STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF LEE	)	**Case No.: 2014-CP-31-227**
Laura Toney,	)	
Appellant,	)	**ORDER**
v.	)	
Lee County School District,	)	
Respondent.	)	

PROCEDURAL BACKGROUND

By order dated August 8, 2014, the Lee County School District ("District") formally notified Laura Toney of its decision to terminate her employment as a continuing contract teacher. On August 27, 2014, Ms. Toney timely filed her Notice of Appeal with this Court. The District filed an Answer and Return dated September 26, 2014. Having considered the arguments presented and briefs filed by both parties, for the following reasons, the order on appeal is reversed and Ms. Toney is reinstated to employment with District.

STATEMENT OF THE CASE

Laura Toney is a veteran teacher employed by the District under continuing contracts since the 1998-1999 school year. On October 4, 2013, Ms. Toney received a letter placing her on administrative leave with pay. This letter alleged that Ms. Toney "violated district policy by creating a disruption to your assigned school by sharing personal information on another staff member to other staff and students at Lee County High School." By letter dated October 29, 2013, the District's Superintendent notified Ms. Toney that she was recommending that Ms. Toney be terminated from employment. This letter accused Ms. Toney of causing "unnecessary disruption in the workplace . . . discussing a faculty member's personal information with other

employees and students . . . using a student's cellular phone to access another employee's social media account . . . and instruct[ing] a student to refuse to cooperate with the administration's investigation." Ms. Toney submitted a timely request to be heard by the Board to challenge this recommendation.

Following the request for a hearing and the deposition of the Superintendent, on December 18, 2013, the District amended the grounds for termination alleging that Ms. Toney caused unnecessary disruption in the workplace by discussing a faculty member's personal information with other employees after being directed by an administrator to leave the matter alone and that her personnel file revealed other incidents of unprofessional conduct. The notice further indicated that Ms. Toney displayed "unacceptable behavior" and "lack of candor" during the investigation into her conduct.

The common thread in the notice of administrative leave and two termination notices issued to Ms. Toney is the allegation that she caused a disruption by "sharing" or "discussing" personal information about a fellow teacher with others. Ms. Toney vigorously denied this allegation, explaining that she merely repeated information that had been shared with her by the school's assistant principal (a friend of the teacher) that, like herself, the teacher had lost his "spouse." When the teacher filed a grievance complaining that Ms. Toney had commented that he had been married to another man, Ms. Toney expressed surprise and offered to apologize. Instead, she was instructed not to approach the teacher and to leave matters alone until the principal returned from a conference.

In addition to filing a grievance, the teacher had communicated with a number of colleagues, the assistant principal and others about Ms. Toney's alleged "outing." A couple of days after the grievance was filed, Ms. Toney found an unmarked envelope near the door of her

classroom containing copies of Facebook postings by the teacher. The contents of the envelope were proffered under seal at the Board hearing and inspected *in camera*.[1] The postings included vulgar comments about Ms. Toney (for example, referring to her as a "f***ing bitch,") and an exchange with someone identified as a "good student" at "SHS" (Sumter High School) containing sexual implications (indicating that the student would "lick [the teacher] to death" and receiving a response from the teacher of "sweet.") The postings also contained references to the teacher's sexual orientation and a photo of his deceased spouse.

Ms. Toney reported receipt of this package to the school administrator filling in for the absent principal, and provided a copy upon his request. She also left a sealed package containing the postings for the Superintendent with the written comment: "Please Read!! The last page seems that a child might be in danger." Ms. Toney did not give the postings or discuss the contents with anyone else, and no testimony was offered to support the accusation that she disrupted the school environment.

After delivering the package to the Superintendent, Ms. Toney was placed on paid leave and told not to communicate with District employees or visit District property. While on leave, Ms. Toney was informed that an uncertified substitute had been assigned to her classes and asked a Board member she considered a friend to look into the matter. Ms. Toney did not ask for any personal intervention by the Board member. This action was characterized as insubordinate and included as a ground for termination.

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[1] The teacher objected to introduction of his postings and moved to quash a subpoena to testify at the hearing. After taking the matter under advisement, the Board decided not to consider the content of the postings or compel the teacher to testify. I have examined the postings and the teacher's deposition testimony filed under seal. This review supports Ms. Toney's objection to the Board's rulings on grounds that the postings and testimony do not invade the teacher's privacy and are relevant to provide context to Ms. Toney's delivery of the postings to the Superintendent. See generally, U.S. v Meregildo, 883 F. Supp. 2d. 523, 526, (S.D.N.Y. 2012) (posts on Facebook to "friends" are public in nature); Rule 401, SCRE (relevant evidence is evidence having a tendency to make the existence of any fact that is of consequence more or less probable than without the evidence)

The Board heard testimony and argument on June 7, July 1 and July 8, 2014. The Board reconvened for additional deliberations and announced its decision on July 29, 2014. The Board issued its written decision stating its reasons for Ms. Toney's termination on August 8, 2014.

STANDARD OF REVIEW

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 requires that a continuing contract teacher be provided substantive and procedural due process by the school district's board. The hearing process established by the General Assembly in the TEDA compels school boards to provide teachers the opportunity to confront witnesses and to challenge the introduction of evidence offered to substantiate any charges presented.

Because school boards are delegated the responsibility to see and hear witnesses called to testify, review of the factual issues on appeal is governed by the substantial evidence doctrine. 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(A)(6)(e); Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981)

On appeal from termination of a continuing-contract to teach, the Court of Common Pleas has the authority and 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) Where, as here, the challenged

action arises from immediate termination[2], 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) This Court may reverse or modify a decision if it is affected by an error of law or is arbitrary or capricious. S.C. Code Ann. § 1-23-380(5)(d), (f) (Supp. 2010) Additionally, this Court has the authority to reverse any decision "made upon unlawful procedure" or in excess of "statutory authority." S.C. Code Ann. § 1-23-380(6) (Supp. 1997), cited in Adamson v. Richland County School District One, 332 S.C. 121, 128, 503 S.E.2d 752, 755-56 (Ct. App. 1998)

GOVERNING LAW

The South Carolina Constitution guarantees all citizens the right to due process of law. S.C. Const. art. I, § 3. The Constitution also states that no person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency except on due process and an opportunity to be heard. S.C. Const. art. I, § 22. This section further provides that no person shall be deprived of liberty or property "unless by a mode of procedure prescribed by the General Assembly." Id.

TEDA establishes the mode of procedure to be used in the dismissal of public school teachers. For example, TEDA statutes guarantee continuing contract teachers such as Ms. Toney specific hearing rights including:

1. Written notice of reasons for dismissal from the school board (§59-25-460);
2. The right to a hearing (§59-25-460); and

[2] S.C. Code § 59-25-430 states: Any teacher may be dismissed at any time who shall fail, or who may be incompetent, to give instruction in accordance with the directions of the superintendent, or who shall otherwise manifest an evident unfitness for teaching; provided, however, that notice and an opportunity shall be afforded for a hearing prior to any dismissal. Evident unfitness for teaching is manifested by conduct such as, but not limited to, the following: persistent neglect of duty, willful violation of rules and regulations of district board of trustees, drunkenness, conviction of a violation of the law of this State or the United States, gross immorality, dishonesty, illegal use, sale or possession of drugs or narcotics.

3. Substantive due process, including the right to cross-examine witnesses, offer evidence and witnesses, and present "any and all defenses to the charges." (§ 59-25-470)

The "primary rule of statutory construction is that the Court must ascertain the intention of the legislature." Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002) Where the terms of a statute are clear, the court must apply those terms according to their literal meaning without resort to subtle or forced construction to limit or expand the statute's operation. Moody v. Dairyland Ins. Co., 354 S.C. 28, 30-31, 579 S.E.2d 527, 529 (Ct. App. 2003) If a statute's language is plain, unambiguous, and conveys a clear meaning, "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 582 (2000) It is manifest error to look beyond the literal wording of the statute itself when the language is clear and plain. Paschal v. State Election Commission, 317 S.C. 434, 454 S.E.2d. 890 (1995)

Our Supreme Court affirmed the right to be heard in a meaningful fashion in Brown v. S.C. Board of Education, 301 S.C. 326, 391 S.E.2d 866 (1990) *citing* Board of Regents v. Roth, 408 U.S. 564 (1972), the Court in Brown held "[t]he fourteenth amendment Due Process Clause requires procedural due process be afforded an individual deprived of a property or liberty interest by the State." In reversing the revocation of the teacher's certificate, the Court stated "the Board must comply with the statutes and regulations providing for the revocation of a teaching certificate before depriving [appellant] of her teaching certificate." Id. 301 S.C. at 330, 391 S.E.2d at 868. In Brown v. James, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010), the Court of Appeals held that the language of the TEDA is unambiguous regarding procedure and that "the observance of the procedural requirements of the Employment and Dismissal Act is

mandatory and not a matter of discretion." Id. S.C. 389 at 53, 697 S.E.2d at 611 (emphasis added)

CONCLUSIONS OF LAW

I. Findings of insubordination based upon Ms. Toney's delivery of sealed Facebook postings to the Superintendent and school administrator cannot support termination.

As a matter of law, termination on the basis of insubordination requires "undeniably and abundantly present" evidence of willful misconduct. This misconduct must rise to the level of demonstrating "evident unfitness for teaching." Delivering the packet containing Facebook postings to a school administrator the Superintendent, even if inconsistent with the principal's directive to "leave the matter alone" in his absence, does not reflect on Ms. Toney's fitness to teach. First, the record reflects that the school administrator went to Ms. Toney's classroom and told her to provide him with what she had, saying, "if [you] have something in writing, to give it to me, put it in writing and I would give it to Mr. Webb [principal] and she presented me with a packet." Ms. Toney only provided the packet with her written note after being asked to do so by the school administrator. Second, the delivery of the packet to the Superintendent does not support termination. This very issue was addressed by the Court of Appeals in Hall v. Board of Trustees of Sumter County School Dist. No. 2., 330 S.C. 402, 409-410, 499 S.E.2d 216, 220 (Ct. App. 1998)

In Hall, a teacher "disobeyed" the superintendent's instructions not to discuss her situation with fellow employees. The Court of Appeals held that this act did not evidence unfitness to teach and could not be relied upon as a basis for the teacher's termination. As a result, the decision of Judge Howard King reinstating the teacher to employment was affirmed.

As in Hall, the record contains no evidence that Ms. Toney's delivery of sealed Facebook postings to the school administrator and Superintendent impaired her ability to teach. Ms. Toney's failure to comply with her principal's general directive to leave the matter alone until he returned falls short of the type of conduct justifying immediate termination pursuant to S.C. Code Ann. § 59-25-430. Accordingly, this ground for termination cannot stand and, like the teacher in Hall, Ms. Toney is entitled to reinstatement.

II. Findings of insubordination based upon Ms. Toney's communication with a Board member cannot support termination.

The Hall decision also establishes that Ms. Toney's communication with a Board member concerning assignment of an uncertified substitute to teach in her absence cannot be relied upon as a basis for her termination. In Hall, the Court of Appeals found that the teacher "disobeyed" a direct instruction from the Superintendent by communicating with district employees during an investigation of her conduct. Id. 330 S.C. at 409, 499 S.E.2d at 220.

In the letter placing Ms. Toney on leave, the District's Human Resources Director instructed her not to "visit any Lee County facility, utilize any school equipment to communicate (including access to computers or email) . . .[or] contact fellow employees of the Lee County School District." There is no evidence that Ms. Toney violated any of these directives. Instead, the only evidence is that she communicated with a Board member about the qualifications of her substitute teacher. Further, Ms. Toney testified that she would not have spoken with a Board member had the letter stated she was not to speak with one. Additionally, any directive prohibiting Ms. Toney from communicating with a Board member on a matter of public concern unrelated to her personal circumstances would violate freedoms protected by the state and federal constitutions. See generally, Pickering v. Board of Ed. of Tp. High School Dist. 205, 391

U.S. 563 (1968) (Teacher communications on matters of public concern are protected by the First and Fourteenth Amendments to the United States Constitution); see also, Hall v. Marion School District Number 2, 31 F.3d 183 (1994) (Teacher termination in violation of First Amendment rights) For these reasons, Ms. Toney's communication with a Board member about a matter unrelated to the reasons for her involuntary leave cannot provide a legitimate basis for her termination.

III. There is not sufficient evidence to support termination.

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 public body 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) Applying this standard, there is not substantial evidence to support Ms. Toney's termination. Specifically, the record does not support the Board's finding that Ms. Toney had a pattern of unprofessional conduct that would amount to evident unfitness to teach. Ms. Toney was never reprimanded by her current principal for being "unprofessional" in dealings with his administration. Additionally, like all prior administrators, the principal recommended that Ms. Toney receive a continuing contract each year without any condition. The principal testified that before she was removed from the school, he had no reason to recommend Ms. Toney's termination. He also conceded that no school documents, including the response to an administrative assistant's observation and e-mails about students picking up supplies relied upon by the Board, led him to conclude that Ms. Toney should be fired.

The controlling law of this State requires undeniable and abundant evidence of unfitness to teach where, as here, a teacher is dismissed during the course of a continuing contract of

employment. The definition of "unfitness" requires conduct that "substantially interfere[s] with the performance of [a teacher's] duty and constitute[s] unprofessional conduct." Hall, *supra.*, 330 S.C. at 409, 499 S.E.2d at 220. Even applying the less rigorous substantial evidence standard, however, the record as a whole does not support Ms. Toney's termination on any ground identified in the Board's decision.

In reaching this conclusion, I have examined the Board's reliance upon alleged acts of defiance or objection to supervision on the part of Ms. Toney over the course of her employment with the District and find that the record cannot support termination based upon failure to improve following written notice under S.C. Code Ann. § 59-25-440. Ms. Toney's personnel file is contained in the record. Contrary to the Board's conclusion, neither this record nor the isolated incidents identified by the Board reveal "a pattern of unprofessional conduct" sufficient to support termination. Indeed, our Supreme Court has held that piecing together conduct alleged to have occurred years before the events prompting a recommendation to terminate does not establish a "pattern" of misconduct warranting termination. See, Curtis Shell v. Richland County School Dist. One, 362 S.C. 408, 411, 608 S.E.2d 428, 429 (2005) (Isolated acts separated by twelve years do not support a pattern of unfitness) For all of these reasons, a fair reading of the record requires a finding that the reasons identified by the Board cannot sustain Ms. Toney's termination on any ground identified in its decision.[3]

[3] In addition to the grounds for reversal set forth in the order, Ms. Toney has argued that the Board's decision to quash the teacher's subpoena and not to consider the content of the teacher's Facebook postings violate TEDA and due process. Ms. Toney also raises objection to the introduction of hearsay in documents presented by the District. Having found the record inadequate to support termination, a ruling on these grounds is not required.

ORDER

For each of the reasons stated above, the order of termination issued by Lee County School Board dated August 8, 2014 is hereby reversed. This reversal is required because the record does not establish substantial evidence of Ms. Toney's unfitness to teach or failure to improve performance to a satisfactory level following written notice, assistance and reasonable opportunity. Accordingly, Ms. Toney is hereby reinstated to employment under a continuing contract and shall be entitled to back pay with benefits, less appropriate mitigation, from the date of her discharge though the date of reinstatement.

IT IS SO ORDERED.

Maité Murphy
Circuit Court Judge

January 12, 2015
Bishopville, South Carolina