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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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

Horry County Schools .... Respondent,

v.

Jacqueline Smith, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

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SC Court of Appeals

<u>TABLE OF CONTENTS</u>

Table of Authorities ii

Statement of Issues on Certiorari iv

Statement of the Case 1

Argument on Questions Presented for Review 4

1. **The Court of Appeals' opinion presented for review overlooks and misapplies controlling precedent in holding that Ms. Smith's due process rights were not violated.**

2. **The Court of Appeals' opinion presented for review misapplies the law in finding that Ms. Smith received proper notice of the grounds for her termination.**

3. **The Court of Appeals' opinion presented for review misapplies the standard of review in finding substantial evidence to support Ms. Smith's termination.**

4. **The Court of Appeals' opinion presented for review misapplies the law in failing to address the absence of any factual findings and legal conclusion both by the Board and the circuit court.**

Conclusion 10

TABLE OF AUTHORITIES

Cases

Adamson v. Richland County School District One, 332 S.C. 121, 128, 503 S.E. 2d 752, 755-56 (Ct. App. 1998) 3

Barr v. Bd. of Trs. of Clarendon County Sch. Dist. No. 2, 319 S.C. 522, 462 S.E.2d 316 (Ct. App. 1995) 3

Brown v. James, 389 S.C. 41, 53, 697 S.E. 2d 604, 611 (Ct. App. 2010) 3, 5

Hall v. Board of Trustees of Sumter School Dist. No. 2, 330 S.C. 402, 407, 499 S.E.2d 216, 219 (Ct. App. 1998) 3

Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997) 4

Johnson v. Spartanburg Co. School Dist. No. 7, 314 S.C. 340, 444 S.E.2d 501 (1994) 5

Kizer v. Dorchester County Vocational Educ. Bd. of Trustees, 287 S.C., 545, 550, 340 S.E.2d 144, 147 (1986) 3

Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981) 4

Laws v. Richland County School District 1, 270 S.C. 492, 243 S.E.2d 192 (1978) 4

Lee County School District Board of Trustees v. MLD Charter School Academy Planning Committee, 371 S.C. 561, 567-568, 641 S.E. 2d 24, 28-29 (2007) 8, 9

Lexington County School District One Board of Trustees v. Bost, 282 S.C. 32, 316 S.E. 2d 677 (1984) 2

Porter v. South Carolina Public Service Commission, 333 S.C. at 21-23, 507 S.E.2d at 332 (1998) 8, 9

Shell v. Richland School District One, 362 S.C. 408, 608 S.E. 2d 428 (2005) 7, 8

Statutes

S.C. Code Ann. § 1-23-380(5)(b)(d)(e)(f) 2, 3, 4

S.C. Code Ann. § 59-25-410 3

S.C. Code Ann. § 59-25-430 5

S.C. Code Ann. § 59-25-440 6

S.C. Code Ann. § 59-25-460 3

S.C. Code Ann. § 59-25-470 .... 3, 5, 9

Other

S.C. Const. art. I, § 22 3

STATEMENT OF ISSUES ON CERTIORARI

1. Does the Court of Appeals' opinion overlook and misapply controlling precedent in holding that that Ms. Smith's due process rights were not violated?

2. Does the Court of Appeals' opinion misapply the law in finding that Ms. Smith received proper notice of the grounds for her termination?

3. Does the Court of Appeals' opinion misapply the standard of review in finding substantial evidence to support Ms. Smith's termination?

4. Does the Court of Appeals' opinion misapply the law in failing to address the absence of any factual findings and legal conclusion both by the Board and the circuit court?

PROCEDURAL HISTORY AND CERTIFICATION

By letter dated January 5, 2011, the Horry County School District ("District") notified Petitioner Jacqueline Smith of its recommendation that she be terminated from employment as a continuing-contract teacher. Following Ms. Smith's timely request, the Horry County School Board ("Board") held the required hearing on March 24 and 25, 2011. At the conclusion of the hearing, the Board voted to uphold the District's recommendation to terminate Ms. Smith's continuing contract. The Board Chair issued a letter confirming the Board's decision on March 29, 2011. (ROA p. 2)

Ms. Smith timely appealed the Board decision to the circuit court. Following a hearing, the court filed a form order affirming the Board's decision. (ROA p. 1) Ms. Smith filed a timely notice of appeal with the Court of Appeals. After holding two oral arguments, the Court of Appeals filed an unpublished opinion on June 30, 2014, affirming Ms. Smith's termination. (Appendix p. 1) Ms. Smith filed a petition for rehearing with the Court of Appeals on July 14, 2014. The District filed a memorandum in response on July 24, 2014. By order dated August 27, 2014, the Court of Appeals denied the petition for rehearing. Because the Court of Appeals' unpublished opinion conflicts with rights guaranteed by statute and constitution, and because the opinion fails to adhere to controlling precedent issued by this Court, Smith now seeks review by way of certiorari.

STATEMENT OF THE CASE

Jacqueline Smith is a veteran teacher employed during the 2010-2011 school year as a continuing-contract with the District. She began teaching in the District in 1999, and in 2003, received the Teacher of the Year award for North Myrtle Beach Elementary

School. Each year, Ms. Smith received a continuing contract to teach for the following year.[1]

On October 28, 2010, Ms. Smith received a letter placing her on administrative leave with pay. By letter dated January 5, 2011, the superintendent recommended termination from employment. Ms. Smith timely requested a hearing before the Board to challenge this recommendation.

At the outset of the hearing, the District submitted numerous proposed exhibits to the Board. These exhibits included documents containing hearsay statements by parents and students who were not called to testify at the hearing. Ms. Smith objected to the admission of any exhibits or testimony that contained hearsay statements unsupported by witnesses available for cross-examination. The Board did not rule on the objection when presented, but voted at the conclusion of the hearing to consider all of the exhibits and testimony presented, including all of the hearsay statements. (ROA pp. 98-103; 224-227) After considering the disputed evidence, the Board voted 6 to 1 to terminate Ms. Smith's employment.

STANDARD OF REVIEW

On appeal from termination of a continuing contract to teach, courts have the duty to correct errors of law. Lexington County School District one Board of Trustees v. Bost, 282 S.C. 32, 316 S.E. 2d 677 (1984) As in any administrative process, a school board decision affected by an error of law, arbitrary or capricious is subject to reversal. S.C. Code Ann. § 1-23-380(5)(d),(f) Additionally, a court has the authority to reverse decisions "made upon unlawful procedure" or in excess of "statutory authority." S.C.

[1] Ms. Smith maintains a professional teaching certificate and has been employed under a continuing contract in Dillon County since the 2011-2012 school year.

Code Ann. § 1-23-380(5)(b) cited in Adamson v. Richland County School District One, 332 S.C. 121, 128, 503 S.E.2d 752, 755-56 (Ct. App. 1998) Where, as here, the challenged action arises from termination of a continuing contract, the record must contain evidence of unfitness to teach that is "undeniably and abundantly present." Kizer v. Dorchester County Vocational Educ. Bd. of Trustees, 287 S.C. 545, 550, 340 S.E.2d 144, 147 (1986); Hall v. Board of Trustees of Sumter School Dist. No. 2, 330 S.C. 402, 407, 499 S.E.2d 216, 219 (Ct. App. 1998)

This appeal is governed by the Teacher Employment and Dismissal Act. ("TEDA"), S.C. Code Ann. § 59-25-410 et seq. In Sections 59-25-460 and 470, the Act guarantees continuing contract teachers substantive and procedural due process. Specifically, the hearing process established in Section 470 of TEDA compels school boards to provide teachers the opportunity to cross examine witnesses and to challenge the introduction of evidence offered to substantiate any charges presented. "The observance of the procedural requirements of [TEDA] is mandatory and not a matter of discretion." Brown v. James, 389 S.C. 41, 53, 697 S.E. 2d 604, 611 (Ct. App. 2010) On appeal, courts have the responsibility of enforcing TEDA and ensuring that teachers are afforded the full process required by law. S.C. Const. art. I, § 22 (no person shall be deprived of liberty or property "unless by a mode of procedure prescribed by the General Assembly")

Because school boards are delegated the responsibility to see and hear witnesses, review of the factual issues on appeal from teacher dismissals is determined by substantial evidence. Barr v. Bd. of Trs. of Clarendon County Sch. Dist. No. 2, 319 S.C. 522, 462 S.E.2d 316 (Ct. App. 1995) Substantial evidence is not a mere scintilla of

evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. Laws v. Richland County School District 1, 270 S.C. 492, 243 S.E.2d 192 (1978) The court must reverse an adverse decision that is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(e); Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981)

ARGUMENT ON QUESTIONS PRESENTED FOR REVIEW

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

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

Contrary to the holding below, this Court's opinion in Jackson does not support a finding of harmless error in this case. In Jackson, the challenged hearsay was deemed "cumulative" because: (a) statements by the witness had already been admitted without objection, (b) the objected to testimony had been previously established, (c) testimony of other witnesses provided the same evidence, and (d) the statements were admissible as admissions of a party opponent. 326 S.C. at 305, 486 S.E.2d at 758. None of these grounds applies to information from non-testifying parents and students relied upon by

the superintendent in the notice of termination, presented over objection in testimony and challenged exhibits, and considered by the Board. Instead, Ms. Smith gave notice of her objection at the beginning of the hearing, the information was available from no admissible source, including school principals, was clearly offered for the truth of the matter, was intended to be and was prejudicial.

Holding that the improperly admitted hearsay was cumulative and harmless also ignores the mandatory nature of the TEDA acknowledged by this Court in Johnson v. Spartanburg Co. School Dist. No. 7, 314 S.C. 340, 444 S.E.2d 501 (1994) and in Brown v. James, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010) Only impermissible speculation can support a conclusion that the Board would have found sufficient evidence to terminate Ms. Smith in the absence of improperly admitted and considered hearsay. Because the process below was infected by the admission of hearsay statements, including alleged complaints by unnamed parents and students, and because the Board violated Ms. Smith's statutory and constitutional right to cross-examination, its decision is *per se* invalid. See, S.C. Code Ann. § 59-25-470 (teacher has the right of "cross-examining" witnesses)

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

In Finding 2 of its opinion, the Court of Appeals ruled that the Board did not violate TEDA because the District provided Ms. Smith notice and an opportunity to be heard prior to dismissal pursuant to S.C. Code Ann. § 59-25-430. Unfortunately, the notice provided to Ms. Smith was deficient. For example, the superintendent's recommendation to terminate relied upon numerous alleged complaints by unnamed

parents and students who were not called as witnesses. (ROA p. 232)(" ...out of the 86 students you taught, the parents of 25 students made 161 complaints about you to the principal ...") In this context, Ms. Smith was not afforded an opportunity to be heard on the reasons presented to the Board in support of termination. This defect violated Ms. Smith's fundamental due process rights by giving false or unsubstantiated "reasons" for the recommended termination.

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

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

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

The Board relied upon "all evidence" including improperly admitted hearsay in

affirming the recommendation to terminate Ms. Smith's employment. Immediately before voting to terminate, the Board overruled all evidentiary objections. (ROA pp. 224-229) Following the hearing, the Board had the opportunity to explain the basis for its decision. Rather than identify admissible testimony or documents, the Board's letter of March 29, 2011 made reference to the 14 hours of hearing and concluded that "all" rather than specific evidence justified termination. (ROA p. 9) Neither the motion passed by the Board nor its letter confirming Ms. Smith's termination identify the testimony of specific witnesses. On appeal, the circuit court expressly affirmed the decision contained in the Board's letter. (ROA p. 1)

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

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

Finding 4 of the challenged opinion states, "**[b]ased upon our review of the record**, we find the circuit court and the Board properly identified supporting facts and legal conclusions in upholding the superintendent's recommendation to termination

Smith's employment." (Emphasis added). This is a misstatement of the record. Neither the circuit court nor the Board issued a decision that identified specific findings of fact or conclusions of law. As addressed above, the Board voted in open session and subsequently issued a letter without reference to any factual findings whatsoever. Likewise the circuit court's order upholding the Board's decision contains no reviewable factual findings or conclusions of law.

Shell establishes that it is an error of law requiring reversal for an appellate court to conduct an "independent evidentiary" review of the record and to make independent factual findings. Consistently, this Court has held that administrative bodies, including school boards, must make sufficient findings of fact to enable a reviewing court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings. Lee County School District Board of Trustees v. MLD Charter School Academy Planning Committee, 371 S.C. 561, 567-568, 641 S.E.2d 24, 28-29 (2007), quoting Porter v. South Carolina Public Service Commission, 333 S.C. at 21-22, fn. 3, 507 S.E.2d at 332-333, fn. 3 (1998) ("Where material facts are in dispute, the administrative body must make specific, express findings of fact.") This Court went on to hold that reviewing courts will not *sua sponte* search the record for substantial evidence supporting a decision when an administrative agency's order inadequately sets out the agency's findings of fact and reasoning. The PSC's order in Porter was deficient because it made no findings of fact and failed to provide any explanation of its conclusion, reciting instead the conflicting testimony and general legal principles. Id.

In light of its failure to comply with Porter's holding that all administrative bodies must make specific findings of fact, the District has argued that the summary decision

affirming the superintendent's termination complies with Section 470 of TEDA. This statute provides, in part, that a Board "shall determine whether the evidence showed good and just cause for the notice of suspension or dismissal and shall render its decision accordingly, either affirming or withdrawing the notice of suspension or dismissal." The District contends that the superintendent's recommendation to terminate may take the place of a written order with specific findings of facts. (Appendix pp. 18-19) This reasoning is not supportable.

Notice alone, particularly notice containing inadmissible hearsay as grounds for termination, cannot excuse failure to provide detailed findings of fact and conclusions of law. In the Lee County charter school opinion cited above, this Court held that the school board failed to make sufficient findings of fact when it denied a charter school application in violation of a statute requiring a written explanation of the reasons for the denial and the standards mandated by Porter. Inconsistent with Porter, the boards' decision did contain specific findings of fact and an explanation of its rationale in sufficient detail so as to afford meaningful judicial review. Id.

By statute, the Board was required to make findings supporting the reasons for Ms. Smith's termination. See, S.C. Code Ann. § 59-25-470 ("the board shall determine… and render its decision") The Board cannot delegate this statutory obligation to the superintendent or simply rely upon a letter containing inadmissible and unproven allegations as its "findings of fact and conclusions of law."

The Court of Appeals' finding that the Board "identified supporting facts and legal conclusions" is not supported by the record and inconsistent with its holding that the superintendent's recommendation and information relied upon by the Board included

inadmissible information. (Finding 1) Moreover, this finding required identification for the first time on appeal specific testimony perceived to support termination. (Finding 3) In summary, the only "supporting facts" identified by the Board confirms that inadmissible evidence was relied upon in terminating Ms. Smith's employment. This cannot stand as a basis for affirming its decision.

CONCLUSION

The opinion issued by the Court of Appeals contains legal error, is not consistent with controlling precedent of this Court, does not comply with the plain language of controlling legislation and deprives Ms. Smith of substantial rights guaranteed by law and constitution. Additionally, the issues presented to the Court of Appeals and in this petition affect the rights of public school teachers that reach far beyond the interests of Ms. Smith or the Horry County School District. Any guidance that could have been provided to teachers, administrators and school boards concerning the inadmissibility of hearsay in termination proceedings has been lost by the unpublished nature of the opinion below. For these reasons, the present petition satisfies criteria established by the rules of this Court for review on certiorari. More importantly, review is necessary to afford Ms. Smith rights guaranteed by law.

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In the Supreme Court

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Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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Horry County Schools .... **Respondent,**

v.

Jacqueline Smith, ... **Petitioner.**

CERTIFICATE OF SERVICE

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

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This 23 day of September, 2014.

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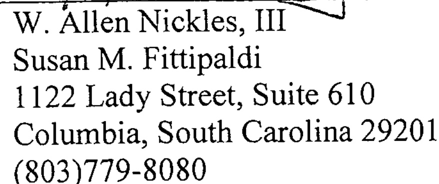
By: 

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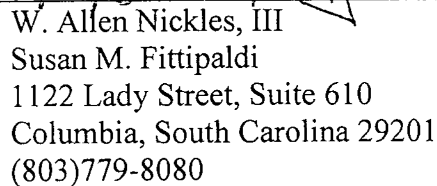
CERTIFICATION OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, counsel for Petitioner hereby certifies that a Petition for Rehearing was duly and timely filed with the South Carolina Court of Appeals in this action on July 14, 2014. This Petition for Rehearing was denied by Order of the Court of Appeals filed August 27, 2014.

NICKLES LAW FIRM, LLC



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