**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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JACQUELINE SMITH.....Appellant

v.

HORRY COUNTY SCHOOLS.....Respondent

**Appellate Case No.: 2012-213509**
**Unpublished Opinion No. 2014-UP-279**

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**Appeal from Horry County**
**Court of Common Pleas**
**Benjamin H. Culbertson, Circuit Court Judge**

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# RESPONDENT'S MEMORANDUM IN RESPONSE TO PETITION FOR REHEARING

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## I. PROCEDURAL POSTURE

The Respondent, Horry County Schools, respectfully submits this memorandum in response to Appellant Jacqueline Smith's (Smith) petition for rehearing. A petition for rehearing should be based on "points supposed to have been overlooked or misapprehended by the court." Rule 221, SCACR. Smith's petition, however, addresses no such issues or points, but rather re-hashes her prior arguments. For the reasons stated in its decision, the Respondent respectfully asks the Court to deny Smith's petition for rehearing.

## II. FACTUAL BACKGROUND

Due to the breadth of Smith's petition for rehearing, which challenges

every aspect of the Court's opinion filed June 30, 2014, the Respondent respectfully refers the Court for relevant factual background to the Statement of Facts set forth in the Final Brief of the Respondent filed July 10, 2013.

## III. LEGAL ARGUMENT

### A. The Court Properly Applied Controlling Precedent in Holding Smith's Due Process Rights Were Not Violated.

The Court's holding in this appeal that the Horry County Schools Board of Education's (Board) decision to terminate Smith's employment did not violate her due process rights relies on established precedent: "The improper admission of hearsay is reversible error only when the admission causes prejudice; [ however, w]here the hearsay is merely cumulative to other evidence, its admission is harmless." *Jackson v. Speed*, 326 S.C. 289, 305, 486 S.E.2d 750, 758 (1997); citing: *State v. Craig*, 267 S.C. 262, 227 S.E.2d 306 (1976); *Marsh v. Plywood Corp. v. S.C. Highway Dept.*, 258. S.C. 119, 187 S.E.2d 515 (1972); *State v. Williams*, 285 S.C. 544, 331 S.E.2d 354 (Ct. App. 1985). Although Smith's petition for rehearing seeks to distinguish *Jackson v. Speed* on the facts, the underlying principle and facts of this case remain. At bottom, Smith suffered no prejudice from the admission of any improper hearsay, and any such hearsay evidence was merely cumulative of the direct testimony of three school principals who supervised Smith, as well as two parents and two co-teachers who worked with Smith. All of these witnesses testified at the hearing based on their personal and direct observations and dealings with Smith. Their testimony fully supports the facts outlined in the Superintendent's recommendation of dismissal showing both her unfitness to teach and job deficiencies, which Smith failed to rectify over a six-year period. (R. pp. 231-34.) Accordingly, Smith's right to due process was not violated by the admission of any hearsay evidence, and the Court properly applied the controlling legal precedent stated in *Jackson v. Speed.*

### B. The Court Properly Applied the Law in Finding Smith Received Proper Notice of the Grounds For Her Termination.

Smith's employment was terminated both for "evident unfitness for teaching" under § 59-25-430 and for performance deficiencies other than "evident unfitness" under § 59-25-440. With regard to § 59-25-430, the statute requires notice of the recommendation of termination and an opportunity to be heard prior to dismissal. Here, the Superintendent's recommendation of dismissal set forth the grounds for dismissal. Smith had a full opportunity to conduct discovery regarding the grounds for dismissal, including document production and depositions.

Smith had clear notice of the grounds for her dismissal. If anything, Smith's argument in her petition for rehearing is that the notice of the grounds against her did not notify her of the identity of parents or students who had complained about her. However, this specific information was made available to her during the discovery period. (R. p. 86.)

With regard to § 59-25-440, the statute requires a teacher to be given notice of such deficiencies and an opportunity to improve. Three principals who supervised Smith over a period of six years testified at the hearing concerning the meetings and communications they held with Smith advising her of serious teaching and teaching-related deficiencies. At least as far back as the 2006-2007 school year, serious concerns with Smith's teaching were noted and addressed with her by her supervising principals. These serious concerns included the nature of Smith's instructional interactions with both students and parents, hostility towards the administration, unsatisfactory teaching quality, and harsh classroom atmosphere. Smith was twice offered an assistance plan, but both times refused them.

In light of these consistent facts and concerns over a period of several

years, schools, and administrators, it is clear that Smith was fully and fairly notified of deficiencies in her performance. Likewise, Smith had ample opportunity to improve her performance over the years, but simply failed or refused to do so. Smith was, therefore, afforded notice of her performance deficiencies and an opportunity to improve, including opportunities for assistance plans, but she did not take advantage of these opportunities. The District fully complied with any obligations it had with respect to § 59-25-440 to provide Smith notice and an opportunity to improve.

In short, Smith has: (1) been insubordinate over a period of years, refusing to follow through with required changes to her classroom management, instruction, and communications, as well as refusing to accept assistance plans (R. pp. 246-48, 314-20 (Compl. Exs. 10, 26)); (2) created a hostile and threatening classroom environment that has caused students undue fear, embarrassment, and anxiety (R. pp. 251-66, 270-73, 274-78, 289-300, 314-20 (Compl. Exs. 14, 18, 19, 22, 26)); and (3) achieved poor instructional results with an excessive number of her students receiving Ds and Fs (R. pp. 267-69, 314-20 (Compl. Exs. 17, 26)). These performance concerns were all identified in the Superintendent's recommendation of termination and are well recognized grounds for termination.

Consequently, the Court properly applied the requirements of § 59-25-430 and § 59-25-440 in finding that Smith received proper notice of the grounds for her dismissal.

### C. The Court Properly Applied the Substantial Evidence Standard of Review in Affirming Smith's Dismissal.

As noted in *Shell v. Richland School District One*, 362 S.C. 408, 608 S.E. 2d 428 (2005), the Court's review of a teacher's dismissal is governed by the grounds stated in the order terminating employment. In this case, unlike *Shell*, the Court did not cherry-pick the record or uphold the Board's decision on grounds or evidence not cited in

the Superintendent's recommendation of dismissal that was affirmed by the Board's order. Rather, the Court properly reviewed the record as whole and correctly determined that it contained substantial admissible evidence to support the factual and legal findings as found by the Board and stated in detail in the Superintendent's recommendation of dismissal. The Court, therefore, properly applied the substantial evidence standard of review.

### D. The Court Properly Applied the Law in Concluding the Board Identified Supporting Facts and Legal Conclusions in Its Order.

Smith essentially alleges the Board's written decision of March 29, 2011 (R. p. 2) does not comply with the standard for decisions of administrative bodies, because it does not set out findings of facts and conclusions of law. *See Lee County Sch. Dist. Bd. of Trs. v. MLD Charter Sch. Acad. Planning Comm.*, 371 S.C. 561, 567, 641 S.E.2d 24, 27-28 (2007); *Porter v. S.C. Pub. Serv. Comm'n.*, 333 S.C. 12, 507 S.E.2d. 328 (1998). However, the Board's decision does comply with the express requirements of the Teacher Employment and Dismissal Act, § 59-25-470, respecting the form of the Board's decision to either affirm or withdraw the Superintendent's notice of suspension and dismissal, and in doing so it is consistent with § 59-25-470. Moreover, the Superintendent's notice of dismissal dated January 5, 2011, affirmed by the Board's decision, sufficiently details and sets forth the relevant findings of fact and conclusions of law. (R. pp. 231-34.)

Section 59-25-470 sets forth the "mode of procedure" to be followed by school boards and administrators in teacher employment termination, including the following:

> Within ten days following the hearing, the board shall determine whether the evidence showed good and just cause for the notice of suspension or dismissal and shall render its decision accordingly,

> either affirming or withdrawing the notice of suspension or dismissal.

§ 59-25-470. *See also Young v. Charleston County Sch. Dist.*, 397 S.C. 303, 307-308, 725 S.E.2d 107, 109 (2012). The Board issued on March 29, 2011 its decision letter stating that it affirmed the recommendation of the Superintendent to terminate Smith's employment. The Board, therefore, affirmed the Superintendent's notice of suspension and dismissal, consistent with the Teacher Employment and Dismissal Act. The Superintendent's January 5, 2011, notice of suspension and recommendation of dismissal sets out in four, single-spaced pages the factual basis for and the conclusions of law supporting the dismissal.

As noted in *Porter*, "[a]n administrative agency is not required to present its findings of fact and reasoning in any particular format, ...." *Porter*, 333 S.C. at 21, 507 S.E.2d at 332. The format of affirming the Superintendent's notice of suspension and recommendation for dismissal as set out in § 59-25-470 fully satisfies the purpose for a written order presenting findings of fact and reasoning. As discussed in *Porter:*

> An administrative body must make findings which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings.

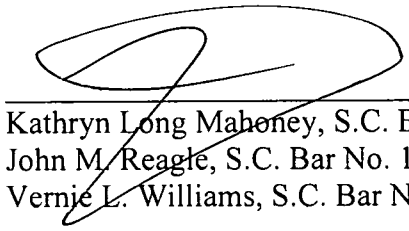
*Id.* The Superintendent's detailed notice of suspension and recommendation of dismissal serves this purpose of affording judicial review; it is sufficiently detailed to enable a reviewing court to determine whether the findings are supported by the evidence presented at the hearing before the Board, and whether the Teacher Employment and Dismissal Act has been applied properly to those findings. Here, the Court properly determined substantial evidence in the record supports the facts and findings affirmed by the Board and the Circuit Court.

## IV. CONCLUSION

For the foregoing reasons, the Respondent respectfully asks the Court to deny Smith's petition for rehearing.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.



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July 24, 2014

Columbia, South Carolina

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**CERTIFICATE OF SERVICE**

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



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July 24, 2014

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July 24, 2014

**VIA HAND DELIVERY**
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

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

Dear Ms. Kitchings:

Our firm represents Respondent, Horry County Schools, in connection with the above-referenced appeal. Enclosed for filing please find an original and 7 copies of Respondent's Memorandum in Response to Petition for Rehearing.

Please return the extra file-stamped copies of this filing to our office via our courier. By copy of this letter we are today serving copies of the above-referenced filing on all counsel of record.

Thank you for your assistance with this matter.

Sincerely yours,

John M. Reagle
*jreagle@childs-halligan.net*

/aes
Enclosures

c: W. Allen Nickles, III, Esq. (w/ encl.)
Susan M. Fittipaldi, Esq. (w/ encl.)