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SC Court of Appeals

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 W. Williams and Paula Woodlief, ... Appellants,

v.

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

RESPONDENT SCDC'S INITIAL BRIEF

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STATEMENT OF THE CASE

The Respondent, the South Carolina Department of Corrections ["SCDC"], by and through its undersigned counsel and on behalf of its Division of Education, also known as the Palmetto Unified School District No. 1 ["PUSD"], respectfully files its brief in the instant matter, an appeal of an order issued August 6, 2010 by the Administrative Law Court ["ALC"].[1] (ALC Order. pp. 1 – 42).

[1] The ALC styled its order as the "Order of the Court Denying the Appeal Filed by the Appellants and Affirming the Final Decision issued by the State Employee Grievance Committee in favor of [SCDC]." (ALC Order, p. 1).

As the ALC recognized in its order, the 20 Appellants "are current and former educators who are currently employed or were at one time employed by [SCDC] within its Division of Education, also known as the [PUSD]." (ALC Order, p. 1). The ALC's order affirmed the Final Decision ["Decision"] issued on February 18, 2009 by the State Employee Grievance Committee ["Committee"], and, by its Decision, the Committee denied the collective appeal filed by the Appellants in which they challenged their removal from their respective positions of employment as a result of a reduction-in-force ["RIF"] implemented by the agency effective June 1, 2003.[2]

By their instant appeal,[3] the Appellants urged this Court to reverse the ALC's order, and, by extension, reverse the Final Decision issued by the Committee in SCDC's favor. Should this Court reverse the ALC's order and, by extension, reverse the Committee's Final Decision, the

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[2] The ALC observed that SCDC implemented its June 1, 2003 RIF through two (2) documents: a RIF policy developed by the agency's Division of Human Resources and the agency's RIF plan. (ALC Order, p. 2, n. 3). SCDC's Executive Director, Jon E. Ozmint, presented the RIF plan in a March 28, 2003 letter to State Human Resources Director Samuel L. Wilkins. (ALC ROA pp. 1626 – 31). As reflected by the last page of his letter to Mr. Wilkins, Director Ozmint included four (4) attachments to the RIF plan. First, Director Ozmint included a copy of the agency's RIF policy, issued March 14, 2003, designated as Policy Number ADM-11.05 (ALC ROA pp. 1633 – 40), as well as a March 14, 2003 letter addressed to John Near, the Director of the agency's Division of Human Resources, from Chris Byrd, OHR's Assistant Director, in which Mr. Byrd advised Mr. Near that OHR had approved the policy. (ALC ROA p. 1632). Second, Director Ozmint attached materials identified as "Listing of Competitive Areas, Areas Map, and Competitive Job Classifications & Classification Series." (ALC ROA pp. 1641 – 43). Third, Director Ozmint attached a "Listing of Positions being eliminated and Employees eligible for Bumping in Each Competitive Area." (ALC ROA pp. 1644 – 59). Fourth, Director Ozmint attached a "Sample Letter – Notification of Reduction-In-Force," a model letter by which the agency would notify employees whose positions were identified for elimination of their potential lay-off. (ALC ROA pp. 1953 – 59). On March 28, 2003, Christopher Poore, an OHR Human Resources Consultant, acknowledged OHR's receipt and review of the RIF plan, which included the RIF policy, as submitted by Director Ozmint. (ALC ROA pp. 1926 – 27). SCDC submitted the above-referenced documents in the above-identified sequence as an exhibit in support of the brief it submitted to the ALC on October 7, 2009. (R. pp. ___ - ___).

[3] On page 1 of their brief, in the section entitled "STATEMENT OF THE CASE," the Appellants stated as follows:

> Appellants are current and former certified educators employed by [SCDC] in the [PUSD]. Appellants were each "covered employees" removed from their positions as a result of a reduction-in-force ("RIF") implemented effective June 1, 2003.

The Committee, quoting S.C. Code Ann. 8-17-320(7), provided the operative definition of the term "covered employee." (ALC ROA p. 9). As discussed further below, the Appellants' interpretation of the term "covered employee" is critical to the analysis they offer in support of their assertion that the ALC erred when it affirmed the Committee's Decision. However, the Appellants' analysis is invalidated by their persistent failure to simply acknowledge the plain language of both SCDC's RIF policy and RIF plan, along with their persistent and gross distortion of the dispositive facts determined by the Committee and adopted by the ALC.

Appellants submit that they are entitled "to reinstatement of employment and benefits.[4]" Toward that end, the Appellants argued, in the section of their brief entitled "CONCLUSION," that "[t]he Constitution of this State requires this Court to enforce the policies, regulations, and law that protected Appellants from separation and required their reinstatement to employment.[5]"

As imprecisely acknowledged by the Appellants in the section of their brief entitled "ORDER OF THE ALC,[6]" the ALC, after examining 27 enumerated paragraphs of purportedly "controlling facts" articulated by the Appellants within their principle brief, determined that the Appellants identified three (3) distinct issues on appeal, and it then determined that the Appellants provided a series of overlapping arguments, divided into four (4) sections, in support of these three (3) issues on appeal.[7] (ALC Order, pp. 8 – 9). The ALC then issued the following rulings on these three (3) issues:

> 1. [SCDC] did not violate its own RIF policy, state law or regulations controlling RIFs, or our state's constitution by including the Appellants and other certified educators it employed in the RIF implemented effective June 1, 2003 (ALC Order, pp. 10 – 15);
> 2. [SCDC] did not violate its own RIF policy, state law or regulations controlling RIFs, or our state's constitution by dividing itself into 11 competitive areas for the purposes of implementing its RIF effective June 1, 2003 (ALC Order, pp. 15 – 20); and
> 3. The Department did not violate its own RIF policy, state law or regulations, or our state's constitution by its decisions to retain and hire temporary employees before and after the RIF it implemented effective June 1, 2003 and to retain employees who accepted the

[4] The Appellants first invoked this remedy on page 13 of their brief, and they invoked it again at various other points of their brief. *See* Appellants' Brief, pp. 15, 17, 19 – 20. The Appellants mentioned no other remedies in their brief.

[5] *Id.*, p. 30.

[6] *See* Appellants' Brief, pp. 2 – 3.

[7] The ALC determined that the Appellants "did not identify distinct issues on appeal within their principle brief," and it determined that their legal arguments "identified instances in which [SCDC's] decisions and actions (1) purportedly violated provisions of [SCDC's] own RIF policy, (2) purportedly violated state statutes, (3) purportedly violated provisions of our state's constitution, and (4) purportedly deprived the Appellants of rights apparently secured to them by [SCDC's] own RIF policy, state law, and state regulation." (ALC Order, pp. 8 – 9).

retirement opportunity it offered during the RIF recall period.[8] (ALC Order, pp. 20 – 29).

Within the section of their brief entitled "SUMMARY OF ARGUMENT," the Appellants succinctly distilled their challenge of the ALC's order into six (6) bullet points.[9] Within these six (6) points, the Appellants contended that SCDC violated §§ 1.1, 2.3, 7.1, 7.5, and 11 of Policy Number ADM-11.05, the RIF policy it issued effective March 14, 2003 and the RIF policy which officials from OHR approved the same day, by the manner in which it developed and implemented its RIF plan.[10] The Appellants also contended within these six (6) points that SCDC, by the manner in which it developed and implemented its RIF plan, violated the provisions of S.C. Code Ann. §§ 8-11-185, 8-17-330, and 24-25-70(7), as well as S.C. Regulation §§ 19-700, 19-719.01, and, finally Article I, §§ 3 and 22 of the South Carolina Constitution.

However, the analysis conducted by the Appellants is built upon a foundation of 25 enumerated paragraphs of purportedly "uncontested facts" which simply do not conform to the dispositive facts considered and determined by the Committee and then adopted by the ALC. As the Appellants didn't even acknowledge that their 25 enumerated paragraphs of facts deviate from the dispositive facts determined by the Committee and adopted by the ALC, they made no

[8] In discussing the scope of the ALC's ruling on the third issue on appeal, the Appellants seemingly ignored the reality that the ALC specifically held that SCDC "did not violate its own RIF policy, state law or regulations, or our state's constitution by its [decision] ... **to retain employees who accepted the retirement opportunity it offered during the RIF recall period.**" [emphasis supplied]. *See* Appellants' Brief, p. 3. The Appellants also did not acknowledge in their overview of the ALC's order that the ALC addressed their decision not to appeal "the Committee's finding that 'there was no credible evidence presented that the elimination of educator positions in [the] PUSD was motivated by a desire for retaliation for an earlier lawsuit that resulted in the increase of educators' salaries." (ALC Order, pp. 29 – 31). The Appellants further did not acknowledge that the ALC specifically concluded that the Appellants failed to articulate a viable equal protection claim either at oral argument or in the materials they submitted to the ALC after oral argument. (ALC Order, pp. 31 – 39).

[9] See Appellants' Brief, pp. 3 – 4. The Appellants also provided argument and supporting authority regarding the standard of review purportedly applicable to this Court's review of their instant appeal of the ALC's order. SCDC examines the argument and supporting authority provided by the Appellants further below.

[10] *See* note 2 above.

effort to argue or demonstrate to this Court, aside from a litany of conclusory statements, that either the Committee or the ALC rendered factual conclusions that are not supported by the substantial evidence in the record. Instead, their purported "facts" represent an "alternate reality" upon which the Appellants illegitimately contend that the ALC erred by affirming the Committee's Decision. Likewise, the legal analysis conducted by the Appellants is replete with erroneous interpretations of the relevant statutes, regulations, precedent, and constitutional provisions. Thus, by its instant brief, SCDC respectfully urges this Court to deny the Appellants' appeal, affirm the ALC's order, and, by extension, affirm the Committee's Decision.

Finally, as provided by South Carolina Appellate Court Rules ["SCACR"] 208(b)(2) and 220(c), SCDC respectfully reminds this Court that it may affirm the ALC's order "upon any ground(s) appearing in the Record on Appeal."

PROCEDURAL HISTORY

SCDC respectfully submits that the procedural history provided by the ALC in Section II of its order provides a comprehensive and accurate accounting regarding this matter from its inception in the forum provided by SCDC's grievance system through oral argument before the ALC on October 28, 2009 and including the materials filed by the parties with the ALC after oral argument in November 2009. (ALC Order, pp. 3 – 6). The ALC's order also chronicles its issuance of its original order on June 2, 2010, the motion for reconsideration filed by the Appellants on June 7, 2010, and the hearing it conducted on July 14, 2010 concerning the Appellants' motion for reconsideration. (ALC Order, p. 42, n. 77).

STANDARD OF REVIEW

I. STANDARD OF REVIEW ARTICULATED BY THE APPELLANTS

In the section of their brief entitled "STANDARD OF REVIEW," the Appellants stated the following:[11]

> 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., 565 S.E.2d 286, 289 (S.C. 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, 645 S.E.2d 424, 427 (S.C. 2007)].
>
> **The material facts in this appeal are largely uncontested.**[12] 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. [emphasis supplied].

In the section of their brief entitled "SUMMARY OF ARGUMENT," the Appellants then provided the following assessment of their appeal:[13]

> 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

[11] *See* Appellants' Brief, p. 2.

[12] *See* note 17 below.

[13] *See* Appellants' Brief, p. 3.

> 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).[14] 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).

However, as shown below, the authorities cited by the Appellants do not represent the precisely applicable or complete standard of review, and, moreover, the Appellants did not "distinctly and specifically direct [this Court's] attention to the errors or abuses allegedly committed by the [ALC]." *Al-Shabazz v. State*, 527 S.E.2d 742, 755 (S.C. 2000).

II. APPLICABLE STANDARD OF REVIEW

ALC Rule of Procedure 40 states that "[j]udicial review of any decision of the [ALC in a matter heard on appeal from final decisions of certain agencies] shall be as provided in S.C. Code Ann. § 1-23-610 (2005) (as amended)." *See also S.C. Dep't of Corr. v. Mitchell*, 659 S.E.2d 233, 234 (S.C. Ct. App. 2008) ("Section 1-23-610 ... sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency."). Thus, the provisions of § 1-23-610, specifically § 1-23-610(B), establish the standard of review applicable to this Court's consideration of the Appellants' challenge of the ALC's order. In its entirety, § 1-23-610(B) reads as follows:

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[14] The Appellants' invocation of § 8-17-340(E)(2) is, at the very least, imprecise, and, by their invocation of this statute, it appears that the Appellants may be attempting to shift the burden incumbent upon them as they continue their efforts to appeal SCDC's decision to deny the grievances they timely filed on or about June 13, 2003. (ALC ROA, p. 3). Section 8-17-340(E)(2) provides the standard of review applied by the Committee to the Appellants' collective appeal of SCDC's decision to deny the grievances originally filed by the Appellants on or about June 13, 2003. (ALC ROA p. 15). Section 8-17-340(E)(2) directs that the Committee "**may not** overrule an agency's decision, **unless the covered employee establishes** that the agency's decision" violates any one or more of the provisions of § 8-17-340(E)(2)(a) – (f) and "prejudices substantial rights of the covered employee." [emphasis supplied]. The Committee, in its Decision, concluded that the Appellants did not meet this burden. (ALC ROA p. 16 and 17). The standard from § 8-17-340(E)(2) is identical to the standard established by § 1-23-380(5), which the ALC applied to the Appellants' challenge of the Committee's Decision, and the ALC, like the Committee, found that the Appellants did not meet their burden. (ALC Order, pp 41 – 42). Thus, SCDC did not, as asserted by the Appellants, violate any rights held by the Appellants which were "enforceable by [§ 8-17-340(E)(2)]." During his summation before the Committee, Appellants' counsel flirted with a burden shifting argument, and the Committee Attorney sustained the contemporaneous objection raised by SCDC's undersigned counsel. (ALC ROA p. 1400).

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact.[15] The court of appeals may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if substantial rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (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 abuse of discretion or clearly unwarranted exercise of discretion.

Pursuant to § 1-23-610(B), this Court "may reverse or modify the [ALC's] decision **only if** [the Appellants prove their] substantive rights [have] been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law." *Mitchell,* 659 S.E.2d at 234 [emphasis supplied] (reversing the ALC's order because the "order [was] devoid of any finding of evidence adduced by [the Appellant] warranting the ALC's reversal of the Department."). Moreover, the Appellants must "distinctly and specifically direct the court's attention to the errors or abuses allegedly committed by the [ALC]. [The Appellants] must include all that is necessary to enable [this Court] to decide whether the [ALC] made an erroneous or unsubstantiated ruling. A mere expression of dissatisfaction with the ruling is not sufficient.[16]" *Al-Shabazz*, 527 S.E.2d at 755 (citations omitted).

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[15] SCDC respectfully submits that the ALC, pursuant to § 1-23-380, sat in its appellate capacity when it reviewed the Committee's Decision. *See generally, Mitchell*, 659 S.E.2d at 235 (The ALC must apply the standard articulated in § 1-23-380(5) when reviewing, on appeal, an administrative agency's decision.). SCDC also respectfully submits that the standards of review set forth in §§ 1-23-380(5) and 1-23-610(B) are identical if not nearly identical.

[16] In 2006, the General Assembly amended the APA so that a party must appeal a decision of the ALC, in which the ALC considered an appeal of an administrative agency's decision, to this Court rather than the circuit court.

By asserting that the material facts in their appeal are largely uncontested, the Appellants' profoundly undercut their argument that, because its order was purportedly affected by an error of law, the ALC's order upholding the Committee's Decision should be reversed.[17] Thus, contrary to the Appellants' argument, this Court must not conduct a sterile and limited review regarding only whether the ALC, in upholding the Committee's Decision, improperly applied the controlling principles of law. Instead, this Court's review must encompass the dispositive facts determined by the Committee and adopted by the ALC, because both the Committee and the ALC used these facts as the prism through which they applied their interpretation and understanding of the controlling regulations, statutes, constitutional provisions, and precedent. Therefore, the ALC's decision "must be affirmed if supported by substantial evidence in the record." *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 669 S.E.2d 899, 905 (S.C. Ct App. 2008). *See also Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles,* 670 S.E.2d 674, 676 (S.C. Ct. App. 2008).

Critically, the Appellants have the burden of proving convincingly that the ALC's decision to uphold the Committee's Decision is unsupported by substantial evidence. *Mitchell,* 659 S.E.2d at 235. Substantial evidence is relevant evidence "when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the ALC arrived at in justifying its decision." *S.C. Coastal Conservation League*, 669 S.E.2d at 905. *See also Original Blue Ribbon Taxi Corp.,* 670 S.E.2d at 676. "Substantial evidence exists when, if the case were presented to a jury, the court would refuse to direct a verdict because the evidence raises questions of fact for the jury. It is more than a mere scintilla of evidence, but is something less than the weight of the evidence." *Al-Shabazz*, 527 S.E.2d at 756. The fact that the record, when

[17] However, as first discussed above and as shown below, the purported "facts" recited by the Appellants in their brief consisted almost entirely of the "alternative reality" they presented during the hearing proceedings conducted by the Committee and not the dispositive facts determined by the Committee in its Decision.

considered as a whole, presents the possibility of drawing two (2) inconsistent conclusions from the evidence does not prevent the ALC's findings from being supported by substantial evidence. *Original Blue Ribbon Taxi Corp.,* 670 S.E.2d at 677; *S.C. Coastal Conservation League*, 669 S.E.2d at 905 – 906.

The Appellants also have the burden of proving the ALC's decision is arbitrary and otherwise characterized by an abuse of discretion. *Mitchell,* 659 S.E.2d at 234. A decision is arbitrary if no rational basis for the conclusion exists, or when it is based on one's will and not upon any course of reasoning and exercise of judgment. A decision may also be arbitrary if it is made at pleasure without adequate determining principles or is governed by no fixed rules or standards. *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 564 S.E.2d 341 (S.C. Ct. App. 2002). An "abuse of discretion occurs when the judge's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the judge is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case." *Ex parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464, 467 (S.C. 2006).

STATEMENT OF FACTS

Again,[18] the Appellants asserted that the "material facts in this appeal are largely uncontested," and, within the section of their brief entitled "STATEMENT OF FACTS," the Appellants presented 25 enumerated paragraphs of purported "facts.[19]" The Appellants began this section by contending that the "facts" articulated therein "demonstrate that SCDC deviated

[18] *See* notes 12 and 17 above.

[19] *See* Appellants' Brief, pp. 4 – 11.

from controlling policy, regulation, and law" both in the manner by which it formulated its RIF plan and in the manner by which it implemented its RIF effective June 1, 2003.[20]

The manner by which the Appellants presented their version of the "largely uncontested" facts to this Court is nearly identical to the manner by which the Appellants presented their version of the facts to the ALC. In the section of the brief they filed with the ALC entitled "CONTROLLING FACTS" (Appellants' July 16, 2009 Brief to the ALC, p. 3), the Appellants presented 27 enumerated paragraphs of purported "facts." (Appellants' July 16, 2009 Brief to the ALC, pp. 3 – 11). Just as they did in their brief to this Court, the Appellants began this section of their brief to the ALC by asserting that the "record as a whole demonstrates that SCDC deviated from controlling policy and law in the challenged RIF," and just as they did in their brief to this Court, the Appellants asserted to the ALC that the "materials facts in this appeal are largely uncontested." (Appellants' July 16, 2009 Brief to the ALC, p. 3).

Despite their assertions to this Court and, for that matter, the ALC, that the material facts are "largely uncontested," a review of the 25 paragraphs of "facts" presented by the Appellants yields the reality that they offered *only their version* of the material facts to this Court. Moreover, the manner in which the Appellants invoked materials from the Record on Appeal, specifically the Committee's Decision, is confusing and, ultimately, misleading. For example, in one of their 25 paragraphs of "facts," the Appellants asserted the following:[21]

> Mr. [John Near, the former Director of SCDC's Division of Human Resources] created eleven geographic regions within SCDC for purposes of the RIF (ROA pp. 1934 – 35). **These regions were not restricted to**

[20] *See* Appellants' Brief, p. 4.

[21] *See* Appellants' Brief, p. 6, paragraph 10. The Appellants articulated the identical paragraph as paragraph 11 within the section of their principle brief to the ALC entitled "CONTROLLING FACTS." (Appellants' July 16, 2009 Brief to the ALC, p. 5). A comparison of the 25 paragraphs of "facts" presented by the Appellants in their brief to this Court and the 27 paragraphs of "facts" presented by the Appellants in their principle brief to the ALC reveals that these versions of the "facts" are, for all intents and purposes, identical. SCDC respectfully provides an analysis of these paragraphs within the appendix it submits in support of its instant brief.

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 [ALC ROA pp. 1085 – 87]). [emphasis supplied].

The Appellants referenced two (2) Findings of Fact from the Committee's Decision, as well as three (3) pages from the Record on Appeal considered by the ALC, to substantiate the purported "fact" that the 11 competitive areas established by Mr. Near,[22] perhaps the key element of the RIF plan developed and implemented by SCDC, "were not restricted to areas were staff was separately organized or clearly distinguishable from the staff in other areas." However, neither of the two (2) Findings of Fact substantiates the purported "fact" that the competitive areas established by Mr. Near "were not restricted to areas were staff was separately organized or clearly distinguishable from the staff in other areas." Instead, these two (2) Findings of Fact only reflect that the Committee acknowledged the following:

Finding of Fact # 4 (ALC ROA p. 12)	Finding of Fact # 5 (ALC ROA p. 12)
Appellants ***contend*** that during the development and administration of the RIF plan the PUSD was not treated as a single "unified" school district as required by law. Consequentially, the determination of the competitive areas by SCDC divided the unified PUSD and are, therefore, arbitrary. The result deprived veteran employees bumping rights due to the arbitrary nature of placing only one or a limited number of educational institutions in the competitive areas which eliminated opportunities for employees affected by the RIF to compete for positions. Moreover, employees with less experience and inferior qualifications were retained in favor of more senior employees. [emphasis supplied].	Appellants ***also contend*** that the designation of educational institutions within the competitive areas of the RIF plan is arbitrary and capricious since a number of institutions appear to fall outside the designated competitive areas. [emphasis supplied].

The other materials invoked by the Appellants to substantiate this purported "fact" consist of three (3) pages of the transcript from the testimony presented by SCDC's Executive

[22] *See* note 2 above for a concise overview of SCDC's RIF plan and RIF policy as well as Mr. Near's involvement in the development and publication of these materials.

Director, Jon E. Ozmint, under cross examination by the Appellants' counsel before the Committee. (ALC ROA pp. 1057 – 1096). Once again, however, Director Ozmint's testimony under cross examination simply does not substantiate the purported "fact" presented by the Appellants that the competitive areas established by Mr. Near "were not restricted to areas were staff was separately organized or clearly distinguishable from the staff in other areas.[23]"

Thus, the Appellants presented no information or argument to this Court by which they even attempt to show that the Committee either ignored certain relevant facts in rendering its findings of fact or that it arrived at its findings of fact through flawed analysis. Likewise, the Appellants presented no information or argument to this Court by which they even attempt to show that the ALC conducted a flawed examination of the facts determined by the Committee. Instead, the Appellants have merely reiterated to this Court many, if not all, of the conclusory statements they presented as purported "facts" before both the Committee and the ALC. By reiterating such conclusory statements the Appellants bring to mind Daniel Patrick Moynihan's oft-quoted observation that "everyone is entitled to his own opinion, but not his own facts."

As demonstrated by its responses immediately below to the Appellants' legal arguments, SCDC respectfully argues that the Appellants have not met their burden of proving convincingly that the ALC's order, which upheld the Committee's Decision, is unsupported by substantial evidence. Thus, as the Appellants' arguments to this Court are predicated entirely upon their own purportedly uncontested facts rather than the dispositive facts determined by the Committee and embraced by the ALC, and as the Appellants did not distinctly and specifically direct this

[23] SCDC respectfully submits that the majority if not the vast majority of the paragraphs articulated by the Appellants within the section of their brief entitled "STATEMENT OF FACTS" are identically flawed. Accordingly, SCDC has prepared a separate analysis of key paragraphs from the Appellants' "STATEMENT OF FACTS" in which the paragraph under examination is compared directly to the relevant and, in many instances, contradictory material within the Record on Appeal considered by the ALC. SCDC respectfully includes this separate analysis in the appendix it submits in support of its instant brief.

Court's attention to the errors or abuses allegedly committed by the ALC when it affirmed the Committee's Decision, this Court must affirm the ALC's order and deny the Appellants' instant appeal since the ALC's order is overwhelmingly supported by substantial evidence.

ARGUMENT

I. CONTRARY TO THE APPELLANTS' CONTENTION THAT THE ALC "FAILED TO ENFORCE THE PLAIN LANGUAGE OF" SCDC'S RIF POLICY, THE ALC PROPERLY INTERPRETED AND APPLIED THE POLICY AS WELL AS THE RELEVANT REGULATIONS, STATUTES, CONSTITUTIONAL PROVISIONS, AND PRECEDENT, AND, ACCORDINGLY, THE ALC PROPERLY AFFIRMED THE COMMITTEE'S DECISION

In their first argument, the Appellants contended that the "ALC failed to enforce the plain language of" SCDC's RIF policy.[24] As explained above,[25] the agency issued its RIF policy, designated as Policy Number ADM-11.05, on March 14, 2003. (ALC ROA pp. 1633 – 40). As also explained above,[26] Chris Byrd, an Assistant Director for OHR, issued a letter also dated March 14, 2003 in which he notified John Near that OHR had approved the policy. (ALC ROA p. 1632). The core of the Appellants' first argument is revealed by the following passage:[27]

> 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. ([ALC ROA pp. 2682]; see also ALC 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 distinguished from the staff in other areas. (RIF Policy § 1.1, ROA p.**

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[24] *See* Appellants' Brief, pp. 11 – 19.

[25] *See* note 2 above.

[26] *Id.*

[27] *See* Appellants' Brief, pp. 12 – 13.

> **1634).**[28] 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.

SCDC clearly identified the 11 competitive areas associated with the RIF it implemented effective June 1, 2003 within its RIF plan (ALC ROA pp. 1641 – 43),[29] and the Appellants' objections to these competitive areas are the focal point of their instant appeal.

A. THE ALC PROPERLY AFFIRMED THE COMMITTEE'S FINDINGS AND CONCLUSIONS THAT SCDC DID NOT VIOLATE § 1.1 OF ITS OWN RIF POLICY BY THE MANNER IN WHICH IT DETERMINED THE RIF'S COMPETITIVE AREAS

Before articulating five (5) violations of § 1.1 of Policy Number ADM-11.05 purportedly committed by SCDC,[30] the Appellants summarized this section of the policy as follows:[31]

> 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.** [ALC ROA p. 1634]. [emphasis supplied by Appellants].

Section 1 of Policy Number ADM-11.05 was entitled "AUTHORIZATION FOR A REDUCTION-IN-FORCE (RIF),[32]" and, in its entirety, it read as follows (ALC ROA p. 1634):

> The Agency Director or designee is authorized to approve any position(s) to be abolished and to approve the competitive areas within which employees subject to a lay off will be able to exercise their rights under this policy/procedure. (NOTE: 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). **The Agency Director will be the final authority for approving a reduction-in-force whereby**:

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[28] *See* note 21 above.

[29] *See* note 2 above.

[30] *See* Appellants' Brief, pp. 13 – 14.

[31] *Id.*, p. 13.

[32] *See* note 2 above.

- Employees may only bump into vacant positions, which are actively recruiting to be filled;
- Filled positions are abolished with the subsequent removal of some or all employees from the payroll and/or the reassignment and/or possible transfer or demotion of others. [emphasis supplied].

1. <u>The Appellants persistently ignored the plain language from § 1.1 of SCDC's RIF policy</u>.

While the Appellants emphasized the phrase "where the staff is separately organized and clearly distinguishable from the staff in other areas" within their summarized version of § 1.1, they completely ignored the two (2) essential words from § 1.1, namely "may be." Thus, § 1.1 simply did not mandate that a competitive area designated in the RIF plan consist of a "more restricted geographical area where the staff is separately organized and clearly distinguishable from the staff in other areas." The Appellants also ignored the reality that § 1.1 vested SCDC's Executive Director with the discretion to approve the contours of the "competitive areas."

The Appellants' ploy to ignore the words "may be" from § 1.1 and to also ignore the discretion bestowed upon SCDC's Executive Director by § 1.1 conforms to their ploy, explained in detail above, to provide a "STATEMENT OF FACTS" which does not conform to the dispositive facts determined by the Committee and adopted by the ALC. However, the Committee, by simply reading all of the words in § 1.1, properly concluded as follows:

> The development of the competitive areas did not violate SCDC's RIF policy, nor were they drawn to retaliate against or punish SCDC educators.[33] Such groupings are specifically allowed in SCDC's RIF policy and, as reflected in the RIF policy, the manner in which the competitive areas are designated is left to the discretion of the Executive Director of SCDC. As such, the Committee finds that the geographical competitive areas were allowable under SCDC's RIF policy and their determination was left to the discretion of the Executive Director. Further, the Committee finds that neither state law nor SCDC's RIF policy

[33] As determined by the ALC (ALC Order p. 30), the Appellants "did not appeal the Committee's finding that 'there was no credible evidence presented that the elimination of educator positions in [the] PUSD was motivated by a desire for retaliation for an earlier lawsuit that resulted in the increase of educators' salaries.' (ALC ROA p. 16)."

> required the PUSD to be treated as a single competitive area in the event of a RIF or that employees be afforded agency-wide bumping rights. In addition, the PUSD employees were not singled out because SCDC was divided into 11 competitive areas which also limited the bumping rights of employees not affiliated with the PUSD. (Conclusion of Law No. 2, ALC ROA p. 16).

First and foremost, the ALC properly affirmed the Committee on this point. (ALC Order, p. 20). Moreover, since their argument on this point consists of nothing other than their distorted reading of § 1.1, the Appellants failed to meet their burden on appeal, and SCDC respectfully urges this Court to affirm the ALC's order.

2. The Appellants misstated and fundamentally misapprehended the so-called "30-mile rule."

The Appellants used their defective argument that SCDC violated § 1.1 in the manner by which it designated the RIF's competitive areas as the basis for further arguing as follows:

> The plain language of § 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 supplied by Appellants].
>
> ...
>
> Because SCDC has only one Education Division and one [PUSD],[34] 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.[35]

[34] As properly recognized by both the Committee and ALC (ALC Order, p. 14), SCDC's Division of Education and the PUSD are one and the same. Any effort by the Appellants to create the impression that the PUSD somehow exists as a distinct entity from SCDC's Division of Education represents a stark departure from reality.

[35] In an associated footnote, the Appellants contended that, "[i]n a prior RIF, implemented when the Central Correctional Institution in Columbia closed, employees were allowed to move to any available position in the state. [ALC ROA pp. 723 – 25]." *See* Appellants' Brief, p. 15, n. 5. The Appellants raised the identical issue before the ALC, and the ALC, relying upon Mr. Near's testimony to the Committee, properly distinguished the circumstances surrounding the closure of this facility from the circumstances which led SCDC to implement the RIF effective June 1, 2003. (ALC Order, p. 16, n. 27).

> 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 employment. The ALC adopted this justification.[36]

The Appellants contended that the ALC's purported adoption of SCDC's "justification" constituted "an error requiring reversal.[37]" Succinctly put, however, the Appellants argument is completely without merit, because SCDC did not invoke the so-called "thirty mile rule" to justify the manner by which it created the RIF's competitive areas. Instead, after considering a nearly identical argument from the Appellants, reviewing the relevant facts from the record, and properly interpreting the applicable provisions of the RIF policy and plan (ALC Order, pp. 18 – 19), the ALC properly concluded "that the 11 competitive areas and the geographic limitations they represent were reasonably derived from our state code of regulations.[38]" (ALC Order, p.

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[36] *See* Appellants' Brief, pp. 14 – 15.

[37] *Id.*, p. 15.

[38] In its analysis, the ALC quoted paragraph 7.2 of the RIF policy and the definition of "involuntary reassignment" provided in S.C. Regulation § 19-700. (ALC Order, p. 19). S.C. Regulation § 19-700 provides the following relevant definition:

> INVOLUNTARY REASSIGNMENT – the movement of an employee's principal place of employment **in excess of 30 miles** from the prior workstation **at the initiative of the agency**. [emphasis supplied].

This definition is identical to the definition provided in the first sentence of S.C. Code Ann. § 8-17-320(13).

Paragraph 7.2, the existence of which the Appellants did not to acknowledge in their brief, provides as follows:

> When a vacancy occurs in an employee's competitive area which is (1) in the same job class, pay band, pay level or lower and functionally similar as the position held prior to the lay off, downward bumping, or reassignment and (2) **within a reasonable geographic distance (30 mile radius) of the work location of the employee**, then the eligible employee will be offered the vacancy provided s/he meets the minimum training and experience qualifications. The position must be accepted in writing by the employee within two (2) working days of the offer or s/he waives any future recall rights. [emphasis supplied]. (ALC ROA p. 1638).

As the ALC further recognized (ALC Order, p. 19), Director Ozmint echoed this concept in his March 28, 2003 letter to OHR Director Wilkins when he described the competitive areas and competitive job classification series encompassed by the RIF plan:

19). Again, since their argument on this point consists of nothing more their distorted view of the ALC's ruling, the Appellants failed to meet their burden on appeal, and SCDC respectfully urges this Court to affirm the ALC's order.

3. The Appellants completely misapprehended the applicable statutes and the ruling from this Court in *Abraham*.

The Appellants summarized their defective argument concerning SCDC's purported violation of § 1.1 by contending as follows:[39]

> 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 [PUSD], acknowledged that there is one and only one school district within SCDC.[40] Moreover, the General Assembly established the [PUSD] as "unified" for the purposes of employee pay and benefits. This "unified" status was confirmed by this Court in the Abraham decision. Accordingly, SCDC violated [§ 1.1] in using eleven regions to eliminate senior staff and Appellants are entitled to reinstatement as a matter of law.

The General Assembly established the PUSD by its enactment of S.C. Code Ann. §§ 24-25-10, *et seq.*[41] In its entirety, § 24-25-10 provides as follows:

> There is hereby established a special statewide unified school district within the South Carolina Department of Corrections to be known as the [PUSD].

> The positions to be eliminated in this [RIF] plan are located across the state of South Carolina. Competitive areas have been designated to include entire groups of institutions and divisions **within a reasonable geographic area to accommodate the realistic opportunity for staff relocation, and hopefully, recall and reinstatement.** In addition, by expanding the number of locations, adverse impact may be minimized on specific groups of employees. [emphasis supplied]. (ALC ROA p. 1627).

[39] *See* Appellants' Brief, p. 15.

[40] *See* note 25 above.

[41] The remaining statutes concerning the PUSD consist of §§ 24-25-20, 30, 35, 40, 50, 60, 70, 80, and 90.

Other than in § 24-25-10, however, the word "unified" does not appear in any of the remaining statutes from §§ 24-25-10, *et seq*. Thus, no authority exists within the statutes to support the Appellants' contention that our legislature established the PUSD "as 'unified' for purposes of employee pay and benefits."

The Appellants then contended that this Court purportedly confirmed the "unified" status of the PUSD in its decision in *Abraham v. PUSD No. 1 & S.C. Dep't of Corr.*, 538 S.E.2d 656 (S.C. Ct App. 2000). While this Court in *Abraham* rendered a decision regarding whether educators employed by SCDC should have been paid in accordance with the applicable "teacher pay scales," absolutely no passage from the decision supports the Appellants' contention that the PUSD is "unified" in such a way that SCDC violated the provisions of § 1.1 by designating the competitive areas in the manner reflected by the RIF plan. (ALC ROA pp. 1641 – 43). To the contrary, this Court recognized in *Abraham*, 538 S.E. 2d at 659, that, under § 24-25-90,[42] our legislature "required that teachers hired to work in the [PUSD] 'be employed, supervised, and terminated' according to the policies and procedures of [SCDC]."

Thus, the inclusion of the Appellants, as SCDC employees, in the RIF implemented effective June 1, 2003 did not violate any provision of the RIF policy including § 1.1 or, for that matter, *Abraham* or the relevant PUSD statutes. Likewise, the manner by which SCDC arrayed its various institutions within the contours of the competitive areas did not violate § 1.1, any other section of the RIF policy, *Abraham* or the relevant PUSD statutes.

As recognized by the ALC (ALC Order, p. 10, n. 15), the Committee acknowledged in its Decision "that the Appellants ***contended*** 'that during the development and administration of the RIF plan the PUSD was not treated as a single 'unified' school district as required by law.' [ALC

[42] In its entirety, § 24-25-90 provides that "[t]he superintendent of the [PUSD] and **all** other educational personnel **shall be** employed, supervised, and terminated according to [SCDC's] personnel policies and procedures." [emphasis supplied].

ROA p. 12]." [emphasis supplied]. Ultimately, the Appellants merely reiterated the same argument to this Court, an argument rejected by both the Committee and the ALC. In doing so, the Appellants offered no applicable supporting authority of any kind other than their completely one-sided and conclusory assessments of the relevant statutes and the *Abraham* decision. Accordingly, SCDC respectfully submits that the Appellants have abandoned this issue. *See Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 699 S.E.2d 687, 692 (S.C. 2010) ("The Fund failed to cite any authority for its position. Moreover, the half-page argument made by the Fund falls far short of overcoming the substantial evidence standard of review. Hence, the fund has abandoned this issue" (citing *Eaddy v. Smurfit-Stone Container Corp.*, 584 S.E.2d 390, 396 (S.C. Ct. App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.")).) Should this Court determine that the Appellants have not abandoned this issue under the above cited authority, SCDC respectfully submits that the Appellants failed to meet their burden on appeal, and it once again respectfully urges this Court to affirm the ALC's order.

B. THE ALC PROPERLY AFFIRMED THE COMMITTEE'S FINDINGS AND CONCLUSIONS THAT SCDC DID NOT VIOLATE § 2.3 OF ITS OWN RIF POLICY

After accurately quoting the entirety of § 2.3 from the RIF policy, the Appellants then offered 10 paragraphs consisting of a combination of purported facts and their conclusory assessments of various applicable regulations, all of which allegedly constituted "violations" of § 2.3 committed by SCDC.[43]

[43] *See* Appellants' Brief, pp. 15 – 16.

Section 2 was entitled "GENERAL PROVISIONS GOVERNING RIFs,[44]" and, in its entirety, § 2.3 read as follows (ALC ROA p. 1634):

> 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.

After presenting the 10 violations of § 2.3 purportedly committed by SCDC, the Appellants contended as follows:

> **Because the eleven [competitive areas] created by SCDC violated [§ 1.1 of Policy Number ADM-11.05], only the SCDC or Education Division qualified as lawful "competitive areas" for purposes of separation and recall of Appellants.** The most egregious example of this violation is the "retirement opportunity" extended to employees on July 16, 2003. 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.[45] [emphasis supplied].

Again, the Appellants invoked their defective and conclusory assertion that SCDC violated § 1.1 of its RIF policy by the manner in which it determined the competitive areas within its RIF plan, and the Appellants erroneously asserted that, because SCDC purportedly violated § 1.1, only the entire agency or the entirety of the agency's Division of Education qualified as lawful "competitive areas" for purposes of the RIF.[46]

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[44] *See* note 2 above.

[45] *See* Appellants' Brief, p. 17.

[46] A practical examination of the Appellants' proposition reveals its profound flaws. First, by asserting that only the entirety of the Division of Education qualified as a legitimate competitive area, the Appellants simply ignore the reality that almost half of the SCDC employees impacted by the RIF were not employed within the Division of Education. The Committee recognized that "[t]he positions of 148 SCDC employees were eliminated effective June 1, 2003" and only 84 of those position (56.75%) were positions within the Division of Education. (ALC ROA p. 11). Second, absolutely no authority supports the Appellants' alternative contention that SCDC was limited to identifying only one (1) competitive area, namely the agency itself, in its RIF plan.

In a footnote associated with final sentence of the above quoted passage,[47] the Appellants further contended that "SCDC offered a second 'retirement opportunity' during the recall period on March 25, 2004." The Appellants also contended that SCDC offered two (2) retirement opportunities during the RIF recall period within the third of the 10 purported violations of § 2.3 they ascribed to SCDC.[48] The Appellants offered the identical erroneous factual contention to the ALC, but the ALC correctly determined that SCDC offered only one (1) retirement opportunity to retirement-eligible employees during the recall period that ran from June 1, 2003 through May 31, 2004. (ALC Order, p. 21, n. 45).

Thus, not only did the Appellants again offer a grossly distorted view of the facts, but they again offered a conclusory assertion void of any supporting authority when they contended that, "[a]s 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." The Appellants continued their tactic of offering distorted facts followed by unsupported conclusory statements when they contended that, contrary to "Frequently Asked Questions" published by OHR, "SCDC also violated the prohibition against hiring temporary employees during the recall period by setting up temporary positions to provide educational services.[49]"

In short, the Appellants merely reiterated the same argument and analysis to this Court, which the Committee and the ALC both properly rejected, and, in doing so, they offered no genuine supporting authority of any kind. Accordingly, SCDC respectfully submits that the Appellants have abandoned this issue. *See Transp. Ins. Co. & Flagstar Corp.* and *Eaddy, supra.* Should this Court determine that the Appellants have not abandoned this issue, SCDC

[47] *See* Appellants' Brief, p. 17, n. 6.

[48] *Id.*, p. 16.

[49] *Id.*, p. 17.

respectfully submits that the Appellants failed to meet their burden on appeal, and it respectfully urges this Court to affirm the ALC's order.

C. THE ALC PROPERLY AFFIRMED THE COMMITTEE'S FINDINGS AND CONCLUSIONS THAT SCDC DID NOT VIOLATE §§ 7.1, 7.5, OR 11 OF ITS OWN RIF POLICY

The Appellants ended their first legal argument by contending that SCDC violated § 7.1, § 7.5,[50] and the definition of the term "temporary employee" from § 11 of its RIF policy by the manner in which it fashioned the competitive areas reflected in its RIF plan.[51] After attributing to the agency a single purported violation of each of these policy sections, the Appellants then argued as follows:

> 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 [competitive areas] 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.[52] [emphasis supplied].

The Appellants yet again predicated their arguments that SCDC violated § 7.1, § 7.5, and the definition of the term "temporary employee" provided in § 11 of the RIF policy upon their initial contention that the 11 competitive areas identified within the agency's RIF plan did not

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[50] As the Committee observed in its Decision (ALC ROA p. 13), the Appellants made the identical or nearly identical argument in that forum:

> Appellants also contend that SCDC did not comply with the requirement of Section 7.5 of its RIF policy which states that: "probationary, temporary (pink slip), or temporary grant employee will not have recall or reinstatement rights."

[51] *See* Appellants' Brief, pp. 17 – 18. *See also* note 2 above.

[52] *See* Appellants' Brief, p. 18 – 19.

conform to § 1.1 of the policy. However, as clearly demonstrated above, the Appellants' argument that SCDC violated § 1.1 of the RIF policy by establishing the 11 competitive areas as reflected in its RIF plan is profoundly defective, and their arguments that SCDC violated § 7.1, § 7.5, and § 11 of its own RIF policy are, therefore, defective as well.

Moreover, the Appellants offered no legitimate supporting authority of any kind to support their assertions that SCDC violated these three (3) sections. Instead, the violations purportedly committed by SCDC consisted of nothing more than the Appellants' grossly distorted version of the facts and their conclusory assertions concerning the applicable policy provisions. Accordingly, SCDC respectfully submits that the Appellants have abandoned this issue. *See Transp. Ins. Co. & Flagstar Corp.* and *Eaddy, supra.* Should this Court determine that the Appellants have not abandoned this issue, SCDC respectfully maintains that the Appellants failed to meet their burden on appeal, and it once again respectfully urges this Court to affirm the ALC's order.

II. CONTRARY TO THE APPELLANTS' CONTENTION THAT THE ALC "FAILED TO ENFORCE CONTROLLING LEGISLATION" APPLICABLE TO THE RIF, THE ALC PROPERLY INTERPRETED AND APPLIED THE STATUTES RELEVANT TO THE RIF, AND, ACCORDINGLY, IT PROPERLY AFFIRMED THE COMMITTEE'S DECISION

A. THE ALC PROPERLY INTERPRETED AND APPLIED THE PROVISIONS OF S.C. CODE ANN. § 24-25-10, *et seq.*

The Appellants began their second argument by reciting passages of what they deemed to be the relevant statutes from the legislation which established the PUSD, and they included passages from S.C. Code Ann. §§ 24-25-10, 20, 30, 40, 70, 80, and 90.[53] Critically, the Appellants did not include any passages from §§ 24-25-35, 50, and 60.[54]

[53] *See* Appellants' Brief, p 19.

[54] As stated in note 41 above, §§ 24-25-10, 20, 30, 35, 40, 50, 60, 70, 80, and 90 comprise § 24-25-10, *et seq.*

After discussing general legal standards purportedly relevant to their second argument, the Appellants argued as follows, and, in so arguing, they again echoed their meritless assertion that the competitive areas established in the RIF plan violated § 1.1 of the RIF policy:[55]

> 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 [PUSD'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, 355 S.E.2d 531, 533 (S.C. 1987)].

The Appellants next catalogued a series of statutory violations purportedly committed by SCDC in the manner by which it devised and implemented the RIF. The Appellants ascribed to SCDC two (2) purported violations of § 24-25-10, two (2) purported violations of § 24-25-20, two (2) purported violations of § 24-25-70(7), one (1) purported violation of § 24-25-40, two (2) purported violations of § 24-25-90, and two (2) violations of S.C. Code Ann. § 8-11-185.[56]

However, the Appellants' assertions that SCDC violated these statutes, like their assertions that the agency violated other statutes, regulations, constitutional provisions, and precedent, are predicated upon a witches brew concocted by the Appellants. In this brew, the Appellants combine their profoundly distorted representation of the dispositive facts with their unrelenting tactic of flatly ignoring the existence of certain authorities or language within the authorities they cite which does not support their arguments.

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[55] *See* Appellants' Brief, p. 20.

[56] *Id.*, pp. 20 – 22.

For example, the Appellants argued the following regarding § 24-25-40:[57]

Statute	Violations:
[Section 24-25-40] states that the [PUSD] shall be under the control and management of a board of nine trustees who shall operate the [PUSD] under the supervision of [SCDC].	SCDC conducted the RIF without conferring with the Board of Trustees or considered the laws creating and governing the [PUSD]. (Blanton testimony ROA pp. 2625 – 28; Near testimony ROA p. 2635).

First, the Appellants ignored the following language from § 24-25-40:

> Four members of the school board shall be appointed by [SCDC's Executive Director], four members of the school board shall be appointed by the State Superintendent of Education, and one member of the school board shall be appointed by the Governor.

Then, they ignored § 24-25-50:

> **The members of the school board may be removed at any time for good cause by [SCDC's Executive Director].** The failure of any member of the school board to attend at least three consecutive meetings thereof, unless excused by formal vote of the school board, may be construed by [SCDC's Executive Director] as a resignation from the school board. [emphasis supplied]

Next, they ignored the unnumbered first paragraph of § 24-25-70:

> **With the consent and concurrence of [SCDC's Executive Director],** the board of the [PUSD] shall operate as executory agent for the schools under its jurisdiction and shall perform administrative functions as follows: [emphasis supplied]

These provisions, along with § 24-25-90, negate any credible argument that SCDC violated the provisions of § 24-25-40 by conducting "the RIF without conferring with the Board of Trustees or considered the laws creating and governing the [PUSD]." Under the above-quoted provisions of §§ 24-25-40, 50 and 70, SCDC's Executive Director is vested with the ultimate authority over the composition of the PUSD's Board of Trustees and the manner by which the Board operates schools under its jurisdiction. Therefore, as properly determined by the ALC (ALC Order, p. 13), the Appellants' argument to the contrary represented "nothing more than

[57] *See* Appellants' Brief, p. 21.

[the Appellants'] own interpretation" of § 24-25-40. Moreover, the ALC properly affirmed the following conclusion of law rendered by the Committee after it considered identical arguments or nearly identical arguments offered by the Appellants (ALC Order, p. 13):

> SCDC management was not obligated by statute or policy to consult the PUSD School Board or obtain its approval before implementing the RIF. While good business relations may, in the opinion of some, dictate that feedback from management of affected areas be solicited, it is not required. The PUSD exists as a unit under the purview of the SCDC Executive Director, not as a separate entity; and, therefore, it is not afforded any special rights or treatment not afforded to other divisions within the agency. Further, § 24-25-90 ... states: "[t]he superintendent of the [PUSD] and all other educational personnel shall be employed, supervised, and terminated according to [SCDC's] personnel policies and procedures. (ALC ROA pp. 16 – 17).

Finally, the Appellants offered no legitimate authority of any kind in support of their argument on these points and, for that matter, they made no effort to identify how either the Committee or ALC erred in making their respective determinations. Accordingly, SCDC respectfully submits that the Appellants have abandoned this issue. *See Transp. Ins. Co. & Flagstar Corp.* and *Eaddy, supra.* Should this Court determine that the Appellants have not abandoned this issue, SCDC respectfully submits that the Appellants failed to meet their burden on appeal, and it once again respectfully urges this Court to affirm the ALC's order.

B. THE ALC PROPERLY AFFIRMED THE COMMITTEE'S DECISION WHICH VALIDATED THE SOLE RETIREMENT OPPORTUNITY OFFERED BY SCDC DURING THE RIF RECALL PERIOD

The Appellants undertook a separate assault on the order by which the ALC affirmed the Committee's Decision when they asserted follows:[58]

> 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

[58] *See* Appellants' Brief, pp. 22 – 23.

> interpretation does not comport with established rules of statutory construction.

In the footnote associated with the last sentence of this paragraph, the Appellants contended as follows:[59]

> 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 employees.

After discussing general legal standards they deemed relevant to their second argument, the Appellants asserted the following analysis:[60]

> 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. [ALC's 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 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 explicity states that re-employment must follow a "required break" and that continued employment "is not guaranteed." [ALC ROA p. 2560]. [SCDC] also required participants in the "Retirement Opportunity" to sign an acknowledgement 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." [ALC ROA pp. 2567 – 68].

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[59] *Id.*, p. 23, n. 7.

[60] *Id.*, pp. 23 – 25.

> 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.[61] 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 v. City of Columbia, 691 S.E.2d 465, 469 (S.C. 2010)] (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.

The Appellants then concluded their argument on this point as follows:

> 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, 529 S.E.2d 280, 283 (S.C. 2000)] (courts must reject a meaning that would lead to a result so plainly absurd that it could not have possibly been intended by the Legislature).

As they stated at the very outset of their brief in the section entitled "STATEMENT OF THE CASE,[62]" the Appellants, as SCDC employees legitimately subject to the RIF, were "covered employees." Section 7 of the RIF policy was entitled "RECALL AND REINTSTATEMENT RIGHTS OF EMPLOYEES," and § 7.1 provided as follows:

> 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 lay off, bumping or

[61] As discussed immediately below, the Appellants' recall rights had to conform to the recall rights prescribed by the applicable provisions of RIF policy.

[62] *See* note 3 above.

> reassignment to another position. Employees will be reinstated in inverse order of lay off. (ALC ROA p. 1638).

Section 7.2, entitled "Recall Rights," then provided the following requirements for agency's recall of covered employees, like the Appellants, whose employment position had been impacted by the RIF:[63]

> When a vacancy occurs in [a covered employee's] **competitive area** which is (1) in the same job class, pay band, pay level or lower and functionally similar as the position held prior to the lay off, downward bumping, or reassignment **and** (2) within a reasonable geographic distance (30 mile radius) of the work location of the employee, then the eligible employee will be offered the vacancy provided s/he meets the minimum training and experience qualifications. The position must be accepted in writing by the [covered employee] within two (2) working days of the offer or s/he waives any future recall rights. (ALC ROA p. 1638). [emphasis supplied].

Section 7.4, entitled "Reinstatement Rights," next provided as follows:

> [A covered employee] affected by a [RIF] may apply for any SCDC or State job for which s/he meets the minimum training and experience requirements. If the [covered employee] accepts a position with a lower pay band than the one from which she/he was separated, s/he still retains recall rights to a position in the same job classification **in the competitive area**. (ALC ROA p. 1638). [emphasis supplied].

Finally, § 7.6 provided as follows:

> If [a covered employee] on the recall list relocates to another geographic area, s/he will be eligible for recall in the **new competitive area**. After relocation it will be the [covered employee's] responsibility to notify the Division Director of Human Resources in writing of the relocation in order to be eligible for recall within **the competitive area**. (ALC ROA p. 1638). [emphasis supplied].

Thus, as the above provisions of the RIF policy make clear, the Appellants, even if they were eligible to fill the positions impacted by the sole retirement opportunity offered by the agency during the recall period, could have been recalled only if a such position had opened *within the competitive area* to which they were assigned under the RIF plan.

[63] *See* note 38 above.

The Appellants did not specifically address or otherwise reconcile the provisions of § 7.2 with their analysis on this issue. Likewise, the Appellants did not specifically address or reconcile the provisions of § 7.4 or § 7.6, discussed immediately above, within their analysis on this issue. Instead, the Appellants simply asserted that SCDC "violated recall and reinstatement provisions of its RIF policy by hiring temporary employees and retirees to replace" them during the RIF recall period.[64] Of course, the Appellants, as they did from the very beginning of their legal arguments, attempted to surmount the obstacle presented by the provisions of § 7.2, § 7.4, and § 7.6 of the RIF policy by once again assailing the legitimacy of competitive areas established by the RIF plan.[65] However, as persuasively shown above, the Appellants' assault on the RIF plan's 11 competitive areas effectively relies upon this Court joining them in ignoring the existence of the words "may be" as they appear within § 1.1 of the RIF policy.

Once again, therefore, the Appellants offered no legitimate supporting authority of any kind, aside from their own interpretation of Title 8 and Title 9 and their conclusory assertions regarding the applicable provisions of the RIF policy, to support their argument that SCDC violated "controlling legislation" and, for that matter, its own RIF policy, applicable regulations, and our state's constitution by its decision to retain its retirement eligible employees who accepted the sole retirement opportunity it offered during the RIF recall period. Accordingly, SCDC respectfully submits that the Appellants have abandoned this issue. *See Transp. Ins. Co. & Flagstar Corp.* and *Eaddy*, *supra*.

Should this Court determine that the Appellants have not abandoned this issue, SCDC respectfully maintains that the Appellants failed to meet their burden on appeal. The flawed logic employed by the Appellants in their assault on the RIF plan's competitive areas ultimately

[64] *See* Appellants' Brief, p. 22.

[65] *Id.*

taints each of the Appellants' legal arguments including their expansive second legal argument. Therefore, the ALC properly recognized that different but equally viable statutory provisions applied to retirement eligible SCDC employees who availed themselves of the retirement opportunity and to the other SCDC employees, like the Appellants, who were subject to the RIF. (ALC Order, pp. 20 – 29). In light of these realities, the ALC properly affirmed the following conclusion from the Committee's Decision:

> The retirement opportunity offered by SCDC after the RIF plan was implemented as a separate action designed to further reduce operating costs. Employees who elected to participate in this opportunity were removed from their full-time equivalent positions and placed into temporary positions. Recall rights are not applicable in the case of temporary positions; therefore, employees affected by the RIF were not provided recall rights in relation to these jobs. The SCDC employees who took part in the retirement opportunity were not offered new positions; rather, it was a way for them to retain their current positions, in a temporary capacity while significantly reducing SCDC costs by reducing salaries and eliminating the cost of benefits for these employees. SCDC was not obligated to offer the positions to Appellants under the RIF policy's recall procedures because they were temporary positions. In addition, Mr. Ozmint's cover letter to OHR that was submitted along with the RIF plan stated that "[t]emporary positions, particularly in the area of educational instruction to inmates, may be developed and made available to affected employees by the Reduction-in-Force;" this language indicates that this is a possibility, not a promise.[66] Additionally, the formal RIF plan did not address, nor would it have addressed, the subject of temporary positions in terms of the recall rights for employees affected by the RIF. (Conclusion of Law # 4, ALC ROA p. 17).

Accordingly, SCDC once again respectfully urges this Court to affirm the ALC's order.

[66] As explained in note 2 above, Director Ozmint's "cover letter to OHR" consisted of his March 28, 2003 letter to OHR Director Wilkins within which Director Ozmint presented SCDC's RIF plan. (ALC ROA pp. 1626 – 31). The Appellants did not address this specific conclusion rendered by the Committee in any of the materials they submitted in support of their appeal to this Court or, for that matter, to the ALC.

III. CONTRARY TO THE APPELLANTS' CONTENTION THAT THE ALC "FAILED TO ENFORCE" THE CONSTITUTIONAL RIGHTS ASSOCIATED WITH THEIR EMPLOYMENT UNDER THE RIF IMPLEMENTED BY SCDC EFFECTIVE JUNE 1, 2003, THE ALC PROPERLY INTERPRETED AND APPLIED THE RELEVANT CONSTITUTIONAL PROVISIONS, AND, ACCORDINGLY, IT PROPERLY AFFIRMED THE COMMITTEE'S DECISION

The Appellants began their third legal argument by invoking *Littlefield v. S.C. Forrestry Comm'n*, 523 S.E.2d 781, 783 (S.C. 2000) in support of the proposition that "[d]epriving one group of employees a benefit afforded another group invokes the equal protection guarantees of the State's Constitution.[67]" They then asserted the following:[68]

> By virtue of state law and the RIF policy, Appellants were entitled to all benefits available to other SCDC employees. See [§ 24-25-90]. As "covered employees," Appellants enjoyed the right to retain employment unless removed for cause or by proper [RIF]. [§ 8-17-330].

The Appellants then asserted that SCDC committed two (2) violations of Article I, Section 3 of our state's constitution, and a single violation of Article I, Section 22 of our state's constitution.[69] In the purported violations they attributed to SCDC, the Appellants invoked *Brown v. S.C. State Bd. Of Educ.*, 391 S.E.2d 866 (S.C. 1990) and *Johnson v. Spartanburg County Sch. Dist. No 7*, 444 S.E.2d 501 (S.C. 1994).

The Appellants then articulated the essence of their third argument:

> 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 I, §§ 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.

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[67] *See* Appellants' Brief, p. 25. As acknowledged by the ALC in its order, the Appellants also relied upon *Littlefield* in the argument they articulated to the ALC on this issue. (ALC Order, pp. 31 – 36).

[68] *See* Appellants' Brief, p. 25.

[69] *Id.*, pp. 25 – 26.

> **No showing of unlawful motivation is required.** Instead, as illustrated in Chief Justice Toal's admonition in [Johnson], a public entity may not conduct itself in "blatant violation of procedural protections established by the General Assembly." [444 S.E.2d at 503].

The Appellants then assailed the ALC's reliance upon this Court's recent decision in *Harbit v. City of Charleston*, 675 S.E.2d 776 (S.C. Ct. App. 2009) when the ALC concluded that the Appellants had failed to articulate a viable equal protection claim in their appeal of the Committee's Decision:

> The ALC relied upon [Harbit] to impose a burden on Appellants to show an unlawful motivation. (ALC Order at pp. 36 – 37). This is an error requiring reversal. [emphasis supplied].

Succinctly stated, however, the Appellants, in making their argument on this issue, simply failed to meet their burden on appeal, as they cited no new or contrary precedent which would cast doubt on the legitimacy of the ALC's analysis and ruling. In keeping with the tactic they persistently employed throughout the entirety of their brief, the Appellants did nothing more than offer their own assessments of *Littlefield*,[70] *Brown*,[71] *Johnson*,[72] and *Harbit*, and, by doing so, they did nothing more than express dissatisfaction with the ALC's ruling. *See Al-Shabazz*, 527 S.E.2d at 755. Accordingly, SCDC once again respectfully urges this Court to affirm the ALC's order.

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[70] The ALC properly determined that the Appellants misapprehended *Littlefield* in the analysis it provided on this issue. (ALC Order, pp. 34 – 36).

[71] The Appellants relied upon *Brown* in the argument they provided to the ALC on this issue. The ALC recognized the Appellants' reliance upon *Brown* in its order, and it properly determined that *Brown* is inapplicable in this matter. (ALC Order, p. 12, n. 23).

[72] The Appellants also relied upon *Johnson* in the argument they provided to the ALC on this issue. The ALC recognized the Appellants' reliance upon *Johnson* in its order, and it properly determined that, like *Brown*, *Johnson* is inapplicable in this matter. (ALC Order, pp. 12 – 13, n. 24).

IV. CONTRARY TO THE APPELLANTS' CONTENTION THAT THE ALC "FAILED TO ENFORCE" THEIR RIGHTS AS COVERED EMPLOYEES DURING THE ONE-YEAR RECALL PERIOD ASSOCIATED WITH THE RIF IMPLEMENTED BY SCDC EFFECTIVE JUNE 1, 2003, THE ALC PROPERLY DETERMINED AND SAFEGUARDED THE APPELLANTS' RIGHTS, AND, ACCORDINGLY, IT AFFIRMED THE COMMITTEE'S DECISION

The Appellants began their fourth legal argument by asserting the following:[73]

> 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, [SCDC] had responsibilities to Appellants under its policy, state law, and regulation. Four Appellants were retained, recalled or rehired by SCDC following the RIF.[74] 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.

The Appellants then asserted that SCDC committed several violations of rights purportedly secured to them by this Court's decision in *Abraham*.[75] In an apparent stream of consciousness, the Appellants then concluded their fourth argument as follows:[76]

> 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 than requires reversal of the ALC order.

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[73] *See* Appellants' Brief, pp. 27 – 28.

[74] As revealed by one of the violations attributed to SCDC by the Appellants, the four (4) Appellants in question were, apparently, Ms. Glenn, Ms. McCabe, Ms. McClanahan, and Mr. Bell. *Id.*, p. 28. The Appellants offered identical or nearly identical arguments to the ALC regarding the post-RIF duties of the Ms. Glenn, Ms. McCabe, and Ms. McClanahan, but the ALC properly determined, after its review of the record, that they "did not provide a complete narrative" of these duties, and, accordingly, the ALC rejected the Appellants' arguments. The ALC also recognized that "the Appellants invoked the post-RIF duties [SCDC] assigned to [Glenn, McCabe, McClanahan, and Bell] to argue that SCDC violated a 'right' to particular compensation allegedly secured to them under [*Abraham*]," but the ALC again properly rejected the Appellants' argument. (ALC Order, p. 24, n. 54).

[75] *See* Appellants' Brief, pp. 28 – 29.

[76] *Id.*, p. 29.

This argument seamlessly dovetailed with the capstone assertion offered by the Appellants in the final section of their brief entitled "CONCLUSION." After invoking the provisions of both §§ 1-23-380(5) and 1-23-610(B),[77] the Appellants asserted as follows:[78]

> The RIF implemented by SCDC separated a disproportionate number of educators compared to the overall employment population of the Agency (Final Decision, [ALC ROA p. 11]); see also [ALC 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 above-quoted paragraph represents a microcosm of the entirety of the Appellants' profoundly flawed challenge of the ALC's order and, by extension, the Committee's Decision. First and foremost, absolutely nothing from the page of the Committee's Decision referenced by the Appellants supports their factual contention that the RIF "separated a disproportionate number of educators compared to the overall employment population of the Agency.[79]" Instead, the Committee, at the page of its Decision referenced by the Appellants, determined the following facts as dispositive (ALC ROA p. 11):

> The RIF plan affected management and administrative support staff in headquarters, management and administration in support programs; and educational personnel and educational support staff. The positions of 148 SCDC employees were eliminated effective June 1, 2003. Of those 148 positions, 84 (56.75%) were PUSD positions including Appellants in this appeal who were certified educators employed by SCDC in the PUSD.

[77] *See* Appellants' Brief, pp. 29 – 30.

[78] *Id.*, p. 30.

[79] *See* note 23 above. *See also* note 46 above.

Likewise, the four (4) pages of documents referenced by the Appellants simply do not support their factual contention that the RIF "separated a disproportionate number of educators compared to the overall employment population of the Agency.[80]"

In reality, the Appellants' capstone assertion represents their effort to simply bring before this Court the original theory of the case that they presented to the Committee, namely that SCDC officials and, specifically, Director Ozmint, targeted educators, including the Appellants, for elimination in the RIF, because the educators, by bringing the lawsuit which ultimately resulted in the decision issued by this Court in *Abraham*, had successfully sued the agency for higher salaries. The portion of the Appellants' capstone assertion which followed their profoundly distorted factual assertion echoes passages from the opening statement (ALC ROA pp. 79) and, almost exactly, from the closing argument (ALC ROA p. 1364) offered by the Appellants counsel before the Committee. However, the Committee, after considering Director Ozmint's testimony (ALC ROA pp. 14 – 15) and all of the rest of the evidence, rendered the following dispositive factual findings (ALC ROA p. 16):

> The Committee finds there is insufficient evidence to support Appellants' allegations that the RIF policy or plan was improperly or inconsistently implemented. In addition, the Committee finds there was not credible evidence presented that the elimination of educator positions in the PUSD was motivated by a desire for retaliation for an earlier lawsuit that resulted in the increase of educators' salaries. SCDC's RIF plan was, by design, based on budgetary pressure to reduce costs. As such, it is reasonable for SCDC to develop a plan that maximized savings while retaining as many employees as possible in essential areas. In SCDC's efforts to reduce

[80] *See* note 23 above. The first of these four (4) pages is a memorandum to Director Ozmint from former PUSD superintendent Wendell Blanton. (ALC ROA p. 2554). The second page is document generated by PUSD officials entitled "FACT SHEET ON EDUCATIONAL PROGRAMS." (ALC ROA p. 2555). The third page is a worksheet which summarizes SCDC's total education expenditures for five (5) fiscal years starting in fiscal year 2000. (ALC ROA p. 2556). The fourth page is a memorandum dated September 8, 2003 from Mr. Blanton to former SCDC official Felicia Poston depicting the "percentage of agency state funds spent on education" for four (4) fiscal years starting in fiscal year 2000 – 01. (ALC ROA p. 2557). Mr. Blanton's memorandum to Ms. Poston also reflects an endorsement from Mr. Blanton to his supervisor, Ms. Gerri Miro, dated September 12, 2003. As recognized by the ALC's order (ALC Order, pp. 13 – 14), Ms. Miro serves as the Deputy Director for SCDC's Division of Programs and Services, and, in this position, she is responsible for SCDC's Division of Education, which includes the PUSD.

> budget deficits, a hierarchy of priorities was identified an programs were evaluated for ways to reduce costs while still providing essential services. The education program was one area where significant cost-saving opportunities existed.
>
> ...
>
> Educators were not unfairly targeted for termination in retaliation for an earlier lawsuit regarding wages. ... The high number of educators involved in the RIF was the result of basic cost-saving principles to maximize savings and retain as many employees as possible due to the high salaries of most educators compared to other personnel.

Moreover, the ALC properly determined that the Appellants "did not appeal the Committee's finding that 'there was no credible evidence presented that the elimination of educator positions in PUSD was motivated by a desire for retaliation for an earlier lawsuit that resulted in the increase of educators' salaries.'" (ALC Order, p. 30). Accordingly, the Appellants' capstone assertion is both unsupported by the record and ineligible for review by this Court.

CONCLUSION

Therefore, for the foregoing reasons, SCDC respectfully urges this Court to affirm the ALC's August 6, 2010 order which affirmed the Committee's decision in SCDC's favor, a decision which upheld the manner by which SCDC developed its RIF plan and the manner in which SCDC implemented its RIF effective June 1, 2003.

As provided by SCACR 208(b)(2) and 220(c), SCDC also, for the foregoing reasons, respectfully reminds this Court that it may affirm the ALC's August 6, 2010 order "upon any ground(s) appearing in the Record on Appeal."

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As SCDC respectfully submitted in note 21 of its brief, the Appellants submitted 25 enumerated paragraphs of purported "facts" in the brief they submitted to the ALC on July 16, 2009. These 25 paragraphs articulated purported "facts" which were identical or nearly identical to the purported "facts" articulated by the Appellants in the 27 enumerated paragraphs they submitted to this Court in their brief. For that matter, the Appellants articulated the same purported "facts" during the hearing conducted by the Committee.

The table appearing immediately below connects the paragraph articulated by the Appellants in their brief to this Court with, where applicable, the passages from both the ALC's order and the Committee's Decision. The passages from the ALC's order and the Committee's Decision reflect where the ALC and the Committee considered the purported "facts" asserted by the Appellants:

Para. #	Page #	Passage from the ALC's Order (if applicable)	Passage from the Committee's Decision (if applicable)
1	4	p. 10, n. 15 p. 13, n. 26 pp. 13 – 14	ALC ROA pp. 16 – 17
3	5	p. 30 and p. 30, n. 60	ALC ROA p. 16
5	5	p. 11, n. 19	N/A
8	5 – 6	p. 15	ALC ROA p. 16
14	7	p. 14	ALC ROA pp. 16 – 17
15	7	p. 19 and p. 19, n. 39	N/A
17	8	p. 21 p. 25	ALC ROA p. 13
18	9	pp. 20 – 25 pp. 28 – 29	ALC ROA p. 17
19	9	N/A	ALC ROA p. 13
20	9 – 10	p. 21 and p. 21, n. 44	ALC ROA pp. 14 and 17
22	10	p. 22 p. 25 pp. 27 – 28	N/A
23	10	p. 22 p. 25	N/A
24	11	p. 23 p. 35 pp. 28 – 29	ALC ROA pp. 13 and 17
25	11	p. 24, n. 54	N/A

As SCDC also respectfully submitted in note 23 of its brief, the majority of the purported "facts" articulated by the Appellants in the 27 enumerated paragraphs they presented in their brief to this Court suffered from the same flaw, namely that they represented only the Appellants' version of the facts rather than the dispositive facts determined by the Committee and adopted by the ALC.

Accordingly, the table which appears on the remaining pages of the instant appendix represents a side-by-side comparison of the key paragraphs of the purported "facts" articulated by the Appellants with materials from the record considered by the ALC. In each instance, the materials from the record either contradict the "facts" offered by the Appellants or provide an accurate context by which to consider the "facts" offered by the Appellants.

Para. #	Page #	Appellants' Purported "Fact"	Material from Record before ALC
8	5 – 6	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, [ALC ROA p. 14]). Director Ozmint testified that these raises were "taken out of the hide" of other employees. ([ALC ROA pp. 1045 – 46]; see also [ALC ROA pp. 1052, 1095 – 96]).	Director Ozmint testified that SCDC was trying to get immediate impact in the current fiscal year, "but also to give [SCDC] maximum bang for the buck, one percent bang for the buck for the next fiscal year which was starting on July 1st of '03." (ALC ROA p. 1056). Director Ozmint also testified that SCDC was not given the funding to pay for the teachers pay raises, but it had to come from somewhere, which "create[d] a real disparity when [correctional officers] don't get a raise but the teachers do. Because those folks know that raise that went to pay that teacher's increased salary came out of their high, you know." (ALC ROA pp. 1045 – 46).
12	6	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. [ALC ROA pp. 3301 – 02]. In contrast, the Appellants separated due to RIF had service ranging from nine to more than thirty years with SCDC.	The Appellants rely on a table entitled "Institutions Greatly Reduced by RIF, which is dated "4/8/03" to support this "fact." (ALC ROA pp. 3301 – 02). This table reflects that the "Remaining Staff (SCDC & Grant Funded)" consisted of seven pink slip teachers, *three* classroom teachers, and one teacher assistant. This table also reflects that the "County Funded Program," consisted of thirty-two teachers, including Appellants Jones, Bratton, Bernard, McCabe, Bell, and Glenn. This table does not reflect educational services provided at all institutions. (ALC ROA pp. 541 – 42).

Para. #	Page #	Appellants' Purported "Fact"	Material from Record before ALC
17	8 – 9	Certified educators with less service than the Appellants retained employment following the RIF. (Final Decision Findings of Fact No. 10, [ALC ROA p. 13]; see also Employee List provided as Appendix A to Appellants' Brief to the ALC dated July 16, 2009 (hereafter "Appendix A")).	Regarding this "fact", the Committee found the following: "Records maintained by SCDC establish that certified educators with less continuous state services than Appellants retained employment following the effective date of the RIF. This retention was the ... result of either: 1) employees were not in the same designated competitive areas and competitive classes; or 2) because they had principal or superintendent certifications that employees with longer state service dates did not possess." (ALC ROA p. 13). SCDC's RIF Plan provided that "[i]n some cases, in accordance with Section 6.9 of [SCDC's] approved RIF Policy, employees with a higher RIF Service Date were retained over other employees with a lower RIF Service Date in the same generic state job classification or job classification series due to the necessary qualifications of the position, or their higher pay level within the pay band (code [R1-R5] on [Listing of Positions])." (ALC ROA pp. 1628 – 29). (*See also* ALC ROA pp. 1644 – 59).
17(b)	8	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).	Mr. Sharpe, Ms. Jackson, and Mr. Wicker were each assigned a code "R3" in the Listing of Positions. (ALC ROA p. 1653). SCDC's RIF Plan explained code "R3" as follows: "R3 (Area 01) – UE07 Academic Program Managers (2) with a lower RIF Service Date did not possess a principal's or superintendent's certification required for either of the two central office Academic Program Managers who had a higher RIF Service Date. In addition, the (UB07) Principal in the same competitive area, was not eligible to upward bump his supervisor who is an Academic Program Manager." (ALC ROA pp. 1628 – 29).

Para. #	Page #	Appellants' Purported "Fact"	Material from Record before ALC
17(e)	8	Certified Teachers Austin (Service Date: 6/4/82), Green (Service Date: 106/84), 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, [ALC ROA pp. 2403 – 17]).[1]	Alfonso Greene and Rose Ruger were listed as code "R4" in the Listing of Positions. (ALC ROA pp. 1653, 1656). SCDC's RIF Plan explained code "R4" as follows: "R4 (Areas 01, 02, 06, 11) – UB02, UB04 – Certified Teacher, Vocational Teacher – In four competitive areas of the state, several certified teachers and vocational teachers did not possess the specific educational credentials or skills necessary to qualify for bumping into positions occupied by employees with a lower RIF Service Date." (ALC ROA p. 1629). Mr. Greene and Ms. Ruger were both classified as "Certified Teacher – [Math]." (ALC ROA pp. 1653, 1656). Eileen Howard was classified as "Certified Teacher – [English]." (ALC ROA p. 1658) Appellant Jones was classified as "Guidance Counselor – G." (ALC ROA pp. 1653 – 58). Appellants Bratton, Bernard, Croxton, Culbreath, Dreyer, Farr, and Fritts were all classified as "Certified Teacher – [General Academic]." (ALC ROA pp. 1653 – 58). Thus, none of the Appellants listed in this "fact" had the same classification title or credentials as Mr. Greene, Ms. Ruger, or Ms. Howard. Diane Austin and Appellant Glenn were both classified as "Certified Teacher – [Media Specialist]. Ms. Austin's RIF service date was "6/4/82," which is *earlier* than Appellant Glenn's service date of "8/10/90." (ALC ROA pp. 1653, 1658).
18(a)	9	Ms. Bower was replaced by a part-time hire, Shirley Johnson. [ALC ROA pp. 275 – 76].[2]	Although Appellant Bower testified that "Shirley Johnson" taught computers at Leath CI sometime after the RIF (ALC ROA pp. 273 – 75), SCDC respectfully submits that the name "Shirley Johnson" does not appear within the Listing of Positions, Response to Question #5, or Appellants' Appendix A. Moreover, a review of the entire record reveals that the only mention of "Shirley Johnson" is by Appellant Bower and in arguments by Appellants' counsel. (ALC ROA pp. 273, 275 – 76, 1392).

[1] The materials which appear at pages 2403 through 2417 of the record considered by the ALC are identical to the materials which appear at pages 1644 through 1659 of the record.

[2] The caption which appears on page 274 of the record considered by the ALC reads "Ms. Bridges – Cross Examination by Mr. Summers." However, it should read "Ms. Bower – Cross Examination by Mr. Summers."

Para. #	Page #	Appellants' Purported "Fact"	Material from Record before ALC
18(b)	9	Ms. Bratton's former duties were assumed by Correctional Officers Watkins, Buhler, and Nazar. [ALC ROA pp. 205 – 06, 208 – 09, 2704].	Heather Pope, Managing Partner of OHR, testified that "in a RIF . . . [y]ou may merge departments through a reorganization where you have somebody else maybe assume those duties, or they're divided up among other people..." (ALC ROA p. 1277). "If an agency were to downsize, if they had five people and they decided we only need four, then some of that work could be assumed by those four." (ALC ROA p. 1279). In addition, Mr. Richardson, Director of the Office of Finance for the S.C. Department of Education, testified that "[y]ou can have an uncertified teacher in a classroom that's the teacher of record. Then that district would lose the funding that those kids, those students would actually generate for that district." (ALC ROA p. 1188). Appellants failed to acknowledge that Appellant Bratton bumped Appellant Farr during the RIF. (ALC ROA pp. 206, 213).
18(c)	9	Ms. Croxton could have performed the duties of Rose Rueger and Talmadge Smith, both with less seniority and protected from separation by RIF. [ALC ROA pp. 361 – 362].	Mr. Smith and Ms. Ruger were each assigned code "R4" in the Listing of Positions. (ALC ROA p. 1653). See SCDC's explanation above regarding code "R4" in "fact" 17(e). In addition, Mr. Smith's RIF service date was "3/14/86," which is *earlier* than Appellant Croxton's RIF service date of "5/14/86." (ALC ROA p. 1653).
18(d)	9	Ms. Culbreath could have bumped Yvette Lakin and Patricia Hudson, both outside her area. [ALC ROA pp. 172 – 75; 178 – 79].	Appellant Culbreath's RIF service date was "2/24/90," (ALC ROA p. 1657), whereas Ms. Lakin's RIF service date was "6/3/83," and Ms. Hudson's RIF service date was "9/18/76." (ALC ROA p. 1653). Thus, Ms. Lakin and Ms. Hudson both had *more seniority* than Appellant Culbreath.
18(e)	9	Ms. Dreyer could have bumped Ray Dorn at Trenton. [ALC ROA pp. 2709 – 10].	Although Appellant Dreyer testified that he could have bumped "Ray Dorn" (ALC ROA pp. 475, 2709 – 10), SCDC respectfully submits that the name Ray Dorn does not appear within the Listing of Positions, Response to Question #5, or Appellants' Appendix A. Moreover, a review of the entire record reveals that the only mention of "Ray Dorn" is by Appellant Dreyer and in arguments by Appellants' counsel. (ALC ROA pp. 467, 475 – 76, 1394, 2696, 2709, 3263).

Para. #	Page #	Appellants' Purported "Fact"	Material from Record before ALC
18(f)	9	Ms. Fritts, a doctoral certified educator, could have bumped Yvette Lakin, Patricia Hudson, Jewell Bounds, and Kathy Jackson. [ALC ROA pp. 186 – 88; 192 – 93].	Appellant Fritts's RIF service date was "10/7/89," whereas Ms. Lakin's RIF service date was "6/3/83," and Ms. Hudson's RIF service date was "9/18/76." (ALC ROA p. 1653). Thus, Ms. Lakin and Ms. Hudson both had *more seniority* than Appellant Fritts. Ms. Jackson was assigned the code "R3" in the Listing of Positions (ALC ROA pp. 1629, 1653). See SCDC's explanation above regarding code "R3" in "facts" 17 and 17(b). SCDC respectfully submits that a review of the entire record reveals that the only mention of "Jewell Bounds" is by Appellant Fritts in her testimony to the Committee. (ALC ROA pp. 192, 197).
18(g)	9	Ms. Glenn could have bumped four librarians from outside her area, Steve Gratzer, Billy Holiday, Donna Deadmont, and Mary McCabe. [ALC ROA pp. 281 – 82; 2714 – 15].	Mr. Gratzer was assigned code "R4" in the Listing of Positions, (ALC ROA p. 1656). See SCDC's explanation above regarding code "R4" in "facts" 17, 17(e), and 18(c). SCDC respectfully submits that the names "Billy Holiday" and "Donna Deadmont" do not appear within the Listing of Positions, Response to Question #5, or Appellants' Appendix A. Moreover, a review of the entire record reveals that the only mention of "Billy Holiday" and "Donna Deadmont" is by the Appellant and in arguments by Appellants' counsel. (ALC ROA pp 250, 254, 282, 1395 – 96, 2714). The Record also reveals that Appellant McCabe's position was eliminated as a result of the RIF. (ALC ROA p. 2718). Consequently, Appellant Glenn could not have "bumped" into Appellant McCabe's former position because it no longer existed.
18(h)	9	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. [ALC ROA p. 2718].	Appellant McCabe testified that Ms. Mailloux lost her position during the June 2003 RIF. Appellant McCabe also testified that *after the recall period ended* on May 31, 2004, a teaching position at Tyger River was created for Ms. Mailloux even though other RIF'd teachers had more seniority than Ms. Mailloux. (ALC ROA pp. 250 – 53, 2718). According to the Listing of Positions, "Marguerite J. Mailloux" was a certified teacher (English) at Northside CI prior to the RIF. (ALC ROA p. 1658). The Response to Question 5 revealed that effective June 21, 2004, after the recall period ended, Marguerite J. Mailloux was a classroom teacher at Tyger River CI. (ALC ROA p. 2235). *See* SCDC's explanation above regarding "Billy Holiday" in "fact" 18(g).

Para. #	Page #	Appellants' Purported "Fact"	Material from Record before ALC
20	9 – 10	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 officers. (Appellant Exhibit 11, [ALC 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 and 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, [ALC ROA p. 14]; Appellant Exhibit 12, [ALC ROA p. 3391]).	Precisely stated, the Committee concluded that Ms. Pope testified that prior to June 1, 2003, the "frequently asked questions (FAQs) about RIF guidelines were posted on OHR's website and available to all agencies and their human resources offices." (ALC ROA p. 14). In addition, the Record reveals that a Memorandum was sent on November 5, 2001, via e-mail, to "Human Resources Directors and Attorneys of Agencies" and provided that OHR had "added a new section to [their] web site called 'Frequently Asked Questions' . . [which included] topics such as Reduction in Force and Temporary Grant/Time-Limited Employees." (ALC ROA p. 3390).

Para. #	Page #	Appellants' Purported "Fact"	Material from Record before ALC
	10 – 11, n. 4	SCDC produced a list of employees assigned responsibilities performed by certified educators prior to the RIF. This list is contained at [ALC 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. [ALC ROA p. 3396, 3398] (identifying the list as actions taken "June 1, 2003 and after who were assigned responsibilities 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.	Appendix A is the Appellants' interpretation of SCDC's "Response to Question #5." (ALC ROA, pp. 2233-38). Response to Question #5 contains "[a] complete list of all employees hired, reclassified, promoted, demoted, or transferred June 1, 2003 and after who were assigned responsibilities that were performed by certified educators as of June 1, 2003, sorted by name, state job class code, state job title, SCDC job title (if known), pay band, pay level, and work location." (ALC ROA, p. 3396). Appellants argued to the Committee that the "Eff. Date" reflected the employees "hire" date (ALC ROA pp. 848 – 49) in support of their argument that the Appellants should have been considered for each of the positions into which these employees were "hired." However, Mr. Near (ALC ROA pp. 816 – 17, 820 – 21) and Ms. Thrailkill (ALC ROA pp. 973 – 74, 978 – 79, 993) both testified that the effective date listed in the "Response to Question #5" was not necessarily the hire date. Instead, the effective date may reflect the date "all employees [were] hired, reclassified, promoted, demoted, or transferred June 1, 2003 and after who were assigned responsibilities that were performed by certified educators as of June 1, 2003." (ALC ROA p. 3396). Moreover, the Appellants acknowledged that Response to Question 5 showed that Appellant Bratton had an effective date of "6/2/03," the date she *bumped* into another position during the RIF. (ALC ROA pp. 985 – 86, 2233). Response to Question #5 also shows that effective date "7/2/03" was the date Appellant McCabe was *recalled* into a certified teacher position. (ALC ROA p. 2236).
25	11	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, [ALC 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; [ALC ROA p. 3251]).	Appellant McCabe was recalled to a certified teacher position approximately one month after the RIF. (ALC ROA pp. 248 – 49). Appellant McClanahan testified that she "probably did every job a correctional officer normally does." (ALC ROA p. 486).