

**FILED**

APR 25 2013

SC ADMIN. LAW COURT

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

Hampton County School District Two, )  
)  
Appellant, )  
)  
vs. )  
)  
South Carolina Public Charter School )  
District and Virgin Johnson Academy of )  
Excellence, )  
)  
Respondents. )

Docket No. 12-ALJ-30-0403-AP

**ORDER**

April 25, 2013

**RECEIVED**  
MAY 09 2013  
**SC Court of Appeals**

**APPEARANCES:** Charles J. Boykin, Esquire, for the Appellant  
M. Todd Caroll, Esquire, for the Respondent South Carolina Public  
Charter School District  
Virgin Johnson, Jr., Esquire, for the Respondent Virgin Johnson  
Academy of Excellence

This matter comes before me pursuant to the Notice of Appeal filed by the Appellant on August 5, 2011. After careful consideration of the Record on Appeal, the briefs of the parties, and oral arguments, I remand this matter to the South Carolina Charter School District for the taking of additional evidence.

**STATEMENT OF THE CASE**

On June 29, 2011, the South Carolina Public Charter School District held a public hearing, during which it considered the Virgin Johnson Academy of Excellence's application to create a charter school in Fairfax, South Carolina. As with all of the Charter School District's meetings, the June 29th meeting was publicly noticed, and the agenda expressly stated that the Academy's application would be considered by the Charter School District.

During the June 29th hearing, representatives from the Academy gave a presentation of the

Academy's charter application. After deliberations, the Charter School District publicly voted five-to-one, with one abstention, to approve the application.

Although the Record reflects there were thirty-one public meetings over a two year period, no one from any local school district ever presented any evidence to the Charter School District—before, during, or even after the June 29th hearing—that granting the Academy's charter application would have an adverse impact on students in any local district.

On August 5, 2011, the Allendale County School District and Hampton County School District 2 (collectively the "Local School Districts") filed notices of appeal of the Charter School District's June 29th decision. In their respective notices, both of the Local School Districts claimed that opening the Academy will "adversely affect" students within those districts. Neither of these districts, however, made this argument or presented any evidence on this issue to the Charter School District prior to seeking an appeal with the Administrative Law Court.

On November 4, 2011, this Court granted Respondent's Motion to Dismiss for lack of subject matter jurisdiction based on failure to appeal timely. Hampton County School District v. S.C. Public Charter School District and Virgin Johnson Academy of Excellence Op. No. 2012-UP-429, filed 7/18, 2012. The Court of Appeals reversed that decision and remanded the matter back to this Court. A hearing was held on March 5, 2013.

#### **STANDARD OF REVIEW**

On appeal, this Court may reverse or modify a decision of a state agency only if the decision is:

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

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

S.C. Code Ann. § 1-23-380(5). Under this deferential standard of review, the Court “may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law.” *Sea Island Youth Build Charter Sch. v. Charleston County Sch. Dist.*, No. 08-ALJ-30-0436-AP, 2008 SC ALJ LEXIS 378, at \*12 (Dec. 31, 2008).

On appellate review, the critical inquiry is whether the Charter School District’s decision is based on “substantial evidence contained in the whole record.” *Id.* at \*13. In this regard, the South Carolina Supreme Court has explained:

Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency’s action. Substantial evidence exists when, if the case were presented to a jury, the court would refuse to direct a verdict because the evidence raises questions of fact for the jury. It is more than a mere scintilla of evidence, but is something less than the weight of the evidence. Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency’s finding.

*Porter v. S.C. PSC*, 333 S.C. 12, 20–21, 507 S.E.2d 328, 332 (1998).

### ARGUMENT

The Administrative Procedures Act, this Court’s Rules, and the Appellate Court Rules prohibit a party from relying on facts that do not appear in the Record. *See, e.g.*, S.C. Code Ann. § 1-23-380(4) (“The review must be conducted by the court and must be confined to the record.”); Rule 210(c), SCACR (“The Record shall not, however, include matter which was not

presented to the lower court or tribunal.”); Rule 36(G), SCALCR (“Review Limited to Record. The Administrative Law Judge will not consider any fact which does not appear in the Record.”).

These rules are designed to allow this Court, sitting in its appellate capacity, to review the proceedings below to determine the propriety of the Charter School District’s decision, *not* to take new evidence and sit as a factfinder. As the Supreme Court has explained with respect to an appellate court’s role when reviewing proceedings below:

This Court will not consider any fact which does not appear in the transcript of record nor will any fact stated in an exception be considered unless it appears from the record that it is true. Likewise, counsel is prohibited from embodying in their briefs any fact which does not appear in the record.

*S.C. State Highway Dep’t v. Meredith*, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962); *see also State v. White*, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) (“Morris’ statement was not presented to the lower court and cannot be properly included in the Record on Appeal.”), *aff’d*, 382 S.C. 265, 676 S.E.2d 684 (2009).

The District did not present evidence at any hearings prior to the filing of the Notice of Appeal on August 5, 2011, and there is nothing in the Record on Appeal to support its argument that the opening of the Academy will adversely affect students within the district. At the March 5, 2013 oral arguments, the Appellant attempted to introduce into evidence the affidavit of Dr. Beverly Gurley. This affidavit supports the Appellant’s contention that the opening of the Academy will adversely affect students within the school district. The Respondent objected to the introduction of the affidavit because it was not part of the record. This objection was sustained.

The Court interprets this attempt to introduce evidence at oral arguments as a request for leave to present additional evidence under S.C. Code Ann. § 1-23-380(3) (Supp. 2012). This

section states:

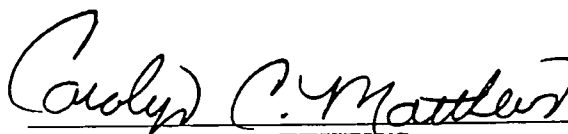
If a timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence may be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file the evidence and modifications, new findings, or decisions with the reviewing court.

S.C. Code Ann. § 1-23-330(3) (Supp. 2012). The Court construes the Appellant's attempt to introduce the affidavit of Dr. Gurley as a request for leave to present additional evidence. There is nothing in the Record on Appeal to support the Appellant's contention that the students of Hampton County School District will be adversely affected by the opening of the Virgin Johnson Academy of Excellence. In order for Respondent South Carolina Public Charter School District to make an informed and comprehensive decision concerning the Virgin Johnson Academy of Excellence, this Court remands this case to the South Carolina Public Charter School District to hear evidence of the potential adverse affect on the students of Hampton County.

#### CONCLUSION

For the reasons stated above, **IT IS HEREBY ORDERED** that this matter is **REMANDED** to the South Carolina Charter School District in order to take additional evidence as to any adverse affect the opening of the Virgin Johnson Academy of Excellence may have on the students of Allendale County.

**AND IT IS SO ORDERED.**

  
CAROLYN C. MATTHEWS  
Administrative Law Judge

April 25, 2013  
Columbia, South Carolina

CERTIFICATE OF SERVICE

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

This 25 day of April 2013  
By: [Signature]  
Judicial Law Clerk