

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas**

**Marvin H. Dukes, III, Master In Equity
And Special Circuit Court Judge**

C.A. No.: 2013-CP-07-03048

Appellate Case No. 2015-000407

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SC Court of Appeals

Phillip C. Shaw,..... Respondent,

v.

Jeffrey C. Moss,..... Ed.D.Appellant,

INITIAL BRIEF OF RESPONDANT

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STATEMENT OF ISSUES ON APPEAL

1. **WHETHER THE CIRCUIT COURT PROPERLY REVERSED THE BOARD OF EDUCATION'S DECISION BECAUSE THE BOARD FAILED TO GIVE NOTICE AND DEPRIVED PHILLIP SHAW OF PROCEDURAL DUE PROCESS?**
2. **WHETHER THE CIRCUIT COURT PROPERLY REVERSED THE BOARD OF EDUCATION'S DECISION BECAUSE THE BOARD DENIED PHILLIP SHAW THE RIGHT TO CROSS EXAMINE A WITNESS THEREBY DEPRIVING HIM OF PROCEDURAL DUE PROCESS?**
3. **WHETHER THE CIRCUIT COURT PROPERLY REVERSED THE BOARD OF EDUCATION'S DECISION BECAUSE THE BOARD DENIED PHILLIP SHAW THE RIGHT TO PRESENT ALL DEFENSES THEREBY DEPRIVING HIM OF PROCEDURAL DUE PROCESS?**
4. **WHETHER THE CIRCUIT COURT PROPERLY REVERSED THE BOARD OF EDUCATION'S DECISION BECAUSE THE BOARD FAILED TO GIVE NOTICE AND DEPRIVED PHILLIP SHAW OF SUBSTANTIVE DUE PROCESS?**
5. **WHETHER THE CIRCUIT COURT PROPERLY REVERSED THE BOARD OF EDUCATION'S DECISION BECAUSE THE SUBSTANTIAL EVIDENCE DID NOT SUPPORT TERMINATION?**

STATEMENT OF THE CASE

This case revolves around the Appellant, Jeffrey C. Moss Ed.D., (hereinafter "Dr. Moss"), who is the Superintendent of Beaufort County School District, Beaufort County School District, (hereinafter "District"), and Respondent, Phillip Shaw, (hereinafter "Mr. Shaw"). On July 16, 2013, Dr. Moss, the newly hired Superintendent met Mr. Shaw for a short period of time. (Respondent's Exh. 31 at R. p. 463). On July 18, 2013, Dr. Moss recommended to the District that Mr. Shaw be terminated. *Id.* Pursuant to S.C. Code Ann. § 59-25-470, Mr. Shaw requested an evidentiary hearing in front of the Beaufort County School District Board of Education, (hereinafter "Board"). *Id.* The hearing commenced on November 1, 2013, and concluded on November 4, 2013. (Order of Nov.

20, 2013, p. 1). At the hearing, Dr. Moss was represented by Shirley M. Fawley, Esquire and Vernie L. Williams, Esquire from Childs & Halligan, P.A. (Transcript from Hearing on Nov.1, 2014, p. 1-4). Mr. Shaw was represented by Clifford Bush, III, Esquire and Fatima Zeidan, Esquire from the Law Office of Clifford Bush, III, LLC. *Id.*

Mr. Shaw requested an evidentiary hearing before the Board as provided by S.C. Code Ann. § 59-25-470. On November 1, 2013, the Board conducted an evidentiary hearing under the South Carolina Employment and Dismissal Act on the recommendation of Dr. Moss. (Order of Nov. 20, 2013, p. 1). On November 4, 2013, the Board voted to terminate Mr. Shaw in accordance with the provisions of S.C. Code Ann. §§ 59-19-90(2) and 59-25-430. *Id.* During the hearing, Mr. Shaw was denied the opportunity to present his case establishing that the administrators involved had ulterior and improper motives. (Order of Nov. 17, 2014).

On November 20, 2013, the Board upheld Dr. Moss' recommendation to terminate Mr. Shaw's employment with the District. (Order of Nov. 20, 2013, p. 3). On December 4, 2013, Mr. Shaw appealed the Board's decision to the Circuit Court in Beaufort County. On November 17, 2014, the Board's decision was reversed by the Circuit Court. (Order of Nov. 17, 2014).

The Circuit Court held that, "based on the evidence presented, the statutory authority and relevant case law, the Board erred in finding Appellant manifested an unfitness for teaching." *Id.* "The Board further erred in finding that good and sufficient evidence existed to terminate Appellant." *Id.*

At the evidentiary hearing, the Board limited the testimony of a witness presented by Mr. Shaw. The Board allowed evidence and testimony of a lockbox into evidence that

was the subject of an investigative report by a District Safety Officer. Mr. Shaw was not allowed to cross-examine the District Safety Officer. Furthermore, the Board admitted the contents of the lock box, which was extremely prejudicial to Mr. Shaw. Finally, substantial hearsay evidence was admitted over countless objections by Mr. Shaw's counsels.

Dr. Moss filed a Motion for Reconsideration on December 3, 2014. (Complaint's Exh. 45 at R. p. 460). On January 23, 2015, a Motion for Reconsideration was heard before the Honorable Marvin H. Dukes, at the Beaufort County Court House. Fatima A. Zeidan, Esquire, represented Mr. Shaw. Kenneth L. Childs, Esquire and Vernie Williams, Esquire represented Mr. Moss. On February 10, 2015, Judge Dukes denied Dr. Moss' Motion for Reconsideration. On February 25, 2015, Dr. Moss filed a Notice of Appeal. *Id.*

FACTS

Mr. Shaw is a well-respected administrator who began his career in the public school system nearly twenty years ago. (Transcript from Hearing on Nov. 1, 2013, p. 16, *ll.* 22-25). His career began in Charleston, South Carolina, where he graduated from the College of Charleston and the Citadel. *Id.* Mr. Shaw quickly became an administrator in Charleston and joined Beaufort County School District in 2006 as the Principal of H.E. McCracken Middle School, (hereinafter "McCracken"), in Bluffton, South Carolina. *Id.* Due to Mr. Shaw's strong leadership skills and immeasurable work ethics, the school's scores improved.

Prior to Mr. Shaw's leadership, McCracken was labeled by the State of South Carolina as a below average school with a growth prospect of being at-risk. *Id.* at 17, *ll.*

6-8. The State categorized McCracken as “at-risk” because it was not doing well and predicted to continue to decline in production. *Id.* Mr. Shaw accepted the District’s challenge of turning McCracken into a better school.

In 2009, the ratings for McCracken went from below average to average as test scores improved throughout the school. *Id.* at 17, *ll.* 10-11. Subsequently, Mr. Shaw’s contract was renewed several times by the District. (Respondent’s Exh. 30, p. 466). In order to ensure all personnel remained enthusiastic and to keep the school moving in the right direction, Mr. Shaw began to report defiant, insubordinate employees to higher authorities if they failed to comply with the policies and procedures of the workplace after issuing various warnings. (Respondent’s Exh. 1-13, p. 460-61). It was Mr. Shaw’s act of reporting a defiant employee to his supervisors that ultimately resulted in his termination.

On June 8, 2012, Mr. Shaw emailed Jacqueline Rosswurm, (hereinafter “Dr. Rosswurm”), Chief Administrative and Human Resource Service Officer to discuss concerns about an insubordinate employee. (Respondent’s Exh. 2, p. 460). That employee is Annette Ballard, (hereinafter “Ms. Ballard”), who is a well-known good friend of Dr. Rosswurm. *Id.* After speaking with Dr. Rosswurm, Mr. Shaw sent her a follow-up email on June 12, 2012, itemizing a list of complaints against Ms. Ballard. (Respondent’s Exh. 3, p. 460). In his email, Mr. Shaw identified a list of staff members who attested to Ms. Ballard’s insubordinate behavior describing how she bullied, manipulated and harassed countless individuals as well as used her friendship with Dr. Rosswurm as leverage against other teachers. *Id.* The email elaborated on how faculty

and staff were afraid to challenge Ms. Ballard because they feared she would issue them a horrible work schedule. *Id.*

On August 15, 2012, Superintendent Dr. Valerie Truesdale, (hereinafter “Dr. Truesdale”), emailed Mr. Shaw his 2011-2012 principal evaluation. (Respondent’s Exh. 14, p. 461). The evaluation listed the newly elected three level scale adopted by the State Department of Education to properly evaluate principals. *Id.* Those standards were:

- Standard 1: Vision - a school principal is an educational leader who fosters the success of all the students by facilitating the development, communication, implementation and evaluation of a shared vision of learning that reflects excellence and equality. The criteria for vision is, performance criteria below describe the observed levels of proficiency for the vision standard. Criteria within each allow for variances of proficiency on the standard. Districts may choose additional local criteria.
- Standard 2: Instructional Leadership - a school principal is an educational leader who fosters the success of all students by leading the development and alignment of the organizational, instructional, and assessment strategies that enhance teaching and learning. The criteria is described as observed levels of proficiency for the instructional standard variation in degrees of proficiency on the standard. Criteria within each level allow for variances in degrees of proficiency on the standard. Districts may choose to list additional local criteria.
- Standard 3: Effective Management - a school principal is an educational leader who fosters the success of all students managing the school organization, its operations, and resources for a safe, efficient, and effective learning environment. Performance criteria below describe the observed levels of proficiency for the effective management standard. Criteria within each level allow for variations in degrees of proficiency on the standard. District may choose to list additional local criteria.
- Standard 4: Climate - a school principal is an educational leader who fosters the success of all students by advocating, nurturing and sustaining a positive school climate. The criteria says performance criteria below describe the observed levels of proficiency for the climate standard. Criteria within each level allow for variations in

degrees of proficiency on the standard. District may choose to list additional local criteria.

- Standard 5: School Community and relations - a school principal is an educational leader who fosters the success of all student by collaborating effectively with stakeholders. Performance criteria below describe the observed levels of proficiency for the school and community standards. Criteria within each level allow for variations in degrees of proficiency on the standards. District may choose to list additional local criteria.
- Standard 6: Ethical behavior - a leader who fosters the success of all students by demonstrating integrity, fairness, and ethical behavior. Performance criteria below describe the observed levels of proficiency for the ethical behavior standard.
- Standard 7: Interpersonal skills - a school principal is an educational leader who fosters the success of all students by interacting effectively with stakeholders and addressing their needs and concerns. Performance criteria below the levels of proficiency for the interpersonal skills standard. Criteria within each level allow for variations in degrees of proficiency on the standard. District may choose to list additional local criteria.
- Standard 8: Staff development - a school principal is an educational lender, who fosters the success of all students by collaborating with school and district staff to plan and implement development activities that promote the achievement of school district goals. The criteria of performance is observed levels of proficiency for the staff development standard. Criteria within each level allow for variations in degrees of proficiency on the standard. District may choose to list additional local criteria.
- Standard 9: Principal's professional development - a school principal is an educational lender who fosters the success of all students by using available resources and opportunities for professional growth. Performance Criteria below describe the observed levels of proficiency for the principal's professional development standard. Criteria within each level allow for variations in degrees of proficiency on the standard. District may choose to list additional local criteria.

(Respondent's Exh. 14, p. 461).

Each standard list three boxes below, which allowed the superintendent to issue the principal a grade for the past school year. *Id.* Dr. Truesdale scored Mr. Shaw an overall

grade of proficient for his leadership as principal of McCracken. *Id.* Mr. Shaw received a proficient on 9 out of 13 of his objectives and an exemplary on one of his reports. *Id.* Furthermore, Dr. Truesdale documented in Mr. Shaw's evaluation that the test scores were strong and he could receive an excellent rating for his work at McCracken if he continued his work performance. *Id.*

On September 5, 2012, Dr. Truesdale sent a letter to Mr. Shaw pertaining to the support the District would provide him to reach his goals for the 2012-2013 school year. (Respondent's Exh. 15, p. 460). In that letter, Dr. Truesdale commended Mr. Shaw for exceeding expectations and acknowledged his strong student achievement as a hallmark. *Id.* Furthermore, Dr. Truesdale stated that all the parties had faith in Mr. Shaw's ability to lead McCracken to Excellence. *Id.* Dr. Truesdale also praised Mr. Shaw by stating she appreciated his time, energy, and talents focused on the children. *Id.* In addition, she stated how much she valued Mr. Shaw and his professionalism as a colleague and team member. *Id.* In her closing remarks, she acknowledged how immensely proud she was of Mr. Shaw and his leadership abilities. *Id.*

After Dr. Truesdale left the District, Dr. Rosswurm was appointed Interim Superintendent on October 1, 2012. (Transcript from Hearing on Nov. 1, 2013, p. 108, *ll.* 17-18). In which, Dr. Rosswurm served in such capacity until July 1, 2013. *Id.* On November 7, 2012, Dr. Rosswurm scheduled a leadership meeting held at the District Office. (Transcript from Hearing on Nov. 1, 2013, p. 112, *ll.* 4-17). Ms. Walton advised Mr. Shaw that she and Dr. Rosswurm wanted to meet with him after the leadership meeting. *Id.* Mr. Shaw had no objections. *Id.* He tried to meet with the two after the leadership meeting, but Dr. Rosswurm was called into an unexpected meeting. Ms.

Walton and Mr. Shaw proceeded with the meeting without Dr. Rosswurm. *Id.* The parties discussed how to assist Mr. Shaw with the concerns of a particular teacher. *Id.* After the meeting, Mr. Shaw was informed by Ms. Walton that he could leave because she was unsure how long Dr. Rosswurm would be in her meeting. *Id.*

On November 8, 2012, Ms. Walton and Dr. Rosswurm visited Mr. Shaw at McCracken. (Respondent's Exh. 16, p. 461). Mr. Shaw was asked to write three statements about his whereabouts and instructed to leave McCracken without any prior notice. (Transcript from Hearing on Nov. 1, 2013, p. 116, *ll.* 11-18). Unexpectedly, Mr. Shaw was placed on administrative leave by Ms. Rosswurm. (Transcript from Hearing on Nov. 1, 2013, p. 115, *ll.* 22-24). Mr. Shaw was informed in writing, on November 12, 2012, that he was placed on administrative leave because of concerns "regarding his whereabouts during school hours, veracity about the same, and failure to comply with District Office administrative directives." (Respondent's Exh. 16, p. 461).

Although Mr. Shaw was on administrative leave, on April 11, 2013, Dr. Rosswurm renewed Mr. Shaw's contract for an additional year. (Respondent's Exh. 30, p. 463). On July 1, 2013, Dr. Moss was hired by the District as the Superintendent. Mr. Shaw tried to contact Dr. Moss several times trying to establish a relationship for the betterment of McCracken and to congratulate him on the new position. (Transcript from Hearing on Nov. 1, 2013, p. 345, *ll.* 12-14). Dr. Moss failed to meet with Mr. Shaw until July 16, 2013. (Respondent's Exh. 31, p. 463). Without any warnings or due process, Dr. Moss recommended termination of Mr. Shaw on July 18, 2013. *Id.* Dr. Moss never reprimanded Mr. Shaw nor granted Mr. Shaw a reasonable opportunity to correct the alleged issues that lead to Mr. Shaw's termination. *Id.*

Mr. Shaw, a principal whose contract was recently renewed was terminated without written notice or due process. For the reasons explained below, the Circuit Court's decision was not clearly erroneous and should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

The S.C. Code Ann. § 59-19-90(2) gives the Board the authority to employ and discharge teachers, stating that the board shall "employ teachers... and discharge them when good and sufficient reasons for so doing present themselves, subject to the supervision of the Board." Teachers are protected by the Teacher Employment and Dismissal Act for employment and dismissal of continuing contract "teachers" in the public schools of South Carolina. *Id.* A Teacher is classified as any person who is employed... to teach or to supervise teaching. S.C. Code Ann. § 59-1-130.

Particularly, this case is predicated on the following three statutes: S.C. Code Ann. § 59-25-430, § 59-25-440 and § 59-25-470. S.C. Code Ann. § 59-25-430 addresses dismissal of teacher, grounds for dismissal, an opportunity for hearing and suspension pending resolution of charges. In sum the statute 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.

Notwithstanding the provisions of Section 59 25 450, when any teacher is charged with a violation of the law of this State

or the United States which upon conviction may lead to, or be cited as a reason for, dismissal, such teacher may be suspended pending resolution of the charges and receive his usual compensation during the suspension period, such compensation not to exceed the term of his teaching contract. If the teacher is convicted, including pleading guilty or nolo contendere to the charges, he may then be subject to dismissal proceedings. If no conviction results, his suspension shall be terminated.

S.C. Code Ann. § 59-25-430.

S.C. Code Ann. § 59-25-440 mandates written notice to a teacher of possible dismissal whereby the school administrator is required to make a reasonable effort to assist the teacher in corrective measures while granting reasonable time for the improvement required. It specifically states:

Whenever a superior, principal, where applicable, or supervisor charged with the supervision of a teacher finds it necessary to admonish a teacher for a reason that he believes may lead to, or be cited as a reason for, dismissal or cause the teacher not to be reemployed he shall: (1) bring the matter in writing to the attention of the teacher involved and make a reasonable effort to assist the teacher to correct whatever appears to be the cause of potential dismissal or failure to be reemployed and, (2) except as provided in Section 59 25 450, allow reasonable time for improvement.

§ 59-25-440.

The final statute S.C. Code Ann. § 59-25-470 covers the employees request for a hearing; time and place of hearing; rights of teacher and the determination by board. The statute states:

Within fifteen days after receipt of notice of suspension or dismissal, a teacher may serve upon the chairman of the board or the superintendent a written request for a hearing before the board. If the teacher fails to make such a request, or after a hearing as herein provided for, the District Board of Trustees shall take such action and shall enter such order as it deems lawful and appropriate. The hearing shall be held by the board not less than ten nor more than fifteen days after the request is served, and a notice of the time and place of

the hearing shall be given the teacher not less than five days prior to the date of the hearing. The teacher has the privilege of being present at the hearing with counsel and of cross examining witnesses and may offer evidence and witnesses and present any and all defenses to the charges. The board shall order the appearance of any witness requested by the teacher. The complainants shall initiate the introduction of evidence in substantiation of the charges. Within ten days following the hearing, the board shall determine whether the evidence showed good and just cause for the notice of suspension or dismissal and shall render its decision accordingly, either affirming or withdrawing the notice of suspension or dismissal.

§ 59-25-470.

In a case raising a novel question of law regarding the interpretation of a statute, the Appellate Court is free to decide the question with no particular deference to the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000); *Osprey, Inc. v. Cabana Ltd. Partnership*, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000). The Appellate Court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice and right. *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 408, 618 S.E.2d 909, 912 (2005).

It is a cardinal rule of the statutory construction that the primary purpose in interpreting statutes is to ascertain the intent of the Legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). A statute as a whole must receive practical, reasonable and fair interpretation consonant with the purpose, design and policy of lawmakers. *Id.* The real purpose and intent of the lawmakers will prevail over the literal import of particular words. *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

A trial court's decision to overturn the board's decision is proper when the decision of the Board lacked substantial evidence. *Id.* Substantial evidence is, when considering the record as a whole, the record would allow a reasonable mind to reach the conclusions the Board reached or must have reached in order to justify its action. *Id.* If substantial evidence does not exist, a court may substitute its judgment for that of the Board: *Id.* The scope of review of cases brought pursuant to Teacher Employment and Dismissal Act is limited to whether grounds given for termination are supported by substantial evidence. *Laws v. Richland County School Dist. No. 1*, 270 S.C. 492, 243 S.E.2d 192 (1978).

An administrative body must make findings which are sufficiently detailed 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. *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 21, 507 S.E.2d 328, 332 (1998) (quoting *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 295, 300, 422 S.E.2d 118, 121 (1992)). This court may reverse an administrative decision if that decision was "clearly erroneous" in view of the reliable, probative, and substantial evidence on the whole record" such that the "substantial [rights] of a party have been prejudiced." *Lark v. Bi-Lo*, 276 S.C. 130, 132-33, 276 S.E.2d 304, 305 (1981). Moreover, this court may reverse an administrative decision if substantial rights of the appellant have been prejudiced due to an error of law. S.C. Code Ann. § 1-23-380(A)(6)(d); *Hall v. Bd. of Trustees of Sumter Cnty. Sch. Dist. No. 2*, 330 S.C. 402, 405, 499 S.E.2d 216, 218 (Ct. App. 1998). The appropriate standard of review for the Court is whether the Circuit Court's decision was a clearly erroneous ruling and the termination of the employee is not supported by substantial evidence.

II. WHETHER THE CIRCUIT COURT PROPERLY REVERSED THE BOARD OF EDUCATION'S DECISION BECAUSE THE BOARD FAILED TO GIVE NOTICE AND DEPRIVED PHILLIP SHAW OF PROCEDURAL DUE PROCESS?

South Carolina Law explicitly express teachers shall be given written notice of any admonishment that may lead to, or be cited as a reason for dismissal or cause the teacher not to be reemployed. Specifically, S.C. Codes Ann. § 59-25-440 provides: "Whenever a superior, principal, where applicable, or supervisor charged with the supervision of a teacher finds it necessary to admonish a teacher for a reason that he believes may lead to, or be cited as a reason for, dismissal or cause the teacher not to be reemployed he shall: (1) bring the matter in writing to the attention of the teacher involved and make a reasonable effort to assist the teacher to correct whatever appears to be the cause of potential dismissal or failure to be reemployed." *Id.*

In this case, Mr. Shaw was denied the opportunity to correct or address any deficiencies alleged against him. Moreover, Dr. Moss nor the Board ever informed Mr. Shaw in writing that such actions would constitute dismissal or termination. In fact, Dr. Moss admitted that he did not give Phillip Shaw notice as required by the statute. (Transcript from Hearing on Nov. 1, 2013, p. 393, line 6-7). Moreover, Dr. Moss met with Mr. Shaw on July 16, 2013 and recommended termination on July 18, 2013. (Transcript from Hearing on Nov. 1, 2013, p. 16, *ll.* 22-24). A reasonable person could find two days is not sufficient time to adequately correct any problems identified as required under the law. In this case, Dr. Moss identified concerns and immediately recommended termination based on those concerns. Furthermore, Dr. Moss' testimony from the evidentiary hearing establishes his failure to give notice as stated below:

Q: Now, in 16 days, you determined you have all of these problems with Mr. Shaw; correct?

A: During the 16 days, I reviewed information. During my meetings with Mr. Shaw is when I formed my decision on what my recommendation would be.

Q: Sure it took you 16 days to do that; correct?

A: Along with a lot of other things that you do as an incoming superintendent.

Q: Thank you, sir. Now, where is your letter, your notice that you wrote to Mr. Shaw about your concerns before you wrote a termination letter?

A: He's not under my employment.

Q: Okay. Did you write a notice to him? Did you give him any written notice? You, in your 16 days here, did you give him any notice?

A: You give a notice of concerns once an employee works under your direct supervision. He --- he's never worked under my direct supervision.

Q: That's a no, you did not give him a notice; correct?

A: That's correct.

(Transcript from Hearing on Nov. 1, 2013, p. 391-393, ll. 25-8).

Based on the above statements from Dr. Moss, it is evident that he did not give written notice to Mr. Shaw about his concerns. Based on Dr. Moss' actions, it is clear that Mr. Shaw was deprived of his procedural due process rights.

III. WHETHER THE CIRCUIT COURT PROPERLY REVERSED THE BOARD OF EDUCATION'S DECISION BECAUSE THE BOARD DENIED PHILLIP SHAW THE RIGHT TO CROSS EXAMINE A WITNESS THEREBY DEPRIVING HIM OF PROCEDURAL DUE PROCESS?

Mr. Shaw was denied his right to cross-examine witnesses during the evidentiary hearing, which infringed upon his procedural due process rights. Procedural due process, affects an individual's property or liberty with adequate notice, the opportunity to be heard at a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses who are used to establish facts and the right to meaningful judicial review. *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003). S.C. Code Ann. § 59-25-470 (Supp. 2013) provides that "The teacher has the privilege of being present at the hearing with counsel and of cross examining witnesses. Procedural due process requires confrontation and cross-examination of one whose word deprives a person of his livelihood." *Brown v. James*, 389 S.C. 41, 53, 697 S.E.2d 604, 610-11 (Ct. App.2010). "The observation of the procedural requirement of the [Teacher] Employment and Dismissal Act is mandatory and not a matter of discretion." *Smith v. Horry County School*, No. 2014-UP-279, 2014 WL 2969359 (S.C. Ct. App June 30, 2014).

In *Smith*, the Court found hearsay evidence which included statements from students and parents detailing specific complaints about Smith, were improperly admitted. Similarly, in this case, the Board improperly admitted hearsay testimony that deprived Mr. Shaw of his livelihood. Mr. Shaw's attorney's objected numerous time to any evidence being admitted pertaining to the lockbox because the chain of custody was

broke and the witness could not be present to testify. (Transcript from Hearing on Nov. 1, 2013, p. 350, *ll.* 11-15; p. 352, *ll.* 22-25). The hearsay evidence admitted against Mr. Shaw was crucial to his livelihood. Unlike the *Smith* case, the Board relied on the hearsay evidence in rendering its decision. In fact, the Order stated the lockbox content was a part of the reason the Board found evident of unfitness on Mr. Shaw's behalf. As per the transcript, Mr. Shaw's attorneys made a Motion in Limine to object to the admission of the lockbox but the motion was denied. See below argument:

MR. BUSH: Yes, Chairman. The only thing is, we had filed a Motion in Limine. We've discussed with Mr. Duff. For the record, we'd like to note that we did file a motion suppressing any evidence from Chris Barrow as well as testimony from Angie Lopatka.

CHAIRMAN EVANS: We have read your motion, Mr. Bush, and thank you. I will tell you that our decision at this time is to admit it, temporarily.

(Transcript from Hearing on Nov. 1, 2013, p. 8, *ll.* 3-12).

The Board denied Mr. Shaw due process as required by South Carolina Code Annotated, specifically as stated in the [Teacher] Employment and Dismissal Act.

IV. WHETHER THE CIRCUIT COURT PROPERLY REVERSED THE BOARD OF EDUCATION'S DECISION BECAUSE THE BOARD DENIED PHILLIP SHAW THE RIGHT TO PRESENT ALL DEFENSES THEREBY DEPRIVING HIM OF PROCEDURAL DUE PROCESS?

The Board clearly denied Mr. Shaw the opportunity to present any all defenses to the charges alleged against him. In this case, Mr. Shaw tried to present witnesses to testify about the ulterior and improper motives that lead to his termination. However, the Board prevented the witness from testifying about such motives. The teacher has the privilege of offering "evidence and witnesses" as well as "presenting any and all defenses

to the charges.” S.C. Code Ann. § 59-25-470. As acknowledged by Mr. Moss’ attorney, “the Board found it necessary to limit testimony of one of Mr. Shaw’s three witnesses, a former Board member and current employee of the District.” (Order of Nov. 17, 2014). “The observation of the procedural requirement of the [Teacher] Employment and Dismissal Act is mandatory and not a matter of discretion” *Brown v. James*, 389 S.C. 41, 53, 697 S.E.2d 604, 610-11 (Ct. App.2010). Deliberately, limiting the testimony of a key witness, who was a former Board member denied Mr. Shaw due process. It is evident that the Board applied the law outlined under the Employment and Dismissal Act in a discretionary manner.

V. WHETHER THE CIRCUIT COURT PROPERLY REVERSED THE BOARD OF EDUCATION’S DECISION BECAUSE THE BOARD FAILED TO GIVE NOTICE AND DEPRIVED PHILLIP SHAW OF SUBSTANTIVE DUE PROCESS?

All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. *Davis v. County of Greenville*, 322 S.C. 73, 470 S.E.2d 94 (1996). It is the cardinal rule of statutory construction that the primary purpose in interpreting statutes is to ascertain the intent of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578, 581 (2000). Substantive due process guarantees legislation, which deprives a person of life, liberty, or a property right. *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 568 S.E. 2d 338 (2002). To prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. *Sloan v. SC. Bd. Of Physical Therapy Exam’rs*, 370 S.C. 452, 483, 636 S.E.2d 598, 614 (2006). “The purpose of the substantive due process clause is to prohibit government from engaging in arbitrary or wrongful acts regardless of

the fairness of the procedures used to implement them." *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347.(2002)

In this case, Mr. Shaw signed a new contract with the District on April 11, 2013. The duration of the contract was from April 25, 2013 until April 25, 2014. (Transcript from Hearing on Nov. 1, 2013, p. 463, *ll.* 8). On July 18, 2013, Dr. Moss recommended termination of Mr. Shaw. *Id.* On November 4, 2013, the Board terminated Mr. Shaw. Mr. Shaw was terminated without being admonished in writing nor afforded an opportunity to correct any problems. Mr. Shaw had a property right in his contract and job. Those rights were denied when the Board refused to allow him to continue working under his contract. These basic rights afforded to Mr. Shaw by South Carolina Law were denied by the Dr. Moss and the Board.

VI. WHETHER THE CIRCUIT COURT PROPERLY REVERSED THE BOARD OF EDUCATION'S DECISION BECAUSE THE SUBSTANTIAL EVIDENCE DID NOT SUPPORT TERMINATION?

The Circuit Court was correct in ruling the Board lacked substantial evidence to terminate Mr. Shaw for unfitness for teaching. Although the Teacher Employment and Dismissal Act contemplates "evident unfitness for teaching" to encompass a broad variety of deficiencies, the Act was also intended to prevent the abuse of a school board's power to terminate employees. *Adams v. Clarendon Cnty. Sch. Dist.*, 270 S.C. 266, 241 S.E.2d 897 (1978). Consistent with this requirement, South Carolina's Appellate Courts upheld immediate termination only where evidence of unfitness for teaching was "undeniably and abundantly present." *Kizer v. Dorchester County Vocational Educ. Bd. of Tr.*, 287 S.C. 545, 550, 340 S.E.2d 144, 147 (1986).

In this case, Mr. Shaw's conduct and performance never rendered him unfit for teaching. Therefore, the procedural safeguards must be followed to protect his rights. On July 18, 2013, after being on the job for only eighteen days, the newly hired superintendent concluded that he would recommend termination of Mr. Shaw from his position with Beaufort County School District. (Transcript from Hearing on Nov. 1, 2013, p. 28, *ll.* 9). This followed two short meetings in which Dr. Moss could not remember the amount of time he spent with Mr. Shaw. Dr. Moss was explicit about there was nothing in Mr. Shaw's file concerning inappropriate or unprofessional conduct. (Transcript from Hearing on Nov. 1, 2013, p. 393, *ll.* 22-25). There was nothing in Mr. Shaw's personal folder about drunkenness or violating any law. *Id.* Dr. Moss' testimony at the Board hearing is as follows:

Q: Okay. Now – now, there's been no unprofessional or inappropriate conduct between Mr. Shaw and any student; correct?

A: Not to my knowledge.

Q: Okay. Nor to any parents; correct?

A: I have no idea what -- if -- if a parent would be suspicious.

Q: You don't have any – you don't have anything in the superintendent file back there, do you?

A: That's correct.

Q: All right. That's correct, you do, or you don't?

A: You said I do not?

Q: Yes.

A: And I said that's correct.

Q: Okay. And nothing in there about inappropriate or unprofessional conduct towards staff; correct?

A: Not to my knowledge, no.

(Transcript from Hearing on Nov. 1, 2013, p. 393, *ll.* 8-25).

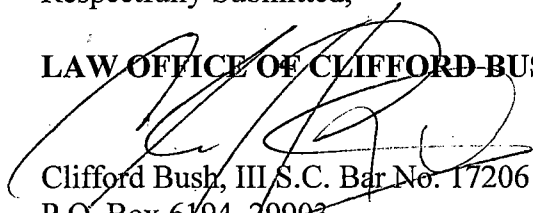
Dr. Moss did not know where the money in the lockbox came from or who gathered the money. (Transcript from Hearing on Nov. 1, 2013, p. 463, *ll.* 19-23). Dr. Moss held Mr. Shaw responsible for violation committed by staff members at McCracken. (Transcript from Hearing on Nov. 1, 2013, p. 387, *ll.* 8-12). Dr. Moss stated that all of the violations were committed by staff members other than Mr. Shaw. (Transcript from Hearing on Nov. 1, 2013, p. 388, *ll.* 17-18). In fact, when Dr. Moss was asked did he have any personal knowledge about Mr. Shaw committing these alleged violations, he responded that "I don't have any personal knowledge, but the principal is responsible for all activities on the campus, including financial." (Transcript from Hearing on Nov. 1, 2013, p. 38, *ll.* 3-5). Based on the unsubstantial evidence, the Circuit Court had no choice but to reverse the Board's decision.

CONCLUSION

Based on the foregoing, Mr. Shaw respectfully submits that the Circuit Court was not clearly erroneous by concluding that the Board's decision to terminate Mr. Shaw was not supported by substantial evidence in the record. Accordingly, Mr. Shaw respectfully requests that this Court affirm the decisions of the Circuit Court and decline to reinstate the Board's decision to terminate Mr. Shaw's employment based on the lack of substantial evidence on the record.

Respectfully Submitted,

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Attorney for Respondent

June 27, 2015

Beaufort, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED

Marvin H. Dukes, III, Master In Equity
And Special Circuit Court Judge

JUL 27 2015

SC Court of Appeals

C.A. No.: 2013-CP-07-03048

Appellate Case No. 2015-000407

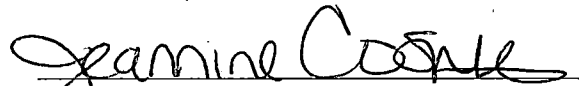
Phillip C. Shaw,..... Respondent,

v.

Jeffrey C. Moss, Ed.D.,.....Appellant,

PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief and Designation of Matter to Be Included in the Record on Appeal on counsel for Appellant, by depositing a copy of it in the United States mail, postage prepaid, on July 27, 2015, addressed to Kenneth L. Childs, Esquire, Vernie L. Williams, Esquire, Shirley M. Fawley, Esquire and Allen D. Smith, Esquire, located at Childs & Halligan, P.A., P.O. Box 11367, Columbia, South Carolina 29903.


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July 27, 2015

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED

JUL 27 2015

SC Court of Appeals

**Re: Phillip C. Shaw v. Jeffery C. Moss, Ed.D.
Appellate Case No. 2015-000407**

Dear Ms. Kitchings:

Please be advised that I represent Phillip C. Shaw, regarding the above-referenced appeal. You will find enclosed for filing, an original and two copies of the Respondent's Initial Brief, Designation of Matter to Be Included in the Record on Appeal and the Proof of Service.

I ask that you please return the extra copies of this filing to my office by my courier. By copy of this letter, I am serving a copy of the above referenced documents on Kenneth L. Childs, Esquire, Vernie L. Williams, Esquire, Shirley M. Fawley, Esquire and Allen D. Smith, Esquire, located at Childs & Halligan, P.A., Post Office Box 11367, Columbia, South Carolina 29903.

I thank you for your assistance regarding this matter.

Respectfully

THE LAW OFFICE OF CLIFFORD BUSH, III


Clifford Bush, III
cbush@lawofficeofcbushiii.com

Enclosures

cc: Kenneth L. Childs, Esquire
Vernie L. Williams, Esquire
Shirley M. Fawley, Esquire
Allen D. Smith, Esquire

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