THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Court of Appeals

APPEAL FROM LEE COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2014-CP-31-227

Laura Toney ..... Respondent

vs.

Lee County School District ..... Appellant.

FINAL BRIEF OF APPELLANT

Charles J. Boykin (Bar No. 65149)
Deidre D. Laws (Bar No. 76986)

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STATEMENT OF THE CASE

This matter arose from a decision of the Lee County School District Board of Trustees (hereinafter "Board" or "Appellant") to terminate the employment contract of Ms. Laura Toney (hereinafter "Toney" or "Respondent"), who had been a teacher in Lee County School District (hereinafter "District"). By letter dated December 18, 2013, Dr. Wanda Andrews (hereinafter "Dr. Andrews"), District Superintendent, notified Toney of the intent to recommend to the Board that Toney's employment with the District be terminated. The recommendation for termination was based on Toney's conduct with regard to discussing a faculty member's personal information with other employees and failure to adhere to the directives of an administrator. Dr. Andrews' recommendation was also based upon a review of Toney's personnel file, which revealed that she had engaged in other incidents of unprofessional conduct.

Pursuant to the South Carolina Teacher Employment and Dismissal Act, S.C. Code Ann. § 59-25-410 through 530, Toney received an evidentiary hearing before the Board, which was held on June 7, July 1, 8, and 29, 2014. During the hearing, Toney was represented by counsel and had the opportunity to present witnesses and documents on her behalf, as well as, challenge evidence offered by the District and cross-examine District witnesses. On July 29, 2014, the Board determined that good and just cause existed for the termination of Toney's employment contract and voted to approve the Superintendent's recommendation for termination. Thereafter, the Board executed, and provided to Toney, a written decision setting forth the basis for its determination (hereinafter "Board Decision").

On August 27, 2014, Toney filed an appeal in the Court of Common Pleas,

pursuant to S.C. Code Ann. § 59-25-480. Thereafter, Toney and the Board filed Memorandums of Law in support of their respective positions. On October 31, 2014, the Honorable Maité Murphy held a hearing and provided the parties with an opportunity for oral argument. On January 14, 2015, Judge Murphy issued an Order which reversed the Board's Decision, and ordered the reinstatement of Toney's employment, as well as, back pay with benefits.

The Board filed a Motion for Reconsideration on January 26, 2015. The Board received notice of the lower court's denial of the Motion for Reconsideration on February 20, 2015. Thereafter, on March 10, 2015, the Board appealed the circuit court Order to this Court.

STATEMENT OF THE FACTS

Toney holds a teaching certificate for the State of South Carolina, and has taught in the District for approximately twenty-three (23) years. (R. p. 268). All of Toney's continuing contracts with the District provided that "all personnel are responsible to their immediate supervisor." (R. pp. 1178-1185, 1187). Michael Baldwin (hereinafter "Baldwin"), a co-worker, and Toney are both teachers within the social studies department at Lee Central High School.

On Friday, September 27, 2013, Toney was in a social studies departmental meeting with the following colleagues: Mr. Anthony Blair; Ms. Kara Fowler; Mr. Darryl Peyton; Mrs. Tonya Addison; and Baldwin. On two separate occasions during the meeting, Toney made reference to personal information concerning Baldwin, which led Baldwin to subsequently file a grievance against Toney on Monday, September 30, 2013. (R. p. 5; p. 195, lines 8-9; p. 278, lines 5-10). Upon receipt of the grievance, the

Principal, Mr. Ron Webb, and the high school's consultant, Mr. Bernard McDaniel, met with Toney to advise her of the grievance. (R. p. 195, lines 9-11; p. 278, lines 8-10; p. 279, lines 10-11). Webb informed Toney that he would deal with the grievance upon his return from a conference, and directed Toney to leave the matter alone until his return. (R. p. 195, lines 21-24; p. 196, lines 2-3, 8-9; p. 197, lines 10-12; p. 221, lines 20-21; p. 278, lines 11-14; p. 279, lines 11-13; p. 310, lines 3-4; p. 312, lines 15-16; p. 332, lines 18-21; p. 437, lines 14-18).

A couple days later, while Webb was still out, Toney approached Mr. McDaniel and said she needed to share something with him regarding Baldwin making inappropriate comments on Facebook. (R. pp. 195-96; p. 397, lines 17-20). Mr. McDaniel reminded Toney of the directive to leave it alone until Webb returned, and ended the conversation. (R. pp. 195-97, 208-09). Believing that Toney wanted to have a discussion regarding the grievance, later that day Mr. McDaniel told Toney that if she had something to share, she should put it in writing and he would give it to Mr. Webb. (R. pp. 196, 211-12; p. 215, lines 6-14). In response, Toney handed Mr. McDaniel a packet of information. (R. pp. 196-97, 208-09, 216, 283). Unbeknownst to Mr. Webb or Mr. McDaniel, Toney also took a copy of the same information to Dr. Andrews' office, in an envelope that read: "Please read the last page. Seems that a child might be in danger." (R. pp. 283-84, 364, 397).

When Webb returned from his conference, he learned that Toney had delivered a packet of information to Dr. Andrews, causing the situation to escalate from the building level to the district level. (R. p. 222). After receiving the information, Dr. Andrews went to the high school to speak with Mr. Webb, Mr. McDaniel, and Toney. (R. p. 417, lines

2-5). Toney was not cooperative during the meeting, and Dr. Andrews subsequently placed Toney on administrative leave. (R. p. 417, lines 6-15; p. 419, lines 22-23; p. 420, lines 4-8).

Dr. Andrews explained to Toney that she was not to discuss the matter with anyone and that if Toney had any questions, she is to contact Dr. Andrews. (R. p. 305, lines 5-9; p. 421, lines 5-7; p. 422, lines 14-22). Dr. Andrews followed up with a written notice of administrative leave, which also provided additional parameters for the administrative leave. (R. pp. 422, 1018). However, Dr. Andrews later learned that Toney violated her directive, by contacting a school board member to discuss concerns regarding who was teaching Toney's class. (R. p. 305, lines 13-24; p. 422, lines 1-11, 21-22).

During her investigation, Dr. Andrews spoke with Mr. Webb, learned that Toney failed to follow Mr. Webb's directive, and reviewed documentation that captured Toney's employment history with the District. (R. p. 420; p. 423, lines 13-19). Toney's file revealed other instances of unprofessional conduct, including but not limited to, challenging administrators, becoming irate with parents, insubordination, and other unprofessional conduct. (R. p. 440, lines 18-25; p. 441, lines 1-16; pp. 1024-1175). Based on the information learned during the investigation, Dr. Andrews determined that it was best if Toney and the District "part company," which led to Dr. Andrews' recommendation for termination of Toney's employment. (R. p. 442, lines 1-4, 13).

On October 31, 2014, Toney requested a public, evidentiary hearing before the Board. The hearing took place on June 7, 2014; July 1, 2014; July 8, 2014; and July 29, 2014. At the hearing, the District offered several exhibits and the testimony of four (4)

witnesses, including Toney's supervisors, the Superintendent of the District, and Toney herself. Toney offered multiple exhibits and the testimony of seven (7) witnesses.[1] (R. p. 3).

To determine whether good and just cause existed to terminate Toney's employment, the Board heard testimony on the following issues: (1) whether Toney engaged in unprofessional conduct during her employment with the District; (2) whether Toney received notice that her conduct was inappropriate and/or unprofessional; and (3) whether Toney complied with the reasonable directives of her supervisor. (R. p. 3). On July 29, 2014, the Board voted, unanimously, to uphold the Superintendent's recommendation for termination. (R. p. 632, lines 13-25; p. 633, lines 1-5). The Board issued an Order setting forth the reasons for its decision on August 8, 2014. (R. pp. 1-10). Upon appeal, the Circuit Court applied an incorrect standard of review, found that certain instances of insubordination cannot support termination, and determined that there was not substantial evidence to support the Board's decision to terminate. (R. pp. 14-15, 17-20). This appeal followed.

STANDARD OF REVIEW

In considering an appeal of a school board's decision to terminate a teacher's employment, the scope of judicial review is limited to an examination of the record to determine whether there is substantial evidence to support the board's decision. Laws v.

[1] Ms. Toney subpoenaed Mr. Michael Baldwin. Mr. Baldwin filed a Motion to Exclude seeking to exclude Facebook printouts allegedly from Mr. Baldwin's account, documents produced in his deposition, and any testimony regarding Mr. Baldwin's private life. After hearing counsel's arguments in executive session, and holding the matter in abeyance until the Board got a clear understanding of the evidence presented in the District's case-in-chief, the Board granted the Motion to Exclude, thus barring Mr. Baldwin's testimony and certain documents. (R. pp. 152-66, 515-17). Additionally, Toney requested another witness, Mr. Span; however, he was not present during Toney's case-in-chief when he was sought to be called. Toney did not request a continuance, or a subpoena, and proceeded with closing arguments. (R. pp. 594-95).

Richland County Sch. Dist. No. 1, 270 S.C. 492, 243 S.E.2d 192, 193 (1978); see also Barrett v. Charleston County Sch. Dist., 348 S.C. 426, 559 S.E.2d 365, 368 (S.C. Ct. App. 2001). The Court is not reviewing the record to determine whether the evidence is "undeniably and abundantly present." Barrett v. Charleston County School District, 348 S.C. 426, 431, 559 S.E.2d 365, 368 (S.C. Ct. App. 2001) (rehearing denied Feb. 20, 2002).

Substantial evidence is that which "considering the record as a whole, would allow reasonable minds to reach the conclusion the [school board] must have reached in order to justify the action." Hendrickson v. Spartanburg County Sch. Dist. No. Five, 307 S.C. 108, 413 S.E.2d 871, 873 (S.C. Ct. App. 1992). If substantial evidence exists, a court may not substitute its judgment for that of the school board. Laws, 243 S.E.2d at 193. "In view of the powers, functions and discretion which must necessarily be vested in educational authorities if they are to execute the duties imposed on them, this Court cannot substitute its judgment for that of those authorities." Id. As discussed more fully below, there is substantial evidence in the record to support the Board's decision to terminate Toney's employment contract.[2] Therefore, the Circuit Court's Order should be reversed and the decision of the Board should be affirmed.

[2] When articulating the standard of review, the Order also identified three (3) additional grounds for reversal pursuant to the South Carolina Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5)(d), (f) and (6). (R. p. 15). However, the lower court did not order reversal for any of these other reasons.

ARGUMENT

I. THE LOWER COURT ERRED WHEN IT DID NOT REVIEW THE RECORD USING THE "SUBSTANTIAL EVIDENCE" STANDARD OF REVIEW, AND THUS INAPPROPRIATELY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE LOCAL SCHOOL BOARD.

"South Carolina case law is clear and unambiguous respecting the proper standard of review regarding the propriety of a teacher's termination. It is the substantial evidence test." Barrett, 559 S.E.2d at 368. Nevertheless, Toney argued, and the Lower Court's Order adopted the assertion, that there must be undeniable and abundant evidence to support its case. (R. pp. 14-15, 17, 19, 640, 660, 675). Similar to the teacher in Barrett, Toney cited Kizer v. Dorchester County Vocational Education Board of Trustees, 287 S.C. 545, 340 S.E.2d 144 (1986), as authority for the proposition that evident unfitness to teach is proven only where the conduct is "undeniably and abundantly present." (R. p. 675); Barrett, at 368. Toney's argument misapprehends the Kizer decision, and completely disregards this Court's holding on this very issue in Barrett.

This Court has expressly held that "[i]n Kizer, the Supreme Court was . . . not articulating a new standard." Id. The Kizer decision included the following language:

> Therefore, the officially enunciated public policy of this State is to provide for immediate removal of those whose conduct manifests evident unfitness. Such conduct is undeniably and abundantly present in this case.

Kizer, 287 S.C. at 550 (emphasis added). A reading of the entire Kizer opinion, as well as other teacher termination cases, reveals that courts have always applied the substantial evidence standard. See Kizer, at 548; Laws v. Richland County School District No. 1, 270 S.C. 492, 243 S.E.2d 192 (1978); Felder v. Charleston County Sch. Dist., 327 S.C. 21, 25, 489 S.E.2d 191, 193 (1997); Hall v. Board of Trustees of Sumter County School District No. 2, 330 S.C. 402, 405, 499 S.E.2d 216, 218 (S.C. Ct. App. 1998).

Thus, the lower court's application of the "undeniably and abundantly present" standard of review resulted in the court producing a result that is rooted in error. When applying the appropriate standard of review, it is clear that there is substantial evidence in the record to support the Board's decision that Toney engaged in unprofessional conduct, which included acts of insubordination, such as bringing forward information about another employee when the principal directed her to leave the matter alone; contacting board members during administrative leave when the Superintendent directed her to contact only her; failing to abide by directives to not send students to pick up instructional materials during class time; becoming irate with a parent during a parent-teacher conference; and providing negative feedback to an instructional observation. (R. pp. 9-10). Therefore, the lower court's Order should be reversed.

II. THE LOWER COURT SUBTITUTED ITS JUDGMENT FOR THE BOARD WHEN THE LOWER COURT CONCLUDED THAT THE DELIVERY OF CERTAIN MATERIAL, IN VIOLATION OF A DIRECTIVE FROM THE PRINCIPAL, CANNOT SUPPORT TERMINATION.

The law in South Carolina is well-settled that an appellate court, in reviewing a board's decision in a teacher dismissal case, may not substitute its judgment for the local board. Laws, 243 S.E.2d at 193. Here, Toney admitted, and Mr. Webb and Mr. McDaniel corroborated, that Mr. Webb directed Toney to leave the matter alone until Mr. Webb returned from a conference. (R. pp. 195-96, 221, 278, 312, 330, 332). However, Toney subsequently went to Mr. McDaniel with a packet of information regarding Baldwin, claiming that some inappropriate or racial comments were made. (R. pp. 196-97). Toney also delivered a copy of the packet of information to Dr. Andrews, thus escalating the situation from the building level to the District level. (R. p. 222). Based

on Toney's actions, Dr. Andrews, Mr. Webb and Mr. McDaniel testified that Toney had failed to follow the directive issued to her. (R. pp. 196-97, 221-22, 437).

Instead, Toney continued to involve herself in a dispute with another employee at school, even after having been asked by her supervisor to leave it alone until he returned. (R. pp. 195-96). After she pursued her dispute with Baldwin, she wanted the Board to believe that she was forced to pursue Baldwin. Her insubordinate conduct risked, and eventually caused, a problem to escalate from the building-level to the District office, in the absence of the principal. (R. p. 222).

Delivering the packet of information to a school administrator and the Superintendent was not only inconsistent with the Principal's directive, but the Board found that Toney's testimony regarding the packet of information was not credible because Toney admitted to failing to follow appropriate protocol regarding information she characterized as "a child being in danger." (R. p. 10; p. 313, lines 15-17; p. 1023). Toney's conduct regarding this information is directly related to her ability to teach children. As a teacher, Toney has the responsibility to report, in good faith, any suspected child abuse or neglect. See S.C. Code Ann. § 63-7-310 (2010).

When addressing this issue, the lower court's Order includes the following:

> First, the record reflects that the school administrator went to [Toney's] classroom and told her to provide him with what she had . . . 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).

(R. p. 17). However, the Order fails to acknowledge the other facts in the record, which the Board relied upon in determining whether Toney's conduct was unprofessional.

Toney testified that two (2) days after receiving notice of the grievance filed against her, she found a packet of information under her classroom door, which contained material regarding the grievant, Mr. Baldwin. (R. p. 283). Toney's testimony was unsupported by any other evidence in the record; thus, requiring the Board to rely upon Toney's credibility. At first, Toney's testimony required the Board to believe that damaging information about the person who filed a grievance against Toney, was placed anonymously in Toney's possession; however, Toney later referenced obtaining knowledge from a particular student. (R. p. 743, lines 15-17; p. 279, lines 18-25; p. 280; p. 564, lines 6-8). In response to an objection, on hearsay grounds, Toney, through counsel, argued:

> Of course, hearsay is inappropriate when its presented for the truth of the matter, but if an individual is testifying as to what someone told them, its that individual's credibility as to whether they received the information.

(R. p. 281, lines 3-7). Toney's credibility, as indicated earlier in the record, was seriously questioned by her stating that she was not going to testify truthfully in her deposition. (R. pp. 751-54). The Board agreed with the position that Toney's credibility was at issue, and ultimately determined that Toney's testimony was not credible. (R. p. 10, ¶¶ 4-5).

In addition, to the manner in which Toney came into possession of the materials, the Board also had to contend with the facts pertaining to how and why Toney violated Mr. Webb's directive. Contrary to the lower court's findings, Toney was not initially approached by the school administrator, Mr. McDaniel, regarding the packet of information. Both Toney and Mr. McDaniel testified that Toney approached Mr. McDaniel about the information first, and Mr. McDaniel had to remind Toney about the directive from Webb. (R. pp. 196, 208; p. 313, lines 21-25--1). Furthermore, Mr.

McDaniel testified that when Toney initially approached him, he thought she wanted to discuss the classroom incident or the grievance that was filed against Toney. (R. p. 196, lines 23-25--1-3; p. 208, lines 24-25; p. 211-12; p. 215, lines 6-14). Based on Toney's actions, Dr. Andrews, Mr. Webb and Mr. McDaniel all testified that Toney had failed to follow the directive issued to her. (R. pp. 196, 221-22, 239, 437).

Additionally, Toney never indicated to Mr. McDaniel that she believed a child was in danger, which is contrary to the lower court's finding that the written note about a child being in danger, was provided because Toney was asked by the school administrator. (R. p. 197, lines 13-20; p. 217, lines 2-10). In fact, the written note was actually provided in a separate packet of information to the Superintendent, and although Toney asserts that she believed a child was in danger, the record and the law does not support her position. (R. p. 283; p. 363, lines 23-25; p. 364, lines 1-5; pp. 397, 1023).

First, Toney did not indicate that a child was in danger when she went to speak with Mr. McDaniel, the first person she sought out regarding the information in question. (R. p. 197, lines 18-22; p. 217, lines 2-10). Second, state law provides that if a teacher suspects abuse or neglect of a child, it should be reported to the Department of Social Services or law enforcement. S.C. Code Ann. § 63-7-310 (2010); (R. pp. 194, 438-40). Toney admitted several times that she was aware of the law and the District trained her regarding the requirements of the reporting. (R. pp. 284-85, 310, 313). Specifically, Toney admitted, "I know the first thing to do was to maybe go to DSS or take it to the sheriff's department, but I did not want to do that." (R. p. 313, lines 15-17). Thus, it is clear that Toney was furthering her dispute with Baldwin, rather than leaving the matter alone as directed by her principal.

The record evidences that: (1) Toney initiated discussions regarding the teacher, despite Mr. Webb's directive; (2) she claimed that she felt a child was in danger, yet refused to make a report as all teachers are required to do; and (3) the Board did not find her testimony to be credible regarding these issues. Thus, Toney's conduct in this case is distinguishable from that of the teacher 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, the local board of trustees terminated Hall's employment due to failure to supervise a class field trip and Hall's insubordination stemming from her discussion of the incident with other employees. 499 S.E.2d at 218. In that case, the teacher agreed to serve as a chaperone only while traveling to and from Florida, and would be "off duty" at all other times. This agreement was made between Hall and another teacher, unbeknownst to the principal of the school. When the administration learned what happened, it was reported to the Superintendent, who placed Hall on administrative leave and told Hall not to discuss the matter with any other employees pending closure of his investigation. Hall later admitted to the superintendent that she discussed it with three other employees. In affirming the circuit court's decision to reverse the termination, this Court found that "Hall did exactly what she agreed to do" on the field trip, and there was insufficient evidence to show that "Hall's [undisputed] insubordination demonstrated evident unfitness for teaching." Id. at 220.

The Hall Court pointed out that there was no evidence that Hall attempted to undermine the investigation; one of the discussions occurred because a fellow teacher called to check on Hall; and the superintendent did not know whether Hall initiated these conversations or their substance. Thus, the Court stated, "[w]hile we recognize that a

single act of disobedience could, under some circumstances, be sufficient to justify a teacher's termination even though it was unrelated to that teacher's classroom performance, the scant evidence introduced here is insufficient to show Hall's unfitness for teaching." Id.

In contrast, Dr. Andrews, Mr. Webb, and Mr. McDaniel all testified that Toney did not do exactly what she agreed to do, and there is more than scant evidence in this case. (R. pp. 196-97, 221-22, 239-40, 437). Toney initiated the conversation about Mr. Baldwin to McDaniel. Toney caused the packet of information to be brought to the Superintendent's attention, in direct violation of her principal's directive. Furthermore, the substance of the information was characterized by Toney as an indication that a child was in danger, yet she admittedly refused to report the alleged danger to the appropriate authorities, which begs the question of her purpose in bringing the information forward.

It is clear from Toney's conduct that she consistently takes action against anyone with whom she disagrees, and she engaged in unprofessional conduct when she believed that she needed to settle a matter with an adversary. The record in this case also included instances such as: Toney's disregard for directives regarding sending students out of class to retrieve her instructional materials; her negative, aggressive response to a classroom observation conducted by Ms. Fowler; and her failure to conduct herself in a professional manner when she became irate with a parent during a conference. These acts also distinguish Toney's case from that of Hall.

This Court has acknowledged that a single act of disobedience can justify a teacher's termination, and here, there are multiple acts of disobedience that were presented to and weighed by the Board. As such, there is substantial evidence in the

record to support the Board's Decision, and the decision of the lower court should be reversed.

III. COMMUNICATING WITH A BOARD MEMBER, IN DIRECT VIOLATION OF A DIRECTIVE GIVEN BY THE SUPERINTENDENT IS SUFFICIENT TO SUPPORT THE BOARD'S DECISION TO TERMINATE TONEY'S EMPLOYMENT.

Toney failed to follow another supervisor's directive, when she called a particular board member to address a question she had about her classroom. (R. pp. 421-22). The lower court, again citing the Hall decision, determined that Toney's communication could not be used as a basis for termination. (R. p. 18). In making this determination, the lower court relied upon the October 4, 2013 letter regarding Toney's administrative leave, which instructed Toney not to "visit any Lee County facility, utilize any school equipment . . . [or] contact fellow employees of the Lee County School District. (R. pp. 18, 1029). The lower court's determination that there is no evidence that Toney violated the Superintendent's directive is in error.

As an initial matter, and contrary to the lower court's finding, the October 4, 2013 letter regarding administrative leave is not the only evidence of the directive given to Toney. Dr. Andrews testified that she met with Toney and clearly advised Toney that "if [Toney] had a question about anything, [Toney] could call [her]." (R. p. 421, lines 5-7). Dr. Andrews further testified that Toney "left with a good understanding" that Toney was not to have communication with anyone, and let the administration investigate. (R. p. 421, lines 13-15; p. 472, lines 14-17).

Toney claims that she contacted a board member after receiving a complaint from students assigned to her classroom. (R. p. 369, lines 7-10). Toney claims that she did not feel comfortable following the directive of the Superintendent. (R. p. 306). However,

her feelings did not justify her unprofessional conduct, as she took it upon herself to undermine Dr. Andrews and now question how the District assigned substitute staff.

As discussed supra, the facts and evidence in the Hall case are distinguishable from those presented to the Board in this case. In Hall, the Court specifically noted that the superintendent did not know whether Hall initiated the conversations or their substance. Hall, 499 S.E.2d at 220. In this case, Toney admitted that she did not follow Dr. Andrews' directive when she called someone else with her question about the certification of a teacher in the classroom. (R. p. 305, lines 7-18, 23-24). Dr. Andrews corroborated Toney's admission. (R. p. 421, line 25; p. 422, lines 1-6, 18-22).

The lower court found that Toney would not have spoken to a Board member had the letter stated she was not to speak with one. (R. p. 18). However, this notion suggests that written directives from the District's Assistant Superintendent for Human Resources hold more weight than oral directives, delivered in person, from the District's Superintendent. Furthermore, it substitutes its judgment in place of the Board's finding that Toney "offers repeated resistance to carrying out directives of supervisors and administrators." (R. p. 9). It is evident unfitness to teach when a teacher admits to not following the reasonable directives of her supervisor. Such behavior is directly related to her fitness to teach, because as Dr. Andrews testified, "[p]rincipals, teachers, district-level staff, we are all on the same team, and students don't benefit if [they] are not working together." (R. p. 435, lines 7-9).

The lower court's determination that Toney's communication with the board member was a matter of public concern, was also in error. Relying on Pickering v. Brd of Ed. of Township High Sch. Dist., 391 U.S. 563, 88 S.Ct. 1731 (1968) and Margaret S.

Hall v. Marion Sch. Dist. No. 2, 31 F.3d 183 (4th Cir. 1994) (hereinafter "M. Hall"), the lower court held that any directive prohibiting Toney from communicating regarding a matter of public concern unrelated to her personal circumstances would violate her constitutional freedoms. (R. pp. 18-19). However, the evidence in the record indicates that Toney's communication was directly related to her personal circumstances, and based upon the content, form, and context of the communication, it is clear that it was not a matter of public concern.

The Fourth Circuit Court of Appeals has ruled, in balancing the First Amendment interests of Toney, a court must first determine whether Toney's speech involved an issue of public concern. If so, the next consideration is whether Toney would have been dismissed "but for" her protected speech. Finally, the court must decide whether Toney's exercise of free speech is outweighed by the countervailing interest of the state in providing the public service the teacher was hired to provide.[3] M. Hall, 31 F.3d at 192.

"Whether the speech fairly relates to an issue of public concern is a question of law," and "is to be determined by the content, form and context of the speech." M. Hall, F.3d at 192. "The essential question is whether the employee is speaking out as a citizen, upon matters of public concern, or as an employee, upon matters only of personal interest." Id. In M. Hall, the teacher wrote a series of letters to the editor of the local newspaper criticizing the local board's handling of funds. 31 F.3d at 187. Similarly, in Pickering, the school board "dismissed [the teacher] for writing and publishing [letters]" to the editor of the local newspaper, consisting "essentially of criticism of the board's allocation of school funds between educational and athletic programs, and of the . . . methods of informing, or preventing the informing of, the district's taxpayers of the real

[3] It is not clear from the Order, whether the lower court went through this three-pronged analysis.

reasons why additional tax revenues were being sought for the schools." 391 U.S. at 569. The United State Supreme Court has held:

> [T]he question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administrations, including school boards, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate.

Pickering, 391 U.S. at 571-72. The facts and evidence in both cases, as well as, the speech exercised by those teachers clearly relate to matters of legitimate public concern.

In this case, however, Toney "communicated with [one] board member about the qualifications of her substitute teacher." [4] (R. p. 18) (emphasis added). Toney never addressed the Board about her concerns during the public comment period of an open board meeting. There were no letters to the editors of local newspapers; there was no concern about the District's expenditures; and the placement of substitute teachers has never been an issue subject to open debate or decided by popular vote. Rather, Toney was yet again disregarding a directive of an administrator, and speaking on something that concerned only her specific classroom. Toney continued to pursue her opposition to Dr. Andrews, and her excuse for contacting a board member should not be allowed to shield her unprofessional conduct.

There is no evidence in the record that any other parents or community members were debating about this particular substitute teacher or concerned about the District's policy and procedure related to the use or assignment of substitute teachers. Additionally, Dr. Andrews testified that individual board members do not assign teachers,

[4] Despite Toney's belief, the individual who taught Toney's class was indeed certified by the South Carolina Department of Education. (R. p. 225, lines 8-12; p. 226, lines 18-19; p. 560, lines 23-25; p. 561, lines 1-6).

whether substitute or certified, to classrooms. (R. p. 421, lines 16-19). Thus, the lower court's finding that Toney was speaking on a matter of public concern is not supported by law or the evidence in the record.[5] Therefore, the decision of the lower court should be reversed.

IV. BECAUSE TONEY HAD PREVIOUSLY RECEIVED WRITTEN NOTIFICATION OF HER INAPPROPRIATE AND UNPROFESSIONAL BEHAVIOR IN THE WORKPLACE, AND THERE IS EVIDENCE THAT TONEY OFFERED REPEATED RESISTANCE TO CARRYING OUT THE DIRECTIVES OF SUPERVISORS AND ADMINISTRATORS, THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT TERMINATION.

Not only did Toney fail to follow the directives of Mr. Webb and Dr. Andrews, but the Board appropriately determined that her record revealed a pattern of unprofessional conduct. (R. p. 9). As indicated in Toney's personnel file, which was admitted into evidence, a former principal Ms. Lenora Scott previously advised Toney on January 25, 2006, that her inappropriate behavior could lead to termination. (R. pp. 8, 1016-17). On appeal, Toney asserted that the letter is too far removed and was hearsay. The lower court erred in not ruling that such letter constituted evidence of prior notice to Toney.

The date of the letter cannot be considered too remote when Toney submitted witness testimony dating back to 1990-2001, referenced other documents in her personnel file dating back to 2000, and then voluntarily placed her personnel file into the record. (R.

[5] Because the Board asserts that Toney was not speaking on matters of public concern, the inquiry normally ends there. However, should this Court find that substitute teachers are a matter of public concern, the next inquiry is whether Toney would have been fired "but for" her speech. M. Hall, 31 F.3d at 193. There is no evidence in the record that her contact with the Board member was the motivating factor in the decision to terminate her employment. Unlike the facts in M. Hall, if the communication with the board member had not occurred, there would still be substantial evidence to illustrate the administration's position that Toney had a tendency to engage in resistance to carrying out directives of her supervisors and administrators. (R. pp. 9-10, 227, 230, 232-33, 235, 252, 272, 292-93; p. 569, lines 8-14). Finally, as discussed supra, Toney's speech did not involve an issue that is generally addressed in a public context, so her right to free speech is not outweighed by the countervailing interests of the state. 31 F.3d at 194.

pp. 188, 289-90, 332, 344; p. 531, lines 10-19; p. 532, lines 2-3; pp. 622-23, 1133-35, 1140-49).

Toney's assertion that the January 25, 2006, letter is hearsay is also without merit. The letter is a business record, maintained in the ordinary course of the District's business of employing teachers. (R. pp. 408-09). Additionally, the notice of termination to Toney includes a reference to Dr. Andrews' review of Toney's personnel file, which the Board was encouraged to review on two occasions during the hearing. (R. pp. 531, 622-23). Thus, the Board appropriately admitted the January 25, 2006, letter and was within its discretion in determining that continuous reminders regarding professionalism are unnecessary. (R. pp. 8, 317-18, 545-46).

In addition to being reminded of the need to remain professional in 2006, the following subsequent incidents evidenced, to the Board, Toney's lack of professionalism and/or failure to follow directives:

(a) In March 2012, a former assistant principal reminded Toney that instructional materials should be picked up during Toney's planning period. Toney, however, sent students to pick up materials, and Mr. Webb testified that he addressed this concern with Toney. (R. p. 236, lines 8-23; p. 1011).

(b) In a February 11, 2013 letter, Mr. Webb wrote to Toney, "[y]ou are receiving this letter as a reminder to make sure you always conduct yourself in a professional manner." (R. pp. 234-35, 1010). Mr. Webb testified that the letter was sent because during a parent conference, Toney allowed her anger to get the best of her, Toney and the parent began going

back and forth during the meeting, and Toney was not acting as a professional. (R. p. 235, lines 6-25; p. 236, lines 1-3). Toney admitted that her voice was elevated during the parent conference. (R. p. 277). This is direct evidence that the lower court substituted its judgment for that of the Board when it found that "Toney was never reprimanded by her current principal for being "unprofessional' in dealings with his administration." (R. p. 19).

(c) On May 7, 2013, Mr. Webb wrote Toney regarding her failure to enter fourth quarter grades. (R. p. 1009). Mr. Webb testified that not entering fourth quarter grades timely could hold up the whole grading process. (R. p. 233, lines 5-16). While Toney claims "these were interim progress reports," Mr. Webb testified, and the evidence reflects, that they were "fourth quarter grades," and this Court can take judicial notice of the District's 2012-2013 calendar, which evidences that May was the end of the District's fourth quarter.

(d) Despite the prior instructions to Toney regarding when to pick up instructional materials, on September 4, 2013, the school administration had to address Toney again about sending students to the office during class time to request supplies. (R. pp. 231-32, 1006-07). Mr. Webb testified that keeping students in class during class time is important for instructional purposes. (R. p. 232, lines 1-4; p. 236, lines 16-20).

(e) On September 16, 2013, Ms. Kara Fowler, a member of the school's administrative team, conducted a classroom observation of Toney and

provided her with feedback regarding ways to improve her instruction. (R. p. 225, lines 1-12; p. 1005). Mr. Webb testified that Toney did not accept the standard feedback provided after the observation. (R. p. 227, lines 13-17). According to Mr. Webb, Toney's reaction was negative, defensive, and not supportive of the instructional process. (R. p. 228, lines 8-16; pp. 229-30). Toney admitted that she turned the focus of the observation from her to Ms. Fowler. (R. p. 272, lines 16-23; p. 292, lines 1-7). Ironically, the same day, Toney also failed to attend a mandatory staff meeting, without prior notice. (R. p. 230, lines 9-20; pp. 244-45, 1002).

These instances do not reflect professionalism or fitness to teach within a teacher, and the lower court's reliance upon the notion that Toney received a contract without any condition, is misplaced. (R. p. 19). Toney signed contracts "For Professional Services," which provided that she is "responsible to [her] immediate supervisor." (R. p. 445, lines 23-25; p. 446, lines 1-17; pp. 1178-87). Moreover, there is nothing in the S.C. Teacher Employment and Dismissal Act that suggests that a teacher must receive continuous notices regarding their conduct. See S.C. Code Ann. § 59-25-410 et seq. The profession of teaching lends itself to requiring professional behavior at all times, as evidenced by the potential to have one's certificate suspended or revoked by the S.C. Department of Education for unprofessional conduct. See S.C. Code Ann. §§ 59-25-160, 59-25-530. Toney's unprofessionalism is further evidenced by the fact that most of Toney's witnesses testified that they have never engaged in any conduct similar to that of Toney.

(R. p. 10; p. 567, lines 22-25; p. 568, lines 1-20; p. 569, lines 6-7; p. 577, lines 17-25; p. 458, line 1; p. 591, lines 2-5; p. 593, lines 14-21).

All of the above-referenced instances, and others, were discovered by Dr. Andrews upon a review of Toney's personnel file and the file maintained at the building level. Thus, Toney's failure to follow Mr. Webb's directive regarding the grievance was not simply an isolated incident. Dr. Andrews' recommendation specifically stated:

> Given the urgent need of the District to improve the academic performance of our students, there is simply no tolerance for persons who put their personal agenda above the need to work in a cooperative fashion with the administration for the good of all students.

(R. pp. 301, 446-47, 1014). The conduct described above was not simply isolated incidents either. The lower court cites Curtis Shell v. Richland County Sch. Dist. One, 362 S.C. 405, 411, 608 S.E.2d 428, 429 (2005), for the proposition that "[i]solated acts separated by twelve years do not support a pattern of unfitness." Toney's conduct is not comparable to the conduct displayed by the teacher in Shell.

In Shell, the board terminated a teacher for arrests related to the possession of crack cocaine in 1988 and 2000. 608 S.E.2d at 428. The court held that "two drug arrests, twelve years apart, neither of which resulted in formal charges, is insufficient to support a finding of unfitness to teach." Id. at 429. In this case, there are more than two incidents, the incidents are not isolated, and the Board has not relied upon conduct that occurred twelve years apart. To the contrary, much of the evidence in the record reflects conduct that occurred between March 2012 and October 2013 – a time period of only one (1) year, and seven (7) months.

After reviewing the evidence and considering all the testimony, the Board found that almost all of Toney's witnesses testified that they have never engaged in conduct

similar to that of Toney. (R. p. 10). The Board appropriately determined that there was a pattern of unprofessional conduct, which included insubordination and uncooperativeness. (R. p. 8).

CONCLUSION

For the reasons set forth above, we respectfully request that this Court reverse the decision of the lower court.

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November 4, 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Court of Appeals

APPEAL FROM LEE COUNTY
Court of Common Pleas

Maité Murphy, Circuit Court Judge

Case No.: 2014-CP-31-0227

Laura Toney..... Respondent,

vs.

Lee County School District..... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellant's Final Brief complies with the requirements of Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the **FINAL BRIEF OF APPELLANT** in the above-referenced matter on all counsels of record, by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this 4th day of November 2015:

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