INITIAL BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Master in Equity and Special Circuit Court Judge

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APPELLATE CASE NO. 2016-000955

John Alden Bauer III — Appellant

v

Beaufort County
School District — Respondent

INITIAL BRIEF OF APPELLANT

John Alden Bauer III, pro se, appeals the order of the Honorable Marvin H. Dukes III, dated and signed March 29, 2016, but not entered. On April 25, 2016, the Honorable Marvin H. Dukes III, signed a new copy of the same order, that remained dated March 29, 2016, but entered and filed on April 25, 2016. Appellant received *email* notice of entry of this order on April 25, 2016. Deadline for Initial Brief was extended.

July 5, 2016

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(B) Statement of Issues on Appeal

Appellant asserts that the Beaufort County Board of Education Hearing Transcript, is the Record; therefore, preserved for appeal, (TEDA 59-25-480 Exhibit 5 page 3). All issues raised herein are referenced in the record. All witnesses were sworn.

Corrections to factual errors in the Court's Order were provided to the court and ignored. (Exhibit 13, and for more detail the ensuing Exhibit 13 Auxiliary)

1. **Board, *as Jury,* Violations; Terminated Teacher Prior to the Hearing and officially *Transacted* July 1, 2014; Ratified and Published Termination; Falsified Minutes of Board Meeting (8 months later)**
2. **Constitutional Issue: District acting as Prosecutor and Jury**
3. **District Failed to Preserve and Provide Exculpatory Technical Evidence.**
4. **Advice Counsel's attendance at the Board's deliberations violated case law.**
5. **District knowingly withheld Exculpatory Evidence.**
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7. **No charges ("*causes*") were ever issued by Board (TEDA 59-25-460; Exhibit 5 page 2)**
8. **Improper Motion in Limine: Exhibit 6**
9. **The court did not exercise its discretion to hear relevant testimony.**
10. **Constitutional Issue, SCRCP 7.02: "Duty to Consult.....Counsel is under no duty to consult with a pro se litigant."**
11. **Respondent's Counsel improperly assumed authority for deciding what evidence was Preserved for Appeal.**
12. **The Board considered it to be critical that Appellant did not testify.**
13. **Board's Judicial Officers allowed accusations that had not been revealed during Discovery to be heard and to be deliberated.**

14. The court failed to consider allegedly obvious Perjurious Testimony by Superintendent Jeffrey C. Moss.

15. The District flagrantly failed to follow the requirements of the Teacher Employment and Dismissal Act ("TEDA" Exhibit 5).

16. Factual errors in Board Order.

17. Petitions, Motions, and FOIA requests were ignored.

18. Unreasonable and illegal delay of hearing by District

19. Respondent's Counsel acted as Advice Counsel to the Board and replaced the Counsel of Record for the District/Board on July 7, 2014, without consent.

20. Court failed to read filed documents.

21. Technical filing violation by District

(C) Statement of the Case

1. February 5, 2014. John Alden Bauer III was placed on Paid Administrative Leave.
2. February 5, 2014. Principal McAden was ordered to preserve evidence.
3. May 21, 2014. George McMaster wrote Litigation Hold Letter to Preserve Evidence.
4. May 29, 2014. Superintendent Moss sent an *email* to Appellant detailing four (4) "bases" for his recommendation for termination, the *only* communication, ever, of any potential charges or accusations.

5. June 5, 2014. Board accepts Superintendent's recommendation for terminating Appellant. No hearing had been held.
6. June 16, 2014. Superintendent confirms termination. Termination officially documented on July 1, 2014.
7. June 21, 2014. Appellant appeals Board action and issues FOIA Request. No response, a misdemeanor.
8. July 7, 2014. Appellant petitions Board. No Response.
9. August. Board ratifies termination. (Day unknown. Minutes later deleted)
10. September 2, 2014. Board ratification of termination is published.
11. October 21. Appellant again petitions Board for hearing. No response.
12. Depositions are held beginning on December 16, 2014 and continuing into February, 2015.
13. April 30-May 2. 2015. Beaufort County Board of Education Hearing.
14. May 19, 2015. Board Order signed.
15. May 29, 2015. Appellant appeals to the Court of Common Pleas
16. July 8, 2015. Attorneys of Record for District/Board Replaced.
17. August 19, 2015. Hearing in Court of Common Pleas. Considered Motion to Dismiss and to change named Respondent.

15. October 19, 2015. Motion for Summary Judgement Filed
16. January 19, 2016. Hearing in Court of Common Pleas. Considered Motion to Disqualify and Motion for Summary Judgment. Denied.

17. March 1, 2016. Hearing in Court of Common Pleas. Considered three Motions to Compel--Security Camera footage, Caller ID, Forensic Analysis of challenged letter. All denied.

18. March 4, 2016. Final Hearing in Court of Common Pleas.

19. c. March 16, 2016. Proposed Order submitted by Counsel for Respondent.

20. c. March 21, 2016. Appellant submitted response to proposed order and alleges substantial factual error(s) in the Proposed Order.

21. March 29, 2016. The Honorable Marvin H. Dukes III, signed the Final Order. Not entered.

22. April 25, 2016. The Honorable Marvin H. Dukes III, again signed the Final Order, dated March 29, 2016, filed the Order, and sent a copy via email to Appellant.

23. April 27, 2016. Hard copy of Final Order received by Appellant.

24. May 5, 2016. Appellant filed Notice of Appeal with the Clerk of Court. (Court of Appeals)

(D) **Argument**

"statutory violations alone support reversal of a teacher termination." Middleton Order, quoting from Young v. Charleston County

1. **Actions of the "Establishment" or "System" operating as one (District, Board, and Superintendent) Board as Jury, Terminated Teacher Prior to a Hearing;**

Termination was *Officially Transacted* July 1, 2014, Ratified and Published; Board substituted a set of False Minutes for the Termination Meeting (8 months later. Exhibit 1 and ensuing Exhibit 1 Auxiliary, page 4, for more detail) Termination Documents, Exhibit 35.

Congruent with the following constitutional issue the court should have recognized that the **Board, as a jury,** did not and would not acknowledge the numerous violations of law committed by the District and the Board.

The Board terminated Complainant as a teacher, prior to any hearing, on June 5, 2014, (violation of TEDA 460) confirmed by the superintendent on June 16, 2014, negating his reference to "*conditional*" in a form letter dated June 6, 2014. The Termination was officially transacted on July 1, 2014, without a hearing, see exhibit 35. (Minutes = Exhibit 1, Confirmation = Exhibit 2, (References in the Record: Page 42, lines 12-16; Page 344, lines 2-3; Page 347, line 24; Page 348, Line 1; Page 356, line 10; Page 521, line 4)

The Board **ratified** the termination at their meeting in August 2014 and *illegally,* as admitted by Alice Walton (Human Resources), **published** the termination on September 2, 2014. (All were violations of state law TEDA 59-25-460 and 470, Exhibit 5), of *Brown v. James,* Exhibit 4, page 5) and publishing the ratification was a violation of Federal Law) The Record = Board Hearing Page 42 lines 5, 23 and 24; Page 43 line 7; Page 350 lines 3 and 4; and Page 359 line 24, Exhibit 3.

The Board wrote a **false set of substitute minutes** for June 5, 2014 in February 2015, and published the new version of the minutes as being June 5, 2014, an admission of error. Exhibit 1 (Auxiliary), page 4. Record = Board Hearing Page 319 lines 10-21.

The Board also removed the August ratification reference, another admission of error, but they could not remove the illegal September publication of the ratification since hard evidence is available. Exhibit 3.

"The observance of the procedural requirements of the Employment and Dismissal Act is mandatory and not a matter of discretion." Brown v. James. Exhibit 4, page 5.

2. Constitutional Issue: District acted as Prosecutor and Jury. The "Establishment" or "System" operate as one (District, Board and Superintendent)

David Duff, Counsel for Respondent (Hearing, 14th Judicial District, August 19, 2016, Page 27 lines 6-7)

"... Board or the District which legally are one in the same."

In this case the Beaufort County Board of Education ("Board") and the Beaufort County School District ("District") acted as both Complainant and Jury during Board Hearing (April 30-May 2, 2015). David Duff, Advice Counsel to the Board, and now Counsel for Respondent, without consent, claimed that the District and the Board

"legally are one in the same", see above, an alleged violation of the Constitution of South Carolina.

From the Constitution of South Carolina

SECTION 22. Procedure before administrative agencies; judicial review.

".....nor shall he be subject to the same person for both prosecution and adjudication; ...." (1970 (56) 2684; 1971 (57) 315.)

From Island Packet, July 1, 2014, Exhibit 34

"Davis will provide direct and full-time legal counsel to superintendent Jeff Moss, staff and the school board."

Mr. Drew Davis had been identified in several overlapping legal capacities for the Board and the District for several months, although he had not yet been licensed to practice law in South Carolina.

The Board replaced Childs and Halligan, who represented the superintendent at the hearing, with the words: *"representing it and the Superintendent."* Minutes of Board meeting July 7, 2015. Exhibit 20 Auxiliary, page 1.

CHAIRMAN EVANS: *"Our charge, at least in this district, is that we hire the superintendent to make those decisions about hiring and firing; okay? Or dismissing."* Page 345 line 19 of Board Hearing.

The Board and the District simply function together as one, with overlapping attorneys alternately serving one, the other, or both.

3. **Failure to Preserve and Provide Evidence.** The Court of Common Pleas failed to consider that the immediate directive (February 5, 2014) to preserve evidence was ignored. Also that the District had later pledged to preserve exculpatory electronic data, but had not done so. Referring to a directive from Human Resources, Principal McAden testified *"... everything was to be preserved."* McAden, Board Hearing, page 209 line 21 to page 210 line 2.

Also, *"We have checked with the administration and have been assured that the staff has taken appropriate steps to preserve the data..."* Childs and Halligan, 6/26/14. Exhibit 30.

The assistant principals both testified that they were never told to preserve data. Board Hearing: page 111, lines 15-17; page 174, lines 10-21.

The exculpatory *"preserved evidence"* was not provided, and the court incorrectly denied the Motion to Compel. (Exhibits 10, 21, 29, 30)

4. Advice Counsel's attendance at the Board's deliberations violated case law.

The court ignored that Mr. Duff's attendance at the Board's deliberations violated Gonzales v. McEuen, 435 F. Supp. 460 (C.D. Cal. 1977) U.S. District Court for the Central District of California - 435 F. Supp. 460 (C.D. Cal. 1977) March 2, 1977.

Mr. McEuen was *"advisor to the Board"* and attended deliberations for 45 minutes. Here is what the court ruled:

"The plaintiffs contend that their due process rights were violated by this involvement of Mr. McEuen with the Board. This court agrees.

"Whether he (McEuen) did or did not participate, his presence to some extent might operate as an inhibiting restraint upon the freedom of action and expression of the Board."

5. **District Knowingly Withheld Exculpatory Evidence.**

The District (Walton) testified that there were about 2000 emails per year involving appellant.

Walton at Board Hearing page 336, lines 19-22.
Question to Walton: *"When you testified that three years of emails --at your February 5th, 2015, deposition...would equal 6,000, was that an exaggeration?*

Answer: *"I believe that was a guesstimate."*

Page 259, Walton Deposition, February 5, 2015.

In the early stage of a lawsuit both parties are required to produce all evidence relevant to the case."
A Yes.
Q So to err on the side of caution, and since I just got involved in this in December, would you be willing to either put on a CD or a disk drive Mr. Bauer's three year history of E-mails?
A All 6,000 E-mails that we have copied?
Q Yes.

Page 260
Q Well, we are interested in everything.
A Okay. I will send spam as well.
Q Okay.

The District provided 1087 emails, eight (8) days after the *discovery deadline,* of the estimated 12,000 emails (2,000 per year as estimated by the District) over a period of six (6) years. Those emails were the subject of a FOIA Request on June 18, 2014 (Exhibit 11) which was un-responded to by the District, a misdemeanor.

The court ignored that more than 80% of the exculpatory evidence in the form of emails, etc., was and still is withheld by the District.

The court ignored that as part of the record (page 247, lines 6-9) the Advice Counsel to the Board, now Counsel for Respondent, misled the board by falsely stating that the emails were "*not withheld*"--referring to the 1087 emails, but ignoring the nearly 11,000 emails still being withheld for 422 days, at the time, and still counting.

How is it appropriate that the Advice Counsel to the Board (Jury) can testify for the District? When an attorney falsely testifies is that not as serious as a witness who commits perjury?

The District's witnesses testified that Appellant's Emergency Substitute Plans were two to three years old, page 237 line 6. There was no evidence presented by the District, but Appellant has proof, by way of computer screen shot, that the plans were modified on October 31, 2013, making the annual document only 3 months old.

Respondent's Attorney, Duff, acting as Advice Counsel to the Board did not require evidence and has since refused to acknowledge that such evidence does not exist.

6. **District knowingly allowed false evidence to be admitted.**

After notification, prior to the hearing (Exhibits 16 and 17) about a false grade book Childs and Halligan, and Duff, White, and Turner were obligated to learn the truth to not allow false evidence, and to take remedial measures. (SCRCP Rules 3.3(3), 1.2(d), 1.0(f), 1.6) Tab 7); SCRPC 8.4(a),

The court did not consider that Duff, acting as Advice Counsel to the Board and William Evans, Chairman of the Board, during the Board Hearing of April 30 to May 2, 2015, *knowingly, willfully, and negligently:*

- Admitted into evidence a false "Grade Book" Exhibit 14, used to imply unfitness to teach. (Page 185 line 1, Board Hearing). "Objection" on the Record, page 185 lines 8+.

- Withheld the authentic Grade Book. Exhibit 15 (Withheld until July 2, 2015, 61 days after the hearing)

- The District incorrectly Implied unfitness and negligence by indicating that the false grade book was official and that it had been mis-used by the teacher.

- The true grade book, which had been withheld for more than two (2) months after the Board Hearing, was sent inadvertently to Dr. John Bauer, of Columbia, along with a set of master keys (!) to the Beaufort County School District Offices. (Also enclosed were 13 un-redacted confidential student files, a violation of FERPA)

- Appellant anticipated the ploy of the false grade book in his Opening Statement, board hearing, page 29, lines 1-4. *"...some of the evidence that the opposing counsel will use is misrepresented. Pay particular attention to what they claim is my class record book."*

- Oddly, all of the district's witnesses, attorneys, and Chairman Evans incorrectly refer to a meeting on February 6, 2014. There was no meeting on February 6, 2014. A thorough '*rehearsal*' with all the witnesses made for uniformity of that error, and similar inaccuracies.

7. No Charges Ever Issued.

Superintendent Moss testified that he issued two charges *in writing*, page 524, Lines 11-16 of Board Hearing, but there is no evidence of such a document. The court erroneously did not require any evidence of any charges ever being issued by anyone. (Violations of TEDA 59-25-460 and 470. Exhibit 5, pages 2-3)

MR. DUFF: *"Mr. Williams, are the charges contained within the exhibits that you intend to introduce?"*

Mr. Williams: *"Yes, sir, they are."*

They were not

Q (Appellant) *"Did you state when I was terminated that the bases for my termination were based on this May 29th email, that the charges were in this?"*

A *(Moss) "No, you were terminated for two charges, neglect of duty and insubordination."*

The law

TEDA 59-25-460 Exhibit 5, page 2.

"No teacher shall be dismissed unless written notice specifying the cause of dismissal is first given the teacher by the District Board of Trustees and an opportunity for a hearing has been afforded the teacher."

There was no written notice of anything--from anyone, and no hearing.

TEDA 59-25-470 Exhibit 5, page 3.

"The complainants shall initiate the introduction of evidence in substantiation of the charges." Again, there were no charges, but Appellant's objections were ignored. (Record = Hearing page 133, line 1; page 282, line 16; page 371, lines 10 & 19; inter alia.)

Accusations ensued that had never been asserted during Discovery. (Record = Hearing Page 128 lines 4-6 and line 12, "Motorola Radio")

There were **no charges revealed** until the third day of the Board Hearing. Page 524 lines 9-12.

Again, *"The observance of the procedural requirements of the Employment and Dismissal Act is mandatory and not a matter of discretion."* Brown v. James, Exhibit 4, page 5.

8. Improper Motion in Limine: Exhibit 6

The Motion in Limine contains technical violations (captions) and inappropriate proposed objections to relevant evidence, and was not disclosed to Appellant until 23 hours before the hearing.

The court ignored that David Duff and Chairman Evans allowed the inaccurately drawn Motion in Limine to be totally imposed.

Do the rules for Motions vary from case to case? (Below) Fairness, accuracy, and intent should be uniform.

"A written motion ... shall be served not later than ten days before the time specified for the hearing..." (Rule 6(d) Exhibit 8)

The concept of timely disclosure is reinforced (in criminal procedures) Rule 110(a)(2), Exhibit 7.

"...all motions...must be filed not less than ten (10) days before trial." Rule 110(a)(2), Exhibit 7.

If Respondent claims that the cited rules were not applicable in this case, certainly reason with common sense requires something compatible.

The Motion in Limine, from attorneys for Superintendent Moss, **was discussed,** days prior to the Board Hearing, but not disclosed to the Appellant until 23 hours before the hearing. Board Hearing, page 361, lines 20 - 23.

Duff referring to Opening Statements: "...objections to...anticipated evidence could also be made at that time." Exhibit 9, page 1, email. Duff was apparently referring

to the Motion in Limine, which was yet to be disclosed to Appellant, but known to the District/Board and Board Officers eight (8) days, or more, before the hearing.

Mr. Duff allowed the Motion in Limine to **disqualify out of state case law** when Duff knew that out of state case law was prominent in *Brown*, a case involving Duff. (Exhibit 4) Disallowing out of state case law was imposed by Chairman Evans, page 361 lines 20-25 Board Hearing.

Another constitutional issue evolved from the Motion in Limine violations. Discussed in #6 below.

9. **Congruent with the constitutional issue the court should have exercised its discretion to hear relevant testimony** that the Board (Duff and Evans) should have allowed, but did not.

- Fed. R. Civ. P. 56(c)(4) "but *(the court)* can consider other materials in the record in its discretion."

- Also
  Rule 12(b)
  "The amendment to the fourth sentence of Rule 12(b) clarifies the litigant's right to assert at trial any defenses as well as any claims he could have raised in a permissive pleading.... "

- And
  "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." Singleton v. Wulff, 428 U.S. 106 (1976) No. 74-1393

Advice Counsel Duff and Chairman Evans used *presumed* technicalities to block witness evidence from depositions that differed from the same person's testimony at the Board Hearing. For example there were eight (8) pages devoted to debating one question. (Board hearing page 84, line 24 to page 91, line 9)

Page 86 line 15

MR. DUFF: *"Mr. Bauer, wait. Let me -- let me try to explain it this way. You can't have -- if the witness is live and in person on the witness stand, you can't have -- you can't have the witness read from the witness's deposition."*

Referring to Fairness and Justice: *They should not raise barriers which prevent the achievement of that end."* Maty v. Grasselli Chemical Co., 303 U.S. 197 (1938)

10. **Constitutional Issue**, SCRCP 7.02: "Duty to Consult before Filing any Motion..... **Counsel is under no duty to consult with a pro se litigant."**

Throughout these prior two plus (2+) years attorneys have refused to respond to hundreds of critical questions, or to provide important information. That continues.

Appellant, pro se, was not aware of the rule that allowed attorneys to ignore a pro se appellant. Common sense expected fairness. For examples of such ignored questions see Exhibits 12, 16, 17 and 31. (Appellant has a list of questions--55 pages--that were sent to attorneys for the District that were not answered or were improperly answered)

Nowhere in the SC Constitution is there anything that contemplates that one adversary should have an advantage over another. The equal protection clause in the U.S. 14th Amendment certainly requires fairness. Fairness is implied throughout the U. S. and State Constitutions and is specifically mentioned in "Victims Rights" SC Constitution Section 24.

Now may be the time to use this case to correct an *artful* statute.

11. **Respondent's Counsel improperly assumed authority for deciding what evidence was Preserved for Appeal.**

The Court of Common Pleas failed to consider that Respondent Counsel's act of assuming authority for what was Preserved for Appeal contradicts TEDA 480 and contradicts rulings of Chairman Evans. Exhibit 5 page 3.

- The court should have ruled that it was inappropriate for Duff, as the deliberations were about to begin, to overrule Chairman Evans, who earlier had admitted "substantial evidence" (Evans' words) that favored Appellant? Page 568, Line 17, of Board Hearing, as follows.

  CHAIRMAN EVANS: *"And there was a substantial amount of --*

  MR. BAUER: *Yes.*

  CHAIRMAN EVANS: *-- evidence put into the record under cross-examination.*

  MR. BAUER: *Exactly."*

- William Evans, Chairman of the Board and acting as co-judicial officer, had ruled that evidence in the appellant's notebooks could be considered by the Board (page 553, Line 4 of Board Hearing). This was overruled by Duff when he and the Board were preparing to withdraw to deliberate. Evans ruled, *"...but we will recognize that all these letters are in the booklet you gave us, so we can take them under advisement when we deliberate."* Page 565 lines 17-19

12 & 13. **The Board considered it to be critical that Appellant did not testify. Board's Judicial Officers allowed accusations that had not been revealed during Discovery.**

The Court Order (Common Pleas, March 4, 2016) specifically states as a negative that **Appellant did not** testify. Order page 10, etc.

- Appellant, prior to the hearing, had asked *"How do I call myself as a witness?"* Exhibit 9 page 3
- Advice Counsel to the Board, Mr. Duff, informed Appellant that he might not be allowed to testify since he had not put himself on the witness list. Exhibit 9 page 1.

  "There also is the matter of your failure to list yourself as a witness. I don't know what the administration's position on your testifying is." Exhibit 9 page 1.

- AND **TEDA does not require a teacher to testify.** In fact the teacher is not required to be present.

- During the Hearing Mr. Duff repeatedly urged Appellant to testify; then Duff denied Appellant's request for time to prepare. The motion to have someone else read the questions (on cross) for the superintendent was made by Appellant to gain time, but was denied (Conley v. Gibson--see below). No other solution was considered.
- Curiously, Appellant's father had been listed as the cross examiner for many months without objection from Childs and Halligan. (Shirley Fawley and Vernie Williams)
- Then at the Hearing--Attorney Fawley, for the district *"Secondly, to have a non-lawyer participate in an administrative hearing is the unauthorized practice of law."* Page 522, line 16.

  BUT
- *"Litigants can be assisted by unlicensed laymen during judicial proceedings."* Conley v. Gibson, 355 U.S. 41 at 48 (1957) (inter alia)
- No consideration was given for any other condition to allow preparation time for Appellant to testify in light of un-charged and, heretofore, *undisclosed* accusations. Page 521, lines 20-24+ of Board Hearing. (Uncharged accusation = 'Motorola' page 128, lines 4-6 and line 12)
- William Evans, Chairman of the Board and acting as judicial officer, had ruled that evidence in the appellant's notebooks could be considered by the Board (page 553, lines 4-6 of Board Hearing). This was not overruled by Duff until *he and the Board* were preparing to withdraw to deliberate. Page 565 lines 17-19. (See #4 above)

14. The court failed to consider putative perjurious testimony by Superintendent Jeffrey C. Moss.

- Jeffrey Moss was alleged to be demonstrably untruthful under oath. Exhibits 13 and 13 Auxiliary.
- Moss swore that he would meet with teachers before terminating them.

  Page 67-68 (Moss Deposition, December 16, 2014)

  A *"The process to ask for the open-appeal hearing comes after they have their meeting with me, and the final decision's rendered."*
- Moss claimed that he recommended dismissal after Appellant refused to meet with him. (Page 68, Deposition, and quoted in Hearing)

  Moss: page 543, line 7 of hearing, *"He refused to meet with me on one occasion, on any occasion. He would not meet with me, as superintendent of the schools. I have never in my 30-plus years had a teacher refuse to meet with me."*
- Moss testified that he would produce the email invitations. (Page 66, 39-40 of deposition) He could not, of course, produce fanciful emails.
- Moss changed *'meeting with him'* to *'meeting with the administration'*. Again no emails of the invitations from him OR from the Administration were found. (Page 543, line 13 of Board Hearing)
- While Moss did not produce email invitations, he falsely testified that he had done so. (Page 543, line 23 and page 546, line 4 of Board Hearing)
- Evans and Duff did not require Moss to show any invitational evidence.

- Moss again changed his story, through attorneys, from claimed invitations by email, from him or the administration to claiming that they were by phone calls. *"There were no scheduled dates for Mr. Bauer to meet solely with Dr. Moss; however, the Superintendent spoke by telephone on a number of occasions with...(Mr. Bauer)"* Childs and Halligan March 18, 2015. Exhibit 26, page 1.
- Telephone records reveal that there were no calls from anyone in the administration. Exhibit 33.

- The court ignored that Mr. Duff and Chairman Evans, acting as Judicial Officer, did not pursue the implications of other allegedly perjurious testimony from the superintendent?

  Q. *"He refused to meet with Ms. Walton; is that correct*?

  A. *"Mr. Bauer refused every directive provided by his employer."* (Page 541)

  "... he refused on multiple occasions to come in and meet with Ms. Walton." page 27 of Board Hearing.

  It is in the record that Appellant met with Walton February 5, 7, 11 and March 5, 2014. (District erroneously claims one meeting on February 6).

  Only one meeting with Walton is in dispute, April 29, 2014, when Walton and Moss did not agree on the terms of the meeting with contradictory statements. (i.e., to allow attendance of a lawyer. Walton = No; Moss = Yes)

  Bauer: *"...I feel that I need my attorney...with me..."* April 28, 2014, Exhibit 28

  Moss: *"You may bring whoever you wish."* April 28, 2014, Exhibit 28.

In a series of emails Appellant had asked Walton to reschedule, at her convenience, with Mr. McMaster, the pro bono attorney.

Walton: *"I will not be contacting your attorney."* April 28, 2014, Exhibit 27.

- In addition to the disagreement over whether Appellant could bring a lawyer to a meeting with Walton, there was also a disagreement between Moss and Walton as to whether Appellant would be allowed to know the subject of the meeting. "I'll direct Ms. Walton to send him an email in writing on what we were planning to meet on..." Walton refused. (Page 509 lines 16-24 of Board Hearing)

15. The Court of Common Pleas failed to consider that the District flagrantly failed to follow the requirements of the Teacher Employment and Dismissal Act.

The Board first voted termination prior to a hearing on June 5, 2014, a violation of *Brown,* Exhibit 4 page 5, of Section 22 of SC Constitution cited above, and TEDA 59-25-460, Exhibit 5 page 2. See Exhibit 35, termination Forms.

"Yet, there is no language in the Employment and Dismissal Act that states that a final decision of the Board is subject to a teacher's right to a hearing after the fact." (Brown v. James Exhibit 4 page 5)

"When the Board voted unanimously...to terminate Brown's contract, it clearly affirmed the notice of dismissal..." (Brown v. James Exhibit 4 page 6)

The Respondent's Counsel, as Advice Counsel, attended the Board's deliberations, a violation of Gonzales v. McEuen, see #3 and #9 above.

No charges were ever issued by the Board, a violation of TEDA 460 Exhibit 5 page 2.

TEDA 59-25-460 Exhibit 5 page 2.

"No teacher shall be dismissed unless written notice specifying the cause of dismissal is first given the teacher by the District Board of Trustees and an opportunity for a hearing has been afforded the teacher."

The administration also gave no opportunity for improvement as required by TEDA 430 Exhibit 5 page 1. Ms. McAden, Principal, testified that she was unaware of the statute that required this. TEDA 440 (Page 426, lines 17-22--based on McAden Deposition Page 16, line 19 to page 17, line 17; Section 59-25-440; Improvement Plan, Exhibit 18)

Appellant to Walton:

"*...If Ms. McAden, in her deposition, says that the improvement plan was your responsibility for a response, and you say that it was Ms. McAden's responsibility for a response, and nobody responded, could that be a problem?*"

Answer: "*No*". (Page 426, lines 17-22)

Appellant asserting that administrators did not follow the law was objected to by the District as *"Calling for a legal conclusion."* Page 349, Line 9

Question to Walton (Human Resources): *"Does that include the right of a hearing before termination of a contract?*

Mr. Williams (for the District): *"You may answer to the extent you can. To the extent that you're asking her for a legal conclusion, I would object to that."*

The Witness *"Yeah, I can't. I cannot answer that question."*

The Human Resources Officer refused to admit that the law says what it says, and the attorneys were complicit.

16. **Factual Errors in Board Order.**

The Court of Common Pleas failed to consider factual errors that were contained in the Board Order of May 19, 2015. The Board Order, page 2, states: *"There was further indication that the statutory deadline for holding a hearing was waived by an attorney, who indicated in writing to counsel for the Complainant that he represented Mr. Bauer. Mr. Bauer did not pursue this objection at the hearing, at least not with evidentiary support".*

That statement is outrageously false ---and compounded.

No evidence was presented for the District's claim. Mr. Duff, who allegedly wrote the order, knew that the claim was false because George McMaster, Esquire, informed him of that error on April 21, 2015 by email. Exhibit 21, also see Exhibit 32.

McMaster, to Duff, *"...Jeffrey Moss in an email on July 3, claimed that I had asked for a delay to the hearing. I did not make any request of any nature regarding any delay and, in fact, was no longer practicing law."*

Duff answered McMaster by writing that McMaster's email was not in *"evidentiary form"*. Exhibit 32.

The hearing should have been held on schedule, as required by TEDA 460 Exhibit 5 page 2. The district had 5 months to prepare and there was no reason to hold the hearing 15 months after the accused event. The delay made it logistically impossible to be reinstated for the ensuing school year, a formidable weapon.

Case law (Middleton) was decided in favor of the Middleton based on a delay of only 4 months. (Appellant was delayed 10 months) The order in Middleton states that leaving the teacher in limbo, awaiting exercise of her right to be heard: *"would lead to the absurd result of rewarding the district for violating statutory rights."*

The Middleton Order continues, quoting from Young v. Charleston County: *"statutory violations alone support reversal of a teacher termination."*

There are other cases in SC in which delay was the cause for reversal. Beaufort County has not received the message.

Again quoting from Middleton. *"It is a well established legal principle that where the terms of a statute are clear, courts must apply those terms according to their literal meaning."*

Another Inaccurate Finding in the Board Order

Page 2, Board Order

"...negligence in supervising students, particularly a Section 504 disabled student, who was left by Mr. Bauer unattended off-campus..."

That is a short clause, 18 words, with 5 defects.

- '*Students*' in the Order is plural. One student was involved. (Evidence cited below)
- The word '*disabled*' is at least misleading. The child was Gifted and Talented, with no physical disability. (The student had something similar to Dyslexia, to Appellant's recollection)
- The word *'left'* is misleading. The child, with an unexcused tardy that morning, had sneaked into class, and hid. His mother was on the way to school to retrieve him. No one knows how he got to the pool, or where he hid. He was not questioned, and access to security camera footage was withheld by the District, in spite of an agreement to preserve that data. (Exhibits 21, 29, 30)
- '*unattended*' is not true. There are at least two swim instructors in attendance at all times.

- *'off campus'* is not accurate. Three schools and the Recreation Center all share a campus on District property. The Center is across the street from the elementary school, 22 yards.

Board Order, "*Students*"

Page 8 of the Board Order misquotes Walton: *"failure to supervise students..."* That statement contradicts Ms. Walton's testimony: *"The incident that he was placed on leave for was negligence to one student..."*

The District's own exhibit contradicts the *"Plural Students"* claim in the Order. The exhibit was a Letter from Walton to Appellant February, 7, 2014, and Walton uses the word "*student*" ...singular. Exhibit 22 (District Supp. Exhibit. 3, in Board Order)

Applying TEDA 430 with a claim of a "*pattern of neglect*' is, therefore, false. Exhibit 5 page 1.

One incident where one student sneaks into one class and hides, in a 17 year teacher's career is not a *pattern*, as required by TEDA 430 Exhibit 5 page 1.

Board Order Psychiatrist

Page 8, of the Board Order *"Mr. Bauer would be required to provide a written statement from a physician certifying that he was capable of caring* (error noted) *out the duties and responsibilities of his job.....Mr. Bauer missed the deadline he was given for submitting the physician's statement, but more importantly, the statement, from a*

psychiatrist who had seen Dr. Bauer, indicated in a rather general manner only that Mr. Bauer was capable of performing the essential functions of his job..."

This from the doctor. *"Who ever wrote that paragraph in the Board Order has seriously misrepresented my professional judgment."* Dr. Laura Rosenbaum-Bloom Affidavit, Exhibit 24.

"Missed the Deadline"? The deadline was March 31, 2014; the date of the evaluation was March 28, well before the deadline. Exhibit 23.

The Board Order went on to say: *"...indicated in a rather general manner only that Mr. Bauer was capable of performing the essential functions of his job..."*

The requirement from Walton was for a general evaluation, i.e.,*"...indicating whether she believes you are presently capable of performing the essential functions of your position, with or without reasonable accommodations."* Exhibit 25.

Dr. Rosenbaum-Bloom wrote:*"He takes his job very seriously and is very conscientious. His role as a Physical Education Instructor means the world to him and he values each student."* Exhibit 23.

The mis-handling of this issue by the District was a violation of Federal Law (see below) and of Due process.

The U.S. Equal Employment Opportunity Commission

"The ADA's requirements.... apply to all of the employees of a covered employer, whether or not they have disabilities."

- *"Any inquiries or examination, however, must be limited in scope to what is needed to determine whether the employee is able to work".*

- *"If an employer decides to make that referral, the basis--why the organization feels the exam is needed -- must be documented."*

- The need for the exam was not documented.

No witness testified as to unfitness for teaching in 587 pages. But--the Board Order uses the word "unfitness" seven (7) times.

The Board Order repeatedly and incorrectly states in the plural that Appellant did not properly supervise *students*. The accusation involved *one* student, and Appellant followed all of the accepted protocols. (TEDA 59-25-430 "*persistent neglect*" Exhibit 5 page 1)

Tardy Student Policy

"*...at one time, the policy was that tardy students could not come late to a safety-intense class?*" Page 31, lines 21-22.

The change in policy allowed a tardy student to slip into a safety-intense class and hide. (The Record page 31, lines 21-22, is based on McAden Deposition, page 18, line 15)

Insubordination as Unfitness

The Board Order states that *insubordination* indicated unfitness for teaching (pages 2, 6, 9). Only Moss had claimed insubordination at the pool event and without specificity. The following exchange on the record should have satisfied the author of the Board Order. (Hearing page 373, lines 8-15)

Question to Moss: *"Are you aware that Mr. Clendaniel testified that the charge of insubordination during the pool event was not true?"*

Moss: *"No, I'm not aware, because I wasn't at his deposition."*

Q *"Would you recommend to the Board that they drop the pool insubordination charge?"*

Mr. Williams: "I object...."

Chairman Evans nods agreement (not recorded)

Donald O. Clendaniel, the Assistant Principal involved, testified repeatedly in his deposition, page 48 line 5-7, that Appellant was not insubordinate. Also TEDA does not use the word 'insubordination'. Hall 330 S.C. 402, 409; Shell 362 S.C. 408 (2005); Kizer 287 SC 545 (1986) The Board Order clearly mis-states the fact.

17. Petitions, Motions, and FOIA requests were ignored.

The Court of Common Pleas failed to consider that Petitions, Motions, and FOIA requests were ignored by the District.

- FOIA Request to Beaufort County School District: Emails (Exculpatory Evidence). June 18, 2014. Exhibit 13. No Response, a misdemeanor. (Pages 489-491)
- Motion/Petition to Beaufort County Board of Education, July 7, 2014. Exhibit 12. No Response
- Petition to schedule hearing: to Board of Education, October 21, 2014. Exhibit 15. No Response

18. **Unreasonable Delay** (also mentioned in #15): The court ignored the fact that the District delayed the Hearing ten (10) months in spite of petitions and motions from Appellant, a violation of case law. (Middleton v. Charleston County, inter alia) *"The district has argued that the lateness of the hearing was 'harmless'. This argument ignores the reality of Ms. Washington-Middleton's status as teacher was in limbo."* (Middleton's delay was 4 months. Appellant's delay was 10 months)

19. Respondent's Counsel acted as Advice Counsel to the Board and replaced the Counsel of Record for the District and the Board, effective July 8, 2014, without consent.

The Court of Common Pleas failed to consider that Respondent's Counsel had acted as Advice Counsel to the Board and replaced the Counsel of Record for the District

and the Board on July 8, 2014, without consent, a violation under SC Rule 11(b). Exhibit 19.

Respondent's Counsel also did not comply with Rule 1.12 (and, arguably, Rule 407, and Rule 8.4(a)) of the South Carolina Rules of Professional Conduct.

20. Court failed to read filed documents.

The court's practice of not reading filed documents, including motions, prior to a hearing may be common, but Appellant urges a common sense directive that circuit court judges are obliged to know the content of pleadings as preparation for a hearing. This would have saved a great deal of confusion, and in one instance the court never did understand the issue. See below.

Example 1: A principal swore that she wrote a letter critical of Appellant on her office computer on a day in which she was not in the office. Internal evidence raised suspicions about the authenticity of the letter.

Questions were raised by a member of the board. (page 262 lines 15-21 of Board Hearing.)

MR. RIVERS: *"Okay. I was just curious, because-- with the letterhead, because without the letterhead, anyone could -- anyone could write it, or it could be post-- post -- I mean, it could be written --"*

THE WITNESS: *"Right."*

MR. RIVERS: *"-- after the time it says it's written, and I was just curious.*

Respondent has refused to authenticate the letter, a one minute operation, at no cost. In fact they simply could take a screen shot of the computer showing the creation date and modification date of the letter. (One other letter was conceded to have been falsely dated!)

Oddly the court wondered why Appellant was asking for a letter that he already had received. JUDGE DUKES: *"But, I mean you've got the letter then? I guess I'm confused. Tell me real quick--"* Transcript of hearing, February 29, 2016, page 7 line 8.

After ten pages of such confusion, Respondent assured the court that, although the letter was *Respondent's exhibit,* it was <u>now</u> irrelevant (Page 18 of same transcript).

Appellant believed that since there were indications that the letter was false the letter was compellingly relevant. Appellant's Motion to Compel was denied. Such a simple, but essential, request could have been complied with ease.

Again, the solution was simple. Respondent could take a screen shot on the author's computer indicating the date of creation.

But the court decided against such a reasonable request.

<u>Example 2</u>: Motion to Compel Technological Evidence. On the day that Appellant was placed on leave the principal was ordered to preserve the technological evidence. (Page 210, line 1 of Board Hearing) For two years the District had refused to make any of this, and other, exculpatory evidence available.

Respondent complained that the Motion, based on two (2) years of seeking the information, was an 11th hour request. (Page 12, line 5 of 2/29/16 Transcript)

In 2014 requesting the *preserved* evidence became so frustrating that Appellant's pro bono attorney wrote a lengthy Preservation Hold letter. Exhibit 29.

Thirty-six days later Childs and Halligan acceded. Exhibit 30.

"An 11th hour request"? No.

Result? Withholding Discovery of exculpatory evidence results in rewarding the district that withheld the evidence.

If the court had become familiar with the issues, the Respondent may not have succeeded in misrepresenting those issues.

21. The court should have considered the technical violation of the District not filing the Board Hearing Transcript in the time frame required by TEDA 480 Exhibit 5 page 3. *"Notice of the appeal and the grounds thereof shall be filed with the district board of trustees. The district board shall, within thirty days thereafter, file a certified copy of the transcript record with the clerk of such court."*

Respondent's numerous motions did not absolve them from following the law.

"The observance of the procedural requirements of the Employment and Dismissal Act is mandatory and not a matter of discretion." Brown v. James Exhibit 4 page 5

- Appellant filed his Appeal on May 29, 2015.
- Respondent filed the transcript of the hearing on September 9, 2015, three (3) months late and filed only after being ordered to do so by the court.

Transcript of Hearing, January 19, 2016, page 51, lines 17+
MR. DUFF: *"The transcript has been filed of record months ago."*

MR. BAUER: *"Three months late."*

MR. DUFF: *"It was filed in accordance with the court's order, with the deadline set in the first order."*

(E) Conclusion

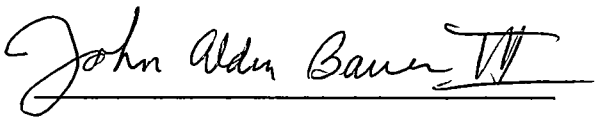
The Record indicates that the District, in concert with the Board, failed to follow the law, knowingly allowed false evidence to be admitted, withheld the true evidence until after the Board Hearing, and continues to withhold other exculpatory evidence.

How can a court ignore such things as a trial without charges, contradictory rulings by de facto co-judicial officers, failure to easily authenticate disputed evidence, ignoring a FOIA request (a misdemeanor), violation of federal law (FERPA), and other misconduct?

The irony is that the school administrators are on the record as being willing to work with Appellant again ("excellent mentor") but lawyers wanted no part of that.

Will the heart of Lady Justitia be further broken?

Respectfully Submitted,



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July 5, 2016

CERTIFICATE OF SERVICE VIA US MAIL

The undersigned, John Alden Bauer III, pro se, certifies that he has served the following counsel of record with the foregoing Initial Appellant Brief and Designated Matter by making a copy of same, postage prepaid, and return address clearly indicated to the following on the 5th day of July, 2016.

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