THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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Case No.: 2015-CP-07-1343
APPELLATE CASE NO. 2016-000955

John Alden Bauer, III — Appellant

v

Beaufort County
School District — Respondent

SUPPLEMENT TO FINAL BRIEF OF APPELLANT

APRIL 18, 2017

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Moody vs. Dairyland Ins. Co., 354 S.C. 28, 30-31, 579 S.E.2d 527, 529 (Ct. App. 2003) (cited in Fields-Lary) Pages 12

South Carolina Teacher Employment and Dismissal Act ("TEDA") Act 59-25-430 through 59-25-480. Pages 5, 7, 8, 9, 12

(B) Statement of Issues on Appeal

The issues involve the Teacher Employment and Dismissal Act, Sections 59-25-410, 440, 450, 460, and 470; id est, termination prior to the hearing, delay of process, no administration of Professional Improvement Plan; also false evidence knowingly admitted, misstatements in orders, and refusal to respond to FOIA Requests, a misdemeanor.

(C) Statement of the Case

1. February 5, 2014. John Alden Bauer, III was placed on Paid Administrative Leave.
2. February 5, 2014. Principal McAden was ordered to preserve evidence.
3. April 14, 2014. Appellant signed new contract.
4. May 21, 2014. George McMaster wrote Litigation Hold Letter to Preserve Evidence, as final act as pro bono consultant (McMaster was closing his law practice).
5. June 5, 2014. Board votes to terminate Appellant. No hearing had been scheduled.
6. June 21, 2014. Appellant appeals Board action and issues FOIA Request. No response to FOIA Request.
7. July 1, 2014. Termination takes effect.

8. July 7, 2014. Appellant Petitions Board for Reinstatement based on violation of 15 day requirement for hearing. No Response.

9. September 2, 2014. Board ratification of termination is published on web.

10. October 21, 2014. Appellant again petitions Board for hearing. No response.

11. Depositions are held beginning on December 16, 2014 and continuing into February, 2015.

12. April 30-May 2. 2015. Beaufort County Board of Education Hearing.

13. May 29, 2015. Appellant appeals to the Court of Common Pleas

14. July 8, 2015. Attorneys of Record for Superintendent/District/Board Fired. Duff White and Turner retained.

15. March 1, 2016. Hearing in Court of Common Pleas. Considered three motions to compel. All denied.

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

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

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

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

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

Arguments

Violation of The Teacher Employment and Dismissal Act ("TEDA") 59-25-460 (S.R. p. 816) *"No teacher shall be dismissed unless...and an opportunity for a hearing has been afforded the teacher."*

2014 Appellant Terminated

2015 Appellant's Hearing

That is illegal (according to this court) Brown v. James, 697 S.E. 2d 604, 389 S.C. 41 (2010) (S.R. pp. 829-836)

It is a fact that Appellant was terminated, with finality, without a hearing. That action became effective on July 1, 2014, ten (10) months before the hearing, and Appellant's employment and salary ceased on that same July 1. (The superintendent's June 6, 2014 file letter containing the word "conditional" was what *should* have been the case, but was not.)

In testimony, Superintendent of Schools Jeffrey C. Moss and the Human Resources Officer Alice Walton confirmed the finality of the termination as shown in the Record. (below)

Walton Testimony (S.R. p. 471, line 15)

"....asked on February 5th, 2015, if Mr. Bauer was terminated by the Board without a hearing," (Walton) *"That is correct."*

Q "Concerning Mr. Bauer's termination on June 5th..."

A (Moss) "*The termination was embedded in two actions.....*" (S.R. p. 665, line 15)

"Notice before termination and notice after termination are not two sides of the same coin. (S.R. p. 834, paragraph 3). Brown v. James.

The fact of final termination on June 5, 2014, by the board was never disputed at the hearing. The board that invoked the illegal termination was now, in 2015, acting as jury, and found no fault with itself.

This court's decision in Brown is widely regarded as definitive on the subject: *"Twenty years later, in Brown v. James, the Court of Appeals held that the language of TEDA is unambiguous regarding procedure and that 'the observance of the procedural requirements of the Employment and Dismissal Act is* ***mandatory and not a matter of discretion****. Only two years ago our Supreme Court reversed the decision of the Young v. Charleston County School District board for violating teacher rights provided in TEDA."* Fields-Lary, page 6 (Brown v. James, 697 S.E. 2d 604, 389 S.C. 41 (2010) (R. pp. 262-273; see page 267, paragraph 1, last sentence)

Will this court contradict its own rulings?

Violation of TEDA 440

SECTION 59-25-440 *"...school administrator required to make reasonable effort to assist teacher in corrective measures; reasonable time for improvement required."*

Alice Walton, Human Resources Officer: *"We were dealing with an employer-employee action, to place an employee on a plan for improvement"* (S.R. p 543, lines 9-10)

Improvement Plan: ordered by Respondent, submitted by Appellant, and then ignored by Respondent (TEDA 440) (R. p. 274)

From Appellant: *"I've provided...a professional improvement plan, which has been ignored."* Email to Walton and Moss. (S.R. p. 823. Line 2)

What else needs to be known? Respondent violated TEDA 440. No one can change the facts.

DELAY

Violation of TEDA 59-25-470 (S.R. p. 817) ***"The hearing shall be held by the board not less than ten nor more than fifteen days after the request is served."***

The *"Plain Meaning Rule"* applies.

Appellant never asked for, nor did he agree to waive the fifteen (15) day requirement. Respondent has offered no evidence to justify

dictating a delay. Attorneys for Respondent had over five months to prepare and should have been able to comply with the law.

"Unless expressly given, administrative agencies do not have authority to waive statutory requirements." Ray Bell Construction Co, Inc. v. School District of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998)(24790)

The board's ignoring its own violations of law, and the lower court ignoring the board's violations of law, are compelling errors.

Violation of TEDA 59-25-410

Appellant signed a new contract on April 14, 2014. The superintendent cannot unilaterally non-renew, or terminate a contract by merely recommending such action to the board.

From David T. Duff, Counsel for Respondent, (S.R. p. 162 lines 5-15): *"As a result of the court's decision in Brown vs. James, it is clear that school boards may no longer make initial decisions to accept or reject a superintendent's non-renewal recommendation prior to an evidentiary hearing, if such a hearing is requested. What is not clear is whether hearings must be conducted prior to April 15th or simply the*

notice of the non-renewal recommendation, and that the opportunity for a hearing is to be given prior to April 15th." David Duff website, September 2010 (S.R. pp. 837-838, see last paragraph)

Mr. Duff, Counsel for Respondent, makes it clear in that article that the hearing should either have been held by, or been scheduled by April 15, 2014, therefore, the imposed delay was a full year.

False Evidence

Violation of the South Carolina Rules of Professional Conduct

Rule 3.3 [4], [5], [6]

The Respondent's attorneys, Chairman Evans, and Mr. Duff knowingly allowed a false (Walmart) roll book, or attendance book, to be presented. All attorneys and Mr. Evans had been informed that the true attendance book had been confiscated and withheld. (S.R. p. 305, lines 8-10, S.R. p. 307, lines 5-16)

In addition, Appellant informed the board: (S.R. p. 148, lines 1-4) *"...some of the evidence that the opposing counsel will use is misrepresented. Pay particular attention to what they claim is my class record book."*

The withheld true attendance/grade book was sent inadvertently, after the hearing, to Dr. John Bauer, of Columbia, along with a set of master keys (!) to the Beaufort County School District Offices. (Also enclosed were 13 un-redacted confidential student files, a violation of the Family Educational Rights and Privacy Act ("FERPA")

More False Evidence

The principal who allegedly had hidden the true attendance/ grade book also swore that she wrote a letter on her *office computer*, critical of Appellant. The authenticity of the letter was questioned by a board member. (S.R. p. 382, line 15, to S.R. p. 383, line 6)

Attorneys for Respondent knew that the letter had no letterhead, allegedly was never delivered, contradicted known facts, and referred to an event yet to happen, but it was presented by attorneys for the district as evidence. (District exhibit #17; S.R. p. 776)

Appellant alleges that the letter, dated December 10, 1013 [sic], was actually written six (6) months later, on or about June 27, 2014. Respondent refused to authenticate the letter, a one moment--three (3) click operation, at no cost. (S.R. p. 338, lines 12-22). In fact they could have simply taken a screen shot of the computer showing the creation date and modification dates of the letter.

A Motion to Compel authentication was denied by the Honorable Marvin H. Dukes, III, an alleged error by the lower court.

Refusal to perform such a simple task should be considered as *"Consciousness of Guilt."*

No Statement of Charges

"The complainants shall initiate the introduction of evidence in substantiation of the charges." TEDA 470 (S.R. p 276)

Asked if the May 29 email contained the charges. Superintendent Moss said *"No, ..."* (S.R. p. 650, line 13-16)

No charges were ever issued by the Board, or by anyone. (TEDA 460) (R. p. 275).

"It is a well-established legal principle that where the terms of the statute are clear, courts must apply those terms according to their literal meaning without resort to subtle or forced construction to limit or expand the statute's operation." Moody v. Dairyland..." Page 8 of Fields-Lary

The Psychological Impact of Misstatement of the Facts

No witness for the district personally observed any of the allegations against Appellant and there was no investigation (S.R. p. 698, lines 11-21). Surmises were accepted as evidence.

The Misstatement. In the orders written by Respondent's counsel, the inaccurate accusation is always that Appellant *left* a *disabled* (sometimes called *challenged*) student *unattended* *off-campus*.

The Truth. There were five (5) adults in attendance, two of the adults were employees of the Recreation Center, and no child was ever unsupervised or unattended. Three (3) schools and the Recreation Center are on district property, with the Center being adjacent to the elementary school, i.e., "on campus". The additional child was not part of the class of 23 that went to the pool. The class of 23 was returned, in its entirety, to the satisfaction of the classroom teacher. No one knows when or how the additional (gifted and talented) child arrived, where he hid, why he was reported to have an unexcused tardy that day, or why his mother was en route to the school.

None of Respondent's witnesses were present at the pool event and there was no investigation (S.R. p. 698, lines 11-21).

Another Misstatement. Respondent's counsel insists that Appellant showed no remorse. Attorneys from Childs and Halligan heard Appellant repeatedly take responsibility for the incident, and in the Record Appellant is transcribed as saying, **"A child was left behind. I was responsible for that, and it bothered me a lot." (S.R. p 153, line 15)** Perhaps it is fair to say that Appellant took more than his share of the blame.

Much was made of the fact that Appellant used the word "ridiculous" to describe the treatment that he was receiving. No mention was made that he also apologized for saying that.

CONCLUSION

The misstatements and omissions by Respondent paint a picture of an *unfit* teacher protesting his firing. Not one witness in over 500 pages of testimony ever said that the Appellant was unfit. In fact they praised his teaching. Donald O. Clendaniel, Assistant Principal, *"...he was a good teacher. He seemed to love what he did, love children."* (S.R. p. 245, line 17)

It is in the record that PTO (same as PTA) President Tammy Downing, who attended the swim classes as a parent volunteer, wrote to Superintendent Moss 1,005 words in support of Appellant. Among her

words: *"He truly is an amazing teacher, a positive role model to our students and provides an environment for our children to learn from and be productive. I am hoping that Mr. Bauer is back at IB in September or sooner! The students would be overcome with excitement!! Many Many parents would be as well!"* (S.R. p 667, line 9, to S.R. p. 671, line 16; S.R. pp. 854-855)

And Marine Colonel Gregory Hall of Parris Island also wrote a lengthy letter in support of Appellant, also in the record: *"If Mr. Bauer has been accused of disrespectful or disruptive behavior, that is certainly contrary to my own experience. I absolutely believe he has been a positive influence on my three children and their attitudes toward Physical Education and school in general. "* (S.R. p. 674, line 1-9, and S.R. p. 858)

Superintendent Moss, who pleaded guilty to Ethics Violations, recommended to The South Carolina Department of Education that Appellant's Teaching Certificate be revoked. The department conducted a lengthy investigation and dismissed the superintendent's recommendation.

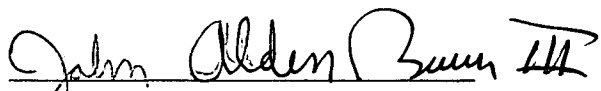
NOTE ON OBEDIENCE TO LAW

Appellant had believed that observance of law would be automatic for the District, the board, and the attorneys. When the District failed to

acknowledge or respond in any way to two FOIA Requests, Appellant pointed out to all concerned, including the lower court, that failure to respond to a FOIA Request was a misdemeanor in both federal and state law (Title 30, etc.). That law was, and still is, ignored by the District without punishment, without a sense of professional integrity, or the decency of remediation.

FROM THE STATE, March 21, 2017, quoting from The Herald Journal, Spartanburg. *"There is little recourse when ...school districts refuse to follow the law. Anyone who wants to enforce the law must sue the public body violating it. That's a level of time and monetary resources to which few individuals or groups cam commit. Public bodies know this, so they are often flagrant in their disregard for the law."*

Respectfully Submitted,



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PROOF OF SERVICE

I certify that I have served the SUPPLEMENT TO FINAL BRIEF OF APPELLANT by United States Mail, postage prepaid, on April 18, 2017 addressed to the attorney of record, David T. Duff, of Duff White and Turner, 3700 Forest Dr., Suite 404, Columbia, SC 29204.

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