THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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 PETITION FOR REHEARING

Appellant hereby petitions this Court for rehearing of its opinion filed June 30, 2014. This Petition is submitted pursuant to Rule 221(a), SCACR. For the reasons set forth in the memorandum in support filed herewith, it is respectfully submitted that the opinion issued by this Court overlooks and misapprehends controlling authority and misapplies the law of this State.

Respectfully submitted,

NICKLES LAW FIRM, LLC

By:_____

W. Allen Nickles, III, S.C. Bar #4226
Susan M. Fittipaldi, S.C. Bar # 14225
1122 Lady Street, Suite 610
Columbia, South Carolina 29201
(803) 779-8080

Attorneys for Appellant

Columbia, South Carolina
July 14, 2014

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APPELLANT'S MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

PROCEDURAL POSTURE

In an unpublished, *per curium* opinion filed June 30, 2014, this Court affirmed the decision of the Honorable Benjamin H. Culbertson, Circuit Court Judge, upholding the Horry County School Board of Education's decision to terminate Appellant's employment. For the following reasons, the unpublished opinion reflects a misapprehension of the law and a misapplication of controlling legal principles and precedent.

FACTUAL BACKGROUND

Jacqueline Smith is a veteran teacher employed during the 2010-2011 school year under a continuing-contract with the Horry County School District ("District"). Ms.

Smith began teaching in the District in 1999. In 2003, she received the Teacher of the Year award for North Myrtle Beach Elementary School.

On October 28, 2010, Ms. Smith received a letter placing her on administrative leave with pay.(R. p. 239) By letter dated January 5, 2011, the District's superintendent notified Ms. Smith that she was recommending termination of employment. The termination letter identified alleged complaints by 86 students and 25 parents concerning Ms. Smith's conduct as a teacher. (R. pp. 231-234). The letter accused Ms. Smith of yelling at students, embarrassing students, making inappropriate comments to students, humiliating students in class, and being "described by students" as mean, harsh, hateful and setting them up to fail. (R. p. 232)

Ms. Smith requested a hearing before the Board to challenge the superintendent's recommendation. At the outset of the hearing, the District submitted numerous proposed exhibits to the Board. These exhibits included documents containing hearsay information attributed to parents and students who did not testify at the hearing. (See, for example R. pp. 267-269, 274-278, 300)

Ms. Smith objected to the admission of any exhibits or testimony that contained hearsay statements or information offered by persons unavailable for cross-examination. The Board did not rule on the objection at that time, but allowed hearsay to be offered. At the conclusion of the hearing, the Board voted to consider all of the exhibits and testimony presented, including challenged the hearsay information. (R. pp. 224- 227) Relying upon the entire record, the Board then voted 6 to 1 to uphold the superintendent's recommendation to terminate Ms. Smith's employment. (R. p. 228-229)

LEGAL ARGUMENT

1. The opinion under review overlooks and misapplies controlling precedent in holding that Ms. Smith's due process rights were not violated.

Finding 1 of the challenged opinion holds that the Board's decision did not violate Ms. Smith's due process rights even though hearsay evidence, including information from parents and students who allegedly complained about her, was **improperly admitted** at the hearing. The opinion states that the admission of this hearsay evidence was "merely cumulative" in light of testimony from school principals. (*citing* Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997)

The Court's reliance on Jackson is misplaced. In Jackson, the challenged hearsay was "cumulative" because: (a) statements by the witness had already been admitted without objection, (b) the objected to testimony had been previously established, (c) testimony of other witnesses provided the same evidence, and (d) the statements were admissible as admissions of a party opponent. 326 S.C. at 305, 486 S.E. 2d at 758. None of these grounds apply to information from non-testifying parents and students relied upon by the superintendent in the notice of termination, presented over objection in testimony and challenged exhibits, and considered by the Board and circuit court. To the contrary, Ms. Smith gave notice of her objection at the beginning of the hearing, the information was available from no admissible source, including school principals, was clearly offered for the truth of the matter, was intended to be and was prejudicial.

Holding that the improperly admitted hearsay was cumulative and harmless also ignores the mandatory nature of the TEDA acknowledged by our Supreme Court in Johnson v. Spartanburg Co. School Dist. No. 7, 314 S.C. 340, 444 S.E.2d 501 (1994) and

this Court in Brown v. James, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010). Because the process below was infected by the admission of anonymous and hearsay statements, and because the Board violated Ms. Smith's statutory and constitutional right to cross-examination, its decision is *per se* invalid.

2. The opinion under review misapplies the law in finding that Ms. Smith received proper notice of the grounds for her termination.

Finding 2 of the challenged opinion holds that Ms. Smith was given reasonable notice and opportunity to improve her performance as required Section 59-25-440. The opinion offers no facts in support of the finding. Conversely, the record establishes that Ms. Smith was given no "opportunity to improve." For example, she was removed from the classroom on October 28, 2010 and not allowed to return or have communication with staff, students or parents thereafter. (R. p. 239) The record further establishes that the Ms. Smith's supervisors considered, but elected not to impose an improvement plan. (R. pp. 218-219; 395) Accordingly, the finding that Ms. Smith was afforded written advance notice, reasonable assistance and adequate time to improve perceived deficiencies cannot be sustained.

The notice provided to Ms. Smith was also deficient. As stated above, the superintendent's recommendation to terminate relied upon alleged complaints by parents and students who were not called as witnesses. In this context, Ms. Smith was not afforded an opportunity to be heard on the reasons presented to the Board in support of termination. This defect violated Ms. Smith's fundamental due process rights by giving false or unsubstantiated "reasons" for the recommended termination.

3. The opinion under review misapplies the standard of review in finding substantial evidence to support Ms. Smith's termination.

Finding 3 of the challenged opinion holds that the testimony of the superintendent, three principals and two parents offer substantial evidence to support Ms. Smith's termination. In reaching this decision, the Court improperly substituted its judgment for the Board and circuit court.

The record establishes that the Board relied upon "all evidence" including improperly admitted hearsay in affirming the superintendent's recommendation to terminate Ms. Smith's employment. Neither the motion passed by the Board nor its letter confirming Ms. Smith's termination identify the testimony of specific witnesses. Instead, immediately before affirming the recommendation to terminate, the Board overruled all evidentiary objections. (R. pp. 224-229). Following the hearing, the Board had the opportunity to explain the basis for its decision. Rather than identify admissible testimony or documents, the Board's letter of March 25, 2011 made reference to the 14 hours of hearing and concluded that "all" rather than specific evidence justified termination. (R. p. 2) On appeal, the circuit court expressly affirmed the decision contained in the Board's letter. (R. p. 1)

Shell v. Richland School District One, 362 S.C. 408, 608 S.E. 2d 428 (2005) holds that appellate review of a teacher's termination is governed by the grounds stated in the order terminating employment. 362 S.C. at 411, 608 S.E. 2d at 429. For this reason, "scouring the record and making ... independent evidentiary findings to support the termination" is reversible error. *Id.* Because an appellate court may not cherry-pick a record to support the termination of a teacher, isolation of testimony otherwise

considered with and influenced by inadmissible, prejudicial offerings is impermissible and requires reversal of the challenged opinion.

4. The opinion under review misapplies the law in failing to address the absence of any factual findings and legal conclusion both by the Board and the circuit court.

Finding 4 of the challenged opinion states, "**[b]ased upon our review of the record**, we find the circuit court and the Board properly identified supporting facts and legal conclusions in upholding the superintendent's recommendation to termination Smith's employment." (emphasis added). This is a misstatement the record. Neither the circuit court nor the Board issued a decision that identified any specific findings of fact or conclusions of law. As addressed above, the Board voted in open session and subsequently issued a letter without reference to any factual findings whatsoever. Likewise the circuit court's order upholding the Board's decision contains no reviewable factual findings or conclusions of law.

Shell established that it is improper and an error of law for an appellate court to conduct an "independent evidentiary" review of the record and to make independent factual findings. Instead, 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 21-23, 507 S.E. 2d at 332 (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.

The finding that the Board and circuit court "identified supporting facts and legal conclusions" is inconsistent with the holding that the superintendent's recommendation and information relied upon by the Board included inadmissible information. (Finding 1). This finding is also inconsistent with the identification for the first time on appeal specific testimony perceived to support termination. (Finding 3). In summary, the only "supporting facts" identified by the Board and the circuit court confirm that inadmissible evidence was relied upon in terminating Ms. Smith's employment. This cannot stand as a basis for affirming their decisions.

CONCLUSION

For the reasons stated above, Appellant Jacqueline Smith requests that this Court reconsider its opinion filed June 30, 2014.

NICKLES LAW FIRM, LLC

By: _____

W. Allen Nickles, III, S.C. Bar #4226
Susan M. Fittipaldi, S.C. Bar # 14225
1122 Lady Street, Suite 610
Columbia, South Carolina 29201
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served Respondent's Petition for Rehearing and Memorandum in Support of Petition for Rehearing by depositing a copy of same in the United States Mail, postage prepaid and addressed as follows:

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

This 14th day of July, 2014.

NICKLES LAW FIRM, LLC

W. Allen Nickles, III, S.C. Bar #4226
Susan M. Fittipaldi, S.C. Bar # 14225
1122 Lady Street, Suite 610
Columbia, South Carolina 29201
(803) 779-8080

NICKLES LAW FIRM, LLC
- ATTORNEYS AT LAW -
1122 Lady Street, Suite 610
Columbia, South Carolina 29201

W. Allen Nickles, III

Telephone: (803) 779-8080
Facsimile: (803) 256-1816
Email: wanickles@nickleslaw.com

July 14, 2014

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Jacqueline Smith v. Horry County School District
Appellate Case No.: 2012-213509

Dear Ms. Kitchings:

Enclosed for filing, please find Appellant's Petition for Rehearing, Memorandum in Support and Certificate of Service in the above matter. A check in the amount of $25.00 for the filing fee is also enclosed. Please file the originals and required copies and return the extra, clocked-in copies with the bearer. Thank you for your cooperation and assistance in this matter.

Sincerely,

W. Allen Nickles, III

WAN/pfb
Enclosures
cc: Kenneth L. Childs, Esquire
Kathryn Long Mahoney, Esquire
Vernie L. Williams, Esquire
File #10-261