

THE STATE OF SOUTH CAROLINA  
In the South Carolina Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

OCT 10 2016

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

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**SC Court of Appeals**

Case No. 2015-CP-07-1343  
Appellate Case No. 2016-000955

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John Alden Bauer, III,

Appellant,

v.

Beaufort County School District,

Respondent.

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**INITIAL BRIEF OF RESPONDENT**

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**STATEMENT OF ISSUES ON APPEAL**

- I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT SUBSTANTIAL EVIDENCE SUPPORTED THE SCHOOL BOARD'S DETERMINATION THAT THERE WERE GOOD AND SUFFICIENT REASONS FOR TERMINATING APPELLANT'S EMPLOYMENT.**
  
- II. THE CIRCUIT COURT CORRECTLY DETERMINED THAT APPELLANT RECEIVED DUE PROCESS.**

## STATEMENT OF THE CASE

### **A. Preliminary Matters Pertaining to Appellant's Brief**

This is an appeal under the substantial evidence standard of review of a circuit court ruling upholding a decision by the Beaufort County School Board in a teacher dismissal case. As a threshold matter related to Appellant Bauer's brief, Respondent Beaufort County School District ("the District") strongly objects to and asks the Court to strike items 2, 3, 5-15, 20, 26 and 27, in the "Statement of the Case" section because these statements go beyond the procedural parameters of the case and include contested factual matter in violation of Rule 208(b)(1)(C), SCACR. These assertions are also not supported by evidence in the record. Given these improper and unsupported arguments, Bauer's statement of the case should be disregarded, and he must be bound by the District's statement of the case presented below.

Additionally, Bauer's Initial Brief cites documentary evidence which was not presented to the School Board and cannot now be considered in the appeal of the Board's decision.<sup>1</sup> *See* Rule 210(c), SCACR (stating the record shall not include matter not presented to the tribunal below). The improper documents, which also are addressed in the District's Motion to Strike Portions of Appellant's Amended Designation of Matter are: "Documents withheld from Appellant until June 14, 2016;" (Second Amended Brief p. 5); "Childs and Halligan, August 2016" (Second Amended Brief p. 9); "Childs and Halligan, July 22, 2014" (Second Amended Brief p. 10) "June 16, 2014 Superintendent Email" (Second Amended Brief p. 11); "July 1, 2014 Official Termination Documents"

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<sup>1</sup> As demonstrated by his numerous filings with this Court and in the initial appeal to the Circuit Court, Bauer has sought from the outset to convert this appeal into an original action, having eschewed the opportunity to present a case at the evidentiary hearing before the School Board.

(Second Amended Brief pp. 11-12); “Emails from Human Resource Officer Walton” (Second Amended Brief p. 12); “Affidavit of Lauren Martel” (Second Amended Brief p. 13).

### **B. Procedural History**

This appeal arises under the S. C. Teacher Employment and Dismissal Act, S.C. Code Ann. § 59-25-410, *et seq.* (hereinafter, “the Act”). Appellant Bauer appeals the decision of the Beaufort County Court of Common Pleas (“the Circuit Court”) affirming the Beaufort County School Board’s decision to terminate Bauer’s employment as a physical education teacher. The Board’s decision accepted the recommendation of the District’s Superintendent, Dr. Jeff Moss, that Bauer be dismissed. The School Board’s written Order, dated May 19, 2015, followed an evidentiary hearing which occurred over three days between April 30 and May 2, 2015. At that hearing, in which Bauer represented himself, Bauer declined the opportunity to testify or otherwise put on a case in chief.<sup>2</sup> Based on the evidence put forward during the hearing, the Board concluded that good and sufficient reasons existed to terminate Bauer’s employment as a teacher because, by his conduct, he manifested an evident unfitness for teaching. *See* S.C. Code Ann. §§ 59-19-90(ii), 59-25-430. Those reasons derived from an incident on February 5, 2014, in which Bauer negligently left a special needs student unattended off-campus,

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<sup>2</sup> The Act requires notice of the grounds for dismissal be provided to the teacher as well as an opportunity for an evidentiary hearing before the school board. S.C. Code Ann. § 59-25-460. The hearing is akin to a non-jury trial during which the District administration, officially the Superintendent as the complainant, puts up its case for termination before the board, after which the teacher, as respondent and through counsel if he chooses, may give an opening statement, cross examine the District administration’s witnesses, and present his own testimony, witnesses, documents, and arguments in support of his case. S.C. Code Ann. § 59-25-470.

coupled with Bauer's insubordinate conduct regarding directives related to the incident that he received from District administrators in the aftermath of that event.

On May 29, 2015, Bauer appealed the School Board's order under § 59-25-480, asking the Circuit Court, sitting in its appellate capacity, to overturn the Board's decision. On April 25, 2016, the Circuit Court issued a Final Order upholding the Board's decision, finding that substantial evidence supported the decision to terminate Bauer's employment and that Bauer had received all process due under the Act. (*See* Final Order). On May 2, 2016, Appellant filed his notice of appeal with this Court.

### **STATEMENT OF FACTS AND EVIDENCE PRESENTED**

The operative facts of this case, developed during the School Board's evidentiary hearing, remain uncontradicted, as Bauer refused to testify, present witnesses, or otherwise mount an affirmative case in his defense. Bauer cross-examined the administration's witnesses and entered a few documents into evidence during that cross-examination. However, such limited presentation failed to rebut the administration's case.

Bauer was as a physical education teacher at Hilton Head Island Elementary School ("HHIES" or "the School"). On February 5, 2014, Bauer left a special needs student unsupervised at an off-campus community recreation center following a swim class taught by Bauer. (Tr. p. 61, ln. 2-5; Tr. p. 133, ln. 11-15; Tr. p. 182, ln. 6-10; Complainant's Ex. 15). The child left behind in the rec center's locker room was academically gifted but disabled under Section 504 of the Rehabilitation Act<sup>3</sup> and was served under a Section 504 behavior plan. (Tr. p. 133, ln. 11-15; Tr. p. 182, ln. 6-10). An

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<sup>3</sup> 29 U.S.C. § 701 *et seq.*

employee of the rec center found the student left behind and returned the child to HHIES approximately 30 minutes after Bauer and the rest of his class had departed the center. (Tr. p. 135, ln. 16-20; Tr. p. 182, ln. 6-10; Compl. Ex. 15).

Bauer did not realize that the child had been left behind until the School's front desk receptionist alerted him to the situation. (Tr. p. 136, ln. 22 – Tr. 137, ln. 3; Compl. Ex. 11). Bauer's emailed response to the news that he had left the student at the rec. center was: "Thanks. It was pouring down raining and we were in a rush to get back." (Tr. p. 137, ln. 4-9; Compl. Ex. 11). HHIES Assistant Principal Donald Clendaniel testified as being shocked by Bauer's apparent lack of remorse, concern, or acceptance of personal responsibility regarding his failure to supervise his students. (Tr. p. 137, ln. 18-35).

When Clendaniel requested a meeting with Bauer to discuss the situation, Bauer responded by saying, "Isn't this something we can talk about on the phone? This is ridiculous. I have something after school today. . . This is absolutely ridiculous." (Tr. p. 138, ln. 11-23; Tr. p. 140, ln. 7-18; Compl. Ex. 13, 14 & 15). Mr. Clendaniel insisted on the meeting and a time was set for later that afternoon. (Tr. p. 140, ln. 18-22; Compl. Ex. 15). Bauer was 15 minutes late to the meeting (apparently after leaving campus to get a soda from a nearby convenience store), during which he slumped in his chair, made no eye-contact, and continued to insist that the situation and the meeting about the matter were ridiculous because the incident was "a simple mistake." (Tr. p. 141, ln. 1-25; Compl. Ex. 15). Clendaniel testified that he believed Mr. Bauer's response to the incident was unprofessional and disrespectful. (Tr. p. 143, ln. 4-7).

In a subsequent meeting later that day with Clendaniel, HHIES Principal Jill McAden, and the District's Chief Administrative and Human Resources Officer, Alice Walton participating by phone, Bauer did not deny that he had left a child at the rec center but continued to insist that the "concern" over the incident was "ridiculous," since the child was returned unharmed. (Tr. p. 183, Ln. 13-21; Tr. p. 277, ln. 1-9). Bauer further suggested that it was the student who was at fault, stating the child should have been written up for failing to follow directions. (Tr. p. 183, ln. 13-17, Tr. p. 190, ln. 14-21). McAden was troubled by Bauer's responses and his defensive demeanor, which indicated to her an inability or refusal on Bauer's part to understand the connection between his failure in supervising this special needs child and the potential safety implications. (Tr. p. 184, ln. 4-18; Tr. p. 190, ln. 1-21; Compl. Ex. 19). McAden also learned that Bauer had exhibited a similar demeanor and attitude earlier that school year, following another incident involving Bauer's failure to supervise a student in Bauer's class who was seen wandering around outside of the gym building. (Tr. p. 179, ln. 18 – Tr. p. 180, ln. 7; *see also*, Tr. p. 53, ln. 16- Tr. 60, ln. 18).

With the approval of Superintendent Moss, Walton placed Bauer on administrative leave with pay after the meeting on February 5. (Tr. p. 277, ln. 10-18; Tr. p. 506, Tr. 10-15, 24-25). Walton again met with Bauer, along with Clendaniel and Brockway on February 6, 2014, (Tr. p. 278, ln. 10-16). At that meeting, Bauer stated, "I don't really see the big deal in all of this. The student got back to the building. He wasn't hurt. I really don't see why you are blowing this out of proportion." (Tr. p. 278, ln. 17-25; Tr. p. 279, ln. 1-9).

Walton felt that Mr. Bauer had failed to comply with School Board Policy IS-2, which requires teachers to supervise their students at all times throughout the school day. (Tr. p. 286, ln. 13-25 - Tr. 287, ln. 1-2; Compl. Ex. 4). In a letter to Bauer dated February 7, 2014, Walton indicated the reasons for placing him on administrative leave were because of concerns over Bauer's negligent actions in leaving the student behind at the recreation center, his apparent lack of concern about what occurred, and his unprofessional behavior toward the school administrative officials who investigated the incident. (Tr. p. 298, ln. 2-18; Walton *De Bene Esse* Dep. Ex. 3).

On February 11, Walton met with Bauer to decide on the steps Bauer needed to take to return from administrative leave. (Tr. p. 299, ln. 4-12, 22-25). At the end of that meeting, Bauer again stated that he thought the whole situation was "ridiculous." (Tr. p. 299, ln. 16-21). At the School Board hearing, Walton explained that Bauer's apparent inability or unwillingness to grasp the seriousness of leaving a special needs child unattended off campus prompted her to require Bauer to undergo a medical wellness check. (Tr. p. 300, ln. 1-9; Walton *De Bene Esse* Dep. Ex. 4). Walton testified she has previously requested that employees receive such assessments when, as in Bauer's case, certain "red flags" exist, such as when an employee exhibits an inability to recognize the gravity of a situation or refuses to accept responsibility for a matter. (Tr. p. 302, ln. 18-25). Bauer subsequently met with a psychiatrist and submitted her certification. (Tr. 304, ln. 1-8). That certification was provided a week late and merely offered a very general statement that Bauer was capable of performing the essential functions of his job and could return to work. (Tr. p. 303, ln. 1 - Tr. 304, ln. 8; Walton *De Bene Esse* Dep. Ex 5 & 6).

Walton's office subsequently contacted Bauer to schedule a meeting to discuss the situation further. (Tr. p. 304, ln. 9-13; Walton *De Bene Esse* Dep. Ex. 8). The meeting was rescheduled at the last minute because Bauer had pink eye. (Tr. p. 107, ln. 15-23).

On April 28, Bauer wrote Walton the following email:

Hello Ms. Walton[:]

My eye is just about better. I believe it's just a severe case of allergies with all the pollen in the air.

If you would like to schedule a meeting for reinstatement I am available any time after today.

If our meeting is for anything other than reinstatement you will need to contact my attorney.

Walton *De Bene Esse* Dep. Ex. 9). Walton responded by informing Bauer that he was required to attend the meeting, as he was on administrative leave and thus subject to the reasonable demands of his employer. (Walton *De Bene Esse* Dep. Ex. 9). Dr. Moss also emailed Bauer stating:

Mr. Bauer,

Ms. Walton is correct in informing you that while you are on administrative leave, with pay, you are to report as requested. This is no different than if you were reporting to work at a school location. Ms. Walton has requested you attend a meeting with her and failure to do so without a valid reason could be considered insubordination.

This is our personnel policy and our administrative rule. The topic for the meeting is decided by Ms. Walton, not you. If you are requesting a change to your leave status please let me know, otherwise I can expect you to meet with Ms. Walton at the designated time.

(Tr. p. 308, ln. 24 – Tr. p. 309, ln. 8; Compl. Ex. 24; Walton *De Bene Esse* Dep. Ex. 9).

Bauer again indicated via email that he would not come to the meeting if it was not for reinstatement and stated his attorney was not available that day. (Tr. p. 309, ln. 9-12;

Walton *De Bene Esse* Dep. Ex. 9). Dr. Moss replied to Bauer allowing the meeting to be rescheduled and stating that Walton would be sending him a letter. (Compl. Ex. 27). Moss further stated that failure to comply with Walton's directives would be considered an act of insubordination. (Compl. Ex. 27).

Walton's letter to Bauer directed him to seek an examination by Dr. Mary St. John Gay, a mental health professional to whom the District had previously referred employees, and to submit her report by May 16. (Tr. p. 305, ln. 19-25; Walton *De Bene Esse* Dep. Ex. 10). At the hearing, Walton explained that she required the further assessment because she felt Bauer was still unable to understand the gravity of his actions and the District's level of concern, as demonstrated by his continued reluctance and refusal to meet with her. (Tr. p. 389, ln. 6-13).

On May 29, Walton wrote Bauer, reminding him of her directive that he meet with Dr. St. John Gay and indicating that if Bauer did not appear at a meeting scheduled for Monday, June 2, 2014, with Dr. St. John Gay's assessment, Moss would proceed with a recommendation for termination. (Tr. p. 311, ln. 14-25; Tr. p. 312, ln. 1-11; Walton *De Bene Esse* Dep. Ex. 12 & 19). Also on May 29, Superintendent Moss emailed Bauer, noting Bauer's continued refusal to cooperate with administration and warning that failure to comply with prior directives by June 2 would cause him (Moss) to proceed with a termination recommendation. (Compl. Ex. 40). In that email, Moss laid out the grounds then existing for termination, citing Bauer's negligence in leaving a student unattended off campus and Bauer's subsequent insubordination in refusing to cooperate with District officials in their attempt to bring resolution to the matter. (Compl. Ex. 40).

Bauer never provided the requested evaluation by Dr. St. John Gay and did not

meet with Walton on June 2, 2014. (Tr. p. 312 ln. 12-14; Tr. p. 313, ln. 7-10). Consequently, thereafter Walton recommended to Moss that Bauer's employment be terminated, citing the following reasons: Bauer's negligence in leaving a child at the recreation center on February 5; his inability to understand the severity of his actions; and Bauer's multiple refusals to meet and provide what was requested of him. (Tr. p. 313, ln. 11-24).

On June 5, 2014, Moss indicated to the Board that he was recommending Bauer be dismissed, subject to Bauer's right to an evidentiary hearing under the Act. (Compl. Ex. 41). Moss informed Bauer of his decision by letter dated June 6, 2014, in which he cited his May 29, 2014 communication as containing the grounds upon which his recommendation was based. (Compl. Ex. 41).

At the hearing before the Board, Moss testified that he felt Bauer had been "extremely insubordinate," and noted that he had given Bauer multiple opportunities to satisfy the directives provided by Walton. (Tr. p. 517, ln. 1-19; Tr. p. 519, ln. 2-9). Moss stated that his initial concerns about Bauer's behavior, which emerged during the investigation into Bauer's conduct on and just after the February 5 incident, coupled with Bauer's continued insubordination toward District officials, left him with no other choice but to recommend Bauer's employment be terminated. (Tr. p. 519, ln. 18-25; Tr. p. 519, ln. 1-16).

Bauer appeared *pro se* at the teacher dismissal hearing.<sup>4</sup> Bauer made a lengthy opening statement (*see generally* Tr. pp. 26 – 44), but he refused to testify or otherwise

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<sup>4</sup> In the months before the dismissal hearing, Bauer was represented by attorney Lauren Martel, Esq. For reasons unknown to the District, Martel did not represent Bauer at the hearing and appeared only as "a spectator." (Tr. 48, ln. pp. 19-21).

offer into evidence his numerous documents, despite being implored to do so by the Board and its advice counsel. (Tr. p. 556, ln. 23 – Tr. p. 563, ln. 12). Bauer was encouraged at least to testify to the information contained in his opening statement to place in the record some matter that could be considered evidence. (Tr. 558, ln. 25 – Tr. 559, ln. 18). Bauer was warned that if he waived his right to testify, the only evidence in the record supporting his position would be whatever relevant information he obtained from his cross-examination and the few documents that the Board admitted during that cross-examination. (Tr. p. 557, ln. 22 – Tr. p. 565, ln. 6). Bauer, in response to these admonitions, stated, “I understand and that is agreeable. Thank you.” (Tr. p. 565, ln. 7-8).

After Bauer informed the Board he would not himself testify, call any other witnesses, or make any statements under oath, counsel for the District’s administration moved to have all of Bauer’s documents not admitted into the record during the hearing removed from consideration by the Board, on the grounds that they were not offered or entered into evidence. (Tr. p. 563, ln. 15-20). Bauer verbally agreed that the record would contain only those documents entered into the record by the administration and by Bauer during cross-examination of administration witnesses. (Tr. p. 564, ln. 9-25 – Tr. p. 565, ln. 1-8).

On May 2, 2015, the Board voted unanimously to uphold Moss’s recommendation that Bauer be dismissed from employment. (Tr. p. 585, ln. 14-25). In its written Order dated, May 19, 2015, the Board found that there were good and sufficient reasons for terminating Bauer because, by his conduct, he manifested an evident unfitness for teaching. (Board Order, p. 10). Those reasons were based upon

Bauer's negligence in the supervision of students, particularly the incident of February 5, 2014, when he left a student behind at the rec center and his continued insubordinate conduct following that incident. (Board Order, p. 10-11).

### ARGUMENT

**I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT SUBSTANTIAL EVIDENCE SUPPORTED THE SCHOOL BOARD'S DETERMINATION THAT THERE WERE GOOD AND SUFFICIENT REASONS FOR TERMINATING BAUER'S EMPLOYEMENT.**

**A. The Standard of Review is Substantial Evidence on the Record As a Whole.**

South Carolina courts have long recognized that the scope of judicial review in appeals of decisions of school boards must be limited to an examination of the record of the School Board's evidentiary hearing to determine whether there is substantial evidence to support the board's decision. *See Laws v. Richland Co. Sch. Dist. No. 1*, 270 S.C. 492, 495, 243 S.E.2d 192, 193 (1978); *Kizer v. Dorchester Co. Voc. Educ. Bd. Of Trustees*, 287 S.C. 545, 548, 340 S.E.2d 144, 146 (S.C. 1986); *Hendrickson v. Spartanburg Co. Sch. Dist. Five*, 307 S.C. 108, 110, 413 S.E.2d 871, 873 (Ct. App. 1992); *Felder v. Charleston County Sch. Dist.*, 327 S.C. 21, 25, 489 S.E.2d 191, 193 (1997). Specifically, review of a school board's decision regarding teacher employment matters is limited to addressing the question of "whether the grounds given for termination of the [teacher's] employment are supported by substantial evidence." *Laws*, 243 S.E.2d at 193. Consequently, the reviewing court is only concerned with the existence of such evidence, not its weight. *Barrett v. Charleston Cnty. Sch. Dist.*, 348 S.C. 426, 434, 559 S.E.2d 365, 369 (Ct. App. 2001).

Substantial evidence is that, which "considering the record as a whole, would allow reasonable minds to reach the conclusion the [school board] must have reached in order to justify its action." *Hendrickson*, 307 S.C. at 110-11, 413 S.E.2d at 873. If substantial evidence exists, a court may not substitute its judgment for that of the school board, and the decision must be upheld. *Id.* This scope of review is intended to preserve the "powers, functions, and discretion which must necessarily be vested in educational authorities if they are to execute the duties imposed upon them." *Laws*, 270 S.C. at 495, 243 S.E.2d at 193.

**B. The Appeals Court Must Affirm the Circuit Court's Finding That There Was Substantial Evidence Supporting the School Board's Decision Because Bauer Abandoned This Issue.**

A party is bound by his statement of an issue on appeal. *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 350, 457 S.E.2d 626, 631 (Ct. App. 1995). "Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR; *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). Furthermore, where an issue is not argued within the body of the brief, it is abandoned on appeal. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004). An unappealed ruling is the law of the case and requires affirmance. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) *see also* *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

Bauer's appeal brief totally fails to address the essential determination of the School Board's Order and the Circuit Court's affirmance—that substantial evidence

supported the Board's decision to terminate Bauer's employment, pursuant to §§ 59-19-90(ii) and 59-25-430. A challenge to that determination is not presented as an Issue on Appeal; nor is it argued in the body of Bauer's brief. As judicial review of the Board's decision to terminate a teacher's employment is limited to the question of whether substantial evidence supports that decision, Bauer's failure to raise the issue or make any argument regarding this determination constitutes an abandonment of the issue and requires affirmance of the Circuit Court's decision upholding the School Board's action.

**C. Even If The Issue Were Not Abandoned, the Circuit Court Correctly Determined That There Was Substantial Evidence Supporting the School Board's Decision.**

The School Board terminated Bauer's employment pursuant to Section 59-25-430 of the Act, which states that a teacher may be dismissed if he "manifest[s] an evident unfitness" for the position. Section 430 provides a non-exhaustive list of the kinds of conduct for which a teacher in South Carolina can be dismissed: "Evident unfitness for teaching may be manifested by conduct such as, but not limited to, the following: persistent neglect of duty, willful violation of rules and regulations of district board of trustees, drunkenness, conviction of a violation of the law of this State or the United States, gross immorality, dishonesty, illegal use, sale, or possession of drugs or narcotics." § 59-25-430 (emphasis added).

The Board's decision to terminate Bauer's employment clearly is supported by substantial evidence produced during the Board's hearing, and from which reasonable minds can only conclude that his termination was justified. The Board's decision was based on 1) Bauer's negligent failure to properly supervise his students, coupled with his apparent failure to understand and appreciate the seriousness and

potential consequences of those actions, and 2) Bauer's willful refusal to follow the directives of his superiors.

As Bauer presented virtually no evidence in his defense, the evidence in the record fully supports the District administration's contention that Bauer failed to supervise his students on at least two occasions, as required by Board Policy IS-2. The most serious instance involved leaving a special needs student unsupervised at an off-campus community rec center. Bauer remained unaware that the student was left behind and when notified of such, he expressed little concern or regret about his actions. Bauer's defensive, unprofessional conduct continued after the incident and culminated in his refusal to meet with and comply with directives from District officials on at least three occasions. Bauer was warned repeatedly that his refusal to attend meetings and participate in the resolution process would be considered insubordination. Despite these warnings, Bauer continually and willfully refused to cooperate with the District's efforts to resolve the matter and permit Bauer to return to work.

At no point in his appeal of the Board's decision has Bauer contested the specific factual allegations against him or the District's claim that his behavior after the fact was insubordinate. Bauer's cross-examination of the Superintendent's witnesses and the few documents he entered into evidence did nothing to negate the allegations that Bauer left a child unsupervised off campus and thereafter refused to comply with reasonable directives by his superiors. For these reasons, the Court should affirm the Circuit Court's decision upholding the School Board's termination of Bauer's employment.

**II. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE DISTRICT COMPLIED WITH THE DUE PROCESS REQUIREMENTS PROVIDED BY THE TEACHER EMPLOYMENT AND DISMISSAL ACT.**

Bauer's "Statement of Issues on Appeal" seeks to raise issues related to asserted defects in the process leading up to and during his teacher dismissal hearing. (Second Amended Brief p. 4). The Circuit Court properly determined that, to the extent such contentions were preserved, Bauer received all process due under the Act. Bauer's failure to take advantage of the Act's procedural safeguards—specifically, his failure to retain counsel for the hearing and his refusal to testify or present any evidence of probative value—cannot constitute a due process violation. *See Stinney v. Sumter School Distr.* 17, 391 S.C. 547, 552, 707 S.E.2d 397, 399 (2011) (stating there could be no due process violation when the parents of a student challenging his expulsion failed to present evidence or exercise their statutory right to question witnesses).

**A. Initially, Bauer's Statements of Issues on Appeal are Procedurally Improper and Alone Warrant Affirmance of the Circuit Court's Final Order.**

Rule 208(b)(1)(B), SCACR states: "A statement of each of the issues presented for review . . . shall be concise and direct as to each issue . . . . Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." "Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). Issues on appeal which are not concise and direct, but rather broad general statements of error without

reference to the legal principles involved, ought to be disregarded by this Court. *Id.* at 348, 692 S.E.2d at 904.

Bauer's Statement of the Issues on Appeal are improper because they do not clearly state the alleged reversible error or the legal principles involved. For this reason, the Court need not consider these claims of error and may affirm on the ground that the Circuit Court's decision is supported by substantial evidence. *Id.* at 346, 692 S.E.2d at 903 ("Under the two-issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.").

**B. "Errors in the Order of the Court of Common Pleas"**

Bauer asserts that the Circuit Court's order contained "multiple errors," though he argues only one. Specifically, he objects to the Circuit Court's finding that his claim that he was terminated without a hearing was both unpreserved and baseless.

The Circuit Court correctly determined that this issue was not preserved because it was not addressed through the presentation of evidence and consequently not ruled on by the School Board. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon" below. (emphasis added)); *Butler v. Town of Edgefield*, 328 S.C. 238, 248, 493 S.E.2d 838, 843 (1997) (applying preservation principles to a hearing by the Election Commission in an election protest). Bauer failed to offer any admissible evidence on this issue, and therefore the Board had no basis or reason to rule on such an issue.

Even if this issue was preserved, the Circuit Court correctly determined that there was no evidence to support such a claim, based on Bauer's failure to testify or otherwise present relevant information.<sup>5</sup> Bauer's citations to matter stated within questions he himself asked witnesses on cross-examination (*see* Second Amended Brief, pp. 8-9) is not evidence, and in any event do not establish that he was terminated at some point prior to the hearing. Additionally, Bauer's continued assertion that the Superintendent's letter of June 6, 2014<sup>6</sup> demonstrated that he had been terminated without a hearing is plainly and demonstrably incorrect. As the Circuit Court correctly pointed out, the June 6 letter informed Bauer that the Board "conditionally accepted" Moss's recommendation, subject to Bauer's right to a hearing, and that no final decision would be made until the hearing was held. (*See* Compl. Ex. 41). Accordingly, the Circuit Court was correct in holding that there was no basis to conclude that Bauer's employment was terminated without or prior to the hearing.

**C. "District imposed 10 months of delays. . ."**

Bauer asserts that the District failed to hold a hearing within 15 days after receipt of his hearing request, in violation of S.C. Code Ann. § 59-25-470. At the time of Bauer's teacher dismissal hearing, Section 470 stated that a teacher dismissal hearing,

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<sup>5</sup> The July 1, 2014 "official termination documents" and the June 5, 2014 board minutes Bauer references (Second Amended Brief pp. 8-9) were not in evidence before the school board, *see supra*, pp. 2-3, and cannot be part of the record in this case. The District would dispute those documents demonstrate Bauer was terminated on that date. Although not entered into evidence, there was some discussion regarding the June 5, 2014 School Board meeting minutes. As the discussion makes clear, the document included a list of non-named employees ("Employee A, B, C . . .") whom the board voted to terminate. While Bauer initially assumed he was one of those employees, he was assured he was not, and he appeared to concede that he was not one of the unnamed employees. (Tr. p. 346, ln. 13-25; Tr. p. 348, ln. 10-13).

<sup>6</sup> Bauer cites a June 16, 2014 letter. However, no such document is contained in the record. Therefore, the District assumes Bauer means the June 6, 2014 letter.

properly requested by the teacher, “shall be held by the board no less than ten nor more than fifteen days after the request is served.”<sup>7</sup> This window of time in which to conduct a hearing was routinely waived by agreement of the parties, which is what occurred in this case. Though Bauer claims he never agreed to a delay and promised during his opening statement to show that to be the case (Tr. p. 38, ln. 11-24), the Circuit Court correctly determined that Bauer failed to produce any testimonial or documentary evidence during the teacher dismissal hearing in support of this contention.<sup>8</sup>

In his brief, Bauer admits that he presented no evidence supporting this issue (*see* Second Amended Brief at p. 11), and he instead cites to unsupported claims he made during his opening statement as evidence that he never agreed to a delay. (*See* Second Amended Brief at p. 10, citing Tr. p. 38, ln. 21-25, p. 39 ln. 1-7). The opening statement, which was not made under oath, is not evidence in this case, as Bauer was repeatedly advised during the hearing. (*See generally*, Tr. pp. 557-563). Bauer ignored exhortations by the Board and its counsel to at least testify about the matters in his opening statement so that the information could be considered evidence. Bauer, however, steadfastly declined, stating that he believed “all of the main points” of his opening statement had been reinforced through witness testimony. (Tr. pp. 557, ln. 22 – Tr. p. 563, ln. 1-12).

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<sup>7</sup> In 2016, the statute was amended to state: “The hearing must be held by the board, or its designee, within forty-five days after the request is served.” S.C. Code Ann. § 59-25-470. The statute was amended in recognition of the fact that the 15-day deadline was, in most cases, impractical.

<sup>8</sup> Bauer cites to several documents in this section of his brief that were not presented to the School Board and are therefore not properly before this Court. *See supra*, pp. 2-3

Therefore, the Circuit Court correctly determined that there was no evidence to support Bauer's allegation that he did not agree to waive the 15-day deadline.<sup>9</sup>

Bauer also fails to allege that he was prejudiced by the delay. *See e.g., Olson v. S. Carolina Dep't of Health & Env'tl. Control*, 379 S.C. 57, 69, 663 S.E.2d 497, 504 (Ct. App. 2008) (stating that the appellant has the burden of demonstrating prejudice to prevail on a due process claim). The fact that Bauer hired an attorney, engaged in extensive discovery, including conducting depositions of all witnesses, suggests not only that he acquiesced to the delay but also that he utilized the extra time to prepare a case.

Bauer's discussion regarding teacher renewal deadlines listed in Section 59-25-410 is not relevant to this appeal. As was made clear to him during the hearing, his case involved termination rather than non-renewal of his contract. (Tr. p. 347, ln. 1-4). Accordingly, the timelines governing non-renewal is not applicable to this case.

To the extent Bauer asserts he did not receive written notice of the reasons for his dismissal, the Circuit Court correctly determined that the communications from Superintendent Moss to Bauer—specifically Moss's email to Bauer on May 29 (see Compl. Ex. 40) and Moss's subsequent letter dated June 6 (see Compl. Ex. 41)—

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<sup>9</sup> Bauer cites two circuit court decisions, *Middleton v. Charleston County School District*, Case No. 2013-CP-10-7094 (October 21, 2014) and *Fields-Lary v. Charleston County School District*, 2014-CP-10-1480 (October 22, 2014), neither of which are precedential or on point. In *Middleton*, the court found that school district improperly delayed a teacher contract non-renewal hearing by four months, noting that there was evidence showing the teacher agreed to only a limited waiver of the 15-day timeline "on the express condition that the hearing be conducted no later than June 15, 2013." (*Middleton* Order, p. 6). In *Fields-Lary*, also a teacher contract non-renewal case, there was evidence the teacher never agreed to extend the 15-day deadline. (*Fields-Lary* Order p. 7) In Bauer's case, he put forth no evidence of his refusal to agree to the extension, though he initially stated he would do so. Furthermore, unlike Bauer's case, the circuit court in *Middleton* and *Fields-Lary* found substantial evidence did not support the Board's decision regarding non-renewal. (*Middleton* Order p. 11-12; *Fields-Lary* Order p.10-11).

provided more than adequate written notice of the reasons supporting the recommendation for dismissal and subsequent decision to terminate. As the Circuit Court found, the statement of reasons satisfied the notice requirement of section 59-25-460. The May 29 email from Moss to Bauer specifically states Bauer's infractions, beginning with the February 5 incident in which Bauer left a special needs student unsupervised. (Compl. Ex. 40). The email continues with a listing of the various meetings Bauer refused to attend and the directives issued by Walton and Moss that Bauer ignored. (Compl. Ex. 40). Moss's letter to Bauer on June 6—the official notice of Moss's intent to seek Bauer's termination—stated: "The bases for the recommendation include the grounds provided to you in my email dated May 29, 2014." (Compl. Ex. 41). Therefore, Bauer cannot reasonably argue that he was unaware of the reasons upon which Moss based his recommendation for dismissal.

#### **D. "False Evidence"**

Bauer complains that the District administration knowingly caused the admission into evidence of a false attendance book (*see* Walton *De Bene Esse* Deposition Ex. 2), and a letter written by McAden that was "falsely dated" (*see* Compl. Ex. 17). (Second Amended Brief pp. 16-17). Initially, this issue is unpreserved because the School Board was not presented with evidence on this question and therefore did not rule on the issue.<sup>10</sup> *Wilke*, 330 S.C. at 76, 497 S.E.2d at 733; *Butler*, 328 S.C. at 248, 493 S.E.2d at 843.

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<sup>10</sup> In a motion before the Circuit Court, Bauer sought to conduct a forensic investigation to determine whether the McAden document was falsely backdated. (*See* March 2 Order; *see* also February 29 Hearing Tr. pp. 1-18, 44-48). The Circuit Court correctly determined the motion was improper and denied it because its purpose was to introduce evidence into the record that was not before the Board. (*See* March 2 Order). The Circuit Court also stated there were "serious questions" as to the relevance and/or probative value of the information Bauer sought. (*See* March 2 Order).

On the merits, there is no evidence demonstrating that the documents were false or that they were admitted with knowledge of their falsity. Bauer objected to the admission of a gradebook he turned over during discovery (*Walton De Bene Esse Dep. Ex. 2*) on the grounds that it was a copy, not his original. (Tr. p. 185, ln. 20-21). Bauer agreed that he would produce the original copy during his testimony. (Tr. p. 230, ln. 8 – Tr. p. 231, ln. 3). Similarly, when Bauer’s questioning of McAden regarding her December 2013 letter suggested it was not written on the date recorded (Tr. p. 218, ln. 15-25), Bauer was reminded that he could express his views about the authenticity of the letter during his testimony. (Tr. p. 219, ln. 1-9). As noted above and throughout this brief, Bauer chose not to testify. Therefore, to the extent Bauer believed he could have demonstrated these documents were false, his failure to testify about these matters or present evidence discrediting them precludes a finding by this Court that the documents were in any way false or that they were admitted with knowledge of their falsity.

Finally, Bauer has not indicated how the admission of these documents impacted the case. Neither of these exhibits relate to the reasons for which Bauer was terminated.

**E. “Why not Testify? The Case was Won”**

In his brief, Bauer asserts, incredulously, that he did not testify because he felt that the Board was “sympath[etic]” to him, that he wanted to avoid being cross-examined, and that he intended all along to present his case through the District’s witnesses only. (Second Amended Brief p. 17). Nothing in the record supports these assertions. Moreover, these explanations neither excuse Bauer’s failure to testify nor salvage any of his arguments, which remain factually unsupported. Finally, it is not clear what reversible error on the part of the School Board is being alleged here. For these

reasons, the Court need not consider this argument. *See Jones*, 387 S.C. at 346, 692 S.E.2d at 903 (requiring that appellant's grounds for appeal should be clear without forcing the court to "grope in the dark" to ascertain the precise point at issue).

Bauer also asserts that 17 documents which he claims he entered into the record disappeared. To the extent Bauer asserts there was error on the part of the School Board, this issue is unpreserved, as he did not raise it to the School Board or the Circuit Court. Regardless, Bauer agreed that the Board Chair's notes as to what was admitted, and what was not, would confirm which documents actually were entered into evidence. (Tr. p. 565, ln. 21 – Tr. p. 566, ln. 23). Bauer further fails to state what impact the documents, had they been entered, would have had on the issues, and, therefore, fails to demonstrate what harm resulted from these documents not being available to him on appeal.

To the extent Bauer asserts Board counsel improperly influenced the Board's decision, this issue is not preserved because Bauer made no objection to Board counsel's presence as advice counsel during the hearing. Further, there is no evidence any improper influence occurred.<sup>11</sup> Instead, the record demonstrates Board counsel did much to assist Bauer, especially through his several attempts to convince Bauer to testify so that his position would be supported by some evidence in the record. Bauer's reliance on *Gonzales v. McEuen*, 435 F. Supp. 460 (C.D. Cal. 1977), is misplaced. In that case, the attorneys prosecuting the case also served as legal advisors to the board. *Id.* at 465. In Bauer's case, the School Board's advice counsel did not prosecute the case, and was not affiliated with the administration's attorneys who prosecuted the case.

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<sup>11</sup> It should be noted that Bauer moved to have Board counsel dismissed as the attorney in this appeal because of his role as the Board's advice counsel in the hearing before the board. (See January 19, 2016 Hearing Tr. 1-5, 11-17). The Circuit Court properly denied that motion because no impropriety exists. (See Feb. 19 Order).

## F. “Additional Violations”

Under the section entitled, “Additional Violations,” Bauer lists various alleged “violations” by the School Board which he, presumably, believes amount to reversible error. However, these allegations are not explicitly listed in his Statement of Issues on Appeal and they are not sufficiently argued as they are unmoored from the facts of this case. Rule 208(b)(1)(D), SCACR requires that each particular issue be particularly listed “followed by discussion and citations of authority.” Where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) (citing *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001)).

Bauer has not properly argued the alleged additional violations. He makes no attempt to explain what the legal errors are or explain the alleged errors in terms of the facts of this case. He makes no arguments supporting the notion that these alleged violations are prejudicial or constitute reversible error. Item 54 improperly states what is required under section 59-25-430. *See* Section I. C. *supra*. Item 55 refers to the requirement for an improvement plan to be offered to teachers under Section 59-25-440. However, as the Circuit Court properly explained, this issue was not preserved because it was not raised to and ruled on by the School Board, nor is it relevant to this case as Bauer was terminated under Section 59-25-430, as noted in Section I. C. *supra*, not Section 59-25-440. (*See* Final Order p. 20). Item 56 does not allege any error or harm. Item 57, referring to a “technical violation” regarding the timely filing of the hearing transcript, is not preserved, nor is any harm alleged. Items 58-69 consist of one or two sentence

allegations of error with no discussion of facts or accompanying argument. The Court must treat these conclusory allegations as abandoned. *See Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n. 2, 433 S.E.2d 871, 873 n. 2 (Ct. App. 1993) (stating a one sentence argument is too conclusory to present any issue on appeal).

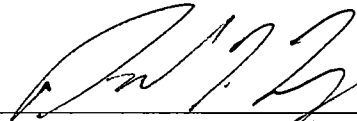
### CONCLUSION

Substantial evidence in the record created before the School Board supports its decision, upheld by the Circuit Court, to terminate Bauer's employment as a teacher. By his own election, Bauer chose not to present evidence before the Board. During the appeal to the Circuit Court and this Court, Bauer has made factual assertions and related arguments for which there is no basis in the record. The Court should reject such efforts by Bauer and disregard his improper factual and legal claims.

For the reasons provided above, this Court should affirm the Circuit Court's order upholding the School Board's decision to terminate Bauer's employment.

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Respectfully Submitted,



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October 10, 2016

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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SC Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

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

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Case No. 2015-CP-07-1343  
Appellate Case No. 2016-000955

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John Alden Bauer, III,

Appellant,

v.

Beaufort County School District,

Respondent.

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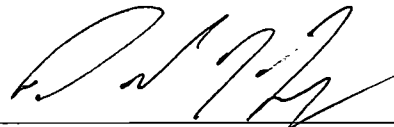
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I certify that I have served Respondent Beaufort County School District's Initial Brief, by depositing a copy of it in the United States Mail, postage prepaid, on October 10, 2016, addressed to *pro se* Appellant John Alden Bauer, III, 5 Gumtree Road E-11, Hilton Head Island, South Carolina, 29926.

October 10, 2016

*SEE SIGNATURE NEXT PAGE*



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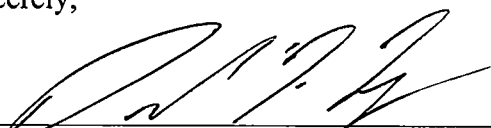
Re: John Alden Bauer, III, v. Beaufort County School District  
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Dear Ms. Allen:

Enclosed for filing is the original and six copies of Respondent Beaufort County School District's Initial Brief with Proof of Service for same.

Thank you for your assistance in this matter.

Sincerely,



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