief of a preliminary injunction. She offered no evidence that she is in danger of sustaining any irreparable harm if the trial court denied the Second Motion and Supplement.

i. <u>Move from Riley Center</u>

Petitioner argues that the trial court erred in denying her Second Motion and Supplement because she sustained irreparable harm from the move of her office from the Riley Center to the allegedly deficient Silcox Building. In her appellate brief, Petitioner argued that "[t]he loss of a faculty office is not easily measured in monetary terms although it may have great value or benefit to the affected faculty member." (*See* App. 96). She further asserted that, without a preliminary injunction, she:

> will suffer interference with her ability to perform her responsibilities as a tenured Associate Professor at the CofC, including the inability to conduct in-person meetings with students and others in her faculty office in the Riley Center and her inability to access and use the equipment and facilities that come with this office location. She will be relocated from the Riley Center to an inferior office location at the Silcox Building despite the deplorable, unhealthy, unsafe, and unworkable conditions that exist there. She will suffer injury to professional standing associated with such a demotion to an inferior office location and mental distress, embarrassment, humiliation, and indignity based on such a transfer of her faculty appointment in violation of the MOU.

(*See id.*). However, the alleged relocation of Petitioner's office — even if to a "lesser" location — is not an irreparable harm warranting the extreme remedy of interim injunctive relief. To the contrary, any harm from the movement of Petitioner's office can be remedied upon the final trial of this matter on the merits.

Petitioner presents no evidence to show *how* moving her offices has impacted her career. She presents no evidence of specific equipment and facilities to which CofC denied her access or the resulting harm she suffered. She presents no evidence to support that the move will cause her irreparable harm to her academic standing or professional career. She presents no evidence of how the Silcox Building is unsafe. She presents no evidence to support her conclusory statement that the Silcox Building is causing her any injury to her "professional standing." She presents no evidence that she had any property interest or ownership in an office in the Riley Center. To the contrary, she merely claims that — because the MOU moved her office to the Riley Center in 2014 — she is entitled to remain there indefinitely and that any change to her office would irreparably harm her. It is difficult to conceive of any court finding that moving an office is so damaging that the court must grant a preliminary injunction to preserve the *status quo* until the conclusion of litigation.

To the contrary, at least one court considering the issue has concluded that a move of a plaintiff's office — even to a "windowless, poorly ventilated room" — is not irreparable harm:

> Hornig's complaint about the relocation of her office to another office in the same building borders on the frivolous. At minimum, Hornig has not demonstrated that her office's relocation qualifies as an injury at all, let alone one "that cannot be remedied if a court waits until the end of trial to resolve." [(Citation omitted.)] Courts within this District have concluded that, moving an "office to a windowless, poorly ventilated room does not constitute an adverse employment action" [(citation omitted)], and Hornig has not provided any basis for the Court to conclude that she cannot return to her prior office after trial, if she succeeds.

See Hornig v. Trustees of Columbia Univ., 2018 U.S. Dist. LEXIS 189268, at *19 (S.D.N.Y. Nov. 5, 2018). Likewise, in this case, there has been no showing that the moving of Petitioner's office cannot be effectively remedied after a trial on the merits.

ii. Denial of Opportunity for Pay Raises

Petitioner also claims that she established irreparable harm because CofC denied her the opportunity to apply for merit-based pay raises. Specifically, she contends that this harm is irreparable because, "[a]lthough the merit pay increase involves a monetary benefit, it will be difficult for a jury to determine exactly how much of a raise Appellant would have received if she had been properly considered for it given that the increases in salary range from 4% to 15% of the faculty member's annual salary." (*See* App. p. 102). For the following reasons, Petitioner's arguments are misplaced.

This alleged injury, at its very core, is monetary and legal. Petitioner claims only that she should have been paid more money than she was actually paid. One can scarcely imagine a more "reparable" injury. If Petitioner proves that CofC improperly denied her a pay raise, the trial court can fully compensate her for that injury after trial. Petitioner cites no evidence supporting that the denial of an interim injunction granting her a 4-15% pay raise would cause irreparable harm that money damages would not remedy.

Petitioner asserts that she has shown irreparable harm because — because the salary raises ranged from 4-15% — it is difficult to calculate her damages, such that an immediate injunction is necessary to make her whole. In support, she cites *Bethel Methodist Episcopal Church v. City of Greenville*, 211 S.C. 442, 45 S.E.2d 841 (1947). That case is inapposite. In *Bethel Methodist*, the Court addressed an ordinance closing a street allowing access to a predominately African-American church. The Court held that irreparable harm existed because there were *no measurable damages* (*i.e.,* any damages would be "nominal" in nature):

> Irreparable injury as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages; and the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in a case where the nuisance is a continuous one. [Citation omitted.] This court has recently held in a related case that injunction will lie to prevent obstruction of a public street or alley if the complaining party has no adequate remedy at law.

See Bethel Methodist, 211 S.C. at 451, 45 S.E.2d at 845. In this case, on the other hand, if CofC

wrongfully denied Petitioner a pay increase, damages would fully compensate her. A finder of fact is capable of determining an appropriate measure of damages from the evidence. As in nearly every case, the parties will present their cases, and the fact finder will decide the appropriate measure of damages. The mere fact that the parties do not know with absolute certainty the percentage pay raise that Petitioner actually would have obtained does not make her alleged injury "irreparable" so as to warrant a preliminary injunction.

iii. HEHP Chairperson Position

Petitioner further argued irreparable harm because CofC denied her the opportunity to apply for the HEHP chair because she did not timely express her interest. (*See* App. pp. 88-89). Petitioner's arguments are without merit.

Petitioner presents no evidence to show how the denial of this opportunity has actually impacted her. She presents no examples of any loss of professional standing. She presents no evidence of a loss of career opportunities. Aside from her self-serving, generic statement that she "will be deprived of the opportunity for realizing an increase in standing. professional reputation, notoriety, prestige, experience, and good will accompanying the performance of the duties connected with the position" (*see* App. p. 96), she presents no evidence at all.

Petitioner has not cited any authority to support that the denial of an opportunity to apply for a promotion or position threatens such irreparable harm that a preliminary injunction is necessary. To the contrary, the weight of authority suggests that the denial of a promotion does not cause irreparable harm. *See McWilliams v. Frankton-Lapel Cmty. Schs,* No. 1:20-cv-01419-JPH-TAB, 2020 U.S. Dist. LEXIS 146767, at *15 (S.D. Ind. Aug. 14, 2020) ("Loss of employment does not constitute irreparable injury under the preliminary injunction standard."); *FOP Library of Cong. Labor Comm. v. Library of Cong.*, 639 F. Supp. 2d 20, 24-25 (D.D.C. 2009) ("Even if plaintiffs prevail in all their claims -- denial of training, loss of promotion opportunities, forced retirement, placement into civilian rather than officer positions -- the Court could remedy these claims by ordering training, reinstatement, back pay, and the like. Indeed, courts consistently hold

that economic loss . . . and loss of employment . . . are not irreparable.") (citations omitted); *Harder v. Vill. of Forest Park*, No. 05 C 5800, 2005 U.S. Dist. LEXIS 28068, at *6 (N.D. Ill. Nov. 14, 2005) ("[L]oss of wages, employee benefits, and promotion opportunities do not constitute irreparable harm."); *Berman v. N.Y.C. Ballet, Inc.*, 616 F. Supp. 555, 557 (S.D.N.Y. 1985) ("The same defect appears in plaintiff's assertion that loss of other employment opportunities will result from failure to make plaintiff the principal second violinist. If plaintiff prevails on the merits, any claimed loss of income from other employment opportunities can be compensated in damages.").

As one Court has held, in a case involving a claimed entitlement to a department chairpersonship:

> Given these considerations, we hold that the court did not abuse its discretion in determining that, without the preliminary injunction, Dr. Schrier would not suffer irreparable harm. The purpose of a preliminary injunction is not to remedy past harm but to protect plaintiffs from irreparable injury that will surely result without their issuance. . . . Dr. Schrier has presented no evidence that his removal as Chair during the time it will take to litigate this case will have an irreparable effect in the sense of making it difficult or impossible for him to resume his chairmanship or restore the status quo ante in the event he prevails. . . . Moreover, Dr. Schrier made no attempt to apprise this court of any evidence in the record showing actual or significant risk of loss of prestige, academic reputation or professional opportunities that cannot be remedied by money damages.

See Schrier v. University of Colo., 427 F.3d 1253, 1267 (10th Cir. 2005) (citations omitted). Similarly, Petitioner has not presented any evidence that the denial of an immediate injunction concerning the HEHP chairpersonship would injure her in a way that could not be fully and completely remedied after trial with money damages.

In support of her claim of irreparable harm concerning the HEHP chair position, Petitioner argued in the Court of Appeals that:

> The value of this increase in professional standing is difficult to measure in monetary terms, thus its loss is irreparable. [*Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 465, 626 S.E.2d 38, 42 (Ct. App. 2005)] (holding that physician's loss of competency if she were unable to ply her trade as the lawsuit progressed was irreparable harm and justified preliminary injunction restraining hospital from terminating her hospital privileges); *see also IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 200 (Tex. Ct. App. 2005) ("'Loss of business goodwill or loss that is not easily calculated in pecuniary terms is sufficient

to show irreparable injury for purposes of obtaining a temporary injunction.").

(*See* App. pp. 96-97). This argument — and the cases that Petitioner cites in support — misses the mark.

In *Levine v. Spartanburg Regional*, the Court affirmed the grant of an injunction enjoining a hospital from terminating the privileges of a doctor to maintain the *status quo* during litigation. In finding that the doctor had satisfied the irreparable harm element, the Court stated:

> The trial court found that Levine, as a physician with a private practice, would suffer irreparable harm if an injunction was not granted. The record supports this conclusion. Levine has built a patient referral base through her work at the Hospital. This referral base would erode and potentially disappear if Levine lost her privileges at the Hospital while the merits of her underlying action against the Hospital and Foothills are adjudicated. Levine would also lose competency in anesthesiology if she were unable to ply her trade as the lawsuit progressed. Such inactivity could lead to the loss of her professional practice and career, which can be an irreparable harm. Therefore, we find the trial court did not abuse its discretion in deciding Levine would suffer irreparable harm without injunctive relief.

See id., 367 S.C. at 465, 626 S.E.2d at 41-42. Petitioner has presented no such evidence. She does not present any evidence that, as a result of the denial of this promotion, her career advancement opportunities will "erode and potentially disappear." In fact, she does not present any evidence of what the actual impact of this will be on her career. Unlike the denial of privileges at issue in *Levine*, Petitioner has not shown that the opportunity at issue here would irreparably damage her professional career to such an extent that an injunction is immediately required.[1]

b. <u>Petitioner Has Not Shown That She Is Likely to Succeed on the Merits.</u>

"In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief." *Compton v. South*

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[1] The Texas case that Dr. Thompson cites — *IAC, Ltd. v. Bell Helicopter* — does not aid her irreparable harm argument. In *IAC*, the issue was misappropriated trade secret information that was used to unfairly compete with the plaintiff, resulting in a potential loss of business goodwill or other losses that could not be calculated in money terms. Again, Appellant Dr. Thompson presents no evidence that the denial of this opportunity would cause so much harm to her career that she could not be compensated at a trial on the merits.

Carolina Dep't of Corr., 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). In considering the element, courts examine the merits *only* to the extent necessary to justify an order halting a party's injury and to afford orderly and deliberative due process. *See Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 167 S.E.2d 313 (1969).

Initially, Petitioner has not presented any evidence or cited any authority supporting that the MOU is a legally enforceable contract. First, the MOU is not enforceable because valuable mutual consideration does not support it. "[A]ll parties must be obligated under a contract in order for it to be enforceable." *Alala v. Peachtree Plantations, Inc.*, 292 S.C. 160, 167, 355 S.E.2d 286, 290 (Ct. App. 1987); *accord Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 276, 525 S.E.2d 898, 901 (Ct. App. 1999) ("[A] covenant not to compete entered into during the employment relationship requires new consideration."). The MOU does not impose duties on Petitioner or require her to give consideration to CofC, beyond what she already provided as an employee. As a result, the MOU lacks consideration.

Moreover, an agreement which leaves open material terms is unenforceable under South Carolina law; it is essential all parties assent to the same thing in the same sense. *Player v. Chandler,* 299 S.C. 101, 105, 382 S.E.2d 891, 894-95 (1989). "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between parties with regard to all essential and material terms of agreement." *Id.* "Thus, for a contract to be binding, material terms cannot be left for future agreement," and "an agreement which leaves open material terms is unenforceable." *Stevens and Wilkinson of S.C., Inc. v. City of Columbia,* 409 S.C. 568, 578-79, 762 S.E.2d 696, 701 (2014) (citation omitted); *accord* 1 Corbin on Contracts § 4.1 ("A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract. They must have expressed their intentions in a manner that is capable of being understood.").

Petitioner has not refuted that the MOU is lacking in definiteness and is not a contract. The MOU discusses certain then-existing responsibilities of CofC that could be subject to change; it also involved possible future tenure or promotion possibilities that would all be subject to various

conditions. There are no definitive time frames or limits for CofC's alleged obligations under the MOU. Instead, the MOU is merely a recitation of certain things that CofC would (and did) do in connection with Petitioner's employment. There are no specific enforceable future promises.

Petitioner asserted that "CofC's own Policy Website containing its official policies includes Official Policy 2.3.1.1, which specifically addresses the nature and extent of the CofC's "contracting authority ... and how it may be exercised."" (*See* App. p. 94). Specifically, she relied on language stating that (emphasis added) "[c]ontracts *may include*, but are not limited to: ... Memoranda of Understanding or Memoranda of Agreement." (*See* App. pp. 94-95). Petitioner did not present this document to the trial court in its consideration of the Second Motion and Supplement. As a result, she did not preserve this issue for appellate review. Nevertheless, Section 2.3.1.1 *only* substantively addresses what contracts require certain levels of approval authority. Nothing in Section 2.3.1.1 makes this particular MOU a legally enforceable contract or changes the law of contracts in South Carolina. Moreover, Section 2.3.1.1 states only that the definition of a contract *within that policy "may include"* memoranda of understanding. It does not mean that every document called a "memorandum of understanding" is automatically a contract. Section 2.3.1.1 does not make any statement concerning the enforceability of this specific MOU.

In addition to the foregoing, even if the MOU could be a contract, Petitioner presented no evidence that she is likely to succeed on the merits of her claims that Respondents violated that contract.

i. Petitioner Has Not Shown That She Is Likely to Succeed on the Merits of Her Claim That CofC Breached the MOU by Moving Her Office From the Riley Center.

Petitioner argued that she is likely to succeed on the merits of her claim that CofC breached the MOU by, *inter alia*, moving her office from the Riley Center. (*See* App. p. 98). Petitioner does not present any evidence that CofC failed to do what was set forth in the MOU. Under the MOU (assuming it is a binding contract in first instance), CofC agreed only that (effective August 16, 2014):

- Petitioner would be moved from EHHP to the Riley Center;
- The Boeing grant would follow Petitioner to the Riley Center;
- Petitioner's tenure clock would not be changed;
- Petitioner would report to Dr. Kendra Stewart, who would be "responsible for determining Dr. Thompson's budgeted time for teaching, research and service and conducting Dr. Thompson's annual evaluations";
- Petitioner's teaching responsibilities would be "three courses a semester unless grant or contract buy-outs reduce the teaching load for appropriate grant or contract duties";
- "Dr. Thompson's current teaching assignments in EHHP in the Public Health Program will continue but can be modified as appropriate with the concurrence of Dr. Stewart, Dr. Hale and others who may be impacted by any modification";
- Dr. Stewart will be responsible for coordinating Petitioner 's panel reviews, with the panel constructed consistent with the Faculty/Administration Manual; and
- Policies and procedures for to tenure and promotion will be followed.

(*See* R. pp. 71-72). Petitioner does not dispute that CofC moved her office to Riley Center. In fact, she pleads that CofC transferred her from the EHHP to the HSS effective August 16, 2014. (*See* R. p. 30 ¶ 26). She also concedes that, consistent with the MOU, she reported to Dr. Stewart, her Department Chair, and had her offices moved from EHHP to the Riley Center. (*See* R. p. 30¶ 27). Petitioner does not argue that CofC failed to do anything under the MOU. Rather, she claims that (years later) CofC breached the MOU by moving her out of the Riley Center.

The premise of Petitioner's argument is that the move of her office to the Riley Center under the MOU was to be perpetual: *i.e.,* CofC could never subsequently move her out of the Riley Center (or out of Dr. Stewart's supervision). The MOU does not have any specific term and does not set any time period for the alleged undertakings thereunder. "Historically, perpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract." *Carolina Cable Network v. Alert Cable TV*, 316 S.C. 98, 101, 447 S.E.2d 199, 201 (1994). In the absence of an express statement of duration, even apparently infinite contracts are terminable:

> Where the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from the circumstances surrounding them it would be unreasonable to impute to the parties an intention to

> make a contract binding themselves perpetually. In such a case the Courts hold with practical unanimity that the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either on giving reasonable notice of his intention to the other.

See Childs v. Columbia, 87 S.C. 566, 572, 70 S.E. 296, 298 (1911); *accord State ex rel. Daniel v. Broad River Power Co.*, 157 S.C. 1, 80, 153 S.E. 537, 564 (1929) ("This, however, would not create a contract to continue the operation of the railway indefinitely or in perpetuity without regard to whether or not reasonable compensation was afforded for the services rendered. A contract resulting in an obligation so onerous as this could not be thus implied.").

If the MOU is a contract, Petitioner presents no evidence that it should be construed as a promise to keep her office at the Riley Center *forever*. The MOU certainly does not state or imply that. The Court should not construe the MOU as a binding promise without end. That is inconsistent with South Carolina contract law and the intent of the parties. Petitioner has certainly not presented any evidence to support that the MOU grants her a permanent right to an office in the Riley Center (or to any other permanent rights). As a result, Petitioner cannot show that she is likely to succeed on the merits of this claim.

ii. Petitioner Has Not Shown That She Is Likely to Succeed on the Merits of Her Claim That CofC Illegally or Improperly Denied Her the Opportunity to Apply for the HEHP Chair Position.

Petitioner also argued that she is likely to succeed on her claim that she was not allowed to apply for the HEHP chairperson position. (*See* App. p. 100). Petitioner presents no evidence and cites no authority that the alleged denial of the chance to apply for this position violated the MOU (or any other putative contract) or was otherwise legally actionable. She does not cite any specific provision of the MOU that CofC violated. She does not assert a claim that her civil rights were violated because she is a member of a protected class under any employment statute. She does cites no legal authority giving her a legal right to apply for the department chair position.

To the contrary, the record indisputably shows that she had a full and fair opportunity to apply for the chair position. She chose not to attend a duly-called meeting on January 26, 2021

where the announcement was made that the current Department Chair would not seek reappointment. The evidence shows that, at that meeting, Dr. Welch asked anyone interested in being considered for the chairmanship to apply within seven days. Petitioner was aware that this meeting was taking place. Because she was not at this meeting, Petitioner did not know about the deadline and did not apply on time. As a result of her missing that deadline, Petitioner filed a grievance and was given a hearing before the Grievance Committee, which gave a non-binding advisory assessment. Petitioner acknowledged during her grievance hearing that she does not know her faculty peer group and has never attended or taken part in department meetings. She has presented no evidence to show that she should have obtained this position. She has not shown that she is likely to succeed on the merits of this claim. Petitioner's claims concerning the HEHP department chair position is without legal basis and is premised upon sheer speculation.

c. Judge Young Correctly Denied a Preliminary Injunction Because Petitioner Has Not Proven the Absence of an Adequate Legal Remedy.

Petitioner argues that she does not have an adequate legal remedy because money damages would be uncertain and difficult to calculate and inadequate to compensate her. She asserts in a conclusory fashion that money damages are insufficient because they cannot "retroactively" compensate her for not having an office in the Riley Center or not being considered for the chairpersonship position. Petitioner focuses on three elements of "damage": (a) having her office moved from the Riley Center; (b) not being considered for a pay increase of 4%-15%; (c) not being considered for the HEHP chairpersonship position. However, she presents no evidence or support, aside from the *ipse dixit* of her counsel, for her contention that money damages would not adequately compensate her for her claimed injuries. Petitioner has not shown that she does not have an adequate legal remedy. To the contrary (as discussed above), she has an adequate legal remedy in the form of a jury trial for money damages. Legal damages can remedy any claimed harm to Petitioner.

2. Judge Hall's Prior Order Precluded the Second Motion and Supplement.

"'There is a long standing rule in this State that one judge of the same court cannot overrule another.'" *Sellers v. Nicholls*, 432 S.C. 101, 114, 851 S.E.2d 54, 60 (Ct. App. 2020); *accord Dorchester Cty. Dep't of Soc. Servs. v. Miller*, 324 S.C. 445, 457, 477 S.E.2d 476, 483 (Ct. App. 1996). Under this rule, Judge Young properly concluded that he should not second-guess Judge Hall's First Order denying Petitioner's First Motion.

Like her First Motion, the Second Motion and Supplement are built upon the premise that Respondents engaged in conduct that violated the terms of the MOU. This is a continuation of the contentions that she previously made in her First Motion, and Judge Hall rejected. For example, Petitioner's April 2, 2021 Second Motion states that "notwithstanding the pendency of this lawsuit, Defendants *have continued* to breach, contravene, and disregard the clear terms and provisions of the written MOU." (*See* R. p. 111 (emphasis added)). She further claims that Respondents "*continued* to retaliate against, harass, and cause financial harm to Plaintiff while this litigation has been ongoing." (*See* R. pp. 11-12 (emphasis added)). In fact, Petitioner's April 2, 2021 Second Motion dedicates *almost 25 pages* (of a total length of 33 pages) to cataloging Respondents' alleged misconduct that occurred *prior to the commencement of this lawsuit (and before the First Order).*

Similarly, Petitioner's Supplement states that "notwithstanding the pendency of this action *and the filing of Plaintiff's previous Motion for Preliminary Injunction, Defendant CofC has continued* to engage in retaliatory conduct, harassment, and intimidation towards Plaintiff." (*See* R. p. 219 (emphasis added); *accord* R. p. 223 ("Defendant CofC *has continued* to engage in harassment, retaliation, and intimidation against Plaintiff.") (emphasis added)). She further argues in the Supplement that "Plaintiff's verified Complaint seeks an order enforcing the terms and provisions of the written *MOU.* The verified Complaint also specifically seeks to restrain and enjoin Defendant CofC and others from *breaching, contravening, or disregarding the MOU's terms and provisions.*" (*See* R. p. 220 (emphasis added)). The remainder of the Supplement is dedicated to assertions that CofC wrongfully removed Petitioner from the Riley Center. Likewise, Petitioner's Affidavit offered in support of her Second Motion and Supplement states that "[t]he

primary purpose of the motions has been to obtain an Order" restraining CofC "from breaching the terms of a written contract [the MOU]" and to stop alleged retaliation. (*See* R. p. 236 ¶ 2).

In other words, Petitioner's Second Motion and Supplement focused on the same allegations of breaches of the MOU, albeit with some different twists with regard to specific conduct. The Second Motion and Supplement were extensions of the arguments in Petitioner's First Motion — with the same legal and factual underpinnings (*i.e.,* alleged violations of the MOU). She has presented no evidence or legal authority supporting that her Second Motion and Supplement were outside of the scope of the First Order. Petitioner has not set forth any reason why Judge Young erred in deferring to Judge Hall's prior denial of injunctive relief.

The specific relief Petitioner requested in her First Motion and Second Motion and Supplement is set forth at length, *supra*. While Petitioner changes the wording somewhat, she seeks essentially the same relief in her Second Motion and Supplement that she sought in her First Motion. The primary relief sought in both motions is an injunction precluding CofC from breaching the MOU or changing Petitioner's location or assignment. However, Judge Hall already denied her request for a preliminary injunction "[a]fter careful consideration."

Petitioner argues that the trial court should have disregarded Judge Hall's First Order because he did not receive memoranda and did not conduct a hearing. However, Petitioner never filed a motion for reconsideration, a motion to alter or amend or any other motion asking Judge Hall to revisit his First Order. As a result, the trial court properly respected Judge Hall's First Order denying Petitioner's initial request for preliminary injunctive relief.

In support of her argument that Judge Young erred in deferring to the First Order, Petitioner argues that the Second Motion and Supplement referred to the following conduct occurring after Judge Hall's First Order: (a) displacement of Petitioner from the Riley Center; (b) the refusal to consider Petitioner for the HEHP chair position; and (c) excluding Petitioner from consideration for a merit pay raise. (*See* R. pp. 110-42). These points can be boiled down to: (a) displacement of Petitioner from the Riley Center; (b) the refusal to consider Petitioner for the HEHP chair position; and (c) excluding Petitioner from consideration for a merit pay raise. Upon close

analysis, this alleged "new" conduct did not prevent Judge Young from deferring to Judge Hall's First Order.

Petitioner first argues that her Second Motion and Supplement alleges "new" conduct, consisting of allegations that Respondents disconnected her Riley Center phone and took her off the Riley Center website, completely removed Petitioner's office from the Riley Center, and "physically remov[ed] Plaintiff from the Riley Center in April 2021 and barr[ed] her access to her faculty office and personal property in that building." This is the same sort of conduct for which the trial court refused to grant an injunction in Judge Hall's First order. For example, Petitioner's Complaint alleges that, under the MOU, her offices were to move to the Riley Center. (*See* R. p. 30 ¶ 25). She further asserted in her First Motion that "MOU specifically mandate[s] that . . . Plaintiff's tenure-track faculty line, office, and any grant-related offices are to be *moved from EHHP to the Riley Center*, where they would be administratively housed or located." (*See* R. p. 78 (emphasis added)). She further alleges that her offices were moved from EHHP to the Riley Center consistent with the MOU. (*See id.*). She expressly requested an injunction "restraining and enjoining Defendants CofC and Welch from unilaterally transferring or *moving Plaintiff back to the CofC's EHHP."* (*See* R. p. 74 (emphasis added)). Thus, the First Motion sought, and Judge Hall denied, an injunction preventing Respondents from removing her from Riley Center. Although the Second Motion and Supplement contain additional factual allegations, they requested the same relief: an injunction precluding Respondents from removing Petitioner from Riley Center.

Petitioner next argues that her Second Motion and Supplement raised novel issues because she asserted that — after the First Order — CofC did not properly notify her of a department chair opening (February, 2021) and excluded her from opportunities to obtain a merit pay raise (July, 2021). (*See* R. pp. 111-12). As discussed below, Petitioner cannot show irreparable harm in connection with this request for injunctive relief. Furthermore, Petitioner did not amend her Complaint to allege a claim concerning such alleged conduct.

Petitioner finally argues that her Second Motion and Supplement raised new conduct concerning her alleged exclusion from consideration for a merit pay raise. Once again, as

discussed below, this putative ground for a preliminary injunction — if Judge Hall's First Order does not foreclose it — is without merit because Petitioner cannot show irreparable harm or a likelihood of success on the merits.

C. The Court of Appeals Correctly Ruled Concerning One Particular Factual Issue.

Petitioner's final argument is that the Court of Appeals erred in affirming certain factual rulings of Judge Young:

> The Court of Appeals upheld the Circuit Court's findings that Petitioner purportedly "has presented no evidence to show that she should have obtained [the HEHP Chairperson] position" for which Welch refused to even consider her application (R_013), and the MOU "do[es] not evidence an intent to be contractually bound to specific, enforceable obligations" (R_014). *See* Opinion ¶ 3. This Court's Opinion states in conclusory fashion that these findings "are supported by evidence in the record," yet the Opinion fails to cite or discuss any actual evidence anywhere in the record supporting those findings. *Id.* Petitioner is again left to guess.

(*See* Pet. for *Certiorari*, at 24).

The first statement referenced above relates to the Second Order's discussion of the "likelihood of success on the merits." As argued previously in this appeal, Petitioner does not cite specific evidence showing that, had she been advised of the opening, she would have obtained the position. The Second Order correctly says that Petitioner presented *no evidence* that — if she had applied for the position — she would have obtained it. The only evidence she proffers is her conclusory statement in her sworn Second Motion that "Dr. Welch has refused to consider Plaintiff's application even though Plaintiff is more experienced and has superior qualifications than the other candidate(s) who applied for the chairperson position." (*See* R. p. 135). She also gives the self-serving opinion that she was "the most qualified" candidate and that "Dr. Pfile is less experienced than me and has demonstrably inferior qualifications for the position." (*See* R. p. 237 ¶ 6). However, she has not presented evidence of her qualifications or the qualifications of any applicant(s) for the chairpersonship. She does not present competent evidence to show that, even if she had been informed of the position earlier, she would have been selected for it. She presents no evidence, aside from her own inadmissible, self-serving, conclusory opinions, that she is likely

to succeed on a claim that she would have obtained this position. Both Judge Young and the Court of Appeals had the opportunity to review the parties' detailed filings and the Record. This Court need not exercise its discretionary jurisdiction to resolve this factual issue that has now been considered by two courts.

Petitioner additionally complains that "the only evidence in the record was that the CofC and Petitioner did intend for the MOU to be a binding contract." (*See* Pet. for *Certiorari*, at 25). However, contrary to Petitioner's present arguments, Petitioner did not carry her burden of proving that the MOU is an enforceable contract (as discussed in detail above).

CONCLUSION

Therefore, the Court should not grant a writ of *certiorari*, as there are no questions of law appropriate for review by this Court. In addition, further review is unnecessary because the Court of Appeals correctly affirmed Judge Young's denial of Petitioner's second request for a preliminary injunction.

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