THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Administrative Law Court

John D. McLeod, Judge

Docket No.: 09-ALJ-30-0103-AP

James "Cal" Bell, Othella Bernard, Katherina Bowyer, Linda M.W. Bratton, Ann T. Bridges, Richard M. Cobb as Personal Representative of the Estate of Rance C. Cobb, Jeannie B. Croxton, Bernetha L. Culbreath, William K. Dreyer, Jacqueline D. Farr, Ruth Fritts, Nancy Glenn, Etta Jane Jones, Geneva M. Martin, Mary H. McCabe, Beverly McClanahan, Max D. Randolph, Carolyn McIver Smith, Maggie G. Williams and Paula Woodlief, ... Appellants.

v.

South Carolina Department of Corrections and Palmetto Unified School District No. 1
..... Respondents.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Appellants are current and former certified educators employed by the South Carolina Department of Corrections ("SCDC") in the Palmetto Unified School District ("District"). Appellants were each "covered employees" removed from their positions as a result of a reduction in force ("RIF") implemented effective June 1, 2003.[1] Appellants each timely submitted an appeal of their separation from employment in keeping with SCDC policy and state law.

Appellants' appeals were initially denied by SCDC and the Office of Human Resources ("OHR"). Appellants filed suit in the Court of Common Pleas for Richland County challenging the denial of their grievances. By Order dated January 8, 2007, the Honorable G. Thomas Cooper, Jr. granted Appellants' request to remand for a hearing before the State Employee Grievance Committee. SCDC appealed Judge Cooper's remand order. On May 14, 2008, this Court dismissed the appeal. By letter dated June 4, 2008, OHR directed SCDC to process Appellants' grievances in accordance with the Agency's grievance policy.

SCDC did not take the action directed by OHR within the time period provided by law. On July 23, 2008, Appellants timely requested a hearing before the State Grievance Committee. The Committee heard testimony, received evidence and argument on November 5, 6, 7, 10, 17; December 15 and 18, 2008; and January 22, 26 and 29, 2009. The Committee issued its Final Decision on February 18, 2009. Appellants filed a notice of appeal to the Administrative Law Court ("ALC") on March 10, 2009. OHR certified the record on appeal on June 24, 2009.

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[1] A "covered employee" occupies all or part of an established full-time equivalent position, has completed the state's twelve month probationary period, has a "meets" or higher overall rating, and holds grievance rights. Employees in temporary and temporary grant positions, as well as participants in the TERI program, and state retirees do not qualify as "covered employees" and do not have grievance rights. A "covered employee" separated from employment by RIF retains "covered" status for a period of twelve months following separation. See S.C. Code Ann. §§ 8-17-320(7), 8-17-370(16), (17) and S.C. Code of Regulations R.19-700.

The ALC heard argument on October 28, 2009, and issued an order on June 2, 2010. Appellants filed a motion for reconsideration on June 7, 2010. The ALC heard the reconsideration argument on July 14, 2010, and issued a final order on August 6, 2010. Appellants filed notice of appeal to this Court on August 24, 2010.

STANDARD OF REVIEW

This is an appeal from a final administrative decision governed by the Administrative Procedures Act ("APA"). S.C. Code Ann. § 1-23-310 et seq. Under the APA, a reviewing court presented with a factual challenge must assess the record as a whole to determine whether the administrative decision is supported by substantial evidence. S.C. Code Ann. §§ 1-23-380(5)(e) and 1-23-610(B)(e). The South Carolina Supreme Court has defined "substantial evidence" as evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. McCraw v. Mary Black Hosp., 350 S.C. 229, 235, 565 S.E.2d 286, 289 (2002).

The deference afforded administrative agencies in resolving factual disputes does not extend to conclusions of law. Instead, a reviewing court must exercise its independent judgment and reverse or modify an administrative decision that is affected by an error of law. S.C. Code Ann. § 1-23-380(5)(a)(b)(c)(d)(f) and 1-23-610(B)(a)(b)(c)(d)(f) see also Hill v. Eagle Motor Lines, 373 S.C. 422, 428, 645 S.E.2d 424, 427 (2007).

The material facts in this appeal are largely uncontested. These facts establish that the order of the ALC must be reversed to protect the substantive rights of Appellants in keeping with S.C. Code Ann. § 1-23-610.

ORDER OF THE ALC

The ALC order identifies three general holdings in affirming the final decision of the

State Grievance Committee: (1) that SCDC did not violate the RIF policy, state law, controlling regulations, or the constitution by including Appellants and other certified educators in the RIF; (2) that SCDC did not violate RIF policy, state law, controlling regulations, or the constitution by creating eleven geographic areas for purposes of implementing the RIF; and (3) that SCDC did not violate RIF policy, state law, controlling regulations, or the constitution by retaining and hiring temporary employees before and after the RIF.[2]

For the following reasons, each of these holdings represents a misapplication of controlling policy, regulation, law, and constitutional guarantees.

SUMMARY OF ARGUMENT

The rights of public employees are contained in agency policies, regulations, and laws enacted by the General Assembly. These rights are guaranteed by the due process and equal protection provisions of the South Carolina Constitution. No public agency has the authority to ignore its own rules, circumvent regulations, or violate laws. In the RIF that separated Appellants from employment on June 1, 2003, SCDC violated established rights and exceeded the scope of its authority, thereby prejudicing substantial rights of the Appellants enforceable by S.C. Code Ann. § 8-17-340(E)(2). Accordingly, the ALC order upholding Appellants' separations must be reversed insofar as its findings and conclusions are based upon violations of statutory authority, unlawful procedure, and legal error proscribed by S.C. Code Ann. §§1-23-380(5) and 1-23-610(B). Specifically:

- SCDC denied Appellants the opportunity to "bump" less senior employees by creating geographic areas that were not restricted to staff separately organized and clearly

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[2] ALC order filed August 6, 2010, at page 9. All issues raised by Appellants before the ALC are preserved for review by this Court. ALC order at page 42.

distinguishable from the staff in other areas as required by the RIF policy. (Policy Section 1.1, ROA p. 1634).

- SCDC made new hires, internal promotions, or reassignments during the recall period into positions vacated by the RIF without affording Appellants the opportunity to recall as required by the RIF policy. (Policy Section 2.3, ROA p. 1634).

- SCDC allowed employees to retire and, after a "break in service," return to employment during the recall period. This violated Appellants' rights as "covered employees" to occupy the vacated positions. (Policy Sections 7.1 and 7.5, ROA p. 1638); see also S.C. Regulation R.19-700 and R. 19-719.01; S.C. Code Ann. §8-11-185.

- SCDC repeatedly assigned employees to "temporary positions" for periods exceeding one year in violation of the RIF policy and state law. (Policy section 11, ROA p. 1640; S.C. Code Ann. § 8-17-330; S. C. Regulation R-19-700). As a result, Appellants were not afforded an opportunity to continue or recall to employment.

- SCDC assigned employees separated by RIF to provide instructional services at pay significantly below the statutory teacher pay schedule in violation of S.C. Code Ann. § 24-25-70 (7).

- SCDC infringed Appellants' constitutional rights in separating them from employment in violation of the RIF plan, controlling regulation, and state law. See S.C. Const. art. I, §§ 3 and 22.

STATEMENT OF FACTS

The following facts demonstrate that SCDC deviated from controlling policy, regulation, and law in the challenged RIF:

1. The Palmetto Unified School District ("District") is a single, statewide school district created by the General Assembly and administered by SCDC. S.C. Code Ann. § 24-25-10. All educators in the District must be employed, supervised, and terminated according to SCDC policies and procedures. S.C. Code Ann. § 24-25-90.

2. The District has one Board and one Superintendent. S.C. Code Ann. §§ 24-25-40 through 90. All educators are held to the same standards and there are no geographic regions within the District. (ROA pp. 513-15, 525-28, 863-65, 913, 2614).

3. Certified educators employed by SCDC in the District perform their duties on a twelve-month school program and receive a teacher's pay schedule based on the State and average school supplement pay scales. S.C. Code Ann. § 24-25-70(7). In 2000, this Court issued an order requiring SCDC to comply with the teacher pay schedule. See Abraham v. Palmetto Unified Sch. Dist. No. 1, 343 S.C. 36, 538 S.E.2d 656 (Ct. App. 2000).

4. In January 2003, Jon E. Ozmint was appointed Executive Director of SCDC. Shortly thereafter, he presented a reduction in force proposal to OHR. The RIF policy utilized in the challenged action was approved by OHR on March 14, 2003. (ROA pp. 1163-67).

5. SCDC submitted its RIF plan to OHR on March 28, 2003. (ROA pp. 1928-59) The same day, OHR provided "approval of procedural correctness." This approval did not include "the determination of the geographic locations in the competitive areas, competitive classes, competitive class series, bumping rights, the positions to be eliminated, or any exceptions included in the plan, **since these are solely the responsibility of SCDC management**." (Final Decision Findings of Fact No. 1, ROA p. 12; see also ROA pp. 1926-27) (emphasis added).

6. Director Ozmint identified the positions for separation pursuant to RIF. (Final Decision Findings of Fact No. 2, ROA p. 12).

7. Of the 148 positions designated for RIF, approximately 84 were certified educators. (Final Decision, ROA p. 11).

8. Higher paid educators were eliminated to get the most "bang for the buck." (ROA pp. 1038-39, 1054-56, 1072, 1079-80, 2682). Appellants and SCDC witnesses testified that non-educator SCDC employees complained about the "unfairness" of statutorily required educator pay raises. (Final Decision Findings of Fact No. 18, ROA p. 14). Director Ozmint

testified that these raises were "taken out of the hide" of other employees. (ROA pp. 1045-46; see also ROA pp. 1052, 1095-96).

9. Director Ozmint instructed SCDC Director of Human Resources, John Near, to draw "competitive areas" in a way to minimize employee bumping and maximize savings.[3] (Final Decision Findings of Fact No. 2, ROA p. 12).

10. Mr. Near created eleven geographic regions within SCDC for purposes of the RIF. (ROA pp. 1934-35). These regions were not restricted to areas where staff was separately organized or clearly distinguishable from the staff in other areas. (Final Decision Findings of Fact Nos. 4-5, ROA p. 12; see also ROA pp. 1085-87).

11. The geographic regions existed only for the purpose of the RIF and to reduce bumping. (Final Decision Findings of Fact No. 3, ROA p. 12).

12. In the areas most affected by the RIF, SCDC funded education staff was limited to seven "pink slip" temporary employees, two classroom teachers, and one teacher assistant. (ROA pp. 3301-02) In contrast, the Appellants separated due to RIF had service ranging from nine to more than thirty years with SCDC.

13. Gerri Miro, Director of the SCDC Education Division, testified that there is only one District in the SCDC. The District is not divided geographically, has one superintendent, and educators are held to the same standards regardless of location. The geographic regions used in the RIF have no bearing on administration or delivery of educational services. (Final Decision

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[3]Prior to Director Ozmint's appointment, SCDC had experienced the closing of the Central Correctional Institution (CCI) in Richland County. Rather than restrict employment opportunities geographically, SCDC permitted all affected employees to obtain positions in other facilities. As a result, employees interested in maintaining employment with SCDC found positions. (ROA pp. 723-25)

Findings of Fact Nos. 8 and 13, ROA p. 13).

14. Wendell Blanton, Superintendent of the District at the time of the RIF, was not called as a witness. Mr. Blanton's deposition testimony confirms that there is only one District in the SCDC and that there are no geographic regions in the District. Mr. Blanton was not involved in the RIF until after he read about it in the newspaper and had one meeting of approximately fifteen minutes with SCDC administrators concerning the RIF after positions had been identified for elimination and geographic regions created. No Board members were consulted prior to the RIF. (Final Decision Findings of Fact Nos. 9 and 13, ROA p. 13).

15. There is no commuting limit for employees of SCDC. (ROA pp. 621-23) Ms. Miro, for example, has commuted forty-seven miles one way each day for her duties as Warden of Allendale Correctional Institution and as a Director of SCDC. (ROA pp. 900-01) There is no requirement that an employee live close to his or her place of work and employees often commute long distances to continue and advance in their service to SCDC. (ROA pp. 527-28; 623).

16. Appellants would have been willing to perform services outside their RIF regions to retain employment. Several Appellants worked in more than one geographic region or obtained employment outside the geographic region from which they were separated. For example:

(a) Rance Cobb worked in more than one geographical area during his service to SCDC. Following his RIF at Leath (Area 10), Mr. Cobb obtained employment in the Cherokee County public school district (Area 3). (ROA pp. 509-12; 2706);

(b) Following her RIF at Leath (Area 10), Ruth Fritts obtained employment in the Berkeley County public school district (Area 6). (ROA p. 2713);

(c) Following her RIF at Stevenson and Kirkland (Area 1), Nancy Glenn obtained a teaching position at Trenton (Area 9). (ROA pp. 2714-15);

(d) Following her RIF at McCormick (Area 10), Etta Jane Jones obtained employment in the Georgia public school system. Ms. Jones had prior service at the Aiken Youth Facility (Area 9). (ROA p. 2716);

(e) Following his RIF at Tyger River (Area 11), Max Randolph obtained employment in the York County public school district (Area 3). (ROA p. 2722);

(f) Following her RIF at Kershaw (Area 5), Paula Woodlief obtained employment in the Sumter County public school district (Area 2). (ROA p. 2725); and

(g) Witness Charlie Williams, who was not separated by the RIF, lived in Greenwood (Area 10) and worked at Tyger River (Area 11). (ROA pp. 3355-56).

17. Certified educators with less service than the Appellants retained employment following the RIF. (Final Decision Findings of Facts No. 10, ROA p. 13; see also Employee list provided as Appendix A to Appellants' Brief to the ALC dated July 16, 2009 (hereafter "Appendix A")). These individuals include:

(a) Henry Bagnal, Principal (Service Date: 7/18/92) rather than Rance Cobb (Service Date 3/12/70);

(b) Academic Program Managers Hoyt Sharp (Service Date: 1/16/92), Kathy Jackson (Service Date: 6/5/92), and Tommy Wicker (Service Date: 5/6/02) rather than Carolyn McIver-Smith (Service Date: 2/10/90);

(c) Carpentry Instructors Stokes (Service Date: 8/16/91) and Rogers (Service Date: 7/17/93) rather than Cal Bell (Service Date: 3/21/90);

(d) Masonry Instructor Morant (Service Date: 7/17/89) rather than Max Randolph (Service Date: 7/10/86); and

(e) Certified Teachers Austin (Service Date: 6/4/82), Green (Service Date: 10/6/84), Howard (Service Date: 2/1/86), and Rueger (Service Date 10/31/92) rather than Othella Bernard (Service Date: 1/13/90), Linda Bratton (Service Date: 1/13/82), Jeannie Croxton (Service Date: 5/18/86), Berneatha Culbreath (Service Date: 2/24/90), William Dreyer (Service Date: 4/30/82), Jacqueline Farr (Service Date: 9/20/92), Ruth Fritts (Service Date: 10/17/89), Nancy Glenn (Service Date: 8/10/90), and Etta Jane Jones (Service Date: 8/24/84) (See Positions Eliminated by Area, Position, and Location, ROA pp. 2403-17).

18. Appellants were replaced by part-time, less experienced, or temporary staff. For example:

(a) Ms. Bower was replaced by a part-time hire, Shirley Johnson. (ROA pp. 275-76);

(b) Ms. Bratton's former duties were assumed by Correctional Officers Watkins, Buhler, and Nazar. (ROA pp. 205-06; 208-09; 2704);

(c) Ms. Croxton could have performed the duties of Rose Rueger and Talmadge Smith, both with less seniority and protected from separation by RIF. (ROA pp. 361-362);

(d) Ms. Culbreath could have bumped Yvette Lakin and Patricia Hudson, both outside her area. (ROA pp. 172-75; 178-79);

(e) Mr. Dreyer could have bumped Ray Dorn at Trenton. (ROA pp. 2709-10);

(f) Ms. Fritts, a doctoral certified educator, could have bumped Yvette Lakin, Patricia Hudson, Jewell Bounds, and Kathy Jackson. (ROA pp. 186-88; 192-93);

(g) Ms. Glenn could have bumped four librarians from outside her area, Steve Gratzer, Billy Holliday, Donna Deadmont, and Mary McCabe. (ROA pp. 281-82; 2714-15); and

(h) Ms. McCabe could have bumped Billy Holliday and observed that Jane Mailloux was hired shortly after the recall period, with less prior service than others separated by the RIF. (ROA p. 2718).

19. Temporary employees and part-time employees were retained and hired during the RIF recall period. (Final Decision Findings of Fact No. 14, ROA p. 13).

20. Heather Pope, a managing partner of OHR testified as a Committee witness. Ms. Pope stated that prior to June 2003, OHR had issued answers to frequently asked questions (FAQ) on its website regarding reductions in force. This information was sent to all agencies and their human resource offices. (Appellant Exhibit 11, ROA p. 3390) The following question and answer appeared on the OHR website during the RIF period under review:

Q. Can an agency hire a temporary employee to replace an employee affected by a RIF or to perform the functions of a position eliminated by a RIF?

A. An agency may not hire a temporary employee to perform the duties of an employee affected by a RIF. If these duties are to be performed within one year of the effective date of the RIF the agency should reestablish the position and implement its recall procedure.

(Final Decision Findings of Fact No. 15, ROA p. 14; Appellant Exhibit 12, ROA p. 3391).

21. The recall period for the challenged RIF was June 1, 2003 – May 31, 2004. On July 18, 2003, and March 25, 2004, SCDC implemented two "Retirement Opportunities" that allowed full-time employees to retire and return to work in "temporary" capacities at 75% of their former salaries. (Final Decision Findings of Fact Nos. 11 and 12; ROA p. 13; ROA pp. 2564-70; 2571-72).

22. A public employee who retires experiences a "break in service." S.C. Regulation R. 19-700 and R. 19-719.01. Retirees lose any enforceable right to re-employment. See S.C. Code Ann. § 9-1-1790 (retiree must leave active employment for a minimum of 15 days).

23. During the recall period of June 1, 2003 – May 31, 2004, SCDC employed twenty-three individuals in temporary positions to perform services formerly provided by full-time, certified educators. During the same period, SCDC assigned responsibilities formerly performed by full-time, certified educators to nineteen individuals designated as non-certified staff.[4]

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[4] SCDC produced a list of employees assigned responsibilities performed by certified educators prior to the RIF. This list is contained at ROA pp. 2233-38. Provided as Appendix A is a list designating employee actions in categories "Education Bump," "Permanent Employees Assigned Education Responsibilities," and "Temporary Employees Assigned Education Responsibilities." This list shows actions taken during and after the recall period. (ROA p. 3396, 3398) (identifying the list as actions taken "June 1, 2003 and after who were assigned responsibilities

24. By regulation, a "temporary employee" cannot exceed one year of employment. Additionally, a "temporary position" cannot be in place for more than one year. S.C. Regulations R. 19-700. During the recall period, SCDC employed individuals as "temporary employees" and re-employed individuals in "temporary positions." (ROA pp. 3303-08; 818-21; 823-24; see also Employee list provided as Appendix A).

25. After the RIF, Appellants Nancy Glenn, Mary McCabe, and Beverly McClanahan performed their former education duties while being paid as security officers. (Final Decision Findings of Fact No. 16, ROA p. 14). SCDC did not have signed position descriptions for these employees and Ms. Glenn received a memorandum before the RIF that she would continue her library services in her new position. (Appellants' Exhibit 2; ROA p. 3251).

LEGAL ARGUMENT

1. The ALC failed to enforce the plain language of the RIF policy.

The General Assembly has assigned OHR the responsibility to "administer a comprehensive system of personnel administration responsive to the needs of employees and agencies and essential to the efficient operation of State Government." S.C. Code Ann. § 8-11-210. Under the authority of the Budget and Control Board, OHR develops policies and programs concerning all aspects of state employment, including reductions in force. S.C. Code Ann. § 8-11-230(6). For this reason, agencies must submit RIF proposals to OHR for procedural review and agencies must comply with substantive requirements for recall and reinstatement of employees affected by RIF. S.C. Code Ann. § 8-11-185.

Words used in policies, regulations, and statutes must be given their "plain and ordinary

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that were performed by certified educators as of June 1, 2003"). The list establishes that there were **twice as many** new permanent and temporary education employment actions during the recall period as the number of Appellants separated by RIF.

meaning" without resorting to subtle or forced construction that would limit or expand their operation. Bryant v. City of Charleston, 295 S.C. 408, 411, 368 S.E.2d 899, 900-01 (1988). Sections or provisions which are part of the same general statutory law must be construed together and given a unified effect. TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1988). Because OHR is charged with the administration of public employee rights and benefits, including those applicable to RIF, its construction of statutes and regulations relating to separation and recall "is entitled to the most respectful consideration and should not be overruled absent compelling reasons." See Emerson Elec. Co. v. Wasson, 287 S.C. 394, 397, 339 S.E.2d 118, 120 (1986); Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (deference provided to an agency's interpretation of applicable statutes and regulations).

The statutes contained in Title 8 of the South Carolina Code, the regulations adopted by the Budget and Control Board, and the guidelines issued by OHR establish a "comprehensive system of personnel administration" that applies to all agencies of state government, including SCDC. See generally S.C. Code Ann. §§ 8-11-210 et seq. These governing principles are not subject to manipulation and may not be ignored. Instead, the "wisdom or folly" of a legislative act is not a matter for judicial review and courts must enforce legislation as written, regardless of questions regarding the soundness of the legislative policy. Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996).

Addressing the RIF process that affected Appellants, Director Ozmint objected to bumping rights established in law and incorporated in the RIF Policy as "silly" barriers to cost savings. (ROA pp. 2682; see also ROA pp. 1054-55, 1077-78, 1080). Ignoring the RIF policy requirement of an operational justification for a competitive area other than agency or

department wide, Director Ozmint instructed his Director of Human Resources to draw geographic areas for the exclusive purpose of eliminating senior employees such as Appellants. The resulting eleven areas were not, as required by the RIF policy, confined to staff that were **separately organized and clearly distinguishable** from the staff in other areas. (RIF Policy § 1.1, ROA p. 1634). Later, the Appellants' rights to recall were sacrificed so that employees retained following the RIF could "retire" and return to SCDC as temporaries at a percentage of their former salaries. This violated OHR guidelines that prohibit hiring temporary employees in favor of those separated by RIF and circumvented rehire provisions of the RIF policy.

A state administrative agency can only exercise powers that have been conferred by the General Assembly. Moreover, administrative agencies must follow their own rules and regulations. Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). Any action taken in excess of authority is "null and void." Id. (citing 73A C.J.S. Public Administrative Law and Procedure § 117 (1983)).

The RIF policy prepared by SCDC and approved by OHR governs the rights of employees subject to its terms. Designated below are RIF policy sections that were violated by SCDC and entitle Appellants to reinstatement of employment and benefits.

> **RIF Policy Section 1.1** states the competitive area may be *agency wide*, a department, or a more restricted *geographical* area **where the staff is separately organized and clearly distinguishable from the staff in other areas.** (ROA p. 1634) (emphasis added).
>
> **Violations**:
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> The District is wholly contained within the SCDC Education Division, which operates as a single, state-wide school district under central administration. (S.C. Code Ann. §§ 24-25-10 through 90; Bell, et al. v. SCDC dated 5/4/05, ROA p. 2114; Bell, et al. v. SCDC dated 1/10/07, ROA p. 2361; Abraham v. SCDC, 343 S.C. 36, 538 S.E.2d 656 (Ct. App. 2000); Cobb testimony, ROA pp. 513-15, 525-28; Miro testimony, ROA pp. 863-65, 913; Blanton testimony, ROA pp. 2614);

Geographic areas do not relate to staff that are separately organized. (Final Decision Findings of Fact No. 8, ROA p. 13; Blanton testimony, ROA pp. 2617-18);

Geographic areas do not relate to staff clearly distinguishable from other areas. (Final Decision Findings of Fact No. 8, ROA p. 13; Blanton testimony, ROA pp. 2617-18);

Geographic areas were used exclusively for RIF without reference to employee residence or past work places. (Final Decision Findings of Fact No. 2 and 3, ROA p. 12; Cobb testimony ROA 525-28); and

Geographic areas eliminated bumping opportunities for senior educators. (See RIF chart showing employee service dates, ROA 1653-59).

The plain language of RIF Policy Section 1.1 requires SCDC to select among three potential competitive areas: (1) agency wide, (2) a department, or (3) a more restricted geographical area "where the staff is separately organized **and** clearly distinguishable from the staff in other areas." (emphasis added). Use of the conjunctive term "and" mandates compliance with both the "separately organized and clearly distinguishable" criteria to establish a competitive area other than agency or department wide. Terry v. Lee, 314 S.C. 420, 425, 445 S.E.2d 435, 437 (1994) (finding the term "and" means "both").

Because SCDC has only one Education Division and one District, if the agency or department option had been selected, Appellants would have had the opportunity to compete for positions based upon performance and seniority against all other certified educators employed by SCDC. Rather than allow competition on an agency or department basis, however, SCDC created eleven fictitious "regions" for the sole purpose of eliminating senior employees.[5] SCDC attempted to justify these regions by reference to the "thirty mile rule" that allows certain employees to grieve an **involuntary transfer** of more than thirty miles from the place of

[5] In a prior RIF, implemented when the Central Correctional Institution in Columbia closed, employees were allowed to move to any available position in the state. (ROA pp. 723-25)

employment. The ALC adopted this justification. (ALC Order, pp. 18-20) For the following reasons, this was an error requiring reversal.

First, the designation of a "competitive area" in RIF Policy Section 1.1 does not contain a commuting limit and there is no organizational justification for such a limit. Second, "bumping" under a RIF is **voluntary** and the decision to accept employment beyond thirty miles does not invoke grievance rights. Third, even an involuntary reassignment in excess of thirty miles is not grievable if the new location is "the nearest facility with an available position having the same state salary range for which the employee is qualified." S.C. Code Ann. 8-17-320(13). Fourth, the thirty mile limitation ignores SCDC practice that allows employees, including several Appellants and the Director of the Education Division, to live distances greater than thirty miles from their work places.

In summary, the regions created for purposes of the RIF neither correspond to any organizational model nor applied to staff that were clearly distinguishable from staff in other areas as explicitly required by the RIF policy. SCDC witnesses, including the Director of the Education Division and Superintendent of the District, acknowledged that there is one and only one school district within SCDC. Moreover, the General Assembly established the district as "unified" for purposes of employee pay and benefits. This "unified" status was confirmed by this Court in the Abraham decision. Accordingly, SCDC violated RIF Policy Section 1.1 in using eleven regions to eliminate senior staff and Appellants are entitled to reinstatement as a matter of law.

> **RIF Policy Section 2.3** states whenever a RIF is in effect, no additional new hires, internal promotions, or reassignments into vacant positions *in the competitive area* will be allowed in any position without first determining through the division Director of Human Resources or designee those employees with recall rights. These employees have

recall rights as a result of being bumped or laid off and must be notified of such vacancies to determine their eligibility. (ROA p. 1634).

Violations:

Nineteen permanent employees in positions assigned responsibilities performed by certified educators during the recall period (6/2/03 – 6/1/04). (Employee list provided as Appendix A; see also ROA pp. 2233-38);

Twenty-three temporary employees in positions assigned responsibilities performed by certified educators during the recall period (6/2/03 – 6/1/04). (Employee list provided as Appendix A; see also ROA pp. 2233-38);

The "Retirement opportunity" extended to employees July 16, 2003, and March 25, 2004, permitted "return" to temporary employment after a break in service for those entering the retirement program. (ROA pp. 2560-72);

An employee that moves from a full-time position to a temporary, temporary grant or time-limited position experiences a "break in service." (S.C. Code of Regulations R.19-700, effective January 25, 2002);

An employee separated from state service as a result of a RIF remains a "covered employee" for up to twelve months and experiences a "break in service" only if not recalled to the original position or reinstated with state government within twelve months of separation. (S.C. Code of Regulations R.19-700, effective January 25, 2002);

"Position" includes those duties and responsibilities constituting a single job. (S.C. Code of Regulations R.19-700, effective January 25, 2002);

"Temporary employee" is a full-time or part-time employee who does not occupy an FTE position, whose employment is not to exceed one year, and who is not a covered employee. (S.C. Code of Regulations R.19-700, effective January 25, 2002);

"Temporary position" is a full-time or part-time non-FTE position created for a period not to exceed one year. (S.C. Code of Regulations R.19-700, effective January 25, 2002);

SCDC employed individuals in temporary positions and permanent positions during the recall period without notifying Appellants. Additionally, SCDC offered retiring employees return to employment after a "break in service" during the recall period without notifying Appellants. (Employee list provided as Appendix A; see also ROA 2233-38; ROA pp. 2560-72; Thrailkill testimony ROA pp. 995-1001); and

SCDC employed four Appellants in non-certified positions to provide inmate instruction. (Glenn Affidavit ROA pp. 2714-15; Bell Affidavit ROA pp. 2700-01; McClanahan Affidavit ROA pp. 2720-21; McCabe Affidavit ROA pp. 2718-19).

Because the eleven regions created by SCDC violated RIF Policy Section 1.1, only the SCDC or its Education Division qualified as lawful "competitive areas" for purposes of separation and recall of Appellants. Nevertheless, temporary and permanent positions were filled throughout the SCDC and the Education Division during the recall period without affording Appellants notice or opportunity to return to employment. The most egregious example of this violation is the "retirement opportunity" extended to employees on July 16, 2003.[6] As a matter of law, retirement constitutes a "break in service," whereas each Appellant remained a "covered employee" during the twelve months following June 1, 2003.

SCDC also violated the prohibition against hiring temporary employees during the recall period by setting up temporary positions to provide educational services. OHR "Frequently Asked Questions" and the testimony of Heather Pope, an OHR Managing Partner, establish that an agency cannot hire temporary employees following a RIF. (ROA pp. 1279-80; see also Appellant Exhibit 12, ROA p. 3391). The declared purpose of the challenged RIF was to eliminate positions rather than individual employees. Replacing separated employees with temporary appointments is inconsistent with this purpose, state law, OHR directive, and the approved RIF plan. The employment of temporaries also circumvents retention and recall rights of the covered employees subject to RIF. Because Appellants were denied the required opportunity to return to employment, they are entitled to reinstatement.

> **RIF Policy Section 7.1** states covered employees who have been laid off or bumped to a position with a lower pay band and pay level will have recall and reinstatement rights for a period of one (1) year from the effective date of their layoff, bumping, or reassignment to another *position*. Employees will be reinstated in inverse order of layoff. (ROA p. 1638)

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[6] SCDC offered a second "retirement opportunity" during the recall period on March 25, 2004. Apparently, no retirees returned to employment under this program before recall expired on May 31, 2004.

Violations:

This policy section allows separated employees to return to positions other than those occupied prior to the RIF. As outlined above, Appellants remained "covered employees" from July 1, 2003, to June 30, 2004. During this period, each Appellant was entitled to recall or reinstatement. Instead, over forty employees were assigned permanent or temporary duties previously performed by Appellants.

RIF Policy Section 7.5 states probationary, temporary (*pink slip*), or temporary grant employees will not have recall *or reinstatement rights*. They may, however, apply for rehire through regular agency employment policy/procedure. (ROA p. 1638)

Violations:

Through the offered "retirement opportunities" and otherwise, SCDC provided preferential treatment to employees not affected by the RIF. This violates the RIF policy and the OHR requirement that employees separated by RIF must be afforded the opportunity to return to employment.

Policy Section 11 (definitions) states *Temporary employee refers to a full-time or part-time employee who does not occupy an FTE position, whose employment is not to exceed one year, and who is not a covered employee.* S.C. Code Ann. § 8-17-320; (ROA p. 1640).

Violations:

During the recall period, SCDC employees were reassigned to temporary positions for more than twelve months. SCDC used this as a cost-saving measure (temporary employees do not receive benefits such as health insurance) rather than retaining permanent employees or recalling/reinstating employees separated by RIF.

There is nothing inherently wrong with crafting a competitive area to maximize savings in a reduction in force. Similarly, state agencies may provide retirement opportunities and incentives to return to work at reduced pay. These otherwise permissible objectives cannot be accomplished, however, at the expense of violating rights established in a RIF policy, state regulations, and laws. Here, SCDC ignored its own policy and rights provided to Appellants as "covered employees" by creating geographic regions incompatible with the RIF policy. These

regions prevented Appellants from using their seniority to "bump" less senior employees. Following the RIF, SCDC continued to violate its policies in failing to reemploy Appellants in positions vacated by retirees and others employed in temporary capacities. Appellants are entitled to reinstatement of employment and all benefits lost as a result of these violations.

2. The ALC failed to enforce controlling legislation.

In 1981, the General Assembly established a "special statewide unified school district" within SCDC. S.C. Code Ann. § 24-25-10. The purpose of this District was to enhance the quality and scope of education for inmates within SCDC and to ensure that education programs are available to all inmates with less than a high school diploma or its equivalent. S.C. Code Ann. § 24-25-20. Academic and vocational training must meet standards prescribed by the State Department of Education. S.C. Code Ann. § 24-25-30. A funding mechanism was established for the District, and its "control and management" provided by a board of nine trustees subject to the supervision of the SCDC. S.C. Code Ann. § 24-25-40. Board functions include establishment of academic and vocational courses in a "twelve-month program [with] teachers' pay schedule based on the state and average school supplement pay scales." S.C. Code Ann. § 24-25-70. Duties delegated to the District's Superintendent include development of policies and procedures and preparation of a separate budget for "all necessary costs to be provided to the inmate by the unified school district." S.C. Code Ann. § 24-25-80. Finally, the Superintendent and all other educational personnel in the District are to be "employed, supervised, and terminated" according to SCDC personnel policies and procedures. S.C. Code Ann. § 24-25-90.

When construing statutory language "the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect. A statute should not be construed by concentrating on an isolated phrase." Duvall v. S.C.

Budget & Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 127 (2008). In reviewing a statutory scheme, such as that establishing the District, a court must presume the Legislature intended to accomplish something and did not intend a futile act. TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1988). Where an administrative agency has consistently applied a statute in a particular manner, its construction should not be overturned absent cogent reasons. This is particularly the case where the application would affect more than one state agency. Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 215, 423 S.E.2d 101, 104 (1992).

SCDC divided a statutorily established "unified school district" into regions having no relationship to the delivery of education services or its responsibility to provide educational programs to "all inmates" having less than a high school diploma or its equivalent. In addition, SCDC failed to honor delegations of authority by the General Assembly to the District's Board and Superintendent. Finally, SCDC ignored the consistent application and interpretation of controlling law by OHR, the agency assigned responsibility to oversee reductions in force. For these reasons, SCDC's RIF in 2003 was "null and void" and Appellants are entitled to reinstatement. See Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987).

Specific statutes violated by SCDC include:

Statute

S.C. Code Ann. § 24-25-10 establishes a "special statewide unified school district within the South Carolina Department of Corrections."

Violations:

The geographic regions arbitrarily divided the "special statewide unified school district." (See violations of Policy Section 1.1 above); and

The RIF reduced district educational services to designated facilities that do not operate

in a "statewide" basis. (See violations of Policy Section 1.1 above; Appellants' Exhibit 5, ROA p. 3258; Miro testimony ROA pp. 914-17, 920-22).

Statute

S.C. Code Ann. § 24-25-20 states that "the district shall ensure that education programs are available to all inmates with less than a high school diploma, or its equivalent, and that various vocational training programs are available to selected inmates with the necessary aptitude and desire."

Violations:

Academic/high school education is offered through the district only to inmates twenty-one years and younger through nine EFA high schools. (Appellants' Exhibits 4 and 5; ROA pp. 3254-58); and

Students older than twenty-one may pursue GEDs through the District only at the nine EFA high schools. At all other institutions, adult education is provided through "local school districts" rather than the PUSD. (Appellants' Exhibits 4 and 5, ROA pp. 3254-58).

Statute

S.C. Code Ann. § 24-25-70(7) requires the Board to establish a teachers' pay schedule based on the state and average school supplement pay scales.

Violations:

SCDC employed non-certified instructional staff and offered instruction through individuals hired in non-certified positions. (ROA pp. 2233-38); and

SCDC employed former certified instructional staff in non-certified positions to perform their former duties. (Glenn Affidavit ROA pp. 2714-15; Bell Affidavit ROA pp. 2700-01; McClanahan Affidavit ROA pp. 2720-21; McCabe Affidavit ROA pp. 2718-19).

Statute

S.C. Code Ann. § 24-25-40 states that the district "shall be under the control and management of a board of nine trustees who shall operate the district under the supervision of the State Department of Corrections."

Violations:

SCDC conducted the RIF without conferring with the Board of Trustees or considering the laws creating and governing the Palmetto Unified School District. (Blanton testimony ROA pp. 2625-28; Near testimony ROA p. 2635).

Statute

S.C. Code Ann. § 24-25-90 states that "the superintendent of the district and all other educational personnel shall be employed, supervised, and terminated according to the South Carolina Department of Corrections' personnel policies and procedures."

Violations:

Throughout the grievance hearing, SCDC emphasized that each Appellant was subject to its personnel policies and procedures. As detailed herein, however, SCDC violated its RIF policy and plan in creating geographic regions not confined to staff that are separately organized and clearly distinguishable from the staff in other areas. (See RIF policy 1.1, ROA 1634; see also Final Decision Findings of Fact No. 8, ROA p. 13).

SCDC also violated recall and reinstatement provisions of its RIF policy by hiring temporary employees and retirees to replace Appellants during the recall period. (See RIF Policy 7.1 – 7.5 and Definition of "Temporary Employee," ROA pp. 1638 and 1640).

Statute

S.C. Code Ann. § 8-11-185 states that "an agency seeking to fill a vacancy or new position must obtain information from the Office of Human Resources' reduction in force applicant pool." This section further provides that "an agency shall provide priority consideration to employees terminated due to a reduction in force for any vacancy or new position in the same classification, classification series, or position category held at the time of layoff is prohibited from filling the position if the agency does not first seek to fill the position from among these qualified employees provided by the Office of Human Resources."

Violations:

SCDC filled vacancies during the RIF recall period without providing priority consideration to Appellants. See violations of policy section 2.3 above; and

SCDC guaranteed re-employment at lower pay to employees who chose to "retire". By law, these retirees experienced a "break in service" and were not entitled to preference over Appellants, who retained "covered employee" status during the recall period. See RIF policy section 2.3 (ROA, p. 1634); S.C. Regulation R. 19-700 and R. 19-719.01; S.C. Code Ann. § 8-11-185.

In finding that SCDC could re-employ retirees despite the clear prohibitions contained in the RIF policy, OHR regulations, and Title 8 of the Code of Laws, the ALC accepted the

argument advanced by SCDC that permissible re-hire provisions of the Retirement Act, contained in Title 9 of the Code, trump the rights of employees separated by RIF. This interpretation does not comport with established rules of statutory construction.[7]

The General Assembly is assumed to act intentionally when adopting legislation and courts must enforce plain statutory language without resort to forced or settled construction. See Auto Owners, Inc. Co. v. Rollison, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008). When statutes address the same subject matter, they are "*in pari materia* and must be construed together, if possible, to produce a single, harmonious result." Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010) (citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) and quoting Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000)).

The mandatory provisions of SCDC's RIF policy, OHR guidelines, and Title 8 serve the legislative purpose of affording protection to individuals involuntarily removed from employment for budgetary reasons. Rather than enforce this purpose by ordering the reinstatement of Appellants, the ALC relied upon permissive language in Title 9 that "allows" retirees to return to employment after a break in service. (Order pp. 25-29, citing Code Sections 9-1-1790, 9-1-1590, and 9-11-90). This legislation does not evidence any intent to compromise the rights provided to Appellants as "covered employees" and does not establish any guarantee of employment following voluntary retirement. Instead, the provisions relied upon by the ALC merely indicate that a retiree "may" be hired after a fifteen day break (S.C. Code Ann. § 9-1-1790(A)) and "may" elect to cease retirement after forty-eight consecutive months (S.C. Code

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[7] Title 8 addresses active public officers and employees whereas Title 9 is limited to retirement. There is nothing in either title that suggests retirees have greater rights than active public employees.

Ann. §9-1-1590 and § 9-11-90). None of these statutes suggest that there is an enforceable right to return to employment. In fact, the information SCDC provided to employees in "Retirement Opportunity" materials explicitly states that re-employment must follow a "required break" and that continued employment "is not guaranteed." (ROA p. 2560). The SCDC also required participants in the "Retirement Opportunity" to sign an acknowledgment of their "break in service" and no guarantee of return to work in a temporary capacity. As a condition of returning, each retiree agreed to take a fifteen day break in service annually and designation of a new "hire date." (ROA pp. 2567 – 68).

In contrast to voluntary retirees, individuals involuntarily separated from employment due to RIF have an enforceable right to reemployment if a position becomes vacant during the twelve month recall period. It may have been permissible for SCDC to rehire retirees following a break in service if no RIF had taken place within twelve months or no employee separated by RIF were available to perform the duties of the position. In this case, however, Appellants were available to fill the positions vacated by retirees. Neither SCDC nor the voluntary retirees could exercise an "opportunity" to deprive Appellants of this enforceable right to reemployment.

Nothing in the plain language of the Retirement Act suggests intent to repeal by implication the rights guaranteed to State employees involuntarily separated by RIF. See Denman, 387 S.C. at 139, 691 S.E.2d at 469 (repeal by implication is disfavored and found only when two statutes are incapable of any reasonable reconcilement). Moreover, the interpretation adopted by the ALC leads to the absurd result of allowing an agency to circumvent the break in service requirements of the Retirement Act and deprive "covered employees" separated by RIF the right to return to employment. Accordingly, the ALC erred in approving SCDC's reemployment, in temporary capacities, of individuals who voluntarily retired during the twelve

month recall period wherein Appellants retained their "covered employee" status and the right to occupy vacated positions. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (courts must reject a meaning that would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature).

3. The ALC failed to enforce Appellants' constitutional rights.

Governmental agencies must operate in a manner consistent with the South Carolina Constitution. In this regard, agencies must provide their employees equal access to benefits attached to public employment. Depriving one group of employees a benefit afforded another group invokes the equal protection guarantees of the State's Constitution. See Littlefield v. S.C. Forestry Comm'n, 337 S.C. 348, 353-54, 523 S.E.2d 781, 783 (2000) (reversing an interpretation of a statute providing annual leave benefits that resulted in a violation of equal protection).

By virtue of state law and the RIF policy, Appellants were entitled to all benefits available to other SCDC employees. See S.C. Code Ann. § 24-25-90. As "covered employees," Appellants enjoyed the right to retain employment unless removed for cause or by proper reduction in force. S.C. Code Ann. § 8-17-330. In violating its RIF policy, state laws, regulations, and OHR guidelines, SCDC deprived Appellants of the constitutionally protected right to continuing employment in the following particulars:

Constitution

S.C. Constitution article I, section 3 states that no "person [shall] be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

Violations

SCDC separated Appellants from employment in violation of the RIF policy and state law, both of which are property interests protected by the constitution. Brown v. S.C. State Bd. of Educ., 301 S.C. 326, 391 S.E. 2d 866 (1990); and

During the recall period following the RIF, SCDC allowed employees choosing to retire to return following a "break in service" without allowing the Appellants the opportunity to recall. Appellants were "covered employees" entitled to full protection of the law during their recall period. Accordingly, the preferential treatment afforded to employees returning after voluntary separation during this period deprived Appellants of their rights as "covered employees" and constituted a violation of due process and equal protection guaranteed by article I, section 3.

Constitution

S.C. Constitution article I, section 22 states that no person "shall be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly."

Violations

SCDC separated Appellants from employment in violation of the RIF policy and state law, both of which affected property and liberty interests protected by the constitution. The rights violated by SCDC deprived Appellants their statutory right to be treated in keeping with SCDC "personnel policies and procedures" under S.C. Code Ann. § 24-25-90. Their separation also affected Appellants' liberty interests to pursue their chosen profession. Brown v. S.C. State Bd. of Educ., 301 S.C. 326, 391 S.E. 2d 866 (1990); see also Johnson v. Spartanburg County Sch. Dist. No. 7, 314 S.C. 340, 444 S.E. 2d 501 (1994).

Although Appellants merely seek to enforce rights provided by policy, regulation, and statute, the ALC held that they must show some unlawful motivation on the part of SCDC to establish infringement of a constitutional guarantee. This misconstrues the purpose of the rights to equal protection and due process contained in Article 1, §§ 3 and 22 of the South Carolina Constitution. The constitutional guarantees in these sections compel agencies of state government to strictly conform to procedural and substantive protections offered by state law and regulation. No showing of unlawful motivation is required. Instead, as illustrated in Chief Justice Toal's admonition in Johnson v. Spartanburg School District No. 7, a public entity may not conduct itself in "blatant violation of procedural protections established by the General Assembly." 314 S.C. at 341, 444 S.E.2d at 503.

The ALC relied upon Harbit v. Charleston, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009), to impose a burden on Appellants to show an unlawful motivation. (ALC Order at pp. 36-37). This is an error requiring reversal.

In Harbit, this Court was asked to determine whether denial of a homeowner's rezoning application violated equal protection. The Court denied the homeowner's claim, holding that to "show discriminatory enforcement in violation of the Equal Protection Clause [the homeowner] must show arbitrary and purposeful discrimination." Id. at 369, 675 S.E.2d at 783. This holding is in keeping with general principles that avoidance of a legal proscription or establishment of selective enforcement involves an analysis of motive.

Whereas the homeowner in Harbit was attempting to obtain relief from a lawfully enacted restriction, Appellants seek to enforce rights explicitly granted by the General Assembly. In Littlefield, the Supreme Court correctly determined that no motivational requirements must be alleged when established statutory entitlements are being violated by an agency. Littlefield v. S.C. Forestry Comm'n, 337 S.C. 348, 523 S.E.2d 781. Here, as in Littlefield, Appellants are being deprived of statutorily granted entitlements by a state agency's improper application of policy and law. The General Assembly did not provide SCDC any choice in whether or not to provide Appellants their rights established under the RIF policy, OHR guidelines, and state law. In the absence of such discretion, no motivational allegations must be made by the Appellants to enforce their rights and to prevail on their equal protection claim.

4. The ALC failed to enforce Appellants' rights as "Covered Employees" following the RIF.

SCDC's RIF Policy, state law, and regulation establish that Appellants retained "covered employee" status for a period of twelve months following separation from employment. During

this period, the SCDC had responsibilities to Appellants under its policy, state law, and regulation. Four Appellants were retained, recalled or rehired by SCDC following the RIF. These employees received compensation for educational services at a rate less than the pay schedule established by the General Assembly. Also during this period, SCDC assigned and hired others to perform the services previously provided by Appellants. These actions violated rights afforded by policy and law as follows:

Right

Certified educators employed by SCDC must receive "compensation equal to the mathematical average of all salary supplements paid by school districts across the state. Such a construction comports with the statutory provisions guaranteeing teachers who are state employees but not employed by a particular school district a salary adjusted to reflect the salary schedules of the surrounding school districts."

Abraham v. Palmetto Unified Sch. Dist. No. 1, 343 S.C. 36, 49, 538 S.E.2d 656, 663 (Ct. App. 2000);

Violations:

Educators assigned instructional duties as correctional officers were entitled to payment on the teacher pay schedule. See Abraham, 343 S.C. at 49, 538 S.E.2d at 663 (Ct. App. 2000) (applying S. C. Code Ann. § 24-25-70(7)); and

Ms. Glenn, Ms. McCabe, Ms. McClanahan, and Mr. Bell all provided instructional services in positions designated as non-instructional. Ms. Glenn was assigned her same librarian duties but paid as a correctional officer. For one month, Ms. McCabe continued her librarian duties but was paid as a correctional officer. Ms. McClanahan was assigned to provide horticulture instruction as a correctional officer and lieutenant. Mr. Bell is assigned to provide vocational instruction (carpentry) and is required to maintain a certificate as a program coordinator. An employee performing the same duties at Tyger River is paid on the teacher salary schedule. Glenn testimony ROA pp. 278-86, Affidavit ROA pp. 2714-15; see also Committee Exhibit 3, ROA pp. 2972, 2991-92, Appellant Exhibit 2, ROA p. 3251; McCabe testimony ROA pp. 247-48, Affidavit ROA pp. 2718-19; see also Committee Exhibit 3, ROA p. 3068; McClanahan testimony ROA pp. 483-88, Affidavit ROA pp. 2720-21; see also Committee Exhibit 3, ROA pp. 3114, 3119, 3131-39; Bell testimony ROA pp. 377-78, 389-90, Affidavit ROA pp. 2700-01; see also Committee Exhibit 3, ROA pp. 3142, 3145, 3157, 3158-59.

Right

An employing agency may not disregard procedural legislation to remove, demote, or otherwise deprive an employee of his salary or position. Abraham v. Palmetto Unified Sch. Dist. No. 1, 343 S.C. 36, 50, 538 S.E.2d 656, 664 (Ct. App. 2000) (citing Johnson v. Spartanburg County Sch. Dist. No. 7, 314 S.C. 340, 444 S.E.2d 501, 503 (1994)).

Violations:

Each Appellant lost pay and benefits because SCDC violated its own RIF policy, state laws, and regulations regarding employment of temporaries, and compensation of certified instructional staff. Additionally, SCDC reemployed retired staff after a break in service during the recall period. Appellants maintained "covered employee" status during this period and were entitled to return to employment under the RIF policy and state law. See RIF policy section 2.3 (ROA p. 1634); S.C. Regulation R. 19-700 and R. 19-719.01; S.C. Code Ann. § 8-11-185; and

OHR answers to "Frequently Asked Questions" regarding reduction in force issues were distributed to agencies in November 2001. Appellant Exhibit 11, ROA p. 3390. This information stated: "An agency may not hire a temporary employee to perform the duties of an employee affected by a RIF. If these duties are required to be performed on the effective date of the RIF, the agency should reestablish the position and implement its recall procedure." Appellant Exhibit 12, ROA p. 3391. See also Final Decision Findings of Fact No. 15, ROA p. 14.

As a result of the Abraham decision, SCDC had no control over the salaries available to Appellants. Instead, SCDC was compelled to pay Appellants on a salary schedule equal to the average compensation for teachers throughout the state. In implementing the June 1, 2003 RIF, SCDC decided to separate Appellants from employment, prohibit them from bumping less senior employees, employ temporaries as their replacements, label those retained as "correctional officers," and ignore their recall rights. Regardless of motive, these actions prejudiced Appellants' rights in a manner that requires reversal of the ALC order.

CONCLUSION

Although an appellate court may not substitute its judgment for that of the State Grievance Committee as to the weight of the evidence on questions of fact, the court is obligated

to examine the record as a whole to determine if the substantial rights of the Appellants have been prejudiced because the findings and conclusions below are:

a. in violation of constitutional or statutory provisions;

b. in excess of the statutory authority of the agency;

c. made upon unlawful procedure;

d. affected by other error of law;

e. clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

f. arbitrary or capricious or characterized by abusive discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. §§ 1-23-380(5) and 1-23-610(B).

The RIF implemented by SCDC separated a disproportionate number of educators compared to the overall employment population of the Agency. (Final Decision, ROA p. 11; see also ROA pp. 2554-57) In Director Ozmint's words, for the RIF to achieve the most "bang for the buck," SCDC had to make certain that veteran educators at the higher end of the compulsory salary schedule were eliminated **and** that these employees could not "bump" into other positions or be recalled. If Appellants were retained or recalled, the law enforced by this Court in Abraham would require their salaries to continue. To avoid this outcome, SCDC violated its RIF policy and governing principles of state law.

The Constitution of this State requires this Court to enforce the policies, regulations, and laws that protected Appellants from separation and required their reinstatement to employment. Whatever the wisdom or folly of granting veteran state employees the right to retain their positions in favor of less senior, temporary, and retired employees, and the right to recall for

twelve months following the RIF, it is not within the discretion of SCDC or its Executive Director to ignore or circumvent those rights. Policies, regulations, and laws are to be enforced as written. As the United States Supreme Court stated more than seventy years ago in rejecting an attempt to avoid federal tax legislation, "[t]o hold otherwise would be to exalt artifice above reality and to deprive the statutory provision[s] in question of all serious purpose." Gregory v. Helvering, 293 U.S. 465, 470 (1935).

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