THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Appeal No. 2015-0004

Phillip C. Shaw, ...Respondent,

v.

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

FINAL REPLY BRIEF OF APPELLANT

CHILDS & HALLIGAN, P.A.

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TABLE OF CONTENTS

PAGES

ARGUMENT 1

1. The District Gave Mr. Shaw Proper Notice Of The Reasons For His Dismissal And Afforded Him Full Due Process As Required By Law 1

2. The Board Afforded Mr. Shaw The Right To Cross-Examine All Witnesses 3

3. The Board Allowed Mr. Shaw An Opportunity To Present All Defenses 6

4. The District Gave Mr. Shaw Proper Notice Of The Reasons For His Dismissal And Afforded Him Full Due Process As Required By Law 7

5. Substantial Evidence Existed In The Record To Support Mr. Shaw's Termination 7

CONCLUSION 8

TABLE OF AUTHORITIES

PAGES

CASE LAW:

Adams v. Clarendon Co. School District No. 2, 270 S.C. 266, 241 S.E.2d 897 (1978) 2

Gallego v. United States, 276 F.2d 914 (9th Cir. 1960) 5

Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997) 5

Kizer v. Dorchester County Vocational Education Board of Trustees, 287 S.C. 545, 340 S.E.2d 144 (1986) 2

McWhirter v. Cherokee County School District No. 1, 274 S.C. 66, 261 S.E.2d 157 (1979) 2

Smith v. Horry County Schools, No. 2014-UP-279, 2014 WL2969359 (S.C. Ct. App., June 30, 2014) 5

State v. Hatcher, 392 S.C. 86, 708 S.E.2d 75 (2011) 5

United States v. De Larosa, 450 F.2d 1057, (3d Cir. 1971) 5

STATUTES:

S.C. Code Ann. § 59-25-430 ..... 1, 2

S.C. Code Ann. § 59-25-440 ..... 1, 2, 7

S.C. Code Ann. § 59-25-450 1

ARGUMENT

Respondent, Phillip Shaw, offers five separate reasons why he believes the Circuit Court Order should be affirmed. Appellant, Dr. Jeffrey Moss, hereby replies, explaining why each of Mr. Shaw's reasons are incorrect and should be rejected and why the Circuit Court's Order should be reversed.

1. The District Gave Mr. Shaw Proper Notice Of The Reasons For His Dismissal And Afforded Him Full Due Process As Required By Law.

Incorrectly relying on a statute that does not apply to his termination, Mr. Shaw argues the District failed to give him notice and an opportunity to correct any alleged deficiencies. He bases this contention on S.C. Code Ann. § 59-25-440, which 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.

This statutory provision is part of the South Carolina Teacher Employment and Dismissal Act, but did not apply to Mr. Shaw's situation. Rather, the District terminated Mr. Shaw's employment pursuant to a separate provision, S.C. Code Ann. § 59-25-430, which provides that "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 ...." Section 59-25-430 cites a non-exhaustive list of conduct constituting an "evident unfitness for teaching" to include, but not be limited to, persistent neglect of duty, willful violation of rules and regulations of district board of trustees, and dishonesty.

As the Court observed in *Adams v. Clarendon Co. School District No. 2*, 270 S.C. 266, 272, 241 S.E.2d 897, 900 (1978), the Teacher Employment and Dismissal Act "has clearly separated the circumstances for which a teacher may be discharged for cause into two categories. One of these categories is explicitly set out in § 59-25-430 and the other is implicit in § 59-25-440." *Id.* The Court noted that § 59-25-430 authorizes an employment termination at any time, while § 59-25-440 requires written notice and a reasonable time for improvement. As the Court recognized, § 59-25-440 addresses deficiencies or shortcomings related to improper performance of employment duties but which do not manifest an evident unfitness for teaching.

In this case, the District maintained from the outset that Mr. Shaw's behavior demonstrated an evident unfitness for teaching and justified his immediate termination. In fact, Dr. Moss' July 18, 2013 letter to Mr. Shaw advising him of the recommendation of termination specifically cites to § 59-25-430. (R. pp. 826-830.) The record below makes clear that the District initiated the termination of Mr. Shaw based on § 59-25-430, not § 59-25-440.

The teacher in the *Adams* case made the same argument Mr. Shaw advances here. The *Adams* court rejected that argument and upheld the termination of the teacher. *See also Kizer v. Dorchester County Vocational Education Board of Trustees,* 287 S.C. 545, 340 S.E.2d 144 (1986) (recognizing § 59-25-440's requirements do not apply in a case under § 59-25-430); *McWhirter v. Cherokee County School District No. 1*, 274 S.C. 66, 261 S.E.2d 157 (1979) (rejecting similar argument based on § 59-25-440). Likewise, Mr.

Shaw's efforts to rely on an inapplicable statute should be rejected, and the Board's termination of his employment should be reinstated.[1]

2. The Board Afforded Mr. Shaw The Right To Cross-Examine All Witnesses.

As a second argument, Mr. Shaw claims the Board denied him the right to cross-examine a witness. Simply put, this is not correct. The District administration presented the testimony of seven witnesses, and Mr. Shaw's legal counsel had the opportunity to fully cross-examine each witness.

Mr. Shaw asserts that evidence related to the lockbox found under his desk constituted hearsay and should have been excluded because the chain of custody was broken. To summarize from Appellant's Opening Brief, two District administrators, Dr. Jacqueline Rosswurm and Alice Walton, received a report that the former school office manager, Denise Gibbo, was attempting to sneak into Mr. Shaw's office after he was placed on administrative leave to retrieve a lockbox. As a result, Dr. Rosswurm and Ms. Walton went to Mr. Shaw's office and located the lockbox under his desk. They found the key to the lockbox in Mr. Shaw's desk drawer. After opening the lockbox, they closed it and summoned Chris Barrow, Coordinator of Protective Services, to come to the

[1] As a practical matter, even though the District was not required to grant it, Mr. Shaw was offered an opportunity to remain with the District as an administrator and could have been successful as a District employee if he had so chosen. Following an investigation that clearly established serious improprieties on the part of Mr. Shaw, Dr. Jacqueline Rosswurm, the Acting Superintendent, offered him another administrative position with the District. (R. p. 184, lines 4-17; R. pp. 690-692.) Mr. Shaw, however, chose not to return to the District and to engage in other inappropriate and unprofessional conduct. (*See* Appellant's Opening Brief, Section D of Facts.) Ultimately, based on a consideration of all of the circumstances, Dr. Moss, after assuming the superintendency, decided to recommend the termination of Mr. Shaw's employment. (R. pp. 826-830.) Thus, Mr. Shaw's employment separation resulted directly from his own behavior, and he in fact had the opportunity to cooperate with the District, address his issues, and continue working in an administrator capacity.

school to take custody of the lockbox and secure it. They also asked Mr. Barrow to inventory the contents of the lockbox. Mr. Barrow came to the school, and they provided the lockbox to him. Mr. Barrow did as requested, and the lockbox was secured at the District Office in a locked room. (R. p. 85, line 12 – p. 86, line 21; R. p. 167, line 1 – p. 170, line 7.) Copies of the contents of the lockbox also were provided to Phyllis White, Chief Operational Services Officer, in connection with her investigation of the financial protocol violations at the school, and later to Dr. Moss as part of his review of the matter after he became Superintendent. The administration had the lockbox available at the Board hearing, and Dr. Moss testified regarding its contents. (R. p. 403, line 24 – p. 404, line 19.) Aside from Dr. Moss' testimony, additional evidence was admitted during the hearing concerning the contents of the lockbox without objection, including the investigative report prepared by Ms. White (R. pp. 813-816) and the Superintendent's letter to Mr. Shaw advising him of his recommendation of termination. (R. pp. 826-830.) Both Ms. White's report and Dr. Moss' letter referred to $600 in cash that was found in the lockbox.

Mr. Shaw's legal counsel objected to the administration's request to enter into evidence a report from Chris Barrow regarding his examination of the contents of the lockbox. The Board upheld the objection and excluded the document prepared by Mr. Barrow. (R. p. 170, line 12 – p. 180, line 21.) As a result, this hearsay evidence the administration offered from Mr. Barrow was not admitted. Significantly, other items were entered into evidence without objection referencing some of the contents of the lockbox. (R. pp. 813-816; R. pp. 826-830.)

Moreover, a reasonable chain of custody was established. Even in criminal cases, in which there is clearly more at risk than in an employment case, courts generally have

abandoned inflexible rules regarding the chain of custody. In *State v. Hatcher*, 392 S.C. 86, 94-95, 708 S.E.2d 75, 754-755 (2011), the South Carolina Supreme Court held:

> Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts. *United States v. De Larosa*, 450 F. 2d 1057, 1068 (3d Cir. 1971). "The trial judge's exercise of discretion must be reviewed in the light of the following factors: '...the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.'" *Id.* (citation omitted.) "If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence." *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960).

In this case, Dr. Rosswurm testified regarding the manner in which the lockbox contents were initially secured by Mr. Barrow. Counsel for the District explained during the hearing that the safe was kept in a secure area at the District Office until such time it was presented at the hearing. In light of the discretion given to trial courts, the Board appropriately considered the lockbox and its contents.

Mr. Shaw relies upon the unpublished decision of *Smith v. Horry County Schools*, No. 2014-UP-279, 2014 WL2969359 (S.C. Ct. App. June 30, 2014). In that unpublished opinion, the Court found that certain hearsay was improperly admitted. As the Court also observed:

> However, we find the improper admission of this evidence was harmless because the statements were merely cumulative to the testimony presented at the hearing of the three principals of the schools that employed Smith; the Horry County Superintendent of Education; and two parents. *See Jackson v. Speed*, 326 S.C. 289, 305 486 S.E.2d 750, 758 (1997) ("The improper admission of hearsay is reversible error only when the admission causes prejudice[; however, w]here the hearsay is merely cumulative to other evidence, its admission is harmless.

Id.

In this case, the Board did not improperly admit any alleged hearsay evidence. In fact, the hearsay evidence, consisting of documentation prepared by Mr. Barrow, was excluded by the Board. The lockbox was present at the Board hearing in the same condition it had been in when found, and the Superintendent testified as to its contents. Additional testimony and documents were offered into evidence without objection referencing some of the contents of the lockbox, so Dr. Moss' description of the lockbox contents was substantially cumulative of the other evidence. Moreover, the record contained significant other evidence, aside from the lockbox, justifying the immediate termination of Mr. Shaw's employment for the many reasons explained in Appellant's Opening Brief. Accordingly, Mr. Shaw's argument is without merit, and the Board's termination of his employment should be reinstated.

3. The Board Allowed Mr. Shaw An Opportunity To Present All Defenses.

Mr. Shaw contends that "ulterior and improper motives" led to his termination. He asserts that the Board's decision to limit the testimony of one witness deprived him of the opportunity to present all of his defenses. Again, he is incorrect.

Mr. Shaw offered the testimony of Michael Sanz during the Board hearing. Mr. Sanz is a former District employee and a former Board member. He joined the District in 2008 as an Assistant Principal at Hilton Head Middle School. He also worked under the supervision of Mr. Shaw for two years, until he retired in 2012. Mr. Sanz was no longer working with Mr. Shaw at the time the financial improprieties were discovered. He had no personal knowledge regarding the issues involved in the termination proceeding. Instead, Mr. Shaw called him to testify to the "culture" of the District. Mr. Sanz

attempted to describe that culture by discussing his own personnel issues that had occurred years earlier. The Board directed Mr. Sanz to confine his testimony to issues related to Mr. Shaw and his relationship with Dr. Rosswurm. (R. p. 462, line 22 – p. 477, line 22.) Apparently this is the instruction on which Mr. Shaw's argument is based.

In short, the Board did not prevent Mr. Sanz from testifying. The Board merely required a witness without personal knowledge to confine his testimony to the issues raised during the hearing, rather than discussing his own unrelated personnel situation. This decision does not provide a basis on which the Board's termination decision may be reversed.

4. The District Gave Mr. Shaw Proper Notice Of The Reasons For His Dismissal And Afforded Him Full Due Process As Required By Law.

By this argument, Mr. Shaw merely repeats his argument based on § 59-25-440, which does not apply to this case. He complains that he was terminated without being admonished in writing or afforded an opportunity to correct any problems. As explained above in Section 1 of this Reply Brief, this argument is misplaced and should not be accepted.

5. Substantial Evidence Existed In The Record To Support Mr. Shaw's Termination.

Contrary to Mr. Shaw's attempt to mischaracterize the record evidence, and as explained in detail in Appellant's Initial Brief, substantial evidence exists in the record supporting the Board's decision to terminate Mr. Shaw's employment. As a result, the Circuit Court erred by reversing the Board's decision and denying Dr. Moss' motion to reconsider.

Mr. Shaw refers to his performance evaluation for the prior school year (2011-12), presumably in an effort to bolster his argument that he was performing his job well. At the outset, while the evaluation was overall acceptable, it did identify areas of needed improvement. (R. pp. 850-867.) Valerie Truesdale, then the Superintendent, concluded that Mr. Shaw needed to improve his performance with regard to the category of "Effective Management." Dr. Truesdale noted on the evaluation instrument items that Mr. Shaw needed to do during the next school year to improve his performance. Moreover, during the same time frame, Dr. Truesdale gave Mr. Shaw a letter identifying a number of concerns and outlining expectations for his improved performance during the 2012-13 school year. (R. pp. 823-825.)

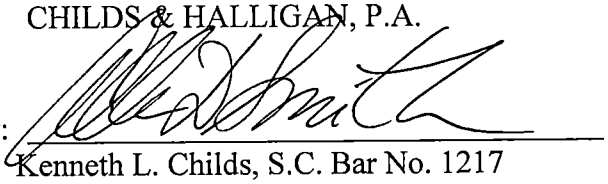
Significantly, Mr. Shaw's evaluation for the 2011-12 school year was completed prior to the discovery of his serious violations of District financial protocols and prior to his subsequent unprofessional conduct, which directly led to his employment termination. Thus, his evaluation for the prior school year does not help his argument and does not invalidate or erase the substantial evidence in the record supporting the Board's decision to terminate Mr. Shaw's employment.

CONCLUSION

Accordingly, Dr. Moss respectfully submits that the Circuit Court erred by reversing the Board's decision to terminate Mr. Shaw and, further, erred by not granting his motion for reconsideration. Therefore, Dr. Moss respectfully requests that this Court reverse the decisions of the Circuit Court and reinstate the Board's decision terminating Mr. Shaw's employment based on the substantial evidence in the record.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 

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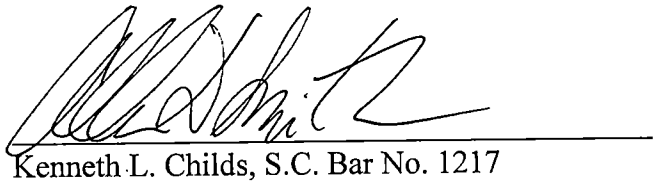
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant Jeffrey C. Moss, Ed.D., complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellant on counsel for Respondent, by depositing a copy of it in the U.S. Mail, postage prepaid, on September 17, 2015, addressed to Clifford Bush, III, Esq., The Law Office of Clifford Bush III, LLC, 28 Old Jericho Road, Beaufort, SC 29906

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