

92015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Honorable J. Mark Hayes Jr., Circuit Court Judge

Docket Case No. 2015-CP-11-0828
Appellate Case No. 2017-001466

RECEIVED
JAN 28 2017
SC Court of Appeals

Sharon Brown, ... Appellant,

vs.

Cherokee County School District, ... Respondent.

APPELLANT'S PETITION FOR REHEARING WITH SUGGESTION EN BANC

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INTRODUCTION

Pursuant to Rule 221, SCACR, Sharon Brown, a school teacher, petitioner and appellant petitions this court for a rehearing with a suggestion *en banc* on the above-entitled matter after an unpublished opinion dated January 15, 2020 was issued which affirmed the decision of the circuit court judge who upheld the decision of the Cherokee County School Board Trustees to terminate the teaching employment contract of Brown. It is to be noted that no argument has been waived in our brief and we assert them fully as supplemental to this Petition for Rehearing.

Additionally, in no way should this Petition be construed as an attack on the Circuit Court Judge who I consider to be a fine judge with exemplary standards and character and on this Panel as well. Nevertheless, from the record below it is clear that the District failed to do the following:

1. The District never presented a certified record from the School District signed by an agency official as mandated by Rule 75 SCRCRCP or S.C. Code 59-25-480.
2. The transcript of the hearing below was certified by the Court reporter and not by an agency official.
3. A certified order was not filed with the Clerk of Court's Office within 30 days of the filing of an appeal by Brown with the Circuit Court.
4. The vote of the Board of Trustees ratifying Brown's termination was not certified within thirty days to the Clerk of Court of Cherokee County as required by Rule 75 SCRCRCP and S.C. Code 59-25-480.

The record reflects the following:

1. Brown files notice of appeal with circuit court and district.
2. District has 30 days to have an official of the District sign a certified transcript of record below. Here the District only filed the court reporter certified Transcript of the Teacher Dismissal Hearing.
3. District then transmitted this non-agency official Certified Transcript to the Cherokee County Clerk of Court's Office for filing.

4. District's transmittal must be more than the just the record of the hearing below but must include any relevant Certified orders of the District and the certified vote of the District Board of Trustees.
5. Then Brown filed briefs and other exhibits with the Circuit Court.
6. The Circuit Judge stated that he considered the following: "After reviewing the transcript of the School board's hearing and the exhibits presented as a part of the hearing's record, reviewing the pleadings and brief's in the Clerk of Court's file, considering the arguments presented by counsel, and applying the required standard of review, the School Board's decision is affirmed."
7. The School Board Chair Stated: "We thank everyone for their participation in the hearing and ask that you please excuse us now so we can begin our deliberation. As I indicated at the beginning, the Board will deliberate in executive session at the close of the summation. No votes will be taken in executive session. The Board will vote in open session and announce its decision. Within 10 days a written decision of the Board will be issued consistent with the Board's announced decision, the evidence presented, and applicable law." **Supplemental Record on Appeal page 442 lines 14-25.**
8. Then a decision and judgment is rendered by the Circuit Court Judge.

We believe that the Court applied a standard of review not warranted by the facts and law in this case. In this regard we believe that it is understandable that the Panel misconstrued and misapplied its application of Code §59-25-480 and SCRPC 75 where the Court did not take the opportunity to discuss the gaps in S.C, Code §59-25-480. Moreover, we also believe that the Circuit Court judge was hamstrung by the misrepresentations of the District about whether the record in the School District was complete and certified by the requisite agency official as contemplated under S.C. Code §59-25-480 and Rule 75 SCRPC. We also believe that the District's legal counsel was confused and as such committed the logical fallacy of equivocation by equating the Transcript of the Teacher Dismissal Hearing, which transcript was certified by the court

reporter, as the complete record on appeal before the Circuit Court as of December 1, 2015.

Additionally, we respectfully believe that this Court overlooked its own precedent *Tony v. Lee County School District*, 419 S.C. 210, 797 S.E.2d 55 (Ct. App. 2017) as it related to termination of Brown's contract under the substantial evidence standard of proof.

ARGUMENT I

Did the School District Violate the Mandatory Commands of S.C. Code §59-25-480 And Rule 75 SCRPC by Not Filing A Record Certified by The Chief Official of The School Board of Trustees Within 30 Days After Brown the Petitioner Filed Her Notice of Intent to Appeal?

CONCLUSION

A School District Violates the Mandatory Commands of S.C. Code §59-25-480 And SCRPC 75 by Not Filing A Record Certified by The Chief Official of The School Board of Trustees Within 30 Days After Brown, the Petitioner, Filed Her Notice of Intent to Appeal.

The Court of Appeals appears to have overlooked the relationship between S.C. Code §59-25-480 and Rule 75 SCRPC. From precedent it appears that both should be read together.

S.C. Code §59-25-480 provides:

(A) The decision of the district board of trustees is final, unless within thirty days afterward an appeal is made to the court of common pleas of any county in which the major portion of such district lies.

(B) Notice of the appeal and the grounds thereof shall be filed with the district board of trustees. The district board shall, within thirty days thereafter, file a certified copy of the transcript record with the clerk of such court. An appeal from the order of the circuit court shall be taken in the manner provided by the South Carolina Appellate Court Rules. If the decision of the board is reversed on appeal, on a motion of either party the trial court shall order reinstatement and shall determine the amount for which the board shall be liable for actual damages and court costs. In no event shall any

liability extend beyond two years from the effective date of dismissal. Amounts earned or amounts earnable with reasonable diligence by the person wrongfully suspended shall be deducted from any back pay.

SCRCP 75 provides in part:

Appeals to the circuit court shall be made upon the original record in the lower court or administrative agency or tribunal. Upon filing of notice of appeal in an action the original record shall be certified by the clerk of the inferior court or administrative agency or tribunal.

The general proposition under the APA § 1-23-380 is that a party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1. Judge Geathers goes on to state that all the courts have applied APA standards to certain school board administrative decisions. See *Brown v. James*, 389 S.C. 41, 697 S.E.2d 604 (2010).

In the context of school district terminations of teachers, the school district is looked upon as an agency as defined in the Administrative Procedures Act. See *Brown v. James*, 389 S.C. 41, 697 S.E.2d 604 (2010), also see *McWhirter v. Cherokee County School District 1*, 274 S.C. 66, 261 S.E.2d 157 (1979). "The observance of procedural requirements of the Employment and Dismissal Act is mandatory and not a matter for discretion." *Brown v. James*, 389 S.C. 41, 697 S.E.2d 604 (Court of Appeals 2010).

In *Brown v. James*, the school district prevented Brown from having a due process hearing. *Brown v. James supra*. It is noteworthy to state that this is the same Sharon Brown that is presently before the court and the panel.

Here, Brown exhausted her administrative remedies. The district in turn was duty bound to strictly comply with South Carolina Code § 59-25-480 which by its own admission, the district did not do. See *Brown v. James supra*.

The appeals panel understandably misconstrued and misapplied an erroneous standard of proof in its finding that there was substantial evidence that the trial transcript was filed. The Panel did not properly apply South Carolina Code § 59-25-480 and Rule 75 SCRPC.

Respectfully, the District did not submit the entire record below. The way the process should have worked is as follows:

1. Brown files notice of appeal with circuit court and district.
2. District has 30 days to have an official of the District sign a certified Record of all the proceedings and documents below.
3. District then must transmit this Certified Record to the Cherokee County Clerk of Court's Office for filing.
4. District's transmittal must be more than just the record of the hearing below but must include any relevant Certified orders of the District and the certified vote of the District Board of Trustees.
5. The Appellant then has a due process hearing before the Circuit Court applying the substantial evidence standard of proof.
6. Then a decision and judgment is rendered by the Circuit Court Judge.

What was not done in this case:

7. The District never presented a certified record from the School District signed by an official as mandated by Rule 75 SCRPC or S.C. Code 59-25-480.
8. The transcript of the hearing below was certified by the Court reporter and not by an agency official.
9. A certified order was not filed with the Clerk of Court's Office within 30 days of filing of an appeal by Brown with the Circuit Court;
10. The vote of the Board of Trustees ratifying Brown's termination was not certified within thirty days to the Clerk of Court of Cherokee County as required by SCRPC 75 and S.C. Code 59-25-480.

Since the School District transmitted what we say is a defective and incomplete non-certified “record” to the Circuit Court, the Circuit Court judge could not properly consider and apply the substantial evidence standard of proof without running afoul of both due process and equal protection clauses of both the South Carolina Constitution, the Federal Constitution and mandatory State Statutes, such as 59-25-480 and Rule 75 of SCRPC. The Statutory provisions of the Act governing teacher dismissals are mandatory on all parties.

Since S.C. Code §59-25-480 only deals with part of the transmittal process. It is clear that the Rule 75 fills in the gaps and list the administrative agency’s clerk, then if no agency clerk, then some other top official as being charged with certifying the transmittal of the record from the School board of trustees to the Circuit Court Clerk. Here legal Counsel for the School Board of Trustees of Cherokee County gives the impression from her December 1, 2015 letter that she filed a certified transcript. This hearing transcript was certified by the Court Reporter. However, Ms. White has not identified any school board official who signed off and certified the record that was ultimately transmitted to the Clerk of Court of Cherokee County. Not having done this, due diligence renders the “Record’ before the Circuit Judge defective and a nullity in terms as to what was ordered in the way of termination of Brown since no valid order existed before the Circuit Judge.

Filing a defective uncertified record does not excuse the District from filing a certified record.

Additionally, the District’s legal counsel’s letter to the Court of Appeals dated November 22, 2017, the School Board’s counsel states that she filed the Transcript of record on December 3, 2015 which is a different date than what she represented in her letter dated December 1, 2015. Additionally, the School Board claims that the only record

they submitted to the Cherokee County Clerk of Court was the Transcript of the Hearing below that was typed by the court reporter. This is significant because Judge Hayes only considered the following:

“After reviewing the transcript of the School board’s hearing and the exhibits presented as a part of the hearing’s record, reviewing the pleadings and briefs in the Clerk of Court’s file, considering the arguments presented by counsel, and applying the required standard of review, the School Board’s decision is affirmed.” R. p. 2.

As has been adverted to Rule 75, states in pertinent part, appeals to the Circuit Court shall be made upon the original record in the lower court or administrative agency or tribunal. Upon filing of notice of appeal in an action, the original record shall be certified by the clerk of the inferior court, or administrative agency or tribunal and transmitted within 30 days to the clerk of court to which the appeal is taken. If the lower court, agency or tribunal has no clerk, then the original record shall be certified and transmitted by the judge or chief official of the lower court, agency or tribunal. (Emphasis added).

In this case, we have not been provided with the name of the person who properly certified the record from the School Board of Trustees of Cherokee County to be transmitted to the Cherokee County Clerk of Court within the thirty (30) requirement under both the Statute and the Rule 75. Moreover, the Court reporter does not appear to be listed in either S.C. Code §59-25-480 or Rule 75 of the SCRCF.

Respectfully, the Panel’s finding that the District “...has provided substantial evidence that it did file a transcript of the board hearing” with respect to the mandatory certification is questionable with regard to the confused dates on the District about when the transcript of the hearing was filed and a lack of a named certifying official of the Record before Judge Hayes. Also, the Panel’s reasoning does not comport with the plain language of either the Statute of S.C. Code 59-25-480 or Rule 75 SCRCF.

Additionally, the Court of Appeals appears to be confused about the issue as to who certifies the record below and what is to be included in the record. Clearly, the transcript and the exhibits from the Court reporter were insufficient. It follows that the School District had the burden to provide the lower court judge with the decision and order of the School District within the 30 days contemplated by both the Statute of S.C. Code §59-25-480 and Rule 75 of the SCRCPP.

It is axiomatic that Brown's due process rights were violated by this oversight by the Court of Appeals which is understandable due to the misrepresentations made by the District to the Clerk of Court, Brown's legal Counsel and the Court of Appeals concerning the certification issue and the District's mischaracterization of what it filed or didn't file in the Cherokee County Clerk of Court's Office.

To reiterate, from the record below, it does not appear that the school board and/or its agents, servants and/or employees complied with Rule 75 of the South Carolina Rules of Civil Procedure because it does not appear that the record below was certified to the circuit court by the administrative agency itself. And it does not appear, we believe, that Ms. White on behalf of the school district has submitted a certified record to the circuit court. If so, then please show us who signed and where it has been submitted.

Clearly then, the Cherokee County School District did not comply with 59-25-480 and/or Rule 75 of the South Carolina Rules of Civil Procedure. It is stated in *Vansant v. Smith* that Rule 74 and 75 make uniform the procedure on appeals to the circuit court where there is no provision by statute or do not replace any provision in Title 18 relating to such appeals in other statutes. Clearly, Rule 75 must be read with 59-25-480 in order to deal with the issue of transmittal of the record below.

In its Brief, the District states that "The District has presented evidence to this Court that it filed the transcript. In its return filed with this Court on November 27, 2017, the District

responded to Appellant's designation of matters to be included in the record on appeal to ask this Court to include a transcript of the teacher dismissal hearing. In that return, the District included as Exhibit A its counsel's letter to the Honorable Brandy McBee, Cherokee County Clerk of Court, dated December 1, 2015, "enclosed for filing the transcript of Brown's teacher's dismissal hearing in accordance with the requirements of South Carolina Code Annotated § 59-25-480." Brown's counsel was copied on the December 1, 2015 letter. In that return the district states, "As further evidence the District filed a transcript, and that it was received by the lower court, Circuit Court Judge J. Mark Hayes cites to the transcript in his order upholding the Board's decision, demonstrating that the transcript was in fact filed. Had the transcript not been filed, Judge Hayes could not have reviewed it." The District also states, " assuming *arguendo* that the clerk of court did not receive the transcript, the appropriate relief is not Brown's reinstatement. Once Brown was informed, through her counsel's discussion with the Cherokee County Court of Common Pleas' clerk on October 30, 2017, that the clerk had not received the transcript, Brown was on notice that there was a possible question over the filing of the transcript. As such, Brown should have remedied the matter by pursuing the appropriate *writ of mandamus*, which she did not do."

Please note in the Transcript of the Teacher Dismissal Hearing there was no order filed with it. Look at Supplemental Record p. 442.

The District cited *Joyner v. Glimcher Properties*, 356 S.C. 460, 463, 589 S.E.2d 762, 765 (Ct. of App. 2002).

This argument is without merit. Why? Because the District's legal Counsel allegedly transmitted an uncertified and incomplete record to the Clerk of Court of Cherokee County. This is distinguishable from the procedure in the magistrates Court's where the Magistrate is mandated to file a return where neither the Solicitor or Criminally Accused are employees charged with transmittal of the Return form the Magistrate to the Court of Common Pleas versus the Clerk of Court's Office. Here, White claims in two different letters that she transmitted the transcript of the Teacher Dismissal Hearing and its exhibits to the Clerk of Court. On page 442 Lines 14-25 Transcript sets forth what the Chairperson of the Board States:

“We thank everyone for their participation in the hearing and ask that you please excuse us now so we can begin our deliberation. As I indicated at the beginning, the Board will deliberate in executive session at the close of the summation. No votes will be taken in executive session. The Board will vote in open session and announce its decision. Within 10 days a written decision of the Board will be issued consistent with the Board’s announced decision, the evidence presented, and applicable law.” **Supplemental Record on Appeal page 442 lines 14-25.**

What Judge Hayes states he considered in rendering his decision:

“After reviewing the transcript of the School Board’s hearing and the exhibits presented as a part of the hearings record, reviewing the pleadings and briefs in the Clerk of Court’s file, considering the arguments presented by Counsel, and applying the required standard of review, the Board’s decision is affirmed.” R.. p. 2.

So where is the Certified decision of the Board of Trustees and its vote other than the exhibits that were filed by Brown? There is no decision that was timely filed by White as legal counsel that Brown had in fact been fired. The District had a right to certify any aspect it considered to be its record. No such duty fell upon Brown to have a writ issued to force the District to protect its own decision before the Circuit Judge.

The Panel cannot relax the rules to suit the District’s failure to comply with the clear commands of the Employment and Dismissal Act S.C. Ann. § 59-25-410, 59-25-480.

CONCLUSION

Since the District chose what record to submit and that record being defective on its face, reversal of the Circuit Judge and School Board’s decision is mandated because it is impossible to apply the substantial evidence standard of proof to the facts in the Transcript of the hearing without a certified decision from the District and as such the lower court’s decision should be reversed and Brown must be reinstated to her former teaching position.

ARGUMENT II

Did the Court Err in Ruling That Brown Was Unfit to Teach Due to Dishonesty During the Investigation into An Alleged Assault of a Minor School Aged Child Where Brown Is Alleged to Have Failed to Comply with A Directive of Her Superior?

This Court states:

“Because one ground for Brown’s termination-dishonesty-was supported by substantial evidence, the Circuit Court did not err in affirming the Board’s finding that Brown was unfit to teach pursuant to 59-25-430.”

We believe that the court of appeals overlooked and/or misapprehended its prior precedent as set forth in the case of *Tony v. Lee County School District*, 419 S.C. 210, 797 S.E.2d 55 (Ct. App. 2017). It appears to be a clear equal protection and due process oversight.

In *Tony*, a determination by the Lee County School District was made to terminate a teacher from employment for disobeying a directive not to have contact with any employees of the school district and for a lack of candor during the course of an investigation into that teacher's alleged misconduct and/or unfitness to teach. The court of appeals in that case affirmed the decision of the circuit court judge and held that the lack of candor and the failure to follow the directives of the superintendent did not rise to the level which warranted termination as set forth by the school board in its determination on the substantial evidence standard of proof. See *Hall v. Board of Trustee*, 330 S.C. 420, 499 S.E. 2d 216 (Ct. App. 1998).

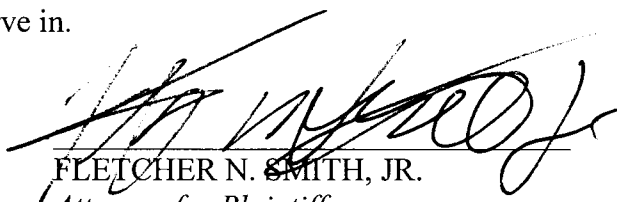
It is noteworthy that both Judge Lockemy and Judge Konduros participated in the *Tony* decision as these said two judges participated on the panel of the above-referenced matter now before it. I suppose a lack of candor means “dishonesty.” If that be the case, maybe Tony deserved to be fired for unfitness. But we know from the decision that was not the result in where the court recognized that in some ways Tony acted in several ways unprofessional.

Since there appears to be a conflict and/or an overlooking of the precedent of its own court, Brown requests that the court rehear this matter in the panel with a respectful suggestion of an en banc hearing.

Finally, the Court overlooked precedent that 59-25-430's dishonesty provision is void for vagueness and a violation of Due Process both substantive and procedural due to its over-breach. Thus this portion of the statute is unconstitutional. See *State v. Legg*, 416 S.C. 9, 785 S.E. 2d 369 (2016); *Town of Mt. Pleasant v. Chimento* 401 S.C. 522, 737 S.E. 2d 830 (2012).

CONCLUSION

This prejudice the Petitioner in so many ways. As such, Petitioner requests that the Circuit Court's decision be reversed and that Brown be ordered reinstated to her job as a school teacher. A job she is well qualified to serve in.



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Greenville, South Carolina

Dated: Saturday, January 25, 2020

EXHIBIT A

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas**

J. Mark Hayes Jr., Circuit Court Judge

**Docket Case No.: 2015-CP-11-0828
Appellate Case No. 2017-001466**

Sharon Brown, ... Appellant,

VS.

Cherokee County School District, ... Respondent.

SUPPLEMENTAL RECORD ON APPEAL

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ATTORNEYS FOR RESPONDENT

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JAN 08 2018

SC Court of Appeals

STATE OF SOUTH CAROLINA) BEFORE THE BOARD OF TRUSTEES
COUNTY OF CHEROKEE) OF CHEROKEE COUNTY SCHOOL
DISTRICT

Dr. Quincie Moore,
Complainant,
vs.
Sharon Brown,
Respondent.

 COPY

TRANSCRIPT OF THE TEACHER DISMISSAL HEARING

Wednesday, October 7, 2015
6:35 p.m. - 10:45 p.m.

Held at the Cherokee County School District Office
141 Twin Lake Road, Gaffney, South Carolina 29341

Board Members Present:
Cheryl Smith, Board Chairman
Barry Bailey
Billy Blackwell
Elaine Fowler
Robin Harper
Tracy Moore
Mark Nix

Attorney for the Board:
Kenneth E. Darr, Jr., Esquire

Andrea E. White, Esquire representing the Complainant
Fletcher N. Smith, Jr., Esquire, representing the
Respondent

1 She does a good job. None of them have come in here
2 and told you she does a bad job. Fact is she's a
3 good teacher. What conversation she had, and you'll
4 read that Hall case, had nothing to do with the
5 classroom whatsoever, and on that basis, she can't
6 be fired by the superintendent or recommended, have
7 a recommendation for her firing, so I ask you all to
8 bring her back. You all have no enemies to punish
9 or anybody reward, but I think it ought to end
10 tonight. I think this whole situation ought to end
11 tonight. Her contract should be honored by the
12 school district, and, and I'll leave it in you all's
13 hands. Thank you.

14 **MADAM CHAIR:** We thank everyone for their
15 participation in the hearing and ask that you please
16 excuse us now so we can begin our deliberation. As
17 I indicated at the beginning, the Board will
18 deliberate in executive session at the close of the
19 summation. No votes will be taken in executive
20 session. The Board will vote in open session and
21 announce its decision. Within 10 days a written
22 decision of the Board will be issued consistent with
23 the Board's announced decision, the evidence
24 presented, and applicable law.

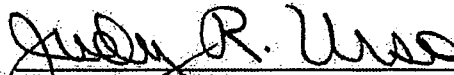
25 **(Off the record)**

CERTIFICATE

This is to certify that the foregoing transcript of Cherokee County School Board hearing, consisting of one hundred sixty-six (166) pages, is a true and correct transcript of the testimony given at said hearing; said hearing was reported by the method of voice writer with backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 31st day of October, 2015.



Judy R. Orso

Certified Court Reporter

Notary Public for South Carolina
My Commission Expires: 1-24-21

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, Jr.
Docket Case No.: 2015-CP-11-0828
Appellate Case No.: 2017-001466

SHARON BROWN,

Appellant,

vs

CHEORKEE COUNTY SCHOOL DISTRICT,

RESPONDENT.

RECEIVED

JAN 28 2020

SC Court of Appeals

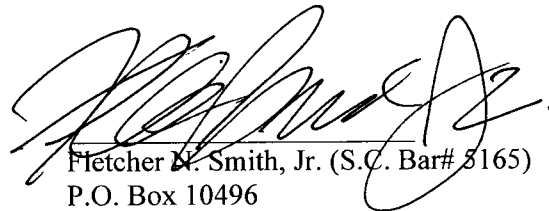
CERTIFICATE OF SERVICE

I, Fletcher N. Smith, Jr., hereby certify that I have this 28, day of January, 2020 served a copy of the herein below listed document to the addressee(s) below by depositing a copy of same via United States Postal Service postage prepaid and mailing same to:

PLEADINGS : Appellant's Petition For Hearing With Suggestion En Banc

PARTY SERVED:

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January 28, 2020

RECEIVED
JAN 28 2020
SC Court of Appeals

South Carolina Court of Appeals
The Honorable Jenny Abbott Kitchings
Clerk of Court
P.O. Box 11629
Columbia, S.C. 29211

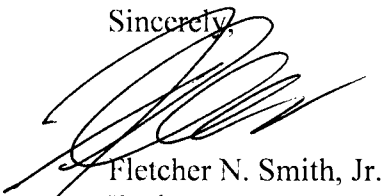
Re: Sharon A. Brown, Appellant vs. Cherokee County School District One, Respondent.
Docket No. 2015-CP-11-0828
Appellate Case No. 2017-001466

Dear Ms. Kitchings:

Please find enclosed an original and six (6) copies of Appellant's Petition for Rehearing. Also enclosed is a check for \$50 the fee associated with filing said Petition along with a Certificate of Service

Please file, time stamp, and return a copy of Appellant's Petition for Rehearing in the self-addressed stamped envelope provided.

Sincerely,



Fletcher N. Smith, Jr.
Enclosure(s)

cc: Ms. Andrea E. White, Esquire
White & Story, LLC