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THE STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

ORIGINAL

The Honorable Carolyn C Matthews, Administrative Law Judge

Case No 2009-ALJ-30-0103-AP

RECEIVED

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SC Court of Appeals

James "Cal" Bell, Othella Bernard, Katherina Bowyer, Linda M W Bratton,
Ann T Bridges, Rance C Cobb, Jeannie B Croxton, Bernetha L Culbreath,
William K Dreyer, Jacqueline D Farr, Ruth Fritts, Nancy Glenn, Etta Jane
Jones, Geneva M Martin, Mary H McCabe, Beverly McClanahan, Max D
Randolph, Carolyn McIver Smith, Maggie G Williams and Paula Woodlief,

Appellants,

VS

South Carolina Department of Corrections and Palmetto Unified School
District No 1,

Respondents

RECORD ON APPEAL

Volume 8 of 8

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

James "Cal," Bell, Othella Bernard, Katherina
Bower, Linda M W Bratton, Ann T Bridges,
Richard M Cobb as Personal Representative of
the Estate of Rance C Cobb, Jeannie B Croxton,
et al ,

Appellants,

vs

S C Department of Corrections and Palmetto
Unified School District No 1,

Respondents

Docket No 09-ALJ-30 0103-AP

**ORDER OF THE COURT
DENYING THE APPEAL FILED
BY THE APPELLANTS AND
AFFIRMING THE FINAL
DECISION ISSUED BY
THE STATE EMPLOYEE
GRIEVANCE COMMITTEE
IN FAVOR OF THE SOUTH
CAROLINA DEPARTMENT OF
CORRECTIONS**

FILED

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I SYNOPSIS OF THE COURT'S ORDER

SC ADMIN LAW COURT

The Appellants in the above captioned matter filed a consolidated appeal with this Court in which they challenged the Final Decision ["Decision"] issued by the State Employee Grievance Committee ['Committee'] on February 18, 2009. The Appellants, 20 in all,¹ are current and former certified educators who are currently employed or were at one time employed by the South Carolina Department of Corrections ["the Department"] within its Division of Education, also known as the Palmetto Unified School District No. 1 ["PUSD"].

The Appellants argued to this Court "that the Final Decision issued by the [Committee] dated February 18, 2009 must be reversed and Appellants awarded reinstatement to employment with back pay and benefits."²

¹ In addition to the seven (7) Appellants whose names appear in the case caption, the following 13 individuals are Appellants in the instant matter: Bernetha L. Culbreath, William K. Dreyer, Jacqueline D. Farr, Ruth Fritts, Nancy Glenn, Etta Jane Jones, Geneva M. Martin, Mary H. McCabe, Beverly McClanahan, Max D. Randolph, Carolyn McIver Smith, Maggie G. Williams, and Paula Woodlief.

² See Appellants' July 16, 2009 Principle Brief, p. 1.

By its Decision, the Committee denied the Appellants' collective appeal of the Department's decisions denying each of the grievances filed by the Appellants. In their respective individual grievances, all of which were identical in format and substance, the Appellants challenged their separation from employment as a consequence of a reduction in force ["RIF"] implemented by the Department effective June 1, 2003.³ Thus, by its Decision the Committee rejected the various challenges to the Department's June 1, 2003 RIF collectively presented by the Appellants, and, consequentially, the Committee affirmed the Department's denial of each of the Appellants' grievances.

Based upon the record on appeal submitted to the Court by the State Office of Human Resources ["OHR"], the principle briefs filed by counsel, the points articulated by counsel during oral argument, the supplemental materials filed by counsel after oral argument, and the applicable law and regulations, the Court **DENIES** the collective appeal filed by the Appellants and **AFFIRMS** the Decision issued by the Committee in the Department's favor.

³ For the sake of clarity the Court observes that the Department implemented its June 1, 2003 RIF through two (2) items: a RIF policy developed by the Department's Division of Human Resources and a RIF plan. Executive Director Jon Ozmint presented the Department's RIF plan in the form of a March 28, 2003 letter to State Human Resources Director Samuel L. Wilkins (R pp 1626 – 31). As reflected by the last page of Director Ozmint's March 28, 2003 letter to Mr. Wilkins, Director Ozmint included four (4) attachments to the RIF plan detailed in his letter. First, Director Ozmint included a copy of the Department's RIF policy issued March 14, 2003, designated as Policy Number ADM 11 05 (R pp 1633 – 40) and a March 14, 2003 letter addressed to the Director of the Department's Division of Human Resources, John Near, from Chris Byrd, OHR's Assistant Director, in which Mr. Byrd advised Mr. Near that OHR had approved Policy Number 11 05 (R p 1632). Second, Director Ozmint attached materials identified as Listing of Competitive Areas, Areas Map, and Competitive Job Classifications & Classification Series (R pp 1641 – 43). Third, Director Ozmint attached a Listing of Positions being eliminated and Employees eligible for Bumping in Each Competitive Area (R pp 1644 – 59). Fourth, Director Ozmint attached a Sample Letter – Notification of Reduction In-Force, a model letter by which the Department would notify employees whose positions were identified for elimination of their potential lay off (R pp 1953 – 59). On March 28, 2003, Christopher Poore, an OHR Human Resources Consultant, acknowledged OHR's receipt and review of SCDC's RIF plan, which included the Department's RIF policy as submitted by Director Ozmint (R pp 1926 – 27). The Department provided the Court with a compilation of these documents in the sequence described above in support of its principle brief. See the Department's October 7, 2009 Principle Brief, Exhibit A.

II PROCEDURAL HISTORY

A GRIEVANCES FILED BY THE 20 APPELLANTS, THE DEPARTMENT'S DENIAL OF THE GRIEVANCES, AND THE DECISION BY THE STATE HUMAN RESOURCES DIRECTOR TO AFFIRM THE DEPARTMENT'S DENIAL OF THE GRIEVANCES

On or about June 13, 2003, each of the 20 Appellants timely submitted grievances with the Department regarding their separation from employment as a consequence of a RIF implemented by the Department effective June 1, 2003, and, by their grievances, each of the 20 Appellants challenged the RIF. The Department's responsible officials denied each of the 20 grievances by determining that no material issue of fact existed regarding the purported inconsistent or improper application of the Department's RIF plan or policy. Accordingly, the Department did not conduct hearings regarding any of the Appellants' grievances.

Each of the 20 Appellants appealed the Department's denial of their grievances to the State Human Resources Director, and the State Human Resources Director affirmed the Department's denial of these grievances. Each of the 20 Appellants moved the State Human Resources Director to reconsider his decision, and the State Human Resources Director denied the Appellants' respective motions for reconsideration.

B CONSOLIDATED COMPLAINT AND PETITION FOR JUDICIAL REVIEW FILED IN CIRCUIT COURT BY THE 20 APPELLANTS

Subsequent to the final decisions issued by the State Human Resources Director, the Appellants filed a consolidated complaint and petition for judicial review in the circuit court, specifically the Court of Common Pleas for Richland County (R pp 29 – 39). The circuit court, pursuant to Ross v. Med. Univ. of S.C., 453 S.E.2d 880 (S.C. 1995), directed the Department to provide responses to the Appellants' discovery requests and to make agency

officials available for deposition (R pp 2112 – 18) In accordance with the circuit court's directive, Appellants' counsel deposed agency officials in December 2005 and June 2006

The circuit court heard argument regarding the Appellants' consolidated Petition for Judicial Review on December 11, 2006 (R pp 2320 - 2357) and, by order issued January 10, 2007 (R pp 40 – 44), it ruled that material issues of fact existed regarding the Appellants' contention that the Department inconsistently or improperly applied its RIF policy and plan in 2003 Consequentially, the circuit court remanded this matter back to OHR for disposition by hearing before the Committee

C THE DEPARTMENT'S APPEAL OF THE CIRCUIT COURT'S ORDER TO THE COURT OF APPEALS

The Department appealed the circuit court's January 10, 2007 order to the Court of Appeals, and, by order issued May 14, 2008, the Court of Appeals dismissed the Department's appeal (R pp 45 – 47) By dismissing the Department's appeal, the Court of Appeals animated the circuit court's order which remanded this matter back to OHR for disposition by hearing before the Committee

D REMAND OF APPELLANTS' GRIEVANCES BACK TO OHR, THE COMMITTEE'S CONSOLIDATED HEARING REGARDING THE APPELLANTS' CLAIMS, AND THE COMMITTEE'S ADJUDICATION OF THE APPELLANTS' CLAIMS

By letter dated June 4, 2008 OHR directed the Department to process each of the Appellants' original 2003 grievances in accordance with its grievance policy within 45 days (R pp 48 – 49) On July 23, 2008, after the Department did not meet the 45 day deadline established by OHR in its June 4, 2008 letter, the Appellants timely submitted this matter to OHR for disposition in accordance with the circuit court's January 10, 2007 order

OHR, in October 2008, detailed the adjudication of the Appellants' collective appeal to the Committee and, by their October 14, 2008 "Statement of Grounds on Appeal," the Appellants articulated their precise collective and individual challenges to the Department's 2003 RIF (R pp 2695 – 99)

The Committee, after conducting hearing proceedings on November 5, 6, 7, 10, and 17, 2008, December 15 and 18, 2008, and January 22, 26, and 29, 2009 (R pp 50 – 1453), issued its Final Decision in this matter on February 18, 2009 (R pp 8 – 17) By its Final Decision the Committee denied the relief demanded by the Appellants in their appeal and upheld the RIF implemented by the Department effective June 1, 2003

E THE APPELLANTS' APPEAL OF THE COMMITTEE'S FINAL DECISION TO THIS COURT

The Appellants timely filed their collective Notice of Appeal with the Administrative Law Court ["ALC"] on March 10 2009, and this Court assumed jurisdiction of this appeal by an order dated and filed May 21 2009 OHR filed the Record on Appeal on June 24 2009

The Appellants filed their principle brief on July 17, 2009, and the Department filed its principle brief on October 7, 2009 The Appellants did not file a reply brief

This Court, by notice dated October 19, 2009, scheduled oral argument for October 28, 2009, and the Court entertained oral argument as scheduled W Allen Nickles, Jr , Esquire, and Dona Guffey, Esquire, appeared on behalf of the Appellants and Lake E Summers, Esquire, appeared on behalf of the Department ⁴

⁴ Mr Nickles and Ms Guffey have represented each of the 20 Appellants since the inception of this matter Mr Summers has represented the Department since May 2006 The Court extends its compliments to counsel for their respective competence scholarship industry and decorum

At the conclusion of oral argument, the Court directed the parties to file supplemental materials, and the parties filed their respective supplemental briefs – in the format prescribed by the Court during the oral argument – on November 17, 2009

By letter filed on November 18, 2009, the Appellants rebutted any assertion advanced by the Department in its supplemental brief that the Appellants had ‘ waived ’ any equal protection claim during the argument they articulated to the circuit court on December 11, 2006 when the circuit court considered the Appellants’ petition for judicial review ⁵

On November 19 2009, the Department filed its objection to the entirety of the materials designated as “Attachment 1,” which the Appellants submitted in support of their supplemental brief, as well as the portion of the Appellants’ supplemental brief associated with the materials designated as “Attachment 1 ” Along with its objection to “Attachment 1 ’ and the portions of the Appellants’ supplemental brief associated with “Attachment 1,” the Department concurrently moved to strike these materials and the allied portions from the Appellants’ supplemental brief On November 20, 2009, the Appellants filed their memorandum in opposition to the Department’s objections to and motion to strike “Attachment 1 ⁶”

III APPLICABLE LEGAL STANDARD

The Appellants’ appeal from the Committee s February 18, 2009 Final Decision is before this Court pursuant to S C Code Ann §§ 1-23-600(D) and 8-17-340(F) Accordingly, this Court sits in an appellate capacity under the Administrative Procedures Act rather than as an independent finder of fact

⁵ The Court provides its decision regarding this issue in Section V(A) below

⁶ The Court provides its decision regarding this issue in Section V(B) below

Thus, the provisions of S C Code Ann § 1-23-380(5) govern the circumstances in which an appellate body, such as this Court, may reverse or modify an agency decision, such as the Committee's Final Decision. In its entirety, § 1-23-380(5) reads as follows:

The court may not substitute its judgment for the judgment of the [Committee] as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are

- (a) in violation of constitutional or statutory provisions,
- (b) in excess of the statutory authority of the [Committee],
- (c) made upon unlawful procedure,
- (d) affected by other error of law,
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Additionally, this Court must not only review the manner in which the Committee applied the controlling legal principles, but it must also determine if the factual determinations made by the Committee meet the substantial evidence standard.

Under this standard, the party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. Waters v. S.C. Land Res. Conversation Comm'n, 467 S.E.2d 913, 917 (S.C. 1996). In applying the substantial evidence rule, the factual findings of an administrative agency are presumed to be correct. Rodney v. Michelin Tire Co., 466 S.E.2d 357, 359 (S.C. 1996). The agency's decision will not be set aside simply because reasonable minds may differ on the judgment. Lark v. Bi-Lo, Inc., 276 S.E.2d 304, 307 (S.C. 1981). Accordingly, the fact that the record, when considered as a whole, presents the possibility of drawing two (2) inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. Waters,

467 S E 2d at 917, Grant v S C Coastal Council, 461 S E 2d 388, 391 (S C 1995) In determining whether an agency's decision is supported by substantial evidence, the reviewing court "need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the administrative agency reached ' DuRant v S C Dep't of Health & Envtl Control, 604 S E 2d 704, 706 (S C Ct App 2004)

An "abuse of discretion occurs when the judge s ruling is based upon an error of law, such as application of the wrong legal principle, or, when based upon factual conclusions, the ruling is without evidentiary support, or when the judge is vested with discretion but the ruling reveals no discretion was exercised, or when the ruling does not fall within the range of permissible decisions applicable in a particular case" Ex parte Capital U Drive-It, Inc., 630 S E 2d 464, 467 (S C 2006) Additionally, a decision is arbitrary if no rational basis for the conclusion exists, or when it is based on one's will and not upon any course of reasoning and exercise of judgment A decision may also be arbitrary if it is made at plcasure without adequate determining principles or is governed by no fixed rules or standards Converse Power Corp v S C Dep't of Health & Envtl Control, 564 S E 2d 341 (S C Ct App 2002)

IV ANALYSIS OF THE ISSUES ON APPEAL IDENTIFIED BY THIS COURT AFTER ITS REVIEW OF THE APPELLANTS' PRINCIPLE BRIEF

A ISSUES ON APPEAL AND SUPPORTING ARGUMENTS FROM THE APPELLANTS' PRINCIPLE BRIEF

The Appellants did not identify distinct issues on appeal within their principle brief Instead, the Appellants challenged the Committee's Decision by providing 27 enumerated paragraphs from which they contended that the "record as a whole demonstrates that the Department deviated from controlling policy and law in the challenged RIF ⁷

⁷ See Appellants July 17 2009 Principle Brief p 3

This Court distilled the following three (3) distinct issues on appeal from the 27 paragraphs enumerated by the Appellants within their principle brief

- 1 **The Department violated its own RIF policy, state law and regulations controlling RIFs, and our state's constitution by including the Appellants and other certified educators it employed in the RIF it implemented effective June 1, 2003,⁸**
- 2 **The Department violated its own RIF policy, state law and regulations controlling RIFs, and our state's constitution by its decision to divide the entire agency into 11 competitive areas, the key decision by which it implemented its RIF effective June 1, 2003,⁹ and**
- 3 **The Department violated its own RIF policy, state law and regulations controlling RIFs, and our state's constitution in the manner by which it retained and hired temporary employees before and after the RIF it implemented effective June 1, 2003, as well as in the manner by which it retained employees who accepted the retirement opportunity it offered during the RIF recall period¹⁰**

In support of these three (3) distinct issues on appeal, the Appellants provided a series of overlapping legal arguments divided into four (4) sections. These legal arguments identified instances in which the Department's decisions and actions (1) purportedly violated provisions of the Department's own RIF policy,¹¹ (2) purportedly violated state statutes,¹² (3) purportedly violated provisions of our state's constitution,¹³ and (4) purportedly deprived the Appellants of rights apparently secured to them by the Department's own RIF policy, state law, and state regulation¹⁴

⁸ Id. pp 3 – 5 paras 1 – 9

⁹ Id. pp 5 – 8 paras 10 – 18

¹⁰ Id. pp 8 – 11 paras 19 – 27

¹¹ Id. pp 14 – 18

¹² Id. pp 19 – 23

¹³ Id. pp 23 – 24

¹⁴ Id. pp 24 – 26

B THE DEPARTMENT'S ARGUMENTS IN RESPONSE

In response to the arguments offered by the Appellants, the Department argued within its principle brief that there was sufficient evidence before the Committee to allow reasonable minds to arrive at the findings rendered by the Committee in its adjudication of the Appellants' collective appeal. The Department further argued that the Committee's conclusions of law reflected the proper application of controlling legal principles, particularly in light of the reality that the interpretation and application of the applicable regulations, statutes, and precedent constituted matters of first impression before any judicial or quasi-judicial body.

C ANALYSIS

As demonstrated below, this Court agrees with arguments presented by the Department in response to the Appellants' principle brief.

1 The Department did not violate its own RIF policy, state law or regulations controlling RIFs, or our state's constitution by including the Appellants and other certified educators it employed in the RIF implemented effective June 1, 2003

In support of the first issue on appeal distilled by the Court from the 27 enumerated paragraphs provided by the Appellants in their principle brief, the Appellants effectively argued that the Department should have excluded them, and the other certified educators it employed, from the RIF it implemented effective June 1, 2003.

The Appellants presented the following description of the PUSD:

The [PUSD] is a single, statewide school district created by the General Assembly and administered by SCDC (S.C. Code Ann. § 24-25-10, ROA p. 2281). All educators in the District must be employed, supervised and terminated according to SCDC policies and procedures (S.C. Code Ann. § 24-25-90, ROA p. 2291).¹⁵

¹⁵ See Appellants' Principle Brief pp. 3–4, para. 1. In its Finding of Fact No. 4, the Committee acknowledged that the Appellants contended that during the development and administration of the RIF plan the PUSD was not treated as a single unified school district as required by law (R. p. 12).

The Appellants continued their description as follows

The [PUSD] has one Board and one Superintendent (S C Code Ann §§ 24-25-40 through 90, ROA pp 2285-2291) All educators are held to the same standards and there are no geographic regions within the [PUSD] (ROA pp 513-515, 525 528, 863-865, 913 2614)¹⁶

The Appellants then presented a chronology of events beginning with Director Ozmint's appointment as the Department's Executive Director in January 2003 and his decision to construct and implement a RIF.¹⁷ As acknowledged by the Appellants, the Department submitted a new RIF policy to OHR, which OHR approved on March 14, 2003.¹⁸ (R pp 1633 – 40) On March 28, 2003, the Department submitted its RIF plan to OHR, which described the process by which the Department would implement the RIF.¹⁹ (R pp 1626 – 59, 1953 – 59, 1926 – 27)

The Appellants then observed that Director Ozmint identified the positions which would be subject to separation pursuant to the Department's RIF plan and that, of the 148 positions designated for separation pursuant to the plan, "approximately" 84 were certified educators.²⁰ Finally, the Appellants observed the following

Higher paid educators were eliminated to get the most "bang for the buck" (ROA pp 1038 1039, 1054-1056, 1072, 1079-1080 2682) Appellants and SCDC witnesses testified that other SCDC employees complained about the "unfairness" of statutorily required educator pay raises (Final Decision Findings of Fact No 18 ROA p 14) Director

¹⁶ See Appellants Principle Brief p 4 para 3

¹⁷ Id. p 4 para 5

¹⁸ Id.

¹⁹ Id. p 4 para 6 While the Appellants focused on Director Ozmint's role the record clearly reflects that John Near who in 2003 served as the Director of the Department's Division of Human Resources drafted the Department's RIF policy and prepared its RIF plan Further Mr Near testified that OHR representatives worked with him and provided input into the final version of the Department's RIF policy (R pp 700 – 06) and Mr Near testified that OHR representatives provided specific input into the final version of the RIF plan (R pp 732 – 48)

²⁰ Id., p 5 paras 7 – 8

Ozmint testified that these raises were ‘taken out of the hide’ of other employees (ROA pp 1045-1046, see also ROA pp 1052, 1095 1096)²¹

In the four (4) sections of their supporting legal argument the Appellants challenged the legitimacy of the Department’s decisions and actions which identified their certified educator positions for elimination. In the section addressing the Department’s purported violations of applicable statutes, the Appellants argued that the Department violated § 24 25-40 by “conduct[ing] the RIF without conferring with the [PUSD] Board of Trustees or considering the laws creating and governing the [PUSD]”²². In the section addressing the Department’s purported violations of our state’s constitution, the Appellants argued that their separation from employment deprived them of property interests secured to them by Article I § 3,²³ and they also argued that their separation from employment affected their liberty interests to pursue their chosen profession in violation of Article I, § 22²⁴

²¹ Id. p 5 paragraph 9. While the Appellants did not claim in their principle brief that the Department retaliated against them in the manner by which it constructed and implemented its 2003 RIF, this passage from their principle brief hints at such a claim. In its Finding of Fact No. 17, the Committee recognized that the Appellants contended that SCDC, through the RIF plan, arbitrarily and capriciously retaliated against SCDC educators who took legal action [Abraham v. PUSD No. 1 & S.C. Dep’t of Corr. 538 S.E.2d 656 (S.C. Ct. App. 2000)] to compel SCDC to provide compensation in accordance with law. (R. p. 14). As explained in Section IV(D) below, however, this Court concludes that the Appellants abandoned their retaliation claim in their appeal.

²² Id. p 22 Section IV. In its Finding of Fact No. 7, the Committee acknowledged the identical argument offered by the Appellants, namely that they contended the PUSD School Board was not involved in development of the RIF plan as required by law and the district superintendent was merely informed of the action. (R. p. 13).

²³ Id., p 24 Section I(a). The Appellants also cited Brown v. S.C. State Bd. of Educ. 391 S.E.2d 866 (S.C. 1990) in support of this argument. This Court concludes that Brown is inapplicable to this case, as our Supreme Court in Brown found that S.C. Code Reg. 43-59 (Supp. 1989), a regulation which allowed state officials to withdraw a teacher’s certification without notice and an opportunity to be heard, was unconstitutional. In short, the facts in Brown are entirely different from the facts here, because no action undertaken by the Department in formulating or implementing its 2003 RIF deprived any of the Appellants their teaching credentials.

²⁴ Id. p 24 Section II. The Appellants cited Brown as well as Johnson v. Spartanburg County Sch. Dist. No. 7, 444 S.E.2d 501 (S.C. 1994) in support of this argument. This Court concludes that Johnson is inapplicable to this matter, as the issues on appeal in Johnson concerned the non-renewal of a teacher’s employment contract and the interpretation of the Teacher Employment and Dismissal Act. No action undertaken by the Department in formulating or implementing its 2003 RIF resulted in the non-renewal of a teacher’s employment contract. The Appellants also invoked § 24 25-90 in support of this argument. In its Finding of Fact No. 6 (R. p. 12), the Committee acknowledged that the Appellants contended that the RIF plan failed to take into account experience

However, the Appellants offered these identical or nearly identical arguments to the Committee, and this Court concludes that the Committee, by applying and interpreting the applicable law, properly denied the Appellants' appeal of the Department's decision to deny their grievances

The Appellants' argument that the Department violated § 24-25-40 by "conduct[ing] the RIF without conferring with the [PUSD] Board of Trustees or considering the laws creating and governing the [PUSD],²⁵ reflects nothing other than their own interpretation of this statutory provision. Likewise, by stating that the PUSD "is a single, statewide school district created by the General Assembly and administered by" the Department,²⁶ the Appellants offered nothing more than their own interpretation of § 24-25-10

The testimony offered by the Appellants and the Department's management officials, specifically Ms. Gern Miro along with the plain and ordinary meaning of the provisions of § 24-24-10, *et seq*, and, specifically § 24-25-90, contradict the notion that the Department merely 'administers' the PUSD. Ms. Miro has since early 2003 served as Deputy Director for the Department's Programs and Services, and, in this position, she has been and remains responsible for the Department's Division of Education (R pp 468 – 69 and 854 – 55). When asked to describe the relationship between the Department's Division of Education and the PUSD, Ms. Miro testified as follows

and credentials such as degrees, certificates, and positions held, which are uniformly applied in the field of education.

²⁵ See note 22 above.

²⁶ See note 15 above.

There really isn't any difference. It's—it's a part of that division. It's an educational component that was mandated by law that is a part of the Division of Education to provide services, educational opportunities for our inmates, education and vocational opportunities for our inmates (R p 864)

During her testimony, Ms. Miro negated the Appellants' persistent contention that the PUSD somehow stood apart from the Department's Division of Education or from the Department itself as a separate and distinct entity (R pp 863 – 70)

Thus, this Court concludes that the Committee properly recognized the realities of the relationship amongst and between the Appellants, the PUSD and the Department as follows

SCDC management was not obligated by statute or policy to consult with the PUSD School Board or obtain its approval before implementing the RIF. While good business relations may, in the opinion of some, dictate the feedback from management of affected areas be solicited, it is not required. The PUSD exists as a unit under the purview of the SCDC Executive Director, not as a separate entity, and, therefore, it is not afforded any special rights or treatment not afforded to other divisions within the agency. Further, § 24-25 90 of the South Carolina Code of Laws states "[t]he superintendent of the district [PUSD] and all other educational personnel shall be employed, supervised, and terminated according to [the Department's] personnel policies and procedures (Committee Conclusion of Law No. 3, R pp 16 – 17)

The Appellants overlooked the reality that the Department's 2003 RIF affected all of its divisions, not just the PUSD, which constitutes the Department's Division of Education. However, the Committee observed the following (R p 11)

The positions of 148 SCDC employees were eliminated effective June 1, 2003. Of those 148 positions, 84 (56.75%) were PUSD positions including Appellants in this appeal who were certified educators employed by SCDC in the PUSD (Committee Exhibit #1, pp 1 – 39)

Thus, 64 of the 148 positions, or 43.25%, eliminated under the RIF implemented by the Department effective June 1, 2003 were non-District positions. This fact reinforces the reality

that the Appellants like all other employees of the Department were properly subject to the RIF implemented by the Department effective June 1, 2003

This reality is again reinforced by an examination of the definitions of “Employee” and “Employing Agency” from the applicable state regulations. An “employee,” as defined by S C Regulation § 19-700, is ‘any person in the service of an agency who receives compensation from the agency and where the agency has the right to control and direct the employee in how the work is performed.’ An “employing agency,” as defined by the same regulation, is “the agency having primary control over the services of the employee.’ This Court concludes that the Committee properly harmonized the Department’s primacy, as the “employing agency,” over its “employees,” including the Appellants, within the context of a RIF driven by the need to address budgetary pressure

SCDC’s RIF plan was, by design, based on budgetary pressure to reduce costs. As such, it is reasonable for SCDC to develop a plan that maximized savings while retaining as many employees as possible in essential areas. In SCDC’s efforts to reduce budget deficits, a hierarchy of priorities was identified and programs were evaluated for ways to reduce costs while still providing essential services. The education program was one area where significant cost-saving opportunities existed. Other areas, such as security, housing, clothing, food, and healthcare, in developing and implementing the RIF plan, were deemed to be areas where further cuts could not be tolerated. (Conclusions of Law, R p 16)

Thus, this Court concludes that the Committee properly determined that the Department legitimately and lawfully included the Appellants and other certified educators it employed in its June 1, 2003 RIF plan.

Additionally, the selection of education employee’s positions for inclusion in the RIF was not the result of a belief by other employees or members of [SCDC] management that educators were overpaid. This high number of educators involved in the RIF was the result of basic cost-saving principles to maximize savings and retain as many employees as possible due to the high salaries of most educators compared to other personnel. (Conclusion of Law No 1, R p 16)

2 The Department did not violate its own RIF policy, state law or regulations controlling RIFs, or our state's constitution by dividing itself into 11 competitive areas for the purposes of implementing its RIF effective June 1, 2003

In support of the second issue on appeal the Court distilled from the 27 enumerated paragraphs provided by the Appellants in their principle brief, the Appellants argued that the Department violated its own RIF policy, state law and regulations, and our state's constitution by dividing the agency into 11 competitive areas, the key decision by which it implemented its RIF effective June 1, 2003

The Appellants presented their chronology of the events which resulted in the designation of these competitive areas. As recounted by the Appellants, Director Ozmint instructed the former Director of the Department's Division of Human Resources, John Near, 'to draw 'competitive areas' in a way to minimize employee bumping and maximize savings'²⁷, Mr Near, upon receiving these instructions "created [11] geographic regions within SCDC for purposes of the RIF,' regions which, according to the Appellants, "were not restricted to areas where staff was separately organized or clearly distinguishable from the staff in other areas"²⁸. According to the Appellants, "Director Ozmint admitted that the geographic regions existed only for the purpose of the RIF and to reduce bumping"²⁹.

²⁷ See Appellants' Principle Brief p. 5 para. 10. In an associated footnote the Appellants observed that before Director Ozmint's tenure began, SCDC had experienced the closing of the Central Correctional Institution (CCI) in Richland County. Id. p. 5 n. 2. As recounted by the Appellants, "[r]ather than restrict employment opportunities geographically, SCDC permitted all affected employees to obtain positions at other facilities, and [a]s a result employees interested in maintaining employment with SCDC found positions." Id. However, as described by Mr. Near, the Court finds that the circumstances which allowed the agency to place SCDC employees affected by the closure of CCI differed dramatically from the circumstances which compelled SCDC to conduct its 2003 RIF. (R pp. 723 - 35)

²⁸ See Appellants' Principle Brief p. 5 para. 11.

²⁹ Id. p. 5 para. 12.

After providing their accounting of the impact of the RIF upon certified educator positions at various institutions operated by the Department,³⁰ the Appellants then invoked portions of the testimony provided to the Committee by Ms. Miro and the deposition testimony provided by former District Superintendent Wendell Blanton in an attempt to support their contention that the Department improperly established 11 competitive areas in the course of implementing its 2003 RIF.³¹

In the four (4) sections of their supporting legal argument, the Appellants challenged the legitimacy of the Department's decisions and actions which resulted in the establishment of the 11 competitive areas it used to implement its RIF effective June 1, 2003. In the section addressing the Department's purported violations of its own RIF policy, the Appellants invoked paragraph 11 of the March 14, 2003 edition of Policy Number ADM 11.05 and then provided six (6) succinct points and a narrative which argued that the Department violated its own RIF policy by establishing 11 competitive areas within its RIF plan.³² In the section addressing the Department's purported violations of applicable statutes, the Appellants argued that the Department violated § 24-25-10 by establishing 11 competitive areas within its RIF plan as these areas "arbitrarily divided 'the special statewide unified school district',³³ and consequentially, the RIF resulted in the reduction of "[PUSD] educational services to designated facilities that do

³⁰ Id. pp. 5 – 6 paras. 13 – 14. Later, the Appellants stated each of them would have been willing to perform services outside the geographic region created for the RIF in order to retain employment, and they provided examples of various Appellants who obtained employment outside the geographic region from which they were separated. Id. pp. 7 – 8 para. 18. While it is uncontested that various Appellants found work outside of the geographic region from which they were separated, this Court concludes that such facts are not and were not relevant to whether the Department complied with its own RIF policy, state law and regulations, and our state's constitution by its decision to divide the agency into 11 competitive areas as part of its agency-wide RIF plan effective June 1, 2003. Moreover, this Court concludes that such facts have no bearing on the legitimate fiscal crisis confronted by SCDC in early 2003 as recognized by the Committee in its Final Decision (R. p. 16).

³¹ See Appellants' Brief pp. 6 – 7 paras. 15 – 16.

³² Id. pp. 14 – 16 Section I.

³³ Id. pp. 20 – 21 Section I.

not operate on a 'statewide' basis³⁴” The Appellants also argued that the Department violated § 24-25-90 by establishing 11 competitive areas within its RIF plan³⁵

However, the Appellants offered these identical or nearly identical arguments to the Committee, and this Court concludes that the Committee, by applying and interpreting the applicable law,³⁶ properly denied the Appellants' appeal of the Department's decision to deny their grievances. For example, the Appellants, in arguing to this Court that the Department violated § 24-25-10 and § 25-25-90 by establishing 11 competitive areas within its RIF plan, simply offer nothing other than their own interpretation of these statutory provisions³⁷

Furthermore, the Appellants argued the following

There is no commuting limit for employees of SCDC (ROA pp 621-623) Ms Miro for example has commuted forty seven miles one way each day for her duties as Warden of Allendale Correctional Institution and as a [Division] Director of SCDC. SCDC staff often live far from their places of employment, including out of state. There is no requirement that an employee live close to his or her place of work and employees often choose to commute and advance in their service to SCDC (ROA pp 527 528)³⁸

In raising this argument, the Appellants assailed Mr Near's decision that an employee's bumping rights under the 2003 RIF would be limited to a reasonable geographic radius of 30 miles³⁹. Mr Near's decision clearly manifested itself within the March 14, 2003 RIF policy Mr Near and his staff developed, specifically within paragraph 7.2 of Policy Number ADM-11.05

³⁴ Id., p 21

³⁵ Id. p 22 Section V

³⁶ See the Committee's Findings of Fact Nos 1 – 9 (R pp 12 – 13)

³⁷ The Appellants offered the same arguments to the Committee as reflected by the Committee's Findings of Fact Nos 4 and 5 (R p 12)

³⁸ See Appellants' Principle Brief p 7 paragraph 17

³⁹ Mr Near testified regarding his understanding that "[t]he state has a rule that talks about you can't involuntarily move people more than . . . I think it's around thirty miles or to a nearest facility" (R p 715)

When a vacancy occurs in an employee's competitive area which is (1) in the *same job class*, pay band, pay level or *lower* and *functionally similar* as the position held prior to the lay off, downward bumping, or reassignment and (2) within a reasonable geographic distance (30 mile radius) of the work location of the employee, then the eligible employee will be offered the vacancy provided s/he meets the minimum training and experience qualifications. The position must be accepted in writing by the employee within two (2) working days of the offer or s/he waives any future recall rights (R p 1638) [emphasis supplied in policy]

Director Ozmint echoed this concept in his March 28, 2003 letter to OHR Director Wilkins when he described the competitive areas and competitive job classification series encompassed by the RIF plan

The positions to be eliminated in this [RIF] plan are located across the state of South Carolina. Competitive areas have been designated to include entire groups of institutions and divisions within a reasonable geographic area to accommodate the realistic opportunity for staff relocation, and hopefully, recall and reinstatement. In addition, by expanding the number of locations, adverse impact may be minimized on specific groups of employees (R p 1627)

In assailing the Department's decision regarding the establishment of 11 competitive areas and the geographic limitations they represent the Appellants overlooked the definition of 'involuntary reassignment' provided in S C Regulation § 19-700

INVOLUNTARY REASSIGNMENT – the movement of an employee's principal place of employment in excess of 30 miles from the prior workstation at the initiative of the agency

Thus, contrary to the Appellants' arguments, this Court concludes that the 11 competitive areas and the geographic limitations they represent were reasonably derived from our state code of regulations

By way of a final example, the Appellants offered a description of Ms Miro as the 'Director of the SCDC Education Division that includes the [PUSD]'⁴⁰. However, this description is misleading, as, according to Ms Miro's testimony, the PUSD and the

⁴⁰ See Appellants Principle Brief p 6 para 15

Department's Division of Education are one and the same under the Department's organizational structure. Ultimately, just as they did before the Committee, the Appellants overlooked the reality that the RIF undertaken by the Department in 2003 affected all of the Department's divisions, not just the PUSD, which constitutes the Department's Division of Education. In light of these realities, this Court concludes that the Committee properly determined that the Department legitimately and lawfully established the 11 competitive areas it used to implement its RIF effective June 1, 2003.

The development of the competitive areas did not violate SCDC's RIF policy, nor were they drawn to retaliate against or punish SCDC educators.⁴¹ Such groupings are specifically allowed in SCDC's RIF policy and, as reflected in the RIF policy, the manner in which the competitive areas are designated is left to the discretion of the Executive Director of SCDC. As such, the Committee finds that the geographical competitive areas were allowable under SCDC's RIF policy and their determination was left to the discretion of the Executive Director. Further, the Committee finds that neither state law nor SCDC's RIF policy required the PUSD to be treated as a single competitive area in the event of a RIF or that employees be afforded agency-wide bumping rights. In addition, the PUSD employees were not singled out because SCDC was divided into 11 competitive areas which also limited the bumping rights of employees not affiliated with the PUSD. (Conclusion of Law No. 2 R p 16)

3 The Department did not violate its own RIF policy, state law or regulations, or our state's constitution by its decisions to retain and hire temporary employees before and after the RIF it implemented effective June 1, 2003 and to retain employees who accepted the retirement opportunity it offered during the RIF recall period

In support of the third issue on appeal, the Court distilled from the 27 enumerated paragraphs provided by the Appellants in their principle brief, the Appellants argued that the Department violated its own RIF policy, state law and regulations and our state's constitution by retaining and hiring temporary employees before and after the RIF it implemented effective June

⁴¹ Again, as explained in Section IV(D) below, this Court concludes that the Appellants abandoned their retaliation claim in their appeal. See also note 21 above.

1, 2003 and by retaining employees who accepted the retirement opportunity after the RIF it implemented effective June 1, 2003

The Appellants provided a list of certified educators with less service than the Appellants who SCDC retained after the RIF ⁴² They also stated that some Appellants testified, purportedly without contradiction, that they had been “replaced by part-time, less experienced or temporary staff” and that “[t]emporary employees and part time employees were retained and hired during the RIF recall period ⁴³” They then referenced Ms Heather Pope, a managing partner of OHR, who “testified that the following question and answer appeared on the OHR website during the RIF period under review ”

Q Can an agency hire a temporary employee to replace an employee affected by a RIF or to perform the functions of a person eliminated by a RIF?

A An agency may not hire a temporary employee to perform the duties of an employee affected by a RIF If these duties are to be performed within one year of the effective date of the RIF the agency should reestablish the position and implement its recall procedure ⁴⁴

The Appellants next discussed two (2) “retirement opportunities” purportedly implemented by the Department during the RIF recall period, which commenced on the RIF s effective date of June 1, 2003 and concluded on May 31, 2004 ⁴⁵ According to the Appellants,

⁴² See Appellant s Principle Brief pp 8 – 9 para 19

⁴³ Id. pp 9 10 paras 20 – 21

⁴⁴ Id. p 10 para 22 The Appellants later argued that by purportedly ignoring the guidance provided by this question and answer from OHR s website the Department violated a right allegedly secured to them under South Carolina precedent namely that [a]n employing agency may not disregard procedural legislation to remove demote or otherwise deprive an employee of his salary or position See Appellants Principle Briet p 26 Section II(b) This Court concludes that no such right exists under South Carolina precedent Moreover this Court concludes that the Committee properly determined that the Department did not violate any internal policies or procedures or any guidelines established by [OHR] (R p 17)

⁴⁵ Id. p 10 para 23 According to the Appellants the Department implemented the two (2) ‘retirement opportunities on July 18 2003 and March 25 2004 However this Court s review of the record reveals that the Department implemented only one (1) retirement opportunity during the RIF recall period which ran from June 1

these “retirement opportunities” allowed full-time employees to retire and return to work in “temporary” capacities at 75% of their former salaries ⁴⁶

The Appellants then provided their assessment of the regulatory authority purportedly applicable to the “retirement opportunities” the Department implemented during the RIF recall period. According to the Appellants, S.C. Regulation §§ 19-700 and 19-719.01 support the proposition that “a public employee who retires experiences a ‘break in service’⁴⁷.” The Appellants then cited S.C. Code Ann. § 9-1-1790 for the proposition that the retirees who accepted the “retirement opportunities” offered by the Department during the recall period “lose any enforceable right to re-employment” and for the proposition that a “retiree must leave active employment for a minimum of 15 days”⁴⁸. The Appellants then stated the following:

During the recall period of June 1, 2003 – May, 31, 2004, SCDC employed [23] individuals in temporary positions to perform services formerly provided by full-time, certified educators. During the same period, SCDC assigned responsibilities formerly performed by full-time, certified educators to 19 individuals as non-certified staff ⁴⁹

2003 to May 31, 2004. This Court’s review of the record also reveals that the retirement opportunity purportedly offered by the Department on March 25, 2004 was not a retirement opportunity at all. Instead, on March 25, 2004, the Department issued a memorandum which announced a retirement opportunity with effective dates between June 18 and July 1, 2004, clearly after the conclusion of the RIF recall period on May 31, 2004. (R. p. 2572). Ms. Patricia Thraikill, the Assistant Director of the Department’s Division of Human Resources, testified that the retirement opportunity discussed in the agency’s March 25, 2004 memorandum constituted the same type of opportunity but offered in a different fiscal year. (R. p. 971).

⁴⁶ Id.

⁴⁷ Id. pp. 10 – 11, para. 24.

⁴⁸ Id.

⁴⁹ Id. p. 11, para. 25.

In an associated footnote the Appellants argued that Appendix A to their principle brief established “that there were twice as many new permanent and temporary education employment actions during the recall period as the number of Appellants separated by RIF”⁵⁰

The Appellants then asserted the following parameters associated with “temporary employee” status

By regulation, a “temporary employee” cannot exceed one year of employment. Additionally, a “temporary position” cannot be in place for more than one year. S.C. Regulations R. 19-700. During the recall period, SCDC employed individuals as “temporary employees” and re-employed individuals in “temporary positions”⁵¹.

In the four (4) sections of their supporting legal argument, the Appellants presented various challenges to the Department’s decision to retain and hire temporary employees before and after the June 1, 2003 RIF and to retain employees who accepted the only retirement opportunity it offered during the RIF recall period. In the section addressing the Department’s purported violations of its own RIF policy, the Appellants argued that the Department violated paragraph 2.3 of Policy Number ADM-11-05 by employing “individuals in temporary positions and permanent positions during the recall period without notifying RIF’ed employees,” and by offering “retiring employees return to employment after a ‘break in service’ during the recall period without notifying RIF’ed employees”⁵². The Appellants further argued that the Department violated paragraphs 7.1, 7.5, and 11 of Policy Number ADM-11-05 in the manner by which it retained and managed its pool of temporary employees during the RIF’s recall period.⁵³

⁵⁰ Id. p. 11 n. 3

⁵¹ Id. p. 11 para. 26

⁵² Id. p. 17 Section II(i)

⁵³ Id. p. 18 Sections III, IV, and V

In the section addressing the Department's purported violations of applicable statutes, the Appellants argued that the Department violated S C Code Ann § 24-25-70(7) by employing "non-certified instructional staff" and "former certified instructional staff in non certified positions to perform their former duties," and by offering "instruction through individuals hired in non-certified positions"⁵⁴ The Appellants also argued that the Department violated S C Code Ann § 24 25-90 and its own RIF policy when it purportedly "hired temporary employees to replace educators separated by RIF and allowed individuals who voluntarily separated for purposes of retirement to return to temporary positions in favor of employees separated by RIF"⁵⁵ The Appellants further argued that the Department violated S C Code Ann § 8-11 185 by guaranteeing "re-employment at lower pay to employees who chose to 'retire,' because, "[b]y law, these employees experienced a 'break in service' and were not entitled to preference over RIF'd employees who retained 'covered employee status during the recall period"⁵⁶ Finally, in the section addressing the Department's purported violations of our state's

⁵⁴ Id., p 21 Section III The Appellants referenced the post RIF duties assigned by the Department to Appellants Nancy Glenn Mary McCabe and Beverly McClanahan. Earlier in their principle brief the Appellants stated that Ms Glenn Ms McCabe and Ms McClanahan each testified that after the RIF they performed their former education duties while being paid as security officers that SCDC did not have signed position descriptions for them and that Ms Glenn received a memorandum before the [effective date of] the RIF that she would continue her library services in her new position Id. p 11 para 27 However this Court's review of the record yields the conclusion that the Appellants did not provide a complete narrative of the post RIF duties fulfilled by these three (3) Appellants For example the Appellants neglected to mention that the EPMS issued to Ms Glenn covering the period of time immediately after the RIF's effective date of June 1 2003 clearly stated that Ms Glenn had made a wonderful transition from librarian to [correctional] officer (R pp 1253 and 2991) Finally the Appellants invoked the post RIF duties the Department assigned to Appellants Glenn McCabe McClanahan and James Cal Bell to argue that the Department violated a right to particular compensation allegedly secured to them under the South Carolina Court of Appeals decision in Abraham v PUSD No 1 & S C Dep t of Corr 538 S E 2d 656 (S C Ct App 2000) (See Appellants Principle Brief p 25 Section I(b)) However this Court again concludes that no such right legitimately exists under Abraham and the Committee properly considered these facts when it ruled in the Department's favor

⁵⁵ See Appellants Principle Brief p 22 Section V

⁵⁶ Id. p 22 - 23, Section VI(b) In Section VI(a) the Appellants argued that the Department filled vacancies following the RIF without providing priority consideration to RIF'd educators However this Court's review of the record reveals that the Department recalled Ms McCabe back to a certified educator position approximately one (1) month after she had accepted a correctional officer position (R pp 248 - 49 256 - 57 and 261)

constitution, the Appellants argued that SCDC violated Article I, § 3 of our state's constitution, because, during the RIF's recall period, it "allowed employees choosing to retire to return following a 'break in service' without allowing the Appellants the opportunity to recall ⁵⁷."

However, the Appellants offered these identical or at least very similar arguments to the Committee, and this Court concludes that the Committee, by correctly interpreting the applicable law and regulations, properly denied the Appellants' appeal of the Department's decision to deny their grievances. Just as they did to the Committee, this Court concludes that the Appellants offered nothing more than their own interpretation of the Department's RIF provisions, state statutes and regulations, our state's constitution, and precedent from our state's courts.

In assailing the Department's decision to implement the retirement opportunity during the RIF recall period and in assailing its management of personnel decisions associated with the implementation of this opportunity, the Appellants invoked the definition of "temporary employee" provided in S.C. Regulation § 19-700. However, neither S.C. Regulation § 19-700 nor § 19-719.01 include the following relevant terms: "retired," "retiree," "retirement," "active service," or "return to active service." Thus, the provisions of these regulations are not precisely applicable to retirees who return to active service, such as the employees who accepted the only retirement opportunity implemented by the Department during the RIF recall period.

Instead, an examination of the statutes that apply to state retirees who return to state employment undermine the Appellants' arguments on these issues. This critical distinction perhaps is best understood by an examination of § 9-1-1790 which is entitled "Amount which may be earned upon return to covered employment." Section 9-1-1790(A) provides as follows:

⁵⁷ Id. p. 24, Section I(b).

A retired member of the system who has been retired for at least fifteen consecutive calendar days may be hired and return to employment covered by this system or any other system provided in this title without affecting the monthly retirement allowance he is receiving from the system. If the employment continues for at least forty-eight consecutive months, the provisions of Section 9-1-1590 apply. If a retired member of the system returns to employment covered by this system or any other system provided in this title sooner than fifteen days after retirement, the member's retirement allowance is suspended while the member remains employed by the participating employer. If an employer fails to notify the system of the engagement of a retired member to perform services, the employer shall reimburse the system for all benefits wrongly paid to the retired member.

Obviously, § 9-1-1790(A) references § 9-1-1590 which is entitled "Effect of restoring beneficiaries to active service," and, by the term "beneficiaries," this statute refers to state *retiree* beneficiaries. The third paragraph of § 9-1-1590 provides as follows:

Should any other beneficiary who has been restored to active employment continue in service for a period of forty-eight consecutive months and his annual compensation be equal to or greater than seventy-five percent of his average final compensation at retirement, then he may elect to cease his retirement allowance and become a contributing member again and void his election of an optional benefit. Any such beneficiary may request the board to allow him to repay to the System all monies received by him as benefits during any periods subsequent to the date of his reentry into active service and make a contribution equal to the amount he would have contributed had he been a member during the period of his restoration to active service prior to his again becoming a member, together with the interest which would have been credited to the contributions on account of such period of restoration up to the date such contribution is made. In no event shall the retirement allowance payable upon subsequent retirement be less than the amount of his allowance previously payable plus any increases which would have been payable under Section 9-1-1810 had he not been restored to service.

The second and third cross references at the conclusion of § 9-1-1590 read as follows:

Application of this section to retired member whose return to covered employment continues for at least 48 consecutive months, see §§ 9-1-1790, 9-1-1890.

Provision allowing retired members of the State Retirement System to return to work and earn certain amounts without having their monthly retirement allowance affected, see §§ 9-1-1790, 9-11-90

Section 9 11-90 is entitled "Effect of restoring beneficiary to service, retirement after return to service," and § 9-11-90(3) provides as follows

Should any other beneficiary who has been restored to active employment continue in service for a period of forty-eight consecutive months and his annual compensation be equal to or greater than seventy-five percent of his average final compensation at retirement, then he may elect to cease his retirement allowance and become a contributing member again and void his election of an optional benefit In no event must the retirement allowance payable upon subsequent retirement be less than the amount of his allowance previously payable plus any increases which would have been payable under Section 9-11-310 had he not been restored to service

Section 9 11-90(4)(a) then provides as follows

Notwithstanding the provisions of subsections (1) and (2) of this section, a retired member of the system who has been retired for at least fifteen consecutive calendar days may be hired and return to employment covered by this system or any system provided in this title without affecting the monthly retirement allowance he is receiving from this system If the employment continues for at least forty-eight consecutive months the provisions of Section 9-11-90(3) apply If a retired member of the system returns to employment covered by the South Carolina Police Officers Retirement System or any other system provided in this title sooner than fifteen consecutive calendar days after retirement, the member's retirement allowance is suspended while the member remains employed by a participating employer of any of these systems If an employer fails to notify the system of the engagement of a retired member to perform services, the employer shall reimburse the system for all benefits wrongly paid to the retired member

Thus, § 9-1-1790(A) clearly authorizes an agency, such as the Department, to hire a state retiree back to employment without the retiree incurring a suspension of his or her monthly retirement allowance so long as the state retiree has been "*retired* for at least fifteen consecutive calendar days " Section 9-1-1790(A) still authorizes an agency, such as the Department, to hire back a state retiree to employment even if the state retiree has not been retired for at least fifteen

consecutive calendar days, but, in such circumstances, the retiree will incur an suspension of his or her monthly retirement allowance for as long as the retiree remains employed

The Appellants persistently assailed the Department's decision to retain and hire temporary employees before and after its June 1, 2003 RIF and to retain employees who accepted the retirement opportunity it offered during the RIF recall period⁵⁸ However § 9-1-1790 does not use term "break in service " instead, it addresses a state *retiree* who has been *retired* for at least 15 consecutive calendar days Moreover, § 9-1-1790 does not explicitly or even impliedly declare, as argued by the Appellants, that retirees who take advantage of "retirement opportunities" lose any enforceable right to re-employment Like § 9-1-1790, § 9-1-1590 and § 9-11-90 also apply precisely to state retirees like those retirees who accepted the only retirement opportunity the Department offered during the recall period

The Appellants anchored their arguments on provisions of our state regulations and statutes that do not precisely apply to the retirement opportunity in question, and they did not consider that a RIF presents an employee with the prospect if not the reality of involuntary separation from their employment while a retirement opportunity presents a retirement eligible employee only with the prospect of a 15 consecutive calendar day period of retirement before the he or she may return to their job without an interruption of their retirement allowance Thus, in light of these realities, this Court concludes that the Committee properly determined as follows

The retirement opportunity offered by SCDC after the RIF plan was implemented as a separate action designed to further reduce operating costs Employees who elected to participate in this opportunity were removed from their full-time equivalent positions and placed into temporary positions Recall rights are not applicable in the case of temporary positions, therefore, employees affected by the RIF were not provided recall rights in relation to these jobs The SCDC employees who took part in the retirement opportunity were not offered new positions, rather, it was a way for them to retain their current positions, in a

⁵⁸ See Appellants Principle Brief pp 16 – 17 Section II(e) p 18 Sections III and V and p 24 Section I

temporary capacity while significantly reducing SCDC costs by reducing salaries and eliminating the cost of benefits for these employees. SCDC was not obligated to offer the positions to Appellants under the RIF policy's recall procedures because they were temporary positions. In addition, Mr. Ozmint's cover letter to OHR that was submitted along with the RIF plan stated that "[t]emporary positions, particularly in the area of educational instruction to inmates, may be developed and made available to affected employees by the Reduction-in-Force,"⁵⁹ this language indicates that this is a possibility, not a promise. Additionally, the formal RIF plan did not address, nor would it have addressed, the subject of temporary positions in terms of the recall rights for employees affected by the RIF (Conclusion of Law # 4, R. p. 17).

This Court also concludes that the Committee also properly determined the following:

The retention of certain temporary and temporary grant employees did not violate the approved RIF policy. While these types of positions are often the first to be eliminated prior to enacting a RIF, there is no specific requirement in SCDC's RIF policy that made this action mandatory. Since these employees do not have benefits and other extraneous costs to the agency like full-time equivalent employees do, electing to keep these positions as opposed to full-time equivalent positions was one way to further maximize savings to the agency, which is in line with the stated purpose of the RIF (Conclusion of Law # 5, R. p. 17).

D THE APPELLANTS' RETALIATION CLAIM

As explained above in Section IV(A), the Appellants did not identify distinct issues on appeal within their principle brief, and, consequentially, this Court distilled three (3) distinct issues on appeal from the 27 paragraphs the Appellants enumerated within their principle brief. As also explained above in Section IV(A), the Appellants provided a series of overlapping legal arguments divided into four (4) sections in support of the three (3) distinct issues on appeal identified by the Court.

However, as demonstrated by the Department, these three (3) distinct issues on appeal and the four (4) sections of supporting legal argument deviate from the grounds for appeal.

⁵⁹ As explained in note 3 above, Director Ozmint's cover letter to OHR consisted of his March 28, 2003 letter to OHR Director Wilkins, within which Director Ozmint presented SCDC's RIF plan (R. pp. 1626 – 31). The Appellants did not address this specific conclusion rendered by the Committee in any of the materials they submitted in support of their appeal.

presented by the Appellants to the Committee⁶⁰ The Appellants articulated a number of arguments to the Committee regarding the purported retaliatory motive behind the Department's 2003 RIF policy and plan (R pp 2695 – 99)

Thus, the Department argued to this Court that the purported retaliatory motive held by the Department and, specifically, Director Ozmint against the Appellants constituted an essential component of the Appellants' appeal to the Committee and the Department further argued that the Committee recognized this reality in its Decision (R p 14)

This Court agrees with the Department and accordingly it finds that the Appellants, for tactical reasons articulated by the Appellants' counsel,⁶¹ did not appeal the Committee's finding that "there was no credible evidence presented that the elimination of educator positions in PUSD was motivated by a desire for retaliation for an earlier lawsuit that resulted in the increase of educators' salaries" (R p 16) Notwithstanding this finding, the Court need not, in light of its rulings concerning the dispositive issues at the heart of this matter, rule on the Department's

⁶⁰ In a document dated October 14 2008 and entitled GROUNDS FOR APPEAL FORM (R pp 2694 – 99) the Appellants framed three (3) overarching grounds for their collective appeal of the Department's denial of their grievances to the Committee First the Department by its 2003 RIF policy and through its 2003 RIF plan purportedly violated the statutes which created and control the PUSD Second the Department by its 2003 RIF policy and through its 2003 RIF plan purportedly deviated from normal RIF practices and procedures Third the Department by its 2003 RIF policy and through its 2003 RIF plan purportedly targeted the Appellants in a retaliatory manner because they had successfully engaged in litigation Abraham v PUSD No 1 & S C Dep t of Corr, 538 S E 2d 656 (S C Ct App 2000) against the Department regarding their compensation (R pp 2272 – 79)

⁶¹ The Court notes the following statement from Appellants' counsel during oral argument conducted by the Court on October 28 2009

Now do we believe certainly does Mr Randolph Mr Bell and Ms Martin do they believe that they were victims of retaliation? Absolutely Do we believe that we proved that? Absolutely But we have purposely removed that from the equation here on this appeal because we have other grounds that reach the same destination

The Department submitted a transcript of the entire October 28 2009 hearing as an exhibit in support of its supplemental brief See the Department's Supplemental Brief Exhibit B See also Transcript of October 28 2009 Oral Argument p 12 lines 12 – 19

contention that the Appellants did not pursue their retaliation claim or consider the precedent invoked by the Department in support of its contention ⁶²

V ANALYSIS OF ISSUES RAISED BY APPELLANTS DURING ORAL ARGUMENT AND IN MATERIALS SUBMITTED BY THE PARTIES AFTER ORAL ARGUMENT

A THE APPELLANTS DID NOT ARTICULATE A VIABLE EQUAL PROTECTION CLAIM IN THEIR INSTANT APPEAL

As chronicled in Section II(E) above, the Appellants, by letter filed with the Court on November 18, 2009, rebutted the contention advanced by the Department in its supplemental brief that the Appellants had “waived” any equal protection claim during the argument articulated by Appellants’ counsel to the circuit court on December 11, 2006 when the circuit court considered the Appellants’ Petition for Judicial Review

1 During oral argument, the Appellants emphasized and expanded upon the equal protection claim they only sparingly articulated in their principle brief

During their presentation to this Court on October 28, 2009, the Appellants emphasized and expanded upon an argument they only sparingly articulated within their principle brief, namely that the Department, by the manner in which it formulated and implemented its RIF effective June 1, 2003⁶³ and by the manner in which it implemented the retirement opportunity it offered during the RIF recall period, had deprived them, under Littlefield v. S.C. Forestry Comm’n, 523 S.E.2d 781, 783 (S.C. 2000), of “the equal protection guarantees of [South Carolina’s] Constitution”⁶⁴.

⁶² See Jones v. Leagan, 681 S.E.2d 6, 15 (S.C. Ct. App. 2009) (citing Jinks v. Richland County, 585 S.E.2d 281, 283 n.3 (S.C. 2003)).

⁶³ See notes 23 and 24 above.

⁶⁴ See Appellants’ Principle Brief pp. 23 – 24. These are the only pages from the Appellants’ principle brief in which the term “equal protection” appears. Regarding the manner by which the Department implemented its retirement opportunity during the RIF recall period, the Appellants argued as follows:

Appellants' counsel initially discussed the Appellants' equal protection argument with the Court during the October 28, 2009 oral argument, and, in doing so, referenced Littlefield

COUNSEL Equal protection comes into this, Your Honor and I'll say a little bit about the equal protection issue. Equal protection, as you know, in the public sector means that those who are similarly [situated] must be treated similarly. What we have here

THE COURT There has to be an intent, though, doesn't it?

COUNSEL No, sir, not with equal protection. There's no motive required to show a violation of equal protection. You can look at the equal protection case. I believe it is Littlefield.

THE COURT Excuse me one second. Go ahead, sir.

COUNSEL Okay. You can look at Littlefield, for example, and in that case what happened was there was a treatment of people who were separated for reasons other than retirement, differently from people who retired, in terms of obtaining a vested benefit. And what the Court said was that difference was a violation of equal protection. They didn't have to go and say these people were being intentionally mean to folks. Just that their conduct resulted in a treatment of similarly situated individuals in a desperate [sic] fashion. You know, a classic equal protection case is you know, if you have someone who is in one position and you have another in the same position and you just arbitrarily pick that person for some disadvantageous reasons, you can violate equal protection.⁶⁵

Appellants' counsel later connected the retirement opportunity offered by the Department to its retirement eligible employees during the RIF recall period to an equal protection claim purportedly held by the Appellants.

THE COURT Information related to the temporary

COUNSEL Correct, Your Honor. Required break in service and earnings limitation. This is what [retirement eligible employees] have to sign understanding that they are going to get [the retirement opportunity].

This was an artifice used by [the Department] as a money saving effort and, while that may be well and good in the absence of [a RIF], it's not allowed where you have people out there that you have involuntarily

During the recall period following the RIF, SCDC allowed employees choosing to retire to return following a break in service without allowing the Appellants the opportunity to recall. Appellants were covered employees' entitled to full protection of the law during their recall period. Accordingly, the preferential treatment afforded to employees returning after voluntary separation during this period deprived Appellants of their rights as covered employees and constituted a violation of equal protection guaranteed by Article I § 3 [of the South Carolina Constitution] *Id.* p. 24.

⁶⁵ See Transcript of October 28, 2009 Oral Argument pp. 20 – 23.

separated who want to come back to work for you in whatever capacity, and you're instead giving preferential treatment to individuals who are not covered employees. Thus, the equal protection argument, Your Honor. So there is a lot of curiosity in this particular [RIF] that doesn't require that we penetrate the motivations of the executive director of [the Department]. Because during the recall period, number one, they made a promise to my clients and everybody else who was separated that you'll get a change at those positions. They didn't have to make that promise because the law required them to and they didn't do it, and they didn't do it to save money.⁶⁶

2 The Appellants more precisely articulated their equal protection claim within their supplemental brief

In their supplemental brief, the Appellants reiterated their reliance upon Littlefield by arguing as follows:

Where the General Assembly has established a classification that protects a designated group of citizens (here, the protected class of "covered employees" during a RIF recall period), failure to afford rights established by the General Assembly violates constitutionally protected equal protection and due process guarantees. Proof of motive is not required to protect a legislatively established right. See [Littlefield]⁶⁷

The Appellants then further addressed their equal protection argument as follows:

Motive is a factor where the equal protection clause is used to challenge a classification established by law. In that case, it must be demonstrated that the government intended to violate an established right in making or enforcing the classification. See Seabrook v. Knox, 369 S.C. 191, 631 S.E.2d 907, 912 (2006) (challenge to a zoning designation). Here, Appellants seek to enforce rather than challenge their rights as members of a protected class: covered employees separated from employment by RIF. By virtue of their covered employee status, Appellants are entitled to protections guaranteed by law that are not available to individuals who are not "covered" due to probationary or temporary employment or who experience a "break in service" due to termination for cause or voluntary separation from employment. The General Assembly's legitimate interest in protecting individuals who lose permanent state employment through no fault of their own establishes substantial, enforceable rights protected

⁶⁶ See Transcript of October 28, 2009 Oral Argument pp. 33 – 36

⁶⁷ See Appellants' Supplemental Brief pp. 3 – 4

by the due process and equal protection clauses of the South Carolina Constitution See, S C Const art I, §§ 3 and 22 ⁶⁸

3 The Department devoted the majority of its supplemental brief to the expanded equal protection argument articulated by the Appellants during oral argument

The majority of the Department's supplemental brief consisted of its response to the Appellants' equal protection argument, and the Department began its supplemental brief by contending that the Appellants, during their presentation to the circuit court on December 11, 2006, had "explicitly denied" that their challenge of the RIF "animated an equal protection claim" to the circuit court ⁶⁹ (R p 2338, lines 9 – 13)

The Appellants' November 18, 2009 letter specifically assailed the Department's contention that they had "waived" or otherwise abandoned their equal protection claim

4 While they did not "waive" their equal protection claim during the hearing conducted by the circuit court, the Appellants misapprehended Littlefield in the analysis they provided to this Court

Regarding the equal protection claim emphasized by the Appellants during oral argument before the Court on October 28, 2009 and articulated by the Appellants within their principle and supplemental briefs, this Court concludes, after considering the transcript of the entire hearing conducted by the circuit court on December 11, 2006 (R pp 2320 – 57), as well as the parties'

⁶⁸ Id., p 5

⁶⁹ See the Department's Supplemental Brief pp 1 – 2. Within its supplemental brief, the Department also accurately cited passages from the argument entertained by the circuit court on December 11, 2006 since the transcript of the circuit court's December 11, 2006 hearing had been included by OHR in Committee Exhibit #1 and submitted to the Committee (R pp 2320 – 57). See also the Department's Supplemental Brief p 2 n 2 and 3. The Department further observed in its supplemental brief that the Appellants did not explicitly identify or otherwise articulate an equal protection argument in their statement of grounds on appeal to the Committee (R pp 2694 – 99). However, this Court observes that the Committee Attorney, during the proceedings on January 22, 2009, included an equal protection component in the charge he presented to the Committee, and this Court further observes that neither party objected to any component of the charge presented to the Committee (R p 1424 – 25).

arguments, that the Appellants did not “waive their equal protection claim during the proceedings before the circuit court

However, this Court observes that the Appellants’ arguments to both the circuit court and this Court concerning their equal protection claim reflected a misunderstanding of the components of such a claim on their behalf. The Appellants’ misunderstanding of an equal protection claim manifested itself in their analysis of Littlefield

For example, the Appellants completely omitted any discussion of whether the Littlefield Court determined or even considered whether a “rational basis” existed for the state’s application of the statute at issue, S C Code Ann § 8-11-620. Ultimately, the Littlefield Court, 523 S E 2d at 783, after conducting a proper equal protection analysis, determined that no rational basis existed to support the manner in which state officials applied this statute.

Moreover, the Appellants failed to address or even acknowledge the concepts of “rational basis” and “strict scrutiny,” concepts which are fundamental to a proper equal protection analysis. See Sylvia Dev. Corp. v. Calvert County, Md., 48 F 3d 810, 818 – 21 (4th Cir. 1995). As an aside, our Supreme Court recognized the Fourth Circuit’s holding in Sylvia Dev. Corp. within its decision in Seabrook v. Knox, 631 S E 2d 907, 912 (S C 2006) (“To establish an equal protection violation, plaintiffs must demonstrate they were intentionally and purposely subjected to treatment different from other similarly situated Sylvia Dev. Corp., 48 F 3d at 818 (citation omitted)). Obviously, the Appellants overlooked this component of Seabrook when they relied upon the decision in their supplemental brief.

Thus, contrary to the flawed understanding of equal protection evidenced by the Appellants, “the essential command of the Equal Protection Clause has always been that the classification of persons [to] which a law applies must be reasonable, not arbitrary, and must

rest upon some ground of difference having a fair and substantial relation to the object of the legislation ” Sylvia Dev Corp, 48 F 3d at 818 (quoting Royster Guano Co v Virginia, 253 U S 412, 415 (1920)) Finally, as recognized by our Court of Appeals in Town of Iva ex rel Zoning Admin v Holley, 649 S E 2d 108, 111 (S C Ct App 2007), “[e]ven assuming [governmental entity] is not enforcing [an] ordinance equally, the fact that there is some unequal treatment does not necessary rise to the level of a constitutional equal protection violation (citation omitted) ”

5 The Appellants failed to articulate a viable equal protection claim in their instant appeal to this Court

Therefore this Court concludes that, under the authority discussed above, as well as our Court of Appeals’ recent decision in Harbit v City of Charleston 675 S E 2d 776 (S C Ct App 2009), the Appellants failed to articulate a viable equal protection claim to this Court during their instant appeal of the Committee’s Final Decision

In Harbit, 675 S E 2d at 782 – 783, our Court of Appeals articulated the following standards associated with a viable equal protection claim

Under the Equal Protection Clause of the Fourteenth Amendment, a state may not “deny to any person within its jurisdiction the equal protection of the laws ” U S Const amend XIV, § 1, *see* S C Const art I, § 3 (‘The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws ’) This clause requires that “the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law’s purpose ” Sylvia Dev Corp 48 F 3d at 818 It does not prohibit different treatment of people in different circumstances under the law [Town of Iva ex rel Zoning Admin , 374 S C at 541, 649 S E 2d 110] Instead, “the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike ” *Id* In a case such as this, the rational basis standard, rather than strict scrutiny, applies because the

classification at issue does not affect a fundamental right and does not draw upon inherently suspect distinctions such as race, religion, or alienage [*Sunset Cay LLC v City of Folly Beach*, 357 S C 414, 428 – 29, 593 S E 2d 462, 469 (2004)]

Further, one seeking to show discriminatory enforcement in violation of the Equal Protection Clause must demonstrate arbitrary and purposeful discrimination in the administration of the law being enforced *See State v Solomon* 245 S C 550, 574, 141 S E 2d 818, 831 (1965) '[E]ven assuming [a governmental entity] is not enforcing [an] ordinance equally, the fact that there is some unequal treatment does not necessarily rise to the level of a constitutional equal protection violation ' *Denene Inc v City of Charleston* 359 S C 85, 96, 596 S E 2d 917, 922 (2004)

Consequently, because the record does not indicate that Harbit was the subject of purposeful, invidious discrimination, the circuit court did not err in granting summary judgment on his equal protection claim *See Sylvia Dev Corp* 48 F 3d at 825 (internal citations omitted) ("While an equal protection claim must be rooted in an allegation of unequal treatment for similarly situated individuals a showing of such disparate treatment, even if the product of erroneous or illegal state action, is not enough by itself to state a constitutional claim ")

Despite the efforts by the Appellants to excise this component of an equal protection analysis from the instant case, no evidence exists, as required under Harbit, that the Department, either in the manner by which it implemented the RIF or in the manner or timing of the retirement opportunity it offered during the recall period, arbitrarily and purposefully discriminated against the Appellants or any other employee

As the Court recognized above in Section IV(D), the Appellants did not pursue the retaliation claim they raised to the Committee. Additionally, Appellants' counsel conceded to the Court during oral argument that the Appellants had 'decided not to address any motivational issues in this appeal ⁷⁰." Finally, the Committee found in its first Conclusion of Law, 'that the Appellants, certified educators employed by the Department, "were not unfairly targeted for termination in retaliation for an earlier lawsuit regarding wages" (R p 16)

⁷⁰ See Transcript of October 28, 2009 Oral Argument p 6

Thus, as established under Harbit, even if the Appellants' equal protection claim is legitimately rooted in an allegation of unequal treatment of the Appellants as opposed to the employees who availed themselves of the retirement opportunity offered during the recall period, a showing of such disparate treatment, even if it was the product of erroneous or illegal action by the Department, is not enough by itself to state a constitutional claim

Even if the equal protection analysis is limited in the manner urged by the Appellants under their flawed interpretation of Littlefield, neither the manner by which the Department implemented its RIF nor its retirement opportunity animated a legitimate equal protection claim. In his argument to the Court,⁷¹ Appellants' counsel focused on a paragraph from Director Ozmint's March 28, 2003 letter to Mr. Wilkins, the State Human Resources Director. This paragraph read, in its entirety, as follows: "Temporary positions, particularly in the area of educational instruction to inmates, may be developed and made available to affected employees by the [RIF]" (R. p. 1630)

According to Appellants' counsel, this paragraph represented a "promise" that, if temporary positions were made available as a result of the RIF, then the Department would offer these temporary positions to employees involuntarily separated by the RIF, such as the Appellants. Thus, when retirement eligible employees availed themselves of the retirement opportunity implemented by the Department during the recall period, their positions became "temporary positions" into which former employees involuntarily separated by the RIF had priority to fill. However, the plain wording of this paragraph indicates that no such "promise" was created by this paragraph (i.e. "may" vs "must")⁷²

⁷¹ See Transcript of October 28, 2009 Oral Argument pp. 14 - 15 and 24

⁷² The Committee recognized this distinction by concluding that the language from this paragraph indicates that this is a possibility, not a promise. See the Committee's Final Decision, Conclusion of Law # 4 (R. p. 17)

Moreover, former employees involuntarily separated by the RIF, such as the Appellants, were not identically situated to the retirement eligible employees to whom the Department offered the "retirement opportunity." As recognized by Harbit, the Equal Protection Clause "does not prohibit different treatment of people in different circumstances under the law."

In their brief, the Appellants identified S.C. Code Ann. § 24-25-90 and § 8-17-330 as the statutes purportedly applied by the Department in an unequal and arbitrary fashion in the architecture and implementation of its RIF.⁷³ Even if the Department somehow unequally or arbitrarily applied by these statutes in formulating or implementing its RIF, a conclusion which the Court has not made and does not make here, the retirement opportunity implemented by the Department during the recall period fell under the provisions of an entirely different set of statutes, namely § 9-1-1790, 9-1-1590, and 9-11-90.⁷⁴

Thus, as reflected at various points by the Committee in its Final Decision, the Court concludes that the Department had a rational basis by which to both implement its RIF through the establishment of 11 competitive areas and to offer its retirement opportunity to those employees unaffected by the RIF who were retirement eligible.⁷⁵ Accordingly, the Court further concludes that the Appellants have failed to provide a sufficient basis upon which this Court may reverse or modify the Committee's Final Decision under the provisions of § 1-23-380(5).

⁷³ See Appellants' Principle Brief, p. 23. During oral argument Appellants' counsel also argued that a Frequently Asked Question posted by OHR on its website should have the effect of a regulation or even a statute. See Transcript of October 28, 2009 Oral Argument, pp. 25 – 26. However, the Committee properly determined that it did not violate any internal policies or procedures or any guidelines established by [OHR] (R. p. 17). See also note 44 above.

⁷⁴ See Section IV(C)(3) above.

⁷⁵ See the Committee's Final Decision, Conclusions of Law # 4 and # 5 (R. pp. 16 – 17).

B THE MATERIALS CONSTITUTING "ATTACHMENT 1" TO THE APPELLANTS' SUPPLEMENTAL BRIEF REPRESENTED NEW FACTS NOT CONSIDERED BY THE COMMITTEE, AND, THEREFORE, THIS COURT GRANTS THE DEPARTMENT'S MOTION TO STRIKE "ATTACHMENT 1" AND THE PORTIONS OF THE APPELLANTS' BRIEF RELATED TO "ATTACHMENT 1"

As chronicled in Section II(E) above, the Appellants submitted materials designated as "Attachment 1" in support of the supplemental brief they filed with the Court on November 17, 2009. On November 19, 2009, the Department filed its objection to the entirety of the materials designated by the Appellants as "Attachment 1" as well the portions of the Appellant's supplemental brief related to the materials designated as "Attachment 1"⁷⁶.

The Department moved to strike these materials under the provisions of ALC Rule of Procedure 46. This rule, which is entitled "POWERS OF ADMINISTRATIVE LAW JUDGE," explicitly authorizes this Court, albeit within the context of contested cases, to "hear and rule on objections and motions" and to "strike from the record objectionable evidence."

The Department anchored its objections to these materials upon the provisions of S C Code § 1-23-380(4) (Supp. 2009) and ALC Rule of Procedure 36(G). Section 1-23-380 is entitled "Judicial review upon exhaustion of administrative remedies," and the first sentence of § 1-23-380(4) provides that the review conducted by this Court "must be confined to the record." ALC Rule of Procedure 36 is entitled "RECORD ON APPEAL," and Rule 36(G), which is entitled "Review Limited to Record," provides that this Court "will not *consider* any fact which does not appear in the record." The last sentence of the 2009 Revised Notes for Rule 36 further

⁷⁶ A total of three (3) documents comprised "Attachment 1." The first two (2) documents of "Attachment 1" consisted of standard 8 ½ by 11 inch pieces of paper while the third document consisted of what appears to be two (2) 8 ½ by 11 inch pieces of paper attached to one another by adhesive tape. The first document in "Attachment 1" was entitled "Legend and List of Websites Used" while the second and third documents appeared to be spreadsheets which reflected information purportedly relevant to the case under review. The second document was entitled "Locations for Distances for All Broad River Road Complex Institutions and Divisions" and the third document was entitled "Distance between Reduction-In Force-Competitive Areas and Locations." See the Department's November 19, 2010 Objection and Motion pp. 2-3.

provides that this Court's review "is limited to those facts appearing in the record" Additionally, as noted by the Department, South Carolina Appellate Court Rule ["SCACR"] 212(b), which this Court may apply in accordance with ALC Rule of Procedure 68, provides that "with the written consent of all attorneys of record, a party may supplement the Record on Appeal at any time before argument commences," but, "[w]ithout such consent or after argument commences, a party desiring to supplement the Record on Appeal must move the appellate court for leave to do so "

After reviewing "Attachment 1" and the related portions of the Appellants' supplement brief, this Court finds that the materials which comprised "Attachment 1" clearly represented and incorporated new facts which were not considered by the Committee in rendering its February 18, 2009 Final Decision This Court also finds that the Appellants made no effort to properly supplement the Record on Appeal in accordance with SCACR 212(b) Thus, having reviewed the Department's motion, the Appellants' memorandum in opposition to the Department's motion, and the authority cited by the Appellants within their memorandum, Stanley v. Kaufman, 171 S E 32 (S C 1933), this Court concludes that the documents which comprise "Attachment 1" are objectionable Consequentially, this Court **GRANTS** the Department's motion to strike "Attachment 1" as well as the portions of the Appellants' supplemental brief related to "Attachment 1 "

Alternatively, even if the materials which comprise "Attachment 1" and the portions of the Appellants' supplement brief related to "Attachment 1" are not objectionable, this Court nonetheless concludes that the data reflected in these materials is not relevant to its review of the Committee's February 18, 2009 Final Decision, and, accordingly, the Appellants have failed to

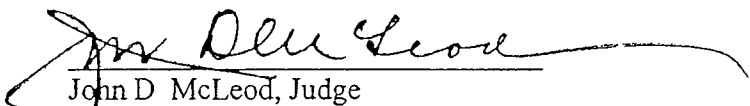
provide a sufficient basis upon which this Court may reverse or modify the Committee's Final Decision under the provisions of § 1-23-380(5)

VI ORDER OF THE COURT AFFIRMING THE DECISION OF THE STATE EMPLOYEE GRIEVANCE COMMITTEE

Thus, for all of the foregoing reasons, this Court determines that the administrative findings, inferences, conclusions and decisions rendered by the State Employee Grievance Committee in its February 18, 2009 Final Decision did not prejudice the Appellants' substantial rights, and this Court further determines that the Appellants' arguments do not provide a sufficient basis by which it may reverse or modify any aspect of the Committee's February 18, 2009 Final Decision under the provisions of § 1-23-380(5)

Accordingly, this Court denies the Appellants' instant appeal and denies the relief demanded by the Appellants in their principle brief, in their argument to this Court, and in their supplemental brief. Therefore, **IT IS HEREBY ORDERED** that the Final Decision of the State Employee Grievance Committee issued February 18, 2009 is **AFFIRMED** ⁷⁷

AND IT IS SO ORDERED


John D. McLeod, Judge
South Carolina Administrative Law Court

August 6, 2010
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof in the United States mail postage paid or in the Interagency Mail Service addressed to the party(ies) or their attorney(s)

This 6 day of August, 2010
By Anthony R. Feldman
Judicial Law Clerk

⁷⁷ This Court issued its original order in this matter on June 2, 2010. The Appellants subsequently filed a motion for reconsideration on June 7, 2010, and the Department filed its memorandum in opposition to the Appellants' motion on June 16, 2010. This Court conducted a hearing regarding the Appellants' motion on July 14, 2010. This Court hereby grants in part and denies in part the Appellants' motion for reconsideration and accordingly it withdraws the order it previously issued June 2, 2010 and substitutes this order in its place.

STATE OF SOUTH CAROLINA) IN THE ADMINISTRATIVE LAW COURT
)
COUNTY OF RICHLAND)

James "Cal" Bell, Othella Bernard,)
Katherina Bowyer, Linda M W Bratton,)
Ann T Bridges, Rance C Cobb, Jeannie)
B Croxton, Bernetha L Culbreath,)
William K Dreyer, Jacqueline D Farr,)
Ruth Fritts, Nancy Glenn, Etta Jane)
Jones, Geneva M Martin, Mary H)
McCabe, Beverly McClanahan, Max)
D Randolph, Carolyn McIver Smith,)
Maggie G Williams and Paula Woodhief,)

Appellants,)

vs)

South Carolina Department of)
Corrections and Palmetto Unified)
School District No 1,)

Respondents)

NOTICE OF APPEAL

The above-named Appellants, by and through their undersigned counsel, hereby appeal the Final Decision of the State Employee Grievance Committee dated February 18, 2009 denying Grievants' requests for relief. Appellants received the Final Decision on February 27, 2009. A copy of this Notice is being provided to the State Budget and Control Board and other counsel.

In support of this appeal, and pursuant to S.C. Code Ann. § 1-23-380(5), Appellants will show that the findings, inferences, conclusions and decisions challenged herein are

- (a) in violation of constitutional or statutory provisions,
- (b) in excess of the statutory authority of the agency,
- (c) made upon unlawful procedure,
- (d) affected by other error of law,

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SC ADMIN LAW COURT

- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion

By way of illustration, Appellants will show that their selection for reduction in force effective June 30, 2003 was in violation of law, regulation, controlling guidelines and the provisions of the approved reduction in force plan and policy. Appellants will further show that actions by the Respondents following the reduction in force violated their rights, including the opportunity for return to employment during the twelve month "recall" period. Appellants will also show that their constitutionally protected liberty and property interests were violated by the Respondents in the implementation of the reduction in force and in providing preferential treatment to temporary employees during the recall period following the reduction in force.

Appellants reserve the right to amend, supplement or modify the grounds for appeal in the Statement of Issues in their brief as permitted in Rule 33(B) of this Court.

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March 10, 2009

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE ADMINISTRATIVE LAW COURT

James "Cal" Bell, Othella Bernard,)
Katherina Bowyer, Linda M W Bratton,)
Ann T Bridges, Richard M Cobb, as)
Personal Representative of the Estate of)
Rance C Cobb, Jeannie B Croxton,)
Bernetha L Culbreath,)
William K Dreyer, Jacqueline D Farr,)
Ruth Fritts, Nancy Glenn, Etta Jane)
Jones, Geneva M Martin, Mary H)
McCabe, Beverly McClanahan, Max)
D Randolph, Carolyn McIver Smith,)
Maggie G Williams and Paula Woodlief,)

Appellants,)

vs)

South Carolina Department of)
Corrections and Palmetto Unified)
School District No 1,)

Respondents)

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SC ADMIN LAW COURT

BRIEF OF APPELLANTS

DOCKET NO 09-ALJ 30-0103-AP

The above-named Appellants submit that the Final Decision issued by the State Employee Grievance Committee dated February 18, 2009 must be reversed and Appellants awarded reinstatement to employment with back pay and benefits. In support of this appeal, Appellants rely upon S C Code Ann § 1-23-380(5) and the Record on Appeal filed with this Court on June 24, 2009.

PROCEDURAL HISTORY

Appellants are current and former certified educators employed by the South Carolina Department of Corrections ("SCDC") in the Palmetto Unified School District ("District"). Appellants were each "covered employees" removed from their positions as a result of a

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reduction in force (“RIF”) implemented effective June 1, 2003 Appellants each timely submitted an appeal of their separation from employment in keeping with SCDC policy and state law

Appellants’ appeals were initially denied by SCDC and the Office of Human Resources (“OHR”) Appellants filed suit in the Court of Common Pleas for Richland County challenging the denial of their grievances By Order dated January 8, 2007, the Honorable G Thomas Cooper, Jr granted Appellants’ request for remand for a hearing before the State Employee Grievance Committee SCDC appealed Judge Cooper’s remand order On May 14, 2008, the South Carolina Court of Appeals dismissed the appeal By letter dated June 4, 2008, OHR directed SCDC to effectuate the intent of Judge Cooper’s Order and the Opinion of the South Carolina Court of Appeals by remanding the matter for processing in accordance with the Agency’s grievance policy

SCDC did not take action within the time period provided by law On July 23, 2008, Appellants timely submitted this matter for hearing before the Grievance Committee The Committee heard testimony, received evidence and argument on November 5, 6, 7, 10, 17, December 15 and 18, 2008, and January 22, 26 and 29, 2009 The Committee issued its Final Decision on February 18, 2009 Appellants filed a notice of appeal on March 10, 2009 OHR certified the record on appeal on June 24, 2009 ¹

STANDARD OF REVIEW

This is an appeal from a final administrative decision governed by the Administrative Procedures Act (“APA”) S C Code Ann § 1-23-310 et seq Under the APA, a reviewing court presented with a factual challenge must assess the record as a whole to determine whether the

¹ This procedural history is recorded in the Final Decision ROA pp 9 11

administrative decision is supported by substantial evidence S C Code Ann § 1-23-350(5)(e) The South Carolina Supreme Court has defined “substantial evidence” as evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached McCraw v Mary Black Hosp., 350 S C 229, 235, 565 S E 2d 286, 289 (2002)

The deference afforded administrative agencies in resolving factual disputes does not extend to conclusions of law Instead, a reviewing court must exercise its independent judgment and reverse or modify an administrative decision that is affected by an error of law S C Code Ann § 1-23-380(5)(d), see also, Hill v Eagle Motor Lines, 373 S C 422, 428, 645 S E 2d 424, 427 (2007)

The material facts in this appeal are largely uncontested It is Appellants’ position, however, that the Final Decision fails to conform these facts to controlling principles of law For these reasons, Appellants are entitled to the relief requested

STATEMENT OF POSITION

The RIF conducted by SCDC on June 1, 2003 was arbitrary and capricious, an abuse of discretion and unwarranted exercise of discretion in violation of S C Code Ann § 8-17 340(E)(2)(f) Additionally, the RIF was characterized by a violation of statutory authority, unlawful procedure and legal error in violation of S C Code Ann § 8-17-340(E)(2)(a) – (e)

CONTROLLING FACTS

The record as a whole demonstrates that SCDC deviated from controlling policy and law in the challenged RIF

1 The Palmetto Unified School District (“District”) is a single, statewide school district created by the General Assembly and administered by SCDC (S C Code Ann § 24-25-10, ROA p 2281) All educators in the District must be employed, supervised and terminated

according to SCDC policies and procedures (S C Code Ann § 24-25-90, ROA p 2291)

3 The District has one Board and one Superintendent (S C Code Ann §§ 24-25-40 through 90, ROA pp 2285-2291) All educators are held to the same standards and there are no geographic regions within the District (ROA pp 513-515, 525-528, 863-865, 913, 2614)

4 Certified educators employed by SCDC in the District perform their duties on a twelve-month school program and receive a teacher's pay schedule based on the State and average school supplement pay scales (S C Code Ann § 24-25-70(7), ROA p 2288) In 2000, the South Carolina Court of Appeals issued an order requiring SCDC to comply with the teacher pay schedule This required SCDC to annually increase certified educator pay to meet the State average (See, Abraham v Palmetto Unified Sch Dist No 1, 343 S C 36, 538 S E 2d 656 (Ct App 2000), ROA pp 2272-2279)

5 In January 2003, Jon E Ozmint was appointed Executive Director of SCDC Shortly thereafter, he initiated a process that resulted in submission of a reduction in force proposal to OHR The RIF policy utilized in the challenged action was approved by OHR on March 14, 2003 (ROA pp 1163-1167)

6 SCDC submitted its RIF plan to OHR on March 28, 2003 (ROA pp 1928-1959) The same day, OHR provided "approval of procedural correctness" This approval did not include "the determination of the geographic locations in the competitive areas, competitive classes, competitive class series, bumping rights, the positions to be eliminated, or any exceptions included in the plan, **since these are solely the responsibility of SCDC management**" (Final Decision Findings of Fact No 1, ROA p 12, see also, ROA pp 1926-1927)(emphasis added)

7 Director Ozmint identified the positions for separation pursuant to RIF (Final Decision Findings of Fact No 2, ROA p 12)

8 Of the 148 positions designated for RIF, approximately 84 were certified educators (Final Decision, ROA p 11)

9 Higher paid educators were eliminated to get the most “bang for the buck” (ROA pp 1038-1039, 1054-1056, 1072, 1079-1080, 2682) Appellants and SCDC witnesses testified that other SCDC employees complained about the “unfairness” of statutorily required educator pay raises (Final Decision Findings of Fact No 18, ROA p 14) Director Ozmint testified that these raises were “taken out of the hide” of other employees (ROA pp 1045-1046, see also, ROA pp 1052, 1095-1096)

10 Director Ozmint instructed SCDC Director of Human Resources, John Near, to draw “competitive areas” in a way to minimize employee bumping and maximize savings² (Final Decision Findings of Fact No 2, ROA p 12)

11 Mr Near created eleven geographic regions within SCDC for purposes of the RIF (ROA pp 1934-1935) These regions were not restricted to areas where staff was separately organized or clearly distinguishable from the staff in other areas (Final Decision Findings of Fact Nos 4-5, ROA p 12, see also, ROA pp 1085-1087)

12 Director Ozmint admitted that the geographic regions existed only for the purpose of the RIF and to reduce bumping (Final Decision Findings of Fact No 3, ROA p 12)

13 The geographic regions drawn at Director Ozmint’s instruction resulted in the elimination of all certified positions at Evans Correctional Institution (Area 4), Kershaw

²Prior to Director Ozmint’s appointment SCDC had experienced the closing of the Central Correctional Institution (CCI) in Richland County Rather than restrict employment opportunities geographically SCDC permitted all affected employees to obtain positions in other facilities As a result employees interested in maintaining employment with SCDC found positions (ROA pp 723 725)

Correctional Institution (Area 5), Allendale Correctional Institution (Area 7), Leath and McCormick Correctional Institutions (Area 10), and significant reductions at Broad River, Watkins and Manning Correctional Institutions (Area 1), Wateree and Lee Correctional Institutions (Area 2), Leiber and McDougal Correctional Institutions (Area 6) and Tyger River and Perry Correctional Institutions (Area 11) (See, Positions Eliminated by Area, Position and Location, ROA pp 2403-2417)

14 In the areas most affected by the RIF, SCDC funded education staff after the RIF was limited to seven “pink slip” temporary employees, two classroom teachers and one teacher assistant (ROA pp 3301-3302) In contrast, the Appellants separated due to RIF had service ranging from nine to more than thirty years with SCDC

15 Gerri Miro, Director of the SCDC Education Division that includes the District, testified that there is only one district in SCDC and that it is not divided geographically The District has one superintendent and educators are held to the same standards regardless of location Ms Miro did not participate in the RIF and the geographic regions used in the RIF have no bearing on administration or delivery of educational services (Final Decision Findings of Fact Nos 8 and 13, ROA p 13)

16 Wendell Blanton, Superintendent of the District at the time of the RIF, was not called as a witness Mr Blanton’s testimony was presented by way of deposition This testimony indicates that there is only one district in SCDC, that there are no geographic regions in the District and that he was not involved in the RIF until after he read about it in the newspaper Mr Blanton testified that he had one meeting of approximately fifteen minutes with SCDC administrators This was after positions had been identified and geographic regions created Mr Blanton informed the District’s Board members of the RIF after the fact No Board

members were consulted prior to the RIF (Final Decision Findings of Fact Nos 9 and 13, ROA p 13)

17 There is no commuting limit for employees of SCDC (ROA pp 621-623) Ms Miro, for example, has commuted forty-seven miles one way each day for her duties as Warden of Allendale Correctional Institution and as a Director of SCDC (ROA pp 900-901) SCDC staff often live far from their places of employment, including out of state There is no requirement that an employee live close to his or her place of work and employees often choose to commute in order to continue and advance in their service to SCDC (ROA pp 527-528, 623)

18 Each Appellant would have been willing to perform services outside the geographical region created for the RIF in order to retain employment Several Appellants worked in more than one geographic region or obtained employment outside the geographic region from which they were separated

(a) Rance Cobb worked in more than one geographical area during his service to SCDC Following his separation due to RIF at Leath (Area 10), Mr Cobb obtained employment in the Cherokee County public school district (Area 3) (ROA pp 509-512, 2706),

(b) Following separation from employment due to RIF at Leath (Area 10), Ruth Fritts obtained employment in the Berkeley County public school district (Area 6) (ROA p 2713),

(c) Following separation from employment due to RIF at Stevenson and Kirkland Correctional Institutions (Area 1), Nancy Glenn obtained a teaching position at Trenton Correctional Institution (Area 9) (ROA pp 2714-2715),

(d) Following separation from employment due to RIF at McCormick Correctional Institution (Area 10), Etta Jane Jones obtained employment in the Georgia public school system

Ms Jones had prior service at the Aiken Youth Facility (Area 9) (ROA p 2716),

(e) Following separation from employment due to RIF at Tyger River Correctional Institution, (Area 11), Max Randolph obtained employment in the York County public school district (Area 3) (ROA p 2722),

(f) Following separation from employment due to RIF at Kershaw Correctional Institution, (Area 5), Paula Woodlief obtained employment in the Sumter County public school district (Area 2) (ROA p 2725), and

(g) Witness Charlie Williams, who was not separated by the RIF, lived in Greenwood (Area 10) and worked at Tyger River (Area 11) (ROA pp 3355-3356)

19 Records maintained by SCDC establish that certified educators with less service than the Appellants retained employment following the RIF (Final Decision Findings of Facts No 10, ROA p 13, see also, Employee list provided as Appendix A) These individuals include

(a) Henry Bagnal, Principal (Service Date 7/18/92) rather than Rance Cobb (Service Date 3/12/70),

(b) Academic Program Managers Hoyt Sharp (Service Date 1/16/92), Kathy Jackson (Service Date 6/5/92) and Tommy Wicker (Service Date 5/6/02) rather than Carolyn McIver-Smith (Service Date 2/10/90),

(c) Carpentry Instructors Stokes (Service Date 8/16/91) and Rogers (Service Date 7/17/93) rather than Cal Bell (Service Date 3/21/90),

(d) Masonry Instructor Morant (Service Date 7/17/89) rather than Max Randolph (Service Date 7/10/86), and

(e) Certified Teachers Austin (Service Date 6/4/82), Green (Service Date 10/6/84), Howard (Service Date 2/1/86) and Rueger (Service Date 10/31/92) rather than Othella

Bernard (Service Date 1/13/90), Linda Bratton (Service Date 1/13/82), Jeannie Croxton (Service Date 5/18/86), Berneatha Culbreath (Service Date 2/24/90), William Dreyer (Service Date 4/30/82), Jacqueline Farr (Service Date 9/20/92), Ruth Fritts (Service Date 10/17/89), Nancy Glenn (Service Date 8/10/90) and Etta Jane Jones (Service Date 8/24/84) (See, Positions Eliminated by Area, Position and Location, ROA pp 2403-2417)

20 Several Appellants testified without contradiction that they were replaced by part-time, less experienced or temporary staff. For example

(a) Ms. Bower was replaced by a part-time hire, Shirley Johnson (ROA pp 275-276),

(b) Ms. Bratton's former duties were assumed by Correctional Officers Watkins, Buhler and Nazar (ROA pp 205-206, 208-209, 2704),

(c) Ms. Croxton could have performed the duties of Rose Rueger and Talmadge Smith, both with less seniority and protected from separation by RIF (ROA pp 361-362),

(d) Ms. Culbreath could have bumped Yvette Lakin and Patricia Hudson, both outside her area (ROA pp 172-175, 178-179),

(e) Mr. Dreyer could have bumped Ray Dorn at Trenton (ROA pp 2709-2710),

(f) Ms. Fritts, a doctoral certified educator, could have bumped Yvette Lakin, Patricia Hudson, Jewell Bounds and Kathy Jackson (ROA pp 186-188, 192-193),

(g) Ms. Glenn could have bumped four librarians from outside her area, Steve Gratzner, Billy Holliday, Donna Deadmont and Mary McCabe (ROA pp 281-282, 2714-2715), and

(h) Ms. McCabe could have bumped Billy Holliday and observed that Jane Mailloux

was hired shortly after the recall period, with less prior service than others separated by the RIF (ROA p 2718)

21 Temporary employees and part-time employees were retained and hired during the RIF recall period (Final Decision Findings of Fact No 14, ROA p 13, see also Employee list provided as Appendix A)

22 Heather Pope, a managing partner of OHR testified as a Committee witness Ms Pope stated that prior to June 2003, OHR had issued answers to frequently asked questions (FAQ) on its website regarding reductions in force This information was sent to all agencies and their human resource offices (Appellant Exhibit 11, ROA p 3390) Ms Pope testified that the following question and answer appeared on the OHR website during the RIF period under review

Q Can an agency hire a temporary employee to replace an employee affected by a RIF or to perform the functions of a position eliminated by a RIF?

A An agency may not hire a temporary employee to perform the duties of an employee affected by a RIF If these duties are to be performed within one year of the effective date of the RIF the agency should reestablish the position and implement its recall procedure

(Final Decision Findings of Fact No 15, ROA p 14, Appellant Exhibit 12, ROA p 3391)

23 The recall period for the challenged RIF was June 1, 2003 – May 31, 2004 During this period, on July 18, 2003 and March 25, 2004, SCDC implemented two “Retirement Opportunities ” These programs allowed full-time employees to retire and return to work in a “temporary capacity” at 75% of the employees’ former salaries (Final Decision Findings of Fact Nos 11 and 12, ROA p 13, ROA pp 2564-2570, 2571-2572)

24 A public employee who retires experiences a “break in service” S C Regulation

R 19-700 and R 19-719 01 These retirees lose any enforceable right to re-employment See, S C Code Ann § 9-1-1790 (retiree must leave active employment for a minimum of 15 days)

25 During the recall period of June 1, 2003 – May 31, 2004, SCDC employed twenty-three individuals in temporary positions to perform services formerly provided by full-time, certified educators During the same period, SCDC assigned responsibilities formerly performed by full-time, certified educators to 19 individuals designated as non-certified staff³

26 By regulation, a “temporary employee” cannot exceed one year of employment Additionally, a “temporary position” cannot be in place for more than one year S C Regulations R 19-700 During the recall period, SCDC employed individuals as “temporary employees” and re-employed individuals in “temporary positions ” (ROA pp 3303-3308, 818-821, 823-824, see, also, Employee list provided as Appendix A)

27 Appellants Nancy Glenn, Mary McCabe and Beverly McClanahan each testified that after the RIF, they performed their former education duties while being paid as security officers (Final Decision Findings of Fact No 16, ROA p 14) SCDC did not have signed position descriptions for these employees and Ms Glenn received a memorandum before the RIF that she would continue her library services in her new position (Appellants’ Exhibit 2, ROA p 3251)

LEGAL ARGUMENT

The General Assembly has assigned OHR the responsibility to “administer a comprehensive system of personnel administration responsive to the needs of employees and

³ SCDC produced a list of employees assigned responsibilities performed by certified educators prior to the RIF This list is contained at ROA pp 2233 2238 Provided as Appendix A is a list designating employee actions in categories Education Bump Permanent Employees Assigned Education Responsibilities and Temporary Employees Assigned Education Responsibilities This list shows actions taken during and after the recall period (ROA p 3396 3398)(identifying the list as actions taken June 1 2003 and after who were assigned responsibilities that were performed by certified educators as of June 1 2003) The list establishes that there were **twice as many** new permanent and temporary education employment actions during the recall period as the number of Appellants separated by RIF

agencies and essential to the efficient operation of State Government ” S C Code Ann § 8-11-210 Under the authority of the Budget and Control Board, OHR develops policies and programs concerning all aspects of state employment, including reductions in force S C Code Ann § 8-11-230(6) For this reason, agencies must submit RIF proposals to OHR for procedural review and agencies must comply with substantive requirements for recall and reinstatement of employees affected by RIF S C Code Ann § 8-11-185 In this context, it is necessary to examine SCDC’s conduct in keeping with governing statutes and guidelines

Words used in policies, regulations and statutes must be given their “plain and ordinary meaning” without resorting to subtle or forced construction that would limit or expand their operation Bryant v City of Charleston, 295 S C 408, 411, 368 S E 2d 899, 900-901 (1988) Sections or provisions which are part of the same general statutory law must be construed together and given a unified effect TNS Mills, Inc v S C Dep’t of Revenue, 331 S C 611, 620, 503 S E 2d 471, 476 (1988) Because OHR is charged with the administration of public employee rights and benefits, including those applicable to RIF, its construction of statutes and regulations relating to separation and recall “is entitled to the most respectful consideration and should not be overruled absent compelling reasons ” See, Emerson Elec Co v Wasson, 287 S C 394, 397, 339 S E 2d 118, 120 (1986), Brown v Bi-Lo, Inc., 354 S C 436, 440, 581 S E 2d 836, 838 (2003) (deference provided to an agency’s interpretation of applicable statutes and regulations)

The statutes contained in Title 8 of the South Carolina Code, the regulations adopted by the Budget and Control Board and the guidelines issued by OHR establish a “comprehensive system of personnel administration” that applies to all agencies of state government, including SCDC See generally, S C Code Ann §§ 8-11-210 et seq These governing principles are not

subject to manipulation and may not be ignored. Instead, the “wisdom or folly” of a legislative act is not a matter for judicial review and courts must enforce legislation as written, regardless of questions regarding the soundness of the legislative policy. Keyserling v. Beasley, 322 S. Ct. 83, 86, 470 S. E. 2d 100, 101 (1996).

Despite these governing legal standards, Director Ozmint objects to employee rights that restrict his exercise of discretion. Specifically, Director Ozmint complained that bumping rights established in law and RIF Policy are “silly” barriers to cost savings. (ROA pp. 2682, see also, ROA pp. 1054-1055, 1077-1078, 1080). Notwithstanding a RIF plan that required an operational justification for a competitive area other than agency or department wide, Director Ozmint instructed his Director of Human Resources to draw geographic areas to minimize bumping. The resulting eleven areas created solely for the purpose of the RIF did not, as required, apply to staff that were **separately organized and clearly distinguishable** from the staff in other areas. (RIF Policy § 1.1, ROA p. 1634). Additionally, the rights of educators separated by RIF were sacrificed in favor of employees who chose to “retire” in exchange for a promised return to employment at a percentage of their former salaries. This action ignored OHR guidelines that prohibit hiring temporary employees in favor of those separated by RIF and circumvented rehire provisions of the RIF policy.

In summary, SCDC violated unambiguous provisions of its RIF policy, clear statutory requirements, and controlling guidelines issued by OHR regarding selection, recall and reinstatement of employees subject to RIF. As addressed below, each of these violations, standing alone, invalidates the RIF and requires an order returning Appellants to a status quo condition prior to the RIF.

RIF POLICY VIOLATIONS

A state administrative agency can only exercise powers that have been conferred by the General Assembly. Moreover, administrative agencies must follow their own rules and regulations. Triska v Department of Health and Environmental Control, 292 S C 190, 194, 355 S E 2d 531, 533 (1987). Any action taken in excess of authority is “null and void.” Id., citing 73A C J S Public Administrative Law and Procedure, § 117 (1983).

The RIF policy prepared by SCDC and approved by OHR governs the rights of employees subject to its terms. Designated below by RIF policy section are controlling principles that were violated by SCDC and entitle Appellants to reinstatement of employment and benefits.

- I **Policy Section 1.1** states the competitive area may be *agency wide*, a department, or a more restricted *geographical* area **where the staff is separately organized and clearly distinguishable from the staff in other areas** (ROA p. 1634) (emphasis added).

Violations

- a The District is wholly contained within the SCDC Education Division, which operates as a single, state-wide school district under central administration (S C Code Ann. §§ 24-25-10 through 90, ROA pp. 2281-2291, Bell, et al. v SCDC dated 5/4/05, ROA p. 2114, Bell, et al. v SCDC dated 1/10/07, ROA p. 2361, Abraham v SCDC, dated 9/11/00, ROA pp. 2274, 2278, Cobb testimony, ROA pp. 513-515, 525-528, Miro testimony, ROA pp. 863-865, 913, Blanton testimony, ROA p. 2614),
- b Geographic areas were drawn for the purpose of limiting bumping rights (Final Decision Findings of Fact No. 3, ROA p. 12),
- c Geographic areas do not relate to staff that are separately organized (Final Decision Findings of Fact No. 8, ROA p. 13, Blanton testimony, ROA pp. 2617-2618),
- d Geographic areas do not relate to staff clearly distinguishable from other areas (Final Decision Findings of Fact No. 8, ROA p. 13, Blanton testimony, ROA pp. 2617-2618),
- e Geographic areas were used exclusively for RIF without reference to employee residence or past work places (Final Decision Findings of Fact No. 2 and 3, ROA p. 12, Cobb testimony ROA 525-528), and

f Geographic areas eliminated bumping opportunities for senior educators
(See, RIF chart showing employee service dates, ROA 1653-1659)

The plain language of Policy Section 1.1 allows SCDC to select among three potential competitive areas (1) agency wide (2) a department or (3) a more restricted geographical area “where the staff is separately organized **and** clearly distinguishable from the staff in other areas.” Use of the conjunctive term “and” requires compliance with both criteria necessary to establish a competitive area other than agency or department wide. Terry v. Lee, 314 S.C. 420, 425, 445 S.E.2d 435, 437 (1994) (finding the term “and” means “both”).

It is stipulated that SCDC has only one Education Division and one School District. Accordingly, if either the agency wide or department option had been selected, Appellants would have had the opportunity to compete for positions based upon performance and seniority against all other certified educators employed by SCDC.

Rather than allow for competition on an agency or department basis, for the first and only time, SCDC created eleven fictitious geographic “regions” for the sole purpose of limiting the retention of senior employees.⁴ The regions created did not correspond to any organizational model and did not apply to staff that were clearly distinguishable from staff in other areas. Indeed, SCDC witnesses, including the Director of the Education Division and Superintendent of the District acknowledged that there is one and only one school district within SCDC. Moreover, the General Assembly specifically established the District as “unified” for purposes of employee pay and benefits. This “unified” status was confirmed by the South Carolina Court of Appeals in Abraham v. Palmetto Unified Sch. Dist. No. 1, 343 S.C. 36, 49, 538 S.E.2d 656, 663 (Ct. App. 2000). For all of these reasons, SCDC violated its RIF policy in using eleven regions.

⁴ In a prior RIF implemented when the Central Correctional Institution in Columbia closed, employees were allowed to move to any available position in the state. (ROA pp. 723-725)

to eliminate senior staff As a result, the RIF was invalid and Appellants are entitled to reinstatement as a matter of law

II **Policy Section 2 3** states whenever a RIF is in effect, no additional new hires, internal promotions, or reassignments into vacant positions *in the competitive area* will be allowed in any position without first determining through the division Director of Human Resources or designee those employees with recall rights These employees have recall rights as a result of being bumped or laid off and must be notified of such vacancies to determine their eligibility (ROA p 1634)

Violations

- a Nineteen permanent employees in positions assigned responsibilities performed by certified educators during the recall period (6/2/03 – 6/1/04) (Employee list provided as Appendix A, see also, ROA pp 2233-2238),
- b Twenty-three temporary employees in positions assigned responsibilities performed by certified educators during the recall period (6/2/03 – 6/1/04) (Employee list provided as Appendix A, see also, ROA pp 2233-2238),
- c “Retirement opportunity” extended to employees July 16, 2003 and March 25, 2004 permitted “return” to temporary employment after a break in service for those entering the retirement program (ROA pp 2560-2572),
- d An employee that moves from a full-time position to a temporary, temporary grant or time-limited position experiences a “break in service” (S C Code of Regulations R 19-700, effective January 25, 2002),
- e An employee separated from state service as a result of a RIF experiences a “break in service” if the employee is not recalled to the original position or reinstated with state government within twelve months of the effective date of the separation (S C Code of Regulations R 19-700, effective January 25, 2002),
- f “Position” includes those duties and responsibilities constituting a single job (S C Code of Regulations R 19-700, effective January 25, 2002),
- g “Temporary employee” is a full-time or part-time employee who does not occupy an FTE position, whose employment is not to exceed one year, and who is not a covered employee (S C Code of Regulations R 19-700, effective January 25, 2002),
- h “Temporary position” is a full-time or part-time non-FTE position created for a period not to exceed one year (S C Code of Regulations R 19-700, effective January 25, 2002),

- 1 SCDC employed individuals in temporary positions and permanent positions during the recall period without notifying RIF'ed employees. Additionally, SCDC offered retiring employees return to employment after a "break in service" during the recall period without notifying RIF'ed employees (Employee list provided as Appendix A, see also, ROA 2233-2338, ROA pp 2560-2572, Thraikill testimony ROA pp 995-1001), and
- j SCDC employed RIF'ed employees in non-certified positions to provide inmate instruction (Glenn Affidavit ROA pp 2714-2715, Bell Affidavit ROA pp 2700-2701, McClanahan Affidavit ROA pp 2720-2721, McCabe Affidavit ROA pp 2718-2719)

Because the eleven geographic regions created by SCDC violated Policy Section 11, only the agency or the Education Division qualified as lawful "competitive areas" for purposes of separation and recall of Appellants. SCDC records reveal, however, that temporary and permanent positions were filled throughout the agency and the Education Division during the recall period without affording Appellants notice or opportunity to return to employment. The most egregious example of this violation is the "retirement opportunity" extended to employees on July 16, 2003 and March 25, 2004. As a matter of law, retirement constitutes a "break in service", whereas each Appellant remained a "covered employee" during the twelve months following July 1, 2003.

SCDC also violated the prohibition against hiring temporary employees during the recall period by setting up "temporary" positions to provide educational services. OHR "Frequently Asked Questions" and the testimony of Heather Pope, an OHR Managing Partner, establish that an agency cannot hire temporary employees following a RIF (ROA pp 1279-1280, see also, Appellant Exhibit 12, ROA p 3391). Moreover, the expressed purpose of the challenged RIF was to eliminate positions rather than individual employees. Replacing separated employees with temporary appointments is inconsistent with state law, OHR directive, and the approved RIF plan. The employment of temporaries also circumvents retention and recall rights of the

covered employees subject to RIF Because Appellants were denied an opportunity to return to employment, they are entitled to reinstatement

- III **Policy Section 7 1** states covered employees who have been laid off or bumped to a position with a lower pay band and pay level will have recall and reinstatement rights for a period of one (1) year from the effective date of their layoff, bumping or reassignment to another *position* Employees will be reinstated in inverse order of layoff (ROA p 1638)

Violation

The plain language of this policy section allows separated employees to return to positions other than those occupied prior to the RIF As outlined above, Appellants remained "covered employees" from July 1, 2003 to June 30, 2004 During this period, each Appellant was entitled to recall or reinstatement SCDC records establish that over forty employees were assigned permanent or temporary duties previously performed by Appellants This record proves repeated violations of the RIF policy and entitles Appellants to reinstatement

- IV **Policy Section 7 5** states probationary, temporary (*pink slip*), or temporary grant employees will not have recall *or reinstatement rights* They may, however, apply for rehire through regular agency employment policy/procedure (ROA p 1638)

Violation

The record establishes that through the offered "retirement opportunities" and otherwise, SCDC provided preferential treatment to employees not affected by the RIF This violates the RIF policy, which conforms to the OHR requirement that employees separated by RIF must be afforded the opportunity to return to employment This record proves repeated violations of the RIF policy and entitles Appellants to reinstatement

- V **Policy Section 11** (definitions) states *Temporary employee refers to a full-time or part-time employee who does not occupy an FTE position whose employment is not to exceed one year and who is not a covered employee* (S C Code Ann , § 8-17-320) (ROA p 1640)

Violation

During the recall period, SCDC employees were reassigned to "temporary" positions for more than twelve months SCDC used this as a cost-saving measure (temporary employees do not receive benefits such as health insurance) rather than retaining permanent employees or recalling/reinstating employees separated by RIF This violation of policy and state law entitles Appellants to reinstatement

RIF STATUTORY VIOLATIONS

In 1981, the General Assembly established the Palmetto Unified School District as a “special statewide unified school district” within SCDC S C Code Ann § 24-25-10. The stated legislative purpose of this district was to enhance the quality and scope of education for inmates within SCDC and to ensure that education programs are available to all inmates with less than a high school diploma, or its equivalent S C Code Ann § 24-25-20. The General Assembly required that the academic and vocational training must meet standards prescribed by the State Department of Education S C Code Ann § 24-25-30. A funding mechanism was established for the district, and its “control and management” provided by a board of nine trustees subject to the supervision of the SCDC S C Code Ann § 24-25-40. The board has certain delegated administrative functions, including the establishment of academic and vocational courses in a “twelve-month program [with] teachers’ pay schedule based on the state and average school supplement pay scales” S C Code Ann § 24-25-70. Certain duties are delegated to the district’s Superintendent, including the development of policies and procedures and preparation of a separate budget for “all necessary costs to be provided to the inmate by the unified school district” S C Code Ann § 24-25-80. Finally, the Superintendent and all other educational personnel in the district are to be “employed, supervised and terminated” according to SCDC personnel policies and procedures S C Code Ann § 24-25-90.

Before the Circuit Court and the Grievance Committee, SCDC asserted that Section 24-25-90 “trumps” all other requirements of law. Judge Cooper properly rejected this argument, which is defective for a number of reasons.⁵ First, when construing statutory language “the statute must be read as a whole, and sections which are part of the same general statutory law

⁵ See Order filed January 10, 2007 finding, among other things, several concerns that present material issues of fact, such as (1) division of the unified school district and (2) lack of participation by the District and its Board (ROA pp. 2359-2362).

must be construed together and each one given effect. Moreover, a statute should not be construed by concentrating on an isolated phrase.” Duvall v. S.C. Budget & Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 127 (2008). In reviewing a statutory scheme, such as that establishing the Palmetto Unified School District, a court must presume the Legislature intended to accomplish something and did not intend a futile act. TNS Mills, Inc. v. S.C. Dep’t of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1988). Moreover, where an administrative agency has consistently applied a statute in a particular manner, its construction should not be overturned absent cogent reasons. This is particularly the case where the application would affect more than one state agency. Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 215, 423 S.E.2d 101, 104 (1992).

The record establishes that SCDC violated clear, mandatory legislative provisions in separating Appellants from employment. For example, SCDC arbitrarily divided a statutorily established “unified school district” into eleven fictitious regions having no relationship to the delivery of education services or the District’s responsibility to provide educational programs to “all inmates” having less than a high school diploma or its equivalent. Additionally, SCDC failed to respect delegations of authority by the General Assembly to the District’s Board and Superintendent. Finally, SCDC ignored the consistent application and interpretation of controlling law by OHR, the agency assigned responsibility to oversee reductions in force. For these reasons, SCDC’s RIF in 2003 was “null and void” and Appellants are entitled to reinstatement. See, Triska v. Dep’t of Health and Env’tl Control, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987).

I Statute

S.C. Code Ann. § 24-25-10 establishes a “special statewide unified school district within the South Carolina Department of Corrections” (ROA p. 2281).

Violations

- a The geographic regions arbitrarily divided the “special statewide unified school district ” (See violations of Policy Section 1 1 above), and
- b The RIF reduced district educational services to designated facilities that do not operate on a “statewide” basis (See violations of Policy Section 1 1 above, Appellants’ Exhibit 5, ROA p 3258, Miro testimony ROA pp 914-917, 920-922)

II Statute

S C Code Ann § 24-25-20 states that “the district shall ensure that education programs are available to all inmates with less than a high school diploma, or its equivalent, and that various vocational training programs are available to selected inmates with the necessary aptitude and desire ” (ROA p 2282)

Violations

- a Academic/high school education is offered through the district only to inmates twenty-one years and younger through nine EFA high schools (Appellants’ Exhibits 4 and 5, ROA pp 3254-3258), and
- b Students older than twenty-one may pursue GED through the district only at the nine EFA high schools At all other institutions, adult education is provided through “local school districts” rather than the PUSD (Appellants’ Exhibits 4 and 5, ROA pp 3254-3258)

III Statute

S C Code Ann § 24-25-70(7) requires the PUSD Board to establish a twelve-month school program and teachers’ pay schedule based on the state and average school supplement pay scales (ROA p 2288)

Violations

- a SCDC employed non-certified instructional staff and offered instruction through individuals hired in non-certified positions (ROA pp 2233-2238), and
- b SCDC employed former certified instructional staff in non-certified positions to perform their former duties (Glenn Affidavit ROA pp 2714-2715, Bell Affidavit ROA pp 2700-2701, McClanahan Affidavit ROA pp 2720-2721, McCabe Affidavit ROA pp 2718-2719)

IV Statute

S C Code Ann § 24-25-40 states that the district “shall be under the control and management of a board of nine trustees who shall operate the district under the supervision of the State Department of Corrections ” (ROA pp 2285)

Violations

SCDC conducted the RIF without conferring with the Board of Trustees or considering the laws creating and governing the Palmetto Unified School District (Blanton testimony ROA pp 2625-2628, Near testimony ROA p 2635)

V Statute

S C Code Ann § 24-25-90 states that “the superintendent of the district and all other educational personnel shall be employed, supervised and terminated according to the South Carolina Department of Corrections’ personnel policies and procedures ” (ROA p 2291)

Violations

Throughout the hearing below, SCDC emphasized that each Appellant was subject to the agency’s personnel policies and procedures This required SCDC to follow its policies and procedures in separating Appellants from employment As detailed herein, SCDC violated its own RIF policy and plan in creating and applying geographic regions that do not relate to staff that were separately organized or clearly distinguishable from the staff in other areas (See, RIF policy 1 1, ROA 1634, see also, Final Decision Findings of Fact No 8, ROA p 13) This violation of the RIF Policy, standing alone, renders Appellants’ separations from employment “null and void ”

SCDC also violated recall and reinstatement provisions of its policy (See, RIF Policy 7 1 – 7 5 and Definition of “Temporary Employee”, ROA pp 1638 and 1640) For example, the record establishes that SCDC hired temporary employees to replace educators separated by RIF and allowed individuals who voluntarily separated for purposes of retirement to return to temporary positions in favor of employees separated by RIF This violates state law, OHR guidelines and the RIF Policy

VI Statute

S C Code Ann § 8-11-185 states that “an agency seeking to fill a vacancy or new position must obtain information from the Office of Human Resources’ reduction in force applicant pool ” This section further provides that “an agency shall provide priority consideration to employees terminated due to a reduction in force for any vacancy or new position in the same classification, classification series, or position category held at the time of layoff is prohibited from filling the position if the agency does not first seek to fill

the position from among these qualified employees provided by the Office of Human Resources ”

Violations

- a SCDC filled vacancies following the RIF without providing priority consideration to RIF’ed educators See, violations of policy section 2 3 above, and
- b SCDC guaranteed re-employment at lower pay to employees who chose to “retire” By law, these employees experienced a “break in service” and were not entitled to preference over RIF’d employees who retained “covered employee” status during the recall period See, RIF policy section 2 3 (ROA, p 1634), S C Regulation R 19-700 and R 19-719 01, S C Code Ann § 8-11-185, see also, ROA pp 2560-2572

RIF CONSTITUTIONAL VIOLATIONS

Governmental agencies must operate in a manner consistent with the South Carolina Constitution In this regard, agencies must provide their employees equal access to benefits attached to public employment Depriving one group of employees a benefit afforded another group invokes the equal protection guarantees of the State’s Constitution See, Littlefield v S C Forestry Comm’n, 337 S C 348, 353-354, 523 S E 2d 781, 783 (2000)(reversing an interpretation of a statute providing annual leave benefits that resulted in a violation of equal protection)

By virtue of state law and the RIF policy, Appellants were entitled to all benefits available to other SCDC employees See, S C Code Ann § 24-25-90 (ROA p 2291) As “covered employees,” Appellants enjoyed the right to retain employment unless removed for cause or by proper reduction in force S C Code Ann § 8-17-330 In violating its RIF policy, state laws, regulations and OHR guidelines SCDC deprived Appellants the constitutionally protected right to continuing employment

I **Constitution**

S C Constitution Article I § 3 states that no “person [shall] be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws ”

Violations

- a SCDC separated Appellants from employment in violation of the RIF policy and state law, both of which are property interests protected by the constitution Brown v S C State Bd of Educ 301 S C 326, 391 S E 2d 866 (1990), and
- b During the recall period following the RIF, SCDC allowed employees choosing to retire to return following a “break in service” without allowing the Appellants the opportunity to recall Appellants were “covered employees” entitled to full protection of the law during their recall period Accordingly, the preferential treatment afforded to employees returning after voluntary separation during this period deprived Appellants of their rights as “covered employees” and constituted a violation of equal protection guaranteed by Article I, § 3

II **Constitution**

S C Constitution Article I § 22 states that no person “shall be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly ”

Violations

SCDC separated Appellants from employment in violation of the RIF policy and state law, both of which affected property and liberty interests protected by the constitution Brown v S C State Bd of Educ, 301 S C 326, 391 S E 2d 866 (1990) See, also, Johnson v Spartanburg County Sch Dist No 7, 314 S C 340, 444 S E 2d 501 (1994) The rights violated by SCDC deprived Appellants not only of their statutory right to be treated in keeping with SCDC “personnel policies and procedures” under S C Code Ann § 24-25-90 (ROA, p 2291) Their separation also affected Appellants’ liberty interests to pursue their chosen profession Each of these violations require reinstatement to employment and return of all lost benefits

FOLLOWING THE RIF, SCDC CONTINUED TO VIOLATE APPELLANTS’ RIGHTS UNDER THE RIF POLICY AND LAW

SCDC’s RIF Policy, state law and regulation establish that each Appellant retained “covered employee” status for a period of twelve months following separation from employment During this period, SCDC had responsibilities to Appellants under its policy, state

law and regulation. As set forth below, certain Appellants retained by SCDC following the RIF received compensation for educational services at a rate less than the pay schedule established by the General Assembly. Also during this period, SCDC assigned and hired others to perform the services previously provided by Appellants. Each of these actions violated rights afforded by policy and law. Accordingly, Appellants are entitled to reinstatement with appropriate back pay and benefits.

I Right

Educators in the Palmetto Unified School District “are entitled to additional compensation equal to the mathematical average of all salary supplements paid by school districts across the state. Such a construction comports with the statutory provisions guaranteeing teachers who are state employees but not employed by a particular school district a salary adjusted to reflect the salary schedules of the surrounding school districts.”

Abraham v. Palmetto Unified Sch. Dist. No. 1, 343 S.C. 36, 49, 538 S.E.2d 656, 663 (Ct. App. 2000), ROA p. 2278.

Violations

- a. Educators assigned instructional duties as correctional officers were entitled to payment on the teacher pay schedule. See, S.C. Code Ann. § 24-25-70(7) applied in Abraham v. Palmetto Unified Sch. Dist. No. 1, 343 S.C. 36, 49, 538 S.E.2d 656, 663 (Ct. App. 2000), ROA p. 2278, and
- b. Ms. Glenn, Ms. McCabe, Ms. McClanahan and Mr. Bell all provided instructional services in positions designated as non-instructional. Ms. Glenn was assigned her same librarian duties but paid as a correctional officer. For one month, Ms. McCabe continued her librarian duties but was paid as a correctional officer. Ms. McClanahan was assigned to provide horticulture instruction as a correctional officer and lieutenant. Mr. Bell is assigned to provide vocational instruction (carpentry) and is required to maintain a certificate as a program coordinator. An employee performing the same duties at Tyger River is paid on the teacher salary schedule.

Glenn testimony ROA pp. 278-286, Affidavit ROA pp. 2714-2715, See also, Committee Exhibit 3, ROA pp. 2972, 2991-2992, Appellant Exhibit 2, ROA p. 3251.

McCabe testimony ROA pp 247-248, Affidavit ROA pp 2718-2719, See also, Committee Exhibit 3, ROA p 3068

McClanahan testimony ROA pp 483-488, Affidavit ROA pp 2720-2721, See also, Committee Exhibit 3, ROA pp 3114, 3119, 3131-3139

Bell testimony ROA pp 377-378, 389-390, Affidavit ROA pp 2700-2701, See also, Committee Exhibit 3, ROA pp 3142, 3145, 3157, 3158-3159

II Right

An employing agency may not disregard procedural legislation to remove, demote or otherwise deprive an employee of his salary or position

Johnson v Spartanburg County Sch Dist No 7, 314 S C 340, 444 S E 2d 501, 503 (1994) cited in Abraham v Palmetto Unified Sch Dist No 1, 343 S C 36, 50, 538 S E 2d 656, 664 (Ct App 2000), ROA p 2278

Violations

- a Each Appellant lost pay and benefits because SCDC violated its own RIF policy, state laws and regulations regarding employment of temporaries, and compensation of certified instructional staff. Additionally, SCDC reemployed retired staff after a break in service during the recall period. Appellants maintained "covered employee" status during this period and were entitled to return to employment under the RIF policy and state law. See, RIF policy section 2.3 (ROA p 1634), S C Regulation R 19-700 and R 19-719.01, S C Code Ann § 8-11-185, and
- b OHR answers to "Frequently Asked Questions" regarding reduction in force issues were distributed to agencies in November 2001. Appellant Exhibit 11, ROA p 3390. This information stated "An agency may not hire a temporary employee to perform the duties of an employee affected by a RIF. If these duties are required to be performed on the effective date of the RIF, the agency should reestablish the position and implement its recall procedure." Appellant Exhibit 12, ROA p 3391. See also, Final Decision Findings of Fact No 15, ROA p 14.

RELIEF

- I Each Appellant was denied the opportunity to "bump" less senior employees due to the creation of geographic areas that were not restricted to staff separately organized and clearly distinguishable from the staff in other areas. (Policy Section 1.1, ROA p 1634). As a result the RIF was invalid and each Appellant is entitled to reinstatement.

- II SCDC made new hires, internal promotions or reassignments during the recall period into positions vacated by the RIF without affording separated employees the opportunity to recall (Policy Section 2 3, ROA p 1634) As a result the RIF was invalid and each Appellant is entitled to reinstatement
- III SCDC allowed employees to “retire” and return to employment at less pay during the recall period Each of these employees experienced a “break in service” As a result, the employees separated by RIF were entitled to bump into the vacated positions (Policy Sections 7 1 and 7 5, ROA p 1638) See also, S C Regulation R 19-700 and R 19-719 01, S C Code Ann §8-11-185
- IV SCDC repeatedly assigned employees to “temporary positions” resulting in employment exceeding one year in violation of the RIF policy and state law (Policy section 11, ROA p 1640, S C Code Ann § 8-17-330, S C Regulation R-19-700) As a result, Appellants were not afforded an opportunity to continue employment or for recall to positions improperly designated as “temporary”
- V SCDC assigned employees separated by RIF to provide instructional services at pay significantly below the statutory teacher pay schedule in violation of S C Code Ann § 24-25-70 (7) As a result Ms Glenn, Ms McClanahan, Ms McCabe and Mr Bell are each entitled to compensation on the teacher pay schedule for their instructional services
- VI SCDC violated the Appellants’ constitutional rights in separating them from employment in violation of the RIF plan and state law See S C Constitution Article I §§ 3 and 22 As a result, Appellants are entitled to reinstatement of all rights and benefits Brown v S C State Bd of Educ, 301 S C 326, 391 S E 2d 866 (1990) See also, Johnson v Spartanburg County Sch Dist No 7, 314 S C 340, 444 S E 2d 501 (1994)

CONCLUSION

This Court may not substitute its judgment for that of the State Grievance Committee as to the weight of the evidence on questions of fact Nevertheless, the Court is obligated to examine the record as a whole to determine if the substantial rights of the Appellants have been prejudiced because the findings and conclusions below are

- a in violation of constitutional or statutory provisions,
- b in excess of the statutory authority of the agency,
- c made upon unlawful procedure,

- d affected by other error of law,
- e clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or
- f arbitrary or capricious or characterized by abusive discretion or clearly unwarranted exercise of discretion

S C Code Ann § 1-23-380(A)(5)

The record establishes that the RIF implemented by SCDC separated a disproportionate number of educators compared to the overall employment population of the Agency (Final Decision, ROA p 11, see also, ROA pp 2554-2557) Director Ozmint admitted that he selected the positions for elimination and directed Mr Near to draw geographic regions to minimize bumping and maximize saving As a result, senior employees such as Appellants lost opportunities to retain their positions and to return to employment during the recall period

In Director Ozmint's words, to obtain the most "bang for the buck," SCDC had to make certain that veteran educators at the higher end of the compulsory salary schedule were eliminated **and** that these employees could not "bump" into other positions where, by law, their salaries would continue To accomplish this objective, SCDC violated its own RIF policy and governing principles of state law For example

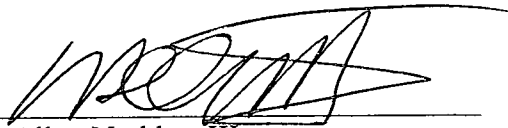
- a geographic regions were drawn in a "unified" district established by the General Assembly,
- b the geographic regions did not apply to staff that are "separately organized and clearly distinguishable from staff in other areas" as required by the RIF policy,

- c temporary and permanent employees were placed in positions during the recall period formerly held by employees separated by RIF,
- d employees separated by RIF were not provided notice or an opportunity to return to employment during the recall period in favor of employees experiencing a "break in service" upon retirement, and
- e certain employees, such as Ms Glenn, Ms McCabe, Ms McClanahan and Mr Bell were employed to provide certified instructional services but were not paid under the teacher pay schedule established by statute and affirmed by the South Carolina Court of Appeals in the Abraham case

The above violations are established in the record and require invalidation of the RIF that caused Appellants to lose their jobs. As the United States Supreme Court stated more than 70 years ago in rejecting an attempt to avoid federal tax legislation, "To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision[s] in question of all serious purpose." Gregory v. Helvering, 293 U.S. 465, 470 (1935). For these reasons, the controlling standard of review on appeal from a final administrative decision requires reversal and award of reinstatement with accompanying benefits to each Appellant.

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By


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July 16, 2009
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APPENDIX A

**LIST OF EMPLOYEES BY POSITION AND DATE ASSIGNED RESPONSIBILITIES
PERFORMED BY CERTIFIED EDUCATORS PRIOR TO RIF
SHOWING ACTIONS DURING AND AFTER RECALL PERIOD**

Source OHR Record Pages 780-785, ROA Pages 2233-2238

1 Education Bumps

Linda M Bratton	Certified Teacher	Tyger River	6/2/03
Ronald M Davis	Certified Teacher	Tyger River	6/2/03
L S Green	Certified Teacher	C G C	6/2/03
Brooks Henderson	Vocational Teacher	Tyger River	6/2/03
Eileen Howard	Certified Teacher	Tyger River	6/2/03
Yvette Lakin	Certified Teacher	PUSD	6/2/03
W Marinko	Certified Teacher	McDougal	6/2/03
Miriam Myers	Certified Teacher	C G C	6/2/03
Ruth Pierson	Guidance Counselor	Turbeville	6/2/03
Rose Ruger	Certified Teacher	C G C	6/2/03
Talmadge Smith	Certified Teacher	Stevenson	6/2/03
Lavinia Thompson	Certified Teacher	Stevenson	6/2/03
J Venning	Guidance Counselor	Stevenson	6/2/03
Carol Williams	Certified Teacher	C G C	6/2/03

2 Permanent Employees Assigned Education Responsibilities During Recall Period

Theron Phillips	Corr Off	Walden	11/13/83
B Connelly	Corr Off	Lieber	01/05/87
W Dittmar	Corr Off	Broad River	08/28/89
B McClanahan	Corr Off	Broad River	12/03/90
G Emrhein	Corr Off	Lieber	03/23/92
J Ferguson	Corr Off	Leath	08/16/93
A Bettencourt	Corr Off	Wateree	09/27/97
Lisa Williams	Corr Off	Lieber	05/04/98
Judy Sullivan	Corr Off	Kershaw	08/31/98
John Lawson	Corr Off	Allendale	03/29/99
Cheryl Newby	Admin Assist	Leath	04/19/99
Vernon Tucker	Corr Off	Kershaw	09/10/01
C Buehler	Corr Off	Perry	09/17/01
Connie Taylor	Prog Coord	Evans	02/28/02
B Easterlin	Corr Off	Lieber	06/03/02
Willie Hill	Corr Off	McCormick	09/03/02
Albert Hall	Corr Off	McCormick	04/14/03
E Quattlebaum	Corr Off	Kirland	06/09/03
Frank Boxx	Human SVC	Leath	06/10/03
Mary McCabe	Certified Teacher	Tyger River	07/02/03
G Weaver	Voc Teacher	Tyger River	12/08/03
D Labrew	Cur Coord	C G C	02/17/04

3 Permanent Employees Assigned Education Responsibilities After Recall Period

M Mailloux	Certified Teacher	Tyger River	06/21/04
Lewis Britt	Corr Off	Evans	10/04/04
Isha Bangura	Corr Off	Perry	12/06/04
Willie Lovett	Voc Teacher	C G C	02/02/05
Nancy Glenn	Certified Teacher	Trenton	03/17/05
Pamela Burnett	Principal	Tyger River	04/17/05
Michael Newsome	Spec Ed	Turbeville	05/31/05
B Declercq	Voc Teacher	Trenton	06/02/05
S Messer	Acad Prog Mgr	PUSD	06/20/05
Michael Newsome	Certified Teacher	Lee	08/17/05
Tina Johnson	Guidance Counselor	Trenton	10/18/05
Rodney Kinlaw	Voc Teacher	C G C	11/14/05
James C Bell	Prog Coord	Perry	01/17/06
A Corley	Voc Teacher	Trenton	02/14/06
Kyle Perry	Prog Coord	Manning	02/21/06
Teri Nettles	Certified Teacher	Richland	03/06/06
L Yarbrough	Voc Teacher	Tyger River	04/10/06
Robert Campbell	Voc Teacher	Turbeville	05/15/06
William Bowen	Certified Teacher	McDougal	06/05/06
James Neim	Prog Coord	Allendale	07/05/06
Linda Dyar	Certified Teacher	Trenton	08/21/06
J Baker	Corr Off	Kershaw	09/01/06

4 Temporary Employees Assigned Education Responsibilities During Recall Period

Sandra Hunter	Teacher's Aide	Wateree	07/15/03
M Singletary	Classroom Teacher	Kirkland	07/23/03
Eva Jones	Classroom Teacher	Lee	07/29/03
Sharonda McCoy	Classroom Teacher	C G C	08/18/03
P Haithcock	Classroom Teacher	Evans	10/27/03
D Stevenson	Classroom Teacher	Richland	11/17/03
Brenda Moody	Classroom Teacher	Evans	11/24/03
James Zuver	Classroom Teacher	Trenton	11/28/03
Wendell Blanton	Superintendent	PUSD	12/01/03
Georgia Brown	Certified Teacher	Turbeville	12/01/03
Willie McKay	Certified Teacher	Turbeville	12/01/03
Leonard Rogers	Vocational Teacher	Turbeville	12/01/03
Linda Younts	Classroom Teacher	Turbeville	12/01/03
Joseph Thomas	Adm Asst	Goodman	12/05/03
E McMillan	Classroom Teacher	Stevenson	12/08/03
Susan Mullis	Classroom Teacher	CGS	01/14/04
Milton Roundtree	R & E Assessment	Kirkland	01/26/04
Patricia Williams	Classroom Teacher	Leath	02/09/04
M Prioleau	Library Asst	McDougal	02/10/04
Chad Clark	Vocational Teacher	Walden	03/17/04
Sheri Akins	Adm Asst	Manning	03/22/04

Martha Crowe	Teacher's Aide	Turbeville	04/26/04
Lois Addison	Adm Asst	Lee	04/27/04

5

Temporary Employees Assigned Education Responsibilities After Recall Period

Merle Brigman	Admin Spec	PUSD	07/12/04
W Marinko	Classroom Teacher	McDougal	07/16/04
Charles Williams	Voc Teacher	Tyger River	07/16/04
Bobby Kinard	Voc Teacher	Manning	08/26/04
Thomas Brown	Vocational Teacher	Kershaw	08/30/04
A Greene	Classroom Teacher	McDougal	08/30/04
Kathy Jackson	Educ Prog Supv	PUSD	08/30/04
Donald Thomas	Voc Teacher	Allendale	09/08/04
R Myles	Classroom Teacher	Lee	10/20/04
Brusce Neal	Vocational Teacher	Kershaw	10/12/04
E Rymszewicz	Voc Teacher	Leath	11/08/04
Edward Sharpe	Spec Teacher	PUSD	12/13/04
Roy Alberty	Voc Teacher	Walden	02/22/05
L Demko	Classroom Teacher	C G C	04/13/05
Frank Boxx	Classroom Teacher	Leath	07/11/05
Henry Bagnal	Principal	Turbeville	07/18/05
James Newman	Classroom Teacher	Lee	08/08/05
Tommie Wicker	Cur Coord	PUSD	08/15/05
Carroll King	Voc Teacher	Broad River	08/22/05
M Wilson	Adm Asst	Lee	09/26/05
B Holley	Adm Asst	Tyger River	11/21/05
M Mullen	Classroom Teacher	Trenton	11/28/05
G Wilson	Classroom Teacher	Turbeville	01/17/06
A Hatchell	Adm Asst	Wateree	01/20/06
Marilyn Dozier	Admin Spec	PUSD	04/16/06
R Gardner	Voc Teacher	Kershaw	04/18/06
A Latham	Cert Teacher	PUSD	06/06/06

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James "Cal" Bell, Othella Bernard, Katherina	)	
Bower, Linda M W Bratton, Ann T Bridges,	)	
Rance C Cobb, Jeannie B Croxton, et al ,	)	Docket No 09-ALJ-30-0103-AP
	)	
Appellants,	)	
	)	
vs	)	BRIEF OF RESPONDENT SCDC
	)	AND OF ITS DIVISION OF
S C Department of Corrections and Palmetto	)	EDUCATION, ALSO KNOWN
Unified School District No 1,	)	AS PALMETTO UNIFIED
	)	SCHOOL DISTRICT No 1
Respondents	)	
	)	

In accordance with the provisions of Administrative Law Court ["ALC"] Rule of Procedure 37, Respondent South Carolina Department of Corrections ["SCDC"], by and through its undersigned counsel and on behalf of its Division of Education, also known as the Palmetto Unified School District No 1 ["PUSD"], hereby files its brief in the instant matter

By its brief, SCDC respectfully submits that this Court should deny the Appellants' appeal and affirm the Final Decision of the State Employee Grievance Committee ["Committee"] issued February 18, 2009, a decision that denied the Appellants' challenge to a reduction in force ["RIF"] implemented by SCDC effective June 1, 2003 ¹

¹ SCDC implemented its June 1 2003 RIF through two (2) items a RIF policy developed by SCDC s Division of Human Resources and a RIF plan SCDC respectfully submits that a review of these items and their interrelationship is essential not only to recognize the flawed analysis and logic associated with the Appellants' brief but also to properly understand the analysis and logic associated with the Committee s February 18 2009 Final Decision in SCDC s favor Given the method by which representatives from the State Office of Human Resources [OHR] assembled the record introduced to the Committee at the beginning of the hearing proceedings (i e Committee Exhibit # 1) SCDC s RIF plan and its RIF policy were not clearly identified or cohesively presented Thus the Record on Appeal before this Court suffered the same fate Accordingly SCDC respectfully provides the following accounting of both SCDC s 2003 RIF policy and RIF plan Director Ozmint presented the agency s RIF plan in the form of a March 28, 2003 letter to OHR Director Samuel L Wilkins (R pp 1626 – 31) As reflected by the last page of Director Ozmint s March 28 2003 letter to Mr Wilkins Director Ozmint included four (4) attachments to the RIF plan detailed in his letter First Director Ozmint included a copy of SCDC s RIF policy issued March 14 2003 designated as SCDC Policy Number ADM 11 05 (R pp 1633 – 40) and a March 14 2003 letter addressed to the Director of SCDC s Division of Human Resources John Near from Chris Byrd OHR s

I STATEMENT OF ISSUES ON APPEAL

The Appellants, in their brief filed July 16, 2009, submitted “that the Final Decision issued by the [Committee] dated February 18, 2009 must be reversed and Appellants awarded reinstatement to employment with back pay and benefits ²” The Committee’s Final Decision denied the collective appeal filed by the 20 Appellants regarding the termination of their respective employment pursuant to the June 1, 2003 RIF implemented by SCDC

The Appellants did not provide a section of their brief entitled “STATEMENT OF ISSUES ON APPEAL” Instead, the Appellants, in the section of their brief entitled “CONTROLLING FACTS,” provided 27 enumerated paragraphs by which they contended that the “record as a whole demonstrates that SCDC deviated from controlling policy and law in the challenged RIF ³” As the Appellants’ brief did not articulate clearly identifiable issues on appeal, SCDC respectfully submits that the grounds for their appeal, as articulated within their 27 enumerated paragraphs, may best be distilled into three (3) distinct headings

- A SCDC violated its own RIF policy, state law and regulations controlling RIFs, and our state’s constitution by including the Appellants and other certified educators it employed in the RIF it implemented effective June 1, 2003, ⁴
- B SCDC violated its own RIF policy, state law and regulations controlling RIFs, and our state’s constitution by its decision to divide the entire agency into 11

Assistant Director in which Mr Byrd advised Mr Near that OHR had approved Policy Number 11 05 (R p 1632) Second Director Ozmint attached materials identified as Listing of Competitive Areas Areas Map and Competitive Job Classifications & Classification Series (R pp 1641 – 43) Third Director Ozmint attached a Listing of Positions being eliminated and Employees eligible for Bumping in Each Competitive Area (R pp 1644 – 59) Fourth Director Ozmint attached a Sample Letter – Notification of Reduction In Force a model letter by which SCDC would notify employees whose positions were identified for elimination of their potential lay off (R pp 1953 – 59) On March 28 2003 Christopher Poore an OHR Human Resources Consultant acknowledged OHR’s receipt and review of SCDC’s RIF plan which included SCDC’s RIF policy as submitted by Director Ozmint (R pp 1926 – 27) SCDC respectfully includes a consolidated version of SCDC’s June 1 2003 RIF policy and plan as well as Mr Poore’s March 28 2003 letter as Exhibit A in support of its instant brief

² See Appellants’ Brief p 1

³ *Id.* p 3

⁴ *Id.* p 3 – 5 paragraphs 1 – 9

competitive areas, the key decision by which it implemented its RIF effective June 1, 2003,⁵ and

- C SCDC violated its own RIF policy, state law and regulations controlling RIFs, and our state's constitution in the manner by which it retained and hired temporary employees before and after the RIF it implemented effective June 1, 2003 as well as in the manner by which it retained employees who accepted the 'retirement opportunity' it offered after the RIF it implemented effective June 1, 2003⁶

The Appellants then, in the section of their brief entitled "LEGAL ARGUMENT," offered a series of overlapping arguments divided into four (4) sections which supported these three (3) discernable grounds⁷ The four (4) sections provided by the Appellants identify instances in which SCDC's decisions and actions purportedly violated provisions its own RIF

⁵ *Id* p 5 – 8 paragraphs 10 – 18

⁶ *Id* pp 8 – 11 paragraphs 19 – 27

⁷ The three (3) discernable grounds reflect a key deviation from the grounds for appeal articulated by the Appellants before the Committee In a document dated October 14 2008 and entitled GROUND FOR APPEAL FORM (R pp 2695 – 99) the Appellants framed three (3) overarching grounds for their collective appeal of SCDC's denial of their grievances to the Committee First, SCDC, by its 2003 RIF policy and through its 2003 RIF plan purportedly violated the statutes which created and control PUSD No 1 Second SCDC by its 2003 RIF policy and through its 2003 RIF plan purportedly deviated from 'normal' RIF practices and procedures Third SCDC by its 2003 RIF policy and through its 2003 RIF plan purportedly targeted the Appellants in a retaliatory manner because they had successfully engaged in litigation, *Abraham v PUSD No 1 & SCDC* 538 S E 2d 656 (S C Ct App 2000) [hereinafter *Abraham*] with the agency over their compensation (R pp 2272 – 79)

The Appellants articulated a number of arguments to the Committee regarding SCDC's purported retaliatory motive behind its 2003 RIF policy and plan (R pp 2695 – 99) Also Appellant Max Randolph appeared as the very first witness during the presentation of the Appellants' case (R pp 123 – 170) During his testimony Mr Randolph testified regarding statements purportedly made by Director Ozmint to him during a conversation between them which purportedly occurred in March 2003 shortly after SCDC officials had announced the RIF The Appellants portrayed Director Ozmint's purported statements to Mr Randolph as evidence that Director Ozmint possessed a retaliatory motive against educators including the Appellants in the manner and method by which he designed and implemented the 2003 RIF

Thus the purported retaliatory motive held by SCDC and specifically Director Ozmint against the Appellants constituted an essential component if not the essential component of the Appellants' appeal and presentation to the Committee and the Committee recognized this reality in its Final Decision (R p 14) However in their appeal to this Court the Appellants did not challenge the Committee's finding that there was no credible evidence presented that the elimination of educator positions in [PUSD No 1] was motivated by a desire for retaliation for an earlier lawsuit that resulted in the increase of educators' salaries (R p 16) For that matter the term retaliation appears nowhere within the Appellants' brief **Accordingly, SCDC respectfully argues that the Appellants have abandoned the retaliation claim they raised in their appeal to the Committee** See *Jones v Leagan* 681 S E 2d 6 *15 (S C Ct App 2009) (An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal (citing *Jinks v Richland County* 585 S E 2d 281, 283 n 3 (S C 2003) (Since County failed to argue this issue in the body of its brief the issue is deemed abandoned)))

policy,⁸ purportedly violated state statutes,⁹ purportedly violated provisions of our state's constitution,¹⁰ and purportedly deprived them of rights apparently secured to them by SCDC's own RIF policy, state law, and state regulation ¹¹

II STATEMENT OF THE CASE

A PROCEDURAL HISTORY

The Appellants “are current and former certified educators employed by [SCDC] in the [PUSD],¹² who “were each ‘covered employees’ removed from their positions as a result of a [RIF] implemented [by SCDC] effective June 1, 2003 ¹³,

On or about June 13, 2003, each of the 20 Appellants “timely submitted’ grievances with SCDC regarding “their separation from employment in keeping with SCDC policy and state law ¹⁴, SCDC denied each of the 20 grievances, as the responsible SCDC officials determined that no material issue of fact existed regarding the purported inconsistent or improper application of SCDC's RIF plan or policy In light this determination, SCDC did not conduct hearings regarding any of the 20 grievances filed by the Appellants

Each of the 20 Appellants appealed SCDC's denial of their grievances to the State Human Resources Director, and the State Human Resources Director affirmed SCDC's denial of these grievances Each of the 20 Appellants moved the State Human Resources Director to

⁸ See Appellants Brief pp 14 – 18

⁹ *Id* pp 19 – 23

¹⁰ *Id* pp 23 – 24

¹¹ *Id* pp 24 – 26

¹² *Id* p 1

¹³ *Id* pp 1 – 2

¹⁴ *Id* p 2

reconsider his decision to affirm SCDC's denial of their grievances, and the State Human Resources Director denied the Appellants' respective motions for reconsideration

Subsequent to the final decisions issued by the State Human Resources Director, the Appellants filed a consolidated complaint and Petition for Judicial Review in circuit court. The circuit court, pursuant to *Ross v Med Univ of S Carolina*, 453 S E 2d 880 (S C 1995), directed SCDC to provide responses to Appellants' discovery requests and to make agency officials available for deposition. In accordance with the circuit court's directive, Appellants' counsel deposed agency officials on December 2005 and June 2006.

The circuit court heard argument regarding the Appellants' consolidated Petition for Judicial Review on December 11, 2006 and, by order issued January 10, 2007, it ruled that material issues of fact existed regarding the Appellants' contention that SCDC inconsistently or improperly applied its RIF policy and plan in 2003, and, consequentially, it remanded this matter back to OHR for disposition by means of a hearing by the Committee (R pp 40 – 44). SCDC appealed the circuit court's January 10, 2007 order to the Court of Appeals, and, by order issued May 14, 2008, the Court of Appeals dismissed SCDC's appeal and effectively animated the circuit court's order remanding this matter back to OHR for disposition (R pp 46 – 47).

By letter dated June 4, 2008, OHR directed SCDC to process each of the Appellants' original 2003 grievances in accordance with its grievance policy within 45 days (R pp 48 – 49). On July 23, 2008, after SCDC did not meet the 45 day deadline established by OHR in its June 4, 2008 letter, the Appellants timely submitted this matter to OHR for disposition pursuant to the circuit court's January 10, 2007 order (R pp 2383 – 84).

OHR, in October 2008, detailed the adjudication of the Appellants' collective appeal to the Committee and, by their October 14, 2008 "Statement of Grounds on Appeal, the

Appellants articulated their precise collective and individual challenges to SCDC's 2003 reduction in force (R pp 2695 – 99) The Committee, after conducting hearing proceedings on November 5, 6, 7, 10, and 17, 2008, December 15 and 18, 2008, and January 22, 26, and 29, 2009, issued its Final Decision in this matter on February 18, 2009 By its Final Decision, the Committee denied the relief demanded by the Appellants in their appeal and upheld the RIF implemented by SCDC effective June 1, 2003 (R pp 8 – 17)

The Appellants timely filed their Notice of Appeal with the ALC on March 10, 2009, and this Court assumed jurisdiction of the Appellants' instant appeal by an order dated and filed May 21, 2009 OHR filed the Record on Appeal in this matter with the Court on June 24, 2009

B APPLICABLE LEGAL STANDARDS

1 Standard(s) of Review urged upon this Court by the Appellants

In the section of their brief entitled "STANDARD OF REVIEW," the Appellants stated the following

This is an appeal from a final administrative decision governed by the Administrative Procedures Act ('APA') S C Code Ann § 1-23-310 et seq Under the APA, a reviewing court presented with a factual challenge must assess the record as a whole to determine whether the administrative decision is supported by substantial evidence S C Code Ann § 1-23-350(5)(e) The South Carolina Supreme Court has defined 'substantial evidence' as evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached McCraw v Mary Black Hosp., 350 S C 229, 235, 565 S E 2d 286, 289 (2002)

The deference afforded administrative agencies in resolving factual disputes does not extend to conclusions of law Instead a reviewing court must exercise its independent judgment and reverse or modify an administrative decision that is affected by an error of law S C Code Ann § 1-23-380(5)(d), see also Hill v Eagle Motor Lines, 373 S C 422, 428, 645 S E 2d 424, 427 (2007)

The material facts in this appeal are largely uncontested It is Appellants' position, however, that the Final Decision fails to conform

these facts to controlling principles of law For these reasons, Appellants are entitled to the relief requested ¹⁵ [emphasis supplied]

The Appellants then provided the following succinct assessment of their appeal in the section of their brief entitled “STATEMENT OF POSITION ”

The RIF conducted by SCDC on June 1, 2003 was arbitrary and capricious, an abuse of discretion and unwarranted exercise of discretion in violation of S C Code Ann § 8-17-340(E)(2)(f) Additionally, the RIF was characterized by a violation of statutory authority, unlawful procedure and legal error in violation of S C Code Ann § 8-17-340(E)(2)(a) – (e) ¹⁶

As illustrated immediately below, however, the authorities cited by the Appellants in the sections of their brief entitled “STANDARD OF REVIEW” and “STATEMENT OF POSITION” do not represent the precisely applicable or complete standard of review for this Court regarding the Appellants’ instant appeal

2 Precisely Applicable and Complete Standard of Review for this Court

The Appellants’ appeal from the Committee’s February 18, 2009 Final Decision is before this Court pursuant to § 1-23-600(D) and § 8-17-340(F) Accordingly, this Court sits in an appellate capacity under the Administrative Procedures Act rather than as an independent finder of fact Thus, the provisions of § 1-23-380(5) govern the circumstances in which an appellate body, such as this Court, may reverse or modify an agency decision, such as the Committee’s Final Decision In its entirety, § 1-23-380(5) reads as follows ¹⁷

The court **may not** substitute its judgment for the judgment of the [Committee] as to the weight of the evidence **on questions of fact** The court may affirm the decision of the agency or remand the case for further

¹⁵ See Appellants Brief pp 2 – 3

¹⁶ *Id* p 3 Again as discussed in note 7 above the Appellants did not include in their STATEMENT OF POSITION an argument that their inclusion in SCDC s 2003 RIF resulted from retaliation undertaken by Director Ozmint or any other SCDC official, and consequently the Appellants have abandoned the retaliation claim they raised in their appeal to the Committee

¹⁷ The Appellants eventually recited the provisions of § 1 23 380(5) at the end of their brief in the section entitled CONCLUSION The Appellants styled their citation to this provision as § 1 23 380(A)(5)

proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are

- (a) in violation of constitutional or statutory provisions,
- (b) in excess of the statutory authority of the [Committee],
- (c) made upon unlawful procedure,
- (d) affected by other error of law,
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion¹⁸

By conceding that the material facts in their appeal are uncontested, the Appellants rather profoundly undercut their argument that the Committee's Final Decision should be reversed because the Committee's decision was affected by an error of law¹⁹. Since the interpretation of the statutes that create the PUSD and control its management and operation under SCDC's authority are essentially matters of first review by any judicial body,²⁰ SCDC respectfully argues that this Court must not, contrary to the Appellants' argument, conduct a sterile and limited review regarding only whether the Committee improperly applied the controlling principles of law. Instead, this Court's review of the instant matter must fully contemplate the factual findings rendered by the Committee, findings which the Committee applied to its interpretation and understanding of the controlling statutes and regulations.

¹⁸ See also this Court's February 24, 2009 decision in *Holbert v. SC State Bd for Tech. & Comp. Ed.* Docket No. 08 ALJ-30 0061-AP 2009 WL 769086 * 2 – 3 (2009).

¹⁹ The Committee invoked § 8 17-340(E)(2) the provision cited by the Appellants in their STATEMENT OF POSITION in the very last and dispositive paragraph of its Final Decision.

The Committee finds that **Appellants failed to establish** that SCDC's implementation of its RIF plan was improper, inconsistent, and/or inappropriate under the requirements of SC Code of Laws § 8 17-340(E)(2). Furthermore, it did not violate any internal policies or procedures or any guidelines established by the State Office of Human Resources. Therefore, the Committee finds in favor of the agency and denies the relief sought by Appellants [emphasis supplied] (R. p. 17).

²⁰ Under the provisions of § 8 17-340, as recognized by the Committee in its Final Decision, "[t]he State Employee Grievance Procedure Act [Grievance Act] creates the Grievance Committee as a quasi-judicial review body that conducts hearings of certain specified state employee grievance appeals" (R. p. 15).

Thus, SCDC respectfully argues that this Court must not only review the manner in which the Committee applied the controlling legal principles but it must also determine if the factual determinations made by the Committee meet the substantial evidence standard²¹ Under this standard, the party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence *Waters v S C Land Res Conversation Comm n*, 467 S E 2d 913, 917 (S C 1996) In applying the substantial evidence rule, the factual findings of an administrative agency are presumed to be correct *Rodney v Michelin Tire Co* , 466 S E 2d 357, 359 (S C 1996) The agency's decision will not be set aside simply because reasonable minds may differ on the judgment *Lark v Bi-Lo Inc* , 276 S E 2d 304, 307 (S C 1981) Accordingly, the fact that the record, when considered as a whole, presents the possibility of drawing two (2) inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence *Waters* 467 S E 2d at 917, *Grant v S C Coastal Council*, 461 S E 2d 388, 391 (S C 1995) In determining whether an agency's decision is supported by substantial evidence, the reviewing court 'need only find, looking at the entire record on appeal,' evidence from which reasonable minds could reach the same conclusion that the administrative agency reached *DuRant v S C Dep t of Health & Envtl Control*, 604 S E 2d 704, 706 (S C Ct App 2004)

Returning to the Appellants' "STATEMENT OF POSITION," an 'abuse of discretion occurs when the judge's ruling is based upon an error of law, such as application of the wrong legal principle, or, when based upon factual conclusions, the ruling is without evidentiary support, or, when the judge is vested with discretion, but the ruling reveals no discretion was exercised, or when the ruling does not fall within the range of permissible decisions applicable in

²¹ See also this Court's decision in *Bradley v S C Dep t of Corr* Docket No 07 ALJ 30 0466 AP 2008 WL 2828614 * 1 and 4 (2008)

a particular case” *Ex parte Capital U-Drive-It Inc*, 630 S E 2d 464, 467 (S C 2006)
Additionally, a decision is arbitrary if no rational basis for the conclusion exists, or when it is based on one’s will and not upon any course of reasoning and exercise of judgment. A decision may also be arbitrary if it is made at pleasure without adequate determining principles or is governed by no fixed rules or standards. *Converse Power Corp v S C Dep t of Health & Envtl Control*, 564 S E 2d 341 (S C Ct App 2002)

III ARGUMENT

SCDC respectfully argues that there was sufficient evidence before the Committee to allow reasonable minds to arrive at the findings rendered by the Committee in its adjudication of the Appellants’ collective appeal and that the Committee’s conclusions of law reflected the proper application of controlling legal principles, particularly in light of the reality that the interpretation and application of the applicable regulations, statutes, and precedent constituted matters of first impression before any judicial or quasi-judicial body

A SCDC DID NOT VIOLATE ITS OWN RIF POLICY, STATE LAW OR REGULATIONS CONTROLLING RIFs, OR OUR STATE’S CONSTITUTION BY INCLUDING THE APPELLANTS AND OTHER CERTIFIED EDUCATORS IT EMPLOYED IN THE AGENCY-WIDE RIF IT IMPLEMENTED EFFECTIVE JUNE 1, 2003

In their first ground on appeal, the Appellants essentially argued that SCDC should have excluded them, and the other certified educators it employed, from its 2003 RIF. In support of this ground, the Appellants presented as uncontested fact the following description of the PUSD

The [PUSD] is a single, statewide school district created by the General Assembly **and administered** by SCDC (S C Code Ann § 24-25-10, ROA p 2281). All educators in the District must be employed, supervised and terminated according to SCDC policies and procedures (S C Code Ann § 24-25-90, ROA p 2291)²² [emphasis supplied]

²² See Appellants’ Brief pp 3 – 4 paragraph 1. In its Finding of Fact No. 4 the Committee acknowledged that the Appellants contended that during the development and administration of the RIF plan the PUSD was not treated as a single unified school district as required by law. (R p 12)

The Appellants continued their description as follows

The [PUSD] has one Board and one Superintendent (S C Code Ann §§ 24-25 40 through 90, ROA pp 2285-2291) All educators are held to the same standards and there are no geographic regions within the [PUSD] (ROA pp 513-515, 525-528, 863-865, 913, 2614)²³

The Appellants then presented, as uncontested fact, a chronology of events beginning with Director Ozmint's appointment as SCDC's Executive Director in January 2003 and his decision to construct and implement a RIF²⁴ As acknowledged by the Appellants, SCDC submitted a new RIF policy to OHR, which OHR approved on March 14, 2003 (R pp 1633 – 40)²⁵ On March 28, 2003, SCDC submitted its RIF plan to OHR, which provided the actual mechanics SCDC would use to implement the RIF²⁶ (R pp 1626 – 59, 1953 – 59, 1926 – 27)

The Appellants then observed as uncontested facts that Director Ozmint identified the positions which would be subject for separation pursuant to the agency's RIF plan and that of the 148 positions designated for separation pursuant to the plan, "approximately" 84 were certified educators²⁷ Finally, the Appellants observed the following as uncontested fact

Higher paid educators were eliminated to get the most 'bang for the buck" (ROA pp 1038-1039, 1054-1056, 1072, 1079-1080, 2682) Appellants and SCDC witnesses testified that other SCDC employees complained about the "unfairness of statutorily required educator pay raises (Final Decision Findings of Fact No 18, ROA p 14) Director

²³ See Appellants Brief p 4 paragraph 3

²⁴ *Id* p 4 paragraph 5

²⁵ *Id*

²⁶ *Id* p 4 paragraph 6 While the Appellants focus on Director Ozmint's role the record clearly reflects that John Near who in 2003 served as the Director of SCDC's Division of Human Resources drafted SCDC's RIF policy and prepared SCDC's RIF plan Further Mr Near testified that OHR representatives worked with him and provided input into the final version of SCDC's RIF policy (R pp 700 – 06) and Mr Near testified that OHR representatives provided specific input into the final version of SCDC's RIF plan (R pp 732 – 48) See note 1 above for a precise explanation of the contents of the RIF plan prepared by Mr Near and submitted to OHR by Director Ozmint

²⁷ *Id* p 5 paragraphs 7 – 8

Ozmint testified that these raises were “taken out of the hide” of other employees (ROA pp 1045-1046, see also ROA pp 1052, 1095-1096)²⁸

In the four (4) sections of their legal argument, the Appellants challenged the legitimacy of SCDC’s decisions and actions which identified their certified educator positions for elimination. In the section addressing SCDC’s purported violations of applicable statutes, they argued that SCDC violated § 24-25-40 by “conducting the RIF without conferring with the PUSD Board of Trustees or considering the laws creating and governing the PUSD”²⁹. In the section addressing SCDC’s purported violations of our state’s constitution, they argued that their separation from employment deprived them of property interests secured to them by Article I, § 3,³⁰ and they also argued that their separation from employment affected their liberty interests to pursue their chosen profession in violation of Article I, § 22.³¹

²⁸ *Id.* p. 5 paragraph 9. While the Appellants did not claim in their appeal to this Court that SCDC retaliated against them in the manner by which they constructed and implemented their 2003 RIF, this passage from their brief certainly hints at such a claim. In its Finding of Fact No. 17, the Committee recognized that the Appellants contended that SCDC, through the RIF plan, arbitrarily and capriciously retaliated against SCDC educators who took legal action [*Abraham*] to compel SCDC to provide compensation in accordance with law (R. p. 14). Again, as explained in note 7 above, SCDC respectfully submits that the Appellants have abandoned their retaliation claim in their appeal to this Court.

²⁹ *Id.* p. 22 Section IV. In its Finding of Fact No. 7, the Committee acknowledged the identical argument offered by the Appellants, namely that they contended the PUSD School Board was not involved in development of the RIF plan as required by Law and the district superintendent was merely informed of the action (R. p. 13).

³⁰ *Id.* p. 24 Section I(a). The Appellants also cited *Brown v. S.C. State Bd. of Educ.*, 391 S.E.2d 866 (S.C. 1990), in support of this argument. *Brown* is inapplicable to this case, as our Supreme Court in *Brown* found that S.C. Code Reg. 43-59 (Supp. 1989), a regulation which allowed state officials to withdraw a teacher’s certification without notice and an opportunity to be heard, was unconstitutional. In short, the facts in *Brown* are entirely different from the facts here, because no action undertaken by SCDC in formulating or implementing its 2003 RIF deprived any of the Appellants their teaching credentials.

³¹ *Id.* p. 24 Section II. The Appellants again cited *Brown* as well as *Johnson v. Spartanburg County Sch. Dist.*, No. 7, 444 S.E.2d 501 (S.C. 1994), in support of this argument. *Johnson* is inapplicable to this matter, as the issues on appeal in *Johnson* concerned the non-renewal of a teacher’s employment contract and the interpretation of the Teacher Employment and Dismissal Act. Again, no action undertaken by SCDC in formulating or implementing its 2003 RIF resulted in the non-renewal of a teacher’s employment contract. The Appellants also invoked § 24-25-90 in support of this argument. In its Finding of Fact No. 6 (R. p. 12), the Committee acknowledged that the Appellants further contended that the RIF plan failed to take into account experience and credentials such as degrees, certificates, and positions held, which are uniformly applied in the field of education.

However, the Appellants offered these identical or nearly identical arguments to the Committee, and the Committee, by properly applying and interpreting the applicable law, denied the Appellants' appeal of SCDC's decision to deny their grievances

The Appellants' argument that SCDC violated § 24-25-40 by "conducting the RIF without conferring with the PUSD Board of Trustees or considering the laws creating and governing the PUSD," is nothing other than their own interpretation of this statutory provision. Likewise, by presenting as uncontested fact that the PUSD "is a single, statewide school district created by the General Assembly and administered by SCDC," the Appellants offered this Court nothing more than their own interpretation of § 24-25-10. The testimony offered by the Appellants and SCDC management officials, specifically Ms. Gerri Miro, along with the plain and ordinary meaning of the provisions of § 24-24-10, *et seq*, and, specifically § 24-25-90, contradict the notion that SCDC merely "administers" the PUSD.³² The Committee properly recognized the realities of the relationship amongst and between the Appellants, the PUSD, and SCDC by concluding as follows:

SCDC management was not obligated by statute or policy to consult with the PUSD School Board or obtain its approval before implementing the RIF. While good business relations, may, in the opinion of some, dictate the feedback from management of affected areas be solicited, it is not required. The PUSD exists as a unit under the purview of the SCDC Executive Director, not as a separate entity, and, therefore, it is not afforded any special rights or treatment not afforded to other divisions.

³² See note 22 above. Ms. Miro has since early 2003 served as Deputy Director for SCDC's Programs and Services and in this position she has been and remains responsible for SCDC's Division of Education (R pp 468 – 69 and 854 – 55). When asked during her testimony before the Committee to describe the relationship between SCDC's Division of Education and the PUSD, Ms. Miro testified as follows:

There really isn't any difference. It's — it's a part of that division. It's an educational component that was mandated by law that is a part of the Division of Education to provide services, educational opportunities for our inmates, education and vocational opportunities for our inmates. (R p 864) [emphasis supplied]

During her testimony, Ms. Miro negated the Appellants' contention that the PUSD somehow stood apart from SCDC's Division of Education or from SCDC itself as a separate and distinct entity (R pp 863 – 70).

within the agency. Further, § 24-25-90 of the South Carolina Code of Laws states “[t]he superintendent of the district [PUSD] and all other educational personnel shall be employed, supervised, and terminated according to [SCDC’s] personnel policies and procedures (Committee Conclusion of Law No. 3, R pp. 16 – 17).

The Appellants failed to acknowledge in their brief to this Court that SCDC’s 2003 RIF affected all divisions of SCDC, not just the PUSD, which constitutes the agency’s Division of Education. The Appellants’ myopia on this essential issue most acutely manifested itself when they presented as uncontested fact that “approximately 84 of the 148 positions designated for separation in the agency’s RIF plan were “certified educators.” The Committee simply did not find that ‘approximately’ 84 of the 148 positions designated for separation in the RIF plan were educators. Instead, the Committee observed the following (R p. 11):

The positions of 148 SCDC employees were eliminated effective June 1, 2003. Of those 148 positions, 84 (56.75%) were PUSD positions including Appellants in this appeal who were certified educators employed by SCDC in the PUSD (Committee Exhibit #1, pp. 1 – 39).

Simple arithmetic yields the conclusion that 64 (43.25%) of the 148 positions that were eliminated effective June 1, 2003 were non-PUSD positions. This simple analysis reinforces the reality that the Appellants, like all other SCDC employees, were properly subject to the RIF implemented by the agency effective June 1, 2003.

This reality is again reinforced by an examination of the definitions of ‘Employee’ and ‘Employing Agency’ from the applicable state regulations. An “employee,” as defined by S.C. Regulation § 19-700, is “any person in the service of an agency who receives compensation from the agency and where the agency has the right to control and direct the employee in how the work is performed.” An “employing agency,” as defined by the same regulation, is ‘the agency having primary control over the services of the employee.’

The Committee properly harmonized the supremacy of SCDC, the “employing agency,” over its “employees,” including the Appellants, within the context of a RIF driven by the profound need to address budgetary pressure

SCDC’s RIF plan was, by design, based on budgetary pressure to reduce costs. As such, it is reasonable for SCDC to develop a plan that maximized savings while retaining as many employees as possible in essential areas. In SCDC’s efforts to reduce budget deficits, a hierarchy of priorities was identified and programs were evaluated for ways to reduce costs while still providing essential services. The education program was one area where significant cost-saving opportunities existed. Other areas, such as security, housing, clothing, food, and healthcare, in developing and implementing the RIF plan, were deemed to be areas where further cuts could not be tolerated (Conclusions of Law, R p 16)

Thus, the Committee properly concluded that SCDC legitimately and lawfully included the Appellants and other certified educators it employed in its June 1, 2003 RIF plan

Additionally, the selection of education employee’s positions for inclusion in the RIF was not the result of a belief by other employees or members of [SCDC] management that educators were overpaid. This high number of educators involved in the RIF was the result of basic cost-saving principles to maximize savings and retain as many employees as possible due to the high salaries of most educators compared to other personnel (Conclusion of Law No 1, R p 16)

B SCDC DID NOT VIOLATE ITS OWN RIF POLICY, STATE LAW OR REGULATIONS CONTROLLING RIFs, OR OUR STATE’S CONSTITUTION BY DIVIDING THE AGENCY INTO 11 COMPETITIVE AREAS

In their second ground on appeal, the Appellants essentially argued that SCDC violated its own RIF policy, state law and regulations, and our state’s constitution by dividing the agency into 11 competitive areas, the key decision by which it implemented its agency-wide RIF effective June 1, 2003. In support of this ground, the Appellants presented as uncontested fact a chronology of the events which resulted in the designation of these competitive areas

As recounted by the Appellants, Director Ozmint, instructed the former Director of SCDC’s Division of Human Resources, John Near, “to draw ‘competitive areas’ in a way to

minimize employee bumping and maximize savings³³” Mr Near, upon receiving these instructions, “created [11] geographic regions within SCDC for purposes of the RIF, regions which, according to the Appellants, “were not restricted to areas where staff was separately organized or clearly distinguishable from the staff in other areas³⁴” According to the Appellants, “Director Ozmint admitted that the geographic regions existed only for the purpose of the RIF and to reduce bumping³⁵”

After providing their accounting of the impact of the RIF upon certified education positions at various SCDC institutions,³⁶ the Appellants then invoked portions of the testimony provided to the Committee by Ms Miro and the deposition testimony provided by former PUSD Superintendent Wendell Blanton in an attempt to support their contention that SCDC improperly established 11 competitive areas in the course of implementing its 2003 RIF³⁷

In the four (4) sections of the their legal argument, the Appellants challenged the legitimacy of SCDC’s decisions and actions that resulted in the establishment of the 11

³³ See Appellants Brief p 5 paragraph 10 In an associated footnote the Appellants observed that before Director Ozmint’s tenure began SCDC had experienced the closing of the Central Correctional Institution (CCI) in Richland County See Appellants Brief n 2 As recounted by the Appellants [r]ather than restrict employment opportunities geographically SCDC permitted all affected employees to obtain positions at other facilities and [a]s a result employees interested in maintaining employment with SCDC found positions *Id* However as described by Mr Near the circumstances which allowed the agency to place SCDC employees affected by the closure of CCI differed dramatically from the circumstances which compelled SCDC to conduct its 2003 RIF (R pp 723 – 35)

³⁴ See Appellants Brief p 5 paragraph 11

³⁵ *Id* p 5 paragraph 12

³⁶ *Id* pp 5 – 6 paragraphs 13 14 Later the Appellants presented as uncontested fact that each of them would have been willing to perform services outside the geographic region created for the RIF in order to retain employment and they provided examples of various Appellants who obtained employment outside the geographic region from which they were separated *Id* pp 7 – 8 paragraph 18 While it is uncontested that various Appellants found work outside of the geographic region from which they were separated SCDC respectfully argues that these facts are not and were not relevant to whether SCDC complied with its own RIF policy state law and regulations and our state’s constitution by its decision to divide the agency into 11 competitive areas as part of its agency wide RIF plan effective June 1 2003 Moreover SCDC respectfully argues that these facts have no bearing on the legitimate fiscal crisis confronted by SCDC in early 2003 as recognized by the Committee in its Final Decision (R p 16)

³⁷ See Appellants Brief pp 6 – 7 paragraphs 15 – 16

competitive areas it used to implement its agency-wide RIF effective June 1, 2003. In the section addressing SCDC's purported violations of its own RIF policy, the Appellants invoked paragraph 11 of the March 14, 2003 edition of SCDC Policy Number ADM-11-05 and then provided six (6) succinct points and a narrative which argued that SCDC violated its own RIF policy by establishing 11 competitive areas within its RIF plan.³⁸ In the section addressing SCDC's purported violations of applicable statutes, the Appellants argued that SCDC violated § 24-25-10 by establishing 11 competitive areas within its RIF plan as these areas 'arbitrarily divided 'the special statewide unified school district',³⁹' and, consequentially, the RIF resulted in the reduction of "[PUSD] educational services to designated facilities that do not operate on a 'statewide' basis"⁴⁰. The Appellants also argued that SCDC violated § 24-25-90 by establishing 11 competitive areas within its RIF plan.⁴¹

However, the Appellants offered these identical or nearly identical arguments to the Committee, and the Committee,⁴² by properly applying and interpreting the applicable law, denied the Appellants' appeal of SCDC's decision to deny their grievances. For example, the Appellants, in their arguments to this Court that SCDC violated § 24-25-10 and § 25-25-90 by establishing 11 competitive areas within its RIF plan, simply offer nothing to this Court other than their own interpretation of these statutory provisions.⁴³

Furthermore, the Appellants presented, as so-called uncontested fact, the following

³⁸ *Id.* pp. 14 – 16 Section I

³⁹ *Id.* pp. 20 – 21 Section I

⁴⁰ *Id.*

⁴¹ *Id.* p. 22 Section V

⁴² See the Committee's Findings of Fact Nos. 1 – 9 (R. pp. 12 – 13)

⁴³ The Appellants offered the same arguments to the Committee as reflected by the Committee's Findings of Fact Nos. 4 and 5 (R. p. 12)

There is no commuting limit for employees of SCDC (ROA pp 621-623) Ms Miro, for example, has commuted forty-seven miles one way each day for her duties as Warden of Allendale Correctional Institution and as a [Division] Director of SCDC SCDC staff often live far from their places of employment, including out of state There is no requirement that an employee live close to his or her place of work and employees often choose to commute and advance in their service to SCDC (ROA pp 527-528) ⁴⁴

In raising this point, the Appellants assailed Mr Near's decision that an employee's bumping rights under the 2003 RIF would be limited to a reasonable geographic radius of 30 miles ⁴⁵ This decision manifested itself clearly within the March 14, 2003 RIF policy Mr Near and his staff developed, specifically within paragraph 7 2 of Policy Number ADM-11 05

When a vacancy occurs in an employee's competitive area which is (1) in the **same job class**, pay band, pay level or **lower and functionally similar** as the position held prior to the lay off, downward bumping, or reassignment and (2) *within a reasonable geographic distance (30 mile radius) of the work location of the employee*, then the eligible employee will be offered the vacancy provided s/he meets the minimum training and experience qualifications The position must be accepted in writing by the employee within two (2) working days of the offer or s/he waives any future recall rights (R p 1638) [italicized emphasis supplied by SCDC]

Director Ozmint echoed this concept in his March 28, 2003 letter to OHR Director Wilkins when he described the competitive areas and competitive job classification series encompassed by the agency RIF plan

The positions to be eliminated in this [RIF] plan are located across the state of South Carolina Competitive areas have been designated to include entire groups of institutions and divisions **within a reasonable geographic area to accommodate the realistic opportunity** for staff relocation, and hopefully, recall and reinstatement In addition, by expanding the number of locations, adverse impact may be minimized on specific groups of employees (R p 1627) [emphasis supplied]

⁴⁴ See Appellants Brief, p 7 paragraph 17

⁴⁵ Mr Near testified regarding his understanding that [t]he state has a rule that talks about you can't involuntarily move people more than I think it's around thirty miles or to a nearest facility (R p 715)

In assailing SCDC's decision regarding the establishment of 11 competitive areas and the geographic limitations they represent, the Appellants were apparently unmindful of the definition of "involuntary reassignment" provided in S C Regulation § 19-700

INVOLUNTARY REASSIGNMENT – the movement of an employee's principal place of employment **in excess of 30 miles** from the prior workstation at the initiative of the agency [emphasis supplied]

Thus, contrary to the Appellants' arguments, the 11 competitive areas and the geographic limitations they represent were reasonably derived from our state code of regulations

By way of a final example, the Appellants, in an effort to cloud this Court's ability to discern whether there was any distinction between the PUSD and SCDC's Division of Education, offered as so-called uncontested fact a description of Ms. Miro as the "Director of the SCDC Education Division that *includes* the [PUSD]"⁴⁶ This description is profoundly misleading, as, according to Ms. Miro's testimony, the PUSD and SCDC's Division of Education are one and the same under SCDC's organizational structure.⁴⁷ Ultimately, just as they did before the Committee, the Appellants failed to acknowledge in their brief to this Court that the RIF undertaken by SCDC in 2003 affected all divisions of SCDC, not just the PUSD, which constitutes the agency's Division of Education. In light of these realities, the Committee properly concluded that SCDC legitimately and lawfully established the 11 competitive areas it used to implement its agency-wide RIF effective June 1, 2003.

The development of the competitive areas did not violate SCDC's RIF policy, nor were they drawn to retaliate against or punish SCDC educators.⁴⁸ Such groupings are specifically allowed in SCDC's RIF policy and, as reflected in the RIF policy, **the manner in which the competitive areas are designated is left to the discretion of the**

⁴⁶ See Appellants' Brief p. 6 paragraph 15

⁴⁷ See note 32 above

⁴⁸ Again, SCDC respectfully argues that the Appellants have abandoned the retaliation claim. See note 7 above

Executive Director of SCDC As such, the Committee finds that the geographical competitive areas were allowable under SCDC's RIF policy and **their determination was left to the discretion of the Executive Director** Further, the Committee finds that neither state law nor SCDC's RIF policy required the PUSD to be treated as a single competitive area in the event of a RIF or that employees be afforded agency-wide bumping rights In addition, the PUSD employees were not singled out because SCDC was divided into 11 competitive areas which also limited the bumping rights of employees not affiliated with the PUSD (Conclusion of Law No 2, R p 16) [emphasis supplied]

C SCDC DID NOT VIOLATE ITS OWN RIF POLICY, STATE LAW OR REGULATIONS, OR OUR STATE'S CONSTITUTION BY ITS DECISION TO RETAIN AND HIRE TEMPORARY EMPLOYEES BEFORE AND AFTER THE JUNE 1, 2003 AGENCY-WIDE RIF AND TO RETAIN EMPLOYEES WHO ACCEPTED THE "RETIREMENT OPPORTUNITY" IT OFFERED AFTER THE AGENCY-WIDE RIF

In their third ground on appeal, the Appellants essentially argued that SCDC violated its own RIF policy, state law and regulations, and our state's constitution by retaining and hiring temporary employees before and after the June 1, 2003 agency-wide RIF and by retaining employees who accepted the "retirement opportunity" after the June 1, 2003 agency-wide RIF

In support of this ground, the Appellants first presented as so-called uncontested fact a list of certified educators with less service than the Appellants who SCDC retained after the RIF⁴⁹ Next, they presented as so-called uncontested fact that some Appellants testified, purportedly without contradiction, that they had been 'replaced by part-time, less experienced or temporary staff' and that '[t]emporary employees and part-time employees were retained and hired during the RIF recall period'⁵⁰ They then referenced Ms Heather Pope, a managing partner of OHR, who "testified that the following question and answer appeared on the OHR website during the RIF period under review

⁴⁹ See Appellant s Brief pp 8 – 9 paragraph 19

⁵⁰ *Id* pp 9 10 paragraphs 20 – 21

Q Can an agency hire a temporary employee to replace an employee affected by a RIF or to perform the functions of a person eliminated by a RIF?

A An agency may not hire a temporary employee to perform the duties of an employee affected by a RIF. If these duties are to be performed within one year of the effective date of the RIF the agency should reestablish the position and implement its recall procedure⁵¹

The Appellants then discussed two (2) 'retirement opportunities' purportedly implemented by SCDC during the RIF recall period, which commenced on the RIF's effective date of June 1, 2003 and concluded on May 31, 2004⁵². According to the Appellants, these "retirement opportunities" allowed full-time employees to retire and return to work in "temporary" capacities at 75% of their former salaries⁵³.

The Appellants then provided their assessment of the regulatory authority purportedly applicable to the "retirement opportunities" SCDC implemented during the RIF recall period⁵⁴. According to the Appellants, S.C. Regulation §§ 19-700 and 19-719.01 support the proposition that 'a public employee who retires experiences a 'break in service''⁵⁵. The Appellants then

⁵¹ *Id.* p. 10 paragraph 22. The Appellants later argued that by purportedly ignoring the guidance provided by this question and answer from OHR's website SCDC violated a right allegedly secured to them under South Carolina precedent, namely that "[a]n employing agency may not disregard procedural legislation to remove, demote, or otherwise deprive an employee of his salary or position." See Appellants' Brief p. 26. Section II(b). SCDC argues that no such right exists under South Carolina precedent. Moreover, the Committee properly determined that SCDC did not violate any internal policies or procedures or any guidelines established by [OHR] (R. p. 17).

⁵² *Id.*, p. 10 paragraph 23. According to the Appellants, SCDC implemented the two (2) retirement opportunities on July 18, 2003 and March 25, 2004. **However, contrary to the Appellants' assertion, the record reflects that SCDC implemented only one (1) "retirement opportunity" during the RIF recall period which ran from June 1, 2003 to May 31, 2004.** The retirement opportunity purportedly offered by SCDC on March 25, 2004 was not a retirement opportunity at all. Instead, on March 25, 2004, SCDC issued a memorandum which announced a retirement opportunity with effective dates between June 18 and July 1, 2004, clearly after the conclusion of the RIF recall period on May 31, 2004 (R. p. 2572). Ms. Patricia Thrailkill, the Assistant Director of SCDC's Division of Human Resources, testified that the retirement opportunity discussed in the agency's March 25, 2004 memorandum constituted the same type of opportunity but offered in a different fiscal year (R. p. 971).

⁵³ *Id.*

⁵⁴ Again, SCDC implemented only one (1) such opportunity during the RIF recall period. See note 52 above.

⁵⁵ *Id.* pp. 10–11 paragraph 24.

cited S C Code Ann § 9-1-1790 for the proposition that the retirees who accepted the “retirement opportunities”⁵⁶ offered by SCDC during the recall period “lose any enforceable right to re-employment” and for the proposition that a “retiree must leave active employment for a minimum of 15 days”⁵⁷. The Appellants then presented as so-called uncontested fact the following

During the recall period of June 1, 2003 – May, 31, 2004, SCDC employed [23] individuals in temporary positions to perform services formerly provided by full-time, certified educators. During the same period, SCDC assigned responsibilities formerly performed by full-time, certified educators to 19 individuals as non-certified staff.⁵⁸

In the footnote associated with this paragraph, the Appellants argued that Appendix A to their brief established “that there were twice as many new permanent and temporary education employment actions during the recall period as the number of Appellants separated by RIF”⁵⁹.

The Appellants then presented as so-called uncontested fact the following parameters associated with “temporary employee” status

By regulation, a “temporary employee” cannot exceed one year of employment. Additionally, a “temporary position” cannot be in place for more than one year. S C Regulations R 19-700. During the recall period, SCDC employed individuals as “temporary employee” and re-employed individuals in “temporary positions”⁶⁰.

In the four (4) sections of their legal argument, the Appellants formulated rather convoluted challenges to SCDC’s decision to retain and hire temporary employees before and after the June 1, 2003 agency-wide RIF and to retain employees who accepted the *only*

⁵⁶ Again SCDC implemented only one (1) such opportunity during the RIF recall period. See note 52 above.

⁵⁷ See Appellants’ Brief pp 10 – 11, paragraph 24.

⁵⁸ *Id.* p 11 paragraph 25.

⁵⁹ *Id.* p 11 n 3.

⁶⁰ *Id.* p 11 paragraph 26.

“retirement opportunity” it offered after the June 1, 2003 agency-wide RIF. In the section addressing SCDC’s purported violations of its own RIF policy, the Appellants argued that SCDC violated paragraph 2.3 of Policy Number ADM-11.05 by employing “individuals in temporary positions and permanent positions during the recall period without notifying RIF’ed employees,” and by offering “retiring employees return to employment after a ‘break in service’ during the recall period without notifying RIF’ed employees.”⁶¹ The Appellants further argued that SCDC violated paragraphs 7.1, 7.5, and 11 of Policy Number ADM-11.05 in the manner by which it retained and managed its pool of temporary employees during the RIF’s recall period.⁶²

In the section addressing SCDC’s purported violations of applicable statutes, the Appellants argued that SCDC violated S.C. Code Ann. § 24-25-70(7) by employing “non-certified instructional staff” and “former certified instructional staff in non-certified positions to perform their former duties, and by offering “instruction through individuals hired in non-certified positions.”⁶³ The Appellants also argued that SCDC violated S.C. Code Ann. § 24-25-90 and its own RIF policy when it purportedly “hired temporary employees to replace educators separated by RIF and allowed individuals who voluntarily separated for purposes of retirement to

⁶¹ *Id.* p. 17, Section II(i).

⁶² *Id.* p. 18, Sections II, IV, and V.

⁶³ *Id.* p. 21, Section III(a) – (b). By this argument, the Appellants referenced the post RIF duties assigned by SCDC to Appellants Nancy Glenn, Mary McCabe, and Beverly McClanahan. Earlier in their brief (p. 11, paragraph 27), the Appellants presented as so-called uncontested fact that Ms. Glenn, Ms. McCabe, and Ms. McClanahan each testified that after the RIF they performed their former education duties while being paid as security officers; that SCDC did not have signed position descriptions for them, and that Ms. Glenn received a memorandum before the [effective date of] the RIF that she would continue her library services in her new position. SCDC respectfully argues that the Appellants did not provide this Court with a complete narrative of the post RIF duties fulfilled by these three (3) Appellants. **For example, the Appellants neglected to mention that the EPMS issued to Ms. Glenn covering the period of time immediately after the RIF’s effective date of June 1, 2003 clearly stated that Ms. Glenn had “made a wonderful transition from librarian to [correctional] officer.”** (R. pp. 1253 and 2991). Finally, the Appellants invoked the post RIF duties SCDC assigned to Appellants Glenn, McCabe, McClanahan, and James Cal Bell to argue that SCDC violated a right to particular compensation allegedly secured to them under the South Carolina Court of Appeals’ decision in *Abraham*. (See Appellants’ Brief, p. 25, Section I(b)). Again, SCDC respectfully argues that no such right legitimately exists under *Abraham*, and the Committee properly considered these facts when it ruled in SCDC’s favor.

return to temporary positions in favor of employees separated by RIF ⁶⁴” The Appellants further argued that SCDC violated S C Code Ann § 8-11-185 by guaranteeing “re-employment at lower pay to employees who chose to ‘retire,’” because, “[b]y law, these employees experienced a ‘break in service’ and were not entitled to preference over RIF’d employees who retained ‘covered employee’ status during the recall period ⁶⁵” Finally, in the section addressing SCDC’s purported violations of our state’s constitution, the Appellants argued that SCDC violated Article I, § 3 of our state’s constitution, because, during the RIF’s recall period, it “allowed employees choosing to retire to return following a ‘break in service’ without allowing the Appellants the opportunity to recall ⁶⁶”

However, the Appellants offered these identical or at least very similar arguments to the Committee, and the Committee, by properly applying and interpreting the applicable law, denied the Appellants appeal of SCDC’s decision to deny their grievances Again, SCDC respectfully argues that the Appellants, just as they did to the Committee, simply offered this Court nothing more than their own interpretation of SCDC’s RIF provisions, state statutes and regulations, our state’s constitution, and precedent from our state’s court

In assailing SCDC’s decision to implement the “retirement opportunity” during the RIF recall period and in assailing its management of personnel decisions associated with the implementation of this opportunity, the Appellants invoked the definition of ‘temporary employee’ provided in S C Regulation § 19-700 However, the Appellants were apparently unmindful that neither S C Regulation § 19-700 nor § 19-719.01 include the following relevant

⁶⁴ See Appellants’ Brief p. 22, Section V

⁶⁵ *Id.* p. 22 – 23, Section VI(b) In Section VI(a) the Appellants argued that SCDC filled vacancies following the RIF without providing priority consideration to RIF’ed educators **However, the record completely negates this argument since SCDC recalled Ms. McCabe back to a certified educator position approximately one (1) month after she had accepted a correctional officer position** (R pp. 248 – 49, 256 – 57, and 261)

⁶⁶ *Id.* p. 24, Section I(b)

terms “retired,” “retiree,” retirement,” “active service,” and “return to active service ” Thus, SCDC respectfully argues that the provisions of these regulations are not applicable to retirees who return to active service, such as the SCDC employees who accepted the only “retirement opportunity ’ implemented by SCDC during the RIF recall period ⁶⁷

Instead, an examination of the statutes that apply to state retirees who return to state employment completely undermine the Appellants’ convoluted arguments on these points This critical distinction perhaps is best understood by an examination of § 9-1-1790 which is entitled “Amount which may be earned upon return to covered employment ’ Section 9-1-1790(A) provides as follows

A retired member of the system who has been retired for at least fifteen consecutive calendar days may be hired and return to employment covered by this system or any other system provided in this title without affecting the monthly retirement allowance he is receiving from the system If the employment continues for at least forty- eight consecutive months, the provisions of Section 9-1-1590 apply If a retired member of the system returns to employment covered by this system or any other system provided in this title sooner than fifteen days after retirement, the member's retirement allowance is suspended while the member remains employed by the participating employer If an employer fails to notify the system of the engagement of a retired member to perform services, the employer shall reimburse the system for all benefits wrongly paid to the retired member [emphasis supplied]

Obviously, § 9-1-1790(A) references § 9-1-1590 which is entitled “Effect of restoring beneficiaries to active service, and, by the term “beneficiaries,” this statute refers to state *retiree* beneficiaries The third paragraph of § 9-1-1590 provides as follows

Should any other beneficiary who has been restored to active employment continue in service for a period of forty-eight consecutive months and his annual compensation be equal to or greater than seventy-five percent of his average final compensation at retirement, then he may elect to cease his retirement allowance and become a contributing member again and void his election of an optional benefit Any such beneficiary may request the board to allow him to

⁶⁷ Again SCDC implemented only one (1) such opportunity during the RIF recall period See note 52 above

repay to the System all monies received by him as benefits during any periods subsequent **to the date of his reentry into active service** and make a contribution equal to the amount he would have contributed had he been a member during the period of **his restoration to active service** prior to his again becoming a member, together with the interest which would have been credited to the contributions on account of such period of restoration up to the date such contribution is made In no event shall the retirement allowance payable upon subsequent retirement be less than the amount of his allowance previously payable plus any increases which would have been payable under Section 9-1-1810 had he not been **restored to service** [emphasis supplied]

The second and third cross references at the conclusion of § 9-1-1590 read as follows

Application of this section to **retired member whose return to covered employment continues for at least 48 consecutive months**, see §§ 9-1-1790, 9-11-90 [emphasis supplied]

Provision allowing **retired** members of the State Retirement System to return to work and earn certain amounts without having their monthly retirement allowance affected, see §§ 9-1-1790, 9-11-90

Section 9-11-90 is entitled "Effect of restoring beneficiary to service, retirement after return to service, ' and § 9-11-90(3) provides as follows

Should any other beneficiary who has been restored to active employment continue in service for a period of forty-eight consecutive months and his annual compensation be equal to or greater than seventy-five percent of his average final compensation at retirement, then he may elect to cease his retirement allowance and become a contributing member again and void his election of an optional benefit In no event must the retirement allowance payable upon subsequent retirement be less than the amount of his allowance previously payable plus any increases which would have been payable under Section 9-11-310 had he not **been restored to service** [emphasis supplied]

Section 9-11-90(4)(a) then provides as follows

Notwithstanding the provisions of subsections (1) and (2) of this section, a **retired member of the system who has been retired for at least fifteen consecutive calendar days may be hired and return to employment** covered by this system or any system provided in this title without affecting the monthly retirement allowance he is receiving from this system **If the employment continues for at least forty-eight consecutive months, the provisions of Section 9-11-90(3) apply** If a

retired member of the system returns to employment covered by the South Carolina Police Officers Retirement System or any other system provided in this title **sooner than fifteen consecutive calendar days after retirement**, the member's retirement allowance is suspended while the member remains employed by a participating employer of any of these systems. If an employer fails to notify the system of the engagement of a retired member to perform services, the employer shall reimburse the system for all benefits wrongly paid to the retired member [emphasis supplied]

Thus, § 9-1-1790(A) clearly authorizes an agency, such as SCDC, to hire a state retiree back to employment without the retiree incurring a suspension of his or her monthly retirement allowance so long as the state retiree has been “retired for at least fifteen consecutive calendar days.” Section 9-1-1790(A) still authorizes an agency, such as SCDC, to hire back a state retiree to employment even if the state retiree has not been retired for at least fifteen consecutive calendar days, but, in such circumstances, the retiree will incur an suspension of his or her monthly retirement allowance for as long as the retiree remains employed.

The Appellants persistently and confusingly assailed SCDC’s decision to retain and hire temporary employees before and after the June 1, 2003 agency-wide RIF and to retain employees who accepted the “retirement opportunity” it offered after the June 1, 2003 agency wide RIF.⁶⁸ However, § 9-1-1790 does not use term “break in service,” instead, it addresses a state *retiree* who has been *retired* for at least 15 consecutive calendar days. Moreover, § 9-1-1790 does not explicitly or even impliedly declare, as argued by the Appellants, that retirees who take advantage of retirement “opportunities” lose any *enforceable right to re-employment*. Like § 9-1-1790, § 9-1-1590 and § 9-11-90 also apply precisely to state retirees, like those SCDC retirees who accepted the only “retirement opportunity” SCDC offered during the recall period.

The Appellants mistakenly anchored their arguments on provisions of our state regulations and statutes that do not precisely apply to the retirement opportunity in question, and

⁶⁸ See Appellants’ Brief pp. 16 – 17, Section II(e), p. 18, Sections III and V, and p. 24, Section I.

they neglected to realize that a RIF presents an employee with the prospect if not the reality of involuntary separation from their employment while a “retirement opportunity” presents a retirement eligible employee only with the prospect of a 15 consecutive calendar day period of retirement before the he or she may return to their job without an interruption of their retirement allowance. Thus, in light of these realities, the Committee properly concluded as follows:

The retirement opportunity offered by SCDC after the RIF plan was implemented as a separate action designed to further reduce operating costs. Employees who elected to participate in this opportunity were removed from their full-time equivalent positions and placed into temporary positions. Recall rights are not applicable in the case of temporary positions, therefore, employees affected by the RIF were not provided recall rights in relation to these jobs. The SCDC employees who took part in the retirement opportunity were not offered new positions, rather, it was a way for them to retain their current positions, in a temporary capacity while significantly reducing SCDC costs by reducing salaries and eliminating the cost of benefits for these employees. SCDC **was not** obligated to offer the positions to Appellants under the RIF policy’s recall procedures because they were temporary positions. **In addition, Mr. Ozmint’s cover letter to OHR that was submitted along with the RIF plan stated that “[t]emporary positions, particularly in the area of educational instruction to inmates, may be developed and made available to affected employees by the Reduction-in-Force,”**⁶⁹ this language indicates that this is a possibility, not a promise. Additionally, the formal RIF plan did not address, nor would it have addressed, the subject of temporary positions in terms of the recall rights for employees affected by the RIF. (Conclusion of Law # 4 R p 17) [emphasis supplied]

The Committee also properly concluded as follows:

The retention of certain temporary and temporary grant employees did not violate the approved RIF policy. While these types of positions are often the first to be eliminated prior to enacting a RIF, there is no specific requirement in SCDC’s RIF policy that made this action mandatory. Since these employees do not have benefits and other extraneous costs to the agency like full-time equivalent employees do, electing to keep these positions as opposed to full-time equivalent positions was one way to

⁶⁹ As explained in note 1 above, Director Ozmint’s cover letter to OHR consisted of his March 28, 2003 letter to OHR Director Wilkins within which Director Ozmint presented SCDC’s RIF plan (R pp 1626 – 31). The Appellants did not address this specific conclusion rendered by the Committee anywhere in its brief to this Court.

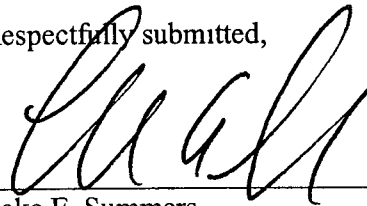
further maximize savings to the agency, which is in line with the stated purpose of the RIF (Conclusion of Law # 5, R p 15)

IV CONCLUSION

Thus, as demonstrated in the above provided arguments, the administrative findings, inferences, conclusions and decisions rendered by the Committee in its February 18, 2009 Final Decision did not prejudice the Appellants' substantial rights, and the Appellants' unsupported arguments to the contrary do not provide a basis upon which this Court may reverse or modify any aspect of the Committee's Final Decision under the provisions of § 1-23-380(5). Accordingly, this Court should affirm the Committee's February 18, 2009 Final Decision.

Accordingly, Respondent SCDC, by and through its undersigned counsel and on behalf of its Division of Education, also known as the Palmetto Unified School District No. 1, respectfully submits that this Court should deny the Appellants' appeal, deny the relief demanded by the Appellants in their brief, and affirm the Final Decision of the State Employee Grievance Committee issued February 18, 2009.

Respectfully submitted,



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Counsel for Respondent SCDC

Columbia, South Carolina
October 7, 2009

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James "Cal" Bell, Othella Bernard, Katherina
Bower, Linda M W Bratton, Ann T Bridges,
Rance C Cobb, Jeannie B Croxton, et al ,

Appellants,

vs

S C Department of Corrections and Palmetto
Unified School District No 1,

Respondents

Docket No 09-ALJ-30-0103-AP

**BRIEF OF RESPONDENT SCDC
AND OF ITS DIVISION OF
EDUCATION, ALSO KNOWN
AS PALMETTO UNIFIED
SCHOOL DISTRICT No 1**

EXHIBIT A



March 28, 2003

Samuel L. Wilkins, Director
Office of Human Resources
1201 Main St. Suite 1000
Columbia, South Carolina 29201

SUBJECT Reduction-In-Force Plan

Dear Mr Wilkins,

As Director of the South Carolina Department of Corrections (SCDC), I am formally submitting a Reduction-In-Force (RIF) Plan for the elimination of several positions within our agency

I. Overview

The Department of Corrections' budget has been reduced by over \$80 million during the past 30 months. These cuts come at a time when incarceration rates have increased the inmate population by several thousand. During this same period, efforts to cut spending have included staff reductions of nearly 1,300 employees, closing prisons, elimination of numerous programs, and drastic cuts in expenditures. Conversely, efforts have also been made to increase revenue from sources such as prison industries, institutional canteens, inmate work programs, and increasing grant funding. Unfortunately, the financial health of this agency remains critical and more drastic measures are necessary.

II. Reason for the Reduction-In-Force

As agency Director, I have the responsibility to focus on our primary mission, which is to protect the public. I must continuously assess the needs of the agency, no matter how difficult, and recommend necessary changes in order to meet that mission.

Sufficient operating funds are not expected to be restored in FY2003-2004, and an additional deficit of over \$10 million is projected. As a result, priorities have been established to ensure the continued efficient operation of the agency. The need to maintain certain programs and administrative positions must now be identified as secondary to achieving our primary mission, and have been targeted for reduction or elimination.

I have made the decision to eliminate 148 non-security positions through a Reduction-In-Force in three primary functions within the agency:

Headquarters management and administrative support staff
Non-essential inmate support programs
Certified education and support staff

PO Box 21787 - 4444 Broad River Road - Columbia, SC 29221-1787 - Telephone (803) 896-8555

<http://www.state.sc.us/scdc> E-mail: corrections.info@doc.state.sc.us

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The implementation of this Reduction-In-Force Plan is projected to save approximately \$8 million (including fringe benefits), assuming the employees occupying the positions to be eliminated will be laid off. Of course, actual saving will be less, based upon employees bumping into filled positions occupied by lower-paid employees, or employees reassigned or demoted into vacant positions for which the agency is actively recruiting.

Long term, I feel the overall operation of the agency could be adversely impacted by the elimination of these positions without additional plans to maximize the valuable programs these positions represent. Therefore, I have developed an organizational plan that should provide the necessary staff oversight and allow continued educational opportunity for the alternate instruction of inmates

The decision to layoff staff is not one that I take lightly. Employees occupying these positions signify the reason why the Department of Corrections has been so successful with such a difficult mission. In a very short time, I have come to know these employees personally and their level of professionalism is overwhelming. Unfortunately, I must look beyond individuals to prepare this agency for the future.

Included in this Reduction-In-Force Plan are the state requirements for the elimination of positions. More importantly, I have identified a number of resources to assist these valuable employees after leaving the Department of Corrections.

III. Competitive Areas and Competitive Job Classification Series

The positions to be eliminated in this Reduction-In-Force Plan are located across the state of South Carolina. Competitive areas have been designated to include entire groups of institutions and divisions within a reasonable geographic area to accommodate the realistic opportunity for staff relocation, and hopefully, recall and reinstatement. In addition, by expanding the number of locations, adverse impact may be minimized on specific groups of employees.

Competitive Areas -- (Attached)

Competitive Job Classifications and Classification Series -- (Attached)

Positions Being Eliminated and Employees Eligible for Bumping in Each Competitive Area-- (Attached)

IV. Name, Age, Race, Sex, Classification, and RIF Service Date of Affected Employees

(See attached) In order to submit the Reduction-In-Force Plan to the Office of Human Resources for review and approval for procedural correctness prior to the effective date of June 1, 2003, each employee's age was based upon their age as of April 1, 2003. The RIF Service Date was calculated based upon EPMS performance evaluations with review dates through March 2, 2003.

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V. Reduction-In-Force Projected Outcome

Following the review and approval of this Reduction-In-Force Plan for procedural correctness by the Office of Human Resources, each of the affected employees will meet with Mr John A. Near, Division Director – Human Resources, or designee, who will advise them of their Reduction-In-Force rights with regard to layoff, bumping, reassignment, demotion, recall, and reinstatement.

After the meeting with a representative from the Human Resources Division, within two (2) working days, the employee must elect layoff, or to exercise their bumping rights based upon their RIF Service Date. Meetings with employees who exercise their bumping rights will be conducted as follows

(First) If the Job Classification is in one of the designated Competitive Job Classification Series identified above, the employee may be eligible to bump into the position occupied by the employee with the lowest RIF Service Date in the same Job Classification and pay band with the same or lower pay level (provided they meet the state and SCDC minimum training & experience requirements). The bumped employee may then bump into the position occupied by the employee with the lowest RIF Service Date in the next lowest Job Classification in the designated series (provided they meet the state and agency minimum training & experience requirements).

(Second) If the position is not in one of the Competitive Series designated above, the employee may first bump the employee in the competitive area with the lowest RIF Service Date in the same Job Classification and pay band, with the same or lower pay level (provided s/he meets the state and SCDC minimum training & experience requirements).

(Third) The employee (or the bumped employee with the lowest RIF Service Date) may next be reassigned or demoted into a vacant position in the competitive area of the same pay band, pay level or lower, provided the agency is actively recruiting to fill the vacancy, and s/he meets the state and SCDC minimum training & experience requirements.

In some cases, in accordance with Section 6.9 of the Department's approved RIF Policy, employees with a higher RIF Service Date were retained over other employees with a lower RIF Service Date in the same generic state job classification or job classification series due to the necessary qualifications of the position, or their higher pay level within the pay band (code "R" on listing of employees to be laid off). The specific reasons in each of these cases are as follows:

) R1 (Area 01) – AH45 Program Manager I in the substance abuse area did not qualify to bump employees whose job duties included engineering/construction experience, or a position requiring knowledge of OSHA, EPA/environmental, or emergency preparedness.

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R2 (Area 01) – EC10 Medical Assistant Technician I (dental assistant) did not qualify to bump employees with a higher RIF Service Date whose positions are a certified nursing assistant (CNA).

R3 (Area 01) – UE07 Academic Program Managers (2) with a lower RIF Service Date did not possess a principal's or superintendent's certification required for either of the two central office Academic Program Managers who had a higher RIF Service Date. In addition, the (UB07) Principal in the same competitive area, was not eligible to upward bump his supervisor who is an Academic Program Manager

R4 (Areas 01, 02, 06, 11) – UB02, UB04 - Certified Teacher, Vocational Teacher – In four competitive areas of the state, several certified teachers and vocational teachers did not possess the specific educational credentials or skills necessary to qualify for bumping into positions occupied by employees with a lower RIF Service Date

R5 (Area 11) - AH35 Program Coordinator I did not qualify to bump employees in the same job classification within the competitive area because the job duties and responsibility levels of all other employees were greater, and the other employees occupied a higher pay level, as indicated in the RIF policy.

The Positions Being Eliminated and Employees Eligible for Bumping in each Competitive Area (attached) has been developed to identify employees in each competitive area occupying the same job classification, or classification series, of positions that are being eliminated

Disclaimer This plan indicates the rights of each employee under the Reduction-In-Force. A specific employee subject to demotion or separation may not be affected due to the decision of the other employees to exercise, or not exercise, their bumping rights

VI. Efforts Made to Assist the Affected Employees

- 1 Affected employees will receive at least a two week written notice prior to separation.
- 2 The Office of Human Resources State Career Center will be notified of this Reduction-In-Force and their assistance will be requested to help the affected employees in their search for other state employment. In addition, the employee will be entered into the automated State Employee RIF Applicant Pool, which will allow the employee to provide updated information and eligibility for other state agency's vacancies
- 3 A Department of Corrections application form will be provided to the affected employee to maintain updated education, work history, and job skills

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- 4 The Department of Corrections will contact the State Department of Education's unit responsible for teacher recruitment to advise them of the availability of certified teachers and administrators. If directed by the State Department of Education, the Department of Corrections will contact local school districts in the competitive area to make them aware of available applicants for vacant positions
- 5 Temporary positions, particularly in the area of educational instruction to inmates, may be developed and made available to affected employees by the Reduction-In-Force
- 6 Outplacement services will be solicited from local vendors to provide cost-free services to affected employees
- 7 The S C Employment Security Commission will be contacted in order to supply information required for application for unemployment compensation, to be completed on-site at the Department of Corrections, if possible. In addition, information will be obtained necessary for registration for application into their statewide database of available job openings
- 8 Local employers may be contacted in competitive areas which have advertised for openings of qualified employees
- 9 The Employee Assistance Program (EAP) for the Department of Corrections will be contacted and counseling services made available for affected employees for a period of 90 days which is equal to current employees
- 10 Affected employees will be advised of all recall and reinstatement rights and privileges and will be asked to maintain a current address with the Department of Corrections' Division of Human Resources.
- 11 Affected employees will be informed about the state group benefits for which the employee is eligible, and the effect of their employment separation upon state benefits such as health & dental insurance, retirement, etc
- 12 Affected employees will be informed of their right, upon request, to review the Reduction-In-Force plan, with the exception of the RIF service date of other affected employees. The employees will be entitled to view their own RIF service date and the order of other employees in RIF Service Date order
- 13 The affected employees will be informed of their right to grieve the Reduction-In-Force through the agency grievance process and appeal through the state grievance process only if the grievance or appeal is based upon an improper or inconsistent application of the Reduction-In-Force policy/procedure, or plan.

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March 28, 2003
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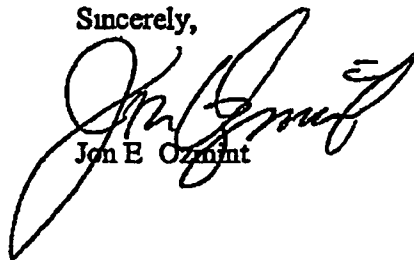
VII. Summary

Mr. Wilkins, a Reduction-In-Force is one of the most unpleasant tasks that I must undertake as Director. However, I am committed to the primary mission of Department of Corrections and to the legal responsibilities to operate within the funds allocated by the Legislature.

The timeframe necessary to implement a Reduction-In-Force of this size across the state mandates our agency move as quickly to implement the procedures of the plan. Therefore, I ask that you give priority to the review and approval of this Reduction-In-Force plan and contact Mr. Near at 896-1645 if you have any questions.

I truly appreciate any assistance you can provide.

Sincerely,



Jon E. Ozment

Attachments

- 1 SCDC Approved Reduction-In-Force Policy
- 2 Listing of Competitive Areas, Areas Map, and Competitive Job Classifications & Classification Series
- 3 Listing of Positions being eliminated and Employees eligible for Bumping in Each Competitive Area.
- 4 Sample Letter - Notification of Reduction-In-Force

Cc file

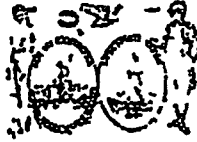
STATE OF SOUTH CAROLINA
State Budget and Control Board
DIVISION OF BUDGET AND ANALYSES
OFFICE OF HUMAN RESOURCES

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MARK SANFORD, CHAIRMAN
GOVERNOR

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FRANK W. FUSCO
EXECUTIVE DIRECTOR

March 14, 2003

Mr John Near
Human Resources Director
S C. Department of Corrections
4444 Broad River Road
Post Office Box 21787
Columbia, South Carolina 29221-1787

Dear Mr Near

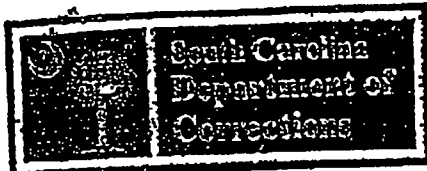
The revised Reduction-In-Force policy submitted to our office has been approved and is enclosed for your files. This revised policy becomes effective only after covered employees receive actual notice of the revisions, including a date for implementation.

Should you determine that further revisions are necessary, please submit them to our office for review and approval as required by statute.

Please let us know if we may be of further assistance to you.

Sincerely,

Chris Byrd
Assistant Director



SCDC POLICY/PROCEDURE

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NUMBER ADM-11.05

TITLE: REDUCTION IN FORCE

ISSUE DATE: MARCH 14, 2003

RESPONSIBLE AUTHORITY: DIVISION OF HUMAN RESOURCES

OPERATIONS MANUAL: ADMINISTRATION

SUPERSEDES: ADM-11 05 (July 1, 2000)

RELEVANT SCDC FORMS/SUPPLIES 16-5, 16-7

ACA/CAC STANDARDS None

STATE/FEDERAL STATUTES Sub-regulations 19-703, 19-704, 19-705, 19-706, 19-715, 19-718, and 19-719, State Office of Human Resources Regulations Manual

THE LANGUAGE USED IN THIS POLICY/PROCEDURE DOES NOT CREATE AN EMPLOYMENT CONTRACT BETWEEN THE EMPLOYEE AND THE AGENCY. THE AGENCY RESERVES THE RIGHT TO REVISE THIS CONTENTS OF THIS POLICY/PROCEDURE.

PURPOSE. To establish guidelines for a reduction-in-force (RIF) in the event of reduced Agency funding, change in workload, or reorganization.

POLICY STATEMENT. In order for the SCDC to continue effectively meeting its financial and/or operational objectives, the Agency Director may authorize a reduction-in-force (RIF) due to the reorganization of the SCDC, reduced funding, and/or change in workload. Any RIF will be planned and conducted in compliance with all applicable State of South Carolina Office of Human Resources regulations and policies/procedures

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Christy D. Dyer 3/14/03

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SPECIFIC PROCEDURES.

1 AUTHORIZATION FOR A REDUCTION-IN-FORCE (RIF).

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1.1 The Agency Director *or designee* is authorized to approve any position(s) to be abolished and to approve the competitive areas within which employees subject to a lay off will be able to exercise their rights under this policy/procedure (NOTE: The competitive area may be *agency wide*, a department, or a more restricted geographical area where the staff is separately organized and clearly distinguishable from the staff in other areas) The Agency Director will be the final authority for approving a reduction-in-force whereby

- employees may only bump into vacant positions, which are actively recruiting to be filled;
- filled positions are abolished with the subsequent removal of some or all employees from the payroll and/or the reassignment, and/or possible transfer or demotion of others

1.2 A RIF plan based on the directives of the Agency Director will be developed by the Division Director of Human Resources

1.3 A copy of the RIF plan will be submitted to the State Office of Human Resources (OHR) for approval of procedural correctness prior to the effective date of the RIF. At a minimum, the plan will contain the reasons for the RIF; a proposed list of affected employees in the order of their RIF Service Dates (see Section 5, below), the competitive area(s) and classification(s) affected, and the age, race, and sex of the affected employees, *organizational chart of affected areas, and a sample letter to employees*. In addition, efforts will be made to assist laid-off employees to find other employment through the State Career Center of the OHR. The Recruiting and Employment Services Branch of the SCDC Division of Human Resources will be provided with updated employment applications of all employees affected by the RIF

1.4 Upon approval of the RIF plan by the OHR, the Division Director of Human Resources will be responsible for implementing the actions called for in the plan. No action will be taken nor will information be provided to any employee without the written approval of the Division Director of Human Resources. No action will be considered official without the written approval of the Division Director of Human Resources

2. GENERAL PROVISIONS GOVERNING RIFs

2.1 The Division Director of Human Resources will maintain a roster of employees who have been bumped or who have been laid-off. It will be the responsibility of all Agency managers to furnish the Division Director of Human Resources with any and all information related to the filing of positions upon request.

2.2 It is the responsibility of all employees to ensure that the Division of Human Resources has current information on their home addresses and telephone numbers at all times

2.3 Whenever a RIF is in effect, no additional new hires, internal promotions, or reassignments into vacant positions *in the competitive area* will be allowed in any position without first determining through the Division Director of Human Resources or designee those employees with recall rights. These employees have recall rights as a result of being bumped or laid off and must be notified of such vacancies to determine their eligibility

3 EXCEPTIONS IN SPECIAL OR UNIQUE CASES

3.1 In exceptional cases, the Agency Director reserves the right to approve actions outside the provisions of this policy/procedure if, in his/her opinion, circumstances warrant such approval. If any provisions of this policy/procedure are affected by a proposed exception, justification and specific instructions to be followed will be recommended in writing to the Agency Director by the appropriate member of the Director's staff

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Christopher D. Taylor

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with the concurrence of the General Counsel and the Division Director of Human Resources

3.2 Reasons or justification for such actions above may include, but are not limited to the following -182-

3.2.1 Sufficient evidence exists that the movement by an employee into a position may aggravate a pre-existing health related condition. Such evidence would require medical documentation and diagnosis of inability to perform the essential functions of the position.

3.2.2 A particular employee may be retained over another employee within the Agency, regardless of RIF Service Date and bumping rights of other employees because s/he possesses supervisory skills, knowledge, experience, or abilities that cannot be learned within a reasonable training period. In such cases, a statement of facts must be made in the reduction-in-force plan and approved in advance by the Agency Director. The SCDC will retain documentation to support any exceptions made on this basis.

3.3.3 The move would violate State and/or Agency nepotism policies/procedures

3.3.4 Sufficient evidence exists to show that it would not be in the best interest of the SCDC or the employee to allow a move

4 EMPLOYEE NOTIFICATION.

4.1 After a RIF plan is approved and reviewed for procedural correctness by OHR and before it becomes effective, employees to be affected by an approved RIF will be notified in writing by the Division Director of Human Resources. Notification will be made by either

- A personally delivered letter to the affected employee requiring the signed acknowledgment of receipt by the employee, or
- Certified mail (return receipt requested)

4.2 An employee affected by a RIF may make a written request to the Division Director of Human Resources to receive a copy of the RIF plan affecting the employee. The RIF Service Dates of affected employees (see Section 5, below) will not be disclosed in the copy of the plan provided to such employees.

4.3 Employees notified that their position is to be abolished (and those employees subsequently bumped under these procedures) will be scheduled to meet with a designated representative of the Division of Human Resources to review their rights under these procedures. After reviewing their rights, affected employees must indicate in writing whether they will exercise or waive their bumping rights (see Section 6, below). Written notification of each employee's decision must be filed with the Division of Human Resources representative designated to meet with the employee no later than two (2) working days following the meeting, or else that employee's bumping rights will be automatically waived.

4.4 Generally, employee meetings and *employees exercising their bumping rights* will be made in decreasing order based on each affected employee's RIF Service Date. Exceptions may be made by the Division Director of Human Resources when

- A change in the order of meetings and transactions does not affect other employees with a lower RIF Service Date, or
- To delay a meeting or transaction would jeopardize efficient operations of the RIF, or
- An employee either fails to keep or fails to notify the Division of Human Resources of his/her inability to keep a required appointment date and therefore, *the appointment will be rescheduled after other employees with a lower RIF Service Date have been contacted.*

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4.5 After the final list of employees to be laid off is determined, these employees will be notified by the Division Director of Human Resources or an approved designee no later than 14 calendar days before the actual date the lay off is to become effective. Notification will, at a minimum, include the following information.

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- Reason for the lay off,
- Competitive classification *and/or competitive* series (job class, pay band, pay level) and competitive area,
- Benefits to which the affected employee is entitled,
- Where to obtain benefit information,
- Recall *and reinstatement rights*,
- Services available for seeking other employment,
- Efforts taken (or to be taken) to place the affected employee, and
- *Employee grievance rights*

4.6 Notification will be made to such employees by either a hand-delivered letter to the employee requiring the employee's written acknowledgment of the same, or by certified mail (return receipt requested)

4.7 The Division of Human Resources will be responsible for ensuring that SCDC Form 16-5, "Personnel Advice Form," and SCDC Form 16-7, "Employee Termination Clearance," are completed for all employees being removed from the SCDC payroll

5. ESTABLISHMENT OF RIF SERVICE DATES A RIF Service Date will be established for any employee affected by a RIF and will be used as the basis for bumping, laying-off, recalling, or reinstating an affected employee. All approved RIFs will be conducted in such a manner which provides employees the optimum security for past performance and length of service, while minimizing disruption to the Agency's operations. The RIF Service Date will be established by combining the continuous state service date of each affected employee with credit for his/her job/ment performance, as follows

5.1 Continuous State Service. The continuous state service date of each affected employee will be determined by the employee's most recent date of hire with the state. Section 19-719 of the State Office of Human Resources Regulations Manual outlines conditions affecting the employee's length of continuous state service

5.2 Job Performance Credit: All employees will be awarded additional service credit based on the total of their last two (2) scheduled performance appraisals (special appraisals are excluded) which precede the date of designation of positions to be eliminated by the Agency Director. The additional service credit will be allocated as follows

- - Below Performance Requirements = 0 months credit
- - Meets Performance Requirements = 6 months credit
- - Exceeds Performance Requirements = 12 months credit
- - Substantially Exceeds Performance Requirements = 18 months credit.

5.3 The calculated additional service credit will be added to the employee's continuous state service date to determine the RIF Service Date for all RIF purposes

5.4 Where two (2) employees have equal RIF Service Dates, deadlocks will be broken by using each employee's Agency hire date. If the deadlock continues, other impartial means (e.g., drawing lots, etc.) may be used to break the deadlock.

5.5 Probationary employees will not have any rights under these RIF procedures and may be terminated at

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any time during their initial 12 month probationary period.

6 BUMPING RIGHTS OF EMPLOYEES:

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6.1 Applicability: Only those employees considered covered state employees are authorized to have bumping rights. Temporary ("pink-slip"), contract, full/part-time temporary grant employees, and probationary employees have no bumping or RIF rights

6.2 Covered Employees: Covered employees have bumping rights only when.

6.2.1 The position the employee occupies is being abolished or the employee is bumped by another employee and the bumped employee has a greater RIF Service Date than remaining employees in the classification and/or job classification series, or

6.2.2 The employee elects to exercise his/her bumping rights in writing no later than two (2) working days following the review meeting with the designated representative of the Division of Human Resources (see Section 4 3, above)

6.3 If an employee elects to exercise his/her bumping rights, the employee must utilize the option below which provides him/her the highest resulting pay band or s/he may elect to be laid-off with recall or reinstatement rights as provided by the provisions within these procedures (NOTE: Under no circumstances may an employee gain from a RIF Bumping rights are only provided laterally or downward)

6.4 The following procedures must be followed only in cases where the position eliminated is one of a designated competitive series (e.g. Administrative Specialist I, AA25, Band 2, and Administrative Specialist II, AA50, Band 3).

- If the employee whose position is eliminated has a higher RIF Service Date than other employees in the designated competitive series in the competitive area, s/he will bump into the position occupied by the employee with the lowest RIF Service Date in the same job classification and pay band with the same or lower pay level. The bumped employee may then bump into the position occupied by the employee with the lowest RIF Service Date in the next lowest job classification in the designated competitive series. Once the employee with the lowest RIF Service Date in the series is determined s/he must then follow the procedures outlined in Section 6 6, below
- In all cases, the employee bumping into a position must meet the State and SCDC minimum training and experience requirements as outlined in 6 10, below

6.5 If a position eliminated is not one of a designated series and the employee elects to exercise his/her bumping rights, the employee must first bump the employee in the competitive area with the lowest RIF Service Date in the same job classification and pay band, and same or lower pay level, provided s/he meets the State and SCDC minimum training and experience requirements

6.6 The employee must next be reassigned or demoted into a vacant position in the competitive area of the same pay band, and pay level or lower, provided the agency is actively recruiting to fill the vacancy, and provided s/he meets the State and SCDC minimum training and experience requirements.

6.7 For those employees bumped or bumping into a position with a lower pay band, the employee's pay rate and review date will be determined in accordance with the Office of Human Resources Regulations Manual.

6.8 If a position is offered to an employee under RIF bumping procedures, and the employee refuses the position, s/he has the right to elect to be laid-off with recall/reinstatement rights

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6.9 An employee is considered as meeting the minimum training and experience requirements provided -185-

- S/he meets minimum state training and experience with regard to education and experience, and
- The experience required is considered acceptable to perform the specific essential functions of the position (i.e., a vocational teacher of a specific trade such as electrical, automotive, plumbing, etc.) as defined in the position's SCDC Additional Requirements

6.10 Any employee exercising his/her bumping rights will be notified in writing by the Division of Human Resources of the position (job title, pay band, pay level, location, and salary) and effective date of the position change. Notification of the position change will also be made to the Recruiting and Employment Services Branch. The Recruiting and Employment Services Branch will be responsible for keying the selection and notifying the Payroll Branch so that the change can be made effective

6.11 An employee bumped out of his/her position during a RIF (regardless of source of funds) may then exercise his/her rights according to these procedural guidelines

6.12 A second wave of bumping rights for covered employees who have been displaced will not be implemented until first wave RIF bumping procedures have been completed

6.13 An employee subject to lay off may waive his/her bumping rights in writing. Once waived, s/he forfeits bumping rights for the remainder of the RIF. An employee who waives bumping rights does not waive any recall rights under these procedures

7. RECALL AND REINSTATEMENT RIGHTS OF EMPLOYEES

7.1 Covered employees who have been laid-off or bumped to a position with a lower pay band and pay level will have recall and reinstatement rights for a period of one (1) year from the effective date of their lay off, bumping, or reassignment to another position. Employees will be reinstated in inverse order of lay off

7.2 *Recall Rights.* When a vacancy occurs in an employee's competitive area which is (1) in the same job class, pay band, pay level or lower, and functionally similar as the position held prior to the lay off, downward bumping, or reassignment and (2) within a reasonable geographic distance (30 mile radius) of the work location of the employee, then the eligible employee will be offered the vacancy provided s/he meets the minimum training and experience qualifications. The position must be accepted in writing by the employee within two (2) working days of the offer or s/he waives any future recall rights

7.3 Upon refusal of the position by an eligible employee, the offer will be extended in decreasing RIF Service Date order to other eligible employees on the recall list. If all eligible employees on the recall list refuse the position, the vacancy will be filled pursuant to normal Agency hiring policy/procedure

7.4 *Reinstatement Rights.* An employee affected by a Reduction-In-Force may apply for any SCDC or State job for which s/he meets the minimum training and experience requirements. If the employee accepts a position with a lower pay band than the one from which s/he was separated, s/he still retains recall rights to a position in the same job classification in the competitive area.

7.5 Probationary, temporary (pink slip), or temporary grant employees will not have recall or reinstatement rights. They may, however, apply for rehire through regular Agency employment policy/procedure

7.6 If an employee on the recall list relocates to another geographic area, s/he will be eligible for recall in the new competitive area. After relocation it will be the employee's responsibility to notify the Division Director of Human Resources in writing of the relocation in order to be eligible for recall within that competitive area

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7.7 Upon appointment to an established position (either as a result of bumping or recall), an employee shall be given one of the following types of status in accordance with State regulations and Agency policies/procedures.

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- Trial, or
- Covered

7.8 Any changes in salary, job date, or performance appraisal review dates will be in accordance with established State regulations and Agency policies/procedures

7.9 Employees who are recalled or reinstated within one (1) year of the effective date of the RIF will be eligible for all benefits including sick leave restored in accordance with state regulations, and will have the option of buying back all, some, or none of the annual leave lost as a result of the RIF.

8. GRIEVANCES: A covered employee who is affected by a reduction-in-force has the right to appeal through the Agency's employee grievance procedures and to the State Employee Grievance Process only if the appeal is based upon inconsistent or improper application of any portion of the Agency's reduction-in-force policy/procedure or plan. *The grievance must be filed within 14 calendar days of the effective date of the RIF as outlined in SCDC Policy/Procedure ADM-11.02.*

9 REORGANIZATION: Reorganization of the SCDC after a RIF will be implemented in compliance with all existing departmental policies. Those employees remaining after reorganization will not be eligible for moving expenses or travel to and from their home to their work stations if they are transferred to meet the mission of the Agency

10 REHIRE. An employee affected by a RIF who waives his/her bumping or recall rights or who is not eligible for such rights may apply for rehire with the Agency through normal hiring and employment policies/procedures

11. DEFINITIONS

Bumping refers to the action taken when an employee subject to lay off is placed in a vacant position or displaces ("bumps") another employee in the same or another job classification and/or location.

Class Series refers to a group of classes which are sufficiently similar in the kind of work performed to warrant similar state class titles, but sufficiently different in level of responsibilities to warrant different state salary ranges.

Competitive Area refers to a common geographic or organizational area in which employees will be considered for reduction-in-force procedures including transfers, reassignments, and/or bumping which is determined and approved by the Agency Director

Competitive Class refers to classifications (job class, pay band, pay level) designated to compete in a reduction-in force

Continuous State Service refers to service with the state determined by the most recent date of hire with the State of South Carolina without a break in service

Employee Subject to Lay Off refers to an employee who is subject to termination because s/he has a lower RIF Service Date than another employee

Lay Off refers to the actual termination of employment from the Agency because of reduced funding

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change in workload, or reorganization.

State Minimum Qualifications refers to those qualifications specified by the state job specifications and specific job functions as required for an employee to enter a job classification. -187-

Probationary Employee refers to an employee in a covered position who has less than 12 months of continuous state service

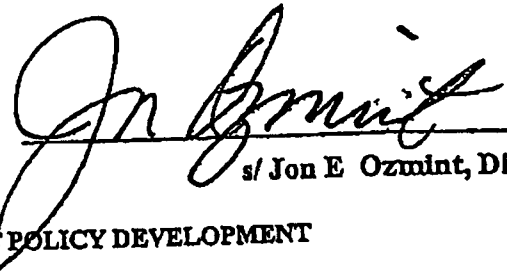
Recall refers to the reinstatement of an employee who is in lay-off status within one (1) year of the effective date of the lay off.

Reduction-in-Force (RIF) refers to the reduction or abolishing of positions because of reduced funding, change in workload, or reorganization.

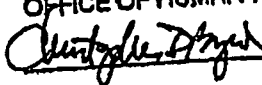
Reduction-in-Force (RIF) Service Date refers to date upon which all RIF procedures are based. RIF Service Date is determined by continuous state service date with additional service credits awarded for job performance rating

Temporary Employee refers to a full-time or part-time employee who does not occupy an FTE position, whose employment is not to exceed one year, and who is not a covered employee. (S.C. Code Ann. §8-17-320)

Trial Period/Status refers to a six (6) month working trial period/status of a covered employee following a promotion, demotion, or reclassification transfer or reassignment to any class in which the employee has not held permanent status.


s/ Jon E. Ozmint, Director

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DEPARTMENT OF CORRECTIONS

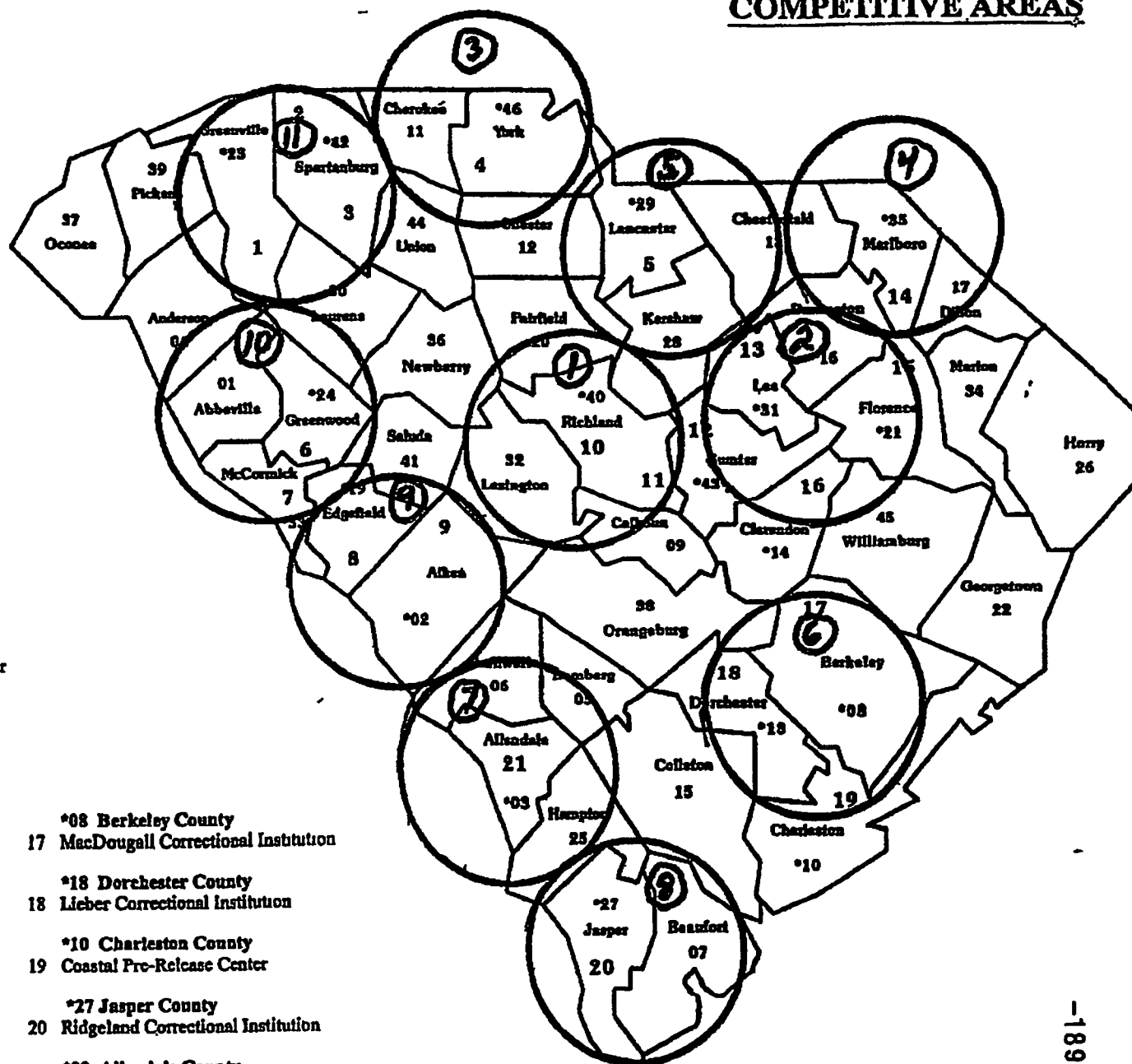
REDUCTION-IN-FORCE - COMPETITIVE AREAS

<u>Competitive Area</u>	<u>Location(s)</u>
1	All Broad River Road Complex Institutions and Divisions Watkins Pre-Release Center Manning Correctional Institution
2	Wateree River Correctional Institution Lee Correctional Institution Palmer Pre-Release Center Turbeville Correctional Institution
3	Catawba Pre Release Center
4	Evans Correctional Institution
5	Kershaw Correctional Institution
6	Coastal Office Coastal Pre-Release Center Lieber Correctional Institution MacDougall Correctional Institution
7	Allendale Correctional Institution
8	Ridgeland Correctional Institution
9	Lower Savannah Pre-Release Center Trenton Correctional Institution
10	Leath Correctional Institution McCormick Correctional Institution
11	Appalachian Office Northside Correctional Institution Livesay Pre-Release Center Tyger River Correctional Institution Perry Correctional Institution

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COMPETITIVE AREAS

- *23 Greenville County
1 Perry Correctional Institution
- *42 Spartanburg County
2 Livezey Pre-Release Center
Northside Correctional Institution
3 Tyger River Correctional Institution
- *46 York County
4 Catawba Pre-Release Center
- *29 Lancaster County
5 Kershaw Correctional Institution
- *24 Greenwood County
6 Leath Correctional Institution
- *33 McCormick County
7 McCormick Correctional Institution
- *19 Edgefield County
8 Trenton Correctional Institution
- *02 Aiken County
9 Lower Savannah Pre-Release Center
- *40 Richland County
10 Broad River Correctional Institution
Campbell Correctional Institution
Goodman Correctional Institution
Kirkland Reception & Evaluation Center
Stevenson Correctional Institution
Walden Correctional Institution
Walkins Pre-Release Center
Women's Correctional Institution
11 Manning Correctional Institution
- *43 Sumter County
12 Wateree River Correctional Institution
- *31 Lee County
13 Lee Correctional Institution
- *35 Marlboro County
14 Evans Correctional Institution
- *21 Florence County
15 Palmer Pre-Release Center
- *14 Clarendon County
16 Turbeville Correctional Institution
- *08 Berkeley County
17 MacDougall Correctional Institution
- *18 Dorchester County
18 Lieber Correctional Institution
- *10 Charleston County
19 Coastal Pre-Release Center
- *27 Jasper County
20 Ridgeland Correctional Institution
- *03 Allendale County
21 Allendale Correctional Institution



DEPARTMENT OF CORRECTIONS

COMPETITIVE JOB CLASSIFICATIONS & SERIES

Competitive Job Classifications and Competitive Job Classification Series within each competitive area for employee bumping are identified as

Competitive Job Classifications

AA75 – (Pay Band 4) - Administrative Assistant
AH20 – (Pay Band 7) - Administrative Manager I
AH45 – (Pay Band 7) – Program Manager I
AJ40 – (Pay Band 6) – Computer Operator II
AJ45 – (Pay Band 6) – Information Resource Consultant II
BC30 – (Pay Band 6) – Public Information Director I
BC50 – (Pay Band 8) – Director of Information Services
CD20 – (Pay Band 4) – Library Specialist
EB52 – (Pay Band 9) – Dentist
EC10 – (Pay Band 2) - Medical Assistant Technician I
EC25 – (Pay Band 5) - Technical Medical Associate II
GA40 – (Pay Band 4) - Human Services Specialist II
JA80 – (Pay Band 4) – Inspector II
UB02 – Certified Teacher
UB04 – Vocational Teacher
UB05 – Guidance Counselor
UB06 – Special Education Teacher

Competitive Job Classification Series

AA25, AA50 – (Pay Bands 2-3) - Administrative Specialist I & II
AD01, AD03 – (Pay Bands 3-4) - Fiscal Technician I & II
AD05, AD08, AD10, AD12 – (Pay Bands 3-4-5-6) - Auditor I, II, III, IV
AD15, AD18 – (Pay Bands 7-8) – Audits Manager I & II
AH10, AH15 – (Pay Bands 5-6) - Administrative Coordinator I & II
AH35, AH40 – (Pay Bands 5-6) - Program Coordinator I & II
CB30, CB35 – (Pay Bands 2-3) - Teacher Assistant, Teacher/Center Director
GA50, GA60 – (Pay Bands 5-6) - Human Services Coordinator I & II
UB09, UE07, UB07– Superintendent, Academic Program Manager, Principal

NAME	CLASSIFICATION	TIME	DATE	LOCATION
RAULI VASDEVARAN	ADAM SPECIALIST B	9/20/78	01	DIV OF CLASSIFICATION & INMATE RECORD
DICOSTANZA NINA M	ADAM SPECIALIST B	2/1/81	01	DIVISION OF INMATE SERVICES
YENNY PATRICIA J	ADAM SPECIALIST B	12/2/81	01	BROAD RIVER CORRECTIONAL INSTITUTION
AUTONACORRECK KATHY S	ADAM SPECIALIST B	3/1/84	01	TRAINING ADMINISTRATION
FLOYD CLAUDETIEL	ADAM SPECIALIST B	8/25/84	01	SUBSTANCE ABUSE SVCS, DIV
HARMON PEARLENE	ADAM SPECIALIST B	7/1/84	01	BROAD RIVER CORRECTIONAL INSTITUTION
BLANE NANCY G	ADAM SPECIALIST B	7/7/84	01	KIRKLAND CORRECTIONAL INSTITUTION
ENTZANGER ROWARD G	ADAM SPECIALIST B	9/18/84	01	KIRKLAND CORRECTIONAL INSTITUTION
HILLER ADEL G	ADAM SPECIALIST B	10/18/83	01	BROAD RIVER CORRECTIONAL INSTITUTION
ROBINSON GLEDA D	ADAM SPECIALIST B	8/26/86	01	BROAD RIVER CORRECTIONAL INSTITUTION
CURRY DONNA C	ADAM SPECIALIST B	9/12/86	01	DIV OF MEDICAL & PROF HEALTH SVCS
BARRES NATHANIEL E	ADAM SPECIALIST B	10/8/88	01	FINANCIAL ACCOUNTING
SCHROER GLORIA E	ADAM SPECIALIST B	1/28/91	01	RECRUITING & EMPLOYMENT SERVICES
BENNETT BARRY F	ADAM SPECIALIST B	3/1/93	01	FOOD SER WASTE INVENTORY/DISTRIBUTION
ABSTONMARRIS JEANNE B	ADAM SPECIALIST B	10/27/94	01	MAINTENANCE ADMINISTRATION
CARRINGTON YVONNE	ADAM SPECIALIST B	1/15/94	01	BROAD RIVER CORRECTIONAL INSTITUTION
SCHIEPP SHERIL K	ADAM SPECIALIST B	4/27/95	01	KIRKLAND CORRECTIONAL INSTITUTION
BOLMOURGT SHAWNA R	ADAM SPECIALIST B	8/28/95	01	RECRUITING & EMPLOYMENT SERVICES
NELSON JERLEEN JOHNSON	ADAM SPECIALIST B	8/22/95	01	DIV OF MEDICAL & PROF HEALTH SVCS
CLARK DAVE M	ADAM SPECIALIST B	7/20/95	01	BROAD RIVER CORRECTIONAL INSTITUTION
GROFF-TOYCE PATRICIA	ADAM SPECIALIST B	7/22/95	01	TRAINING ADMINISTRATION
BRACEY APRIL C.P	ADAM SPECIALIST B	12/8/95	01	DIV OF MEDICAL & PROF HEALTH SVCS
HICKSON ANN	ADAM SPECIALIST B	3/8/96	01	TRAINING ADMINISTRATION
PEACE JOY A	ADAM SPECIALIST B	3/10/96	01	BEHAVIORAL MEDICINE DIVISION
MOSES MARTHA	ADAM SPECIALIST B	5/22/96	01	MAINTENANCE CORRECTIONAL INSTITUTION
TORRESJELA TERESA A	ADAM SPECIALIST B	8/21/96	01	MAINTENANCE CORRECTIONAL INSTITUTION
STONK JR PRESS	ADAM SPECIALIST B	8/28/96	01	CABLE GRAYMAN CORRECTIONAL INST
BRURLOCK SHERRY F	ADAM SPECIALIST B	2/17/97	01	DIVISION OF HUMAN RESOURCES
GLASONS BRENDIA K	ADAM SPECIALIST B	2/22/97	01	KIRKLAND CORRECTIONAL INSTITUTION
MARSAULO KATHLEEN A	ADAM SPECIALIST B	3/14/97	01	MAINTENANCE ADMINISTRATION
STONE PEGGY L	ADAM SPECIALIST B	10/7/97	01	KIRKLAND CORRECTIONAL INSTITUTION
WARD FAYON R	ADAM SPECIALIST B	10/25/97	01	KIRKLAND CORRECTIONAL INSTITUTION
BURTON PAMELA M	ADAM SPECIALIST B	3/7/98	01	DIVISION OF HUMAN RESOURCES
LIVINGSTON JACQUELINE	ADAM SPECIALIST B	2/22/98	01	CABLE GRAYMAN CORRECTIONAL INST
GREEN KELLEY	ADAM SPECIALIST B	3/8/98	01	GOODMAN CORRECTIONAL INSTITUTION
STAS SANDRA D	ADAM SPECIALIST B	6/17/98	01	DIV OF CLASSIFICATION & INMATE RECORD
SMITH DONNA C	ADAM SPECIALIST B	7/2/98	01	WALDEN CORRECTIONAL INSTITUTION
MADISON LINDA C	ADAM SPECIALIST B	8/7/98	01	KIRKLAND CORRECTIONAL INSTITUTION
CHARBIA MARION M	ADAM SPECIALIST B	10/2/99	01	KIRKLAND CORRECTIONAL INSTITUTION

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100	101	102	103	104	105	106	107	108	109	110	111	112	113	114	115	116	117	118	119	120	121	122	123	124	125	126	127	128	129	130	131	132	133	134	135	136	137	138	139	140	141	142	143	144	145	146	147	148	149	150	151	152	153	154	155	156	157	158	159	160	161	162	163	164	165	166	167	168	169	170	171	172	173	174	175	176	177	178	179	180	181	182	183	184	185	186	187	188	189	190	191	192	193	194	195	196	197	198	199	200	201	202	203	204	205	206	207	208	209	210	211	212	213	214	215	216	217	218	219	220	221	222	223	224	225	226	227	228	229	230	231	232	233	234	235	236	237	238	239	240	241	242	243	244	245	246	247	248	249	250	251	252	253	254	255	256	257	258	259	260	261	262	263	264	265	266	267	268	269	270	271	272	273	274	275	276	277	278	279	280	281	282	283	284	285	286	287	288	289	290	291	292	293	294	295	296	297	298	299	300	301	302	303	304	305	306	307	308	309	310	311	312	313	314	315	316	317	318	319	320	321	322	323	324	325	326	327	328	329	330	331	332	333	334	335	336	337	338	339	340	341	342	343	344	345	346	347	348	349	350	351	352	353	354	355	356	357	358	359	360	361	362	363	364	365	366	367	368	369	370	371	372	373	374	375	376	377	378	379	380	381	382	383	384	385	386	387	388	389	390	391	392	393	394	395	396	397	398	399	400	401	402	403	404	405	406	407	408	409	410	411	412	413	414	415	416	417	418	419	420	421	422	423	424	425	426	427	428	429	430	431	432	433	434	435	436	437	438	439	440	441	442	443	444	445	446	447	448	449	450	451	452	453	454	455	456	457	458	459	460	461	462	463	464	465	466	467	468	469	470	471	472	473	474	475	476	477	478	479	480	481	482	483	484	485	486	487	488	489	490	491	492	493	494	495	496	497	498	499	500	501	502	503	504	505	506	507	508	509	510	511	512	513	514	515	516	517	518	519	520	521	522	523	524	525	526	527	528	529	530	531	532	533	534	535	536	537	538	539	540	541	542	543	544	545	546	547	548	549	550	551	552	553	554	555	556	557	558	559	560	561	562	563	564	565	566	567	568	569	570	571	572	573	574	575	576	577	578	579	580	581	582	583	584	585	586	587	588	589	590	591	592	593	594	595	596	597	598	599	600	601	602	603	604	605	606	607	608	609	610	611	612	613	614	615	616	617	618	619	620	621	622	623	624	625	626	627	628	629	630	631	632	633	634	635	636	637	638	639	640	641	642	643	644	645	646	647	648	649	650	651	652	653	654	655	656	657	658	659	660	661	662	663	664	665	666	667	668	669	670	671	672	673	674	675	676	677	678	679	680	681	682	683	684	685	686	687	688	689	690	691	692	693	694	695	696	697	698	699	700	701	702	703	704	705	706	707	708	709	710	711	712	713	714	715	716	717	718	719	720	721	722	723	724	725	726	727	728	729	730	731	732	733	734	735	736	737	738	739	740	741	742	743	744	745	746	747	748	749	750	751	752	753	754	755	756	757	758	759	760	761	762	763	764	765	766	767	768	769	770	771	772	773	774	775	776	777	778	779	780	781	782	783	784	785	786	787	788	789	790	791	792	793	794	795	796	797	798	799	800	801	802	803	804	805	806	807	808	809	810	811	812	813	814	815	816	817	818	819	820	821	822	823	824	825	826	827	828	829	830	831	832	833	834	835	836	837	838	839	840	841	842	843	844	845	846	847	848	849	850	851	852	853	854	855	856	857	858	859	860	861	862	863	864	865	866	867	868	869	870	871	872	873	874	875	876	877	878	879	880	881	882	883	884	885	886	887	888	889	890	891	892	893	894	895	896	897	898	899	900	901	902	903	904	905	906	907	908	909	910	911	912	913	914	915	916	917	918	919	920	921	922	923	924	925	926	927	928	929	930	931	932	933	934	935	936	937	938	939	940	941	942	943	944	945	946	947	948	949	950	951	952	953	954	955	956	957	958	959	960	961	962	963	964	965	966	967	968	969	970	971	972	973	974	975	976	977	978	979	980	981	982	983	984	985	986	987	988	989	990	991	992	993	994	995	996	997	998	999	1000
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SEE DISCLAIMER IN SECTION V OF RIF PLAN

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R I F 1,2,3	EMPLOYEE NAME	C E X	A S E	A G E	J A S B B	A V S D L	CLASSIFICATION TITLE	R/F SVC DATE	C A O R M E P A	LOCATION
	MYERS MARILYN	B	F	42	AA75	04	B ADMINISTRATIVE ASSISTANT	9/13/91	01	STEVENSON CORRECTIONAL INSTITUTION
	CANDARELLA DENISE M	W	F	44	AA75	04	D ADMINISTRATIVE ASSISTANT	8/20/91	01	OFFICE OF GENERAL COUNSEL
	WISE DEBRA M	B	F	34	AA75	04	D ADMINISTRATIVE ASSISTANT	11/19/91	01	KIRKLAND CORRECTIONAL INSTITUTION
	WAITES THERESA H	W	F	58	AA75	04	A ADMINISTRATIVE ASSISTANT	2/2/92	01	CIV LABOR POOL 9511
	ARD CAROL B	W	F	62	AA75	04	E ADMINISTRATIVE ASSISTANT	5/1/92	01	DEPUTY DIR FOR MED & PROF HEALTH SERV
	COBB TERESA F	W	F	62	AA75	04	D ADMINISTRATIVE ASSISTANT	6/5/92	01	EDUCATIONAL SERVICES
	OSTRANDER SHARON B	W	F	51	AA75	04	D ADMINISTRATIVE ASSISTANT	8/1/92	01	DIVISION OF INTERNAL AFFAIRS
	MUELLER CAROLE J	W	F	59	AA75	04	D ADMINISTRATIVE ASSISTANT	2/13/92	01	DIVISION I INSTITUTIONS
	JEFFCOAT JUNETTE	W	F	42	AA75	04	D ADMINISTRATIVE ASSISTANT	12/16/92	01	VEHICLE COMMUNICATION MANAGEMENT
	DURHAM ANITA I	W	F	65	AA75	04	A ADMINISTRATIVE ASSISTANT	2/13/93	01	CORRECTIONAL INDUSTRIES ADMINISTRATION
1	MYERS KATHERINE M	W	F	50	AA75	04	A ADMINISTRATIVE ASSISTANT	2/20/93	01	EDUCATIONAL SERVICES
	WOODS DOROTHY D	W	F	58	AA75	04	D ADMINISTRATIVE ASSISTANT	6/13/93	01	KIRKLAND CORRECTIONAL INSTITUTION
	FORBES VERA A	B	F	39	AA75	04	A ADMINISTRATIVE ASSISTANT	7/10/93	01	BROAD RIVER CORRECTIONAL INSTITUTION
	TOWER MICHELE M	W	F	41	AA75	04	D ADMINISTRATIVE ASSISTANT	8/17/93	01	CANTEEN WHSE INVENTORY/DISTRIBUTION
	PALMER JEANNE	B	F	42	AA75	04	D ADMINISTRATIVE ASSISTANT	9/20/93	01	RECRUITING & EMPLOYMENT SERVICES
	CALDWELL KIMMERLY Y	B	F	38	AA75	04	D ADMINISTRATIVE ASSISTANT	1/9/94	01	OFFICE OF GENERAL COUNSEL
	GRABER JR ALVIN	B	M	38	AA75	04	D ADMINISTRATIVE ASSISTANT	4/9/94	01	KIRKLAND CORRECTIONAL INSTITUTION
	REED REATHER M	B	F	43	AA75	04	A ADMINISTRATIVE ASSISTANT	8/22/94	01	KIRKLAND CORRECTIONAL INSTITUTION
	WHITAKER DESHAWN M	B	F	29	AA75	04	A ADMINISTRATIVE ASSISTANT	1/8/95	01	SECURITY DIVISION
	RICHARDSON SANDRA J	O	F	31	AA75	04	B ADMINISTRATIVE ASSISTANT	2/24/95	01	DIV OF CLASSIFICATION & INMATE RECORD
	STOCKER JIMMY M	W	M	49	AA75	04	C ADMINISTRATIVE ASSISTANT	3/31/95	01	CANTEEN WHSE INVENTORY/DISTRIBUTION
	PAGE MARY N	W	F	59	AA75	04	A ADMINISTRATIVE ASSISTANT	4/14/95	01	CORRECTIONAL INDUSTRIES ADMINISTRATION
	WHITE MICHELLE	B	F	31	AA75	04	D ADMINISTRATIVE ASSISTANT	3/1/98	01	CAMILLE GRAHAM CORRECTIONAL INST
	BROWN-MITCHELL DAYNA L	B	F	47	AA75	04	D ADMINISTRATIVE ASSISTANT	3/10/98	01	DIVISION OF HUMAN RESOURCES
	FRIDGEN NADINE L	W	F	39	AA75	04	D ADMINISTRATIVE ASSISTANT	3/18/98	01	DEPUTY DIR FOR MED & PROF HEALTH SERV
	MARGROVE BOBBY	B	M	48	AA75	04	A ADMINISTRATIVE ASSISTANT	5/4/98	01	CAMILLE GRAHAM CORRECTIONAL INST
	BRIGMAN MICHELLE G	W	F	35	AA75	04	A ADMINISTRATIVE ASSISTANT	8/24/98	01	DEPUTY DIRECTOR ADMINISTRATION
	SMITH FERNETHIA P	B	F	44	AA75	04	D ADMINISTRATIVE ASSISTANT	6/22/98	01	CAMILLE GRAHAM CORRECTIONAL INST
	HUGHES JOE L	B	M	49	AA75	04	D ADMINISTRATIVE ASSISTANT	6/22/98	01	MANNING CORRECTIONAL INSTITUTION
	BROWN MARGARET A	W	F	60	AA75	04	D ADMINISTRATIVE ASSISTANT	8/29/98	01	DIV OF CLASSIFICATION & INMATE RECORD
	ALICK DONNA C	W	F	39	AA75	04	D ADMINISTRATIVE ASSISTANT	7/12/98	01	DIV OF MEDICAL & PROF HEALTH SVCS
1	ZANDERS SYLINDA P	B	F	34	AA75	04	D ADMINISTRATIVE ASSISTANT	8/22/98	01	SUBSTANCE ABUSE SVCS, DIV
	HOPKINS SHARON D	B	F	42	AA75	04	D ADMINISTRATIVE ASSISTANT	10/11/98	01	BEHAVIORAL MEDICINE DIVISION
	HARVEY SALLIE C	W	F	63	AA75	04	D ADMINISTRATIVE ASSISTANT	12/2/98	01	CORRECTIONAL INDUSTRIES ADMINISTRATION
	BAKER BEVERLY M	W	F	51	AA75	04	A ADMINISTRATIVE ASSISTANT	2/24/97	01	OFFICE OF GENERAL COUNSEL
	FANNIN GARY L	W	M	66	AA75	04	D ADMINISTRATIVE ASSISTANT	8/18/97	01	CAMPBELL PRE-RELEASE CENTER
3	POSTELL CECIL A	B	M	44	AA75	04	B ADMINISTRATIVE ASSISTANT	8/14/97	01	DIV OF MEDICAL & PROF HEALTH SVCS
3	WESSINGER DEBBIE S	W	F	41	AA75	04	A ADMINISTRATIVE ASSISTANT	11/29/97	01	WATKINS PRE-RELEASE CENTER
3	NESSITT VALERIE L	B	F	39	AA75	04	A ADMINISTRATIVE ASSISTANT	11/8/99	01	DIV OF CLASSIFICATION & INMATE RECORD
3 P	TUCKER LISA A	B	F	29	AA75	04	D ADMINISTRATIVE ASSISTANT	11/12/02	01	VICTIM SERVICES DIVISION
	TOTAL POSITIONS ELIMINATED - 4									

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SEE FIRST ALIAS IN SECTION V OF RIF PLAN

R	I	F	1.2.1	NAME	CLASSIFICATION	DATE	LOCATION
				WOLVERTON LINDA M	AD03 04 A FISCAL TECHNICIAN II	6/1/87	FOOD SER WHSE INVENTORY/DISTRIBUTION
				SWANSON - LOUI M	AD03 04 A FISCAL TECHNICIAN II	2/14/84	FINANCIAL ACCOUNTING
				PURVIS RUTHIE M	AD03 04 A FISCAL TECHNICIAN II	2/2/84	CIV LABOR POOL 8511
				JORDAN SUSAN B	AD01 03 D FISCAL TECHNICIAN I	2/4/74	FINANCIAL ACCOUNTING
				DAVIS DOROTHY M	AD01 03 D FISCAL TECHNICIAN I	6/17/83	FOOD SERVICES ADMINISTRATION
				WHITE JACOLYN E	AD01 03 D FISCAL TECHNICIAN I	7/22/83	FINANCIAL ACCOUNTING
				WILLIAMS ROMONA C	AD01 03 D FISCAL TECHNICIAN I	10/12/81	HIGHLAND CORRECTIONAL INSTITUTION
				BROWNE BARBARA L	AD01 03 D FISCAL TECHNICIAN I	7/7/83	FINANCIAL ACCOUNTING
				WILLIAMS BEVERLY W	AD01 03 D FISCAL TECHNICIAN I	9/17/82	FINANCIAL ACCOUNTING
				BOURGCHT, DEBBIE	AD01 03 D FISCAL TECHNICIAN I	2/28/83	CORR. INDUSTRIES ADMIN.
				HALE GLORIA V	AD01 03 D FISCAL TECHNICIAN I	4/4/83	FINANCIAL ACCOUNTING
				PURE TRACY B	AD01 03 D FISCAL TECHNICIAN I	5/28/83	FINANCIAL ACCOUNTING
				PERSONS, VERLENE E	AD01 03 D FISCAL TECHNICIAN I	9/3/83	CORR. INDUSTRIES ADMIN.
				SMALL TADAY V	AD01 03 D FISCAL TECHNICIAN I	8/7/83	CORRECTIONAL INDUSTRIES ADMINISTRATION
				ENSHAW JEANNE C	AD01 03 D FISCAL TECHNICIAN I	5/18/83	FINANCIAL ACCOUNTING
				TOTAL POSITIONS ELIMINATED 2			
				MASTRA L	AD12 08 D AUDITOR IV	8/22/80	DIVISION OF INTERNAL AUDITS
				MORGAN JOHN P	AD12 08 D AUDITOR IV	10/18/82	DIVISION OF INTERNAL AUDITS
				BOWERS DAVID C	AD12 08 D AUDITOR IV	11/27/82	DIV OF INTERNAL AUDITS
				HUDOLE W CHARLES E	AD10 05 D AUDITOR III	7/8/82	CANTEEN WHSE INVENTORY/DISTRIBUTION
				SHEPARD LARRY T	AD10 05 D AUDITOR III	10/13/83	CANTEEN WHSE INVENTORY/DISTRIBUTION
				TOTAL POSITIONS ELIMINATED 2			
				LORETTA O	AD08 04 D AUDITOR B	8/18/83	DIV OF INTERNAL AUDITS
				JOHNNY E	AD13 03 E AUDITS MANAGER B	4/17/83	DIV OF INTERNAL AUDITS
				GLEN B	AD13 07 E AUDITS MANAGER I	12/10/87	DIV OF INTERNAL AUDITS
				TOTAL POSITIONS ELIMINATED 2			
				HARRISON RICHIE	AH20 07 B ADMINISTRATIVE MGR I	6/8/77	DIV OF INSPECT OPER REVIEW, DRUG TES
				DEHL JOHN BRYANT	AH20 07 B ADMINISTRATIVE MGR I	8/2/77	CANTEEN WHSE INVENTORY/DISTRIBUTION
				VALIGAN WILLIAM J	AH20 07 E ADMINISTRATIVE MGR I	8/7/82	CORRECTIONAL INDUSTRIES ADMINISTRATION
				PAGE JAMES EDWIN	AH20 07 C ADMINISTRATIVE MGR I	8/2/83	BEHAVIORAL MEDICINE DIVISION
				MCQUEEN THOMAS EDGAR	AH20 07 E ADMINISTRATIVE MGR I	10/18/83	CORRECTIONAL INDUSTRIES ADMINISTRATION
				GRAY ISAH	AH20 07 C ADMINISTRATIVE MGR I	2/28/87	VEHICLE COMMUNICATION MANAGEMENT
				JEWELL TOLUA M	AH20 07 D ADMINISTRATIVE MGR I	3/18/87	FOOD SER WHSE INVENTORY/DISTRIBUTION
				POSTON JEFF	AH20 07 A ADMINISTRATIVE MGR I	6/18/82	CONSTRUCTION ADMINISTRATION
				KING, JR. JOHN W	AH20 07 A ADMINISTRATIVE MGR I	12/16/83	COMMISSARY WHSE INVENTORY/DISTRIBUTION
				KENNEY KENNETH M	AH20 07 B ADMINISTRATIVE MGR I	8/4/85	CORRECTIONAL INDUSTRIES ADMINISTRATION
				TOTAL POSITIONS ELIMINATED 1			
				JOHNSON ANNA K	AH40 08 B PROGRAM COORDINATOR B	8/28/80	DIVISION OF INMATE SERVICES
				PUTCHIE SUSAN F	AH40 08 C PROGRAM COORDINATOR B	4/22/72	DIV OF CLASSIFICATION & INMATE RECORD
				DANZLER DON H	AH40 08 D PROGRAM COORDINATOR B	3/17/73	CORRECTIONAL INDUSTRIES ADMINISTRATION
				STORBE MICHAEL J	AH40 08 E PROGRAM COORDINATOR B	8/28/78	DIV OF CLASSIFICATION & INMATE RECORD
				KOON BARBARA R	AH40 08 E PROGRAM COORDINATOR B	10/12/78	DIV OF CLASSIFICATION & INMATE RECORD

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123.	NAME	CLASSIFICATION	DATE	LOCATION
R	RECK STEVEN J	PROGRAM MANAGER I	8/4/88	01 FOOD SERVICES ADMINISTRATION
R	CLARK JOHN R	PROGRAM MANAGER I	8/10/88	01 DIVISION OF HUMAN RESOURCES
I	BURGART LES G	PROGRAM MANAGER I	8/24/88	01 SUPPORT SERVICES ADMINISTRATION
F	CONNELLY YVONNE Y	PROGRAM MANAGER I	1/17/89	01 DIV OF MEDICAL & PROF HEALTH SVCS
	DEK JR HERBERT O	PROGRAM MANAGER I	10/10/81	01 AGRICULTURE SERVICES
	POWELL KATHLEEN F	PROGRAM MANAGER I	8/18/82	01 BEHAVIORAL MEDICINE DIVISION
13	SHULER THOMAS A	PROGRAM MANAGER I	8/11/83	01 SUBSTANCE ABUSE SVCS DIV
R1	ELLISOR SHARON E	PROGRAM MANAGER I	8/4/86	01 CONSTRUCTION ADMINISTRATION
R1	CRAIG PAMELA R	PROGRAM MANAGER I	12/20/89	01 SAFETY/FIRE INSPECTIONS DIVISION
TOTAL POSITIONS ELIMINATED 1				
1	BLATT ALBERT R	INFO RESOURCE CONSULT II	8/8/88	01 NETWORK & TELE COMM
	HOCKER SFL GARY A	INFO RESOURCE CONSULT II	8/8/89	01 NETWORK & TELE COMM
	BOYE FRED C	INFO RESOURCE CONSULT II	4/3/88	01 NETWORK & TELE COMM
2	STOTTS DARRYL J	INFO RESOURCE CONSULT II	8/7/82	01 CORRECTIONAL INDUSTRIES
TOTAL POSITIONS ELIMINATED 1				
	STEVENS KAREN L	COMPUTER OPERATOR II	2/8/81	01 SYSTEMS OPER. & SUPPORT
	ANDERSON SHIRLEY W	COMPUTER OPERATOR II	8/20/82	01 SYSTEM OPER. & SUPPORT
13	JOHNSON RICHMOND A	COMPUTER OPERATOR II	3/22/88	01 SYSTEM OPER. & SUPPORT
TOTAL POSITIONS ELIMINATED 1				
13	ROBINSON KAY	PUBLIC INFOR DIR. I	1/17/88	01 OFF OF COMMUNICATIONS
TOTAL POSITIONS ELIMINATED 1				
12	BATES-LEE CHERYL A	DIR INFORMATION SVCS.	7/18/83	01 OFF OF COMMUNICATIONS
TOTAL POSITIONS ELIMINATED 1				
	SUNAMERS JOHN W	DENTIST	3/11/80	01 BROAD RIVER CORRECTIONAL INSTITUTION
	GILLIAM MEDRINA J	DENTIST	5/13/89	01 DEPUTY DIR FOR MED & PROF HEALTH SERV
	MCPIERSON DOUGLAS W	DENTIST	3/13/82	01 KIRKLAND CORRECTIONAL INSTITUTION
	MURDER EUGENE	DENTIST	3/20/86	01 DIV OF MEDICAL & PROF HEALTH SVCS
13	STEIN SANDRA G	DENTIST	5/24/86	01 CAMBLE GRAYHAM
TOTAL POSITIONS ELIMINATED 1				
	ROBINSON HESTER	MED. ASST TECH. I	4/20/79	01 BROAD RIVER CORR. INST
	OLVARO JEAN F	MED. ASST TECH. I	8/16/79	01 CAMBLE GRAYHAM CORR. INST
	WRIGHT MARGARET	MED. ASST TECH. I	2/1/80	01 KIRKLAND CORR. INST
13	JERRY KILLICENT M	MED. ASST TECH. I	5/16/88	01 DIV OF MED. & PROF SVCS.
R2	BENDER MARY	MED. ASST TECH. I	8/21/89	01 CAMBLE GRAYHAM CORR. INST
R2	EVANS KATHRYN L	MED. ASST TECH. I	9/17/80	01 BEHAVIORAL MEDICINE DIVISION
R2	ROBINSON LOUITA V	MED. ASST TECH. I	2/28/81	01 KIRKLAND CORR. INST
R2	RICHARDSON KATHLEEN	MED. ASST TECH. I	8/7/80	01 CAMBLE GRAYHAM CORR. INST
P32	WUVA MARY L	MED. ASST TECH. I	8/24/82	01 KIRKLAND CORR. INST
P32	THREK JORCE E	MED. ASST TECH. I	7/22/82	01 KIRKLAND CORR. INST
P32	BL YOLANDO	MED. ASST TECH. I	8/12/82	01 KIRKLAND CORR. INST
P32	HOCKS ANGELA J	MED. ASST TECH. I	8/1/82	01 KIRKLAND CORR. INST
P32	GARDNER PATRICIA	MED. ASST TECH. I	12/22/82	01 CAMBLE GRAYHAM CORR. INST
TOTAL POSITIONS ELIMINATED 1				

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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SEE DISCLAIMER IN SECTION V OF RIF PLAN

_____(Date)_____

_____(Name)_____
_____(Address)_____
_____(City, State)_____

SUBJECT Notification of Reduction-In-Force

Dear Mr./Ms _____ (Name)_____,

The Department of Corrections' budget has been reduced by over \$80 million during the past 30 months. These cuts come at a time when incarceration rates have increased the inmate population by several thousand. During this same period, efforts to cut spending have included staff reductions of nearly 1,300 employees, closing prisons, elimination of numerous programs, and drastic cuts in expenditures. Conversely, efforts have also been made to increase revenue from sources such as prison industries, institutional canteens, inmate work programs, and increasing grant funding. Unfortunately, the financial health of this agency remains critical and more drastic measures are necessary.

As Agency Director, I have the responsibility to focus on our primary mission which is to protect the public and to continuously assess the need for further cuts in spending, which now must include further reductions in our employee staffing levels. As a result, I regret to inform you that I have submitted a Reduction-In-Force Plan to the State Office of Human Resources, and received approval for procedural correctness, to eliminate your position along with a large portion of our administrative and support employee population, to be effective close of business June 1, 2003. The approved Reduction-In-Force Plan will be made available for your review, at your request, excluding the Reduction-In-Force Service Dates of other employees.

While the Reduction-In-Force process can be very stressful, steps have been taken to ensure you are advised of the entire process and employee benefits continuation, should you eventually lose your position with the Agency. A Reduction-In-Force Service Date has been established for all employees within your job classification that will determine the order for bumping. If you are not eligible to bump another individual, you may be offered a vacant lower level position for which you meet the state and Agency minimum training & experience requirements.

Additionally, should you ultimately be laid off, the Agency will provide you with an SCDC and state application form and notify the Office of Human Resources. State Career Center will be notified of this Reduction-In-Force and their assistance will be requested to help the affected employees in their search for other state employment. In addition, the employee will be entered into the automated State Employee RIF Applicant Pool, which will allow the employee to provide updated information and eligibility for other state agency's vacancies.

Mr. John A. Near, Division Director - Human Resources, or designee from the Division of Human Resources, will be meeting with you to provide a copy of the Agency's Reduction-In-Force Policy,

Notification of Reduction-In-Force

1953

(Date) _____
Page 2

explain the Reduction-In-Force process, as well as, detail your recall and reinstatement rights and benefits as an employee affected by a Reduction-In-Force.

A summary of the policy on the Reduction-In-Force process offers you the following components

Competitive Areas All agency work locations have been identified and eleven (11) specific geographic areas of the state designated as competitive areas that may be eligible for employee "bumping" purposes

- 1 All Broad River Road Complex Institutions and Divisions, Watkins Pre-Release, Manning
- 2 Wateree River, Lee, Palmer Pre-Release, Turbeville
- 3 Catawba Pre-Release
- 4 Evans
- 5 Kershaw
- 6 Coastal Office, Coastal Pre-Release, Lieber, MacDougall
- 7 Allendale
- 8 Ridgeland
- 9 Lower Savannah Pre-Release, Trenton
- 10 Leath, McCormick
- 11 Appalachian Office, Northside, Livesay Pre-Release, Tyger River, Perry

Competitive Job Classification Series Competitive Job Classifications and Competitive Job Classification Series within each competitive area for employee bumping are identified as

Competitive Job Classifications

- AA75 -- (Pay Band 4) - Administrative Assistant
- AH20 -- (Pay Band 7) - Administrative Manager I
- AH45 -- (Pay Band 7) - Program Manager I
- AJ40 -- (Pay Band 6) - Computer Operator II
- AJ45 -- (Pay Band 6) - Information Resource Consultant II
- BC30 -- (Pay Band 6) - Public Information Director I
- BC50 -- (Pay Band 8) - Director of Information Services
- CD20 -- (Pay Band 4) - Library Specialist
- EB52 -- (Pay Band 9) - Dentist
- EC10 -- (Pay Band 2) - Medical Assistant Technician I
- EC25 -- (Pay Band 5) - Technical Medical Associate II
- GA40 -- (Pay Band 4) - Human Services Specialist II
- JA80 -- (Pay Band 4) - Inspector II
- UB02 -- Certified Teacher
- UB04 -- Vocational Teacher
- UB05 -- Guidance Counselor
- UB06 -- Special Education Teacher

) **Notification of Reduction-In-Force**

_____(Date)_____

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Competitive Job Classification Series

AA25, AA50 – (Pay Bands 2-3) - Administrative Specialist I & II
 AD01, AD03 – (Pay Bands 3-4) - Fiscal Technician I & II
 AD05, AD08, AD10, AD12 – (Pay Bands 3-4-5-6) - Auditor I, II, III, IV
 AD15, AD18 – (Pay Bands 7-8) - Audits Manager I & II
 AH10, AH15 – (Pay Bands 5-6) - Administrative Coordinator I & II
 AH35, AH40 – (Pay Bands 5-6) - Program Coordinator I & II
 CB30, CB35 – (Pay Bands 2-3) - Teacher Assistant, Teacher/Center Director
 GA50, GA60 – (Pay Bands 5-6) - Human Services Coordinator I & II
 UB09, UE07, UB07 – Superintendent, Academic Program Manager, Principal

RIF Service Date A Reduction-In-Force Service Date has been established to be used as the basis for bumping, laying off, or recalling an employee. The RIF Service Date is established by combining your continuous state service date with additional credit for job performance on each of your last two scheduled EPMS performance evaluation ratings (Below = 0 months, Meets = 6 months, Exceeds = 12 months, Substantially Exceeds = 18 months)

) **Bumping Rights** Following your meeting with a representative from the Division of Human Resources, within two (2) working days, you must elect layoff, or to exercise your bumping rights based upon your RIF Service Date. Failure to provide written notification of your decision to the Division of Human Resources within two (2) working days will automatically waive your bumping rights. If you elect to exercise your bumping rights and fail to attend a scheduled meeting, a subsequent meeting will be rescheduled after other employees with a lower RIF Service date have been contacted. Should you elect to exercise your bumping rights, a summary of the process identified in the Reduction-In-Force Policy will be conducted as follows

(First) If your Job Classification is in one of the designated Competitive Job Classification Series identified above, you may be eligible to bump into the position occupied by the employee with the lowest RIF Service Date in your same Job Classification and pay band with the same or lower pay level, provided you meet the state and SCDC minimum training & experience requirements. The bumped employee may then bump into the position occupied by the employee with the lowest RIF Service Date in the next lowest Job Classification in the designated series, provided they meet the state and agency minimum training & experience requirements

) (Second) If your position is not in one of the Competitive Series designated above, you must first bump the employee in your competitive area with the lowest RIF Service Date in your same Job Classification and pay band, with the same or lower pay level, provided you meet the state and SCDC minimum training & experience requirements

) Notification of Reduction-In-Force

(Date) _____

Page 4

(Third) You (or the bumped employee with the lowest RIF Service Date) must next be reassigned or demoted into a vacant position in the competitive area of the same pay band, pay level or lower, provided the agency is actively recruiting to fill the vacancy, and you meet the state and SCDC minimum training & experience requirements

If you elect to bump into another position, your annual salary may be reduced (State Office of Human Resources Regulation 19-719, revised March 4, 2003) to a salary either between 0% - 15% below your current salary or between your current salary and the midpoint of the lower pay band.

Recall and Reinstatement Rights Should you be laid off, reassigned, or demoted to another position with a lower pay band or pay level, you will have recall rights for a period of one year from the effective date of the layoff (June 1, 2004) When a vacancy occurs in the competitive area which is the same job classification, pay band, and pay level or lower, that you occupied at the time of the layoff, you will be offered the vacancy in inverse order of RIF Service Date, provided you meet the minimum training and experience requirements The position must be accepted within two (2) working days of the offer, or you will waive any future recall rights You may apply for other positions with a lower pay band and pay level during the recall period, and if selected, will still retain your recall rights Probationary employees will not have recall or reinstatement rights

You may apply for any SCDC or other state job for which you meet the minimum training and experience requirements. If you accept a position with a lower pay band than the one from which you were separated, you will retain recall rights to a position in the same job classification in the competitive area.

Moving If you relocate to another geographic area, you may request to be considered for positions in your same job classification title in the new competitive area. You must notify the Division of Human Resources of your new address in writing and willingness to be recalled in another area.

Status Upon your move into an established position (either as a result of bumping or reinstatement), you will be given either Trial or Covered status in the job classification in accordance with state and agency guidelines

Sick Leave, Annual leave, and Holidays If you are laid off, you will be paid for your unused annual leave up to a maximum of forty-five (45) days You will forfeit any unused sick leave If you are recalled or reinstated within one (1) year, you will be eligible to have all sick leave reinstated that was forfeited at the time of your layoff Non-exempt employees will be paid for any accrued holiday compensatory time, exempt employees will forfeit any accrued holiday compensatory time. Upon recall or reinstatement you may buy back all, some, or none of your annual leave

Notification of Reduction-In-Force

(Date) _____

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Health Care and Dental Coverage Health Care Coverage will end on the last day of the month in which you cease employment. Any dependent coverage will end on the date your coverage ends. You and your eligible dependents may be eligible for continuation of coverage under COBRA for a limited time. To continue coverage under COBRA, a Notice of Election (NOE) form, along with the required premium, must be completed and returned to the Office of Insurance Services within 60 days of the loss of coverage or notification of the right to continue coverage, whichever is later.

Life Insurance and Long Term Disability Coverage Coverage for all group life insurance, optional life insurance, dependent life insurance, and supplemental and long term disability will end on the last day of the month in which you cease employment. You may apply for conversion to an individual policy by making application within 31 days of the date your coverage ceases for all of the above by contacting the SCDC Benefits Branch or the Office of Insurance Services.

Grievances A covered employee who is affected by a Reduction-In-Force has the right to grieve through the Agency grievance process and appeal to the State grievance process only if the grievance is based upon inconsistent or improper application of any portion of the Agency's Reduction-In-Force Policy/Procedure or Plan.

Again, I deeply regret the necessity of this action. I am hopeful that while this Reduction-In-Force process was necessary, you will be able to be placed within our Agency and recalled or reinstated in order to continue employment with the State of South Carolina.

Sincerely,

Jon E. Ozmint

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Acknowledgement of Receipt of Notification of Reduction-In-Force

I have received the attached Notification of Reduction-In-Force from Director Ozmint.

Print Employee Name _____

Employee Signature S/ _____

Date _____

PLEASE REMOVE THIS PAGE
AND RETURN IT TO A REPRESENTATIVE IN THE
DIVISION OF HUMAN RESOURCES

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

-506-

**REDUCTION-IN-FORCE
POSITION BUMPING SELECTION/REFUSAL**

In accordance with SCDC Policy ADM-11 05 "Reduction-In-Force," I have been advised of the bumping options available to me by _____ on _____

(Name)

(Date)

and that I must make my selection and return this form within two (2) working days on _____

If I fail to return this form within the time required, I agree to automatically

(Date)

waive my rights to elect to bump in to a position and voluntarily select layoff. In accordance with SCDC Reduction-In-Force Policy - ADM-11 05, paragraph 4.3, I must select the option offered to me, or elect to be laid off with recall and reinstatement rights as provided by the provisions of the Reduction-In-Force Policy. Regardless of my selection, I understand I will have recall rights for a period of one year from the effective date of the layoff.

_____ (initial) I elect to bump into a filled or vacant position

_____ (initial) I elect layoff

(Employee Signature)

(Date)

ELECTION TO BUMP INTO A FILLED OR VACANT POSITION

I elect to exercise my bumping rights under the provisions of the Reduction-In-Force Policy and agree to accept the position of _____

(Position Title)

(Position #)

in the area of _____ to be effective _____

I understand I must fulfill all requirements of the position, in accordance with Agency policy, to include satisfactory completion of all job duties and responsibilities.

(Employee)

(Date)

(HR Representative)

(Date)

ELECTION TO SELECT LAYOFF

I decline to exercise my bumping rights under the provisions of the Reduction-In-Force Policy and refuse accept the position of _____

(Position Title)

(Position #)

in the area of _____ As a result, I agree that the effective date of my layoff will be close of business _____

(Employee Signature)

(Date)

(Employee Signature)

(Date)

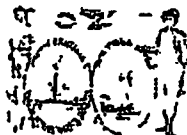
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STATE OF SOUTH CAROLINA
State Budget and Control Board
 DIVISION OF BUDGET AND ANALYSES
 OFFICE OF HUMAN RESOURCES

MARK SANFORD, CHAIRMAN
 GOVERNOR

GRADY L. PATTERSON, JR.
 STATE TREASURER

RICHARD ECKSTROM
 COMPTROLLER GENERAL



1201 MAIN STREET, SUITE 1000
 COLUMBIA, SOUTH CAROLINA 29201
 (803) 737-0900

SAMUEL L. WILKINS
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 CHAIRMAN, SENATE FINANCE COMMITTEE

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 CHAIRMAN, WAYS AND MEANS COMMITTEE

FRANK W. FUSCO
 EXECUTIVE DIRECTOR

March 28, 2003

Mr John Near
 Director of Human Resources Management
 South Carolina Department of Corrections (SCDC)
 4444 Broad River Road
 Post Office Box 21787
 Columbia, South Carolina 29221-1787

Dear Mr Near-

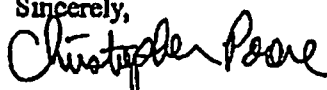
Your reduction-in-force (RIF) plan for the Department of Corrections' (SCDC) eleven (11) competitive areas has been reviewed. As part of the plan, we reviewed the following components the plan, the competitive areas diagram, the listing of competitive job classifications and job classification series, the "Listing of Positions Being Eliminated and the Employees Eligible for Bumping in Each Competitive Area", and the sample letter to employees in positions being eliminated. In light of your assessment that the Department's current organizational charts may not be completely up-to-date, we understand that the "Listing" includes all employees in each competitive area and each competitive class and class series included in the reduction in force plan. We used this information to conduct our review.

Based on the information you submitted, it appears that the plan is procedurally correct. The Office of Human Resources' approval of the procedural correctness indicates only that the required elements of the RIF plan are present and in accordance with the Department's RIF Policy/Procedure. Our approval does not include the determination of the geographic locations in the competitive areas, competitive classes, competitive class series, bumping rights, the positions to be eliminated, or any exceptions included in the plan, since these are solely the responsibility of SCDC management. Justification for any exception should be retained by the Department.

In accordance with SC Code of Laws Ann §8-11-185 (1976 & 2002 Supp), any state agency implementing a RIF must report information pertaining to employees affected by a RIF to the Office of Human Resources to be included in the RIF applicant pool. State law also requires agencies to consult the RIF applicant pool and give priority consideration to employees affected by a RIF when seeking to fill vacancies. For this purpose, the RIF applicant pool may be accessed through the web-site www.state.sc.us/ohr/rif. Should you have questions about these requirements, please call Bob Karel at 734-0980.

If I can be of further assistance, please give me a call at (803)737-0952

Sincerely,



Christopher Poore
Human Resources Consultant

STATE OF SOUTH CAROLINA	)	IN THE ADMINISTRATIVE LAW COURT
	)	
COUNTY OF RICHLAND	)	
	)	
James "Cal" Bell, et al ,	)	
	)	
Appellants,	)	
	)	APPELLANTS' SUPPLEMENTAL BRIEF
vs	)	
	)	DOCKET NO 09-ALJ-30-0103-AP
South Carolina Department of	)	
Corrections and Palmetto Unified	)	
School District No 1,	)	
	)	
<u>Respondents</u>	)	

At the conclusion of oral argument on October 28, 2009, the Court offered both parties the opportunity to submit supplemental argument providing, in brief, a distillation of the parties' positions. The Court suggested that this supplemental brief be in topic form with bullet points and acknowledged that the positions advanced by the parties in their initial briefs and oral argument would be preserved for review on further appeal, if necessary.

In keeping with the Court's request, Appellants offer the following supplemental argument ¹

SUMMARY OF ARGUMENT

Policies and procedures affecting public employment establish substantial, enforceable rights. The violation of these rights alone mandates relief, regardless of the motives or reasons prompting the violations. Johnson v. Spartanburg School District No. 7, 314 S.C. 340, 444 S.E.2d 501, 503 (1994) (Public employer may not disregard procedural legislation to remove, demote or otherwise deprive an employee of salary or position), Armstrong v. School District Five of Lexington and Richland Counties, 26 F.Supp.2d, 789, 795 (D.S.C. 1998) (State statutes may create enforceable property interest), Hogsd v. Lancaster Area Schools Board of Trustees

FILED

NOV 20 2009 3550

SC ADMIN LAW COURT

283 S C 42, 47, 320 S E 2d 724, 727 (Ct App 1984)(Adoption of an optional transfer policy required compliance)

I The record as a whole and the findings of the State Employee Grievance Committee establish violations of the challenged RIF Policy, state law and regulation

- RIF Policy Section 1 1 states that the competitive area may be *agency wide*, a department or a more restricted *geographical* area where the staff is separately organized and clearly distinguishable from the staff in other areas
- The record establishes and the Grievance Committee found that the geographic areas created for purposes of the RIF do not relate to staff that are separately organized or clearly distinguishable from the staff in other areas
- State law establishes that the Palmetto Unified School District is a single unit under one superintendent and one board
- South Carolina Department of Corrections (SCDC) has placed the entire Palmetto Unified School District in its Education Division that is under one director and is not organized geographically but administered as one unit
- RIF Policy establishes rights for employees affected by RIF, including no additional new hires, internal promotions or reassignments into vacant positions *in the competitive area* (Section 2 3), bumping and recall rights (Section 7 1), preference over temporary employees (Sections 7 5 and 11)
- State law and Office of Human Resources guidelines establish that the duties formerly performed by employees separated by RIF cannot be assigned to temporary employees during the RIF recall period (S C Code Ann § 8-11-185 and OHR Answer to Frequently Asked Questions)

- Nineteen permanent and twenty-three temporary employees were assigned responsibilities previously performed by Appellants during the recall period
- SCDC did not notify employees affected by the RIF of employment opportunities or recall employees separated by RIF. Instead, SCDC allowed employees who voluntarily retired, thereby experiencing a “break in service”, to return to temporary employment during the recall period.
- SCDC ignored state law that requires the involvement of the superintendent and board in matters affecting the delivery of educational services to inmates and circumvented state law that requires compensation of educators on a state wide salary schedule through the assignment of educational services to temporary and non-certified employees

II Violations of policy, state law and procedure do not require Appellants to establish a “retaliatory motive” on the part of SCDC

- Where a policy or statute is violated in a fashion that adversely affects the rights of a public employee, motive for the violation is not a factor. See, Johnson, Armstrong and Hogsed, cited above, see also, Triska v DHEC, 292 S C 190, 194, 355 S E 2d 531, 533 (1987)
- Unlike some employment actions, such as reclassifications, appeal from a RIF does not require evidence that the action was “punitive”. Specifically, a RIF may be challenged on grounds that “the agency inconsistently or improperly applied its reduction in force policy or plan.” S C Code Ann § 8-17-330
- Where the General Assembly has established a classification that protects a designated group of citizens (here, the protected class of “covered employees” during a RIF recall period), failure to afford rights established by the General

Assembly violates constitutionally protected equal protection and due process guarantees. Proof of motive is not required to protect a legislatively established right. See, Littlefield v S C Forestry Comm'n, 337 S C 348, 353-354, 523 S E 2d 781, 783 (2000)

- Motive is a factor where the equal protection clause is used to challenge a classification established by law. In that case, it must be demonstrated that the government intended to violate an established right in making or enforcing the classification. See, Seabrook v Knox, 369 S C 191, 200, 631 S E 2d 907, 912 (2006)(challenge to a zoning designation). Here, Appellants seek to enforce rather than challenge their rights as members of a protected class, covered employees separated from employment by RIF. By virtue of their covered employee status, Appellants are entitled to protections guaranteed by law that are not available to individuals who are not “covered” due to probationary or temporary employment, or who experience a “break in service” due to termination for cause or voluntary separation from employment. The General Assembly’s legitimate interest in protecting individuals who lose permanent state employment through no fault of their own establishes substantial, enforceable rights protected by the due process and equal protection clauses of the South Carolina Constitution. See, S C Const art I, §§ 3 and 22

III SCDC’s focus on motive and assertion of a thirty mile rule cannot excuse its unlawful conduct

SCDC contends that despite multiple violations of its own policy, OHR guidelines, state law and regulation, Appellants can prevail only if the reason for these violations was retaliation. This is not a sustainable legal position.

State law provides two paths for challenging an adverse public employment action. The challenge may assert violation of established policies, procedures or laws as indicated in the procedural objections to RIF made available in S C Code Ann § 8-17-330 and in the holdings of Johnson, Armstrong, Hogsed and Littlefield. Proof of policy and procedure violations in the implementation of a RIF eliminates the need to establish motive. By way of contrast, a procedurally sound employment action may be challenged only if unlawfully motivated. This is illustrated in the challenge to “punitive” reclassification made available in S C Code Ann § 8-17-330 and by Demian v S C Health and Human Services Finance Comm’n, 297 S C 1, 374 S E 2d 510 (Ct App 1988). Because the record contains numerous violations of policy, procedure and law, Appellants are not required to prove a retaliatory motive.²

SCDC further attempts to defend its actions by referring to a “thirty mile rule” that allows employees to grieve an **involuntary** transfer of more than thirty miles from their place of employment. This reliance is misplaced for several reasons. First, the designation of “competitive area” in RIF Policy Section 1.1 does not contain such a limit and there is no organizational justification for such a limit. Second, “bumping” under a RIF is voluntary and the decision to accept employment beyond thirty miles does not invoke grievance rights. Third, a thirty mile limitation ignores SCDC practice that allows employees, including several Appellants and the Director of the Education Division, to live distances greater than thirty miles from their workplaces. Finally, an examination of the actual distances between facilities affected by the RIF demonstrates forty-six instances where facilities **outside** competitive areas were closer than the greatest distance between facilities **within** a competitive area.

² S C Code Ann § 8-17-330 provides that a reclassification may be challenged only if it is punitive whereas a reduction in force is subject to challenge on grounds that the agency inconsistently or improperly applied its reduction in force policy or plan.

CONCLUSION

SCDC violated its RIF Policy in separating Appellants from employment and in failing to observe their recall rights as required by the RIF Policy, OHR policy and state law. Accordingly, although Appellants continue to believe that SCDC's motive was unlawful, in light of the record and findings by the State Grievance Committee, proof of retaliation is not necessary to prevail in this appeal. For these reasons, the reasons stated in Appellants' initial brief and oral argument, Appellants have established violations of constitutional and statutory provisions, actions by SCDC in excess of its statutory authority, actions made upon unlawful procedure and affected by error of law, and clearly erroneous, arbitrary conduct that render the reduction in force resulting in Appellants' separation from employment invalid and require their reinstatement to employment with appropriate benefits.

GERGEL, NICKLES & SOLOMON, P A

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James "Cal" Bell, Othella Bernard, Katherina	)	
Bower, Linda M W Bratton, Ann T Bridges,	)	Docket No 09-ALJ-30-0103-AP
Rance C Cobb, Jeannie B Croxton, et al ,	)	
	)	
Appellants,	)	SUPPLEMENTAL BRIEF OF
	)	RESPONDENT SCDC AND OF
vs	)	ITS DIVISION OF EDUCATION,
	)	ALSO KNOW AS PALMETTO
S C Department of Corrections and Palmetto	)	UNIFIED SCHOOL DISTRICT
Unified School District No 1,	)	No 1, AS DIRECTED BY THE
	)	COURT DURING ORAL
Respondents	)	ARGUMENT CONDUCTED ON
	)	OCTOBER 28, 2009

In accordance with the directive issued by the Court during the oral argument it conducted on October 28, 2009, Respondent South Carolina Department of Corrections ["SCDC"], by and through its undersigned counsel and on behalf of its Division of Education, also known as the Palmetto Unified School District No 1 ["PUSD"], hereby files its supplemental brief in the instant matter in the format prescribed by the Court

Response to the Appellants' Equal Protection Argument
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- Procedural defects associated with the Appellants' equal protection argument
 - The Appellants failed to properly preserve their equal protection argument, as they did not identify or otherwise articulate such an argument in their statement of grounds on appeal to the State Employee Grievance Committee (R pp 2694 - 99)
 - In his December 11, 2006 presentation to the circuit court in support of the Appellants' Petition for Judicial review, **Appellants' counsel explicitly denied that the Appellants' challenge of the RIF animated an equal protection claim**
 - At "Tab 2" of the "APPEAL HEARING APPENDIX" which he submitted to this Court during oral argument, Appellants' counsel included the circuit court's order filed stamped January 10, 2007 which granted the Appellants' Petition for Judicial Review (R pp 2014 – 2017)

- Within the section of his principle brief to this Court in which he inadequately attempted to articulate the Appellants' equal protection claim, Appellants' counsel referenced material (R pp 2233 – 2238) that he originally submitted to the circuit court in support of the Appellants' Petition for Judicial Review ¹ (See Appellants' Brief, pp 16 – 17, Violations II(a), II(b), and II(1)) ²
- In his argument to this Court on October 28, 2009, Appellants' counsel articulated the identical or nearly identical analysis of the procedural flaws purportedly associated with the RIF as he did to the circuit court in support of the Appellants' Petition for Judicial Review on December 11, 2006 (R p 2330 – 34, 2336 – 41 and 2356)
- However, completely contrary to the argument he articulated to this Court, **Appellants' counsel explicitly denied to the circuit court that he was presenting an equal protection argument on the Appellants' behalf**
 - ❖ [THE CIRCUIT COURT] Is this an equal protection argument?
 - ❖ [APPELLANTS' COUNSEL] Well, this isn't equal protection No, sir No, sir This is pure and simple violation of procedure (R p 2338, lines 9 – 13) ³

➤ Substantive Defects associated with Appellants' Equal Protection Argument

- In his argument to his Court on October 28, 2009,⁴ Appellants' counsel first addressed the equal protection claim purportedly held by the Appellants as follows ⁵
 - [APPELLANTS' COUNSEL] Equal protection comes into this, Your Honor, and I'll say a little bit about the equal protection issue Equal protection, as you know, in the public sector means that those who are similarly [situated] must be treated similarly What we have here

¹ Appellants counsel included the very same materials at Tab 9 in the Hearing Notebook' he submitted to the Committee and the Committee entered the 'Hearing Notebook' as Appellants Exhibit # 7 (R p 3260 and pp 3303 – 08)

² The entirety of the materials submitted by Appellants' counsel to the circuit court in support of the Appellants' Petition for Judicial Review appear in the Record before this Court and, obviously, these materials were submitted to the Committee as part of Committee Exhibit # 1 (R pp 2142 – 2240)

³ SCDC includes this page from the Record as Exhibit A in support of its instant supplemental brief The entire transcript of the hearing conducted by the circuit court on December 11, 2006 regarding the Appellants Petition for Judicial Review appears in the Record before this Court and, obviously this transcript was submitted to the Committee as part of Committee Exhibit # 1 (R pp 2320 – 2357)

⁴ SCDC includes a transcript of the oral argument conducted by this Court on October 28, 2009 as Exhibit B in support of its instant supplemental brief

⁵ See Exhibit B pp 20 – 22

- [THIS COURT] **There has to be an intent, though, doesn't it?**
- [APPELLANTS' COUNSEL] **No, sir, not with equal protection** There's no motive required to show a violation of equal protection You can look at the equal protection case I believe it is the Littlefield case⁶
- [THIS COURT] Excuse me one second Go ahead, sir
- [APPELLANTS' COUNSEL] Okay You can look at the Littlefield case, for example, and in that case what happened was there was a treatment of people who were separated for reasons other than retirement, differently from people who retired, in terms of obtaining a vested benefit And what the Court said was that difference was a violation of equal protection **They didn't have to go and say these people were being intentionally mean to folks Just that their conduct resulted in a treatment of similarly situated individuals in a desperate [sic] fashion**⁷ You know, a classic equal protection case is, you know, if you have someone who is in one position and you have another in the same position and you just arbitrarily pick that person

⁶ See Exhibit B, p 21 Within the section of the Appellants' brief entitled 'RIF CONSTITUTIONAL VIOLATIONS (see Appellants' Brief, p 23), Appellants counsel invoked 'the Littlefield case' in the following manner

Governmental agencies must operate in a manner consistent with the South Carolina Constitution In this regard agencies must provide their employees equal access to benefits attached to public employment Depriving one group of employees a benefit afforded another group invokes the equal protection guarantees of the State's Constitution See, *Littlefield v S C Forestry Comm'n* 337 S C 348 353-354 523 S E 2d 781 783 (2000) (reversing an interpretation of a statute providing annual leave benefits that resulted in a violation of equal protection)

⁷ In his analysis of *Littlefield*, Appellants counsel demonstrated a fundamental misunderstanding of an Equal Protection claim For example Appellants' counsel completely omitted any discussion of whether the *Littlefield* Court determined or even considered whether a 'rational basis' existed for the state's application of the statute at issue S C Code Ann § 8-11-620 Ultimately the *Littlefield* Court, 523 S E 2d at 783 after conducting a proper equal protection analysis determined that no rational basis existed to support the manner in which state officials applied this statute Moreover, Appellants counsel, both in his argument to this Court and in his brief failed to address or even acknowledge the concepts of 'rational basis' and "strict scrutiny," concepts that are fundamental to a proper equal protection analysis See *Sylvia Dev Corp v Calvert County Md*, 48 F 3d 810 818 – 21 (4th Cir 1995) As an aside, our Supreme Court recognized the Fourth Circuit's holding in *Sylvia Dev Corp* within its decision in *Seabrook v Knox* 369 S C 191 200 631 S E 2d 907 912 (2006) ('To establish an equal protection violation, plaintiffs must demonstrate they were intentionally and purposely subjected to treatment different from other similarly situated *Sylvia Dev Corp* 48 F 3d at 818 (citation omitted)) This Court questioned Appellants counsel regarding the above quoted language from *Seabrook* and remarkably after having previously insisted that intent was not a necessary component of an equal protection analysis, Appellants counsel affirmatively answered this Court's question as to whether the Appellants had 'made out a prima facie case of intentional discrimination' See Exhibit B pp 41 - 42 Thus contrary to the flawed understanding of equal protection evidenced by Appellants counsel, the essential command of the Equal Protection Clause has always been that the classification of persons [to] which a law applies must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation' ' *Sylvia Dev Corp* 48 F 3d at 818 (quoting *Royster Guano Co v Virginia* 253 U S 412, 415 (1920)) Finally, as recognized by our Court of Appeals in *Town of Iva ex rel Zoning Admin v Holley* 374 S C 537, 541, 649 S E 2d 108, 111 (Ct App 2007) '[e]ven assuming [governmental entity] is not enforcing [an] ordinance equally, the fact that there is some unequal treatment does not necessary rise to the level of a constitutional equal protection violation (citation omitted)'

for some disadvantageous reasons, you can violate equal protection [emphasis supplied]

- Later in his argument to this Court, Appellants' counsel connected the retirement opportunity offered by SCDC to its retirement eligible employees on July 16, 2003 to an equal protection claim purportedly held by the Appellants
 - [THIS COURT] Information related to the temporary
 - [APPELLANTS' COUNSEL] Correct, Your Honor Required break in service and earnings limitation This is what [retirement eligible SCDC employees] have to sign understanding that they are going to get [the retirement opportunity] This was an artifice used by [SCDC] as a money saving effort and, while that may be well and good in the absence of [a RIF], it's not allowed where you have people out there that you have involuntarily separated who want to come back to work for you in whatever capacity, and you're instead giving preferential treatment to individuals who are not covered employees **Thus, the equal protection argument, Your Honor So there is a lot of curiosity in this particular [RIF] that doesn't require that we penetrate the motivations of the executive director of [SCDC]** Because during the recall period, number one, they made a promise to my clients and everybody else who was separated that you'll get a change at those positions They didn't have to make that promise because the law required them to and they didn't do it, and they didn't do it to save money ⁸ [emphasis supplied]
- In his brief, Appellants' counsel addressed the equal protection claim purportedly held by the Appellants as follows
 - SCDC employed individuals in temporary positions and permanent positions during the recall period without notifying RIF'ed employees Additionally, SCDC offered retiring employees return to employment after a "break in service" during the recall period without notifying RIF'ed employees (Employee list provided as Appendix A, see also, ROA pp 2233-2238, ROA pp 2560-2572, Thrailkill testimony ROA pp 995-1001) ⁹
 - Because the eleven geographic regions created by SCDC violated Policy Section 1 1, only the agency or the Education Division qualified as lawful "competitive areas" for purposes of separation and recall of Appellants ¹⁰

⁸ See Exhibit B, pp 33 – 36 This passage represents a microcosm of the contradictory arguments offered by Appellants' counsel On the one hand Appellants' counsel argued that the retirement opportunity represented an artifice used by [SCDC] as a money saving effort' while on the other hand, Appellants' counsel argued that SCDC 'didn't do it to save money " Moreover, Appellants' counsel has offered nothing other than his own interpretation of the applicable statutes and regulations to his equal protection argument

⁹ See Appellants' Brief, p 17

¹⁰ SCDC's legitimate decision to divide the agency into 11 competitive areas for the purposes of conducting the RIF it implemented effective June 1, 2003 is, obviously, a target of the Appellants' appeal SCDC discusses a particular

SCDC records reveal, however, that temporary and permanent positions were filled throughout the agency and the Education Division during the recall period without affording Appellants notice or opportunity to return to employment. The most egregious example of this violation is the “retirement opportunity” extended to employees on July 16, 2003 and March 25, 2004.¹¹ As a matter of law, retirement constitutes a “break in service,” whereas each Appellant remained a “covered employee” during the twelve months following July 1, 2003.¹²

- The record establishes that through the offered “retirement opportunities” and otherwise, SCDC provided preferential treatment to employees not affected by the RIF. This violates the RIF policy, which conforms to the OHR requirement that employees separated by RIF must be afforded the opportunity to return to employment. This record proves repeated violations of the RIF policy and entitles Appellants to reinstatement.¹³
- By virtue of state law and the RIF policy, Appellants were entitled to all benefits available to other SCDC employees. See, S C Code Ann § 24-25-90 (ROA p 2291). As “covered employees,” Appellants enjoyed the right to retain employment unless removed for cause or by proper reduction in force. S C Code Ann § 8-17-330. In violating its RIF policy, state laws, regulations and OHR guidelines SCDC deprived Appellants the constitutionally protected right to continuing employment.¹⁴
- During the recall period following the RIF, SCDC allowed employees choosing to retire to return following a “break in service” without allowing the Appellants the opportunity to recall. Appellants were “covered employees” entitled to full protection of the law during their recall period. Accordingly, the preferential treatment afforded to employees returning after voluntary separation during this period deprived Appellants of their rights as “covered employees” and constituted a violation of equal protection guaranteed by Article I, § 3.¹⁵

- However, under a proper equal protection analysis, the argument offered by Appellants’ counsel is revealed to be fundamentally defective.

argument regarding the establishment of these competitive areas articulated by Appellants’ counsel during the October 28, 2009 oral argument conducted by the Court further below.

¹¹ The record clearly reflects that SCDC implemented only one (1) “retirement opportunity” during the RIF recall period, a period which ran from June 1, 2003 to May 31, 2004. See SCDC’s Brief, notes 52, 54, 56 and 67.

¹² See Appellants’ Brief, p 17.

¹³ *Id.* p 18.

¹⁴ *Id.* p 23.

¹⁵ *Id.* p 24.

- Our Court of Appeals, in *Harbit v City of Charleston*, 382 S C 383, 396 – 97, 675 S E 2d 776, 782 – 83 (Ct App 2009), very recently articulated the following standards associated with an equal protection analysis
 - ❖ Under the Equal Protection Clause of the Fourteenth Amendment, a state may not “deny to any person within its jurisdiction the equal protection of the laws” U S Const amend XIV, § 1, *see* S C Const art I, § 3 (“The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws”) This clause requires that “the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law’s purpose” *Sylvia Dev Corp*, 48 F 3d at 818 **It does not prohibit different treatment of people in different circumstances under the law** [*Town of Iva ex rel Zoning Admin*, 374 S C at 541, 649 S E 2d 110] Instead, “**the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike**” *Id* In a case such as this, the rational basis standard, rather than strict scrutiny, applies because the classification at issue does not affect a fundamental right and does not draw upon inherently suspect distinctions such as race, religion, or alienage [*Sunset Cay LLC v City of Folly Beach*, 357 S C 414, 428 – 29, 593 S E 2d 462, 469 (2004)]
 - ❖ Further, **one seeking to show discriminatory enforcement in violation of the Equal Protection Clause must demonstrate arbitrary and purposeful discrimination in the administration of the law being enforced** *See State v Solomon*, 245 S C 550, 574, 141 S E 2d 818, 831 (1965) “[E]ven assuming [a governmental entity] is not enforcing [an] ordinance equally, the fact that there is some unequal treatment does not necessarily rise to the level of a constitutional equal protection violation” *Denene, Inc v City of Charleston*, 359 S C 85, 96, 596 S E 2d 917, 922 (2004)
 - ❖ Consequently, because the record does not indicate that Harbit was the subject of purposeful, invidious discrimination, the circuit court did not err in granting summary judgment on his equal protection claim *See Sylvia Dev Corp* 48 F 3d at 825 (internal citations omitted) (“While an equal protection claim must be rooted in an allegation of unequal treatment for similarly situated individuals, a showing of such disparate treatment, even if the product of erroneous or illegal state action, is not enough by itself to state a constitutional claim”) [emphasis supplied]

- In light of the above quoted standards from *Harbit*, Appellants' counsel has not animated a viable equal protection claim to this Court
 - Despite the efforts by Appellants' counsel to excise this component of an equal protection analysis from the instant case, no evidence exists, as required under *Harbit*, that SCDC, either in the manner by which it implemented the RIF or in the manner or timing of the retirement opportunity it offered in July 2003, arbitrarily and purposefully discriminated against the Appellants or any other SCDC employee
 - ❖ As demonstrated by SCDC in its principle brief, Appellants' counsel abandoned the retaliation claim he raised in the Appellants' appeal to the Committee¹⁶ Additionally, Appellants' counsel conceded to this Court that the Appellants had "decided not to address any motivational issues in this appeal"¹⁷ Finally, the Committee found, in its first "Conclusion of Law," that the Appellants, certified educators employed by SCDC, "were not unfairly targeted for termination in retaliation for an earlier lawsuit regarding wages" (R p 16)
 - ❖ Thus, as established by *Harbit*, even if the Appellants' equal protection claim is legitimately rooted in an allegation of unequal treatment of the Appellants as opposed to the SCDC employees who availed themselves of the July 2003 retirement opportunity, a showing of such disparate treatment, even if it was the product of erroneous or illegal action by SCDC, is not enough by itself to state a constitutional claim
 - Even if the equal protection analysis is limited in the manner urged by Appellants' counsel, based upon his understanding of *Littlefield*, neither the manner by which SCDC implemented its RIF nor its July 2003 retirement opportunity animated a legitimate equal protection claim
 - ❖ In his argument to this Court,¹⁸ Appellants' counsel focused on a paragraph from Director Ozmint's March 28, 2003 letter to Samuel L Wilkins, Director of the State Office of Human Resources ["OHR"]
 - This paragraph read, in its entirety, as follows "Temporary positions, particularly in the area of educational instruction to inmates, may be developed and made available to affected employees by the [RIF]" (R p 1630) According to Appellants' counsel, this paragraph represented a "promise" that, if temporary positions were made available as a result of the [RIF], then SCDC would offer these temporary positions to employees involuntarily separated by the RIF,

¹⁶ See SCDC s Brief note 7

¹⁷ See Exhibit B, p 6

¹⁸ See Exhibit B, pp 14 – 15 and p 24

such as the Appellants. Thus, under the flawed logic and interpretations offered by Appellants' counsel, when retirement eligible SCDC employees availed themselves of the July 2003 retirement opportunity, their positions became "temporary positions" into which former employees involuntarily separated by the RIF had priority to fill.

- However, the plain wording of this paragraph indicates that no such "promise" was created by this paragraph (i.e. "may" vs "must")¹⁹
- ❖ Moreover, former SCDC employees involuntarily separated by the RIF, such as the Appellants, were not identically situated to the retirement eligible SCDC employees to whom SCDC offered the July 2003 retirement opportunity. As recognized by *Harbit*, the Equal Protection Clause "does not prohibit different treatment of people in different circumstances under the law."
- In his brief, Appellants' counsel identified S.C. Code Ann. § 24-25-90 and § 8-17-330 as the statutes purportedly applied by SCDC in an unequal and arbitrary fashion in the architecture and implementation of its RIF.²⁰
- Even if these statutes were somehow unequally or arbitrarily applied by SCDC in its RIF (a point which SCDC does not concede and a point completely undermined by the findings and conclusions rendered by the Committee in its Final Decision), the retirement opportunity offered by SCDC in July 2003 came under the provisions of an entirely different set of statutes, namely § 9-1-1790, 9-1-1590, and 9-11-90.²¹
- Appellants' counsel even argued that a "Frequently Asked Question" posted by OHR on its website should have the effect of a regulation or even a statute.²²

¹⁹ The Committee recognized this clear distinction when it concluded that the language from this paragraph "indicates that this is a possibility, not a promise." See the Committee's Final Decision, Conclusion of Law # 4 (R p 17).

²⁰ See note 14 above.

²¹ See SCDC's Brief, pp 24 – 28.

²² See Exhibit B, pp 25 – 26. However, the Committee properly determined that it "did not violate any internal policies or procedures or any guidelines established by [OHR]" (R p 17).

- Thus, as reflected at various points by the Committee in its Final Decision, SCDC had a rational basis by which to both implement its 2003 RIF through the establishment of 11 competitive areas and to offer its retirement opportunity to those SCDC employees unaffected by the RIF who were retirement eligible ²³

Response to the Appellants' Argument regarding the Competitive Areas Legitimately Established by SCDC

- In both his argument and in his brief, Appellants' counsel assailed the decision by which SCDC officials, namely former Director of SCDC's Division of Human Resources John Near, divided the agency into 11 competitive areas
 - In his argument, Appellants' counsel argued the following
 - And the thrust of our argument, Your Honor, is that when you get right down to it and you observe the evidence in this case and you hear it from the mouths of defense witnesses, you can only come to one conclusion, **the same conclusion that the [Committee] came to,**²⁴ that these circles that were drawn, these competitive areas that were created, had nothing to do with separately organized staff, had nothing to do with clearly distinguishable staff So they didn't satisfy their own criteria for having a competitive area that was either agency-wide or department-wide ²⁵ [emphasis supplied]
 - In his brief, Appellants' counsel argued as follows

²³ See the Committee's Final Decision, Conclusions of Law # 4 and # 5 (R pp 16 – 17)

²⁴ Appellants' counsel offered no reference to the Committee's Final Decision which would support this assertion. As demonstrated further below, such a reference is impossible to find because the Committee did not conclude as indicated by Appellants' counsel. Unfortunately, the entirety of the argument offered by Appellants' counsel to this Court is replete with similar errors. For example, Appellants' counsel assailed the so-called 30-mile rule which, according to Mr. Near's testimony, factored into the formulation of the 11 competitive areas. Mr. Near testified regarding his understanding that "[t]he state has a rule that talks about you can't involuntarily move people more than I think it's around thirty miles or to a nearest facility" (R p 715). Appellants' counsel made the following argument to this Court:

If there were a 30-mile limit on getting to your job at [SCDC], Ms. Miro would have never had the opportunity to be director. And the record shows in this case, and it's in our brief, that many of the appellants in this case lived more than 30 miles from where they worked. See Exhibit B p 73.

However, as Mr. Near accurately recalled, the 30-mile rule contemplates *involuntary reassignment*. As provided in S.C. Regulation § 19-700, involuntary reassignment means the movement of an employee's principal place of employment in excess of 30 miles from the prior workstation at the initiative of the agency. Thus, the reference to Ms. Miro's *completely voluntary decision* to commute to her workstation at a distance greater than 30 miles from her home by Appellants' counsel evidences a fundamental misunderstanding of the regulation by Appellants' counsel.

²⁵ See Exhibit B, p 18.

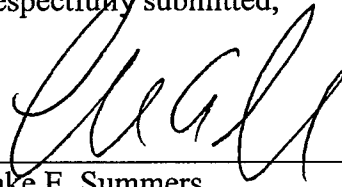
- Because the eleven geographic regions created by SCDC violated Policy Section 1 1, only the agency or the Education Division qualified as lawful “competitive areas” for purposes of separation and recall of Appellants²⁶
- As developed during the hearing conducted by the Committee, the RIF policy, which was approved by OHR’s Assistant Director (R p 1632), was designated as SCDC Policy Number ADM-11 05 and it was issued March 14, 2003 (R p 1633)
 - The first sentence of paragraph 1 1 of SCDC Policy Number ADM-11 05 read as follows
 - The Agency Director or designee is authorized to approve any position(s) to be abolished and to approve the competitive areas within which employees subject to a lay off will be able to exercise their rights under this policy/procedure (**NOTE** The competitive area may be *agency wide*, a department, or a more restricted *geographical* area where the staff is separately organized and clearly distinguishable from the staff in other areas) (R p 1634) [emphasis supplied in original]
- Ultimately, Appellants’ counsel again misreads this policy provision Nothing in this paragraph mandates that the competitive areas identified by SCDC be agency wide, department wide or a more restricted geographic area where the staff is separately organized and clearly distinguishable from the staff in other areas Instead, the parenthetical note which appears at the conclusion of the first sentence to paragraph 1 1 only uses the words “may be” instead of “must be,” “shall be,” or “will be ”
- Thus, the Committee, contrary to the assertions offered by Appellants’ counsel, properly concluded the following
 - The development of the competitive areas did not violate SCDC’s RIF policy, nor were they drawn to retaliate against or punish SCDC educators Such groupings are specifically allowed in SCDC’s RIF policy and, as reflected in the RIF policy, **the manner in which the competitive areas are designated is left to the discretion of the Executive Director of SCDC** As such, the Committee finds that the geographical competitive areas were allowable under SCDC’s RIF policy and **their determination was left to the discretion of the Executive Director** Further, the Committee finds that neither state law nor SCDC’s RIF policy required the PUSD to be treated as a single competitive area in the event of a RIF or that employees be afforded agency-wide bumping rights In addition, the PUSD employees were not singled out because SCDC was divided into 11 competitive areas which also limited the bumping rights of employees not affiliated with the PUSD (R p 16) [emphasis supplied]

²⁶ See Appellants Brief, p 17

CONCLUSION

As it urged in its principle brief and during oral argument, SCDC respectfully submits that this Court should deny the Appellants' appeal and affirm the Final Decision of the State Employee Grievance Committee issued February 18, 2009, a decision that denied the Appellants' challenge to a reduction in force implemented by SCDC effective June 1, 2003

Respectfully submitted,



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Counsel for Respondent SCDC

Columbia, South Carolina
November 17, 2009

1 employees who are at-will And they eliminated the
2 long-term, permanent state employee school teachers,
3 certified teachers

4 And, Your Honor if you look at just general
5 Human Resources management activity, that is
6 absolutely upside-down Absolutely Because what
7 you do is, a reduction in force -- and this is in
8 their policy -- is a last resort

9 THE COURT Is this an equal protection
10 argument?

11 MR NICKLES: Well, this isn't equal protection
12 No, sir No, sir This is pure and simple violation
13 of procedure

14 THE COURT: No When you're comparing the
15 reduction in force of correctional officers to the
16 reduction in force of teachers

17 MR NICKLES No They didn't eliminate any
18 correctional officers They didn't do that And I'm
19 not begrudging them that I don't think that they --
20 I really don't think that they had grounds for the
21 reduction in force to begin But that's not my call
22 We're not making this argument on the basis that they
23 didn't need to save money We'll accept as
24 legitimate their need to save money They just
25 didn't do it right Your Honor And the people they

2338

SCDC
0305

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Docket # 09-ALJ-0103-AP

James "Cal" Bell, Othella Bernard,	)
Katherina Bowyer, Linda M W	)
Bratton, Ann T Bridges, Rance C	)
Cobb, Jeannie B Croxton, et al ,	)
	)
Petitioners,	)
	)
v	)
	)
South Carolina Department of	)
Corrections and Palmetto Unified	)
School District 1,	)
	)
Respondents	)
_____	)

ADMINISTRATIVE HEARING

Wednesday, October 28, 2009

2 05 p m - 3 20 p m

The hearing before the Honorable John D McLeod was taken at the Edgar A Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 28th day of October, 2009 before Suzanne R Bryant, Court Reporter and Notary Public in and for the State of South Carolina

APPEARANCES

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EXHIBITS

(There were no exhibits marked during the hearing)

STIPULATIONS

It is stipulated and agreed that this hearing
is being taken pursuant to the rules of the
Administrative Law Court and the South Carolina Rules
of Civil Procedure

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1 MR COURT My name is John McLeod My law clerk
2 who couldn't get the door open is Anthony
3 Goldman Suzanne Bryant is our reporter Have
4 you noted the appearances, Ms Bryant?

5 COURT REPORTER Yes

6 THE COURT This is docket 09-ALJ-30-0103, an
7 appeal, Bell, et al versus South Carolina
8 Department of Corrections and Palmetto Unified
9 School District Mr Summers?

10 MR SUMMERS Yes, sir

11 MR COURT Yes, sir It's good to meet you This
12 is the first time you've been before me, I
13 think

14 MR SUMMERS That is correct, yes, sir Good
15 afternoon

16 MR COURT And Mister

17 MR NICKLES Nickles

18 MR COURT Mr Nickles

19 MR NICKLES Yes

20 MR COURT And?

21 MR NICKLES Ms Guffey

22 MR Guffey Good to see you

23 MR COURT Good to have you here the first time
24 also for you folks

25 MR NICKLES My pleasure

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1 THE COURT Mine also, thank you All right
2 Preliminarily, I'd say this is perhaps the most
3 detailed and perhaps the most complex matter
4 that's been before me on appeal If you feel
5 you need a little extra time then I would
6 certainly grant that I would say at the
7 outset, a minimum of 30 minutes a piece Maybe
8 15 in reply if you feel the need to go beyond
9 that, then indicate it and we will Let's try
10 to work within those limits to start with Is
11 that suitable?
12 MR NICKLES We'll do our best
13 MR SUMMERS Yes, sir, that'd be fine
14 MR COURT Okay Yes, sir?
15 MR NICKLES Your Honor, do you prefer that we
16 stand at the podium?
17 MR COURT Stand wherever you're most comfortable
18 or be seated if you wish
19 MR NICKLES Well, we have, as you noted, a
20 considerable record here It might be most
21 efficient if I sat, if that's
22 MR COURT That's perfectly all right
23 MR NICKLES okay with you
24 MR COURT Yes, sir
25 MR NICKLES Thank you I did want to, once again,

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1 introduce myself Al Nickles Dona Guffey

2 We have Mr Bell, Mr Randolph, and Ms Martin

3 here representing the appellants in this case

4 MR COURT Good to have you folks here today

5 Appreciate you being here

6 MS MARTIN Thank you

7 MOTION BY MR NICKLES

8 MR NICKLES Your Honor, as you may have observed,

9 this case has somewhat of a tortured procedural
10 history

11 THE COURT My words exactly

12 MR NICKLES The reduction force that is challenged

13 here goes back many years and

14 MR COURT 2003, isn't that right?

15 MR NICKLES It goes back to 2003, yes, sir And

16 what happened back then, if you can cast your

17 mind back to 2003, that was just after the

18 election of our current governor and there were

19 new appointments being made to various agencies

20 and, with that, there were also some budgetary

21 considerations that were on the forefront and

22 one of the things that this particular

23 executive director did, almost immediately upon

24 coming into his position, was decide that he

25 needed to implement a reduction in force He

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1 had been in the position less than three months
2 before the actual date of the presentation and
3 the approval of the reduction in force and,
4 Your Honor, in the proceeding below, we made
5 various assertions regarding the motivation of
6 this reduction in force, regarding its
7 lawfulness, regarding the activity following
8 the reduction in force and, quite frankly, we
9 presented those as best we could to the State
10 Employee Grievance Committee and they decided
11 to rule in favor of the Department on the
12 motivation issue Acknowledging that that is
13 one that is governed by substantial evidence,
14 and we presented the evidence, we've decided
15 not to address any motivational issues in this
16 appeal This appeal is purely as to the legal
17 issues that were before the State Employee
18 Grievance Committee and it's our position, Your
19 Honor, that if you accept their factual
20 conclusions that you cannot accept their legal
21 conclusions And I'm going to go into some
22 detail in addressing that In any appeal the
23 first issue to be addressed is what's the
24 standard of review What is it that we're here
25 to decide and that, of course, depends upon the

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1 issues being presented to the appellate body
2 In this administrative appeal it is our
3 position that the issues presented are legal in
4 nature and, as you know, those are for you to
5 decide and for you to decide based upon the
6 evidence below, but you're not bound by the
7 legal conclusions that were issued by the State
8 Employee Grievance Committee This is
9 illustrated, I think, by the New York Times
10 versus Spartanburg School District 7 case that
11 is cited in our brief Actually, no, I've
12 handed handed that up to you It's in the
13 materials that I've handed up to you This is
14 a 2007 South Carolina Supreme Court decision
15 and in it the Court says, in a case raising a
16 novel issue regarding the interpretation of a
17 statute, the Appellate Court is free to decide
18 or question with no particular deference to the
19 lower court, here the State Employee Grievance
20 Committee And it goes on to say, in general
21 terms, the statute must be construed with
22 regard to its plain and ordinary meaning and
23 the Court is not to resort to forced
24 construction or any attempt to limit or expand
25 the statute's scope The interpretation of the

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1 statute, as you know in dealing with statutory
2 matters on a daily basis, is to determine what
3 the intent of the legislature was and whether
4 or not there is agreement with that intent to
5 enforce that intent Now, in this case we have
6 a question of whether or not the Department of
7 Corrections violated its own RIF policy We
8 have a question of whether or not the
9 Department of Corrections violated controlling
10 Budget and Control Board regulations We have
11 a question of whether or not the Department of
12 Corrections violated controlling state laws in
13 implementing this RIF and the final question is
14 if the answers to any of those questions are
15 yes, were the rights of my clients
16 substantially prejudiced And those, in a
17 nutshell, are what the issues are in this
18 appeal Now, we approached those from various
19 angles and we have made our arguments in our
20 brief and I want to preserve all arguments that
21 are presented in those briefs, although time
22 may not allow me to reach all those in my oral
23 presentation Common to the issues that I've
24 just addressed to you, violation of policy,
25 violation of regulation, violation of statute,

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1 there is in common that no motive is required
2 to be shown

3 MR COURT I notice that you don't mention
4 violation of the constitution That's one in
5 your brief

6 MR NICKLES Well, the violation of the
7 constitution is the evidence of prejudice to my
8 clients and that follows from the violations of
9 the policy, the statutes, and the regulations
10 So you're absolutely correct in pointing that
11 out In one case that I tried many years ago
12 in fact, there are two of them One of
13 them is the Brown versus State Board of
14 Education case The other is the Johnson
15 versus Spartanburg School District 7 case
16 Both of those went to whether or not the State
17 constitution was invoked when an employee or,
18 in the case of both it would have been an
19 educator, was adversely affected by the
20 administrative decision And the Court found
21 in both those cases that, yes, in deed, that
22 was the case and I'll talk a little bit about
23 those as we proceed When looking at this
24 case, one thing that I wanted to do was to see
25 what it is that we're dealing with You know,

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1 you dis you distill cases as you proceed
2 with them They'll start out looking one way
3 There are transformations in the course of
4 discovery as you try the case, as you try to
5 refine it to bring it to appeal, and what I've
6 come to the conclusion is that this is a case
7 that was driven initially by a desire to save
8 money and by what I consider to be a disregard
9 for the law Now, and I say that with due
10 respect to the Agency I think that they were
11 caught up in this what they perceived to be a
12 desperate need to save money and they ignored,
13 not only general principles of law, but their
14 own policies and their own procedures And I
15 look back to a case when there were even darker
16 economic times, 1935 The U S Supreme Court
17 issued the decision in the Gregory versus
18 Helvering that's cited in our brief and it was
19 a case in which a taxpayer indicated that the
20 government had to show a wrongful motive in
21 setting up certain shields to payment of taxes
22 and the Supreme Court looked at that, in those
23 dark days of the depression, and said, the
24 question for determination is whether what was
25 done, apart from motive, was the things that

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1 the statute intended Putting the question of
2 motive aside, we have to determine what was the
3 intent of the legislation that was invoked and
4 it says in closing, in the circumstances
5 presented to that Court the facts speak for
6 themselves and are susceptible to the one
7 interpretation The rule which excludes from
8 consideration the motive of tax avoidance is
9 not pertinent to the situation because the
10 transaction, on its face, lies outside the
11 plain intent of the statute And then it says
12 some words that I have used before To hold
13 otherwise would be to exalt artifice above
14 reality and to deprive the statutory provision
15 in question of all serious purpose Now, let's
16 look at how the South Carolina Supreme Court
17 has approached that and one of the case I
18 mentioned to you, the Johnson versus
19 Spartanburg School District case, I had the
20 privilege of representing the educator in that
21 case The educator was deprived of his
22 compensation without observing the niceties of
23 the procedures available to the Department and,
24 much as in this case, the employee said, well,
25 we sort of got it right You know, we

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1 shouldn't be compelled to keep paying this
2 fellow because we don't think he was really
3 should be in that position And what the Court
4 said was where there is monetary loss alone,
5 there is a property interest which requires
6 protection, because there can be no doubt to
7 allow a school district, here we say the
8 Department of Corrections, to ignore procedure
9 and then to work at financial hardship is an
10 injustice requiring the employee's re-
11 employment, and that's what the Supreme Court
12 said in the Johnson case Now, do we believe
13 certainly, does Mr Randolph, Mr Bell, and
14 Ms Martin, do they believe that they were
15 victims of retaliation? Absolutely Do we
16 believe that we proved that? Absolutely But
17 we have purposely removed that from the
18 equation here on this appeal because we have
19 other grounds that reach the same destination
20 And let's talk about the basic legal principles
21 involved in this appeal They're principles
22 with which you are very familiar First is
23 that an agency must follow its own policies and
24 that failure to comply renders the action of
25 that agency null and void One of the cases

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1 cited in our brief is a, not surprisingly, a
2 DHEC case And in that case, Triska versus
3 DHEC, cited in our brief, the Court says that
4 DHEC must follow its own regulations and the
5 provisions of the Administrative Procedures Act
6 in carrying out its legitimate purposes If
7 DHEC does not have the statutory or regulatory
8 authority to take the action that they took
9 then its action is null and void That's what
10 the Court said in the Triska case So we
11 looked at the plain language of the document
12 that controls here and that is the reduction in
13 force plan and policy And this plan and
14 policy was not written by my clients, it was
15 not written by the Office of Human Resources,
16 the Budget and Control Board It was written
17 by the Department of Corrections, and certainly
18 when the Department of Corrections writes
19 something and tells its employees that this is
20 the plan and this is the policy that we will be
21 using, they're entitled to rely upon that and
22 when the Department deviates from that, they're
23 entitled to relief Mr Summers has kindly
24 attached to his brief a copy of what he
25 presents as the entire grievance plan from step

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1 one to the end, and I want to go through some
2 of that and reference some pages on the record,
3 which my points fall Now, one of those is
4 there's an introductory letter that Mr Ozmint,
5 the executive director, writes to Mr Wilkins,
6 the OHR executive director, in March of 2003
7 anticipating the reduction in force to come in
8 June and he's saying what they are going to do
9 In fact, he writes out numerically the things
10 that they are going to do One of the things
11 he writes, this is his number five on page 1630
12 of the record, it says, temporary positions,
13 particularly in the area of education
14 instruction to inmates may be developed And
15 then what he says is, and made available to
16 affected employees by the reduction in force
17 Well, he was right from part of that and we'll
18 address that specifically There were
19 temporary positions made available as a result
20 of the reduction in force What he didn't do
21 was make those available to the affected
22 employees He didn't follow through on his
23 representation to Mr Wilkins in that regard
24 Then we look at the actual reduction in force
25 policy procedure It has the stamp of approval

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1 of the Office of Human Resources saying they
2 read this, relied upon it Now, we know their
3 approval isn't a blank check to an agency that
4 you can do any doggone thing you want to They
5 say there are certain limitations on our review
6 and that's, you know, to be expected because
7 they received and approved this document on the
8 same day They didn't do the, you know,
9 exhausted examination of it But let's see
10 what the Department of Corrections told OHR and
11 its employees about what they were going to do
12 in terms of this reduction in force and at
13 Section 1 1, the very first one, of this plan,
14 it's page 1634 of the record, and it says, the
15 agency director or designee is authorized to
16 approve any positions to be abolished and go
17 through the competitive areas within which the
18 employees subject to layoff will be able to
19 exercise their rights under the policy and
20 procedure, standard And Mr Ozmint testified,
21 yes, he did it, he picked the people to be
22 eliminated but it says, note, and note is bold
23 and underlined, it says, the competitive area
24 may be, and then it goes, options, agency-
25 wide, option one, a department, option two, and

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1 then it has an option three, or a more
2 restricted geographical area where the staff is
3 separately organized and clearly
4 distinguishable from the staff in other areas
5 Well, wait a minute Agency-wide, department
6 or geographical area, but geographical area is
7 only where staff is separately organized and
8 clearly distinguishable from the staff in
9 other areas

10 MR COURT These are the 11 geographical areas?

11 MR NICKLES Yes, sir

12 MR COURT Yes, sir

13 MR NICKLES These are the circles that you've seen
14 in the record and we know from testimony from
15 Mr Ozmint, we know from testimony from the
16 human resources director, Mr Near, that those
17 areas were drawn exclusively for the purpose of
18 reduction in force We know they were drawn in
19 order to limit bumping They're very candid
20 about that

21 MR COURT Define bumping for me

22 MR NICKLES Bumping is where if I am a senior
23 employee and I am in a position that either I
24 have formally held or someone else holds and
25 that person and my position is eliminated,

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1 if it's in my competitive area, I have the
2 right to say to the less senior person, sorry,
3 I'm going to take that job If you can bump
4 somebody else or move somebody else down the
5 line then you may do so That's what bumping
6 means So it is a right earned by senior
7 service in state government The longer you
8 work as an employee, as long as you are a
9 satisfactory employee, and some agencies have a
10 formula where they give you certain points by
11 the number of years you're there, certain
12 points by the level of evaluation that you've
13 had Those formula are pretty much gone now
14 because evaluations in state government have
15 become less and less important with the lack of
16 money to provide bonuses or merit increases
17 So usually it's a straight seniority system now
18 so that, in this case for example, we have
19 multiple samples in our brief where Mr
20 Randolph or Ms Martin or others who are our
21 clients looked around and said, you know,
22 there's somebody over here in this other school
23 that teaches where I teach, but I've been here
24 longer, I would like to go over there But
25 because of those artificial circles that were

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1 drawn, they were not allowed to compete in
2 those area And the thrust of our argument,
3 Your Honor, is that when you get down to it and
4 you observe the evidence in this case and you
5 hear it from the mouths of the defense
6 witnesses, you can only come to one conclusion,
7 the same conclusion that the State Grievance
8 Committee came to, that these circles that were
9 drawn, these competitive areas that were
10 created, had nothing to do with separately
11 organized staff, had nothing to do with clearly
12 distinguishable staff So they didn't satisfy
13 their own criteria for having a competitive
14 area that was either agency-wide or department-
15 wide That's their own restriction that they
16 placed on themselves and, Your Honor, they
17 can't whine about that now They can't say,
18 well, we really didn't mean to do it that way
19 That's this plan becomes their controlling
20 document and they are obligated to follow it
21 and that's the law of the State of South
22 Carolina Now, what we have here is we have
23 one Palmetto Unified School District They
24 have created, although it's nowhere in the
25 legislation, they've created an education

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1 division in which this Palmetto Unified School
2 District exists Now, the Department says,
3 well, they are coterminous, that the division
4 is the school district That's really not the
5 testimony of the executive of the director
6 of the education division because what they did
7 in this case, if you recall, Your Honor, is
8 that they decimated the certified employees
9 They closed down a number of the schools in
10 which these certified employees were providing
11 instruction and they contracted out the
12 educational services to school districts in
13 those areas, and what the director of the
14 education division conceded was that she really
15 had no control over those contracted out
16 services She could tell the local school
17 district, you know, I don't like this
18 particular employee, send me somebody else
19 But she didn't have an employment supervisor
20 relationship with those subs So they've
21 created something apart and distinct from the
22 Palmetto Unified School District, which is
23 defined by statute But even if that did not
24 happen, Your Honor, and one of the suggestions
25 by the Department in this case is, well, Mr

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1 Nickles is arguing that the educators should
2 have been immune from the reduction in force
3 I challenge you to find that in the record It
4 doesn't exist We have not challenged the
5 availability of reduction in force We have
6 not challenged that it may be applied and
7 implemented lawfully We've said it was
8 implemented unlawfully, and what my clients
9 have been able to demonstrate through the
10 record is if it had been implemented lawfully,
11 if they had used agency wide or department
12 wide, they would have then had the opportunity
13 to bump others, less senior, and they would
14 still be employed at the Department of
15 Corrections, Your Honor So that is one of the
16 foundational violations in this case and from
17 that violation stems the deprivation of a
18 property interest, their continuing employment
19 with the State The deprivation of a liberty
20 interest, their ability to carry out their
21 professional services Equal protection comes
22 into this, Your Honor, and I'll say a little
23 bit about the equal protection issue Equal
24 protection, as you know, in the public sector
25 means that those who are similarly situation

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1 must be treated similarly What we have here

2

3 MR COURT There has to be an intent, though,
4 doesn't it?

5 MR NICKLES No, sir, not with equal protection
6 There's no motive required to show a violation
7 of equal protection You can look at the equal
8 protection case I believe it is the
9 Littlefield case

10 MR COURT Excuse me one second Go ahead, sir

11 MR NICKLES Okay You can look at the Littlefield
12 case, for example, and in that case what
13 happened was there was a treatment of people
14 who were separated for reasons other than
15 retirement, differently from people who
16 retired, in terms of obtaining a vested
17 benefit And what the Court said was that
18 difference was a violation of equal protection
19 They didn't have to go and say these people
20 were being intentionally mean to folks Just
21 that their conduct resulted in a treatment of
22 similarly situated individuals in a desperate
23 fashion You know, a classic equal protection
24 case is, you know, if you have someone who is
25 in one position and you have another in the

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1 same position and you just arbitrarily pick
2 that person for some disadvantageous reason,
3 you can violate equal protection Here what we
4 have is a statutorily created system in which
5 some folks have benefits and some folks do not
6 And what I'd like to do is talk a little bit
7 about that if you would indulge me for a
8 moment What I have in the little package that
9 I gave up to you

10 THE COURT Yes, sir

11 MR NICKLES is a tab that is tab number nine
12 and if you could turn to that tab number nine,
13 I'll show you how the State categorizes
14 employees Now, in this instance, for example,
15 my clients who were subjected to a reduction in
16 force were all the most protected types of
17 employees in state government They were
18 permanent state employees, they were covered
19 employees And, as you may be aware from some
20 of your other cases appearing before you, when
21 you are a covered employee you're entitled to
22 the full panoply of procedural protections
23 under the state human resource policies and
24 regulations In this case what we have is
25 these folks who are covered employees, what the

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1 state law says is you're covered until you have
2 a break in service All right Now, a break
3 in service for someone who has been separated
4 by a RIF occurs on the one year anniversary
5 date of their RIF During that year, from the
6 date of their separation for a one year period
7 of time, they remain covered employees There
8 is they have certain entitlements to re-
9 employment, they have entitlement to
10 reinstatement of leave, other types of things
11 But if you retire or if you voluntarily leave
12 state government for a period of 15 days or
13 more, you have a break in service, and you lose
14 all your rights under the state human resource
15 laws, all of them Now, why is that important
16 here? Well, it's important for a number of
17 reasons One is in the implementation of this
18 reduction in force, even though my clients were
19 covered employees, they were treated less
20 favorably than folks who were not The
21 Department of Corrections determined that they
22 would retain temporaries, they would retain, in
23 at least one case, a probationary employee who
24 have no rights whatsoever under state law and
25 they would shield them from the reduction in

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1 force Now, they had an economic reason for
2 doing that because these temporaries do not
3 receive state benefits They're cheaper
4 employees, they are less costly to the Agency
5 But they don't have any rights and what
6 happened which was even more astounding to
7 me after we finally got discovery and if you
8 look through the record and see how hard it was
9 to get discovery from this agency When we
10 finally got discovery, low and behold, what was
11 learned was that during the 12-month recall
12 period there were numbers of hires of
13 temporaries Now, why does that matter? Well,
14 it matters in a number of respects First, the
15 Department of Corrections promised that Mr
16 Wilkins and all the employees, that they would
17 be offered these positions if they became
18 available, so they broke their promise More
19 importantly, the office of human resources,
20 long before this reduction in force was
21 implemented, had informed all state agencies,
22 their human resource directors, and their in-
23 house counsel that you cannot replace someone
24 separated by RIF with a temporary employee
25 You can't do it Now, on the one hand the

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1 Department says, our reduction in force was
2 approved by the office of human resources On
3 the other hand they say, oh, well, so what
4 about that It's like when I was growing up
5 yes, sir?

6 MR COURT Go back to the point about there being a
7 prohibition about replacing a RIF with a
8 temporary

9 MR NICKLES Yes, sir

10 MR COURT Whose EDEC was that?

11 MR NICKLES That is the office of human resources
12 or the Budget and Control Board and we have a
13 copy of that

14 MR COURT Is that a regulation?

15 MR NICKLES It is a well, it's based upon a
16 regulation

17 MR COURT All right Based upon what regulation?

18 MR NICKLES It's based upon regulations in Title
19 7-19, I believe Let me just look and see what
20 those and I have some of the regulations
21 that I'll talk to you about Yeah, there are
22 no, it's 19-700 that set are the
23 regulation and they derive from that And let
24 me show you how the points connect If you
25 look at tab five in the material that I handed

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1 up to you, you'll see that there is an
2 Appellate's Exhibit Number Eleven and this is
3 from Dona Traywick back in November of 2001, so
4 it's long before this reduction in force was
5 implemented, and who is it to? Human resource
6 director, the attorneys of agencies,
7 departments and institutions of higher
8 education, boards and commissions, and she's
9 telling these folks that what we have at the
10 office of human resources done is establish,
11 for your assistance in implementing certain of
12 your personnel actions, frequently asked
13 questions and answers So this issue had come
14 up before 2001 How could it be a frequently
15 asked question unless it had come up earlier
16 You look at the next page and here's the
17 frequently asked question Can an agency hire
18 a temporary employee to replace an employee
19 effected by a RIF or perform the functions of
20 a position eliminated by a RIF So there are
21 two aspects to that and what does OHR say?
22 That you may not hire a temporary employee to
23 perform the duties of an employee effected by
24 a RIF If these duties are required to be
25 performed within one year of the effective date

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1 of a RIF, the Agency should reestablish the
2 position and implement its recall procedure
3 Now, how does that tie into what we're talking
4 about in the regulations? Well, what we have
5 is a definition of a break in service and
6 that's tab number nine, as I said earlier, and
7 these are regulations that have been accepted
8 by the General Assembly and they are governing,
9 unless they are overturned in some fashion, I
10 guess Your Honor could find them to be
11 unconstitutional, but they are the law of the
12 land

13 MR COURT That's the one thing I cannot do, I
14 believe, is find something unconstitutional

15 MR NICKLES Do I have to go up a notch to do that?

16 MR COURT That's right, yes, sir

17 MR NICKLES Fortunately, you don't need to in this
18 case

19 MR COURT Well, thank you

20 MR NICKLES A break in service Once you're
21 employed by the State and finally get your 12
22 months in, you say, hallelujah, I'm a covered
23 employee, I have these rights, you can have
24 those rights eliminated by a break in service
25 There are a number of ways that you can

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1 that can happen One of those is moving from
2 a full-time equivalent position to a temporary
3 grant or time limited position, okay? And
4 these regulations, by the way, were in effect
5 long before this reduction in force took place
6 We look at what the definition of covered
7 employee is It excludes certain categories
8 It says this definition does not include
9 employees in positions such as temporary,
10 temporary grant, time limited employees who do
11 not have grievance rights, okay? What is a
12 position? It's the duties and responsibilities
13 of a single job What is reinstatement,
14 because you know what I'm coming to That is
15 the retirement opportunity that was offered
16 during the recall period and what the
17 Department says, well, wait a minute, these
18 were merely reinstated to their former
19 positions That is absolutely wrong as a
20 matter of law That's what they now say
21 That's not what they said to the employees at
22 the time and that's not what the law allows
23 because reinstatement says this, to return an
24 employee to state service without a break in
25 service, without a break in service, they

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1 required a break in service for these employees
2 on this retirement opportunity and I want to
3 talk about that Now, who is a temporary
4 employee? A full or part-time employee who
5 does not occupy an FTE position Why is that
6 important? Because you can't return to an FTE
7 position as a temporary employee You cannot,
8 as a matter of law, return to your former
9 position That position is no longer there
10 Now, Your Honor, I'd also suggest that you look
11 at, as you have the opportunity, regulation 9-
12 719 01 and it elaborates on

13 MR COURT Say that again

14 MR NICKLES It's a part of the same tab, number
15 nine It's regulation 9-719 01 Because this
16 regulation elaborates on what it means to have
17 a break in service what it means to separate
18 from state service, and it says, with regard to
19 my clients, for example, if you separate from
20 state service as a result of a reduction in
21 force, you have a break in service if you're
22 not recalled or reinstated within 12 months
23 So they continue to be covered during that
24 period of time Now, who else has a break in
25 service? Anyone that moves from an FTE

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1 position to a temporary, temporary grant or
2 limited time position Now, Your Honor, let's
3 talk a little bit about this retirement
4 opportunity that was offered by the Department
5 of Corrections We found the timing of this
6 retirement opportunity to be somewhat
7 surprising because, as you may be aware,
8 ordinarily if there's to be a reduction in
9 force other types of actions to reduce your
10 workforce are taken first so that you can see
11 how many you actually need to involuntarily
12 separate This retirement opportunity was
13 offered six weeks after the reduction in force,
14 so my clients did not have the opportunity to
15 participate in it They were already gone
16 And what was the retirement opportunity? And
17 Ms ??? chastised me during the hearing I
18 called it, I guess, a retirement incentive
19 She says, no, it's retirement opportunity and
20 she's absolutely correct What she also said
21 that was absolutely correct is that words mean
22 a whole lot in the employment setting, words
23 mean a whole lot, and they do At page 1106
24 through 1118, and I provide a copy of those
25 pages for you to look at if you care to, it

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1 begins with the announcement of this retirement
2 opportunity from the executive director to all
3 employees, July 16, 2003

4 MR COURT What tab is that?

5 MR NICKLES That it's actually a hand up
6 that's that should be a part of what I've
7 just sent you If you see at the top, please
8 post and circulate to staff?

9 MR COURT I have it, thank you

10 MR NICKLES Yes, sir And he's pleased to
11 announce the opportunity for employees to do
12 what? Retire from the agency, and then he
13 says, and continue working in their present
14 position He can't do that, that's not
15 allowed We've already gone through that You
16 can't continue to work in your current position
17 in a temporary capacity It's a severance of
18 the employment relationship and you're in a new
19 capacity He corrects himself on the documents
20 that ultimately come from this He says that
21 you will be a temporary employee How are you
22 going to qualify for this? You must experience
23 a 15 calendar day break in service Well, wait
24 a minute We've already seen the regulation
25 If you have a 15-day break in service you are

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1 no longer a continuing state employee You're
2 no longer covered You come back and you are
3 a temporary, you're not covered It says,
4 retirees will be hired into their same position
5 as a temporary employee We see that's
6 oxymoronic, Your Honor You can't come back in
7 your former position as a temporary employee
8 because you had an FTE You can't come back to
9 that, it's new Says no benefits will be
10 associated with this temporary employment It
11 will be a temporary position Well, if you
12 scroll through this material you will see that
13 there was some additional information that was
14 provided and there's some procedures provided
15 and look at page 1113, Your Honor It's in
16 this same package

17 MR SUMMERS And, with respect I'm only
18 interrupting him for the sake of correcting the
19 designation The numeral

20 MR NICKLES Oh, I'm sorry, up at the top

21 MR SUMMERS It's at the top That's from the
22 Committee exhibit

23 MR NICKLES Yeah

24 MR SUMMERS And

25 MR NICKLES Let me correct myself The page 1106

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1 is actually 2560 in our record, so if you will
2 please make a note of that, and the page that
3 I was inviting your attention to is 1113 and
4 the record below is now 25 is it, Dona, 60
5 2567, the next page would be 2568 But,
6 anyway, if you've got it in front of you I'd
7 like for you to take a look at it And this
8 has

9 MR COURT Information related to the temporary
10 MR NICKLES Correct, Your Honor Required break
11 in service and earnings limitation This is
12 what they have to sign understanding that they
13 are going to get this thing It says, I
14 understand and agree that I must have a break
15 in service, other factors, by voluntarily
16 retiring and returning to temporary employment,
17 I understand the following If you look at the
18 third bullet, employment will be in a temporary
19 capacity It says performing the same duties
20 I held It says, however, the Agency has
21 authority to reassign me, change my duties, at
22 any time Next bullet, I may be terminated at
23 any time Next bullet, no benefits will be
24 provided Next bullet, I have no grievance
25 rights And the pen ultimate bullet, the next

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1 to last bullet, I understand that as a
2 temporary employee I must take a 15 calendar
3 day break in service annually Well, that's a
4 little unusual, Your Honor, because we know
5 from the regulations that a temporary
6 employment position is supposed to be for not
7 longer than 12 months They're telling these
8 folks, we're going to continue to re-up you
9 You just take a 15 day unpaid vacation every
10 year and you can be with us until the cows come
11 home This was an artifice used by this
12 department as a money saving effort and, while
13 that may be well and good in the absence of
14 reduction in force, it's not allowed where you
15 have people out there that you have
16 involuntarily separated who want to come back
17 to work for you in whatever capacity, and
18 you're instead giving preferential treatment to
19 individuals who are not covered employees
20 Thus, the equal protection argument, Your
21 Honor So there is a lot of curiosity in this
22 particular reduction in force that doesn't
23 require that we penetrate the motivations of
24 the executive director of the Department of
25 Corrections Their own testimony, their own

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1 documents, demonstrate that they didn't follow
2 the law, didn't follow procedure Your Honor,
3 we attached as an appendix to our brief a
4 summary of some employment actions that were
5 taken during and outside of the recall period
6 and we don't ask that you accept this on our
7 word We cite the provisions, the pages of the
8 record that these are taken from, and what our
9 review of these records indicate is that where
10 there were this is important, where there
11 were bumps available in those little confined
12 areas that are not agency or department-wide,
13 those bumps were taken You can see that in
14 number one of our appendix Where people were
15 actually separated, you will see, our number
16 two is permanent employees assigned educational
17 responsibilities during the recall period, and
18 they just go off the chart There are bunches
19 of them If you look at number four from this
20 appendix and these are temporary employees
21 assigned educational responsibilities during
22 the recall period And, Your Honor, it's our
23 position whether these people were new to the
24 Agency, were rehired as temporaries or were
25 participants in these retirement opportunities,

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1 it does not matter Because during the recall
2 period, number one, they made a promise to my
3 clients and everybody else who was separated
4 that you'll get a chance at those positions
5 They didn't have to make that promise because
6 the law required them to and they didn't do it,
7 and they didn't do it to save money So what
8 we contend in this case is there are numerous
9 violations, and I cataloged them as best I
10 could in my brief, of the policy itself There
11 are numerous violations of state law, there are
12 numerous violations of regulation And all of
13 those produce violations of my clients'
14 statutory and constitutional rights And what
15 our Supreme Court has said is that in that
16 circumstance where you do not do it correctly,
17 whatever reason, then your actions are invalid
18 and those folks who have been adversely
19 affected by those actions are entitled to
20 relief These folks behind me and their
21 colleagues have been fighting this battle for
22 quite awhile and I am continuously amazed at
23 their determination to seek justice in this
24 case They have never sought preferential
25 treatment, never The assertion that the

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1 education division should have been excluded
2 from this, while I think it probably would have
3 been good policy, that's not my call They
4 were subject to a reduction in force if it were
5 properly implemented and, as we asserted below,
6 properly motivated But that that we're
7 putting aside for purposes of appeal Your
8 Honor, this is a big case There are a lot of
9 documents, there is a lot of testimony, but
10 when you distill this case to its essence the
11 questions are did the Department of Corrections
12 confine its competitive areas as it advertised
13 to the Office of Human Resources and to its
14 employees If it did not, its actions are
15 invalid Did the Department of Corrections
16 provide these folks adversely affected by the
17 reduction in force their rights as covered
18 state employees during the 12-month recall
19 period? If they did not, then their actions
20 are invalid, and my clients are entitled to
21 return to employment It comes down to that
22 and, Your Honor, we believe that if you look at
23 the State Employee Grievance Committee's final
24 decision and you look at their findings of
25 fact, you can only conclude that, yes, they did

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1 violate these folks' rights Yes, they did
2 violate their own guidelines Finding of Fact
3 Number Eight, Gerri Miro, director of SCDC's
4 education division which includes the PUSD,
5 testified there's only one school district in
6 the SCDC It is not geographically divided
7 PUSD has one superintendent and educators are
8 held to the same standards regardless of
9 location What could be clearer than that? If
10 you want to know why that's the case, all
11 you've got to do is look at the controlling
12 legislation for the Palmetto Unified School
13 District and this is at tab seven of my handout
14 and as we commented earlier, Your Honor, the
15 General Assembly is presumed to mean what it
16 says and say what it means You don't look to
17 extrinsic evidence, you don't look for
18 justifications They are the elected voice of
19 appeal We know in our constitution, all
20 authority, not specifically branded elsewhere,
21 devolves to the people through the General
22 Assembly That's the constitution of the State
23 of South Carolina We have a strong General
24 Assembly legislative constitution and I know
25 I'm getting beyond my time Anytime you want

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1 to cut me off, please do But what this
2 General Assembly said back in 1981 is that they
3 were going to establish a, one, state-wide
4 unified school district within the South
5 Carolina Department of Corrections to be known
6 as the Palmetto Unified School District What
7 could be clearer than that? We contend that
8 even if they had wanted to subdivide this into
9 sub school districts, even if they'd actually
10 done that, which they didn't do, it would have
11 been a violation of the law Why did the
12 General Assembly do that? Well, they have a
13 expressed purpose It's in 24-25-20 This is
14 not Al Nickles talking or Max Randolph or Cal
15 Bell This is the General Assembly talking
16 It says, the establishment of the district
17 shall ensure that educational programs are
18 available to whom? All inmates with less than
19 a high school diploma or its equivalent and
20 that various vocational training programs are
21 made available to selected inmates with the
22 necessary aptitude and desire Something very
23 important it said It says all inmates It
24 doesn't say all inmates under the age of 21
25 What happened as a coordinate outcome of this

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1 reduction in force is the Palmetto Unified
2 School District is now confined to inmates who
3 are 21 years or younger The other areas, the
4 older inmates seeking a GED, are being provided
5 those services through subcontractors through
6 local school districts

7 MR COURT And let me stop you here I think we're
8 getting a little bit a field of what were the
9 main issues

10 MR NICKLES Let me just finish by saying this
11 The Department of Corrections has isolated one
12 provision of the statute and it says the
13 superintendent of the district and all
14 educational personnel should be employed,
15 supervised, and terminated according to SCDC
16 personnel policy and procedures We have never
17 contested that, Your Honor It's our position
18 that they violated SCDC personnel policies and
19 procedures here, but it's also our position
20 that these other statutes that specifically say
21 that the Board shall do certain things and that
22 the superintendent shall do certain things are
23 not the General Assembly whistling in the wind
24 They're not there merely for eyewash, Your
25 Honor, and what happened in this case, and we

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1 think it's meaningful, we don't think it's
2 determinative, we think it's meaningful, is
3 that this administration completely ignored the
4 Board, completely ignored the superintendent,
5 according to his own testimony, and took this
6 action driven by economic concerns without
7 reflecting or consulting with these education
8 administrators designated by the General
9 Assembly as having some authority But, Your
10 Honor, in this case you need not reach that
11 issue We think it's there, we think it's a
12 clear violation, but if you wish to confine
13 your review to the policy, to the statutes that
14 govern reduction in force in general, our
15 clients must prevail It's as simple as that
16 MR COURT Thank you About five minutes ago you
17 had gotten down to reducing your argument to
18 its lowest common denominator in which you gave
19 are two salient issues, I think I want to ask
20 that you, after you leave here today, commit
21 those to writing and send them to me with a
22 copy to opposing counsel and he can do likewise
23 with his Trying to listen to you, it's
24 inappropriate for me to try to take notes and
25 there was too much for me to note at one shot

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1 Give me just one more minute here

2 MR NICKLES Yes, sir

3 MR COURT On equal protection, Seabrook versus

4 Knox, the 2006 case To establish an equal

5 protection violation the plaintiffs must

6 demonstrate that they were intentionally and

7 purposefully subjected to treatment different

8 from others similarly situated I assume that

9 you take the position that you made out a prima

10 fascia case of intentional discrimination?

11 MR NICKLES Absolutely

12 MR COURT Mr Summers, the ball is in your court

13 All right We started about five after 2 00,

14 so you'll have a similar period of time if you

15 need it

16 MR SUMMERS Yes, sir, thank you very much Again,

17 good afternoon

18 MR COURT Good afternoon

19 MR SUMMERS For the sake of your edification and

20 for the sake of the record behind me, you see

21 two individuals To your left is Ms Pat

22 Thrailkill She is the deputy director of

23 SCDC's division of human resources and Mr

24 Nickles referenced her during his presentation

25 to the Court To her or your right, is Mr

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1 Bart Vincent He's deputy general counsel for
2 the Department of Corrections

3 MR COURT It's good to have both of you here I
4 have not met either of you Thank you for
5 being here

6 MR VINCENT Thank you

7 MR SUMMERS Ultimately, Your Honor, you indicated
8 a few moments ago toward the conclusion of Mr
9 Nickles' time that he had gone a little bit a
10 field of the issues that are before the Court
11 on this appeal Very respectfully and, again,
12 having worked this case with both Mr Nickles
13 and Ms Guffey for several years, I have the
14 highest regard for their skills as litigators,
15 I have the highest regard for their legal
16 acumen But it would seem to me, as the
17 Agency's representative here, that their
18 presentation overall went a bit far of field
19 from the issues that are truly here before the
20 Court And, very respectfully, with the
21 exception of a few matters I'll talk about
22 during my presentation, Mr Nickles made, if
23 not identical, then very similar arguments to
24 the State Employee Grievance Committee as the
25 Court knows and as the Committee indicated in

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1 its final decision, it's a quasi judicial body
2 When Mr Nickles made the presentation
3 consisting of testimony, consisting of
4 documentary evidence, to the State Employee
5 Grievance Committee, the overarching motive or
6 the overarching theme or theory that he
7 advocated, as well as Ms Guffey, was that of
8 retaliation And, Your Honor, I think he got
9 into that a bit when he came to reciting or
10 reviewing the case law that you had your law
11 clerk pick up for you With all due respect
12 for Mr Nickles or to Mr Nickles, it seems
13 like they want to have it both ways On the
14 one hand they're saying, well, no, we're not
15 saying that there was discrimination, we're not
16 saying that we were individually, if you will,
17 targeted for this particular reduction in
18 force, this particular event that occurred in
19 2003 Well, as I indicated in my brief, when
20 they went before the State Employee Grievance
21 Committee that was the overarching theory, that
22 there was a retaliatory motive formulated and
23 then implemented by, among others, Director
24 Ozmint toward the appellants by virtue of their
25 involvement in litigation that occurred prior,

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1 several years prior, to the reduction in force
2 It seems to me that the appellants are now
3 changing horses in midstream Very
4 respectfully, at the end of his presentation,
5 in response to your question, it was very
6 confusing Was there some type of intent by
7 which these appellants found themselves in the
8 reduction of force and, therefore, triggering
9 the potential analysis of an equal protection
10 claim? With all my memory is, and the
11 Court certainly has the final say in its review
12 of the record, equal protection was not a
13 theory that was advocated or brought forward by
14 Mr Nickles, by Ms Guffey, on behalf of the
15 appellants before the State Employee Grievance
16 Committee Mr Nickles talked at the beginning
17 of his presentation about the standard of
18 review and on the one hand he said, well, there
19 really aren't too many issues, if any, of
20 contested fact But, on the other hand, we
21 feel that the Employee Grievance Committee
22 misapplied or did not properly apply the
23 controlling legal principles And, moreover,
24 Mr Nickles said, if you look at the facts, the
25 findings in fact as articulated in the final

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1 decision published by the Committee, he
2 advocated to the Court that the Court must find
3 that there were violations of the law Well,
4 first and foremost, this matter is on appeal
5 from a decision, as the Court knows, from the
6 State Employee Grievance Committee They did
7 not see it that way So, ultimately, the
8 standard we would submit to the Court is
9 broader or more nuanced, for that matter Was
10 there substantial evidence put before the
11 Committee by which the Committee made its
12 conclusions? Mr Nickles and Ms Guffey have
13 advocated their interpretation of various
14 regulations, various statutes of our State's
15 constitution For that matter, they've
16 advocated their interpretation of the Agency's
17 own reduction in force policy But just as
18 occurred before the State Employee Grievance
19 Committee, we respectfully submit that there's
20 not much by way of legal justification or legal
21 support at all

22 MR COURT You've repeated that numerous times in
23 your brief

24 MR SUMMERS Yes, sir

25 MR COURT But I assume that you're going to tell

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1 me why they were wrong
2 MR SUMMERS Yes, sir And, ultimately, hopefully,
3 my brief gave the Court some idea of what I'm
4 talking about right now And I'll go ahead and
5 get into an area with the Court's prompting
6 with respect to equal protection Ultimately,
7 the appellants were treated just like everybody
8 else in the reduction in force that occurred in
9 2003 Mr Nickles accurately pointed out that
10 at various times in these proceedings we've
11 relied on, it's in the materials as well as in
12 the record, it's in the tab very last page
13 at tab seven, provisions of 24-25-90 And
14 ultimately, Your Honor, it reads the
15 superintendent of the district, that's the
16 Palmetto Unified School District, and all other
17 educational personnel shall be employed,
18 supervised, and terminated according to the
19 South Carolina Department of Corrections'
20 personnel policies, and procedures Well, we
21 have a RIF policy in play and I will get an
22 accurate reference to the record for that
23 particular statute, in just a moment, but I
24 think it may appear more than a few times in
25 the record

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1 MR NICKLES It's in our tab number seven
2 MR SUMMERS Right I just wanted if I could,
3 I'll get it in just a moment It's somewhere
4 around page 2281 of the record, and I can get
5 a more precise estimate for the Court and
6 pinpoint the site for the Court That being
7 said, again, the appellants, like all other
8 SCDC employees, were subject to the reduction
9 in force They weren't treated differently
10 They weren't treated differently because
11 they're all SCDC employees When Mr Nickles
12 talks about the formulation of the competitive
13 areas he references the provision of the
14 policy, the RIF policy, and this is at page
15 1634 in the record before the Court, it's
16 paragraph 1-1 And he accurately read through
17 and recited for the Court, that particular
18 paragraph But then ultimately, we
19 respectfully submit, he added his own
20 interpretation of it The competitive areas,
21 as the State Employee Grievance Committee
22 properly found, were determined by SCDC There
23 was no chicanery, there was no ill intent,
24 there was no failure by the Agency to comply
25 with its own policy The Committee found that

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1 those competitive areas were properly
2 determined and for a moment we're going to step
3 back, with the Court's indulgence, and look at
4 what was going on with the Agency back in 2003
5 when Director Ozmint came on board Director
6 Ozmint testified, and it's in the record, that
7 there was a rather substantial budget deficit
8 being confronted by the Agency and that it was
9 significantly higher than the figure that had
10 been presented to him when he was doing his due
11 diligence When he came on board he recognized
12 that he had to make some hard decisions and
13 very quickly he made the decision the
14 decision that faced him by virtue of those
15 fiscal urgencies, to conduct this reduction in
16 force Mr Nickles, throughout his
17 presentation to the Court today and in his
18 brief and, for that matter, before the Employee
19 Grievance Committee, talked about how these
20 geographic competitive areas had never existed
21 before He used the term before the Court,
22 these circles I think he may have used the
23 term, imaginary areas Ultimately, there's no
24 law, there's no regulation, that says that
25 competitive areas must be synchronized or must

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1 somehow match up with previously existing
2 designations within an agency Taking a step
3 back for a moment, looking at why the RIF was
4 implemented to begin with, the Agency faced a
5 very stark choice and a very stark reality of
6 having to reduce its operating expenses, how
7 much it was able to take in versus how much it
8 was spending on its services Director Ozmint
9 identified three key areas That would be
10 security, number one And there's testimony
11 from Director Ozmint in the record

12 MR COURT Prioritize

13 MR SUMMERS Prioritize, yes, sir And the
14 priority is established by the director, which
15 his in his discretion, not challenged by
16 Mr Nickles Priorities were security Then
17 he had medical care as number two Then he had
18 food and clothing as number three Education
19 activity, and Director Ozmint testified about
20 how the educational activity undertaken by his
21 division of education, which is essentially the
22 same as the Palmetto Unified School District,
23 how that activity continued and continues to
24 this day, after the reduction in force If you
25 would listen to Mr Nickles and Ms Guffey, it

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1 perhaps would appear that no educational
2 activities continued past the reduction in
3 force That's not the case at all What you
4 had was a certain number of employees that had
5 to be drawn down because of fiscal realities
6 In the manner in which the competitive areas
7 were established by John Near, he's now retired
8 from the Agency, Your Honor He was Mr
9 Uphill's boss He was the director of human
10 resources for the Department of Corrections
11 When he established these geographic
12 competitive areas he complied with the policy
13 Further, as he testified, in the back of his
14 mind was a provision of the State regulations,
15 the definition, some of which Mr Nickles went
16 through in his presentation to the Court,
17 involving involuntary reassignment Talked
18 about a 30 mile rule, that he could not and
19 the regulation does reflect this particular
20 definition You could not involuntarily
21 reassign an employee further than 30 miles from
22 his original posting Forgive me digression to
23 military terminology, Your Honor Sometimes it
24 comes back to haunt me So if you look at the
25 testimony from Mr Near, and I'm going to

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1 reference page 789 of the record, he talks
2 about his rationale by which he went through
3 and devised the competitive areas Again,
4 there's no requirement Hasn't been a
5 requirement, is not currently a requirement,
6 that the competitive areas marry up with
7 preexisting designation within an agency,
8 within a prison, anything else The reason why
9 the competitive areas were generated to begin
10 with was because of the RIF You have this
11 state-wide entity, the Department of
12 Corrections, including the appellants,
13 including the organization that at times it's
14 seemingly it would seem Mr Nickles and Ms
15 Guffey would advocate as a separate entity in
16 certain ways All of that came under the
17 umbrella for the Department of Corrections
18 Ultimately again, this material was
19 presented to the Employee Grievance Committee
20 They heard it and they rendered their decision,
21 but looking at the policy there is no violation
22 of SCDC's policy Getting to another issue
23 that Mr Nickles raised in some detail during
24 his presentation, talked about the retirement
25 opportunity, and you heard terms and that

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1 was, I think, in the guise
2 THE COURT Of the what?
3 MR SUMMERS I think that was used in the guise of
4 improperly bringing or employing temporary
5 employees at or during the recall period of the
6 RIF As the Court is no doubt aware, the RIF
7 became effective June 1, 2003 The one year
8 recall period began that day and all 148
9 affected employees, including the 20
10 appellants, had recall rights up until May 31,
11 2004 Well, Mr Nickles starts connecting some
12 dots that, under his interpretation and under
13 the interpretation advocated as well by Ms
14 Guffey, portrays, if you will, a reality that
15 just simply didn't exist There was not a
16 failure of the Department to conform with the
17 applicable regulations There was not a
18 failure by the Department to conform with
19 applicable laws There was no deprivation of
20 rights as a consequence of these purported
21 failures Instead, the retirement opportunity
22 was properly undertaken Yes, it was
23 undertaken during the one year recall period,
24 but it was a separate transaction It would
25 seem that Mr Nickles is saying and he may

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1 have and I'm not trying to speak for him,
2 I'm trying to put it in terms so I can continue
3 on with the presentation from our perspective,
4 that when the retirement opportunity came
5 around, that the folks who availed themselves
6 in that retirement opportunity, by doing so
7 lost the ability to come back and fill their
8 position Further, what Mr Nickles is saying
9 is that when those folks availed themselves for
10 the retirement opportunity they created
11 positions, opened positions, that his folks,
12 and I would perhaps presume that the other 148
13 folks, should have had first priority to fill

14 MR COURT And of that 148, some were district
15 employees and some were not?

16 MR SUMMERS Well, yes, sir

17 MR COURT It was broken down into percentages and
18 that seems to me to be at least marginally
19 important

20 MR SUMMERS Well, yes, sir And more
21 specifically, what they broke it down I think
22 it was 56 percent, 56 75 percent, of those
23 affected by the reduction in force were
24 educators

25 MR COURT Okay

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1 MR SUMMERS And a moment ago the Court said they
2 were employees of the district Well, there
3 was a lot of testimony about that before the
4 Employee Grievance Committee and, ultimately,
5 the Employee Grievance Committee, this is a
6 factual issue, determined, under the applicable
7 statute, that they were employees of SCDC So,
8 obviously, the Court a moment ago talked about
9 the employees of the district We respectfully
10 submit, as bound by the Employee Grievance
11 Committee, that the appellants and other folks
12 from the Palmetto Unified School District,
13 which, again, we respectfully submit the
14 evidence showed was a division of education of
15 Department of Corrections, that 56 75 percent
16 of those folks were certified educators

17 MR COURT And the rest were simply

18 MR SUMMERS Other

19 MR COURT SCDC employees?

20 MR SUMMERS Correct Just like the 56 75 percent
21 They're all SCDC employees, Your Honor We
22 respectfully submit that the Employee Grievance
23 Committee that finding of fact is
24 dispositive And, digressing for just a
25 moment, Mr Nickles talks about, well, we don't

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1 concede or they're not arguing that there
2 are material issues of fact Ultimately, their
3 argument is the Committee didn't properly apply
4 the controlling legal principles We
5 respectfully contend, Your Honor, that there
6 are mixed questions in fact and law that were
7 presented to the Employee Grievance Committee
8 and that the existence of certain facts drives
9 certain legal conclusions So while we
10 certainly respect Mr Nickles and Ms Guffey's
11 desire to extract, if you will, the factual
12 issues, if you look at the final decision
13 rendered by the Employee Grievance Committee
14 there are mixed questions of law and fact The
15 existence of one fact drives a legal
16 conclusion That being said, for example one
17 legal conclusion is that all the folks who were
18 effected by the RIF were SCDC employees That
19 there was no separate entity, if you will,
20 known as the Palmetto Unified School District
21 That being said, when this retirement
22 opportunity was offered, properly offered, if
23 you will, by the Department of Corrections,
24 there was no violation of any policy There
25 was no violation of our State law There was

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1 no violation of any derivative constitutional
2 rights held by the appellants or, for that
3 matter, any other folks who were subject to
4 this RIF It would seem that where Mr Nickles
5 starts getting off track is when you look at
6 the time of the transaction, we'll call it
7 that, during the retirement opportunity When
8 an SCDC employee, whether it was a certified
9 educator or a correctional officer, came up for
10 that retirement opportunity, number one, it was
11 voluntary Unlike the reduction in force,
12 which was an involuntary reassignment, the
13 retirement opportunity was voluntary, and in
14 order to qualify for the retirement opportunity
15 the SCDC employee in question had to be, first
16 and foremost, retirement eligible So when
17 that retirement opportunity came up, the
18 retiree took the break in service and in my
19 brief I go through the statutes that we submit
20 would apply to this instance So they're a
21 retiree, they take advantage of the retirement
22 opportunity Then they come back to their
23 prior position, which now by virtue of their
24 taking advantage of the retirement opportunity,
25 they're filling as a retiree Again, there's

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1 nothing wrong with that transaction Mr
2 Nickles, again very creatively and very
3 zealously, presented to the Court a version of
4 reality that would, in his assessment, and has
5 been in Ms Guffey's assessment, present
6 violations of statute and constitution It
7 simply is not there We submit, very
8 respectfully, that the Employee Grievance
9 Committee got it right That there was, again,
10 no violation There were some other matters
11 that Mr Nickles talked about and, again, we'll
12 go back just for a moment to the competitive
13 areas and how they impacted the decision by the
14 Department of Corrections And, again, from
15 the beginning there was an element of
16 retaliation

17 MR COURT There's been an assertion?

18 MR SUMMERS That's correct, sir And Mr Nickles
19 talked about not pursuing that on appeal or at
20 least, perhaps, today It would seem to us
21 that he's abandoned that particular theory
22 And, again, as I said a moment ago, changing
23 horses in midstream, he's now trying to tackle
24 or highlight, what he perceives to be and what
25 Ms Guffey perceives to be, failures by the

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1 Committee to properly apply the controlling
2 principles of law But, again, as this Court
3 knows, this Court may not substitute its
4 judgement for that of the Committee when it
5 comes to questions of fact And, as I said a
6 moment ago, we've got mixed questions of fact
7 and law And, furthermore, if we talk in terms
8 of an equal protection claim, the intent aspect
9 is something the Court, we feel, accurately
10 identified and reflected So we go through and
11 we talk about competitive areas, but you have
12 to understand, very respectfully, Your Honor,
13 that these 20 folks, these appellants, three of
14 whom are here today, the RIF did what it was
15 intended to do and some of them or all of them
16 fell into the RIF, the reduction in force
17 policy and plan in a proper fashion Again
18 we've got 20 different appellants Of those 20
19 appellants, 13 had their employment ended as a
20 consequence of the RIF Six elected to bump,
21 and Your Honor had an exchange with Mr Nickles
22 about bumping rights That makes 19 13 who
23 ended their employment, six who got bumped, and
24 one ultimately well, ended his employment,
25 but came back and got rehired So when you go

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1 through and look at those 20 folks, one of
2 them, Mary McCabe, was in a competitive area
3 She elected to bump into an open correctional
4 officer position Well, within one month she
5 was recalled, pursuant to the provisions of the
6 RIF policy, to a certified educator position
7 So it would appear that the RIF policy, and
8 this is, again, we submit validated by the
9 findings of fact and conclusion of law issued
10 by the Committee, that the RIF policy worked in
11 Ms McCabe's circumstance She was recalled
12 back to a position Again, recognizing the
13 priorities identified by Director Ozmint, folks
14 like Ms McCabe and the other three appellants
15 who are here, they found themselves in the
16 Agency at a time when the Agency faced just a
17 dire financial reality and efforts have been
18 made leading up to the RIF to try to cut costs,
19 to try to do some innovative things to reduce
20 the amount of expenses and expenditures the
21 Agency was experiencing But, again, when it
22 came time for Director Ozmint to make a hard
23 decision, he implemented an agency-wide
24 reduction in force Going within the
25 competitive areas and talking, again, about Ms

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1 McCabe and the other 19 appellants and as the
2 brief indicated, they were willing to go pretty
3 much anywhere in the State in order to keep
4 their certified teaching position But, again,
5 looking at the competitive areas that were
6 drawn, as Mr Near testified to and as was
7 reflected in the policy, there was a desire to
8 have realistic bumping rights and realistic
9 reinstatement rights Mr Nickles, towards the
10 end of his presentation to the Court, talked
11 about whether it was proper, whether the right
12 call would have been to conduct a separate RIF
13 involving just certified educators who fell
14 under the purview of the Palmetto Unified
15 School District, which again, is a division of
16 education He said, well, that's not my call
17 It may have been the wise thing to do Well,
18 again, seemingly wanting to have it both ways
19 The decision that was made was to institute the
20 RIF, fashion these 11 competitive areas, and
21 then have all SCDC employees fall under the
22 provisions of the RIF policy There is no
23 provision of state regulation, there is no
24 provision of state law, that requires state-
25 wide bumping rights There is no provision

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1 that those state-wide rights were somehow
2 withheld from the appellants, from any of them
3 So when Your Honor goes through and reviews the
4 record and Your Honor goes through and reviews
5 the briefs, we respectfully submit that the
6 Court must look at what the laws and
7 regulations actually stand for and what they
8 actually purport to say Mr Nickles talked in
9 terms of how the Agency had outsourced, and I'm
10 trying to get the terminology correct from my
11 hurried notes during his presentation, that
12 when it came to GED and adult education
13 inmates, that the Agency had outsourced or
14 contracted out the instructional activities as
15 it applied to those particular inmates Very
16 respectfully, the record doesn't reflect that
17 The record reflect in certain instances that
18 school districts in remote locations had an
19 arrangement with SCDC to bring on folks to
20 provide instruction That was not necessarily,
21 quote, the norm And, again, at times during
22 his presentation Mr Nickles talked about what
23 would ordinarily happen in a reduction in
24 force Well very respectfully, Your Honor,
25 there is no norm that's been propounded by Mr

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1 Nickles or Ms Guffey When he talks in terms
2 of what ordinarily would have happened, what
3 normally would have happened, that's a standard
4 that's somewhat nonexistent The question
5 before the Court is did the State Employee
6 Grievance Committee get it right Did the
7 State Employee Grievance Committee properly
8 look at the RIF plan, the RIF policy, and the
9 manner by which it was applied, not just to the
10 appellants, but to the other 46 or 45 percent
11 of those that were affected by the RIF
12 Finally, Your Honor, Mr Nickles talked about
13 the frequently asked question, and that appears
14 in tab nine of his materials, and I may be
15 mistaken on that Could have been tab seven,
16 forgive me But, ultimately, I've addressed
17 it, the frequently asked question aspect, in
18 page 20 and 21 of my brief And at that point
19 in my brief

20 MR NICKLES It's at tab five

21 MR SUMMERS Tab five, forgive me Thank you, Mr
22 Nickles And I had some help from behind me
23 Tab five You see the frequently asked
24 question that appears there and it was, for the
25 sake of the record, it was introduced, that

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1 particular printout, as the Court can see
2 there, it was introduced as Appellant's Exhibit
3 Twelve Well, ultimately, Your Honor, a
4 representative from the Office of Human
5 Resources, Ms Heather Pope, came before the
6 State Employee Grievance Committee and she
7 testified about the origins of that frequently
8 asked question and about the OHR's policies
9 when it comes to reduction in force and can you
10 hire back temporary employees to fill
11 positions Number one, we respectfully submit
12 that the evidence is there that the Agency took
13 proper actions when it came to managing its
14 work force The Agency took proper action and
15 fulfilled its policy, followed state law and
16 precedent, when it came to managing these
17 temporary employees, when it came to its
18 probationary employees and their management
19 during the reduction in force, as well as
20 during the retirement opportunity But if you
21 look at what Ms Pope actually testified to,
22 and her testimony, Your Honor, begins at page
23 1274 in the record, and, again, this goes back
24 to, if you will, for lack of a better term, the
25 big picture And, as I conclude my comments

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1 and my presentation to the Court subject to the
2 Court's questions, we respectfully submit that
3 that has to be the backdrop to the Court's view
4 of what happened, as well as the Employee
5 Grievance Committee's final decision in this
6 matter Ms Pope came and testified that if
7 you elimin the purpose of a RIF, when you
8 eliminate a position, is that the Agency has
9 said we're going to eliminate the function of
10 that job position, and that particular dialogue
11 appears on page 1276 of the record But then,
12 on questioning from the panel, Ms Pope starts
13 going into the realities of what happens when
14 you lose job positions and the people who held
15 those job positions and she started talking
16 about the motivation for the RIF and then she
17 ultimately talked about the motivation for the
18 type of RIF that the Agency conducted in 2003,
19 which was budgetary concerns You're going to
20 have to do, SCDC, as much, perhaps even more,
21 with less because there are just not the funds
22 available to continue to have the number of
23 employees that you've been having So Ms Pope
24 talked about it being proper, that when you
25 have an Agency downsizing situation that the

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1 folks who were left behind are going to have to
2 divide up that workload And that's ultimately
3 what happened The exhibit that Mr Nickles
4 brought forth as an attachment to his brief, as
5 well as what was shown in the RIF plan itself,
6 and there's a rather lengthy spreadsheet that
7 exists in the RIF plan and, for the record,
8 I'll get to it in just a moment That
9 spreadsheet details how the RIF works and that
10 spreadsheet begins at page 1644 of the record
11 Mr Near testified about the methodology that
12 went into creating this spreadsheet The
13 spreadsheet was not something, as the evidence
14 would show and as Mr Near testified, he did
15 not have that particular methodology in mind
16 when he first went to OHR In the meetings he
17 had with OHR, as he's formulating the RIF plan,
18 for which Director Ozmint ultimately bears a
19 responsibility, he testified that OHR made
20 these suggestions to him So what you have, as
21 reflected overall by this spreadsheet, is an
22 Agency losing members of its workforce and the
23 remaining employees having to shoulder more
24 So when you see references in Mr Nickles'
25 appendix or his exhibits in his brief, the

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1 reality is reflected that these folks who were
2 left behind, including some of the appellants,
3 the six who remained behind, for example, Ms
4 McCabe, are going to have to do more with less
5 Mr Nickles, of course, and Ms Guffey want to
6 ascribe to that reality and to the way that
7 reality manifested itself, a conclusion that
8 they seek the Court to adopt, that the method
9 by which SCDC formulating and ultimately
10 implemented the RIF was just flat out wrong
11 We respectfully submit that there's no
12 substantial evidence, no evidence that
13 demonstrates that, and we're confident the
14 Court will look at the entirety of the record,
15 we're confident that the Court will take into
16 consideration the mixed questions of law and
17 fact here, as represented by the Agency's
18 or, I'm sorry, the Employee Grievance
19 Committee's final decision and affirm the final
20 decision which includes findings of fact and
21 conclusions of law rendered by the Committee
22 I thank you for your patience with my
23 presentation Subject to your questions, it
24 would appear that Mr Nickles has the
25 opportunity to rebut

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1 MR COURT Ten minutes, Mr Nickles
2 MR NICKLES Thank you, Your Honor In this case,
3 as in many other cases, there are various and
4 sundry issues that presented themselves and we
5 have consistently, and if you would look at
6 Judge Cooper's order in this case back before
7 the State Employee Grievance Committee ever
8 heard a word of testimony, it's in our tab
9 number two, concluded that there were a number
10 of issues that needed to be decided, one of
11 which was retaliation But among those issues
12 was the division of the Palmetto Unified School
13 District Among those issues was the lack of
14 participation of the Board Among those issues
15 was the predominance of the educators being
16 selected for reduction in force, and among
17 those issues was the retention and employment
18 of temporary and probationary employees Your
19 Honor, one out of five issues, which were
20 framed before it went to the State Employee
21 Grievance Committee, related to retaliation
22 There were four other discreet issues presented
23 to them I invite you to look at the record if
24 you have the time and temperament to All
25 those issues were addressed, all those issues

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1 were argued, all those issues were preserved
2 We have been consistent in bringing this matter
3 to the Court's attention Now, I do think it
4 is interesting that the Department would refer
5 the Court to the testimony of Ms Pope, who was
6 a managing a partner of the Office of Human
7 Resources As the Court knows, the Office of
8 Human Resources is an arm of the Budget and
9 Control Board and it's been designated by the
10 General Assembly to be that Agency responsible
11 for the administration of a comprehensive
12 personnel system throughout the State of South
13 Carolina That's in the statutes that are part
14 of our notebook that we've handed up to you,
15 and I'd invite you to take a look at them
16 They're in Title 8, Your Honor And so when
17 OHR talks agencies listen And what Ms Pope
18 was being asked in her examination by the
19 Committee, Mr Cooper, one of the Committee
20 members, was saying, wait a minute If you
21 have a reduction in force, don't you as Mr
22 Summers said, don't you delegate additional
23 responsibilities to those who remain or just
24 eliminate that form of service Ms Pope said,
25 oh, yeah, that's the way it normally works He

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1 said, well, wait a minute What if you just
2 need to give a little bit of somebody's work to
3 a temporary, could you do that? Ms Pope We
4 have historically said no That's not
5 acceptable to hire a temporary to do a job that
6 was eliminated through a RIF This is page
7 1279 of the record, Your Honor A direct
8 answer to a direct question Mr Cooper says,
9 trying to help the Agency apparently, well, not
10 the entire job, but part of it She says, to
11 my knowledge, that's been our position Okay?
12 Okay So the position of OHR, which is
13 responsible for the administration of
14 reductions in force, is the Department of
15 Corrections cannot do what it did Now, what
16 Mr Summers would suggest to you, what the
17 Department would suggest to you, is that it is
18 perfectly appropriate to offer a retirement
19 opportunity to an employee We've never
20 challenged that, Your Honor But if you offer
21 a retirement opportunity during a recall
22 period, your opportunities to return are
23 limited, and that is that you can only come
24 back if those folks who have been involuntarily
25 separated don't want that job That's a

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1 that is a limit imposed by law, Your Honor, and
2 that's not what happened in this case So is
3 a retirement opportunity itself an evil? No
4 As it was implemented here, is it in violation
5 of law? Yes Mr Summers would say, well,
6 we've got mixed questions of fact and law
7 I've been practicing law for over 30 years
8 I've never met a situation that didn't have
9 both factual and legal implications But the
10 factual issue is did it happen The legal
11 question is does it violate, in this case,
12 anyone's rights Now, the State Employee
13 Grievance Committee found, yes, these things
14 happened Yes, there was no limitation to a
15 discreet competitive area that applies to
16 employee organization Now, Mr Summers and
17 the Department would say, well, we didn't have
18 to confine ourselves that way The answer to
19 that is, so what, you did And when you
20 confined yourself in that way you have to
21 operate in that way That's the law, that's
22 what Triska tells us, that's what gets DHEC in
23 trouble all the stinking time If you have
24 confined yourself, you have to operate within
25 those confines because agencies can only

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1 operate according to their delegated authority
2 and within their own policies and procedures
3 That's the law And in this case, this agency
4 did not Your Honor, we're not making this
5 stuff up It happened, it was found by the
6 Grievance Committee to have happened Now, in
7 terms of equal protection, the implication is
8 that we take the position that these 20 people
9 who happened to stand up for themselves are the
10 only people in the protected group, that's not
11 the case The adverse action here, it happened
12 between covered individuals and those who were
13 not Now, all 148 people didn't come to my
14 office, Your Honor If they had, I'd probably
15 be before you here today on behalf of 148
16 people because they were all adversely affected
17 by this But I have 20 people who stood up for
18 their rights, filed a grievance, wanted to be
19 heard, were never heard, had to go to court,
20 had to have a hearing compelled by court, and
21 had to go to the Court of Appeals to get their
22 hearing, and they're now finally nearing their
23 destination, Your Honor And the issue is did
24 the Agency follow its own policies If you
25 believe the findings of the State Grievance

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1 Committee, if you believe the testimony of Ms
2 Miro, who is the director of the education
3 division, the answer is no Now, there's this
4 idea somehow that this issue about confining it
5 to a particular geographic location is all fine
6 and dandy and in some circumstances it might
7 be, Your Honor If they defined their
8 competitive groups in that way, if they were
9 organized in that way, but they're not But
10 they're not And Ms Miro, who is the director
11 of the education division she's the boss of
12 all these people, she commutes daily more than
13 60 miles to her job If there were a 30 mile
14 limit on getting to your job at the Department
15 of Corrections, Ms Miro would have never had
16 the opportunity to be director And it
17 reflects the reality of the situation, who
18 wants to live next door to a prison It is not
19 unusual And the record shows in this case,
20 and it's in our brief, that many of the
21 appellants in this case lived more than 30
22 miles from where they worked They lived in
23 other circles where their jobs were eliminated
24 They were closer to other facilities But did
25 that matter? No, because they created these

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1 circles And, Your Honor, whether it's
2 relevant or not, I invite you to look at the
3 record because the reason the circles were
4 created and the only reason the circles were
5 created, according to the testimony of the
6 executive director, was to limit bumping, was
7 to prevent senior employees from exercising
8 their rights under law That's the reason
9 Now, I personally find that curious Is it
10 necessary for us to prevail to show that was
11 wrong? No Motivation doesn't matter because
12 it's the violation, according to our Supreme
13 Court, according to the United States Supreme
14 Court, it's the violation that triggers the
15 right And, Your Honor, you examine this
16 record, listen carefully to the arguments
17 presented, read carefully the briefs presented,
18 and I think you will see that there is no
19 question at all that there was violation in the
20 implementation of the RIF and there were
21 violations in the course of the recall period
22 that entitled my clients and others, if they'd
23 had the temerity that my clients have had, to
24 relief We thank you very much for your
25 attention and we'd be happy to address the

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1 points that you asked in supplemental brief if
2 that's your desire

3 MR COURT Please, but keep it short I don't want
4 a dissertation, I just want the meat of it

5 MR NICKLES I understand I'm going to address
6 if I understand your request correctly, I'm
7 going to address our position as to the
8 violation relating to the implementation of the
9 RIF, that is the violations of the RIF policy
10 itself, and the violations that followed in the
11 failure to recall these individuals as promised
12 and required

13 THE COURT That's the gravamen of your case

14 MR NICKLES Yes, sir Those two, and the legal
15 issues surround those two issues

16 THE COURT Well, I would suggest that you have two
17 headings and bullet and use very succinct
18 explanations I don't want anything I've
19 got your brief and I can probably extract it
20 from that, but what I want is something that's
21 easier to look at, and you have the same right,
22 of course, Mr Summers

23 MR SUMMERS Yes, sir And just to make sure I
24 understand, would the Court want a brief in
25 reply to Mr Nickles?

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1 MR COURT You can, you can, but I wanted to avoid
2 that This is just for my use in
3 MR SUMMERS Yes, sir
4 MR COURT interpreting your current
5 MR SUMMERS I understand the Court's directive
6 MR NICKLES You want a distillation of our
7 position?
8 MR COURT Distillation is the word
9 MR NICKLES Yes, sir
10 MR SUMMERS Yes, sir
11 MR COURT All right To you lawyers, first of
12 all, I want to thank you for a wonderful
13 presentation I practiced law for about 40
14 years and on my best day I couldn't have laid
15 out a difficult subject as you have here today
16 I understand it much better due to your
17 efforts Secondly, I would say, and
18 particularly to you appellants who are back
19 there, you've been at this a long time and I
20 can't promise you anything but more time
21 because this is a large record and I intend to
22 grind through it as best I can and it's not
23 going to be a quick result, so I won't even
24 promise you when I'll get something out I'd
25 like to have the requested stuff from the

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1 lawyers, you know, within 15 or 20 days,
2 something like that, if it's not a problem
3 Shouldn't take you that long, particularly if
4 you do it while it's fresh on your mind, but
5 just in a reasonable time If there's nothing
6 else, then we'll be adjourned Thank you
7 (There being nothing further, the hearing adjourned
8 at 3 20 p m)

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

James "Cal" Bell, Othella Bernard Katherina)
Bowyer, Linda M W Bratton, Ann T Bridges,)
Rance C Cobb, Jeannie B Croxton, et al)

Appellants,

vs

SC Department of Corrections and Palmetto)
Unified School District No 1)

Respondents

**NOTICE OF RE-ASSIGNMENT
(Appeal)**

DOCKET NO 09-ALJ-30-0103-AP

NOTICE IS GIVEN that a notice of appeal seeking review of agency action was filed on March 10 2009 In accordance with S C Code Ann § 1-23-570 (Supp 2006), the Honorable Carolyn C Matthews was assigned to preside in this matter ***This case is hereby re-assigned to the Honorable John D McLeod, Administrative Law Judge*** The Administrative Law Judge may be contacted by mail at 1205 Pendleton Street, Suite 224, Columbia, South Carolina 29201, and by telephone at (803) 734-0550

Rules of Procedure governing matters before the Court may be obtained from the Clerk of Court or on the Court's website, www.scalc.net

A copy of any document or any other item filed with the Court shall be sent to all other parties at the time of filing If a mailing address changes, or if an address is incorrect, the Division must be notified immediately of the correct address

This the twenty-first day of May, 2009

Marvin F Kittrell
Chief Administrative Law Judge

OFFICES

MAY 22 2009

THOMPSON
SUMMERS & OTT, LLC

By

Jana E Shealy
Jana E Shealy, Clerk
Edgar A Brown Building
1205 Pendleton Street Suite 224
Columbia South Carolina 29201

FILED

MAY 21 2009

SC ADMIN LAW COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

AUG 24 2010

SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Administrative Law Court

John D McLeod, Judge

Docket No 09-ALJ-30-0103-AP

James "Cal" Bell, Othella Bernard, Katherina Bowyer, Linda M W Bratton, Ann T Bridges, Richard M Cobb as Personal Representative of the Estate of Rance C Cobb, Jeannie B Croxton, Bernetha L Culbreath, William K Dreyer, Jacqueline D Farr, Ruth Fritts, Nancy Glenn, Etta Jane Jones, Geneva M Martin, Mary H McCabe, Beverly McClanahan, Max D Randolph, Carolyn McIver Smith, Maggie G Williams and Paula Woodhief,
Appellants

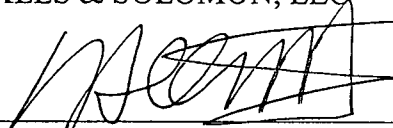
v

South Carolina Department of Corrections and Palmetto Unified School District No 1
Respondents

NOTICE OF APPEAL

The above-named Appellants hereby appeal the Order of the Honorable John D McLeod issued and filed on August 6, 2010 Appellants received this Order on August 9, 2010 A copy of this Notice is being provided to the Clerk of the South Carolina Administrative Law Court and other counsel

NICKLES & SOLOMON, LLC


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Other counsel of Record

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Columbia, South Carolina
August 24, 2010

GERGEL, NICKLES & SOLOMON, P A

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November 18, 2009

Via Email and Hand Delivery

The Honorable John D McLeod, Judge
Administrative Law Court
Edgar A Brown Building, Suite 224
1205 Pendleton Street
Columbia, South Carolina 29201

RE Palmetto Unified School District v SCDC, et al
Case No 09-ALJ-30-0103-AP

Dear Judge McLeod

In its Supplemental Brief submitted on November 17, 2009, the South Carolina Department of Corrections offers one page from the record of an oral argument to the Circuit Court on December 11, 2006 as evidence that the Appellants "waived" any equal protection claim. For your convenience, I have provided a copy of the page offered by SCDC as well as the three pages that follow.

As revealed in the attached materials, the topic under discussion with the Court involved whether there was an equal protection claim comparing Appellants to **correctional officers**. The accurate and honest response then and now was "no". Appellants have never challenged SCDC's authority to retain correctional officers to perform security duties. In contrast, Appellants have consistently asserted that SCDC has violated their rights in failing to follow its own policy and controlling law.

The record is clear that Appellants have never waived claims relating to their recall rights. In fact, the Court explicitly preserved the issue of whether or not SCDC retained temporary employees in favor of Appellants in the Order issued on January 8, 2007 (ROA pp 2359-2362). Additionally, in the letter of appeal addressed to Samuel L Wilkins, Esquire dated January 23, 2008, Appellants specifically asserted "that SCDC employed others to perform their duties under different titles" (ROA pp 2383-2384).

As stated to this Court on October 28, 2009 and reiterated in Appellants' Supplemental Brief, the equal protection argument is based upon the disparate treatment of Appellants as "covered employees" entitled to recall during the twelve months following their separation due to reduction in force. By OHR policy and controlling law, Appellants (and all others separated by RIF) were entitled to resume their duties rather than have those duties assigned to temporary

The Honorable John D McLeod
November 18, 2009
Page two

employees This failure to provide equal protection to "covered employees" who were RIF'd, as well as the other substantive procedural and statutory violations identified by Appellants, invokes the state's constitution

Finally, as stated in Appellants' Initial Brief, oral argument and Supplemental Brief, it is the established law of this State that a public entity must abide by law and its policies As SCDC should have learned from the Abraham decision, even professed "good reasons" (such as lack of funding) do not justify a violation of law Accordingly, as in Abraham, relief in this case is not contingent upon SCDC's motivation See, Abraham v Palmetto Unified School District No 1, 343 S C 36, 538 S E 2d 656 (Ct App 2000)

I appreciate your consideration in this matter

Sincerely,



W Allen Nickles, III

WAN/pfb
Enclosure
cc Lake Summers, Esquire (via email only)
File #03-156

1 employees who are at-will And they eliminated the
2 long-term, permanent state employee school teachers
3 certified teachers

4 And, Your Honor if you look at just general
5 Human Resources management activity, that is
6 absolutely upside-down Absolutely Because what
7 you do is a reduction in force -- and this is in
8 their policy -- is a last resort

9 THE COURT Is this an equal protection
10 argument?

11 MR. NICKLES Well, this isn't equal protection
12 No, sir No sir This is pure and simple violation
13 of procedure

14 THE COURT No When you're comparing the
15 reduction in force of correctional officers to the
16 reduction in force of teachers

17 MR NICKLES No They didn't eliminate any
18 correctional officers They didn't do that And I'm
19 not begrudging them that I don't think that they --
20 I really don't think that they had grounds for the
21 reduction in force to begin But that's not my call
22 We're not making this argument on the basis that they
23 didn't need to save money We ll accept as
24 legitimate their need to save money -- They just
25 didn't do it right, Your Honor And the people they

1 stepped on were my clients They could have done it
2 very easily other ways

3 Now Mr Summers is going to tell you that the
4 Gospel according to Nickles is really irrelevant on
5 this And I have to agree with him I mean, I'm not
6 the executive director of the Department of
7 Corrections But I do know the law and I do know the
8 way that this reduction in force was set up and I do
9 know what people were told

10 And people were told that it was going to be a
11 last resort, we're only doing this because we have
12 to And then when you got the records it shows that
13 they didn't have to that they kept people they
14 didn't have to keep they protected people We've
15 got this in our materials They moved folks around
16 to protect people from reduction in force

17 And, Your Honor it's just a mess the way that
18 this Department did this, because they had one end in
19 mind and that is we're going to cut the highest
20 paid teachers out of this The easiest way to do
21 this is set up these 11 little circles where they
22 can't compete against one another

23 And that's -- just to remind you, this is a
24 state unified district The Department had set up I
25 think 11 geographic areas for competitive purposes

1 And they say they did that so folks wouldn't have to
2 drive too far or move too far away if they wanted to
3 take people's jobs from them bump into other jobs

4 Well unfortunately, what happened in this case
5 and you'll see it in the records, in creating those
6 11 geographic units, they absolutely eliminated
7 education facilities in several of those areas So
8 that even if I had 20 years with the Department and
9 somebody over here 25 30 miles away had two years
10 with the Department I couldn't compete with them for
11 reduction in force Thus the bang for the buck

12 So, Your Honor, we contend in this matter for
13 the reasons set forth in our brief for the reasons
14 set forth in our Proposed Order, for the reasons
15 appearing in the appendices to our brief that there
16 are multiple issues of fact to be addressed by the
17 State employee Grievance Committee that the
18 appropriate action for this Court to take is to
19 remand this, as was done in the Dimian case, as was
20 done in the Wise case, and let the parties bring
21 their facts to the Committee and let the Committee
22 make its judgment on whether those facts are
23 convincing or are not convincing

24 But the facts are there the disputes are there,
25 the irregularities are there we believe in a manner

1 that overwhelmingly supports our claims And we
2 believe that if given the opportunity to present this
3 to the State Committee they will agree that our
4 clients have been victimized in this situation and
5 they're entitled to relief

6 THE COURT The relief you seek is to remand to
7 the --

8 MR NICKLES Exactly We want to be heard,
9 Your Honor We want to be heard on the merits

10 THE COURT Well, posturally, this was a --

11 MR NICKLES It's a petition for a judicial
12 review and complaint The petition for judicial
13 review is for remand to the Grievance Committee The
14 complaint is a declaration that there have been
15 violations If we get the remand we don't need to
16 reach that issue of the complaint

17 THE COURT All right Mr Summers

18 MR SUMMERS Yes sir Again my name is Lake
19 Summers Forgive my speaking voice I have a touch
20 of a head cold sinus infection

21 THE COURT I can hear you just fine

22 MR SUMMERS I appreciate it very much, sir
23 First and foremost, in listening to what Mr Nickles
24 argued to the Court and in reading what Mr Nickles
25 and Ms. Guffey presented to the Court by way of their

The South Carolina Court of Appeals

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M Martin, Mary H McCabe, Beverly
McClanahan, Max D Randolph,
Carolyn McIver Smith, Maggie G
Williams and Paula Woodlief, Appellants,

v

S C Department of Corrections and
Palmetto Unified School District No 1, Respondents

The Honorable John McLeod
Richland County
Trial Court Case No 2009-AL-30-00103

ORDER

Appellants move to strike Respondents' designation of matter to be included in the record on appeal or in the alternative, to pay costs to produce the entire record considered by the administrative law court The entire record considered by the administrative law court is 3,999 pages

Rule 210(c), SCACR, places the burden of paying for the record on appeal on the Appellant. Accordingly, Appellants' motion must be denied. Nothing in this motion prevents Appellants from moving pursuant to Rule 222(c), SCACR, after the appeal is determined.

AND IT IS SO ORDERED

Jasper W. Curreton A.J.

Columbia, South Carolina

cc W. Allen Nickles, III, Esquire
Christopher D. Florian, Esquire
Eric Lake Summers, Esquire

FILED
3/21/11

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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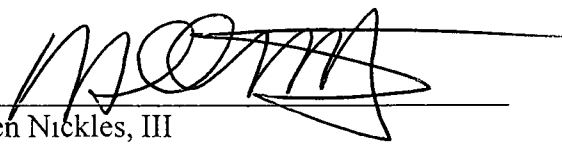
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Respondents

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all materials proposed to be included by any of the parties and not any other materials

NICKLES & SOLOMON, LLC


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Columbia, South Carolina

Attorneys for Appellants

**THE STATE OF SOUTH CAROLINA
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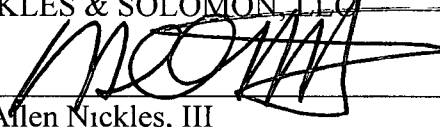
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a copy of the Record on Appeal by hand delivery, as follows

Lake E Summers, Esquire
Malone, Thompson, Summers & Ott, LLC
339 Heyward Street, Suite 200
Columbia, South Carolina 29201

This 18th day of April, 2011

NICKLES & SOLOMON, LLC


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