THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM COUNTY
Horry County Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 2014-UP-279 (S.C. Ct. App. Filed June 30, 2014)

JACQUELINE SMITH.....Petitioner,

v.

HORRY COUNTY SCHOOLS.....Respondent.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

Kathryn Long Mahoney
John M. Reagle
Vernie L. Williams
CHILDS & HALLIGAN, P.A.
1301 Gervais Street, Suite 900
P.O. Box 11367
Columbia, SC 29211
(803) 254-4035

Attorneys for Respondent

Other Counsel of Record:

W. Allen Nickles, III
Susan M. Fittipaldi
NICKLES LAW FIRM, LLC
1122 Lady Street, Suite 610
Columbia, South Carolina 29201
(803) 779-8080

Attorneys for Petitioner

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I. STATEMENT OF ISSUES ON CERTIORARI

Smith's petition for writ of certiorari from the decision of the Court of Appeals upholding the Horry County School District Board of Education's ("Board") termination of her employment under the Teacher Employment and Dismissal Act ("Act"), S.C. Code Ann §§ 59-25-410 through 530, presents the following issues for the Court's review:

1. Does the Court of Appeals' opinion properly apply controlling precedent in holding Smith received due process of law?
2. Does the Court of Appeals' opinion properly apply the law in finding that Smith received notice of the grounds for her termination?
3. Does the Court of Appeals' opinion properly apply the substantial evidence standard of review in finding substantial evidence supports Smith's termination?
4. Does the Court of Appeals' opinion properly apply the law in finding the form of the Board's decision, affirming the Superintendent's notice of suspension and dismissal, was proper under the Act.

II. STATEMENT OF THE CASE

This petition for writ of certiorari seeks the Court's review of the Board's termination of Smith's employment with the Horry County School District ("District").

Pursuant to the Teacher Employment and Dismissal Act, S.C. Code Ann. §§ 59-25-410 through 530, on January 5, 2011, the District's Superintendent, Dr. Cynthia Elsberry, advised Smith that she was recommending her termination from employment for the reasons set forth in her letter. (R. pp. 231-234, Compl. Ex. 1.) An extensive period of discovery followed, including production of records and depositions, and on March 24, 2011 an adversarial hearing was held before the Board. (R. pp. 64-230.) At the hearing on

March 24, 2011, which lasted approximately 16 hours, Smith took advantage of her right to be represented by legal counsel, her right to produce witnesses and other evidence, and her right to cross examine the District's witnesses. Smith was represented by legal counsel, Dr. Elsberry was represented by legal counsel, and the Board was represented by Kenneth S. Generette, Esq. Following the hearing, in the early morning hours of March 25, 2011, the Board issued its decision affirming the Superintendent's recommendation of termination of January 5, 2011. Smith was notified of the Board's decision on that date, and the Board's decision was subsequently confirmed in writing on March 29, 2011. (R. p. 2 Copy of the Board's decision letter.) Smith filed her appeal to the Circuit Court on April 20, 2011, pursuant to § 59-25-480. (R. pp. 5-9, Notice of Appeal.) The District filed its Answer and Return to the appeal on May 3, 2011. (R. pp. 445-446.) Smith's appeal was heard by the Honorable Benjamin H. Culbertson on September 13, 2012. Judge Culbertson entered judgment in favor of the District, affirming the Board's termination of Smith on September 20, 2012, which was filed with the Clerk of Court on October 26, 2012. (R. p. 1.) Thereafter, Smith appealed to the Court of Appeals. (R. pp. 441-442.)

After holding two oral arguments, the Court of Appeals filed an unpublished opinion on June 30, 2014, affirming Smith's termination. (Appendix p. 1.) Smith filed a petition for rehearing with the Court of Appeals on July 14, 2014. The District filed a memorandum in response on July 24, 2014. By order dated August 27, 2014, the Court of Appeals denied the petition for rehearing.

For the reasons discussed below, Smith's petition for writ of certiorari should be denied.

III. ARGUMENT ON QUESTIONS PRESENTED FOR REVIEW

1. The Court of Appeals Properly Applied Controlling Precedent in Holding Smith's Due Process Rights Were Not Violated.

The Court of Appeals' holding in this appeal that the Board's 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 Plywood Corp. v. S.C. Highway Dep't*, 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 certiorari review seeks to distinguish *Jackson v. Speed* on the facts, the underlying principle articulated in *Jackson* still applies to this case. 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 establishes the facts outlined in the Superintendent's recommendation of dismissal showing both Smith's unfitness to teach and job deficiencies, which Smith failed to rectify over a six-year period. (R. pp. 231-34.)

Further, not all evidence Smith objects to is inadmissible hearsay. The Court of Appeals did not specify which evidence it found to be inadmissible hearsay; however, much of, if not all, the evidence to which Smith objects is subject to an evidentiary exception under Rules 803(2), (3), (4), (6) and (8), SCRE, or is not hearsay at all. For example, notice of Smith's performance deficiencies is a central issue in this

matter. This Court has directly addressed the issue of whether out of court statements regarding poor job performance are hearsay in *Baber v. Greenville County*, 327 S.C. 31, 488 S.E.2d 314 (1997). The Court held testimony offered to show an employee had notice of poor job performance was not hearsay. "Testimony to show notice of a fact and not the fact itself is not hearsay." *Id.* at 41, 488 S.E.2d at 319. Smith's notice of her performance deficiencies is of course relevant to her termination under the Act, § 59-25-440. In her letter recommending Smith's dismissal, the Superintendent directly addressed the notice issue:

> You stated you have not received "documentation" of any complaints about you. However, the documentation contained in numerous emails from parents suggests otherwise. In many cases where parents have requested a conference, there are emails that establish they first attempted to communicate directly with you regarding their questions or concerns and they were not satisfied with your response or did not believe you responded in a timely manner.

(R. p. 232.) In viewing the record as a whole, as the Court must do under the substantial evidence standard of review, it is plain that the Board's decision is not based solely on inadmissible hearsay and that sufficient competent evidence supports the Board's ruling affirming the Superintendent's recommendation of Smith's dismissal.

Accordingly, Smith's right to due process was not violated by the improper admission of any evidence, and the Court of Appeals properly applied the controlling legal precedent stated in *Jackson.*

2. The Court of Appeals 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 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, the District provided her with this specific information during the discovery period, and she is simply wrong to the extent she now suggests otherwise. (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 of Appeals 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.

3. The Court of Appeals Properly Applied the Substantial Evidence Standard of Review in Affirming Smith's Termination.

As noted in *Shell v. Richland School District One*, 362 S.C. 408, 608 S.E.2d 428 (2005), a 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 of Appeals properly reviewed the record as a whole and correctly determined that it contained substantial admissible evidence to support the

factual and legal findings as found by the Board in affirming the Superintendent's recommendations and as stated in detail in the Superintendent's recommendation of dismissal. The Court of Appeals, therefore, properly applied the substantial evidence standard of review.

4. The Court of Appeals Properly Applied the Law in Concluding the Board Identified Supporting Facts and Legal Conclusions in Its Order Terminating Smith's Employment

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'n,* 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.

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 of Appeals properly determined substantial evidence in the record supports the facts and findings affirmed by the Board and the Circuit Court.

IV. CONCLUSION

Certiorari review is not a matter of right and will only be granted where there are special and important reasons. Here, no special or important reasons justifying certiorari review exist: no novel question of law is presented; there is no dissent in the Court of Appeals' decision; the Court of Appeals' decision does not conflict with any decision of this Court; and no substantial constitutional issue is directly involved. Accordingly, for the foregoing reasons, the Respondent respectfully asks the Court to deny Smith's petition for certiorari review.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: _____

Kathryn Long Mahoney, S.C. Bar No. 65332
John M. Reagle, S.C. Bar No. 14185
Vernie L. Williams, S.C. Bar No. 9511

P.O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorneys for Respondent Horry County School District

October 23, 2014
Columbia, South Carolina

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In The Court of Appeals

APPEAL FROM COUNTY
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Honorable Benjamin H. Culbertson, Circuit Court Judge

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JACQUELINE SMITH.....Petitioner,

v.

HORRY COUNTY SCHOOLS.....Respondent.

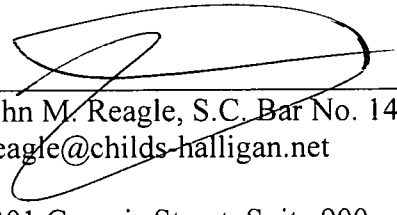
PROOF OF SERVICE

The undersigned hereby certifies that he has served Respondent's Return To Petition For Writ of Certiorari by hand delivering a copy of the same as follows:

W. Allen Nickles, III, Esq.
Susan M. Fittipaldi, Esq.
Nickles Law Firm, LLC
P. O. Box 1866
Columbia, SC 29202-1866

October 23, 2013

CHILDS & HALLIGAN, P.A.



John M. Reagle, S.C. Bar No. 14185
jreagle@childs-halligan.net

1301 Gervais Street, Suite 900
P.O. Box 11367
Columbia, SC 29211
(803) 254-4035
Attorney for Respondent

CHILDS & HALLIGAN

A PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

The Tower at 1301 Gervais Street, Suite 900, Columbia, SC 29201
Post Office Box 11367, Columbia, SC 29211-1367

Telephone (803) 254-4035
Facsimile (803) 771-4422

Kenneth L. Childs
William F. Halligan
Kathryn Long Mahoney
Allen D. Smith†
Shirley M. Fawley*
John M. Reagle**
Vernie L. Williams
Thomas K. Barlow**

Allison Aiken Hanna
Keith R. Powell***
Connie P. Jackson
Kimberly Kelley Blackburn
Jasmine Rogers Drain++
Dwayne T. Mazyck
Tyler R. Turner
Mary Allison Caudell

†Certified Specialist in Employment and Labor Law
*Also admitted in District of Columbia
**Also admitted in North Carolina
***Also admitted in Missouri
++Also admitted in Georgia

October 23, 2014

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

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

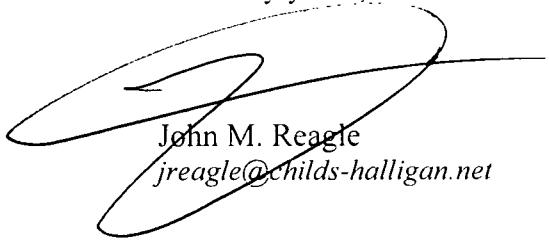
Dear Ms. Kitchings:

Our firm represents Appellant, the School District of Horry County, in connection with the above-referenced appeal. Enclosed for filing, please find an original and 7 copies of Respondent's Return To Petition For Writ of Certiorari.

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

/rml
Enclosures
(c) W. Allen Nickles, III, Esq.
Susan M. Fittipaldi, Esq.