THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Maité Murphy, Circuit Court Judge

Civil Action No.: 2014-CP-31-227

Laura Toney.....Respondent,

v.

Lee County School District.....Appellant.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

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2. **Whether the Circuit Court correctly held that a finding of insubordination based upon Ms. Toney's delivery of sealed Facebook postings to the Superintendent and school administrator cannot support termination.**

3. **Where the Circuit Court correctly held that a finding of insubordination based upon Ms. Toney's communication with a Board member cannot support termination.**

STATEMENT OF THE CASE

The Lee County School District Board of Trustees ("Board") appeals the Circuit Court's reversal of the Board's decision to terminate the employment of veteran teacher Laura Toney.

By letter dated October 29, 2013, the newly appointed Superintendent of the Lee County School District ("District") recommended termination of Ms. Toney's continuing-contract to teach. (R. pp. 1019-20)[1] Ms. Toney timely requested a hearing before the Board and initiated discovery in keeping with her statutory rights. After the Superintendent's deposition, a second letter of termination was issued. (R. pp. 1025-26) The Board hearing was held on April 28, June 7, July 1, 8 and 29, 2014. On July 29, 2014, the Board voted to uphold the Superintendent's recommendation to terminate Ms. Toney's contract of employment. The Board issued the required written decision providing its reasons for termination on August 8, 2014. (R. pp. 1-10) On August 28, 2014, Ms. Toney filed her Notice of Appeal with the Lee County Circuit Court. Both parties filed memoranda of law. On October 31, 2014, the Honorable Maité Murphy heard oral argument. By order filed January 14, 2015, Judge Murphy reversed the Board's decision to terminate. On February 18, 2015, Judge Murphy denied the Board's Motion for Reconsideration. On March 10, 2015, the Board filed its Notice of Appeal with this Court.

STATEMENT OF THE FACTS

Laura Toney is a veteran teacher employed by the District under continuing contracts since the 1998-1999 school year. During the 2013-2014 school year Ms. Toney was assigned to teach social studies at Lee County High School. On July 9, 2013 Dr.

[1] Toney exhibit notebook admitted into evidence (R. pp. 510-11).

Wanda Andrews was employed as Superintendent of the District. Early in the school year, Ms. Toney reported to Dr. Andrews that the Assistant Principal at the High School had assigned her friends favorable schedules, including two planning periods. Following this report, the assignments were changed. (R. pp. 349-51)

"Teacher B"[2] was one of the favored teachers who lost a second planning period. The preceding year, Teacher B had competed unsuccessfully against Ms. Toney for the presidency of the local teacher association. Teacher B had accused Ms. Toney of unethical conduct during the election. (Teacher B dep. p. 14, lines 6-13) Teacher B also complained in writing about losing his second planning period. (Teacher B dep. Ex. 4; see also, Teacher B dep. p 56, line 12-p.60, line 18; T. p. 129, line 1-p. 131, line 25)

On September 27, 2013, Ms. Toney attended a social studies department meeting. Teacher B also attended. During this meeting, Ms. Toney was asked how she was doing. She responded that September is a sad time for her because she lost her husband and mother during that month. Ms. Toney also commented that Teacher B should know how she feels because he lost a spouse as well. (R. pp. 351, line 23-p. 253, line 2) On September 30, 2013, Teacher B filed a grievance alleging that Ms. Toney made a "blatant attack" on his character and shared information about his "private life" during a department meeting and to students "who may have been in the hall." (Toney Ex. Tab 4) On October 4, 2013, Dr. Andrews placed Ms. Toney on administrative leave. (R. p. 1029) The letter removing Ms. Toney from her teaching duties alleged that she "violated district policy by creating a disruption to your assigned school by sharing personal information on another staff member [Teacher B] to other staff and students at Lee County High

[2] In the Board proceeding, all reference to this teacher was addressed in executive session and all records relating to this teacher were sealed. Accordingly, the same records have been filed under seal with this Court.

School." By letter dated October 29, 2013, Dr. Andrews recommended termination of Ms. Toney's employment. (R. pp. 1027-28) This letter accused Ms. Toney of causing "unnecessary disruption in the workplace . . . discussing a faculty member's personal information with other employees and students . . . using a student's cellular phone to access another employee's social media account . . . and instruct[ing] a student to refuse to cooperate with the administration's investigation."

Following Ms. Toney's request for a hearing and Dr. Andrews' deposition, the grounds for termination were amended by removing reference to students. Dr. Andrews continued to allege that Ms. Toney caused unnecessary disruption in the workplace by discussing Teacher B's personal information with other employees after being directed by an administrator to leave the matter alone. (R. pp. 1025-26) Dr. Andrews' revised recommendation added that Ms. Toney's personnel file revealed other incidents of unprofessional conduct and accused her of "unacceptable behavior" and "lack of candor" during the investigation of her conduct.

The common thread in the notice of administrative leave and two termination recommendations is the allegation that Ms. Toney caused a disruption by "sharing" or "discussing" personal information about Teacher B with others. Ms. Toney vigorously denied this allegation, explaining that she merely repeated information that had been shared with her by the school's Assistant Principal (a Facebook friend of Teacher B) that Teacher B had lost his "spouse." (R. p. 352, line 12-p. 353, line 16) When informed that Teacher B had filed a grievance complaining that she had commented on his marriage to another man, Ms. Toney immediately expressed surprise and offered to apologize. (R. p. 208, lines 11-15; R. p. 278, lines 5-19) Instead, she was instructed not to approach

Teacher B and to leave matters alone until the Principal returned from a conference. (R. p. 278, line 7-p. 279, line 13)

In addition to filing a grievance, Teacher B communicated with a number of fellow teachers, the Assistant Principal and others about Ms. Toney's alleged "outing." (Teacher B dep. p. 19, line 1-p. 20, line 8; p. 21, lines 2-24; p. 30, lines 7-12; p. 43, lines 1-23) A couple of days after the grievance was filed, Ms. Toney found an unmarked envelope near the door of her classroom containing copies of Facebook postings by Teacher B. (R. p. 279, lines 18-25, p. 361, lines 23-p. 363, line 15) The contents of the envelope were proffered under seal at the Board hearing and inspected *in camera.*[3] The postings included vulgar comments about Ms. Toney (for example, referring to her as a "f***ing bitch,") and an exchange with someone identified as a "good student" at "SHS" (Sumter High School) containing sexual implications (indicating that the student would "lick [Teacher B] to death" and receiving a response from Teacher B of "sweet.") The postings also contained references to Teacher B's sexual orientation and a photo of his deceased spouse. (Toney Ex. Tab 7, under seal) Teacher B admitted in his deposition that the postings were his, were not "private," and had been viewed by the children of a friend. He also admitted that his postings were delivered to several Facebook "friends" including fellow teachers at Lee County High School, the Assistant Principal, an administrative assistant and at least one public school student. (Teacher B dep. Ex. 3; see

[3] Teacher B objected to introduction of his postings and moved to quash a subpoena to testify at the hearing. After taking the matter under advisement, the Board decided not to consider the content of the postings or compel Teacher B to testify. The Circuit Court examined the postings and Teacher B's deposition testimony filed under seal. Based on this this review the Circuit Court reversed the Board's rulings on grounds that the postings and testimony do not invade Teacher B's privacy and are relevant to provide context to Ms. Toney's delivery of the postings to the Superintendent. See generally, U.S. v Meregildo, 883 F. Supp. 2d. 523, 526, (S.D.N.Y. 2012) (posts on Facebook to "friends" are public in nature); Rule 401, SCRE (relevant evidence is evidence having a tendency to make the existence of any fact that is of consequence more or less probable than without the evidence) (R. p. 13, fn. 1) Accordingly, these materials are offered under seal for review by this Court.

also, Teacher B dep. p 33, lines 2-23; p. 36, lines 4-23; p. 41, line 2-p. 43, line 23; p. 55, line 10-p. 56, line 9; p. 62, lines 9-15)

Ms. Toney reported receipt of this packet to the school administrator filling in for the absent Principal and provided a copy upon his request. (R. p. 362, lines 11-22) After receiving the packet, the school administrator called Dr. Andrews and intended to deliver it to her. (R. p. 208, line 25-p. 209, line 8; R. p. 211, lines 507) Later that day, Ms. Toney left a sealed envelope for Dr. Andrews containing the same postings with the written comment: "Please Read!!! The last page seems that a child might be in danger." (R. p. 1023) Ms. Toney did not give the packet to or discuss the contents with any staff or students. (R. p. 364, lines 1-25)

The District offered no evidence to refute Ms. Toney's testimony or to support Dr. Andrews' accusation that she disrupted the school environment. For example, the District did not offer testimony from the Assistant Principal, the **only person** to whom Ms. Toney allegedly made a comment about Teacher B's marriage to a man. (Teacher B dep. p. 20, line 16-p. 21, line 10) Ms. Toney vigorously denied making this statement and indicated that it was the Assistant Principal (a Facebook "friend" of Teacher B) who had informed her about the death of his spouse without revealing the gender. (R. p. 353, line 3-p. 354, line 5) Five co-workers and the school administrator confirmed that Ms. Toney caused no disruption to the school or the learning environment. (Testimony of Anthony Blair, R. pp. 556, lines 9-25; p. 559, lines 18-22; Sheneaka Ratliff, R. p. 562, lines 9-22; p. 563, line 18-p. 564, line 1; Virginia Rogers, R. p. 569, line 24-p. 570, line 23; R. p. 572, lines 3-8; Stacy Harrison, R. p. 573, line 14-p. 574, line 22; R. p. 576, lines 9-21; Bernard McDaniel, R. pp. 191, line 20-p. 192, line 1; p. 212, lines 4-13; Deposition

testimony of Hope Stephney, R. pp. 983-88; Toney Ex. 10 from July 8, 2014 hearing, filed under seal)

After delivering the sealed envelope to Dr. Andrews, Ms. Toney was placed on paid leave and told not to communicate with District employees or visit District property. While on leave, Ms. Toney was informed that an uncertified substitute had been assigned to her classes and asked a Board member she considered a friend to look into the matter. Ms. Toney did not ask for any personal intervention by the Board member. (R. p. 369, line 14-p. 370, line 18) This communication was characterized as insubordinate and included as a ground for termination.

STANDARD OF REVIEW

This appeal is governed by the Teacher Employment and Dismissal Act. ("TEDA") S.C. Code Ann. § 59-25-410 et seq. In Sections 59-25-460 and 470, TEDA requires that a continuing contract teacher be provided substantive and procedural due process by the school district's board. The hearing process established in TEDA compels school boards to provide teachers the opportunity to confront witnesses and to challenge the introduction of evidence offered to substantiate any charges presented. As our Supreme Court has acknowledged, TEDA is designed to prevent abuse of power by school districts and boards. Adams v. Clarendon County School Dist. No. 2, 270 S.C. 266, 272, 241 S.E. 2d 897, 900 (1978)

Normally, factual issues in a TEDA appeal are reviewed under the substantial evidence doctrine. Barr v. Bd. of Trs. of Clarendon County Sch. Dist. No. 2, 319 S.C. 522, 462 S.E.2d 316 (Ct. App. 1995) Substantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence

which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. Laws v. Richland County School District 1, 270 S.C. 492, 243 S.E.2d 192 (1978) Where, as here, the challenged action arises from immediate termination[4], the record must contain evidence of unfitness to teach that is "undeniably and abundantly present." 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) *citing* Kizer v. Dorchester County Vocational Educ. Bd. of Trustees, 287 S.C. 545, 550, 340 S.E.2d 144, 147 (1986)

On appeal from termination of a continuing-contract to teach, courts also have the duty to address errors of law. Lexington County School District One Board of Trustees v. Bost, 282 S.C. 32, 316 S.E.2d 677 (1984) Reviewing courts must reverse or modify a decision that is affected by an error of law, arbitrary or capricious. S.C. Code Ann. § 1-23-380(5)(d),(f) Additionally, courts have the authority to reverse any decision "made upon unlawful procedure" or in excess of "statutory authority." S.C. Code Ann. § 1-23-380(6), cited in Adamson v. Richland County School District One, 332 S.C. 121, 128, 503 S.E.2d 752, 755-56 (Ct. App. 1998)

GOVERNING LAW

The South Carolina Constitution guarantees all citizens the right to due process of law. S.C. Const. art. I, § 3. The Constitution also states that no person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency except on due

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

process and an opportunity to be heard. S.C. Const. art. I, § 22. This section further provides that no person shall be deprived of liberty or property "unless by a mode of procedure prescribed by the General Assembly." Id.

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

1. Written notice of reasons for dismissal from the school board (§59-25-460);

2. The right to a hearing (§59-25-460); and

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

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

Our Supreme Court affirmed the right to be heard in a meaningful fashion in Brown v. S.C. Board of Education, 301 S.C. 326, 391 S.E.2d 866 (1990) *citing* Board of

Regents v. Roth, 408 U.S. 564 (1972) The Court in Brown held "[t]he fourteenth amendment Due Process Clause requires procedural due process be afforded an individual deprived of a property or liberty interest by the State." In reversing the revocation of the teacher's certificate, the Court stated "the Board must comply with the statutes and regulations providing for the revocation of a teaching certificate before depriving [appellant] of her teaching certificate." Id. 301 S.C. at 330, 391 S.E.2d at 868. In Brown v. James, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010), this Court held that the language of TEDA is unambiguous regarding procedure and that "the observance of the procedural requirements of the Employment and Dismissal Act is **mandatory and not a matter of discretion.**" Id. S.C. 389 at 53, 697 S.E.2d at 611 (emphasis added)

LEGAL ARGUMENT

1. The Circuit Court applied the proper standard of review in reversing Ms. Toney's termination and correctly held that the record does not contain substantial evidence to uphold the Board's decision. (Appellant Arguments I and IV)

The Board argues that the Circuit Court based its decision on an improper standard of review by applying the undeniable and abundant evidence of unfitness to teach standard articulated by this Court in Hall rather than the substantial evidence doctrine. This argument fails on two counts. First, the Hall standard controls. Second, the Circuit Court held that even under the less rigorous substantial evidence standard, the record cannot support any of the grounds identified as supporting Ms. Toney's termination. (R. pp. 1-10)

Relying on Hall and Kizer, the Circuit Court recognized that immediate termination of a continuing contract to teach can only be upheld where evidence of unfitness for teaching is "undeniably and abundantly present." (R. pp. 5, 7) The Board's argument to the contrary, the Hall standard is well grounded in law. Indeed, this Court identified a series of cases which "illustrate the appropriate application of **this standard**." Hall, 330 S.C. at 407, 499 S.E.2d at 219 (emphasis added) In reviewing the Board's decision, the Circuit Court properly determined that the allegations identified as grounds for termination did not meet this or any other permissible standard. (R. pp. 9-10) The Board's argument that the Circuit Court's decision is "rooted in error" for failure to apply the proper standard of review is misguided and apparently based on a misreading of the order on appeal.

"Unfitness to teach" required to support termination of a continuing contract must manifest conduct that "substantially interfere[s] with the performance of [a teacher's] duty and constitute[s] unprofessional conduct." Hall, *supra.*, 330 S.C. at 409, 499 S.E.2d at 220; see also, Adams, *supra*, 270 S.C. at 273-274, 241 S.E.2d at 900-901 (holding that irremediable ineffectiveness in providing instruction is required to support termination under TEDA Section 430) Applying these principles, the Circuit Court properly concluded that regardless of the of review standard used the record does not reflect the alleged "pattern of unprofessional conduct" necessary to demonstrate unfitness to teach. (R. p. 9) For example, Ms. Toney was never reprimanded by her current Principal for being "unprofessional" in dealings with his administration. Additionally, like all prior administrators, the Principal recommended that Ms. Toney receive a continuing contract each year without any condition. (R. pp. 1178-1187)

Ms. Toney's Principal testified that before she was removed from the school in October 2013, he had no reason to recommend her termination. He also conceded that no school documents, including her response to an administrative assistant's observation and emails about students picking up supplies later characterized by the Board as "unprofessional," led him to conclude that Ms. Toney should be fired. (R. p. 251, lines 8-20; p. 262, line 15-p. 263, line 4) None of the emails or other school documents identified by the Board as demonstrating a pattern of unprofessional behavior were ever placed in Ms. Toney's personnel file or considered as grounds for disciplinary action. Instead, Ms. Toney was repeatedly re-employed without condition. (R. p. 242, line 13-p. 243, line 20; p. 250, line 22-p. 252, line 18)

Significantly, Dr. Andrews first offered an alleged "pattern" of unprofessional conduct as a ground for Ms. Toney's termination only after it became clear that she could not prove that Ms. Toney had caused any disruption or discussed Teacher B's personal information as initially charged. In an attempt to bolster this *post hoc* ground for termination, Dr. Andrews testified that Ms. Toney "had a problem with every principal she worked for with documents being in writing." (R. p. 440, lines 13-21) When asked to identify former Principals who experienced problems with Ms. Toney, however, Dr. Andrews could not provide names and had not spoken to any. (R. p. 457, line 16-p. 458, line 11) In contrast, Ms. Toney provided the Board her complete personnel file. The file reveals only one disputed negative "document in writing" from 2006, more than seven years before Dr. Andrews' recommendation to terminate. (Toney personnel file; R. p. 338, line 22- p. 345, line 23)

The Circuit Court correctly concluded that neither Ms. Toney's personnel file materials nor the isolated incidents identified by the Board reveal "a pattern of unprofessional conduct" sufficient to support termination. This conclusion is supported by Supreme Court precedent that piecing together conduct alleged to have occurred years before the events prompting a recommendation to terminate cannot establish a "pattern" of misconduct warranting termination. See, Curtis Shell v. Richland County School Dist. One, 362 S.C. 408, 411, 608 S.E.2d 428, 429 (2005) (isolated acts separated by years do not support a pattern of unfitness) For all of these reasons, a fair reading of the record as a whole supports the Circuit Court's finding that the reasons identified by the Board cannot sustain Ms. Toney's termination on any ground identified in its decision.[5]

II. The Circuit Court correctly held that a finding of insubordination based upon Ms. Toney's delivery of sealed Facebook postings to the Superintendent and school administrator cannot support termination. (Appellant Argument II)

As a matter of law, termination on the basis of insubordination requires evidence of willful misconduct. Hall, *supra*. To support termination, insubordination must also rise to the level of demonstrating "evident unfitness for teaching." Delivering a packet containing Facebook postings to a school administrator and superintendent, even if inconsistent with the Principal's directive to "leave the matter alone" in his absence, does not reflect on Ms. Toney's fitness to teach.

[5] In addition to the grounds for reversal set forth in the order, Ms. Toney argued that the Board's decision to quash the Teacher B's subpoena and not to consider the content of Teacher B's Facebook postings violated TEDA and due process. Ms. Toney also raised objection to the introduction of hearsay in documents presented by the District. Having found the record inadequate to support termination, the Circuit Court declined to rule on the constitutional issues. (R. p. 20, fn. 3) Nevertheless, Ms. Toney's objections remain a part of the record and she relies upon the argument presented in her memorandum on appeal to the Circuit Court, incorporated herein by reference. See, Memorandum of October 29, 2014, R. pp. 54-57. These errors by the Board constitute additional grounds for reversal of Ms. Toney's termination.

The avowed purpose of the Principal's directive was to keep Ms. Toney from talking directly to the Teacher B (she wanted to apologize for any misunderstanding), and "to minimize any disruption [by] trying to keep it within in the realm of those who were involved..." (R. p. 215, line 2-p. 216, line 10) There is no evidence that Ms. Toney discussed the Facebook packet with Teacher B or anyone else. (R. p. 211, lines 18-21)

Upon receiving the Facebook postings, Ms. Toney told the school administrator (and nobody else) that she was concerned about something the teacher had done. (R. p. 208, line 21-p. 209, line 5) When the administrator first told Ms. Toney to "leave it alone" she left without saying anything further. Later, the administrator went to Ms. Toney's classroom and told her "if [you] have something in writing, to give it to me, put it in writing and I would give it to Mr. Webb [Principal] and she presented me with a packet." (R. p. 196, lines 21-7; p. 208, line 21-p. 209, line 19) The administrator testified that when he received the packet from Ms. Toney, he informed Dr. Andrews. (R. p. 209, lines 25-6)

The Board argues that by delivering the packet to Dr. Andrews, Ms. Toney "escalated the situation from the building level to the District level." (Appellant's brief, p. 8) This argument is contrary to the evidence produced at the hearing. At Teacher B's request, the Principal shared his grievance with Dr. Andrews. This occurred before Ms. Toney delivered his Facebook postings to anyone. (R. p. 256, line 25-p. 257, line 19) Additionally, the school administrator informed Dr. Andrews about the packet. This record cannot support the Board's conclusion that Ms. Toney was responsible for first involving the District level.

Even construing delivery of the sealed envelope to Dr. Andrews as insubordinate, the record cannot support Ms. Toney's termination. In Hall, a teacher in the neighboring Sumter School District "disobeyed" the superintendent's instructions not to discuss her situation with fellow employees. Despite violation of an explicit directive, this Court held that the teacher's conduct did not evidence unfitness to teach and could not be relied upon as a basis for the teacher's termination. As a result, the decision of Judge Howard King reinstating the teacher was affirmed. As in Hall, the record contains no evidence that Ms. Toney's delivery of sealed Facebook postings to the school administrator or Dr. Andrews impaired her ability to teach.

To support termination, there must be a clear link between the teacher's insubordination and unfitness for teaching. Hall, *citing* Felder v. Charleston County School District, 327 S.C.21, 25, 489 S.E.2d at 193. Any failure to comply with the Principal's general directive to leave the matter alone until he returned falls short of the type of conduct justifying immediate termination under S.C. Code Ann. § 59-25-430. Accordingly, this ground for termination cannot stand and, like the teacher in Hall, Ms. Toney was correctly determined to be entitled to reinstatement.

The Board's decision is further undermined by mischaracterization of Ms. Toney's note ("a child might be in danger") on the sealed envelope delivered to Dr. Andrews. The Board argues that if Ms. Toney had a legitimate concern about child safety, she failed to report her concern to DSS or law enforcement "as all teachers are required to do," *citing* S.C. Code Ann. § 63-7-310 (Appellant's brief, pp. 11-13) Subsection (B) of this statute provides that a mandated reporter should report suspected abuse by a parent or guardian to the DSS. Suspected abuse committed by others may be

reported to law enforcement. Ms. Toney testified that she did not know the child's age or identity (therefore, the term "might" in her note to Dr. Andrews) and was concerned that she had been told to take no action. (R. p. 309, lines 12-17) Because she had been told not to communicate with Teacher B, she instead notified the District's chief administrator. (R. p. 310, lines 14-21) Reviewing the record as a whole, the Circuit Court properly determined that, Ms. Toney's conduct was neither unreasonable nor insubordinate. This conclusion is borne out by Dr. Andrews' failure to contact law enforcement **after** reviewing the contents and interviewing Teacher B. (R. p. 465, line 18-p. 467, line 7)

III. The Circuit Court correctly held that a finding of insubordination based upon Ms. Toney's communication with a Board member cannot support termination. (Appellant Argument III)

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

The letter placing Ms. Toney on leave instructed her not to "visit any Lee County facility, utilize any school equipment to communicate (including access to computers or email) . . . [or] contact fellow employees of the Lee County School District." (R. p. 1018) There is no evidence that Ms. Toney violated any of these directives. Instead, Dr. Andrews complained that Ms. Toney communicated with a Board member about the qualifications of her substitute teacher. Ms. Toney testified that she would not have approached the Board member had the letter placing her on leave prohibited

communication with Board members. (R. p. 372, lines 5-12) The Board member did not testify and Ms. Toney made no further communication after receiving explicit instruction. (R. p. 371, lines 1-7)

It is incumbent on the District to provide clear directives. Because Ms. Toney reasonably understood that communication with the Board member was not prohibited, her conduct cannot be considered a willful or intentional disregard of a directive. Additionally, any directive prohibiting Ms. Toney from communicating with a Board member on a matter of public concern unrelated to her personal circumstances would violate freedoms protected by the state and federal constitutions. See generally, Pickering v. Board of Ed. of Tp. High School Dist. 205, 391 U.S. 563 (1968) (Teacher communications on matters of public concern are protected by the First and Fourteenth Amendments to the United States Constitution); see also, Hall v. Marion School District Number 2, 31 F.3d 183 (1994) (Teacher termination in violation of First Amendment rights) For these reasons, Ms. Toney's communication with a Board member about a matter unrelated to the reasons for her involuntary leave cannot provide a legitimate basis for her termination.

CONCLUSION

For each of the reasons stated above, the termination decision issued by Lee County School Board on August 8, 2014 was properly reversed. Reversal was required because the record does not establish substantial evidence of Ms. Toney's unfitness to teach or failure to improve performance to a satisfactory level following written notice, assistance and reasonable opportunity. Accordingly, the order of January 14, 2015 reinstating Ms. Toney to employment under a continuing contract and awarding back pay

with benefits, less appropriate mitigation, from the date of her discharge though the date of reinstatement should be affirmed.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that he has served that Respondent's Final Brief complies with Rule 211(b).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing Respondent's Final Brief by depositing a copy of same in the United States Mail, postage prepaid and addressed as follows:

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This 21st day of September, 2015.

NICKLES LAW FIRM, LLC

BY: _____

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